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## LETTER FROM THE CHAIR

This Issue of the ILT features Professor Lea Brilmayer's lead article on "What Use Is John Rawls' Theory of Justice to Public International Law?" Rawls' Theory of Justice and Brilmayer's critiques are both thought-provoking, since Rawls' application of his political science theory to international relations faces certain obvious difficulties. Rawls presumably means to consider international law. Why then call it the "law of peoples?" What are "peoples?" Rawls seems to minimize states as the sources of international law. Yet abstract legal thoughts or ideas, prior to their adoption by states, do not qualify as laws or legal principles. Therefore, "principles of justice" in the domestic sphere are meaningful only if they are incorporated into the domestic legal system by positive legislation; and, even if a certain number of such principles are recognized by one or more domestic legal systems, they cannot automatically be extended and applied to the international legal system unless and until the "law-makers" of international law (i.e. states), agree to adopt them by way of treaties, custom or other forms of compromised consent.

Rawls' recognition of seven fundamental "principles of justice" in the international legal system reflects contemporary practice. States are indeed sovereign and independent from one another. As equal members (at least in form and in law) of the family of nations, they respect each other's sovereignty and independence. Non-

intervention in the use of force except for self-defense, *pacta sunt servanda*, promotion and the protection of fundamental human rights, and the duty to observe the laws of wars, are among other very important international legal principles required of states and other subjects of international law. These and other fundamental principles of international law are not automatically extended from the so-called "principles of domestic justice"; rather, they are positive norms and rules specifically established and recognized by states through agreements, custom or otherwise.

While Rawls' "two-tiered methodology," giving priority to "domestic political structures" is controversial, so is Brilmayer's constructivist theory. The suggestion, for example, that East Timor exists "largely because of things that happened in the international community, not because of things that happened inside East Timor or inside Indonesia", seems an overstatement. Were it not for the unique history of East Timor and the very fragile and questionable control Indonesia had over it, there would have been little that the international community could do to help create an independent East Timor. The Baltic States were similarly situated. The international system does not "form" states, but rather sets forth the basic criteria for statehood which facilitate (or hinder) the creation of new states. What ultimately constitutes a new "state" is the *internal* condition of the entity in question, when it meets the basic criteria for statehood under international law.

Our editors have invited me to prepare a lead article for discussion in the next issue of the ILT on “Humanitarian Intervention and the Non-Intervention Principle in International Law.” I welcome disagreements, comments and suggestions about my views on this controversial and very important topic.

Finally, it is already time to look ahead to the ASIL Annual Meeting next April. Our group will sponsor a lunch panel on “The Philosophical Foundation of Public International Law”, which will be chaired by our editor, Tim Sellers. Our business meeting will also be held immediately before or after the panel. Ideas and suggestions of items for inclusion in our meeting agenda will be greatly appreciated (I can be reached at [jshen@sjulawfac.stjohns.edu](mailto:jshen@sjulawfac.stjohns.edu)). Please keep an eye on ASIL newsletters and announcements in the mail and/or on the web. We look forward to a large turnout at the meeting.

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#### WHAT USE IS JOHN RAWLS' THEORY OF JUSTICE TO PUBLIC INTERNATIONAL LAW?

For the past thirty years lawyers and philosophers have from time to time wondered how to apply John Rawls' *Theory of Justice* to international relations. Now John Rawls has tried to do so himself, making the question even more pressing for those of us who care about international law. Rawls' own effort, and its deficiencies, make clear that it would be a bad idea to apply the ideas of his *Theory of Justice* to international relations. International lawyers and statesmen should leave Rawls' books on the shelf for philosophers.

Since the *Theory of Justice* first came out with its rather short remarks about international relations, people have speculated about their possible application to international law. Now Rawls has worked out a *Law of Peoples*, widely published in various forms, most recently in his collected essays (1999). Rawls' *Law of Peoples*

reveals how incompletely thought out his international theory really is. His essay is deeply troubling. First, simply because Rawls has not thought his theory out fully, but second because anyone who does try to work through the implications of Rawls' theory for him will quickly see fundamental problems. The improbable assumptions that Rawls makes are so obvious to persons with a background in international law that any educated person would be better off going directly to the legal issues at hand, without Rawls help.

Rawls' theory of international justice, as set out in his essay on the *Law of Peoples* begins with a very brief list of seven basic “principles of justice between free and democratic peoples,” which includes:

1. Peoples as organized by their governments are free and independent and their freedom and independence is to be respected by other peoples.
2. Peoples are equal and parties to their own agreements.
3. Peoples have the right of self-defense, but no right to war.
4. Peoples are to observe a duty of non-intervention.
5. Peoples are to observe treaties and undertakings.
6. Peoples are to observe certain specified restrictions on the conduct of war.
7. Peoples are to honor human rights.

This is obviously a very bare-bones sketch of his position, and Rawls admits that his statement of principles is very incomplete. Other principles would need to be added, (he admits) and would require much explanation and interpretation. For instance, there would need to be principles for forming and regulating federations or associations of peoples and formal standards of fairness for trade and other cooperative arrangements. There should be certain provisions for mutual assistance between peoples in times of famine and drought, and provisions for insuring that in all reasonably developed liberal societies the citizens' basic needs will be met. This is all that Rawls says about the obviously extraordinarily important issue of international economic and social

inequity. His principles are tossed off so lightly that one can hardly discern where they came from. Rawls' principles are mostly rather nice principles. They appeal to the better side of human nature. But he never fully explains what they are, or where they come from. Rawls appears to believe that the mere attractiveness of his conclusions will motivate us to adopt his theory. Why should it? Other theories could generate the same principles. Rawls' conclusions cannot justify his premises. They're simply conclusions that are attractive in their own right.

In the end, the essence of what Rawls finds important about his theory lies not in his seven meager principles or in the scant elaboration that he gives them. What really interests Rawls, in the bulk of his essay is not these particular conclusions but rather his methodology. Methodology was also the focus of Rawls' *Theory of Justice*. So it should come as no surprise that questions of methodology are what largely concern Rawls when he comes to apply his ideas to the international setting, so much so that one can disregard his conclusions. The seven conclusions with their small amount of elaboration are beside the point. What really matters for Rawls is his methodology. Applying Rawls to international legal theory means embracing his methodology, for better or worse. Rawls' methodology is distinctive, striking and in the end (when examined) unacceptable to anyone with any knowledge of international law.

The methodology that Rawls uses has two basic parts to it. They are closely linked but theoretically distinct: First, Rawls bases his theory on the principles of domestic justice, beginning with his *Theory of Justice*. Rawls looks first to issues of domestic justice before "extending" (as he puts it) these same theories to the international situation. This has important consequences and creates important problems. Domestic justice comes first.

The second distinctive aspect of Rawls' methodology is that when he finally does extend his theory to international relations he takes it for granted almost without examination that the morally relevant entities in the international

arena are states. International lawyers and theoreticians will recognize this at once to be an enormously problematic assumption.

Rawls' theory begins with the case of a hypothetically closed and self-sufficient liberal democratic society concerned only with political values and not with any other part of life. This gives him a theory of domestic justice. The question now arises as to how that conception can be extended in a convincing way to cover a given society's relations with other societies, to yield a reasonable law of peoples. Just as, in 1971, Rawls published a *Theory of Justice* and only thirty years later returned to apply this theory of domestic political justice to the international arena, so his theory itself progresses from domestic to international affairs. This makes the progression from domestic to international principles of justice seem natural, but it is far from the only way to address the two issues and in fact raises some questions that Rawls never answers.

Rawls' second assumption is pervasively statist. Despite one belated reference to humanitarian intervention, Rawls never questions the primary role of states. Rawls simply assumes that the enterprise at hand concerns interactions between societies or states or (to use his term) "peoples". When Rawls writes of "peoples" he usually means states or state-like entities, and the relationships between them. Rawls is trying to develop the ideals and principles that a society should employ to guide its policy towards other states or "peoples".

Many scholars over the years have noticed this statist outlook in Rawls. Not only are his conclusions statist, but so is his whole methodology, to such an extent that it would have been a surprise if Rawls had reached anything but statist conclusions. Rawls' problem grows out of the progression of his writing. Since he already had an answer in place concerning domestic political justice, it would not have made sense to start again from the beginning in addressing international affairs. So naturally he looked to states (not individuals) as the building blocks of his new international order.

Rawls' two methodological assumptions are both profoundly flawed, so much so that they vitiate his entire enterprise. In developing his "constructivist" (i.e. contractarian) theory, Rawls begins with the basic structure of a closed and self-contained democratic society, which he then extends forward to future generations, outward to encompass foreign peoples, and inward to cover special social situations. Each time the constructivist procedure is modified to fit the subject in question. In due course all the main principles are on hand, including those needed for the various political duties and obligations of individuals and associations.

