

DON DUNSTAN HUMAN RIGHTS ORATION:
GLOBAL JUSTICE AND HUMAN DEVELOPMENT

Professor Martha Nussbaum

23 August 2005

Supporting Papers: 3 of 3

Chapter 4. Mutual Advantage and Global Inequality: the Transnational Social Contract

Global inequalities in income increased in the 20th century by orders of magnitude out of proportion to anything experienced before. The distance between the incomes of the richest and poorest country was about 3 to 1 in 1820, 35 to 1 in 1950, 44 to 1 in 1973 and 72 to 1 in 1992.

Human Development Report 2000, United Nations Development Programme

I. A World of Inequalities

A child born in Sweden today has a life expectancy at birth of 79.9 years. A child born in Sierra Leone has a life expectancy at birth of 34.5 years.¹ In the US, GDP per capita is \$34,320 dollars; in Sierra Leone, GDP per capita is \$470. Twenty-four nations among the 175 surveyed by the United Nations Development Programme have GDP per capita over \$20,000. Sixteen nations have GDP per capita under \$1000. Eighty-three nations are under \$5000, and one hundred twenty-six nations are under \$10,000. Adult literacy rates in the top twenty nations are around 99 %. In Sierra Leone, the literacy rate is 36%. In twenty-four nations, the adult literacy rate is under 50%.

The world contains inequalities that are morally alarming, and the gap between richer and poorer nations is widening. The chance event of being born in one nation rather than another pervasively determines the life chances of every child who is born.

¹ All data in this paragraph are from Human Development Report 2003: United Nations Development Programme (2003): 237-40. Data are listed as from 2001. Sierra Leone never got above 40 years in life expectancy, even before the advent of HIV/AIDS, but in the past year its life expectancy has gone down from 38.9 to 34.5 years, largely from that cause. The United States overall ranks number 7 in the weighted Human Development Index, behind Norway, Iceland, Sweden, Australia, the Netherlands, and Belgium. It is twenty-fifth in life expectancy, behind most of the generally high-ranking nations, but also behind Costa Rica, Malta, Singapore, and Hong Kong.

Any theory of justice that proposes political principles defining basic human entitlements ought to be able to confront these inequalities and the challenge they pose, in a world in which the power of the global market and of multinational corporations has considerably eroded the power and autonomy of nations.

Nor do these data, being aggregates, tell us all we need to know about how the most deprived people in the world are doing. Women, for example, notoriously lag behind men in education, employment opportunities, and even in basic life chances.² Other inequalities influence basic opportunities: inequalities of class, caste, race, religion, ethnicity, inequalities between rural and urban populations. Deprivations imposed by these inequalities are to some extent independent of general poverty, although general prosperity does typically raise the floor of entitlement to education, health care, and other basic opportunities. Any theory of justice that aims to provide a basis for decent life chances and opportunities for all human beings must take cognizance both of inequalities internal to each nation and of inequalities between nations, and must be prepared to address the complex intersections of these inequalities in a world of increased and increasing global interconnection.

In our world, the global market, multinational corporations, and the nature of the global economic system pervasively influence the life chances of children in every nation. Other new global actors are also prominent: nongovernmental organizations and social movements, many of these multinational; international treaties and other documents; international or multinational agencies and institutions. Again, a viable theory of justice for the contemporary world ought to have some way of coming to grips with the changing centers of influence and advantage that make our world very different from the world of free republican states envisaged in Kant's Perpetual Peace.

The dominant theory of justice currently used to think about global matters – when a sheer amoralist realism does not predominate -- is the social-contract theory in some form,

² See discussion in Nussbaum (2000a), Introduction. For education, see Nussbaum (2004b).

a theory that sees global agreements as the outcome of a contract people make, for mutual advantage, to leave the state of nature and govern themselves by law. Such theories have been influential in thinking about global justice from the time of Kant, and they have recently received a good deal of attention, thanks to the influential work of John Rawls. Despite their great strengths in thinking about justice, social-contract theories have some structural defects that makes them yield very imperfect results when we apply them to the world stage. I shall first describe the two different strategies used by contractarians to address the problems of justice between nations: the strategy of what I shall call the two-stage contract, and the strategy of what I shall call the global contract. Taking John Rawls's The Law of Peoples as a best case of the former strategy, I shall argue that this approach cannot provide an adequate account of global justice. The strategy of the global contract looks more promising; but it cannot defend redistribution from richer to poorer nations without departing in major ways from the contractarian approach.

