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Review of The Law of Peoples

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THE LAW OF PEOPLES

By John Rawls, Harvard University Press, 1999. Pp. 199. \$22.50

Reviewed by Frank J. Garcia*

Since the publication in 1971 of *A Theory of Justice*, many scholars have sought to apply John Rawls's theory of justice as fairness to international justice problems.¹ Rawls himself refrained from doing so in that work, which disappointed many commentators.² Since then, Rawls has steadfastly continued to refuse the international extension of justice as fairness. In 1993, he published an essay in which he attempts to work out an alternative approach to international justice, the so-called "Law of Peoples."³ This short sketch of his position, again falling well short of a full international application of justice as fairness, continued to disappoint even sympathetic commentators.⁴ Despite Rawls' own reticence, interest in the international application of justice as fairness continues unabated.⁵

Commentators hoping that the much-anticipated publication of Rawls's most recent book, *The Law of Peoples*, would signal a reconsideration of his position need consider only the title alone to realize that they will once again be disappointed. Although this book is a fuller treatment of the issues raised in the earlier essay, the position Rawls holds

* Associate Professor, Boston College Law School. The author would like to thank Samuel Rickless and Benjamin James Stevenson for useful conversations regarding this project, and Mr. Stevenson for excellent research support as well. Portions of this manuscript were completed while the author was a visiting professor at the University of Houston Law Center, and the author would like to thank that library staff for their invaluable assistance.

1 Notable treatments since publication of *A THEORY OF JUSTICE* include: BRIAN BARRY, *THE LIBERAL THEORY OF JUSTICE* (1973); CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979); David A. J. Richards, *International Distributive Justice*, in *NOMOS XXIV: ETHICS, ECONOMICS AND THE LAW* 275 (J. Roland Pennock & John W. Chapman eds., 1982); and THOMAS POGGE, *REALIZING RAWLS* (1989).

2 See, e.g., BEITZ, *supra* note 1, at 128; CHRISTOPHER D. STONE, *THE GNAT IS OLDER THAN MAN* 253-62 (1993); Anthony D'Amato, *International Law and Rawls' Theory of Justice*, 5 *DENV. J. INT'L L. & POL'Y* 525, 530-34 (1975).

3 John Rawls, *The Law of Peoples*, 20 *CRITICAL INQUIRY* 36 (1993) [hereinafter Rawls, *CRITICAL INQUIRY*].

4 THOMAS FRANCK, *FAIRNESS IN INTERNATIONAL LAW* 18-19 (1995) (undercutting Rawls's objections to an international application of justice as fairness as "not convincing").

5 See Jon Mandle, *Globalization and Justice*, 570 *ANNALS AM. ACAD. POL. & SOC. SCI.* 126, 127-29 (2000); Ethan Kapstein, *Distributive Justice and International Trade*, 13 *ETHICS & INT'L AFF.* 175, 175-76 (1999); Richard J. McLaughlin, *Sovereignty, Utility, and Fairness: Using U.S. Takings Law to Guide the Evolving Utilitarian Balancing Approach to Global Environmental Disputes in the WTO*, 78 *OR. L. REV.* 855, 898-900 (1999); Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 *GEO. INT'L ENVTL. L. REV.* 1, 73-74 (1999).

with respect to distributive justice remains unchanged: international justice is not justice as fairness, but merely “the foreign policy of a liberal people,” and some would argue a cribbed one at that.

This review will evaluate, from the perspective of an academic international lawyer sympathetic to Rawls’s overall theoretical project,⁶ several criticisms which have been made or can be made with regard to the positions Rawls adopts, taking the earlier essay and the new book as one for this purpose. After a brief summary of the theory of justice as fairness, I will summarize the argument of *The Law of Peoples*. I will then examine two criticisms: first, that the law of peoples is inadequate as a reconstruction of contemporary international law; and second, that the law of peoples is inadequate as a theory of international justice. Put another way, the complaints are that *The Law of Peoples* fails to account both for what international law *is* at present, and what it *ought to be*. I conclude that the failure lies not with Rawls’s basic enterprise, but his failure to follow it through as rigorously with respect to international justice as he does for domestic justice.