At times Rawls' seems conscious of his shaky foundations. He concedes that "at first sight" his constructivist doctrine seems hopelessly unsystematic. Why proceed through the series of cases in one order rather than another? Rawls' asks himself the right question, but gives no satisfactory answer. He prefers to select one particular sequence, and to test its merits as he proceeds. There is no advance guarantee that this choice makes sense, and Rawls admits that much trial and error may be needed. That is the best that Rawls can do to justify his methodology. Rawls prefers instead to apply his methodology without justification and then to see what happens, through a process of trial and error. But he never goes back to test his hypothesis against its results, or revisit his ordering of domestic and international politics. The matter is simply dropped. Rawls knows that this is a very important question that he is avoiding, but he has nothing to say about it and so he simply moves on.

The same thing happens with Rawls' persistent assumption of statist premises. Rawls must be sensitive to the question of statism, because so many of the principles that he chooses have significant statist aspects to them, and Rawls has been widely criticized for this. He is surely aware that his decision to base his contractarian analysis on the preferences of states is deeply controversial. Rawls recognizes the problem, without offering any satisfactory response. Having worked out "justice as fairness" for domestic society, he moves on as if

the same structures will apply in other contexts. Rawls transposes his familiar domestic methods to construct a "law of peoples" and justifies this by observing that peoples as corporate bodies organized by their governments already exist in some form all over the world. These existing entities must agree to any proposed political reforms. This being the case (Rawls believes) all principles and standards proposed for the law of peoples must be acceptable to the considered and reflective opinion of "peoples" and their governments.

There is some truth to this. International lawyers must realize the importance of being hardheaded and practical. Law begins with reality, and reality includes states, whether one likes them or not. So it is entirely reasonable for those who advocate practical reforms to start out with statist assumptions, as Rawls does. Even profoundly anti-statist reformers may have to begin with the recognition that states are to a greater or lesser degree simply a fact of life. This makes sense for lawyers, who must deal with the world as they find it.

Philosophers, however, should dig more deeply. The value of philosophy lies in stepping outside existing institutions, to evaluate and improve them. Rawls does not do this, making assumptions that any international lawyer would recognize at once as profoundly problematic.

For example, Rawls makes the assumption that domestic political structures have priority. Rawls wants to build domestic societies first and then extrapolate a law of peoples to govern their interactions. This two-tiered methodology does not offer any decisive advantages, and a very good argument could be made that Rawls has the priority precisely backwards. The constructivist school of international relations theory (to give one example) makes a very persuasive argument that the actors in a system are more or less constructed by the international system in which they find themselves, and not vice versa.

That's a rather theoretical way of putting the point. There's much more practical way to put it. Consider East Timor. Why does East Timor

exist? Or why is it soon to exist? Where did it come from? East Timor exists and will exist largely because of things that happened in the international community, not because of things that happened inside East Timor or inside Indonesia. If it were not for the existence, the attitudes, the assumptions, the moral preferences, the ideas and beliefs of people outside the immediate area, East Timor would not be in the situation that it currently is. And East Timor is far from the only example. Until very recently the Baltic States were not states. They were provinces of the Soviet Union. What makes a state start to exist? We can't simply take the existence of states or the existence of any other international actors as having some kind of independent validity outside of the social system, the legal system, and the political system that is present in existing international, non-domestic law.

Rawls is insufficiently critical in adopting assumptions that states existed before international society. Doing so ignores the important role that international law and society played in creating the states. This is not to say that the priority should be reversed. The process is dialectical. States form international law and society, but international law and society also form states. The process goes back and forth. That is how international actors come into existence. They are not created by God or found under cabbage leaves.

Any international lawyer would recognize that not all international actors are states. By beginning his analysis with statist assumptions Rawls builds statist structures right into his philosophical conclusions. Rawls' original position, from which he constructs his "law of peoples" is composed only of a group of states, making their own social contractarian analysis behind a veil of ignorance. That just is not how things are. The world is not composed only of states, or of "peoples," but also of people. There are non-governmental organizations, universities, human rights organizations, churches, mosques and many other institutions that have just as much independent validity internationally as states do, from a purely theoretical point of view. There is no reason

theoretically to start with states as the relevant actors. Or if there is a reason, Rawls does not provide it. The detailed attention that international lawyers have long given to these questions shows how very far ahead of Rawls they already are. There would be no point in applying Rawls' theory of justice to the international arena.

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#### "THE USEFULNESS OF WHICH RAWLS?"

Lea Brilmayer invites us to consider the usefulness of John Rawls' theory of justice for international law. Her paper is based on Rawls' essay *The Law of Peoples*, first published in 1993. Her paper and its conclusion, that there would be "no point" in applying Rawls' theory of justice to the international arena, reveal much disappointment in Rawls' efforts as represented by that essay. Coincidentally, Prof. Brilmayer's paper was delivered in the same year (1999) in which Rawls published a book-length treatment of the same subject, by the same name (*The Law of Peoples*) (hereinafter *TLOP*). Unfortunately, there is little in the book that would encourage Prof. Brilmayer - indeed, the book's argument follows closely that of the earlier, eponymous essay. For this reason, I shall treat Prof. Brilmayer's criticisms as equally applicable to the book.

I agree with the substance of most of Prof. Brilmayer's criticisms, *as they relate to TLOP*. However, I believe there are good reasons for considering Rawls' principal work, his theory of justice as fairness (JAF) developed in *A Theory of Justice (ATOJ)*, to in fact be quite relevant and useful to international law; in fact, I would argue that in *TLOP* Rawls does not really apply JAF to the international arena in at all, and that is its main shortcoming. For this reason, while I share many of Prof. Brilmayer's criticisms, and her disappointment, I reach a more optimistic conclusion as to the promise of Rawls' larger project for international law.

Prof. Brilmayer's criticisms sort into two basic groups: criticisms of Rawls' assumptions, and criticisms of his methodology. Implicit in these two criticisms is, I believe, a criticism of his results as well. The criticism of Rawls' assumptions can be summarized by stating that the world Rawls assumes for the exposition of his theory is not the contemporary world we live in. This is not simply a case of philosophical abstraction in the service of elegance of argumentation: Rawls is wrong, in important ways, about the nature of contemporary global society, and in particular the nature of contemporary international law. Two illustrations suffice: first, the world does not in fact consist of largely self-sufficient states. In fact, global economic interdependence is a highly visible, much-discussed feature of contemporary global life. As early as 1979, Rawlsian commentators were pointing this out, and in the process noting important philosophical implications of this fact for international application of Rawls' theory. (See, e.g. Charles Beitz, *Political Theory and International Relations* (1979)). Second, contemporary international law is not exclusively, or even some would argue, primarily, about states and their inter-relations. On the contrary, contemporary international law recognizes the fundamental role of the individual and her basic human rights in the constitution of international law, and the vital role played by NGO's and other non-state actors in shaping international policy and discourse.

I believe that these criticisms are well founded. I also agree with Brilmayer's characterization of Rawls as fundamentally concerned with methodology, a concern (if not obsession) which characterizes much contemporary philosophy. Rawls in particular must be careful on methodological matters, precisely because his aims extend far beyond methodology to substantive moral and political positions, thus rendering him particularly vulnerable to methodological attacks. In particular, Brilmayer objects to two aspects of Rawls' methodology in *TLOP*: the priority he places on the construction of domestic justice prior to the elaboration of international justice, and his construction of international justice

exclusively on the basis of the choices of states. She also makes the third, implicitly methodological criticism, that Rawls does not adequately justify the principles of international justice he identifies as constituting the law of peoples - they are merely "tossed off."

I think Brilmayer's third methodological criticism goes to the heart of the deficiencies in *TLOP*. I would restate this point in Rawls' own terms as a criticism that he fails in *TLOP* to follow the procedure of reflective equilibrium so critical to his work in *ATOJ*. In other words, he 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 about these moral intuitions, following a process of critical reflection, evaluation and adjustment. Instead, he merely takes as representative of international law a rather dated set of general international legal principles from Brierly's *The Law of Nations*, and asserts that these principles would in fact be chosen as principles of international justice. He does, nevertheless, *explain* the choice of these principles in a manner reminiscent of his argument in *ATOJ*, involving the now-familiar devices of an original position, the veil of ignorance, and representative individuals.

In important respects, however, the approach Rawls uses in *TLOP* is not the same approach as in *ATOJ* - the words are similar, but the substance is not. 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." (*TLOP* 41).

