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Race, Rights, and Justice

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to what goes into making a viable legal system at the state level. Perhaps, as Kant hopes, sufficient global interest and seriousness will be gained over time to make a system of international law a reality.

However, even if the above 11 requirements are satisfied robustly, it is unclear whether their satisfaction is sufficient for a plausible system of international justice. For as Julius Stone reminds us, "It is at least probable, that the magic circle of the unresolved classical problems will not be broken until we cease to assume that the categories, and methods of municipal law are sufficient, or even necessarily relevant, either for testing the validity of international law or for understanding its actual operation."[50] An example of how this caution applies to the problem of international law and justice is the fact that there are various ways to construe the possible relationship between state law and international law, and each requires special argumentative support in order to establish itself as the basic norm of international relations. First, there is the view that international law, properly construed, has proper authority over states' law in both international and states' decisions. Second, there is the position that international law, properly construed, has proper authority over states' laws in international matters, while states' laws have proper authority over international law in matters within states. A third perspective holds that states' laws have legitimate authority over international law in all affairs, while a fourth view is that we ought not to assume any conflict between states' laws and international law such that competing authorities become a real issue.

Now the fourth position is rather unrealistic, as history reveals that there are some drastically conflicting sets of states' laws, which implies that no viable system of international law could possibly accommodate them all without violating the above requirement against the development of a contradictory system of international law—internally or externally. The third position seems to rule out the possibility of an authoritative international law altogether, being skeptical for whatever reasons of its legitimacy. While this view ought not to be presumed untenable, it does suffer from the defect of its not even allowing the development of a system that would resolve disputes between states that would in some cases avert war, terrorism, and other forms of violence. As long as it is at least possible in principle to resolve such problems by way of a system of international law, the question then becomes one of not whether or not there ought to be serious attempts in good faith to establish one such system, but how it ought to be accomplished.

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[50] Quoted in Sweeney, Oliver and Leech, Editors, *The International Legal System*, pp. 1205–1206.

This leaves the first two possible approaches to international law. The second view separates the authorities of the respective states and the international legal system according to what counts as states matters on the one hand and international matters on the other. But this begs the question as to what truly counts as being a matter of international justice. What this view requires is a plausible account of precisely when a problem is one for the states to resolve themselves, without interference of the international legal order, properly construed, and when it is beyond the purview of global justice. Lacking such an account, this position's plausibility is quite uncertain.

The first view of the relationship between states' authority and that of the international legal system, properly construed, is akin to the supremacy clause in the U.S. Constitution, which declares the authority of the U.S. Constitution over all 50 states within its ever-expanding domain. Thus if a law in one state, for example, conflicts with a rule stipulated in the U.S. Constitution, it is said to be "unconstitutional" and ought to be struck down. As a possible example of how even a state's constitution or law might conflict with the "law of the land" in the U.S., I offer the fact that Jim Crow laws throughout the U.S. South declared racial segregation to be the law of the South. But as is plain, Jim Crow found itself on a collision course with the Fourteenth Amendment to the U.S. Constitution, and was doomed to eventual death in the courts. Another example might be in the case of the Constitution of the State of California. While Article 1, Section 3 supports the supremacy clause of the U.S. Constitution in declaring that "the Constitution of the United States is the supreme law of the land," Section 4 seems to delimit the right to "liberty of conscience" in a way that the U.S. Constitution does not: "... the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State." Understood is the supreme law of the land's Tenth Amendment granting states rights to pass and enforce laws that are not prohibited by it. Nonetheless, what in effect the U.S. Constitution allows for the California Constitution does not. If this does represent a contradiction between the two constitutions, the view of international law under consideration would argue that just as the U.S. Constitution is the supreme authority in matters where states' laws conflict with it, so too the system of international law, properly devised, should override states' laws wherein there is a conflict between international law and states' laws. The main difficulty with this position on international law is that it asserts the possibility of devising a workable and properly just international legal system wherein states are subject to international law and to the penalties for violating it. While this is a daunting task, I shall, along with Kant, proceed

with a cautious degree of optimism that significant progress can be made in this area. Indeed, with Kant I surmise that the fate of the world depends on success in this arena. And it is with this attitude that I now venture into contemporary theories of global justice as possible grounds for a system of international law.