Although my arguments are directed against social-contract approaches to global justice, I choose these approaches because they are stronger than some others we have – stronger, in particular, than models of global development based on contemporary economic Utilitarianism. The "human development approach" that I favor can make alliance with contractarians, up to a point, against that crude approach. It is this subtle debate between two worthy opponents that concerns me here. And my main contention will be that we cannot arrive at an adequate account of global justice by envisaging international cooperation as a contract for mutual advantage among parties similarly placed in a state of nature. We can produce such an account only by thinking of what all human beings require to live a richly human life -- a set of basic entitlements for all people -- and by developing a conception of the purpose of social cooperation that focuses on fellowship as well as mutual advantage. Contractarian ways of thinking, especially the idea that we ought to expect advantage from cooperation with others, have untold influence on public debate. My aim is to supply something both new and

old, resurrecting the richer ideas of human fellowship across national boundaries that we find in Grotius and other exponents of the natural law tradition.

Before we begin, we need to have before us very clearly three features of social contract conceptions that are salient in their analysis of global issues. (Although this involves some recapitulation from chapters 1 and 2, these issues need to be mentioned again in the context of a new set of problems, which may attract the attention of different groups of readers.) These are all features on which Rawls continues to rely throughout his work – despite the fact that his hybrid theory, as we have seen, mixes Kantian moral elements with the idea of a social contract.³ First, we must continue to focus critical attention on Rawls's endorsement of the idea that the social contract is made between parties who are roughly equal in power and resources, so that no one can dominate the others – the idea that he associates both with Hume's account of the "Circumstances of Justice" and with classical social contract doctrine. We must bear in mind, as we turn to the global plane, that this rough equality of the parties is Rawls's analogue to the idea of the State of Nature in classical social contract doctrine (see TJ 12).

Second, a closely connected point, the social contract is imagined as one made for mutual advantage, where advantage is typically defined in familiar economic terms. Although the Veil of Ignorance introduces moral constraints on the ways in which the parties achieve their own interest, the parties are still imagined as exiting from the State of Nature in the first place because it is in their interest to do so, as they attempt to further their plans of life. Thus, while the Veil sharply limits the role played interest can play once they enter the Original Position, interests in promoting one's own conception of the good continue to play a large part in determining who is in and who is out at the initial stage. Rawls believes that a contract for mutual advantage makes sense only between rough equals. Despite his Kantianism, Rawls remains a contractarian in these two crucial respects.

³ See also LP 4: "This idea of justice is based on the familiar idea of the social contract..."

Finally, social-contract theories take the nation state as their basic unit, conceiving of their contracting parties as choosing principles for such a state. This focus is dictated by their starting point: they imagine people choosing to depart from the state of nature only when they have found principles by which to live a cooperative life together under law. This starting point is a grave limitation when we consider transnational agreements, as we shall see.

Two other features of Rawls's theory on which I have focused attention in chapter 2 will not concern me here. His use of wealth and income as a way of indexing relative social positions, although central to his own account of mutual advantage, will not be the focus of my arguments in this chapter; I shall focus on the more general idea of a contract for mutual advantage. Rawls's use of a reason-based Kantian conception of the person for political purposes plays no role in his analysis of international relations, and thus will not be further discussed here.

Before we begin, there is a question we must face. Both Kant and Rawls stress the symmetry between first-stage and second-stage contracts, and both clearly think that the contract between nations establishes essential moral foundations for international relations. One might, however, try to argue that Rawls's project never was to think about global justice in general; instead, his aim is only to describe the correct foreign policy for decent liberal societies. He certainly describes his aim this way, both in TJ and in LP. Thus, the interlocutor might say, it is not surprising that domestic arrangements are treated as fixed and that the inquiry focuses only on matters of war and peace: for Rawls is not trying to talk about global justice at all.

We might have some doubts about whether these two aspects of the theory really do follow from the idea of articulating the foreign policy of a liberal society: for perhaps a decent foreign policy for such a society ought to think about the well-being of others in a comprehensive and robust way. More generally, we might doubt whether these two projects can be separated in the way the interlocutor suggests. Once one grants, as

modern contractarians do, that foreign policy is correctly founded on moral principles and not only on (Hobbesian) considerations of national security and power, one might then doubt that one can insulate domestic arrangements from scrutiny, if they are such as to make it impossible for people in other nations to live decent lives. The whole idea that our transnational duties involve matters of war and peace only, and not matters of economic justice, may be questioned as both inadequate and, possibly, incoherent (in the sense that the adequate pursuit of global peace almost certainly involves economic redistribution). Certainly we cannot assume that a just foreign policy for a decent liberal society is indeed one that adopts such a thin account of the terrain of foreign policy, shielding domestic arrangements from scrutiny.