I. RAWLSIAN JUSTICE, DOMESTIC AND OTHERWISE

The “general conception” of justice as fairness as Rawls presents it in *A Theory of Justice* consists of a single central idea: “All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored.”⁷ This general conception is further developed into two principles, the principle of equal liberty, and the difference principle.⁸ It is Rawls’s contention that

⁶ Philosophers and political scientists have from within their own disciplines particular complaints and perspectives on Rawls’s international work and work in general, and while I draw upon their work I do not attempt such critiques myself. As my own work reveals, I find Rawls’s basic theory useful and compelling, although his own international applications, and non-applications, are disappointing for the reasons this review will discuss. Therefore, my critique is in an important sense an “internal” one and not an “external” one.

⁷ JOHN RAWLS, A THEORY OF JUSTICE 303 (1971) [hereinafter A THEORY OF JUSTICE].

⁸ In the resulting special conception of justice, the two principles take the following form:

First Principle

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Second Principle

Social and economic inequalities are to be arranged so that they are both:

- (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
- (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

the application of these two principles would be adequate to assure the implementation of a just overall system of allocation of social primary goods. However, in *A Theory of Justice*, Rawls confines himself to articulating principles of justice for domestic society (more will be said about this later). In *The Law of Peoples*, by contrast, he explicitly tackles the question of justice between societies, or as he puts it, justice within the “society of peoples.”

Rawls begins by focusing his attention not on states, but on “peoples,” a political conception of society as consisting of individuals sharing conceptions of what it means to be a political being (i.e., citizenship) and how individuals, singly and together, act through political institutions.⁹ By “law of peoples,” Rawls means a particular political conception of right and justice that applies to the principles and norms of international law and practice between and among peoples.¹⁰ In fact, the law of peoples constitutes a “society of peoples,” consisting of all those peoples who follow the ideals and principles of the law of peoples in their mutual relations. Rawls acknowledges that there may be more than one law of peoples which might satisfy his criteria, and refers collectively to this set as “The Law of Peoples.”¹¹

Rawls takes as his task to articulate how “the content of the Law of Peoples might be developed out of a liberal idea of justice similar to, but more general than . . . justice as fairness.”¹² To do so, he sets out five types of societies: liberal, decent hierarchical, outlaw, burdened, and benevolent absolutist; and argues for a set of principles which representatives of liberal peoples would choose to govern their associations with certain of the other four types of societies. He characterizes this effort, quite passionately, as “realistic utopianism,” whereby political philosophy seeks to expand what is ordinarily considered the limits of practical political possibility. His concern here, and the core of this project, is to articulate a basis upon which liberal and non-liberal but decent peoples can agree on principles of fair coexistence.¹³ His project, therefore, is the formulation of normative

Id. at 302.

For a useful and critical overview of Rawls’s basic theory, see BARRY, *supra* note 1, at 34-52; see also ROBERT P. WOLFF, UNDERSTANDING RAWLS chs. 13-17 (1977); READING RAWLS chs. 4 & 8 (Norman Daniels, ed. 1977).

9 JOHN RAWLS, THE LAW OF PEOPLES 23 (1999) [hereinafter THE LAW OF PEOPLES].

10 *Id.* at 3 (introducing the concept of the “Law of Peoples” and distinguishing it from justice as fairness).

11 *Id.* at 4 n.4.

12 *Id.* at 3.

13 See *id.* at 5-6. It is Rawls’s belief that cooperation to eliminate political injustice at home is

principles to guide the foreign policy of a liberal people; it is not the reconstruction of international justice for a *cosmopolis*.

The argument proceeds in three parts: the extension of domestic justice to a society of liberal societies (Part I); the extension of liberal ideas of political right and justice to relations between liberal and decent hierarchical states (Part II, the most important part of the book); and the special problems posed by the world as we find it, or the realm of “non-ideal theory,” *i.e.*, relations between liberal and decent peoples on the one hand, and burdened societies and outlaw states on the other.¹⁴ The methodology followed in parts I and II should be familiar to readers of *A Theory of Justice*: an original position is constructed, first for the selection of principles of domestic justice, and second for the selection of principles guiding the law of peoples, namely the relations among liberal peoples, and between liberal peoples and decent hierarchical peoples.

