

DAVID A. REIDY

LOS PUEBLOS, LAS PERSONAS Y LOS DERECHOS HUMANOS SEGÚN RAWLS: UNA DEFENSA

Resumen: Mi objetivo en este artículo es aclarar y defender uno de los aspectos más relevantes de la argumentación de Rawls sobre la justicia internacional, a saber, su doctrina sobre los Derechos Humanos. En primer lugar me ocuparé de la reconstrucción de su teoría sobre los Derechos Humanos; luego desarrollaré dos argumentos que permiten asumirla como correcta. El primer argumento se refiere al razonamiento de los agentes que representan a los pueblos democráticos liberales, cuya posición original es adecuada a la identificación de los principios de la justicia internacional desde su punto de vista común. El segundo argumento se refiere a la importancia de la historia y la cultura con respecto a la identificación de los intereses fundamentales de los individuos; en mi interpretación, finalmente, sostengo con Rawls que ambos argumentos pueden ser abordados dentro de una teoría de la justicia más general que antepone a los derechos internacionales el argumento que privilegia los derechos intrínsecos como el respeto moral a la persona humana.

Palabras clave: Pueblos, personas, justicia internacional, Derechos Humanos.

RAWLS ON PEOPLES, PERSONS AND HUMAN RIGHTS: A DEFENSE

Abstract: My aim in this paper is to clarify and defend just one aspect of Rawls's theory of international justice, namely his doctrine of human rights. Of course, what I shall say will bear on other aspects of his theory as well, but my focus is Rawls's position on human rights. I begin by reconstructing and thereby, I hope, clarifying that position. I then develop two arguments for thinking it correct. The first concerns the reasoning of agents representing liberal democratic peoples in an original position ap-

appropriate to the identification of principles of international justice from their common point of view. The second concerns the importance of history and culture with respect to identifying the fundamental interests of individual human persons. Finally, I suggest that these two arguments show the consistence of Rawls's proposal, which is, in my opinion, less vulnerable to objection than many of his critics have claimed.

Key words: International justice, law of peoples, liberal democracy.

In *The Law of Peoples* (hereafter *LP*), John Rawls turns his attention to the question of international justice.¹ His analysis in *LP* has not been well-received.² To these complaints I would add a fifth, which I shall only mention. And that is that the only aspect of corrective justice Rawls discusses as part of non-ideal theory is just war theory, which

¹ Rawls, J., *The Law of Peoples*, Cambridge, Harvard University Press, 1999. This is an extended and revised version of Rawls's Oxford Amnesty Lecture titled "The Law of Peoples" and published in *On Human Rights*, Shute, S. and Hurley, H., eds., Basic Books, 1993.

² The complaints are roughly fourfold. The first is that while many of the politically moderate substantive proposals made in *LP* are, not surprisingly, quite plausible, there is little in *LP* by way of careful, detailed argument for them. Rawls's view is, the complaint goes, opaque and underdeveloped. The second concerns Rawls's doctrine of human rights. The charge is that Rawls's doctrine is too thin or anemic and that it ought to be replaced by a more robustly liberal and democratic conception of human rights. The third is that Rawls fails to require democracy of international institutions, whether global institutions such as the United Nations or World Trade Organization, or regional institutions such as the Organization of African States or European Union. The final complaint is that Rawls not only fails to defend but positively rejects any principle of global economic justice constraining the growth of inequalities between peoples. The demands of global economic justice are met, on Rawls's view, so long as all peoples enjoy the minimum level of economic development necessary to constitute and maintain themselves as a peoples and to engage in free and fair trade with other peoples. The wealthy peoples of the so-called "first world" are obligated as a matter of international justice to take only those steps needed to secure these conditions. See, e.g., Charles Beitz, "Rawls's Law of Peoples," *Ethics*, v. 110(4), 2000, pp. 669–696, and "Human Rights as Common Concerns," *American Political Science Review*, v. 95(2), 2001, pp. 269–282; Buchanan, A., "Rawls's Law of Peoples: Rules for a Vanishing Westphalian World," *Ethics*, v. 110(4), 2000, pp. 697–721; Pogge, T., "An Egalitarian Law of Peoples," *Philosophy and Public Affairs*, v. 23(3), 1994, pp. 195–224, and "The International Significance of Human Rights," *Journal of Ethics*, v. 4(1), 2000, pp. 45–69; and Tan, K.-Ch., *Tolerance, Diversity and Global Justice*, Penn State University Press, 2000, esp. ch. 4.

applies only to present, ongoing injustices. Yet, we know that uncorrected historical injustices are one of the most vexing problems of contemporary international relations. Accordingly, they need to be theorized as part of any complete and adequate theory of international justice.

My aim in this paper is to clarify and defend just one aspect of Rawls's theory of international justice, namely his doctrine of human rights. Of course, what I shall say will bear on other aspects of his theory as well, but my focus is Rawls's position on human rights. I begin by reconstructing and thereby, I hope, clarifying that position. I then develop two arguments for thinking it correct. The first concerns the reasoning of agents representing liberal democratic peoples in an original position appropriate to the identification of principles of international justice from their common point of view. The second concerns the importance of history and culture with respect to identifying the fundamental interests of individual human persons.

Peoples, Persons, International Justice and Human Rights in LP.

The problem of international justice is, for Rawls, a problem concerning the relations between "peoples", not states simpliciter. To speak of peoples is to speak of the artificial corporate moral agents, or persons, that make conflicting claims upon one another on the global stage. Of course, peoples are not the only agents capable of making claims on the global stage. States may, for example, make such claims. But a theory of international justice concerns the conflicting claims made by moral agents, not agents simpliciter. And states *qua* states are not moral agents, but rather agents simpliciter. Still, peoples are not the only *moral* agents capable of making claims on the global stage, claims the right resolution of which is a matter of justice. Individual human persons, for example, as well as other artificial corporate agents possessed of the requisite moral nature, may also make claims. But the problem of international justice concerns first

and foremost the relations between peoples.³

Rawls emphasizes three features shared by all peoples. First, they possess a degree of cultural unity (even if, as in pluralist liberal democracies, only in their public political culture) sufficient to underwrite a set of identifiable and determinate ends. Second, they possess an institutional embodiment sufficient to enable them to advance their ends in the world. Third, they possess a capacity for self-regulation in the interests of justice as they pursue their ends in the world.⁴ Taken together, these features justify the claim that peoples possess to the requisite minimum degree the two fundamental moral powers essential to personhood.⁵

But these are not the only conditions that must be satisfied by all peoples. Rawls insists also that peoples are also well-ordered, genuine, self-sufficient or independent schemes of social cooperation among individual human persons.⁶ This point merits further elaboration.