Chapter 4
Global Justice

I am a citizen of the world—Diogenes the Cynic

. . . international emergencies, from famines to debt crises to terrorism, have destroyed any remaining illusions of the insularity of domestic political theory, and require that philosophers reflect on treasured principles from a global perspective—Bernard Boxill.[1]

. . . justice can never grow on injustice—Clarence Darrow[2]

. . . For whatever the constitution of a government may be, if a single man is found who is not subject to the law, all the others are necessarily at his discretion. And if there is a national leader and a foreign leader as well, whatever the division of authority they may make, it is impossible for both of them to be strictly obeyed and for the state to be well-governed—Jean-Jacques Rousseau.[3]

In recent years, there has been a proliferation of philosophical research on global justice. My aim in this chapter is not to canvass it, but to focus on two of the main ways of conceptualizing global justice. One such view is expressed in John Rawls' *The Law of Peoples*. Another is cosmopolitan liberalism. While there are important variations of each of these respective theories of international justice, I shall focus on their general representative positions. While I find that a certain criticism of Rawls' theory of international justice explicated in this chapter is important and requires his theory to be supplemented by additional principles,[4] I also believe that Rawls' theory

[1] Bernard Boxill, "Global Equality of Opportunity and National Integrity," *Social Philosophy & Policy*, 5 (1987), p. 144.

[2] Clarence Darrow, *Verdicts Out of Court* (Chicago: Quadrangle Books, 1963), p. 144.

[3] Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, Donald A. Cress (trans.) (Indianapolis: Hackett Publishing Company, 1992), p. 2.

[4] Of course, Rawls was keenly aware that his principles of international justice were incomplete.

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is more promising than cosmopolitan liberalism, which suffers not only from the "problem of compensatory justice," but in ways much deeper than Rawls' theory does. Rawls' theory of global justice, in its focus on sovereignty and tolerance (i.e., liberty) of peoples, suffers from incompleteness, and I will attempt to commence to rescue the Law of Peoples from that difficulty. However, cosmopolitanism of the variety that I engage is inadequate, suffering from fundamental flaws that do not appear to be corrected without doing acute damage to its essential focus on the "equality" of individual persons.

John Rawls' Law of Peoples and Compensatory Justice

In *The Law of Peoples*, Rawls sets forth and defends "principles and norms of international law and practice"[5] and "hopes to say how a world Society of liberal and decent Peoples might be possible."[6] His view is of one of a realistic utopia to the extent that "it extends what are ordinarily thought of as the limits of practical political philosophy"[7] and "because it joins reasonableness and justice with conditions enabling citizens to realize their fundamental interests."[8] In working toward his realistic utopia, Rawls employs a modified version of the original position employed in his earlier works.[9] However, his conception of the veil of ignorance is "properly adjusted" for the problems of international justice: the free and equal parties in the second (globalized) original position do not know the size of the territory or population or relative strength of the people whose basic interests they represent.[10] Although such parties know that reasonably favorable conditions possibly exist for the foundation of a constitutional democracy, they do not know the extent of their natural resources, the level of their economic development, etc.[11] Moreover, Rawls states,

> Thus, the people's representatives are (1) reasonably and fairly situated as free and equal, and peoples are (2) modeled as rational. Also their representatives are (3) deliberating about the correct subject, in this case the content of the Law of

[5] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), p. 3.

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

[7] Rawls, *The Law of Peoples*, p. 6.

[8] Rawls, *The Law of Peoples*, p. 7. See pp. 11–23 for his elaboration of the nature of a realistic utopia.

[9] See, for example, John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971); *Political Liberalism* (New York: Columbia University Press, 1993).

[10] Rawls, *The Law of Peoples*, p. 32.

[11] Rawls, *The Law of Peoples*, p. 33.

> Peoples. . . . Moreover, (4) their deliberations proceed in terms of the right reasons (as restricted by a veil of ignorance). Finally, the selection of principles for the Law of Peoples is based (5) on a people's fundamental interests, given in this case by a liberal conception of justice (already selected in the first original position).[12]

From this procedure, Rawls argues, the following "principles of justice among free and democratic peoples" will be selected:

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of nonintervention.
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political or social regime.[13]

I shall refer to these as "Rawls' principles of global justice." And I shall argue that they do not include, but neither do they rule out, principles of compensatory justice consonant with "human rights" mentioned in 6, above.

It is interesting to note that over a decade before Rawls himself published *The Law of Peoples* and prior to cosmopolitan liberalism's attack on Rawls' Law of Peoples, Bernard Boxill had observed that the informational content of Rawls' fair equality of opportunity principle and the difference principle (as they are articulated in *A Theory of Justice*) might be extended globally.[14] However, Boxill also provided a set of criticisms of the early theory of cosmopolitan justice devised by Charles Beitz: "that a global principle of fair

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[12] Rawls, *The Law of Peoples*, p. 33. One criticism of Rawls' procedure is voiced in the following terms: ". . . he says nothing to help us distinguish between a proper humility or appropriate caution in the light of the several sources of disagreement among reasonable people and a failure to exercise even rather minimal critical scrutiny regarding the quality of the reasoning we or others use to support conceptions of justice" [Allen E. Buchanan, *Justice, Legitimacy, and Self-Determination*, (Oxford: Oxford University Press, 2005), p. 166, 173f.]. It is deemed that Rawls' theory of international justice is overly tolerant of nonliberal societies, resulting in injustice that could and should otherwise be addressed. But compare David Reidy, "A Just Global Economy: In Defense of Rawls," *The Journal of Ethics*, 11 (2007), pp. 193–236.