The second part of the argument is the most difficult and most provocative, in that Rawls attempts to identify conditions under which liberal peoples may extend the Law of Peoples to include their relations with non-liberal peoples. Rawls argues that such an extension is possible, and warranted, where the peoples are not liberal but still “decent.” By this Rawls means that while they are not organized according to political liberalism, such peoples yet maintain some form of consultative hierarchy whereby the interests of that society’s groups are represented to the rulers, and a limited set of basic human rights is respected.¹⁵

Rawls’s principal conclusion in this part of the argument is that liberalism does not require, as a cornerstone of a just foreign policy, that liberal peoples actively seek that all states be liberal.¹⁶ It is enough that they be “decent,” and that they not be so burdened so as to defeat domestic justice. The alternative, Rawls argues, denies the respect due the domestic political choices of decent non-liberal peoples, even if liberal peoples would not consider those choices to result in a fully just society.¹⁷ In

the critical condition for peace and security abroad. In this sense, his project is a reaction against the view that peace abroad requires liberalism at home. This view, Rawls would argue, yields not peace but war, as a misguided commitment to reversing the results of domestic political choices pits liberal states against decent but hierarchical states.

14 *Id.* at 89-90 (explaining that outlaw states are those that refuse to comply with a reasonable law of peoples, while burdened societies are characterized by unfavorable conditions that make achieving a well-ordered regime impossible).

15 *Id.* at 63-67 (enumerating the criteria for decent hierarchical societies, including a lack of aggressive aims and a recognition that diplomacy and trade are means to legitimate ends).

16 *Id.* at 82-85 (rejecting a policy of economic incentives to decent non-liberal peoples in exchange for becoming more liberal).

17 *Id.* at 82-84 (disapproving of a foreign policy which assumes that only a liberal democratic society can be acceptable).

effect, Rawls argues that a decent hierarchical society is “just enough,” and to require further justice and different choices as a condition of peaceful coexistence and cooperation serves the interests of neither liberal peoples nor decent hierarchical peoples.

By so extending the Law of Peoples, Rawls argues in effect that among decent peoples the principle of toleration is paramount for the attainment of peace and stability, the twin conditions under which domestic justice best flourishes.¹⁸ This leaves two other cases: relations with burdened societies and with outlaw states. Under the Law of Peoples, liberal states owe a duty of assistance to burdened societies, whose resources are inadequate for the formation of just domestic political institutions. However, in no case do the obligations of the Law of Peoples extend to relations with outlaw states. Such states, by rejecting the Law of Peoples (in particular the principle of non-aggression), expose themselves to the possibility of just armed aggression when they threaten liberal and decent peoples.

II. PROBLEMS WITH RAWLS’S TREATMENT OF INTERNATIONAL JUSTICE

From an international legal point of view, the issues which may be raised with respect to Rawls’s approach sort themselves into two types of complaints: first, that The Law of Peoples is an inadequate account of the doctrinal and normative content of contemporary international law as we actually find it; and second, that The Law of Peoples fails in its vision of what a liberal international law should be from a normative perspective.

A. *Treatment of International Law is Inadequate*

Commentators have raised two criticisms with respect to the adequacy with which Rawls’s approach to international law captures the doctrinal and normative structure of contemporary international law: that Rawls’s methodology is statist,¹⁹ and that his commitment to tolerance undercuts accepted international human rights.²⁰

When an international lawyer accuses a doctrine or theory of being “statist,” that is generally understood to be a bad thing. Political theorists have also raised the same issue, but under a different rubric, namely the

18 See *id.* at 59-62, 64-67, 83-84. This emphasizes the “great importance of all decent peoples’ maintaining their self-respect and having the respect of other liberal or decent peoples.” *Id.* at 62.

19 Lea Brilmayer, *What Use is John Rawls’ Theory of Justice to Public International Law?*, 6 INT’L LEGAL THEORY (forthcoming) (on file with author).

20 FERNANDO TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW 115 (1998) (arguing that “[t]he range and kind of human rights that are now recognized by international law considerably exceeds the modest requirements of legitimacy proposed by Rawls.”).

problem of the priority of domestic justice. In both cases, the focus of the criticism is Rawls's commitment to a two-stage argument for international justice. In Rawls's view, the conditions for international peace and justice depend on the prior existence of domestic justice.²¹ In other words, the gravest evils in human history stem from domestic political injustice, and that once such political injustice is resolved, such evils will disappear.²² Therefore, as a matter of ideal theory international justice requires first the prior choice by representatives of *individuals*, of the principles of justice for domestic society, and then a second choice by representatives of *peoples* of the principles to govern the society of peoples. This two-step approach mirrors Kant's approach in *Perpetual Peace*, namely that one first establish the conditions for just states, and then articulate how they might justly interact among themselves.²³