Peoples are in principle *self-sufficient or independent* in a way that individual human persons are not. Individual human persons literally come to be as persons only within and through social cooperation. They must cooperate with others to satisfy their most fundamental interests, including their interest in securing the social conditions necessary to their moral status as persons. But matters are different with respect to peoples. Peoples can and sometimes do both come to be and persist over time as peoples apart from any cooperation with other peoples. And while many peoples adopt ends unrealizable except through cooperation with other peoples, no people must. Any people (and therefore all peoples) might commit itself to securing domestic justice, for

³ There are several reasons for this. One is that as a matter of history, peoples have proved themselves to be the most significant actors on the global stage. Another is that peoples are ontologically or analytically prior to individual human persons, at least in the paradigm case.

⁴ Rawls, *The Laws of...*, cit., pp. 23–30.

⁵ On the two fundamental moral powers as essential to personhood, see *A Theory of Justice*, pp. 442–447; and *Political Liberalism*, pp. 48–54.

⁶ Rawls, *The Laws of...*, cit., pp. 4, 19, 64–67.

example, as its only fundamental end. Assuming that there is no significant territory on Earth within which human beings might not constitute and govern themselves as a people committed to no final end other than domestic justice, there is no reason in principle why peoples *qua* peoples must cooperate with one another.⁷

To say that a people is well-ordered is to say that its members constitute and govern themselves as a single body politic through a conception of justice (even if illiberal and undemocratic) that is publicly known, publicly enforced and (for the most part) voluntarily honored. A well-ordered people is stable over time without excessive or widespread coercion, manipulation or deception. And it constitutes and governs itself through a conception (again, even if illiberal and nondemocratic) of *justice*. While different conceptions of justice employ different substantive principles to resolve conflicting claims between individual human persons, they all employ principles nonviolative of the moral status of claimants as individual human *persons*. That is, they all recognize in one way or another the inviolability of persons that lies at the heart of justice. Thus, a people is always more than a mere system of social interaction aimed at and justified by reference to some aggregate or corporate good. A people is always a system of social cooperation aimed at and justified by reference to the good of its members, all of whom regard themselves and one another as human *persons*, as moral agents, both rational and reasonable, and thus as independent sources of valid claims on one another.

It is, I think, safe to say that on Rawls's view all peoples are constitutional republics in the most basic sense. They publicly constitute themselves as bodies politic aimed at the common good of their members taken as individual persons

⁷ Whether the assumption grounding this claim is realistic or not is, of course, open to debate. But Rawls's view is that the material conditions needed for human beings to constitute themselves as a people are less important and demanding than the cultural conditions, and that the latter rarely fall outside the reach of human beings to secure.

and thus claimants on the body politic.⁸ But what of the

⁸ Rawls is quite careful in his use of the term “peoples.” He refers to states (as in “outlaw states”) rather than peoples when speaking of those institutionally embodied corporate agents (in control of territory) that systematically refuse to abide by principles of international justice. Lacking the requisite moral nature, outlaw states are not corporate persons, or peoples, and thus can assert no valid claims of justice against other peoples. In the same spirit, Rawls refers to societies (as in “burdened societies”) when referring to those groups of individual human beings lacking either the cultural unity or institutional embodiment (including material and economic resources) requisite to constitute themselves collectively as a people. Unable to have and advance a consistent, coherent and determinate set of ends, burdened societies are not corporate persons, or peoples, and thus can assert no valid claims of international justice against other peoples.

Of course, individual human beings living in outlaw states or burdened societies may still assert valid claims of international justice. Specifically, they may assert their human rights, both against their own government and against all other peoples. Rawls’s doctrine of human rights specifies the claims that individuals may so assert no matter where they happen to live. So, individuals living in a persistently expansionist and aggressive outlaw state may demand, as a matter of international justice, that their human rights be honored during any international undertaking to constrain their state. And, individuals living in an outlaw state that systematically commits gross internal human rights violations may demand, as a matter of international justice, that steps be taken by other peoples to end such violations. Individuals living in burdened societies and thus without the material or cultural resources necessary collectively to constitute themselves as a people may insist, as a matter of international justice, on aid from other peoples.

Importantly, Rawls’s view is not that human beings living within outlaw states or burdened societies (and thus denied membership within a well-ordered people) are merely, and may assert claims only as, human beings rather than human persons. There is no bright line the crossing of which marks the transition from human being to human person. Human beings living within outlaw states or burdened societies will typically participate in many forms of social life and cooperation within and through which their moral capacity for a sense of justice will be developed and exercised. And human beings may always find themselves cast into an outlaw state or burdened society from the happier circumstance of membership within a well-ordered people. Rawls’s point is simply that within an outlaw state or burdened society the moral capacity for a sense of justice cannot be exercised to the minimum degree necessary to personhood when it comes to issues of justice, and thus personhood, in the sense relevant to issues of justice, can at best be approximated. Here it bears emphasizing that the moral contexts within which the distinction between human beings and human persons will prove of great import are many and diverse and there is no reason to think that the distinction must be marked in exactly the same way in all contexts, even if the ways in which it is marked must be consistent with, or better cohere with, one another.

