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Race, Rights, and Justice

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This, of course, was what Rawls by and large sets out to do in *A Theory of Justice*, namely, to construct a philosophical theory of justice for the state.

But Kant further argues that "*The problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed* ***external relationship*** *with other states, and cannot be solved unless the latter is also solved.*"[15] Just as within states there is conflict between individual and group members concerning the exercise of their freedoms, so too will states have conflicts regarding the exercise of their freedoms. Each requires, then, a constitution or law that will adjudicate such conflicts that will, in effect, serve to spell-out the basic rights of each state as a matter of global justice. Just as a state's constitution serves as the supreme authority for individuals and groups within its territories, so too states themselves require a constitution or body of law that can govern effectively international affairs. He refers to this as a "cosmopolitan system of general political security."[16] It is for this reason that matters of legal interpretation are fundamentally relevant both to state constitutions and to the legal rules that are meant to govern peoples. Whatever else international law includes, Kant argues that it ought to include a "principle of equality" in order to guard against a war of all against all, i.e., a state of nature between states. For Kant, peace between states is the main purpose of international law.[17]

But Kant understands that the creation of a viable system of international law must be predicated on some factors of human development. First, he states, "we are still a long way from the point where we could consider ourselves *morally* mature."[18] I take this statement to be generally true of human beings taken as a whole. Indeed, it is quite an understatement of the horrific actions of various individuals and states throughout even just modern history. Moreover, Kant avers, "as long as states apply all their resources to their vain and violent schemes of expansion, thus incessantly obstructing the slow and laborious efforts of their citizens to cultivate their minds, and even

[15] Kant, "Idea for a Universal History with a Cosmopolitan Purpose," p. 47. Emphases in original.

[16] Kant, "Idea for a Universal History with a Cosmopolitan Purpose," p. 49. Emphasis in original.

[17] Mine is an avowedly statist interpretation of Kant's views on this topic. For an interpretation of Kant's words on international law that is less statist and more in line with cosmopolitan liberalism, see Fernando Tesón, *A Philosophy of International Law* (Boulder: Westview Press, 1998), p. 9. Also see Pauline Kleingeld, "Kant's Cosmopolitan Patriotism," *Kant-Studien*, 94 (2003), pp. 299–316.

[18] Kant, "Idea for a Universal History with a Cosmopolitan Purpose," p. 49. Emphasis in original.

deprive them of all support in these efforts, no progress in this direction can be expected."[19] Furthermore, "*The history of the human race as a whole can be regarded as the realization of a hidden plan of nature to bring about an internally—and* ***for this purpose*** *also externally—perfect political constitution as the only possible state within which all natural capacities of mankind can be developed completely*."[20] And "*A philosophical attempt to work out a universal history of the world in accordance with a plan of nature aimed at a perfect civil union of mankind, must be regarded as possible and even as capable of furthering the purpose of nature itself*."[21] Thus we have in Kant the urging of a "universal *cosmopolitan existence*" and a philosophical attempt to work out principles of a system of international law. Indeed, the "burden of history," Kant writes, is this "cosmopolitan goal."[22]

Of course, one is entitled to wonder precisely how fair-minded and unbiased Kant is about justice for "mankind," as he has written rather harsh words about those of the "Negroid race" in particular.[23] It is a bit like the framers and ratifiers of the U.S. Constitution in their statements and quests for justice and rights that turn out, in practice, to be self-serving at various turns. Nonetheless, it is important to consider Kant's principled cosmopolitanism as it serves as a philosophical basis for contemporary theories of international justice.

What seems to motivate Kant's quest for cosmopolitan justice and a system of international law is his recognition of the fact that world history is replete with injustices by one state against another: ". . . it cannot be reconciled with the morality of a wise creator and ruler of the world if countless vices, even with intermingled virtues, are in actual fact allowed to go on accumulating."[24] I take this to imply (or at least make room for), among other things, the need for a system of international law that would both prevent further injustices from occurring, but also one that would require the compensation of harmful wrongdoings or "vices." And this interpre-

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[19] Kant, "Idea for a Universal History with a Cosmopolitan Purpose," p. 49.

[20] Kant, "Idea for a Universal History with a Cosmopolitan Purpose," p. 50. Emphases in original.

[21] Kant, "Idea for a Universal History with a Cosmopolitan Purpose," p. 51. Emphasis in original.

[22] Kant, "Idea for a Universal History with a Cosmopolitan Purpose," p. 53. Emphasis in original.

[23] See Robert Bernasconi and Tommie Lott, Editors, *The Idea of Race* (Indianapolis: Hackett Publishing Company, 2000).