Is Rawls's project, however, the thin project of talking about liberal foreign policy alone, under a very narrow definition of what foreign policy involves? The discussion of the topic in TJ may suggest this reading; but, as we read more closely, the project is clearly to extend Rawls's own normative conception, justice as fairness, to the international plane, not simply to describe a nation's foreign policy (see the summary at PL 21). Rawls makes it clear that the Veil of Ignorance imposes moral constraints on international relations that are analogous to the demands of fairness in the domestic case: the second-stage contract is designed to "nullif[y] the contingencies and biases of historical fate" (378). Certainly, by the time we arrive at the fuller discussion of the second-stage contract in LP, it is abundantly clear that international justice is Rawls's theme: "a particular political conception of right and justice that applies to the principles and norms of international law and practice" is Rawls's own definition of "Law of Peoples" in the book's first sentence (3), and the project is that of describing a "realistic utopia," a world fulfilling certain moral conditions. The focus on human rights in LP shows, as well, that Rawls is concerned with the idea of a world that is in some crucial ways fair to all. Thus even if Rawls continues to characterize his project as that of thinking about the foreign

policy of a liberal society, it is clear that he understands that project in a broad sense, as involving a set of understandings that are fair to all, and even utopian.

II. A Theory of Justice: The Two-Stage Contract Introduced

The pre-contractarian tradition "natural law" tradition, represented by the ancient Greek and Roman Stoics and early modern successors such as Hugo Grotius and Samuel Pufendorf, held that relations between states, like the rest of the world of human affairs, are regulated by "natural law," that is, binding moral laws that supply normative constraints on states, whether or not these dictates are incorporated into any system of positive law. Grotius' version of this approach had enormous influence on the history of thought about global principles. For Grotius, all entitlements in the international community, including national sovereignty itself, derive ultimately from the dignity and the sociability of the human being. That is the approach that I shall ultimately be favoring.

The social contract tradition, by contrast, understood the situation that exists between states as a state of nature, and imagined principles of justice being contracted as if between virtual persons. The major social contract thinkers all understood the state of nature as involving some natural rights and duties; it was the insecurity of those entitlements that made a contract necessary. Thus their thought is in many ways continuous with that of Grotius and Pufendorf. Modern contractarians, however, forgo any account of natural (prepolitical) entitlements, viewing entitlements as generated by the procedures of the contract themselves. Thus their thought departs far more radically from that of Grotius and Pufendorf than did that of their early modern forebears. As we study the idea of the second-stage contract, we should keep this difference firmly in mind.

The clearest example of this two-stage approach, and the most significant for Rawls, is Kant, who writes in The Metaphysics of Morals that a state is like a household situated alongside others. Under the Law of Nations, he continues, a state is "a moral Person living with and in opposition to another state in a condition of natural freedom, which itself is a condition of continual war." This situation gives states the right "to compel each other to abandon the state of war and to establish a constitution that will guarantee an enduring peace" (343). The Postulate of Public Law in the State of Nature says, "If you are so situated as to be unavoidably side by side with others, you ought to abandon the state of nature and enter, with all others, a juridical state of affairs, that is, a state of distributive legal justice" (307). This postulate is applied in the first instance to persons, enjoining that they leave the State of Nature and enter a state. It is then applied a second time over to states⁴, enjoining that they enter some kind of juridical state of affairs.⁵

Kant's views about this state of affairs change over time. In "Universal History" and "Theory and Practice," he favors a system of coercive laws binding the federated states of the world. In Perpetual Peace, while he still mentions this idea as a rational one, he does not press the analogy between persons and states this far. States, he holds, "already have a lawful internal constitution, and have thus outgrown the coercive right of others to subject them to a wider legal constitution in accordance with their conception of right" (104). He favors a voluntary agreement to enter a foedus pacificum, a peace-committed federation, which would not, however, have the force of public law or coercive power (104). Nonetheless, international principles of right, whether conceived as binding law or

⁴ Kant says, rightly, that "Law of Nations" is a misnomer: it ought to be "Law of States" (in his Latin, ius publicum civitatum).