normative relations between peoples and persons? This is a more complicated matter. Analytically, persons exist, for the purposes of justice, only in and through membership within peoples. And thus peoples are analytically prior to persons. Normatively, however, matters here are indeterminate. The normative status of a people depends on its being well-ordered, and this requires that it publicly honor a public conception of justice consistent with and minimally adequate to the status of all members as persons, as participants in a mutually advantageous system of cooperation. So a people must treat its members as persons. But to do so it need honor no more than Rawls's conception of human rights. Of course, as a people develops over time, its members may come to think and experience themselves as persons in a far richer and more demanding sense than that minimally necessary to the idea of a well-ordered people. And the persons living within the peoples to which this happens may have a further normative priority over the people to which

Rawls's point is *not* that the fate of individual human persons is never a matter of international justice, the latter being concerned only with a certain class of corporate persons, namely peoples. Nor is it that those not belonging to a people are not *persons* at all for the purposes of any moral inquiry or judgment. His point is rather that belonging to a people is ordinarily a necessary social condition to personhood within the context of inquiry into or judgment over issues of justice. And this is so because the two moral powers essential to personhood for the purposes of issues of justice cannot ordinarily be developed and exercised by individual human beings to a sufficient minimum degree apart from membership within a well-ordered body politic.

The priority relations between peoples and individual human persons then are complex. Analytically (or perhaps ontologically) peoples are prior to individual human persons, at least if we are theorizing justice, for individual human persons arise in and through membership within peoples. But analytically (or perhaps ontologically) human beings are prior to peoples, for peoples exist only in and through social relations between human beings. And normatively human beings are prior to peoples. While peoples, as artificial corporate persons, have normative status as claimants when it comes to justice, that status depends on their being well-ordered internally by a conception of domestic justice consistent with (even if illiberal and undemocratic) the moral status of all members as individual human persons. Thus, the claims of individual human beings to the social conditions minimally necessary to personhood are normatively prior to the claims of peoples.

they belong. But they will not enjoy that normative priority over all peoples, or at least they will not if we assume that different peoples will follow different paths of historical and cultural development and thus differently constitute individual persons as persons, so that even if there were a worldwide society of peoples, individual persons would not all have the same normative status vis a vis peoples, save for the baseline priority assigned to them by Rawls's doctrine of human rights.

Individual *human beings* are, of course, given by nature. Individual human *persons* are not. Human persons, human moral agents possessed to the requisite minimum degree of the two fundamental moral powers, are a complex social achievement. Essential to that achievement, on Rawls's view, is genuine belonging to a people, for individual human beings cannot collectively and fully constitute themselves as human persons apart from membership within a people, a well-ordered body politic.⁹

Persons possess a sense of justice or a capacity for and disposition to being reasonable and thus find themselves able and inclined to propose and honor fair terms of cooperation with others. The development and exercise of this moral capacity presupposes a social world larger and more complex than that given by the family and civil society, either individually or taken together.¹⁰ It presupposes a polis or body

⁹ Of course, peoples are social achievements as well. And there are many reasons why humans living together can fail to constitute themselves as a people. They might lack the cultural unity (including political culture) necessary to underwrite any system of shared ends. Or they might lack the material resources necessary to an adequate institutional embodiment. Or their institutional embodiment might fall into the hands of a tyrant or despot for whom the moral status of neither individual human persons nor other peoples (as artificial corporate persons) is of any moral concern. If every human being has a right to membership in a people (as a necessary social condition to his or her self-realization as a human person), then an adequate conception of international justice must provide a theoretical framework capable of grounding a reasonable hope for a worldwide society of peoples.

¹⁰ Both the family and civil society are, of course, necessary to the moral development of persons, to their acquisition of a sense of justice or capacity for reasonableness. But neither individually nor taken together are they

politic within which the family and civil society are both sustained and integrated in a system of nonvoluntary cooperation within which the claims of persons are adjusted to one another as required by justice.¹¹

It follows that if becoming or fully becoming a human person counts as one of the fundamental ends or interests of every human being, then no human being should be denied genuine membership within a people, a well-ordered body politic. Or to put it differently, every human being has a compelling basic claim to live as a member of a genuine people since so living is a social condition necessary to the development and exercise, to the requisite minimum degree, of the two fundamental moral powers essential to personhood. This, I think, is the heart of Rawls's doctrine of human rights. Human rights are just those rights possessed by all human beings by virtue of their compelling basic interest in or claim to genuine membership in one or another people.¹²

These rights are, on Rawls's view, subsistence and secu-

sufficient. On this point, see Rawls's account of moral development in *A Theory of Justice*, Chapter VIII.

¹¹ The family, like the polis, is to a large extent nonvoluntary from the point of view of participants. Like political society, we simply find ourselves born into families. But the family is unlike political society in that not all participants are persons. Some are merely potential persons. Civil society, like the polis, is an arena within which persons and only persons make conflicting claims upon one another. But civil society is unlike the polis in that the claims made by persons there all arise out of voluntary interaction. Thus, it is only in the polis that we confront the problem of justice: the need to adjust conflicting claims by persons within a scheme of interaction from which none may exit and thus all experience as nonvoluntary.

¹² Like Charles Jones's or Henry Shue's, Rawls's doctrine of human rights is grounded then in the fundamental shared interests of all human beings. See, Shue, H., *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, 2nd Ed., Princeton Univ. Press, 1996; and Jones, Ch., *Global Justice: Defending Cosmopolitanism*, Oxford University Press, 1999. Rawls's doctrine remains distinct, however. It is formally and publicly justified not by direct and exclusive reference to the fundamental shared interests of all human beings, but rather through two uses of an original position argument within which agents represent peoples rather than individual human beings or persons. Because it is so justified, it is in the most basic sense a moral constraint on the relations between peoples, rather than, as with Jones's and Shue's doctrine, a moral constraint on individuals *qua* individuals within a cosmopolis.

rity rights, certain liberty rights (freedom from slavery, serfdom, forced occupation, and a freedom of conscience sufficient to underwrite freedom of religious practice and thought), the right to personal property, and the right to formal justice and the rule of law. Rawls describes these rights as the “necessary conditions of any system of social cooperation.”¹³ They express the minimum social conditions that must obtain if individual human beings are to realize themselves as human persons through social life with others, through belonging to a people. They, and only they, are human rights, properly speaking.¹⁴ Human rights are a subset of liberal rights, for liberal rights are those rights belonging to persons who conceive of themselves, politically speaking as free and equal, and who share a common interest in securing the social conditions necessary and conducive to the full development and exercise of the two moral powers.