I would argue that it is in this “shortcut” that Rawls fails to deliver on the promise which his domestic theory of JAF suggests would be forthcoming in an international application of his views, a promise which many, many commentators have pointed out (see, e.g., Beitz (supra) or Thomas Pogge, *Realizing Rawls*). 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, indeed likely, that international justice would in fact go beyond the basic principles of international law BRIEFLY distilled decades ago, but we must consider this possibility without the benefit of Rawls’ insight.

Fortunately, we have other very able thinkers to assist in this determination, such as Brilmayer herself, Beitz, Pogge, Thomas Franck, David A. J. Richards and others. Clearly, construction of an international theory of justice along Rawlsian lines would require an examination of the natural and social facts of global society, construction of an international original position, and the selection of appropriate representatives in that original position. In this, I am less troubled by the other two aspects of Rawls’ methodology that Brilmayer criticizes, namely that Rawls begins first with domestic justice, and that he constructs a second original position exclusively for representatives of states. Certainly, Beitz, Pogge and others have also argued that a more consistently liberal, Rawlsian theory of international justice would involve a single 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. However, with regard to the priority of domestic justice, Rawls is here explicitly following Kant’s basic approach in *Perpetual Peace*, which first establishes the conditions for just states, and then articulates how they might justly interact among themselves. 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 states.

With respect to the fact that in Rawls’ theory states alone choose the terms of international justice, I do not believe that this feature by itself renders the results illiberal or fatally flawed. In fact, one can 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 that in exercising this power they must respect individual rights and consider the inputs of international civil society (see Fernando Teson, *A Philosophy of International Law* (1998)). If so, then Rawls’ statist model is to this extent still accurate as a matter of which party holds the power of decision, even if no longer accurate as to what and who they must consider when they exercise this power. 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.

Rather than insist on a single, cosmopolitan original position, I think it important to carry Rawls’ project a step farther on his own terms, and develop arguments for which principles of justice state representatives would, in fact, choose in an international original position. In this respect, I think Rawls’ project is very much alive, even if he regrettably does not really carry it out himself in *TLOP*. The continued attractiveness for international scholars of the principles of JAF that Rawls articulated three decades ago for domestic society, suggests that those principles remain quite promising for international society. I would contend, and I hope Prof. Brilmayer would agree, that this set of principles, suitably adapted for international use, and not *TLOP*, should be the basis for any determination of the ultimate usefulness of Rawls’ work for international law.

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## A RESPONSE TO PROFESSOR BRILMAYER ON RAWLS

While I am far from an unreserved Rawlsian, I am rather better disposed to his thought than Professor Brilmayer. My comments on her paper will follow the themes of her critique, but will rely on more detailed exegesis of Rawls' argument. A large part of the problem, I suspect, lies in her having chosen an early version of *The Law of Peoples*, about which Rawls: "...was never satisfied with what I said or did with the published essay... It wasn't feasible to try to cover so much in a single lecture, and what I did cover was not fully developed and was open to misinterpretation." (*LP* p. v.) Much of her critique is alleviated by Rawls' definitive restatement after five years of criticism.

The question of the utility or inutility of Rawls' position provides a useful starting point, because it bridges many of the themes in Professor Brilmayer's essay. Brilmayer's allegations of the practical inutility of Rawls' work are beside the point because his position is not -- in *The Law of Peoples* nor in any of his previous work -- a call to action. For such an application, one would do better to look to Charles Beitz' *Political Theory and International Relations*.

Both *Theory of Justice* and *The Law of Peoples* are thought exercises; subjecting them to the criteria of practical utility or policy relevance is simply an *ignoratio elenchi*. Both works, and this is also true of *Political Liberalism*, are responses to a "what if" question. What sort of norms or system would we get given the starting point spelled out at *TJ* §20-30? Professor Brilmayer's criticisms are analogous to those of an earlier generation of critics who faulted Rawls for his use of the Original Position as a starting point. Professor Brilmayer asks the wrong questions and faults Rawls for failing in his attempts at things that he never undertook.

In the first sentence of the book Rawls explains that: "By the "Law of Peoples" I mean a particular conception of *right* and *justice* that

applies to the *principles* and *norms* of international law and practice." (*LP* p. 3, emphasis added) Rawls is not discussing international law; he is postulating a possible society, one comprised of peoples who, while divergent in many ways, share an "overlapping consensus" of rightness and justice as regards their interactions. The law of peoples itself is *not* a postulated international law, but is rather the principles of justice between peoples in this "realistic utopia", and an articulation of the overlapping consensus. Its relation to international law is only that of normative standard against which practice is to be measured.

### I. Statism

Ultimately, on the matter of state-centrism Professor Brilmayer's objection comes down to the reduction of peoples to states. "When Rawls writes of 'peoples' he usually means states or state-like entities..." This was apparently true of the article, but not of the book, where Rawls finally explains the matter in §2, "Why Peoples and Not States?"

In §2 Rawls begins by characterizing both peoples and states to illustrate why states are unsuitable as a starting point. Key among the characteristics of a people are what, borrowing from Mill, Rawls calls "common sympathies", the possession of a moral character, the lack of juridical sovereignty and the possession of both rationality *and* reasonableness. While Pufendorf and perhaps Leibniz would object to Rawls denying the moral character of a state, it is hardly of moment.

States tend to be narrowly *zweckrational* and characterized by insecurity.

...if a state's concern with power is predominant; and if its interests include such things as converting other societies to the state's religion, enlarging its empire and winning territory, gaining dynastic or imperial or national prestige and glory, and increasing its relative economic strength -- then the difference between states and peoples is enormous. (*LP* p. 28)



None of this, however, has addressed the issue of whether, labels aside, Rawls' account is *practically* state-centric; to answer this we must look into the Second Original Position. The parties here are, according to Rawls, representatives of peoples, but is this really the case? As structured in §3.2, the representatives -- given the veil of ignorance -- cannot be pursuing the ends Rawls attributes to states. All that is smuggled behind the veil is the people's fundamental interest, i.e. the liberal conception of justice. Rawls justifies this inclusion by equating this with the primary goods which are known even in the First Original Position (cf. TJ §10-19). This notion of justice as fairness is an outcome of the first iteration of the thought exercise. The character and interests of states are specificities which, like one's preference schedule or position within society, one does not know behind the veil.

Whatever the label, the import of the statism charge is that Rawls is inattentive to the other actors in the international realm. Professor Brilmayer is absolutely correct that Rawls is under-attentive to international organizations and other international actors which are not "peoples." Even in the book I cannot defend Rawls on this count, except to say that his theory has no *prima facie* bar to their inclusion, he has just failed to treat them adequately. He does not, however, ignore IO's; Rawls is quite interested in both the UN (§4.1) and the IMF/World Bank (§11.3), but discussion is under-developed.

Are Rawls' principles statist? As delineated at §4.2 (in somewhat different terms from those restated in Professor Brilmayer's article), the principles are certainly "peoples-ist"; Rawls, in fact, derives them from international law (*LP*, p. 37, n. 42), but *contra* Professor Brilmayer, Rawls does set about their justification. This is undertaken in detail in §6, *passim*, but matters become particularly interesting when Rawls factors in non-liberal, non-well-ordered states in Part II, and the desire for liberal states to have more than a *modus vivendi* with them. This discussion offers perhaps the greatest value-added of *The Law of Peoples*, but receives no attention from Professor Brilmayer. The detailed discussions on Human Rights which

this generates (§10), and its concomitant challenge to traditional notions of sovereignty surely indicate that while peoples are primary in the formulation of principles, people are the guiding concern.

## II. The Priority of the Domestic

I have taken this topic out of sequence because the answer to Professor Brilmayer's objections has its grounds in the previous section. Rawls is certainly open to the constructivist-based criticism that he ignores the cycle of co-constitution always underway between unit and system; however, in her examples of East Timor and the Baltic states, Professor Brilmayer, in presenting a version of constructivism, mistakenly conflates recognition and constitution. Rawls does intimate these issues at §2.2 and 2.3, in which some of the characteristics of the state are not manifest until there are other states with which interaction can occur.

Even given the recognition of co-constitution, one must still posit an operational starting point; one must cut into the process at some point. Brilmayer is mistaken in asserting that the *theory* is weakened by Rawls' stipulation of the ontological priority of individual peoples to a society of peoples; one might well challenge this choice on grounds of method and efficacy, but not ontology.

It bears repeating that Rawls' question is not "How can we govern the international system?" Rather he asks "How might we optimally structure a society?"