[24] Immanuel Kant, "On the Common Saying: 'This May Be True in Theory, But it Does Not Apply in Practice'," in Hans Reiss, Editor, *Kant: Political Writings* (Cambridge: Cambridge University Press, 1991), p. 88.

tation of Kant's words seems to draw rather strong support from his theory of retributive justice.[25] Moreover, Kant has a progressive idea of the world in which it ought to be in continual improvement for the sake of posterity, implying that we have an "inborn duty" to at least attempt to ensure this progress. And to those who would object that the attempt to create a system of international law is idealistically utopian, Kant retorts, "It is quite irrelevant whether any empirical evidence suggests that these plans, which are founded only on hope, may be successful. For the idea that something which has hitherto been unsuccessful will therefore never be successful does not justify anyone in abandoning even a pragmatic or technical aim."[26]

But what exactly does Kant have in mind with his notion of cosmopolitan justice? By a "*cosmopolitan* constitution," he means that persons "must" "form a state which is not a cosmopolitan commonwealth under a single ruler, but a lawful *federation* under a commonly accepted *international right*."[27] Thus he urges a federation of states that freely and jointly concur on a constitution or system of international law for the protection of the rights of all states. And all of this is to be realized, Kant writes, on the basis of a social contract. "Just as individual sovereign states can contribute to the growth of human freedom, so, too, can various forms of cooperation among states including ultimately a federation of states."[28] Thus Kant's theory of international law mirrors his theory of the state in this regard. Both are based on social contract theory. But the social contract must make it such that "each state must be organized internally in such a way that the head of state, for whom the war actually costs nothing (for he wages at the expense of others, i.e., the people), must no longer have the deciding vote on whether war is to be declared or not, for the people who pay for it must decide" so that "posterity will not be oppressed by any burdens which it has not brought upon itself, and it will be able to make perpetual progress towards a morally superior state." He continues, "Each commonwealth, unable to harm others

[25] J. Angelo Corlett, *Responsibility and Punishment*, 3rd Edition (Dordrecht: Springer, 2006), Library of Ethics and Applied Philosophy, Volume 9, Chapter 3.

[26] Kant, "On the Common Saying: 'This May Be True in Theory, But it Does Not Apply in Practice'," p. 89.

[27] Kant, "On the Common Saying: 'This May Be True in Theory, But it Does Not Apply in Practice'," p. 90. Emphasis in original.

[28] Burleigh T. Wilkins, "Kant on International Relations," *The Journal of Ethics*, 11 (2007), pp. 147–159. See also Burleigh T. Wilkins, "Teleology in Kant's Philosophy of History," *History and Theory*, 5 (1966), pp. 172–185. For more on Kant's view of international law, see Brian Orend, "Kant on International Law and Armed Conflict," *Canadian Journal of Law & Jurisprudence*, 11 (1998), pp. 329–381.

by force, must observe the laws on its own account, and it may reasonably hope that other similarly constituted bodies will help it to do so."[29] In short, Kant bases his main plea for a system of international justice on what might be termed the "state of nature argument" wherein states are in constant war and otherwise in conflict with one another, preventing international and even domestic stability.

To those who would argue that cosmopolitan justice as Kant describes it is a fanciful theory with no application in the real world,[30] Kant replies in a normative way, placing his faith in what individuals and states ought to do according to what is right, and that we are permitted to assume its possibility in practice. Kant's optimism about the world "cannot and will not see it as so deeply immersed in evil that practical moral reason will not triumph in the end, after many unsuccessful attempts." For "whatever reason shows to be valid in theory, is also valid in practice."[31] Ought implies can.

H. L. A. Hart on International Law

Moving from Kant to more contemporary philosophers of law, we come to H. L. A. Hart's analysis of international law. And unlike Kant who showed an optimistic attitude toward international law, in Hart we find arguments against it. But in the end they are overcome by various considerations Hart brings to bear on the problem.[32]

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[29] Kant, "On the Common Saying: 'This May Be True in Theory, But it Does Not Apply in Practice'," p. 91.

[30] One scholar writes: ". . . it would involve a considerable act of faith on the part of great states such as the U.S.A., to renounce their ultimate independence by submitting all disputes to an independent court" [Dennis Lloyd, *The Idea of Law* (New York: Penguin Books, 1976), p. 336].

[31] Kant, "On the Common Saying: 'This May Be True in Theory, But it Does Not Apply in Practice'," p. 92.