On Rawls’s account, there is no human right to democratic domestic institutions. There is also no human right, where there are democratic domestic institutions, to universal suffrage. Religious minorities and women, for example, need not possess, as a matter of human rights, the right to vote, or an equal right to vote. Nor need they possess the right, or an equal right, to run for or hold public office. On Rawls’s view, while all human beings are entitled as a matter of international justice to certain basic liberties essential to their status as persons, they are not entitled as a matter of international justice to the system of equal basic liberties common to liberal democratic conceptions of justice. They likewise are not entitled to any particular distribution of economic resources within and through their domestic economy, other than one which secures basic subsistence and security, and is consistent with mutually advantageous coop-

¹³ Rawls, *The Laws of...*, *cit.*, p. 68.

¹⁴ For a similar reading of human rights as marking the social conditions necessary to a minimally adequate human life, see Nickel, J., *Making Sense of Human Rights*, University of California Press, 1987, pp. 51–52.

eration and the rule of law.¹⁵ Human rights and the demands of international justice more generally, then, are far less demanding than liberal democratic rights and the demands of liberal democratic justice more generally.

Rawls's conception of human rights falls well-short not only of liberal democratic principles of justice, but also of the Universal Declaration of Human Rights and contemporary human rights discourse and practice. To be sure, there are important points of overlap. But the discontinuities are striking. Rawls explicitly refrains from grounding his conception of human rights in the UDHR's claim that "All human beings are born free and equal in dignity and rights...endowed with reason and conscience...and [obligated] to act towards one another in a spirit of brotherhood." He characterizes this claim as a liberal aspiration. And he rejects several UDHR rights as genuine human rights, e.g., the right to social security or to equal pay for equal work, on the grounds that they presuppose specific kinds of institutions.¹⁶

Notwithstanding its limited content, Rawls's doctrine of human rights, if honored, would go along way toward alleviating some of the grossest abuses of human beings around the world. While it does not demand democracy, it does demand that individuals be able to petition their governments and to communicate their interests directly or indirectly to their leaders. And while it does not demand full gender equality, it does demand subsistence and security rights for women, as well as the right to hold and control personal property and to the rule of law. And while it does not demand liberal democratic justice, it does demand the priority of at least a common good conception of *justice* over other social virtues. Further, human rights are, on Rawls's view, universal in the full sense of the term. They apply to all human beings and they bind all peoples prior to and

¹⁵ Of course, those who are citizens of liberal democracies have constitutional and civil rights to these things. Whatever the merits of liberal democracy, unique and exclusive fidelity to human rights is not among them on Rawls's view.

¹⁶ Rawls, *The Laws of...*, *cit.*, p. 80.

independent of treaties or other voluntary undertakings. And while they may be adjusted one to another for the sake of coherent instantiation in diverse concrete contexts, they may not be sacrificed for any other reason. They thus function as rights, or trumps, in the familiar sense of the term. While critics are surely correct that in many ways Rawls's doctrine falls well short of contemporary human rights discourse and practice, it must be noted that it is still a human rights doctrine with some genuine critical bite.¹⁷

Yet, for those who had hoped to find in Rawls's work support for the view that human rights just are liberal democratic rights, pitched at a certain high level of abstraction to be sure, extended and applied to all human beings regardless of their location or citizenship, *LP* has proved a disappointment. I want now to develop two lines of argument aimed at defending the correctness of Rawls's view. The first concerns Rawls's original position argument for the principles of international justice, including the doctrine of human rights, he defends. The second concerns the historical and cultural variability of the fundamental interests of human persons.

Human Rights and the Original Position Argument.

Rawls is driven to issues of international justice by the need of those living within contemporary liberal democracies to evaluate critically the policies guiding their collective conduct as a people on the global stage. Since this cannot be done without appeal to principles of international justice, such principles must first be identified and justified. But, Rawls insists, they must be identified and justified from the moral point of view of the liberal democratic peoples

¹⁷ It should also be emphasized that Rawls nowhere suggests that liberal democratic peoples ought not work through treaty-making toward an international law regime more robustly liberal and democratic than his doctrine of human rights. Rawls's point is simply that liberal democratic peoples cannot demand such treaties of other peoples on the grounds that they are required by prelegal and prepolitical or natural principles of international justice.

wanting to evaluate critically their foreign policy. To identify and justify them in any other way would render them a compromise of principle. Of course, liberal democratic peoples are committed to a moral principle of reciprocity in political life. In light of their own commitments, then, they must refrain from acting toward other peoples from principles that other reasonable peoples may reasonably reject.

Toward the end of identifying and justifying such principles, Rawls deploys a two-stage original position argument. He first constructs an original position populated only by agents representing liberal democratic peoples. These agents, Rawls insists, would agree only to eight principles of international justice, expressing roughly the post WW-II settlement in international law and including his doctrine of human rights.¹⁸

Rawls then constructs a second original position populated only by agents representing illiberal and undemocratic but nevertheless well-ordered (and therefore reasonable) peoples, “decent peoples” to use Rawls’s phrase. These agents, he argues, would agree only to the same eight principles. Thus, these and only these principles constitute the first principles of international justice.¹⁹

Rawls’s two stage method here has two important impli-

¹⁸ Rawls, *The Laws of...*, *cit.*, p. 37. These principles limit the right of war to individual or collective self-defense, and they limit state sovereignty by the doctrine of human rights already described. They include a principle obligating all peoples to aid those societies unable to constitute themselves as a people, and thus excluded from a just society of peoples, because “burdened by unfavorable conditions.” And they obligate all peoples to keep their treaties, honor the demands of free and fair trade, and abide by principles of just war.