[13] Rawls, *The Law of Peoples*, p. 37.

[14] Boxill, "Global Equality of Opportunity and National Integrity," p. 144.

equality of opportunity would undermine cultural diversity, national autonomy, and individual self-respect, and create international instability; and it probably presupposes the dangerous institution of a world government."[15] Throughout my discussion of cosmopolitan liberalism, I shall refer to Boxill's concerns as the "objection from diversity," the "objection from national autonomy," the "objection from individual self-respect," and the "objection to a world government," respectively.

Various questions might be raised about Rawls' theory of international justice,[16] including one concerning the possible lexical ordering of Rawls' Law of Peoples principles [(1)–(8)] because such an ordering is essential to the proper application of such principles under conditions of uncertainty and rights conflicts.[17] But whether or not, and, if so, how the principles ought to be lexically ordered, this set of principles is importantly incomplete, especially in light of Rawls' repeated claim that "decent" peoples have rights to property, territory, and life. And consonant with Rawls' admission that "other principles need to be added, . . . "[18] I offer a new international principle of justice that complements Rawls' own list.

International Justice and Compensatory Justice

While recognizing Boxill's seminal discussion of the possible extension Rawls' fair equality of opportunity and difference principles to global contexts, I shall focus on Rawls' global justice principles as he states and defends them in *The Law of Peoples*.[19] Rawls' eight principles of international justice seem to lack any mention or guarantee of compensatory justice between peoples. Yet without such a principle, there can hardly be a realistic global utopia as Rawls desires in that part of what helps to ensure social stability at the global level would be absent: remediation through compensation when certain rights are violated. Insofar as Rawls' principles of international justice are to protect basic rights that would best ensure

[15] Boxill, "Global Equality of Opportunity and National Integrity," p. 145.

[16] Thomas Pogge, "Rawls on Global Justice," *Canadian Journal of Philosophy*, 18 (1988), pp. 227–256; "Rawls on International Justice," *The Philosophical Quarterly*, 51 (2001), pp. 246–254.

[17] Burleigh T. Wilkins, "Principles for the Law of Peoples," *The Journal of Ethics*, 11 (2007), pp. 161–175.

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

[19] I return to Boxill's extension of Rawls' fair equality of opportunity principle to global contexts below when I assess cosmopolitanism's critique of Rawls.

global stability, and insofar as rights of remediation are basic rights along with substantive rights,[20] then Rawls' principles lack an important aspect of what is essential to international justice in a realistic utopia. Liberal and decent peoples simply must compensate those whom they wrongfully harm, as is implied by the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. It is their duty correlated with the right of those they wrongfully harm to be compensated. And it simply will not do to argue in Rawls' defense that matters of compensatory justice are not the proper domain of Rawls' theory of global justice, as Rawls' principles reflect a concern for conditions of war and poverty and so imply remedial rights. Thus it is an omission on Rawls' part—not to mention on the parts of various other philosophers who write on global justice—that there is not even a mention of a basic principle of compensatory justice. This would imply that reasonably just societies have no duties to compensate other societies they have harmed by way of, say, reparations for past and severe injustices. Because such injustices are so prevalent even in societies that Rawls believes are reasonably just, the issue of compensatory justice is especially important. Why would a party in the international original position select principles 1–8 above without some principle(s) of remedial rights that help(s) to guarantee them—either by their deterrent effect or by their granting the authority to an international court of justice to award reparations or other appropriate compensation to severely and wrongfully harmed peoples by those who have wrongfully harmed them? It is reasonable and rational for those Peoples in the original position to select not only Rawls' principles, but principles of compensatory justice that properly and fairly undergird them. But precisely what might some such principle be in the context of international justice?

Consider the following principle of compensation which I shall call the "principle of international compensatory justice" (PICJ) as it is intended to supplement Rawls' eight principles of international justice, though in such a way that it does not indicate a lexical ordering:

> PICJ: To the extent that peoples wrongfully harm other peoples, they have a duty to compensate those they wrongfully harm in proportion to the harm caused them, all things considered.