Rawls' starting point is also justified on normative grounds; he sees most of the problems of international relations having their roots in unjust domestic arrangements. I will quote him at length:

Two main ideas motivate the Law of Peoples. One is that the great evils of human history -- unjust war and oppression, religious persecution and the denial of liberty of conscience, starvation and poverty, not to mention genocide and mass murder -- follow from political injustice, with its own cruelties and

callousness... The other main idea, obviously connected with the first, is that, once the gravest forms of political injustice are eliminated by following just (or at least decent) basic institutions, these great evils will eventually disappear. (LP p. 7)

### III. Peoples and People

Let us examine §11. The contrast Rawls makes in this section is between his "liberal social contract political conception of justice" and a cosmopolitan conception which starts from individuals. Why not start with a global original position? Ultimately one must ask what would be the consequences of starting from one point rather than the other. What difference in principles would result? Consider hierarchy. While, *in se*, the abolition of hierarchy is a good, for Rawls, the matter comes down to the denial inherent in such a stance of the acceptability of any other than a liberal society; decent hierarchical societies are ruled out [if not declared oxymoronic], and hence an entire segment of the world is declared morally illegitimate. In Kantian terms, it is to deny the dignity of all other types of societies than our own.

### IV. Conclusion

"Rawls' methodology is distinctive, striking and in the end (when examined) unacceptable to anyone with any knowledge of international law." Perhaps lawyers ought not look to Rawls for guidance; who told them to? I would argue that he never wrote for lawyers. Rawls has certainly never averred any claims that his ideas are useful tools for either lawyers or politicians. The Law of Peoples is the province of moral philosophers and theorists of international ethics and justice. The subject-matter is not law strictly construed; unfortunately English cannot render "*jus*" otherwise than "law", and as Rawls states (LP p. 3, n. 1) his derivation is from *jus gentium* in its pre-positivist form. Would any of Professor Brilmayer's criticism have arisen if Rawls had entitled the work "Justice among Peoples"?

If one chooses to borrow from Rawls, it should be obvious that it is not a toolbox which

can offer anything except *philosophical justifications* for moral and political *principles*, an explanation of why they are reasonable and desirable; it makes no other claims. Readers will not find anything telling them how to act upon and realize these principles; that is simply a task which Rawls did not undertake. It is an unreasonable *petitio principii* to fault him for not having done so, but a much graver error to impute to Rawls practical claim he has not made and then find them lacking.

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### THE LAW OF PEOPLES

Modern international law began in the seventeenth century as "the law of nature applied to nations". Lawyers and philosophers took principles already well-known and highly-developed in studying the natural rights and obligations of persons and applied them to relations between states. (See e.g., E. de Vattel, *Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et des Souverains* (1758)). States and persons are not the same, as clear-headed practitioners such as Emmerich de Vattel readily admitted, but the temptation to recycle good philosophy as law was very strong, some parallels between persons and states are legitimate, and most lawyers have spent as much time representing individuals (not states) as philosophers have spent thinking about individuals (and not states), so the habit continues.

John Rawls presents a recent example of this ancient phenomenon. Having developed an elaborate theory of justice for constitutional democracies (*A Theory of Justice*, Harvard, 1971), and refined it in his book on *Political Liberalism* (New York, 1993), Rawls has now applied his conclusions to international relations. The subjects of Rawls' *Law of Peoples* are members of what he calls the "Society of Peoples", which is to say those states that meet his test as "decent" societies. Rawls published his *Law of Peoples* bound together with *The*

*Idea of Public Reason Revisited* (on domestic political discourse), to underline the intimate connection between his “liberal” theories of domestic and of foreign politics. Both depend on a “Public Reason” that avoids questions of truth to construct a “political zone”, within which government can take place (p. vi).

### International Law

Rawls’ “Law of Peoples” recycles his domestic conception of right and justice to reconstruct the principles and norms of international law. Rawls proposes a “Society of Peoples” to embrace all “decent” (p. 3) states that follow the ideals and principles of his new law of peoples in their international relations. Rawls’ concept of “decency” corresponds loosely with the concept of “civilized” nations in Article 38(c) of the statute of the International Court of Justice. “Decent” states would seem to be those states whose views are worth taking into account in constructing the law of nations.

Rawls’ study of international law offers a new epistemology of international justice, to complement his liberal technique for finding justice within states. The concepts of “decency” (between states) and “reasonableness” (within states) define whose views will count, and in which circumstances, when deliberating about justice. But Rawls’ concept of “decency”, as applied to states, is broader than his concept of “reasonableness” as applied to persons. “Decent” states also include “decent hierarchical peoples” (he means governments), whose public officials “consult” their subjects, without giving them any real voice or power (p. 4). Such governments are not “reasonable” in their internal politics, but still manage to be “decent” in their external relations.

This curious gap between “decency” and “reasonableness” reflects Rawls’ recognition of a difference between “ideal” and “non-ideal” theory. In a perfect world, all states would be “reasonable” liberal democratic societies, as described in his book on *Political Liberalism*. Rawls developed his general “Law of Peoples” to serve this ideal situation. But because not all states really are liberal democracies, Rawls has extended his liberal Law of Peoples as much as

possible to embrace non-liberal non-democracies, to the extent that they are still “decent” enough to participate in international relations (p. 5).

### Realism

Rawls sets out to construct what he calls a “realistic” utopia, in which reasonably just constitutional democratic societies can participate in a broader international society. This international society must be “realistic”, in that it takes the world and human nature as it is -- imperfectly democratic. Rawls’ proposal is still “utopian” because he hopes to construct an international social structure that will realize political right and justice for “decent” peoples (p. 6). Political injustice leads to other evils, Rawls believes, so that establishing better basic political institutions will put an end to unjust war, religious persecution and other forms of oppression on both the domestic and the international levels (p. 7).

Realism means pushing the acceptable range of basic social institutions as far as possible in the direction of actual institutions as they presently exist, without sacrificing the ultimate ideal of liberal justice. At the beginning of his *Contrat Social*, Jean-Jacques Rousseau wrote of taking men as they are, to construct laws as they might be. Rawls takes states as he imagines them to be, to construct international law as he would wish it to be. He sets aside questions of war, immigration and nuclear weapons on the assumption: (1) that democracies and decent authoritarian states will not fight each other; (2) that immigration need not be permitted; and (3) that nuclear weapons are only necessary to keep outlaw states at bay (pp. 8-9).

Rawls’ “realism” lies in his willingness to extend the “original position”, in which all states determine the rules of justice between themselves, to include non-liberal non-democracies. In his earlier *Theory of Justice* (1971) and *Political Liberalism* (1993), Rawls proposed an “original position” for designing the basic concept of justice in liberal constitutional democracies. This original position was

designed to take the religious and philosophical beliefs of all “reasonable” people equally into account in constructing the basic rules of justice. “Reasonable” in this context included only those people whose philosophy or religion made them willing to take other people’s “reasonable” views equally into account. Applied to states, Rawls’ “realism” in designing his new original position means taking the interests and views of all “decent” governments equally into account at the international level, including the views of some governments that have *not* adopted the original position conception of justice to govern their domestic affairs. Rawls gives the views and desires of “decent” non-liberal non-democracies the same weight as the views and desires of reasonable democratic states (p. 10).

### The Fact of Pluralism

This “realistic” theory of justice in both its domestic and its international versions develops from what John Rawls has called “the fact of reasonable pluralism” (p.11). This “fact” as Rawls imagines it in constructing his domestic and international constitutional ideals assumes the persistence of an inevitably permanent and unavoidably conflicting plurality of “comprehensive” conceptions of the good, which people and peoples will neither change nor compromise in the face of reasoned arguments or truth (p.12). Rawls constructs his theories of justice and international relations on the basis of reciprocity between the holders of these mutually incompatible and non-commensurable “comprehensive” moral views (p. 14).

This fundamental assumption of the “fact of pluralism”, as Rawls understands it, is simply false as applied to normal political relations, which vitiates his concept of “political liberalism” in domestic politics. The “fact of pluralism” may be better supported in international relations, but not as the basis of any “just” law of peoples. The “fact” of pluralism is false as applied to normal political relations because very few individuals have “comprehensive” conceptions of the good. Most people have partial conceptions of the good. To the extent that people do hold comprehensive

views, reasonable people (in the word’s usual sense), will be willing to modify their opinions when faced with cogent arguments for changing their minds. People who cling to non-revisable irrational conceptions of the good, refusing to engage in reasoned argument, are not “reasonable”, despite Rawls’ appropriation of that term. Their refusal to reason makes them unreasonable, and discounts the moral relevance of their views.