[32] Jeremy Bentham did not have much to write about "international jurisprudence" or the "law of nations," except that he seems to be the first philosopher in the English-speaking world to use the former term, however cautiously, as he argued that it involved the mutual transactions between sovereigns. He had nothing normative to convey about international law. He neither affirmed nor denied its possibility, or its oughtness [Jeremy Bentham, *The Principles of Morals and Legislation* (New York: Haefner Press, 1948), pp. 326–327]. H. L. A. Hart argues that "Bentham, the inventor of the expression 'international law', defended it simply by saying that it was 'sufficiently analogous' to municipal law" [H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), p. 231]. However, the problems with Hart's interpretation of Bentham are that, first, Bentham never used the term "international law," but rather "international jurispru-

Hart begins his discussion of international law by asking the crucial question of whether or not it even constitutes law: ". . . international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules."[33]

This set of facts raises for Hart "two principal sources of doubt" about international law. One is "How can international law be binding?" This is not a concern about the applicability of international law, as Kant addresses, but one of legal status. Just as in the case of constitutional law that does not reflect a democratic legitimacy and hence does not bind all citizens to oblige in the case of domestic law,[34] the argument goes, so too there is a problem at the global level. For, can such "laws" be binding on states in light of "the absence from the system of centrally organized sanctions"?[35] And if such laws are not legitimate and binding in this sense, then in what sense, argues Hart, is it law at all? For "all speculation about the nature of law begins from the assumption that its existence at least makes certain conduct obligatory."[36] In the end, Hart rejects this concern: ". . . no simple deduction can be made from the necessity of organized sanctions to municipal law, in its setting of physical and psychological facts, to the conclusion that without them international law, in its very different setting, imposes no obligations, is not 'binding', and so not worth the title of 'law'."[37] Hence, the objection that international law lacks the sanctions that grant legal legitimacy that imply legal obligation can be met "if one day international law were reinforced by a system of sanctions."[38] This is rather consistent with Kant's optimistic attitude about the possible development of a viable system of international law.

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dence" and "law of nations," as indicated above, and second, Bentham in no way "defended" the idea at all. In fact, Bentham barely writes enough to mention the category. Equally problematic is the claim by Morton A. Kaplan that Bentham actually "doubted the character of international law" [Quoted in Joseph Modeste Sweeney, Covey T. Oliver and Noyes E. Leech, Editors, *The International Legal System*, 2nd Edition (Mineola: The Foundation Press, Inc., 1981), p. 1215].

[33] Hart, *The Concept of Law*, p. 209.

[34] Recall the concern registered with theories of original intent in Chapter 1, namely, that insofar as the original intent of legal rules are fraught with racist, sexist, or classist meanings, this may well have the effect of nullifying the legitimacy of law *vis-a-vis* the matter of legal obligation is concerned.

[35] Hart, *The Concept of Law*, p. 212.

[36] Hart, *The Concept of Law*, p. 212.

[37] Hart, *The Concept of Law*, p. 215.

[38] Hart, *The Concept of Law*, p. 215.

Another objection to the idea of international law, argues Hart, is that it violates the sovereignty of states, and that any system that does this is unjustified. On this view, "the doctrine of sovereignty is not easily reconcilable with the establishment of fundamental human rights."[39] Hart points out that this kind of argument works neither in the case of individuals within a state nor in the context of international law. The reason is that, just as individuals have limited sovereignty delimited legitimately by the rights of others that can impose reasonable boundaries for individual sovereignty, so too states have no absolute sovereignty. The notion of absolute sovereignty, where individual or collective, is a myth and stands as a reasonable objection neither to domestic law limiting the autonomy of individuals nor international law limiting the autonomy of states.[40] Moreover, Hart argues, "There is no way of knowing what sovereignty states have, till we know what the forms of international law are and whether or not they are merely empty forms."[41]

For Hart, the basic issue regarding the viability of a system of international law rests with "the great difficulties in formulating the 'basic norm' of international law."[42] This is the necessary and sufficient condition of such a system's becoming law. And while there are those who would doubt the possibility of there being such a basic norm, Hart sides with Kant that there seems to be no good reason to rule out on *a priori* grounds alone that such a norm could become a reality globally. And of course it is an empirical question as to whether the past almost half century of work in international law has produced a set of primary and secondary rules that would indeed qualify as law, internationally speaking. Hart does not rule out this possibility, and with good reason. But he is more cautious than Kant in expressing a normative desire for such a system. As a practical caution to both, it is suggested by one commentator that "Before international law can be effective, a reasonable alternative to war as a solution to international problems must be found."[43]

Other objections to the idea of international law include that it is improbable that the threat of prosecution of powerful states causing unjust wars would ever deter them if they are bent on conquest (the deterrence objection). However, like the other concerns, there seems to be no principled reason to

[39] Lloyd, *The Idea of Law*, p. 339.