¹⁹ Again, it bears emphasizing that these principles permit the liberalization and democratization of international law through treaty-making or other voluntary undertakings. And Rawls nowhere suggests that liberal democratic peoples ought not try to persuade other peoples to join them in such an endeavor. Rawls’s point is simply that they must persuade other peoples to voluntarily so join them within a context of mutual respect. Thus, the liberalization and democratization of the international order is a concrete historical and political task that must be undertaken without the crutch of philosophical claims to the effect that liberal democracy is required by principles of natural law or some other form of universal and transhistorical exercise of reason.

cations for his principles of international justice. First, it enables him to claim that they fully express the commitments of liberal democratic peoples with respect to matters of international justice. Second, it enables him to claim that liberal democratic peoples may justifiably act on them around the world, since no reasonable people may reasonably reject them.

What puzzles many readers of *LP* is that Rawls thinks that agents representing liberal democratic peoples would demand no more than the modestly ambitious eight principles he identifies. After all, they represent only liberal democratic peoples. And the task they set themselves is to identify principles to govern the relations between liberal democratic peoples only. Why wouldn't they simply agree to enforce general liberal democratic principles against themselves? What would they stand to lose by so agreeing?

Liberal democratic peoples are, and regard themselves as, peoples, independent and self-sufficient artificial corporate moral agents.²⁰ As peoples they, in principle, need not cooperate or interact with one another. They confront one another not as inescapably and mutually dependent participants in a necessary scheme of social cooperation, but rather as independent agents prepared to cooperate on mutually acceptable terms but in principle capable of abstaining from cooperation without suffering catastrophic losses. Thus, liberal democratic peoples will each and all have a powerful reason to refuse to cooperate with one another on terms that undermine their independence and sovereignty.

Of course, every liberal democratic people will agree to constitute itself in perpetuity as a people, for it is only by so doing that it enjoys the status of moral agent capable of asserting claims of justice on the global stage. Thus, no

²⁰ Kok-Chor Tan and Charles Beitz, cited above, seem to think that Rawls's reasoning here turns on the nature of peoples as communities in the strong sense. But this can't be right, since liberal democratic peoples aren't communities in the strong sense. The limited but nevertheless robust sovereignty of peoples, whether liberal and democratic or decent, is a function of their status as artificial corporate moral agents.

liberal democratic people will reject Rawls's doctrine of human rights as a constraint on their independence and sovereignty. Accepting this doctrine is a necessary condition to their moral status as a people.

Further, liberal democratic peoples will insist that treaties be honored as a matter of international justice and that they thus be able voluntarily to impose on themselves a more liberal and democratic regime of human rights through voluntary treaty-making. So much is consistent with their independence and sovereignty as peoples. But they will not agree to the imposition, as a matter of international justice, of such a human rights regime apart from and prior to their voluntarily undertaking it. In bargaining over terms of international justice, they will find none of the potential fruits to be gained through cooperation with other peoples of sufficient value to merit trading away their independence and sovereignty.

Indeed, the self-respect of liberal democratic peoples depends on their independence and sovereignty. Liberal democratic peoples regard their domestic instantiation of systems of liberal democratic rights as one of their *own* greatest creative achievements and thus as a basis for their own self-respect. But to so regard their domestic orders, liberal democratic peoples must regard them as the products of *self-determination*. And this presupposes their independence and sovereignty as moral agents. It is noteworthy here that liberal democratic peoples take great pride in their realization of liberal democratic domestic orders, but not in their realization of basic human rights as Rawls conceives them. The latter they regard as the minimal moral demands they must meet to have any moral standing at all as peoples. Their honoring human rights is presupposed by and does not express their self-determination as a people.

It is important here to remember the differences between Rawls's use of the original position argument in *LP* for the purposes of identifying principles of international justice and his more familiar use of it to identify principles of

domestic justice. In the former use, but not the latter, the parties represented are assumed to be self-sufficient, not in the sense that they can achieve any and all of their interests without cooperation, but rather in the sense that their existence as moral agents does not depend on or arise through cooperation. They are self-sufficient with respect to their most fundamental interests, securing and preserving their status as moral agents, and thus cooperation is strictly speaking optional.²¹ Thus, agents representing liberal democratic peoples in Rawls's first original position argument in *LP* need not regard noncooperation with other peoples as catastrophic. The principles of international justice, then, reflect the fair bargaining over terms of cooperation by agents representing parties each of whom no doubt stands to gain from cooperation but none of whom needs fear or avoid noncooperation. Within this context, agents will find it rational, or at least not irrational, to bargain under the assumption that they represent parties blessed by the best possible circumstances and to veto principles that do not maximize the advantage of the parties they represent.²²

²¹ This, it will be recalled, explains why Rawls makes no use of a list of primary goods to be distributed by principles of international justice. The parties to any agreement over principles of international justice need not cooperate with one another and thus do not necessarily seek from voluntary cooperation any common generic goods.

²² This helps to explain why the agents representing liberal democratic peoples agree as a matter of international justice neither to a global difference principle to govern the distribution of wealth and income in and through the global economy nor to a global principle of democracy to govern global or regional institutions such as the United Nations, World Trade Organization or European Union. With no compelling reason to fear or avoid noncooperation, each will find it rational to veto any principle not to their maximal advantage under the most favorable of possible circumstances. As a matter of global economic justice, all will agree to the principles of free and fair trade essential to any mutually advantageous system of cooperation, and to a duty of assistance to aid burdened societies incapable of constituting themselves as a people. But none will agree to more. Since the cost of noncooperation is acceptable, each agent can afford to reason optimistically, as if representing a wealthy and economically powerful people. So each will veto any more egalitarian principles proposed for governing international economic cooperation. The same reasoning will lead each to veto any democratic principles for governing international governing institutions. Thus, the

Matters are quite different with the use of the original position argument to identify principles of domestic justice. There the parties represented are not assumed to be self-sufficient. Their existence and status as moral agents depends on and arises through cooperation; noncooperation is not an option.²³ Thus, the terms of the agreement will not reflect any veto exercised by agents unwilling to agree to principles not maximally advantageous to the parties they represent under the best of possible circumstances. The cost of exercising such a veto, noncooperation, is simply too high to make it rational to do so.²⁴

Admittedly, Rawls does not develop this line of argument in *LP*. But it is implicit there and fully consistent with Rawls's stated views. Once made explicit, it answers adequately the question posed by critics, to-wit: Why would agents representing only liberal democratic peoples settle for anything less than liberal democratic principles of international justice? The answer: They don't need to cooperate to achieve their most fundamental interests and thus, even from behind

principles of international justice reflect the fair bargaining over terms of international cooperation by agents who have no compelling reason not to reason as if they represent wealthy and powerful peoples prepared to settle for noncooperation rather than for cooperation on terms not maximally favorable to them and their interests.