Rawls’ concept of pluralism may apply better to states, because states are inherently less reasonable than individual persons engaged in public deliberation. States are less reasonable than individual persons because states are not real persons, and cannot reason, except to the extent that the particular persons or representative structures that govern states at any given time reason on their behalf. To the extent that states represent real persons deliberating in good faith about justice and the purposes of government, they may usefully be considered as “reasonable”. Non-representative, non-democratic state structures represent nobody, except their government’s interest in power, wealth and self-preservation. Such attitudes generate inevitable pluralism and incommensurability of views between states, but they are not “reasonable”. Sometimes each self-seeking government’s relatively equal power forces a *modus vivendi* in which each government leaves the others free to exploit their own subjects. This self-interested stand-off has no rational connection with either law or justice.

### Reason

Rawls’ conception of “reason” means the willingness to get along. “Reasonable” people, as Rawls understands the term, are people who do not challenge their neighbors’ fundamental beliefs. No moral questions are open for discussion, beyond the purely political (p. 16). Extended to create a “reasonable” law of peoples, this rationale determines that the governments of states should not challenge the fundamental commitments of the governments of other states, until these cross some ultimate threshold of “decency” (p. 17). Rawls’ sense of “reasonable” implies the necessity of never

contradicting others. Rawls' sense of "rational" means pure and undisguised self-interest (p. 18).

The idea of public reason for Rawls' "Society of Peoples" parallels the idea of public reason in his domestic democratic constitutional model (p.19). Rawls avoids confrontation because he fears the fanaticism of religious conviction (p. 21). The over-confidence of irrational faith does often lead to persecution, but not simply because "comprehensive" beliefs are too deeply held. What makes such views dangerous is their irrationality. Defining "reason" to avoid reasoned discussion of fundamental moral questions strengthens the power of irrationality and therefore the threat of violence. Rawls advocates the maintenance of formal respect for and deference to irrationally held comprehensive views, when he should have prescribed humility in the application of reasoned discourse to reduce the dangers of religious and philosophical oppression.

"Reasonable" peoples, according to Rawls' theory of reason, are peoples willing to offer "fair" terms of cooperation to other peoples, just as reasonable citizens in domestic society should offer to cooperate with fellow citizens (p. 25). This formula would be perfectly acceptable if Rawls had a more robust conception of fairness. Rawls' sense of "reasonable" is too far removed from actual reason to offer any useful measure of what should count as "fair" between peoples. Assuming a plurality of equally "reasonable" yet "comprehensive" doctrines traduces the normal sense of both words, by assuming that persons, behind a veil of ignorance, not knowing which views they will hold, would agree equally to honor all views, and would not prefer to encourage those moral views that are actually more correct (p. 31).

### Peoples

Rawls speaks of "peoples" rather than "nations" or "states" to convey the need for community among the inhabitants of a given territory, whatever their origin may be (p. 25). "State" implies sovereignty and a certain separation between the government and people that Rawls strongly disapproves (pp. 25-26). By

writing of "peoples" rather than "states" in the second-level "original position" in which states determine their mutual duties, Rawls implies that states in a sense do (or should) speak for, embody or represent the peoples that they rule. This introduces a spurious impression of consent into Rawls broader society of "decent" peoples, which includes the governments of authoritarian and non-democratic states, who have no legitimate authority to deliberate or to consent on behalf of their subjects.

By using the word "peoples" in writing of governments, Rawls hopes to convey the "reasonable" values of reciprocity that ought to exist between states (p. 28). Reciprocity between peoples would be desirable, but should not necessarily extend to the governments of all states, whose interests may be quite different from those of the peoples that they rule. By obscuring the difference between peoples (subjects) and states (governments), Rawls gives states a spurious legitimacy, and too much authority in speaking on behalf of the peoples that they rule. Just as liberal governments view their subjects as free and equal citizens (according to Rawls' theory), so he believes that international society should view all states as free and equal in constructing international law (p. 31). But many states are neither free nor equal. Some are authoritarian non-democracies. Such governments do not deserve an equal voice.

Perhaps at this point one might argue that even when the governments of states deserve no equal voice, their peoples do, which is certainly true. In constructing rules of international justice some imaginary pre-political "representative" of the people may need to be constructed to express their interests and views (p. 33). Rawls would picture this representative as also speaking for the state. The difference between "states" and "peoples" is not for Rawls, as it would be in ordinary discourse, the difference between governments and subjects, but rather the difference between two types of government. Governments that respect the dignity of other governments are "peoples", in Rawls' terminology, and governments of "states" are those that do not (p. 35).

## States

“State”, as the word is usually understood, signifies the government of a determinate territory, with its own population (“people”) and political independence, confirmed through recognition by the governments of other separate (and “sovereign”) states. Rawls speaks of “peoples”, but he means states when he writes that they should be: (1) free and independent; (2) bound by treaties; (3) equal; (4) committed to non-intervention; (5) pacifist, except in self-defense; (6) respectful of human rights; (7) humanitarian when forced into war; and (8) committed to helping less fortunate states to achieve prosperity and good government. These are the basic tenets of the “Law of Peoples” that Rawls imagines that the representatives of states (“peoples”) would embrace in an original position, behind the veil of ignorance (p. 37).

Rawls assumes stable boundaries between states. However historically arbitrary a state’s geographical boundaries, Rawls would maintain them in perpetuity to give each people a clear sense of property and responsibility over its own national territory and fate (pp. 38-39). Governments would insist on equality (p. 57) in the original position (Rawls believes) to protect their own interests from being short-changed to serve the happiness of others. This leads to the familiar and largely traditional “Law of Peoples” that Rawls adapts from long-established usage in international law and practice (p. 46).

In the first instance, Rawls’ “Law of Peoples” applies only to liberal democratic states, such as those constructed behind the “veil of ignorance” in his first (domestic) “original position”. His law of nations emerges “politically”, and not as an expression of the comprehensive doctrines of truth or right that might hold sway in any particular society (p. 55). As extended to “decent hierarchical peoples”, Rawls’ rationale must be somewhat different. Principles that would be accepted from the standpoint of liberal democratic peoples acting behind a veil of ignorance must be shown also to be valid from the standpoint of authoritarian hierarchical states that reject the principles of liberal democracy (p. 58).

## Toleration

Rawls proposes to extend the benefits of the Law of Peoples to non-liberal governments, by applying the principle of “toleration”. By “tolerate” (contrary to ordinary usage), Rawls means not simply to put up with, but fully to include non-liberal governments in his Society of Peoples (p. 59). Rawls would “tolerate” (in this broad sense) all “decent” peoples (p. 60), including certain non-liberal governments, because he believes that the dignity of their subjects would be compromised by any measures taken to encourage “decent” authoritarian governments to become more democratic and liberal. Here again Rawls equates disrespect for governments with disrespect for peoples (p. 61). By confusing peoples and states Rawls diminishes the power of peoples against their own governments. There may well be non-liberal states that deserve the protection of Rawls’ eight principles of international law, but their governments should be tolerated (in the ordinary sense of the word), not praised. Contrary to what Rawls’ believes, states that disenfranchise their peoples should be stigmatized as wrong, even when they must be tolerated, for prudential reasons.

Toleration implies error, as Rawls well understands. His broad conception of toleration is tactical, like his domestic strategy of reasonable pluralism. Rawls believes that if liberal peoples pretend that authoritarian governments are fully acceptable, and act as if authoritarian leaders were fully respectable, then eventually authoritarian states will move towards liberalism. This reflects Rawls’ fundamental beliefs (1) that all criticism is counterproductive, and (2) that all moral change comes from within. Rawls opposes challenging false moral beliefs or bad government practices directly, because he does not think that criticism will persuade. Rawls would like governments to reform themselves in their own way. Recognizing authoritarian governments as part of a decent society of peoples will encourage them to reform (p. 61). Rawls believes that peoples will lapse into bitterness and resentment when liberal governments criticize the

authoritarian masters of non-democratic states (p. 62).

Rawls' conception of toleration as full inclusion and respect weakens the persuasive value of good institutions, by forcing good governments to pretend that bad governments are equally respectable. This deprives bad governments of the truth, which might have encouraged reform, and perverts international discourse, to the extent that non-representative governments have an equal voice in international affairs. True toleration includes a measure of disapproval. Hiding this disapproval, as Rawls suggests that we should, will dispirit reformers within authoritarian regimes, and betray the aspirations of their peoples. Rawls' conception of toleration betrays the oppressed by denying the reality of their oppression. It encourages liberal peoples to collude with foreign injustice.

### Decency

Rawls defends himself against this charge of collusion by insisting that his Law of Peoples extends its benefits only to "decent" authoritarian regimes (p. 61). These regimes count as "decent", because they have a "decent consultation hierarchy" (p. 63), they do not harbor aggressive aims (p. 64), they respect human rights (p. 65), they view all members of society as decent and rational, and their judges and public officials sincerely believe that the law serves the common good of all those subject to it (pp. 66-67). The main difference between "decent" authoritarian regimes and liberal states lies in their different conceptions of the subjects of the law. Liberal governments respect their subjects as free and equal citizens. "Decent" authoritarian regimes regard their subjects as members of groups (p. 66), and consult only with officially recognized group "leaders" in deciding public policy (p. 64).