[40] Hart, *The Concept of Law*, p. 218.

[41] Hart, *The Concept of Law*, p. 218.

[42] Hart, *The Concept of Law*, p. 228.

[43] G. W. Paton, *A Text-Book of Jurisprudence* (Oxford: Oxford University Press, 1951), p. 65.

not pursue plausible answers to them. My goal in this chapter is to explore some of the foundations of a viable system of international law.

Requirements for a Viable System of International Law

The previous and related concerns, I believe, serve as the grounds for the following requirements for a viable international legal system. First, there must be a genuine sense of global community and sufficient basis for core shared values. Implied here is the idea that principles of international law ought not to reflect only Western ideals (or Eastern ones, for that matter), unless, of course, those ideals can be supported by independent and non-question-begging argument. Otherwise, it would seem that the system of international law would be vulnerable to criticisms regarding its universality. And recall that Kant seeks a universal system of international law. The principles of international law simply cannot become those which foster the interests of power elites, Western or otherwise.[44] This also means that theories of international law ought not to presume that Western values are common grounds for agreement on matters of global justice. Nor ought they to presumptuously think or imply that indigenous cultures have unsophisticated views of rights unless informed by Western ideals.[45]

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[44] Consider the following argument from a Marxist standpoint:

> The rules of international law being borne in the process of struggle and co-operation between states, are the result of the clash and coordination of the wills of the ruling classes of different states. They are created by sovereign states. The wills of the ruling classes in the different countries, . . . are juridically equal. But it goes without saying that in moulding international law the actual influence exerted by these wills is not at all identical [Quoted in Sweeney, Oliver and Leech, Editors, *The International Legal System*, p. 1218].

From this perspective, it is argued that the concept of a world government is both utopian and dangerously reactionary. What is needed instead is something like a workable federation of states that in a United Nations fashion works toward the resolution of common problems.

[45] Consider the following assertion made by Allen Buchanan, apparently in ignorance of the fact that the Crees (as well as many other indigenous groups), in the very source that he cites, demonstrate a keen awareness of the notion of human rights as it played a role in their own governance: ". . . the Crees have come to appreciate the power of the discourse of human rights. Moreover, while they may have at first embraced the concept of human rights only as an effective though uncomfortably alien instrument, many Crees now seem to have a sincere belief in human rights, . . . " (Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 153). The difficulty is Buchanan's use of the locutions "have come," "alien instrument," and "now" indicate an implied presumption that the Cree

Second, there must be the legal workings such that laws are developed speedily and with enough clarity to address new and evolving conditions. Related to the first requirement, this one might remain unfulfilled in that genuine agreement cannot be found on universalizable principles of international law. For instance, the principle of equality in whatever form it might take might not be as universally accepted as political liberals of various stripes tend to assume.

Third, there must be an authoritative legislature of federated states that has the legitimacy to demand obedience to its statutes and has the power to enforce its laws. This point seems to occupy the minds of most who have thought critically about international law.[46]

And it should be remembered that each of these three requirements are interrelated. Perhaps, then, they ought to be construed as one. In any case, one worry here is that there can be an underestimation of raw political, economic, and military power that exerts itself in international affairs and that, being as powerful as it is, will always succeed in subverting the authority of international law—however well-intentioned and well-conceived. This, coupled with the fact that there are several acting groups in the world other than the states themselves, poses a problem for the assumption that international law and its courts are to be the primary instruments of international law. Although these are important concerns in the development and maintenance of an international legal system, they also arise for states, but in no way prohibit the good faith attempts to create and maintain laws of states. The rules of international law must take into account these factors. But they do not pose principled or conceptual obstacles to the workability of international law. In

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had no conception of human rights until recently. Buchanan owes it to the Cree and to those of us who respect the Cree to either substantiate his claim, or retract it, as there is substantial evidence that they and various other indigenous groups in North America held the concept of land rights as a human right long before Western contact [Grand Council of the Crees of Quebec, *Sovereign Injustice* (Quebec: The Grand Council of the Crees, 1995); J. Angelo Corlett, *Race, Racism, and Reparations* (Ithaca: Cornell University Press, 2003), pp. 165–168]. It will not do to argue that Buchanan's claim concerns only the narrow point that the Crees only recently believed in *human* rights, as distinct from other rights. For the Crees and many other indigenous peoples, rights to land are as deep as rights can get, and the distinction between human rights and other rights has little meaning in the context of their genocidal violations.