²³ And this explains why Rawls makes use of a list of primary social goods to be distributed by principles of domestic justice. The parties to any agreement over principles of domestic justice must cooperate with one another if they are to enjoy their moral status as persons. Accordingly, they all necessarily seek from their cooperation certain common generic goods, namely those essential to their moral status as persons. Rawls's famous two principles constitute, in his view, the most reasonable distribution of those common generic goods. But Rawls allows that other principles may also constitute reasonable, even if less reasonable, distributions. Utilitarian principles, of course, do not constitute an even minimally reasonable distribution, at least insofar as they fail to protect certain basic liberties essential to the moral status of persons. Here it is noteworthy that in *LP* Rawls does not include among the decent peoples to be admitted to a just society of peoples any society committed to and governing itself by Utilitarian principles.

²⁴ Note that all that is claimed here is that in the domestic context a maximax strategy is irrational or simply inconceivable. It doesn't follow that a minimax strategy is the most rational strategy, although given other considerations it may be.

an appropriate veil of ignorance, they have no reason not to bargain under the assumption that the parties they represent have been favored by nature, history and chance, and to demand principles consistent with the maximal advantage of the parties they represent so imagined. They thus settle on principles requiring only that they maintain their moral status as peoples and that cooperation be always genuinely voluntary, and thus mutually advantageous. Settling on such principles has the further advantage that it permits each liberal democratic people to take pride in its own domestic system of liberal democratic civil and political rights as a matter of its own self-determination.

Peoples, Persons and History.

The foregoing argument assumes, with Rawls, that principles of international justice are to be identified and justified through reference to the fundamental interests of peoples. It is, after all, the interests of peoples that are represented in both of Rawls's uses of the original position argument in *LP*. But suppose we think principles of international justice must be identified and justified through reference to the fundamental interests of individual human persons. Wouldn't we then be driven by any plausible original position argument to principles of international justice, including a doctrine of human rights, more robustly liberal and democratic? This is the question many of Rawls's critics rhetorically ask.²⁵

Initially, we need to note that Rawls does take seriously and at a foundational level the interests of human beings when it comes to the identification and justification of principles of international justice. He does so through his idea(I) of well-ordered peoples. It is simply wrong, therefore, to claim that Rawls gives complete priority within international justice to the interests of peoples over the interests of individual human beings or persons. On Rawls's view, issues of international justice arise only if peoples exist. And peoples exist only if they provide for all their individual human members the

²⁵ Beitz and Tan in particular insist on this line of objection.

social and material conditions minimally necessary to personhood. So, the objection must be that in his theory of international justice and his doctrine of human rights Rawls gives too much weight to the interests of peoples and too little weight to at least some of the interests of individual human beings or persons.²⁶

The trouble with this objection is that the fundamental interests of human persons above and beyond those specified by Rawls's doctrine of human rights – rights grounded in the interests of *human beings* and thereby incorporated into the interests of *human* persons – are a function of the history and structure of the peoples to which they belong and through which they are constituted as persons with fundamental interests. This can be seen more clearly by attending to two examples of the ways in which the fundamental interests of persons within familiar contemporary pluralist liberal democracies depend on historical and structural facts about the peoples to which they belong that are not now universally shared by all peoples and cannot reasonably be assumed to be necessarily shared in time by all peoples.

At the heart of liberalism in the domestic context lies a fact and an ideal, on Rawls's view. The fact is that of reasonable pluralism with respect to comprehensive doctrines. The ideal is that of reciprocity. Together these ground political liberalism, with its democratic component, as Rawls's favored conception of domestic justice.

Critics of *LP* and the conception of human rights Rawls offers there argue that the fact of reasonable pluralism and the ideal of reciprocity dictate some form of liberal demo-

²⁶ Another aspect of the objection which needs clarification concerns the claim that Rawls's failure to take seriously enough the interests of individual human persons is responsible for his failure to endorse principles of democracy as binding on international institutions. This can not be right, since from the point of view of the interests of individual human persons there is no reason to give very differently sized peoples the same democratic vote within an international institution. Indeed, the idea of democratic principles as applying to international institutions makes sense only if one takes peoples as artificial corporate persons to be the primary moral actors rather than individual human persons.

cracy as the only reasonable conception of domestic justice for any and every people. Indeed, they note, Rawls sometimes seems himself committed to this position. He never claims that the common good conceptions of justice affirmed by decent but illiberal and undemocratic peoples are as reasonable as any liberal democratic conception. And he maintains that it is perfectly appropriate for those living in liberal democracies to hope and even to work as individuals for the internal liberalization and democratization of all peoples.²⁷ Individu-

²⁷ Rawls insists that it would be a misreading of his conception of international justice or his doctrine of human rights to conclude that he no longer thinks liberal democratic institutions and intuitions more reasonable and hence more just than any alternative. It is true that on his view illiberal and undemocratic peoples may fully honor human rights and thus, if they are also non-aggressive toward other peoples (and keep their treaties, etc.), fully comply with the demands of international justice. But it does not follow that their domestic institutions are as reasonable as those of liberal democratic peoples. Still, he insists, so long as a people honors basic human rights (and constitutes and governs itself as a non-aggressive people) the reasonableness of its domestic institutions is not an issue of international justice. That does not mean, however, that it is not an issue of international politics to be pursued by liberal democratic peoples or by various NGO's and civic associations within a global civil society.