Rawls' eight Laws of Peace apply only to "decent" peoples, which makes his criteria of decency both too narrow and too broad for the different purposes they serve. Rawls' standards of decency are too narrow, because governments that do not meet his requirements of human

rights, the common good, and judicial sincerity (p. 67) may still deserve protection against aggression and other violations of international law. Rawls' standards of decency are too broad, because he insists on respecting all "decent" states equally, as if they were fully liberal and democratic, which they are not. No government that denies the political equality of its citizens will ever fully respect their human rights, or seek their common good. Rawls' fantasy of "consultation" through group leaders (p. 64) will only entrench certain "leaders" in power, and coerce citizen membership in artificially perpetuated groups. (Cf. Mussolini's system of consultation with the recognized leaders of socially representative "fascies" in Italy.) Denying the equal citizenship of any member of society is not "decent", and future subjects of the law would not accept authoritarian government behind a veil of ignorance, as Rawls himself must recognize.

Perhaps governments may properly be considered to be "decent" when they *try* to serve the common good of their people (p. 67). But governments are not fully worthy of respect unless they also actually *realize* the common good to some extent, and this will never happen under authoritarian regimes. By putting the rulers of authoritarian governments into his inter-state "original position", alongside the representatives of liberal democracies (p. 69), Rawls pollutes his contractarian model. Authoritarian governments cannot speak for their subjects, because they do not represent their subjects. Governments that claim equality in the international arena should first concede equality to their subjects at home. Rawls' conception of a "decent consultation hierarchy" (p. 71) cannot replace the direct representation of citizens, because authoritarian systems delegate authority without consulting the citizens themselves (p. 72). Self-appointed or government-selected group "leaders" can only represent their own interests, not those of other citizens or groups (p. 73).

### Human Rights

Rawls' two primary tests of "decency" are respect for the common good, and protection of

the most basic universal human rights. Defining either too broadly would assimilate decency to democracy and liberalism, which is not Rawls' purpose. Instead, he restricts the human rights requirements of "decency" to a short list of "fundamental" rights (p. 78) against military aggression, slavery, religious persecution, and genocide (p. 79). Rawls suggests that governments respecting these minimum rights should be immune from economic sanctions or other interference designed to protect or to encourage their subject peoples (p. 80). Outlaw states that violate fundamental human rights may be sanctioned or invaded (p. 81), but Rawls would respect authoritarian non-democracies, even though they deny the more refined human rights of constitutional democracies.

Despite his Kantian antecedents (p. 87), Rawls disavowed the immediate recognition of any world-wide "cosmopolitan" justice, that would respect the equal rights and liberties of all persons, without discrimination (p. 82). Respecting the universal and equal dignity of all persons would threaten the power of "decent" authoritarian governments, by undermining their authority. Beyond the absolute minimum of a "common good" attitude, "reasonable" consultation, good-faith judges (pp. 61, 67) and minimum human rights, such as those against slavery and genocide (p. 79), Rawls refused to endorse any values that authoritarian governments could not themselves accept (p. 83). Even to offer incentives, in the form of foreign aid, for governments to respect human rights, would violate Rawls' policy of "respecting" authoritarian governments (pp. 84-85).

Rawls' deferential attitude towards existing regimes seems unnecessary to his basic theory and fundamentally unjust to the subjects of authoritarian governments, whose rights Rawls disregards. His arguments has three parts, describing (1) the law of peoples that would prevail between liberal states, then (2) extending the same rules to "decent" authoritarian governments, and finally (3) protecting "decent" non-liberal non-democracies against criticism. The first step is reasonable, the second excessive, and the third pernicious.

Deliberative, democratic and rights-respecting governments (1) should defer to each other in ways that non-democratic or non-liberal governments (2) do not deserve, and certainly not (3) without criticism. By putting non-representative governments into an equal position "behind the veil of ignorance" (and in the community of states) as just and representative democracies (p. 86), Rawls minimizes the protection of human rights in his unnecessarily illiberal "law of peoples".

### The Law of Peoples

The eight principles of Rawls' Law of Peoples (p.37), regarding states' (1) independence, (2) respect for treaties, (3) equality, (4) non-intervention, (5) pacifism, (6) respect for rights, (7) humanitarian attitude to war, and (8) generosity, are all constrained by, and to a large degree derived from, or subordinated to, his fundamental commitment to the sovereign power of "decent" governments, against their own subjects. Rawls' proposals mirror standard nineteenth-century international law doctrine (1-3 and 7), slightly modified by post-second-World-War pacifism (4-5) and the Western charitable impulse (8). Rawls' weak commitment to human rights deprives his doctrine of the only transformative element (6) that might have challenged existing authoritarian structures and orthodoxies.

Universal human rights to personal security and political participation have a stronger position in contemporary international law than they do in Rawls' *Law of Peoples* (see e.g. M.N.S. Sellers, "Republican Principles in International Law" 11 *Connecticut Journal of International Law* 403 (1996)). Had Rawls understood the duty "to honor human rights" (p. 37) more robustly, his proposals might have strengthened international law. As it is, Rawls' "Law of Peoples" encourages oppression, by protecting the independence and equality of oppressive governments without restraint, short of absolute chattel slavery, ethnic genocide or other violations of what Rawls calls the most "urgent" human rights (p.79). Only then would Rawls permit liberal societies to begin to



encourage certain “outlaw” governments to reform (p. 93).

Rawls overlooks important distinctions between the different situations in which just societies may (1) criticize unjust governments, (2) impose non-military sanctions on unjust governments, or (3) take military action to correct international injustice. His curiously broad conception of toleration would seem to imply that authoritarian governments may not be (1) criticized or (2) sanctioned until they may also (3) be corrected by military force. The choice of means becomes entirely prudential. Rawls presents governments as either “decent” or “outlaw” states. Decent states must deliberate among themselves to decide the best means of correcting outlaws (p. 93). Throughout his argument, the standards of intervention and criticism of injustice under Rawls’ “Law of Peoples” become increasingly strict, until even human sacrifice may be to some extent protected, so long as outlaw states do not export it (pp. 93-94, footnote 6).

### Conclusion

John Rawls’ “Law of Peoples” goes wrong by extending the title of “decency” too far among illiberal non-democratic states. By giving illiberal non-democracies an equal voice in determining international law, Rawls replicates the worst elements of existing international practice. Like the older conception of “civilized” nations, which Rawls’ theory reproduces for the modern world, “decency” is both too broad and too narrow as applied to states under international law. Too broad, because it gives unrepresentative governments an equal voice in determining the law of nations. Too narrow, because it deprives subject peoples of any voice at all, when their governments oppress them.

Rawls’ concept of the “original position” might have been useful in reforming international law, if applied from the standpoint of all human beings, to regulate state structures and interstate relations. Or the governments of just states, as constructed by their future subjects from the standpoint of the original position,

might usefully have entered into a second-tier inter-state “original position” to construct international institutions. But putting non-representative non-democracies into the original position, as Rawls suggests, would simply perpetuate the interests of illiberal elites against their unfortunate subjects. States are not people, and unless governments actually speak for peoples, Rawls’ technique of imagining a non-liberal interstate “original position” is dangerously misplaced.

The fundamentals of a just law of peoples hover somewhat obscured in the midst of Rawls’ overextended conception of “decency”. The “common good idea of justice” and “basic human rights” (pp. 65, 71) deserve a more prominent place at the center of any just law of nations, which Rawls denies them by minimizing rights, and overstating self-interest. At times in his argument, Rawls seems to contemplate a more robust world order (pp. 65, 80), only to retreat in the end (pp. 69, 82-83) to the defense of authoritarian governments, and excessive deference to established power (pp. 122-3, esp. note 1, in which Rawls seems to sympathize with Jefferson Davis against the “expansionist” North.) Had he drawn his conception of “decency” more narrowly, Rawls’ argument would have made more sense.

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### THE SIGNIFICANCE OF RAWLS’S LAW OF PEOPLES

Rawls’ recent book on “The Law of Peoples,” (henceforth *LP*) corrects many of the weaknesses of his earlier essay by the same name. For example, the book says more about economic and social equality, and adds an eighth fundamental principle that: “Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime” (37). In addition, Rawls devotes several pages (105-120) to the discussion of burdened societies and distributive justice among peoples.