[46] One scholar distinguishes two kinds of legitimacy, each of which is required for a state to enjoy full protection under international law: horizontal legitimacy and vertical legitimacy. "The former denotes the legitimacy of the social contract among the citizens that form the state, their political association. The second denotes the legitimacy of the agency contract between the subjects and the governed—the legitimacy of the government itself" (Tesón, *A Philosophy of International Law*, p. 40).

fact, rather than serving as an argument against the viability of international law, these considerations ought to serve as powerful reasons and impetus for the establishment of law and order in the global community.

It is for this reason that there is a fourth requirement, namely, that the international system of law adequately distinguish and handle matters of international public law from those of international private law. The former concern the relations of states to one another, while the latter concern the relations of individuals, groups (such as nongovernment organizations), corporations as they relate to one another across state territorial lines.[47]

From these four requirements, at least eight more can be devised in line with Lon Fuller's requisites for a legitimate legal system in his notion of the "internal morality of law:"[48] First, rules of international law must be general and not *ad hoc* commands. They must, be general enough to protect the interests that nonhumans possess, whether or not they have rights. For if international law is truly global in scope, then it ought to exist for the protection of all good things, human and nonhuman. It is understood, of course, that such laws will favor human welfare over the welfare of nonhumans. But they ought not to do so excessively.

Second, the rules of international law cannot be secret or unpromulgated ones. All peoples should be invited to participate in and contribute to the process of international law, and on as much common ground as possible.

Third, international law cannot be *ex post facto*. This is no trivial matter, as one of the most notorious cases in the 20th century was the Nuremberg trials, wherein Nazi defendants were tried and many convicted. But William O. Douglas points to an interesting fact about the war crimes trials of some Nazi officials:

> . . . no matter how many books are written or briefs filed, no matter how finely the lawyers analyze it, that crime for which the Nazis were tried had never been formalized as a crime with the definiteness required by our legal standards . . . , nor outlawed with a death penalty by the international community. By our standards that crime arose under an *ex post* facto law.[49]

The point here is not that what the Nazis did to millions of ethnic and other minorities in Europe was somehow a good thing—it was evil. But that it was in fact an administration of international *ex post* facto "justice" indicates the

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[47] Barry Carter and Phillip Trimble, *International Law* (Boston: Little, Brown, & Company, 1995), pp. 1–2.

[48] Lon Fuller, *The Morality of Law*, Revised Edition (New Haven: Yale University Press, 1969).

[49] William O. Douglas, *An Almanac of Liberty* (New York: Doubleday and Company, Inc., 1954), p. 96.

dire need for international law to speedily, but carefully, adopt sound rules so that even currently unforeseen (but not unforeseeable) atrocities cannot go unpunished, yet without the administration of odious *ex post facto* determinations. What the International Criminal Court and international war crimes tribunals do not want to engage in is a kind of "victor's justice," which, of course, is no justice at all in the natural law sense.

Fourth, the rules of international law must be formed and translated such that they are understood by the common folk in each country and nation. This satisfies Rawls' publicity requirement for valid law that requires legal obligation based on the principle of fair play.

Fifth, the laws cannot be in any way contradictory, either internally or externally. An example of an internally contradictory legal system is that found in the U.S. insofar as the U.S. Congress in 1940 made it a crime to advocate or teach the overthrow of the government by force, effectively retracting a basic right and duty forged into the Declaration of Independence. Since the Congress has not formally nullified the informational content of the Declaration of Independence (for it to do so would prove quite embarrassing to the "patriotic" who hold the document in such high esteem), we can assume legal and internal contradiction and at the highest of levels. Normatively, I assume here that while the U.S. Constitution and Declaration of Independence have different legal statuses (legal, political, moral, etc.) that the latter has such a status that commands some significant measure of legal respect, if only in the form of a set of important legal principles.

Sixth, the rules of international law must not demand actions, inactions, or attempts thereof beyond a normal state's ability to perform, fail to perform, or attempt to perform (as the case may be). Thus to make an international law that requires all states to relieve the poverty of others, or to never fall into poverty for any reason whatsoever, is a bad law because there are various causes of poverty that are external to human volition and hence beyond the control of various states to relieve at one time or another given contingencies of circumstances faced by such states.

Seventh, the content of the rules of international law must not be in such constant flux that states attempting to abide by them in good faith cannot do so without disobeying them. Changing the international rules of law every day, week, month, or year would cause such confusion and instability that most, if not all, states would decide against compliance—and with good reason.

Finally, there must be at least a minimum of correspondence between the informational content of the rules of international law and how they are administered, say, in the International Criminal Court and other courts of international law. These requirements, at least, are quite parallel, if not identical,