This approach can be challenged on the grounds that it is empirically flawed and methodologically unsound. Empirically, Brilmayer argues that international law has moved beyond a strict sovereignty model to recognize the role of international organizations, in particular non-governmental organizations (NGOs), in international law and policy.²⁴ Political theorists such as Beitz and Pogge have also argued that the appropriate methodology for a more consistently liberal, Rawlsian theory of international justice would involve a single choice, in an original position consisting of individuals representing future individuals, who must choose principles of justice which are then to be applied to domestic and international political and distributive problems alike.²⁵

As a preliminary matter, it should be noted that Rawls takes pains to distinguish his concept of peoples from what are traditionally known as "states." In particular, he seeks to distance peoples from the abuses characteristically associated with states and state sovereignty in international law, namely wars of aggression and domestic human rights violations.²⁶ Nevertheless, in important respects the charge still has merit. First, as a matter of methodology there is a clear distinction between

21 See THE LAW OF PEOPLES, *supra* note 9, at 6.

22 *Id.* at 6-7.

23 In his essay, *Perpetual Peace*, Kant suggests that a morally legitimate international law is founded upon an alliance of separate free nations, united by their moral commitment to individual freedom, by their allegiance to the international rule of law, and by the mutual advantages derived from peaceful intercourse. IMMANUEL KANT, PERPETUAL PEACE 12-37 (COLUMBIA UNIVERSITY PRESS 1939) (1796).

24 Brilmayer, *supra* note 19.

25 *E.g.*, POGGE, *supra* note 1, at 246-59.

26 THE LAW OF PEOPLES, *supra* note 9, at 25-30. For these reasons, Tesón does not characterize Rawls as statist. TESÓN, *supra* note 20, at 109.

principles chosen in the first round to govern relations among individuals, and the principles chosen in the second round. The principles chosen for the Law of Peoples are those which govern the interactions of a people, *as a unit*, with other peoples, *each as a unit*. In other words, they are principles governing the relations among international actors, and those actors are aggregates of individuals, not individuals themselves. In this respect, Rawls's distinction between peoples and states deflects nothing: functionally, they are identical. Moreover, Rawls implicitly assumes that the primary agents for the international relations of peoples are states.²⁷

Nevertheless, I do not believe that Rawls's adoption of a two-stage, state-based model of international justice by itself renders the results illiberal or fatally flawed. As a matter of ideal theory, this approach can still be a liberal one, even if it is "statist," if one argues as Kant and Rawls do that the justice of the resulting order presupposes the justice of the component units. Empirically, one can also argue that states remain the fundamental decision-makers on the international level, even if they hold that power in trust as "agents" of their people, and even if in exercising this power at least decent states are constrained to respect individual rights at some level and to consider the inputs of international civil society. In this sense, I do not believe that Rawls is arguing, or assuming, that states are the only morally significant actors in the international arena, as Brilmayer contends, even as he assumes their functional centrality. His approach is statist not because he is necessarily enamored of states or their track record (he clearly is not), but because they remain the primary delivery vehicles for domestic justice, which is for Rawls the *sine qua non* of international justice.

The charge of "illiberalism" surfaces again with respect to Rawls's concern in *The Law of Peoples* with developing a principle of international toleration for non-liberal but decent societies.²⁸ Tesón acknowledges that Rawls works within the same deontological liberal tradition as Kant (whom Tesón follows), but considers Rawls to have fallen short of an adequate rational reconstruction of modern international law.²⁹ By arguing for the inclusion of decent hierarchical states within the international legal system as legitimate, albeit not liberal, states, Rawls makes two key assumptions: (1) hierarchical states are legitimate because at some level

27 With respect to the stability and security of the territorial boundaries, which a people must have, Rawls's discussion assumes the identity of peoples and states and the agency of the state's government in securing such boundaries. *THE LAW OF PEOPLES*, *supra* note 9, at 38-39. Moreover, when discussing cooperative organizations among peoples, he lists as examples state-based membership organizations such as the GATT and the World Bank. *Id.* at 42 n.51.