Now this principle of international justice is phrased in terms of a *duty* of peoples to compensate others whom they wrongfully harm wherein the

[20] Hence the old legal adage: "Absence of remedy is absence of right." One author repeatedly accuses Rawls of devising a "lean" and "truncated" list of rights [Buchanan, *Justice, Legitimacy, and Self-Determination*, pp. 160–161]. Apparently, Buchanan fails to take Rawls seriously when Rawls prefaces his listing of human rights with the locution: "Among the human rights are . . . " (Rawls, *The Law of Peoples*, p. 65).

object of the duty has a corresponding right to the compensation in question. But it might also be couched in terms of a *right* that all peoples have to such compensation for experienced harmful wrongdoings wherein the object of the right has a duty to compensate the peoples they have wrongfully harmed:

> PICJ: To the extent that peoples are wrongfully harmed, they have a right to be compensated in proportion to the harms suffered, all things considered.

Yet these principles of international justice are themselves vague, as they do not indicate precisely who ought to compensate whom, for it is open for someone to argue that even third parties have a duty of compensation toward those who have been wronged, whether or not the third parties have served as contributory causes of the harmful wrongdoing in question. Perhaps the precedent of anti-bad Samaritan legislation in certain jurisdictions of the U.S. and elsewhere, for example, might serve as grounds for such a claim. Thus clarification is in order if sense is to be made of the idea of international compensatory justice as a principle of international justice.

Consider this revised version of the duty of compensatory justice for the Law of Peoples:

> PICJ*: To the extent that peoples wrongfully harm other peoples, they have the primary *duty* to compensate those they wrongfully harm in proportion to the harm caused them, all things considered.

According to our revised principle of international justice, peoples who wrongfully harm other peoples have a duty of compensation to them pursuant to our newly revised PICJ, and the corollary rights version of the compensatory PICJ seems likewise to hold:

> PICJ*: Peoples have a *right* to be compensated in proportion to the harms wrongfully suffered, all things considered, at the hands of their primary offender(s).

I shall refer to both the duty and rights versions of PICJ* as one such principle. One point here is that no genuinely third party peoples have a duty to compensate what another people has a primary duty to compensate. Additionally, what Rawls himself refers to as "outlaw" states or societies are not to escape their compensatory duties toward those they have wrongfully harmed. And it is inconceivable that free and equal parties in the international original position would ignore compensatory justice considerations. For if they were to do so, then the Law of Peoples would lack a basic component to any legitimate and workable legal order. And recall that it is Rawls himself who seeks to articulate and defend principles of international justice that can be implemented with reasonable workability in a *realistic* utopia. Even in a realistic utopia rights are violated now and then, and require rectification if it is to remain a reasonably just social scenario. Nothing about Rawls'

international original position excludes the possibility of the international principle of compensatory justice.

Moreover, principle of international compensatory justice (PICJ*) fits well into Rawls' list of eight principles. It supports (1) in that it provides a basic rule in cases wherein peoples' rights to independence and freedom are disrespected by other peoples. Peoples wrongfully harming other peoples are to compensate those they harm to the extent of their harming them, all things considered. Furthermore, PICJ* implies that rules (4) and (5) of Rawls' list of principles, above, can be broken by decent peoples in certain cases where the ninth rule (PICJ*) is violated in a flagrant manner by an outlaw state. Indeed, third-party peoples might consider it their duty to confront the guilty peoples who refuse to adequately compensate the wronged party. Indeed, in cases wherein an outlaw state refuses to compensate peoples it has wrongfully and severely harmed, (5) must be supplemented by a corollary one stating that in defense of others war and certain other forms of political violence may be justified. I have in mind here cases where generations of race-based slavery (a case Rawls himself discusses) go uncompensated, or where indigenous peoples are victimized by genocide for the sake of societal expansion—again, without compensation. In such instances, it is clear that (5) can be broken in light of his claim (a claim that he never recanted) that at times militancy is justified.[21] Indeed, it would appear that the PICJ* upholds (6) insofar as it is plausible to think that (1) relies on such general rights being protected by compensatory rights. PICJ* further implies, in the waging of war or other means of political violence, that certain restrictions are to be obeyed in terms of going to war or engaging in political violence for the sake of enforcing laws of compensation and protecting compensatory rights. Finally, as mentioned earlier, PICJ* is congruent with (8) in that the former allows for the assistance of third-party peoples to involve themselves in the administration of compensatory justice in cases where offender peoples refuse to compensate those peoples whom they have wrongfully harmed, or where such compensation is forthcoming but grossly inadequate to return the compensated peoples to a decent level of living subsequent to the harms caused by the wrongful action of the offender peoples.

Thus a plausible principle of international compensatory justice (PICJ*) is both necessary for the Rawlsian analysis of international justice, and congruent with many of the principles as stated. This revised version of the duty and right of compensatory justice should be added to Rawls' eight principles [(1)–(8)] in order to better locate peoples in Rawls' realistic utopia. For if

[21] Rawls, *A Theory of Justice*, p. 368: "Now in certain circumstances militant action and other kinds of resistance are surely justified."