⁵ See also "Idea for a Universal History," where Kant speaks of the "barbarous freedom of established states" (49); "Theory and Practice," where he speaks of a "state of international right, based upon enforceable public laws to which each state must submit (by analogy with a state of civil or political right among individual men" (92); "Perpetual Peace," where he speaks of the "lawless condition of pure warfare" between states, and continues, "Just like individual men, they must renounce their savage and lawless freedom, adapt themselves to public coercive laws,..." (105). (All translations from these works are from Kant (1970). Pages are given as in that edition, since it does not include the Akademie pagination.)

only as the moral rules of a federation, are still held to apply in the first instance to states, not directly to their inhabitants, and are understood to be the ways in which states depart from the State of Nature that exists between them, insofar as they do.

In A Theory of Justice, Rawls continues this Kantian approach. He assumes that the principles of justice applying to each society have already been fixed: each has a "basic structure" whose form is determined by those principles (377). The "basic structure" of a society is defined as "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation" (7). It is said to be equivalent to those structures that have effects that are "profound and present from the start," affecting "men's initial chances in life" (7).

We now imagine a second-stage original position, whose parties are "representatives of different nations who must choose together the fundamental principles to adjudicate conflicting claims among states" (378). (The parties are also called "representatives of states.") They know that they represent nations "each living under the normal circumstances of human life," but they know nothing about the particular circumstances of their own nation, its "power and strength in comparison with other nations." They are allowed "only enough knowledge to make a rational choice to protect their interests but not so much that the more fortunate among them can take advantage of their special situation." This second-stage contract is designed to "nullif[y] the contingencies and biases of historical fate" (378).

Rawls says little about the principles that would be chosen in this situation, but he indicates that they would include most of the familiar principles of the current law of nations: Treaties must be kept; each nation has a right of self-determination and non-intervention; nations have a right to self-defense and to defensive alliances; just war is limited to war in self-defense; conduct in war is governed by the traditional norms of the law of war; the aim of war must always be a just and lasting peace (378-9).

Let us now consider the analogy between states and "moral persons," (Kant's term), which Rawls recreates by treating representatives of states as analogous to the parties in the Original Position. One of the problems of the analogy is that many nations of the world do not have governments that represent the interests of the people taken as a whole. Even when a nation has a government that is not a mere tyranny, large segments of the population (women, racial minorities) may be completely excluded from governance. Thus Rawls's device of representation is indeterminate. In such cases, if the representative represents the state and its basic structure, as Rawls strongly implies, he is likely by this very fact not to represent the interests of most of the people. If, instead, he is imagined as somehow representing the real interests of the people, this is idealism carried to a point at which it loses useful contact with reality: for we are asked to imagine that, holding firm the unjust basic structure of the state, a representative somehow emerges who can truly represent the people's real interests.

A second problem concerns the fixity of the domestic basic structure. Rawls seems to accord legitimacy to the status quo, even when it is not fully accountable to people. One of the things people themselves might actually want out of international relations is help overthrowing an unjust regime, or winning full inclusion in one that excludes them. (Thus women, for example, often turn to international agencies and agreements in search of domestic reform.) There is no place for this in Rawls's early scheme.

But the gravest problem with the analogy is its assumption of the self-sufficiency of states. In designing principles at the first stage, the society is assumed to be "a closed system isolated from other societies" (8). (Thus it is no surprise that the relations between states are envisaged as occupying a very thin terrain, that of the traditional law of war and peace.)

This isolation and self-sufficiency is so far from being true of the world in which we live that it seems most unhelpful. Rawls's structure has no room even for a supra-national political/economic structure such as that of the EU, far less for the complex

interdependencies that characterize the contemporary world as a whole. Some states are more influenced by "external" matters than others, and the most powerful sometimes do act as if they were lone cowboys on the frontier. All, nonetheless, are far from being self-sufficient. For poorer states, the economic policies of the IMF and the World Bank, international trade agreements, in general the global economic order, are all decisive influences on well-being. For almost every nation, the presence of multinational corporations influences both economic and political life. Political yet nongovernmental entities such as the ILO, the diverse organizations that comprise the international women's movement, and many others are prominent ways in which citizens within each state fight for their rights. International tribunals deal with offenders in certain types of domestic conflicts. Environmental issues of necessity cross national borders. For such reasons, it is not helpful to regard the basic structures of states as fixed and closed to external influence. Even as an idealizing device, it takes us so far from the real world that the key problems of that world cannot be well framed.