28 TESÓN, *supra* note 20, at 114.

29 *Id.* at 117.

they represent and respond to the preferences of their citizens; and (2) while such societies are not built on liberal principles, their principles are nevertheless rational.³⁰

Tesón rejects these assumptions, arguing that to treat hierarchical/communal regimes as both reasonable and legitimate abandons key tenets of liberal justice, resulting in a reconstruction of international human rights law that falls short of what Tesón considers to be the accepted, enforceable core of existing rights. By including decent hierarchical peoples within the ambit of the Law of Peoples, Rawls has insulated such peoples from challenge or coercion from liberal peoples on the grounds of violations of internationally recognized human rights such as gender equality and freedom of political dissent, which are not part of decent hierarchical societies in the way such rights are understood and expressed in liberal democratic societies.³¹

Implicitly, both Tesón and Brilmayer argue that in *The Law of Peoples* Rawls fails to articulate a normative theory that accurately represents the normative structure of contemporary international law. International law has moved beyond statism, to recognize the normative priority of the individual. However, a key question posed by Rawls's work is whether this recognition of the normative priority of the individual entails asserting the universal validity of liberalism. Rawls's account of international justice does not depend on this—his account embraces normative pluralism, at least to the extent of decent hierarchical peoples. In contrast, Tesón's Kantianism asserts the superiority of Western liberalism and constructs international law accordingly. Tesón rejects Rawls's attempt to wrestle with the problem of incommensurable universalist views, based on Tesón's confidence that rationality is adequate to demonstrate the invalidity of all universalist conceptions of human nature, except those of Kantian liberalism.

B. Rawls's Account of International Justice is Inadequate

Thus far, we have looked at two criticisms principally rooted in international law as we find it: that Rawls's theoretical account fails to fully *recognize* important changes in international legal doctrine with respect to state sovereignty and human rights, changes with important normative consequences for a liberal theory of international justice. Now, this review turns to a different criticism: that Rawls's account fails to *lead*

30 See THE LAW OF PEOPLES, *supra* note 9, at 62-70.

31 TESÓN, *supra* note 20, at 117-20. Tesón also cites the right to democratic governance, but I do not believe this right is as clearly recognized as his other examples, and citation of it weakens his argument. *Id.* at 115-17.

contemporary international law in the direction that many liberal theorists believe it must go, namely towards a fuller treatment of the problem of inequality and its distributive implications.

Since the publication of *A Theory of Justice*, many commentators otherwise favorable to Rawls have criticized him for his failure to extend the difference principle internationally.³² With respect to the problem of inequality, Rawls can again be criticized as “illiberal” in that he articulates a principle of economic justice, the duty of mutual assistance, which would not be chosen by representatives of individuals as a principle of domestic justice.³³ This is particularly troubling because, as Barry points out, the international distributive problem dwarfs the domestic one.³⁴ What is Rawls’s justification for this limit? How can one explain the cottage industry in applying Rawls to international distributive justice problems, despite his own reticence to do so?

In *A Theory of Justice* Rawls limits his theoretical enterprise to principles of justice for a closed domestic society. Although Rawls is working at the level of ideal theory, one can question the degree to which his assumption of self-sufficiency on the part of domestic societies is realistic, or even justifiable, and consider the implications for his theory if it is not. Even by 1979 this assumption was being seriously questioned.³⁵ Economic globalization and other developments in international relations generally and in international economic relations in particular, have rendered Rawls’s positing of domestic societies as closed societies, if perhaps understandable on the part of an academic philosopher in the early 1970’s, certainly not tenable today.³⁶

The fact of economic interdependence among the world’s societies is a key element in establishing the possibility of a contractarian argument

32 See *supra* note 1 and accompanying text.

33 The principle that individual representatives would choose is, of course, the difference principle, or so Rawls argues in *A Theory of Justice*. See *A THEORY OF JUSTICE*, *supra* note 7, at 75-83.

34 On the scope and persistence of this problem, see generally T. N. SRINIVASAN, *DEVELOPING COUNTRIES AND THE MULTILATERAL TRADING SYSTEM* (1998) (chronicling the role of developing countries in the GATT, the International Trade Organization, and the WTO, and addressing problems of distributive justice specific to developing countries under those regimes); Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 MICH. J. INT’L L. 979 (2000) (characterizing international trade as exacerbating existing problems with the distribution of resources); Kapstein, *supra* note 5 (providing a normative assessment of the manner in which trade gains are distributed among nations).