This does not mean that international lawyers ought to read Rawls before they go on with their practice of law; no more than a domestic lawyer ought to read *A Theory of Justice* before filing another court paper or completing another transaction. But Lea Brilmayer goes too far when she claims that an “educated person” – one interested in the question how we, as liberal people, ought to influence our government’s foreign policy – would be better off leaving *LP* on the shelf. *LP* may be a hard read for those not initiated into the rest of Rawls’s philosophy. It packs a lot into a relatively short space and uses various technical concepts (e.g. “public reason,” “political liberalism,” and “stability for the right reasons”) that may not be clear to one not already familiar with Rawls’s work. But I believe that Rawls’s ideas are sufficiently interesting, well articulated, and importantly connected to his earlier work – itself of profound importance to a student of politics and justice – to warrant the effort that an educated person would have to put in to appreciate what Rawls has to say.

I proceed as follows. First, I will explain what I take to be at the core of *LP*. Second, I will describe what I take to be the core of Brilmayer’s criticism – that Rawls’s approach is indefensibly “statist” – and argue that her argument against Rawls is really a non-sequitur. Third, I defend one feature of Rawls’s statism directly, it’s toleration of other states. Fourth, I introduce other questions concerning his statism.

### **I. *The Law of Peoples*, a Quick Summary**

The question Rawls sets himself is how reasonably just liberal societies should conduct their foreign policy. His first aim is to describe a “realistic utopia” for the “Society of Peoples.” The aim is utopian in the sense that it asks what international law “might be” (13) in the ideal case; it is realistic in the sense that it “takes people as they are” (13). What he means by the “Society of Peoples” is that collection of liberal and non-liberal societies which can all accept certain conditions of justice and rights both with regard to their own residents and with regard to each other. He refers to the non-liberal societies

that meet these conditions as “decent” societies. Reasonably just liberal societies and decent societies together count as “well-ordered” societies. The first aim of *LP*, then, is to describe the realistic utopian aim of a Society of Peoples, and the law which would make such a society both possible and desirable.

One of the peculiarities of Rawls’s account is that he discusses “peoples” instead of states. Peoples, as he uses the term, are a special subset of states distinguished by their behaving like moral persons. He says that *liberal* peoples have three basic features: “a reasonably just constitutional democratic government that serves their fundamental interests; citizens united by what Mill called ‘common sympathies’; and finally, a moral nature” (23). What seems to be most significant in the decision to speak about “peoples” rather than states is the third feature, their moral nature. Peoples are more than politically organized collections of individuals pursuing their collective interest guided only by the norms of rationality. Peoples are the international analog of citizens: “As reasonable citizens in domestic society offer to cooperate on fair terms with other citizens, so (reasonable) liberal (or decent) peoples offer fair terms of cooperation to other peoples” (25). As a result, peoples accept certain limits on their power (or sovereignty) and duties towards other peoples that states have not traditionally accepted.

Rawls’s second aim is to describe how well ordered peoples should deal with states and societies that would not exist in an ideal world. There are two kinds of problems that Rawls thinks call for action on the part of well-ordered peoples. First, there are “outlaw” states that are willing to wage war to advance their national power and ambition. Rawls argues that liberal and decent societies can use force to defend themselves against outlaw states. Furthermore, if these states engage in sufficiently egregious human rights abuses, liberal and decent states can use force to stop those abuses (94, n.6 cont.). Second, there are “burdened societies” which “lack the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources to be well-

ordered” (106). Rawls argues that liberal and decent peoples have a duty to aid burdened societies, aiming in particular to help burdened societies change their political and social culture so that human rights are respected and so that they can become in general well-ordered members of the Society of Peoples. (Rawls discusses interfering with the internal affairs of outlaw states that are not aggressive towards other states but that violate human rights (93-94, n.6). His definition of outlaw states, however, requires that they be aggressive. I would recast this discussion as concerning the use of force against burdened societies to prevent human rights abuses. Conversely, I assume that Rawls should want aid directed at outlaw states if that would cause them to become well-ordered members of the Society of Peoples.)

The key to understanding why Rawls focuses on a Society of Peoples, rather than focusing directly on such issues as human rights, is to be found in the notions of tolerance and autonomy. Liberalism calls for toleration of a certain degree of illiberal social organization if that is what most people in a society freely choose. It would be worse, from a liberal perspective, to intercede coercively on behalf of full liberal rights, using anything from economic sanctions to military force, than to respect the political autonomy of groups that self identify as separate nations or peoples. Indeed, to show proper respect for the autonomous choice of another society to organize itself in an illiberal fashion – provided that certain core human rights are respected – the notion of toleration should be interpreted to require treating “these non-liberal societies as equal participating members in good standing of the Society of Peoples” (59).

There is a straightforward analogy with the domestic situation. In domestic life, a liberal society will fully tolerate illiberal associations as long as they are compatible with the notion that all members of the society are free and equal as citizens. Many liberals would prefer a world in which even private associations reinforced the liberal conception of people as fundamentally free and equal. For example, they would prefer a society in which offices in all religious

organizations were equally open to women and men. But they recognize that their liberal commitment to freedom of conscience, of speech, and of association is incompatible with using the power of the state to force their liberal values on those who do not embrace them. Likewise, recognition of the importance of self-determination or autonomy of peoples requires fully tolerating their choice to organize in an illiberal form, at least as long as their organization does not violate core human rights.

## II. Brilmayer’s criticism: “Statism”

Lea Brilmayer’s primary criticism of Rawls concerns what she calls his “methodology,” by which she means his choice to discuss the requirements of justice in steps: first at the domestic level, and second at the international level using states or peoples as the morally relevant entities. Her objection to this “statist” methodology takes two forms. First, she objects that Rawls never justifies his statist premises. But this objection, insofar as it is accurate, is logically only secondary. Clearly, if Rawls’s project makes sense of important intuitions and pre-theoretical commitments, then the statist premises will be vindicated. Her second and more basic objection is that states are not primary in the international context. Rather, the relationship is “dialectical”: “States form international law and society, but international law and society also form states.” Ultimately, according to Brilmayer, the problem is that international law is and should be as concerned with individuals, non-governmental organizations [NGOs], and other non-state-like entities as with states.

This challenge needs to be qualified. I see no reason why Rawls would object to the claim that international law can deal directly with certain international players other than states, players such as NGOs and international corporations. His choice not to address the regulation of such entities may be a sign of incompleteness – a theme to which I will return – but it is not itself a sign of failure. The real bone of contention is Rawls’s view that international law should not, at least under ideal conditions, concern itself directly with the

welfare of the individual people who reside in foreign lands. When dealing with outlaw states and burdened societies, countries like the U.S. can concern themselves directly with the welfare of the individuals on whose behalf intervention may be justified. But when dealing with well-ordered peoples, Rawls's position is that international law should allow states to speak for their residents. (I speak of residents rather than citizens because states clearly affect the welfare of all residents, not just their citizens, when they make the kinds of policy choices the legitimacy of which might be questioned by other states.)

A useful analogy, I believe, is with the way liberal democracies treat families. If parents are too dysfunctional to provide for the basic welfare of their children, then the state will step in and concern itself directly with the welfare of the children. But if the family meets certain basic standards of child care (the children are adequately housed, clothed, fed, and educated, and are not subject to clear physical or emotional abuse), then the state does not interfere with the decisions the family might make as to how to raise the children. Parents can raise their children religiously or secularly, they can inculcate liberal egalitarian values or hierarchical values, they can emphasize economic prudence or living for today.

The analogy with families is incomplete. Liberal states adopt policies aimed at affecting how families in general raise children (for example, giving tax credits for tuition expenses). Rawls, however, does not think the Society of Peoples should form some kind of body capable of affecting how peoples treat their residents in an analogous way. The analogy works only insofar as liberal states treat all "well-ordered" families as equal members of the "society of families."

The analogy with families is good enough, however, to make it clear that Rawls's commitment to the primacy of states, at least in the ideal form of peoples, cannot be dismissed by observing, as Brilmayer does, that states and international law and society mutually inform each other. Indeed, this ground for criticizing Rawls is basically a non-sequitur. The effect of

the international climate on the birth and life of states just does not bear on whether states are the appropriate representatives of their residents. Compare the analogous case of families. Of course families influence the state and the state influences families. That says nothing about whether the state should treat parents as the moral representatives of their children.

### III. A Liberal Justification of Statism

The primacy of states is nonetheless a striking thesis that calls for justification, and the analogy to the family is just that, an analogy, not an argument. A better way to push the question about the primacy of states is to look into its liberal foundations. Such an inquiry might seem to presuppose that the individual should be the primary concern of international law since protecting the rights and liberties of the individual is the primary concern of liberalism. But we must not confuse the operation of international law, which Rawls presents as state focused, with its underlying justification, which may have to be individual focused if it is to be justifiable on liberal grounds.