The assumption of the fixity and finality of states makes the second-stage contract assume a very thin and restricted form, precluding any serious consideration of economic redistribution, or even substantial aid, from richer to poorer nations.⁶ Indeed, Rawls waves that problem away from the start by his contractarian assumption of a rough equality between the parties: no one is supposed to be able to dominate the others. Of course, in our world, these conditions are not fulfilled: one probably can dominate all the others. At any rate, the G8 do effectively dominate all the others. To assume a rough equality between parties is to assume something so grossly false of the world as to make the resulting theory unable to address the world's most urgent problems.

Even had Rawls not assumed a rough equality among the parties, the very assumption of fixity and finality would itself preclude any serious consideration of the

⁶ To some extent this thin focus is explained (not, I think, justified) by Rawls's subsequent focus on the issue of conscientious objection, to which the discussion of international law is a preliminary.

distribution of primary goods among states. Within a state, parties are assumed to want and need a whole range of primary goods, including liberties, opportunities, income, wealth, and the social bases of self-respect. The contract concerns the distribution of this wide range of goods. It seems plausible to think that a contract among nations would talk about these resources also: for surely representatives of nations, not knowing which their nation is, would want to ensure that the distribution of primary goods among nations is a fair one, and that no nation is crippled by poverty, or humiliated before others. Initially it looks as if Rawls has just made an error in limiting the topics of the contract to the traditional issues of war and peace. Why shouldn't the contract concern, as in the first stage, the entire range of primary goods? Once we face this question, however, we see its answer: because, in that case, the state could not be taken as a fixed and closed system. Redistributing income and wealth to other states would necessitate a rethinking of domestic priorities. And this Rawls has already ruled out.

By assuming the fixity of states as his starting point, then, Rawls has effectively prevented any serious consideration of economic inequalities and inequalities of power among states. He has ratified philosophically what the powerful nations of the world, especially the United States, like to do anyway: they pretend that their system is fixed and final, and resist with might and main any demand that they change internally, whether in matters of human rights or in environmental matters or in matters of economic policy, in response to the situation of the rest of the world, or in response to international treaties and agreements. The demand for change in domestic priorities is typically met as an illicit imposition: who are you to ask us to change our own internal affairs? These are our business, and we have fixed them already, prior to entering into any relations or discussions with you. In the real world, however, we see this tactic for what it is: an arrogant mentality that is culpably unresponsive to grave problems. One should not give it the patina of philosophical respectability.

Notice, too, that starting from the assumption of the existence and finality of states, we do not get any interesting answer to the question why states might be thought to matter, why it might be important to make sure that national sovereignty does not get fatally eroded by the power of economic globalization. Here again, the problem lies with the analogy between states and persons. There is a good reason to begin with persons and to give them salience in a theory of justice. We are each born and live our lives as persons, each body separate in its birth, death, nutrition, pain, and pleasure from every other body. Utilitarianism ignores this separateness at its peril, pretending that lives are just locations of satisfactions and that the salient fact for ethics is the totality of satisfactions in the system as a whole. Thus one person's great pain and misery can be compensated for by a plurality of people's exceeding good fortune. Here a moral fact of paramount importance – that each person has only one life to live – has been effaced.

We cannot say, in a similar way, that the state is a necessary moral starting point. While it is true that each person lives, at any given moment, within the borders of some state, people can move from state to state as they do not and cannot migrate from body to body. Moreover, as I have argued, structures other than the state influence their lives in fundamental ways. We may add that the modern nation state is an historically bounded phenomenon: thus it is not even clear, in terms of Rawls's own argument, that the parties in the Original Position, who lack knowledge of their time in history, ought to be thinking from the start in terms of the nation-state. In any case, we need an account of why states matter to persons and what their appropriate role is. Why might people want the state, rather than corporations or international agencies, to supply much of the basic structure for their lives? By simply taking the state as a fixed starting point, Rawls precludes any illuminating answer to this question.

According to Rawls, "Political philosophy is realistically utopian when it extends what are ordinarily thought of as the limits of practical political possibility" (LP 6).⁷ The defects I have described suggest that the two-stage contractarian approach is not a helpful extension of ordinary practical thought for the contemporary world. Confirmation of this suspicion must, however, await examination of Rawls's detailed confrontation with international issues in The Law of Peoples. I believe that the book makes a little progress on some of the problems, but none on others; and it introduces new problems of its own.