35 BEITZ, *supra* note 1, at 143-50.

36 In his study of the concept of fairness in international law, Franck concludes that the requisite level of community has emerged at the international level to sustain a fairness analysis. FRANCK, *supra* note 4, at 12-13.

for international distributive obligations. A primary motivating force behind the need for justice, according to Rawls, is that some mechanism is needed to allocate the advantages that arise from social cooperation. One can argue, therefore, that wherever social cooperation has created some wealth or advantage which otherwise would not exist, the social predicate exists for the application of justice. As Beitz puts it in his seminal study of political philosophy and international law: “[T]he requirements of justice apply to institutions and practices (whether or not they are genuinely cooperative) in which social activity produces relative or absolute benefits or burdens that would not exist if the social activity did not take place.”³⁷

International economic relations satisfy this condition because they lead to increases in individual and national wealth through the operation of comparative advantage and principles of efficiency in general. As the international trade regulatory system has grown in scope and institutional capacity with the creation of the WTO, the gains from such social cooperation increase, as does the institutional capacity for allocative decision-making and enforcement of the resulting norms. In this sense, therefore, international economic relations and international economic law can be said to involve the creation of benefits from social cooperation. The need to allocate such benefits raises precisely the same sort of issues that are raised in domestic society when such benefits stand to be allocated. Therefore, even if there is a justifiable distinction between domestic and international society for some purposes, with regard to the applicability of justice theory the same basic predicate is present in both.

If there are in fact no closed societies in the Rawlsian sense, then Rawls’s own reticence to extend his theory across social boundaries thus needs reconsideration, particularly in view of the manifest justice problems of the global economic system. In particular, Rawls’s distinction between the choice problem for the domestic justice and that for international justice, on which his theory of international justice depends, collapses. If international economic relations establish the necessary predicate for contractarian obligations, then there is no theoretical bar to international distributive obligations patterned along Rawlsian principles. Such obligations may indeed require some form of wealth redistribution across national boundaries, so that inequalities between states are limited to those which work to the benefit of the least advantaged.³⁸

37 BEITZ, *supra* note 1, at 131. Beitz has since limited the scope of this argument from the strong claim that such cooperation makes a global difference principle *necessary*, to the more limited claim that such relationships make such a principle *feasible*. See *Cosmopolitan Ideals and National Sentiment*, 80 J. PHIL. 591, 595 (1983). Even in its weaker form, the argument still supports the view that such a principle must at least be considered.

38 See Anthony D’Amato & Kristen Engel, *State Responsibility for the Exportation of Nuclear*

Nevertheless, in *The Law of Peoples* Rawls concludes that the choice problem would not result in similar principles,³⁹ and he fails to justify this conclusion with reference to either different social facts or different reasoning. Instead, he simply relies on the fact that he assumes as a starting point the existing content of international law, which does not include the a difference principle, and casts his project as the development of a justification for these principles.⁴⁰ Now, this bears a superficial resemblance to his “rational reconstruction” in *A Theory of Justice* of our moral intuition on liberty and equality, but the resemblance is only superficial. In arguing for the difference principle in *A Theory of Justice*, Rawls advocates for the adoption of principles of justice which, while they might reflect our moral intuitions, clearly go beyond existing laws and policies in their redistributive implications.⁴¹

In adopting this approach in *The Law of Peoples*, Rawls fails to distinguish between the extent of a plausible set of current widely recognized norms of international law, and the extent of our moral intuitions regarding international moral obligations. The two might be identical, but such identity cannot be assumed.⁴² Moreover, the extent of criticism Rawls has received and continues to receive for rejecting the difference principle in international justice is at some level evidence of at least disagreement over the content of such international moral intuitions.⁴³

Power Technology, 74 VA. L. REV. 1011, 1047 (1988); STONE, *supra* note 2, at 254-60.

39 With particular reference to the difference principle, Rawls argues instead that states would choose a limited duty of assistance, obligating them to assist “burdened societies”, societies which lack the resources to establish basically just domestic institutions. THE LAW OF PEOPLES, *supra* note 9, at 106. Once such institutions are established, Rawls concludes that the duty of assistance ends. “[T]he role of the duty of assistance is to assist burdened societies to become full members of the Society of Peoples and to be able to determine the path of their own future for themselves. It is principle of *transition* . . . for each burdened society the principle ceases to apply once the target is reached.” *Id.* at 118-19.

40 “I consider the merits of only the eight principles of *The Law of Peoples* listed [earlier]. These familiar and largely traditional principles I take from the history and usages of international law and practice. The parties are not given a menu of alternative principles and ideals from which to select, as they are in *Political Liberalism*, or in *A Theory of Justice*.”

Id. at 41. They are drawn, in fact, from Brierly’s *Law of Nations*. See *id.* at 37 n.42.