Human rights specify a necessary condition to be met by the domestic political and legal institutions of any people in good standing in a just international order. They thus set a limit on the pluralism among and toleration between peoples. Their realization by a people, Rawls argues, is sufficient to block justified and forceful intervention by other peoples into its domestic affairs, whether by military or non-military (diplomatic or economic sanctions) means.

Rawls is careful here not to say that the realization by a people of basic human rights is sufficient to block as unjustified any and all exercise of diplomatic or economic pressure by other peoples. But few are the steps he thinks a liberal democracy may justifiably take to encourage an illiberal and undemocratic people to realize a conception of human rights more robust than that demanded (on his view) by international justice. For example, he explicitly claims that a liberal democracy ought not, as a matter of its foreign policy, offer subsidies or other incentives to illiberal and undemocratic peoples already in full compliance with the human rights he identifies. He gives two reasons for this. First, liberal democracies ought first to use their financial resources to meet their duty of assistance to burdened societies unable to meet these basic human rights or otherwise to constitute themselves as a genuine people, even if illiberal and undemocratic. Second, liberal democratic peoples must respect the good of self-determination for all peoples, and this good outweighs whatever moral gains might be secured by a liberalization or democratization purchased through subsidies or other incentives.

als living in liberal democracies, and the civic associations (including NGO's) they form, may and presumably ought to push more aggressively for the domestic liberalization and democratization of illiberal and undemocratic peoples. They may even offer financial incentives and subsidies. It is only liberal democratic peoples acting as a people through their foreign policy that must refrain from aggressively pushing liberalization or democratization. As between peoples, political relations must reflect mutual respect and a commitment to change through dialogue and persuasion, a politics within the limits of reason alone. Within a global civil society, however, more aggressive political initiatives are possible. Of course, illiberal and undemocratic states may, consistent with the human rights demands of international justice, limit the activities of various foreign civic associations within their borders. And liberal democratic states ought not seek to accomplish indirectly through NGO's and other associations what they ought not seek to accomplish directly, e.g., by pressuring multinational corporations to adopt certain global investment patterns intended to function as financial incentives for illiberal and undemocratic but otherwise decent peoples to liberalize and democratize. So, the critics press, Rawls ought simply to concede that illiberal and undemocratic peoples are all unreasonable and thus not potentially full members in good standing in a just international society of peoples.

What these (or most of these) critics miss, however, is that the reasonableness of a people's internal domestic order is not a matter which can be fully assessed from some fully

On Rawls's view, then, there are only two foreign policy tools available to liberal democracies eager to encourage the liberalization and democratization of illiberal and undemocratic peoples already in compliance with basic human rights as Rawls conceives them. The first is diplomatic dialogue and persuasion (which may take the form of an immanent critique appealing to local values or of an appeal to more or less foreign liberal democratic values). The second is the hopefully inevitably liberalizing and democratizing effects of numerous forms of voluntary contact and exchange.

trans–historical, cross–cultural point of view.²⁸ The point of view from which the reasonableness of a people’s internal domestic order is to be fully assessed is always informed by substantive ideals or standards of the reasonable itself. And these, Rawls insists, are given neither by the merely formal or procedural requirements of practical reasoning nor by such minimalist or thin claims as “each human being has a fundamental interest in the social conditions minimally necessary to realizing and maintaining the moral status of personhood.” They are given instead by a people’s shared understanding of the fundamental interests shared by human persons (rather than the fundamental interest in personhood shared by human beings). One or another form of liberal democracy is the most reasonable conception of domestic justice, therefore, only where persons widely share a specific common understanding of their fundamental interests as persons, or as persons *qua citizens*. This conception is likely to be widely shared only under certain general historical and cultural conditions. Two in particular merit mentioning, and these constitute the two examples I mentioned earlier.

The first concerns the fact of reasonable pluralism as a fact of reasonable disagreement over comprehensive moral, religious and philosophical doctrines. While Rawls sometimes treats this as a trans–historical permanent fact of the human condition, such a reading is a bit of philosophical speculation that may itself be reasonably rejected.²⁹ Of course, the fact of reasonable pluralism is a fact for the foreseeable future in many societies, including those of Europe and North America with their shared history of religious fragmentation, Enlightenment, modernity and the like. There it cannot reasonably be rejected

²⁸ It must be emphasized that Rawls does think that the reasonableness of a people’s internal domestic political order may be *partially* assessed from a sufficiently trans–cultural, trans–historical objective point of view. That point of view is the view of biological human beings possessed of the potential to achieve moral personhood. And from that point of view, any society that fails to honor Rawls’s doctrine of human rights is without a reasonable domestic political order.

²⁹ I have argued for this point elsewhere.

(as a fact of history extended into the foreseeable future). But it is not obviously a fact for all peoples. Those without the relevant sort of history and thus still largely unified through a shared commitment to one or another comprehensive doctrine from which they derive their common good conception of justice may not unreasonably maintain that while they can deny neither the reality of simple disagreement nor the possibility of reasonable disagreement *tout court* (and must thus permit a certain limited measure of dissent, freedom of religious practice, etc.), they need not affirm what history has not in fact revealed to them, namely the fact of reasonable disagreement as it extends to matters of comprehensive moral, religious or philosophical doctrine. It is only when assessed against the background of certain features common to the history of liberal democratic peoples that the affirmation by decent peoples of a common good conception of justice (hostile to certain liberal democratic rights) will prove unreasonable. This would, perhaps, be beside the point if it were unreasonable to think that decent peoples would not inevitably in time share the same history as liberal democratic peoples. But there is no non-question begging way to establish this in a dialogue between liberal and decent peoples. History is simply open on this point.³⁰

The second way in which the reasonableness of liberal democratic conceptions of justice depends on historical and cultural context concerns the liberal democratic idea(l) of the free and equal person (whether *qua* person or *qua* citizen). This idea(l) presupposes a certain cultural and institutional background. Absent some form of the family within which all children are extended and able to internalize a like kind and degree of unconditional love sufficient to underwrite a certain common