Since the real problem case is toleration of decent, non-liberal regimes, let us ask how we can justify that toleration on liberal grounds. As I said above, the key reason is respect for the autonomy of illiberal peoples who choose to be organized that way. But of course, no society is homogenous. So we need a more detailed analysis that breaks countries down into the relevant populations. Following Rawls, I will use a fictional example of a decent Islamic state, Kazanistan.

There are four groups which need to be considered. First, there are those who accept the same basic interpretation of Islam, and the same vision of a good society, as the rulers of Kazanistan. Second, there are those who have different conceptions of a good society (say a Christian or Jewish minority), but who think that it is appropriate for a state to be run by the majority religion, and who therefore accept the laws in Kazanistan as proper. Third, there are those who object to the laws in Kazanistan, but who value the integrity of Kazanistan as a nation

and would resent outside interference aimed at changing the law. Finally, there are those who, like many blacks in South Africa under apartheid, would welcome outside pressure (perhaps even the use of outside military force) that aimed to help them change the law in Kazanistan.

Along with these four groups, there are four types of considerations a liberal would normally take into account: the number of people in each group, the objective strength of their claims either to be free from interference or to be helped, the subjective intensity of their desire either to be free from or to have outside pressure, and the types of pressure that could possibly be effective along with the context in which they would be deployed. Thus if there are very few people in the fourth category, and the vast majority of people in a country would not want foreign intervention, that is *prima facie* good reason to tolerate the way Kazanistan handles its domestic affairs. But of course, even if only a very small number object, if their objections are well grounded in core human rights claims, that would tip the balance back in favor of intervention. In addition, the degree to which people cared about both getting aid and, on the other side, not having outsiders interfere with their country would also play a role in determining what to do. Finally, one would have to ask these questions with regard to each type of intervention that promised to be effective, taking into account contextual matters such as whether a state of war already exists because of Kazanistan's aggression. (Our forcing Germany and Japan to accept liberal forms of government was acceptable in the aftermath of World War II only because the Germans and the Japanese started the war.)

The possibility that there could be illiberal countries in which the balance of considerations would tip, from a liberal point of view, in favor of non-intervention marks the logical space in which decent peoples can exist. It follows that liberal societies should refrain from interfering with the internal affairs of these societies even though these societies do not respect certain liberal rights. The U.S. can engage with them in trade, and in the formation of international

associations for trade, environmental protection, defense, etc. Such engagement would doubtless lead to influence. But the point is not that we should not influence them at all. The point is that we should treat them as respected equals in the international arena, subject to no sanctions other than those which may result from the breach of agreements voluntarily entered into.

This I believe provides sufficient ground for Rawls's claim that in foreign policy, we should deal with "peoples," at least when it comes to respecting the right of well-ordered peoples to be free from foreign coercive intervention. (I assume that liberal societies would deserve at least as much respectful toleration as decent peoples.) This leaves open the question how we should decide when a society is well-ordered. Rawls suggests that there are two criteria which "specify the conditions for a decent hierarchical society to be a member in good standing in a reasonable Society of Peoples" (64). These are (1) that the society does not have aggressive aims, and (2) that its law (a) secure a list of core human rights (smaller than the liberal and progressive list in the 1948 Universal Declaration of Human Rights), (b) be (generally) recognized as giving rise to moral duties and obligations, and (c) be administered by officials who (generally) sincerely and reasonably believe it is guided by a common good conception of justice (see 64-67). This list considers the interests of those I have described as part of the fourth group only insofar as they have human rights claims. Perhaps that is sufficient, perhaps not. Perhaps a more case-by-case approach should be taken. Such details, however, do not need to be decided before one agrees that peoples should be allowed to represent the interests of their residents.

#### IV. Three Other Questions for The State Primacy

There are three related questions concerning the primacy of states that are worth raising. The first concerns distributive justice. Why not adopt a foreign policy that would pursue in the international arena what Rawls thinks we should pursue in the domestic arena? In a *Theory of*

*Justice*, Rawls argues that the government's economic policy should aim to produce a distribution of income and wealth such that the worst off are as well off as possible – i.e. it should accept the “difference principle.” Why not embrace the same aim for the world's worst off? Peculiarly, Rawls raises this question (120), but does not answer it squarely. He simply asserts that the “Law of Peoples is indifferent” between distributions affecting how well off the worst off individuals are in each of a collection of well-ordered peoples. How can Rawls be so indifferent?

Due to limited space, my answer will only touch on three possibilities. First, there are two reasons to think that Rawls is not indifferent to individuals who fall below a baseline of well-being: (a) the empirical claim that political culture “is all-important” (108), so with the right political culture a society can become well-ordered and take care of its people well enough; conversely, (b) a society that does not secure its residents human rights, including the right “to the means of subsistence and security” (65) would be a burdened society which others would have a duty to aid. Second, it would be unfair to demand that a society that takes care to secure wealth for itself subsidize a society that does not as long as the latter has the capacity to change its priorities and improve its own situation (see 117-18). Third, as the Law of Peoples is meant to be acceptable to the range of liberal and decent peoples, it cannot demand in advance of real political choices that all parties accept the extreme egalitarianism of the difference principle. Indeed, in “Public Reason Revisited,” Rawls sets the bar at about the same height for liberal societies. It is enough that they meet the baseline of “ensuring for all citizens adequate all-purpose means to make effective use of their freedoms” (141). Thus while the Society of Peoples *may* adopt the difference principle for the worst off individuals among them, it is not a requirement of the Law of Peoples that they do so. More in depth inquiry would be required to determine the adequacy of these three reasons.

The second question for the priority of states concerns how this idea should be addressed to the complexity of federal systems. This

question resolves into two further questions: (1) At what level in a federal system, if any one particular level, should we identify the relevant “people” for the Law of Peoples? (2) Are there any normative limits the Law of Peoples should impose on the structure of federal relationships? Rawls has nothing to say about these questions, but clearly something must be said about them to make the theory applicable to the modern world.

Finally, how should international law deal with international organizations? Rawls deals with these as voluntary associations that peoples may choose to belong to or not. Peoples are “free to make use of them on their own initiative” (43). It is almost as if they are on a par with local church groups that one might chose to join or not. Rawls is concerned that these organizations not have “unjustified distributive effects between peoples” (43), but his considerations on this matter fall short in two important regards.

First, the pressures on states to join such organizations are much greater than the analogous pressures an individual might face to join a local church. A better analogy might be with the choice to run for political office without joining one of the major parties – a few can succeed that way, but parties have so much control over access to political office that they have to be regulated as quasi-public entities. See *Terry v. Adams*, 345 U.S. 461 (1953) (holding unconstitutional an all-white party primary because it effectively blocked blacks from being able to run for public office).

Second, beyond the power of international organizations, there are important normative questions regarding how certain issues ought to be addressed. For example, what is the appropriate form of political organization for dealing with international pollution and the externalities that it entails? Ought it to be treaties between sovereign nations, or should more permanent international bodies with legal authority over domestic laws be established? How should they incorporate democratic principles? Directly with elections by all citizens, or indirectly through the medium of

nations as members? These are important questions, and Rawls's focus on "peoples" could make it seem that there is nothing to resolve here.

Rawls's failure to discuss forms of political organization at levels other than the state – i.e. his failure to discuss federalism and international organizations – may be the biggest shortcoming of *LP*. I do not believe they are fatal flaws. It may be that the state is still and should remain the most important form of political organization. And it may be that attractive positions regarding what sorts of issues should be resolved at other levels can be added to Rawls's conception of the Law of Peoples without significantly changing the latter or shortchanging the former. But these are important issues that have yet to be worked out.

## V. Conclusion

*The Law of Peoples* asks how people committed to a liberal democracy should deal with people in other states. It assumes that there will be no world government, and that people will continue to seek to organize themselves into free and in certain fundamental ways independent nations. It works out an answer which holds that liberal states should tolerate and respect as equals other liberal or decent peoples. Each member of the Society of Peoples should refrain from using coercive force to interfere with the domestic affairs of other members. Members also have a duty to help other states and societies become members in good standing. This picture of international law strikes a balance between those "realists" who think a state is responsible for nothing but the prudent pursuit of its own interests, and cosmopolitan theorists who would reject the significance of states in favor of showing concern for the welfare of all the world's individuals. It is certainly a conception of international law worthy of serious attention.

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**PAST CHAIRS:**

Joaquín Tacsan (1994 - 1996)

Nicholas Onuf (1996 - 2000)

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