41 See A THEORY OF JUSTICE, *supra* note 7, at 75-83.

42 Rather, Rawls categorically “contend[s] that the eight principles of the Law of Peoples . . . are superior to any others,” but he does not really evaluate this claim or argue for this superiority with reference to prior moral principles, nor does he even set out why these principles reflect our moral intuitions on the subject. THE LAW OF PEOPLES, *supra* note 9, at 41.

43 In describing the task of the representatives in the second original position, Rawls states they “simply reflect on the advantages of these principles of equality among peoples and see no reason to depart from them or to propose alternatives.” *Id.* While this may describe Rawls’s own approach, the

The compelling logic of the domestic original position and the similarity of its circumstances and constraints with the international original position are powerful arguments for the obvious conclusion: that some form of a difference principle would also be chosen in the international original position. Conclusions to the contrary demand a reasoned argument. However, in explaining his failure to incorporate this principle in his earlier essay on the subject, Rawls states that the difference principle, and other aspects of justice as fairness not carried forward, “are not needed for the construction of a reasonable law of peoples, and by not assuming them our account has greater generality.”⁴⁴ Given the centrality of the problem of inequality to domestic justice as fairness, this brief explanation has been justly criticized as leaving much to be desired.⁴⁵

In *The Law of Peoples*, Rawls attempts a fuller response to his critics’ claims that the arguments for a domestic difference principle are just as cogent in an international original position, but his response continues to be dissatisfying. Rawls equates such arguments with a cosmopolitan vision of liberalism necessitating “global justice for all persons” rather than the “foreign policy of a reasonably just liberal people” towards other societies of liberal and non-liberal but decent peoples.⁴⁶ Such a move, argues Rawls, would result in a duty on the part of liberal peoples to work to shape all non-liberal societies in a liberal direction, which assumes illegitimately that we know already that the decent non-liberal societies are not acceptable.⁴⁷ Thus, it would be better to proceed “from the international political world as we see it,”⁴⁸ and identify principles of toleration appropriate to a world including decent non-liberal states.

This argument reinforces the conclusion that in *The Law of Peoples* Rawls essentially *sidesteps* the problem of inequality at the international level, focusing instead on basic political rights and liberties, their priority, and their effective enjoyment as extended to international society.⁴⁹ It is

objections of Pogge, Beitz, Barry, Richards, and others would suggest that the representative might not in fact be so sanguine about this choice. *E.g.*, POGGE, *supra* note 1, at 246 (“I am at a loss to explain Rawls’ quick endorsement of a bygone status quo.”).

44 Rawls, CRITICAL INQUIRY, *supra* note 3, at 43-44.

45 See FRANCK, *supra* note 4, at 18-19 (criticizing Rawls’s objections to so extending his theory as not “convincing”).

46 THE LAW OF PEOPLES, *supra* note 9, at 82-83.

47 *Id.* at 82.

48 *Id.* at 83.

49 POGGE, *supra* note 1, at 244 (rejecting the principles of international law which Rawls chooses to rely on as “wholly insensitive to distributional concerns”). While acknowledging the fact of inequality in international relations, Rawls attributes the inequality principally to the absence of just domestic institutions, advocating instead a limited duty of assistance enabling burdened societies to

important to note in this regard that Rawls's argument does not really address the global inequality problem at all, but confines itself to the problem of toleration for non-liberal societies. One can readily conceive of an international original position yielding *both* principles of appropriate toleration for decent non-liberal societies *and* an international difference principle. Although such a view might be consistent with "the international political world as we see it," Rawls does not take this step.

In the case of statism and human rights, international legal doctrine changed in response to changes in international relations, which called into question prior normative assumptions and resulted in new doctrine and powerful normative commitments. With respect to these two areas, the criticism leveled at Rawls earlier in this Review was that he failed to grasp the extent to which these changes were manifest in the law itself. Here, with respect to the problem of inequality, perhaps it is the case that again our collective moral intuitions have moved beyond those captured by Brierly's list. The many arguments for an international difference principle, and many calls by the developing world for more adequate and vigorous aid programs, suggests that our intuitions may indeed extend this far. However, Rawls's theory does not recognize these intuitions or their doctrinal implications, because in *The Law of Peoples* he shortcuts the process of "reflective equilibrium," which is central to his methodology in developing the theory of justice as fairness.