III. The Law of Peoples: The Two-Stage Contract Reaffirmed and Modified

The Law of Peoples "is an extension of a liberal conception of justice for a domestic regime to a Society of Peoples" (LP 9). Its intention is to work out "the ideals and principles of the foreign policy of a reasonably just liberal people" (10).⁸ It is also abundantly clear that this aim does not preclude, for Rawls, another, wider aim: to describe a "realistic utopia," a world in which, through the extension of justice as fairness, a decently just international structure obtains. The book thus attempts to answer the question posed in PL (21), concerning whether Rawls's political conception can be extended to give good answers to questions of justice in the realm of international relations. Even to the extent that his project is one of asking about foreign policy, there is no reason to think that foreign policy must deal with matters of war and peace only; in LP it is clear that Rawls himself does not hold such a narrow definition of its concerns.

As in TJ, Rawls takes the domestic principles and policies of liberal societies as fixed, including their economic policies, and simply inquires into their foreign policies. The fixity and basic importance of the domestic "basic structure" is the starting point – although, as

⁷ Rawls (1999). Hereafter I shall refer to the book as LP, to the associated earlier article, Rawls (1993), as "LP."

⁸ Although, as we shall see, consideration is also given to reasonable nonliberal peoples, the purpose of this consideration, Rawls emphasizes, is to "assure ourselves that the ideals and principles of the foreign policy of a liberal people are also reasonable from a decent nonliberal point of view" (10).

we shall see, Rawls's distinction between states and peoples introduces some ambiguity on this point. The traditional concerns of international law are the book's center, and it contains no discussion of the shifting configurations of the global economic order, the role of multinational and international agreements, institutions, and agencies, or the role of nongovernmental organizations, political movements, and other bodies that influence policy, frequently in ways that cross national boundaries.

At the same time, however, Rawls is more than usually concerned to reassure his reader that his analysis is realistic. Uncharacteristically, he devotes a substantial portion of the book to questions of non-ideal theory. Moreover, he argues that utopian or ideal theory can be a valuable guide to practice in the contemporary world, provided that it is "realistically utopian." Whenever the two-stage structure shows signs of strain, Rawls is at pains to reassure the reader that the problem in question really can be solved through a procedure that fixes the domestic basic structure first and then addresses, at a second stage, problems between nations.

Thus he mentions immigration, only to reassure us that the need for immigration would "disappear" (9) if all nations had an internally decent political structure. Among the causes of immigration he mentions religious and ethnic persecution, political oppression, famine (which he holds to be preventable by domestic policies alone⁹), and population pressure (which, again, he holds to be controllable by changes in domestic policy). In "the Society of liberal and decent Peoples" these causes would not exist. Absent from his list, however, is one of the greatest causes of immigration, economic inequality – along with malnutrition, ill health, and lack of education, which so often accompany poverty.

Similarly, discussing the "burdened peoples," who on account of their poverty will not be part of the Society of Peoples, he justifies not discussing economic inequality between

⁹ Here he cites Amartya Sen's work in Sen (1981). But he misdescribes Sen's conclusion. Sen does hold that a free press and political democracy are extremely important ingredients in famine prevention, but he does not hold that they are always sufficient. Moreover, his analysis applies only to famine and not to undernutrition, poor health due to undernutrition, etc.

nations by insisting that extreme poverty can be eradicated by reasonable domestic policies:

I believe that the causes of the wealth of a people and the forms it takes lie in their political culture and in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as in the industriousness and cooperative talents of its members, all supported by their political virtues. I would further conjecture that there is no society anywhere in the world – except for marginal cases [the footnote mentions Arctic Eskimos] – with resources so scarce that it could not, were it reasonably and rationally organized and governed, become well-ordered. Historical examples seem to indicate that resource-poor countries may do very well (e.g., Japan), while resource-rich countries may have serious difficulties (e.g., Argentina). The crucial elements that make the difference are the political culture, the political virtues and civic society of the country, its members' probity and industriousness, their capacity for innovation, and much else....[He mentions population control.] (108)

This analysis states a partial truth. But it ignores many salient issues. Even if we ignore the damage done by colonialism both to resources and to the economic and political culture of many contemporary nations, we should acknowledge the fact that the international economic system, and the activities of multinational corporations, create severe, disproportionate burdens for poorer nations, who cannot solve their problems by wise internal policies alone. Clearly in the domestic case Rawls would not consider it sufficient, if the basic structure imposes unfair disadvantages on the poor, to point out that poor families can get by on thrift and virtue. Even to the extent that it may be true that thrift and virtue can overcome such obstacles, that fact does not dispose of the question of justice.