³⁰ That is, there is no non-question begging way to establish in a global dialogue between peoples the fact of reasonable pluralism (extended to comprehensive doctrines) as a permanent fact of the human condition that every people must ultimately accept. Decent peoples will simply assert that if afforded an appropriate degree of independence and (limited) sovereignty, their unity in and through a shared commitment to a particular comprehensive doctrine will endure. This may be a false prediction, but it is one that reasonable peoples may make.

sense of self-worth, and absent some form of civil society within which persons who regard themselves as independent and similar sources of valid claims on others seek as individuals to advance their interests through mutual and voluntary bargaining and the like, the idea(l) of the free and equal citizen as the primary element within those domestic relations constitutive of the state simply has no purchase on or contact with social life as lived and experienced.

To be sure, all peoples, including illiberal and undemocratic but still decent peoples, must provide for all their human members the material and social conditions minimally necessary to personhood. And this will limit, as does Rawls's doctrine of human rights, the forms that families may permissibly take and the ways in which the activities of persons within civil society may be regulated.³¹ But within this limit a people may constitute itself as a people, the members of which enjoy the material and social conditions minimally necessary to personhood, without incorporating the family and civil society in their forms familiar to liberal democratic peoples. It must be emphasized here that there may still be good grounds for criticizing the inegalitarian, nonindividualistic, illiberal and undemocratic forms of the family or civil society found within decent peoples. The point is simply that the basis of such criticism cannot be that they necessarily fall short of the social conditions minimally necessary to personhood. Rather, the basis of such criticism must be that such institutional arrangements fall short of the social conditions necessary and sufficient to a particular and more attractive conception of personhood, one historically achieved and widely affirmed by and within liberal democratic peoples.

In a significant sense, then, the rights essential to liberal democratic conceptions of domestic justice are an effect and not the cause of the underlying social processes which construct the sort of persons presupposed by such conceptions

³¹ The family and a public sphere in some form or other are each necessary institutional elements of all peoples. They are essential to the moral development of human beings into human persons. They need not take the same form, however, in all peoples. And thus the fundamental interests of human persons may vary from people to people.

of justice. It is because the family and civil society developed in a particular way or ways in Europe and elsewhere that human beings were made there into the sort of persons fitted for and inclined to demand the full panoply of liberal and democratic rights. This constitutes a second sense, then, in which the reasonableness of liberal democracy is a function, at least in part, of certain cultural and institutional background conditions, which may or may not obtain within all peoples.³²

In many ways, Rawls's own analysis points in the direction suggested by Brown. Individual persons acquire their moral capacities and their fundamental interests by virtue of their belonging to a particular form of social life, to a people with a history and a sense of itself. There are, of course, limits as to what counts as a people, and these limits are normative, since peoples are persons capable of making valid claims as a matter of justice. But assuming that the ideas of well-orderedness and of a self-sufficient cooperative scheme mark those limits, we cannot then say what rights all individual persons possess as a matter of international justice, beyond those derived from the idea(I) of a well-ordered, self-sufficient people itself, prior to identifying those principles of international justice no people could reasonably reject. It is for this reason, then, and not out of a prudential concern for global stability, that Rawls's conception of human rights takes the shape it does. Absent these background conditions, it is not unreasonable for a people to reject liberal democratic principles of domestic justice. Again, this would perhaps be irrelevant if there were a non-question

³² Rawls flirts with this point in his discussion of one ideal type of decent people, the decent consultation hierarchy. There he notes that in such a society individual persons are conceived as belonging first to groups, and that the reconciliation of their interests through the state is accordingly mediated through their group membership. In such a society, presumably, the liberal democratic conception of the citizen would be able to gain no foothold. See Rawls, *The Laws of...*, *cit.*, pp. 71–73.

The connection between the reasonableness of liberal democracy and the cultural and institutional forces necessary to create the sort of individual persons to whom liberal democracy appeals is discussed by Chris Brown in "Universal Human Rights: A Critique," in Dunne, T., and Wheeler, N., *Human Rights in Global Politics*, Cambridge University Press, 1999.

begging way for liberal democratic peoples to show that these background conditions were themselves either historically inevitable or required by justice. But so much appears not to be the case.

Thus, even if one supposes that the primary concern of international justice is the resolution of conflicting claims between human persons, wherever they may be, and that accordingly the demands of international justice are to be determined by reference to an original position argument within which agents represent individual human persons and seek principles for the regulation of their global cooperation, the path to a more robustly liberal and democratic doctrine of human rights remains blocked. Since neither history nor reason show decisively that a people must be liberal and democratic in order to afford its members the material and social conditions minimally necessary to personhood, agents in such an original position must consider the interests of persons as constituted by or through membership in both decent and liberal democratic peoples. They will therefore have reason to reject principles of international justice that effectively demand, rather than merely permit, liberal democratic domestic institutions.

Human beings universally share a fundamental interest in achieving and maintaining personhood and thus in the social conditions minimally necessary thereto. But their fundamental interests as persons are historically, socially and contingently given, and not necessarily shared. Thus, we can arrive at a more liberal democratic doctrine of human rights having departed from an original position argument within which agents represent individual human beings or persons only if we smuggle into the argument controversial claims about the interests or perfection of all human beings or persons.

Conclusion

In the end, I think Rawls's doctrine of human rights is less vulnerable to objection than many of his critics have claimed. The doctrine protects the fundamental interest all human beings share in the social conditions minimally necessary to

moral personhood, while at the same time respecting the moral status of peoples as artificial corporate moral agents. It permits the liberalization and democratization of international law, but demands, consistent with the moral imperatives of reciprocity, that it be accomplished through voluntary treaty-making between peoples committed to mutual respect. And it remains firmly grounded in, indeed never runs beyond, a conception of reason empirically and historically informed.

Department of Philosophy
University of Tennessee
dreidy@utk.edu