Reflective equilibrium plays an important role in Rawls's methodology—it is the point at which we settle upon that account of justice which best fits our moral judgments, when considered in view of a perhaps inconsistent yet appealing account of principles of justice. It is important, because it is the point at which "at last our principles and judgments coincide."⁵⁰ Rawls is explicit that this process entails the possibility that our initial moral judgments may need to be revised, when we see what sorts of principles of justice arise from various accounts of the original position.

"When a person is presented with an intuitively appealing account of his sense of justice . . . , he may well revise his judgments to conform to its principles even though the theory does not fit his existing judgments exactly From the standpoint of moral philosophy, the best account of a person's sense of justice is not the one which fits his judgments prior to his examining any conception of justice, but rather the one

establish such institutions. THE LAW OF PEOPLES, *supra* note 9, at 108-09.

50 A THEORY OF JUSTICE, *supra* note 7, at 20.

which matches his judgments in reflective equilibrium.”⁵¹

In *A Theory of Justice*, Rawls does not consider the universe of possibilities; he confines himself to two alternative conceptions of domestic justice: utility and perfection.⁵² In *The Law of Peoples*, we do not even have two alternatives—the set of judgments represented by the Brierly list is posited *ab initio* and accepted without question.⁵³ In so doing, Rawls fails to establish that the principles of international law he begins with reflect our moral intuitions concerning international relations, and that the principles of international justice he arrives at reflect our considered judgment as to such moral intuitions, following a process of critical reflection, evaluation, and adjustment. Rather than present detailed arguments as to why representatives in the original position would choose his principles of international justice over other competing principles, he merely asserts that they would, and admits as much:

“Thus, in the argument in the original position at the [international] level I consider the merits of only the eight principles of the Law of Peoples. . . . [T]he 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.”⁵⁴

I would argue that it is in this “shortcut” that Rawls fails to deliver on the promise which his domestic theory of justice as fairness suggests would be forthcoming in an international application of his views, a promise which many, many commentators have pointed out. By not adducing arguments for these principles, Rawls forestalls any opportunity for consideration of what form of international justice our moral intuitions do in fact require—we are left instead with the dissatisfaction Brilmayer expresses. It is quite possible that international justice would in fact go beyond the basic principles of international law Brierly distilled decades ago, but we must consider this possibility without the benefit of Rawls’s insight.

III. CONCLUSIONS

This review has not dwelt at sufficient length upon the positive contributions which Rawls makes in this book, principally in his account of the conditions under which one can search on the international level for

51 *Id.* at 48.

52 *Id.* at 49-50.

53 THE LAW OF PEOPLES, *supra* note 9, at 35-38 (admitting that the statement of principles is incomplete, requiring explanation and interpretation).

54 *Id.* at 41.

liberal justice without normative unanimity. In so doing, Rawls tackles the same fundamental liberal dilemma motivating *A Theory of Justice* and *Political Liberalism*, which is just as compelling if not more so on the international level because the normative divides run, if possible, deeper and the power of states lies behind them. Articulating a principled basis for the incorporation of decent hierarchical states into the community of nations thus responds to a pressing problem of global social policy in the age of violent and poisonous religious/ethnic rivalries.

Moreover, with respect to the problem of inequality, Rawls does argue for a duty of assistance, which for those concerned with international inequality problems is a surer footing for international aid than mere charity, or solely instrumental or utilitarian justifications for international assistance. Rawls also recognizes at some level the importance of distributive justice for international justice, although he consigns the effectuation of this to international support for more just domestic institutions.

The principal shortcoming of Rawls's effort is the failure to engage in a full-blown process of reflective equilibrium. Instead, Rawls begins and ends with a dated form of international law, and justifies it. The fact that he argues for its extension to non-liberal but decent peoples is an important development, but does not save this approach from its shortcomings. With respect to distributive justice, the number and strength of critical reactions to this limitation, and the powerful logic of the *A Theory of Justice* which carries over into the international arena, together suggest that Rawls's own process of reflective equilibrium works: competing theorists present an "intuitively appealing account" of the liberal sense of justice with respect to international inequality that includes a difference principle, but it does not "fit...existing judgments [Brierly's rules] exactly." As Rawls suggests, in that situation one "may well revise his judgments to conform to its principles." It is unfortunate that Rawls himself forecloses the possibility of precisely such an adjustment towards recognition of an international difference principle. This may be a failure of time or of energy, but I would suggest it is not a failure of the basic vision. The vision motivating these theorists, and underlying such an "intuitively appealing account," is very much Rawls's own, and for this we are all in his debt.