Let us now investigate Rawls's central argument. As in TJ, the device of the Original Position is applied in two stages: first domestically within each liberal society, and then between those societies. However, a major new feature of the book is that Rawls also holds that a decent Society of Peoples includes as members in good standing certain nonliberal peoples, who have "decent hierarchical societies." But these societies, being nonliberal, do not apply the Original Position domestically. They have other ways of establishing their political principles (LP 70). So, there are three applications of the Original Position device: domestically by liberal peoples, then internationally by liberal peoples,

then, in a further step, internationally by the nonliberal peoples who decide to sign on to the Society of Peoples.

Why are there two separate applications of the second-stage Original Position? Why not simply put all the decent societies together in a single second-stage contract? The reason seems to be that the principles are derived as an extension of the liberal first-stage contract, and then ratified, though not similarly derived, by the decent hierarchical societies. Thus liberal societies know that they are liberal societies, and the decent hierarchical societies, similarly, know that they are nonliberal and yet decent societies, although in other respects their ignorance of their situation is extensive. Rawls clearly thinks it unreasonable to expect them to derive the principles that they ratify from domestic liberal procedures: for after all, they are not liberal societies. Rawls seems to think that they are more respected if they are asked to contract first with other similar societies, using whatever principles they favor among themselves, rather than being thrown directly into a structure that in essence derives from liberalism. But then it is a little unclear why he thinks that these societies will indeed agree on the same Law of Peoples that is chosen by the liberal societies. This whole part of the argument needs further work. Rawls seems to acknowledge as much, concluding that we could also "think of liberal and decent peoples together in an original position when joining together into regional associations or federations of some kind..." (70).

As in TJ, the traditional concerns of foreign policy are the focus of both second-stage contracts, and a stable peace is at the core of their aspiration. Thus, among the eight principles of the Law of Peoples (LP 37), six deal with familiar topics of international law, such as independence and self-determination, non-aggression, the binding force of treaties, non-intervention, the right of self-defense, and restrictions on the conduct of war. But Rawls expands his account to include agreement on some essential human rights and a duty to assist other peoples living under unfavorable conditions "that prevent their having a just or decent political and social regime" (37). The long-term goal of their

cooperation is a "democratic peace" of the sort envisaged by Kant, in which decent democratic regimes increasingly come to power in all societies, thus eliminating religious persecution, war (Rawls insists that democracies never make war on one another), and the other greatest evils of the modern era. Here Rawls follows Kant: a perpetual peace may be envisaged, as a result of the establishment of a federation of free republican states.

The goal thus described seems somewhat richer than the understanding of mutual advantage sketched in TJ, although, as we shall see, Rawls's interpretation of it is constrained by his refusal to consider substantial material redistribution across national boundaries. But how far does it really go beyond the contractarian idea of a fair contract for mutual advantage? Clearly democratic peace would confer a great advantage on every society. It is thus rather difficult to know to what extent Rawls understands the goal as embodying a good that transcends the advantages of the parties (on fair terms), linking them all into a new global society. To understand this further, we need to examine LP's treatment of the state/person analogy, asking to what extent Rawls diverges from his previous treatment of the basic structure.

As in TJ, Rawls treats the domestic principles of justice, in both liberal and nonliberal peoples, as fixed and not up for grabs in the second-stage contract. For none of these states, then, will the second-stage contract call into question anything about their assignment of liberties and opportunities, or, importantly, about their domestic economic arrangements. Thus no international treaty that bears on these nations' domestic arrangements, in areas going beyond the thin menu of human rights that nations are assumed to respect, will be permitted to alter any nation's basic structure. Many international treaties in today's world, however, do have implications for nations' domestic arrangements, in matters concerning the basic structure of societies. (For example, the provisions of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) concerning marital rape, the determination of nationality, and

marriage and divorce require modification of domestic law in many nations, and these changes touch on the basic structure, since they concern the family.) So Rawls's position would appear to be that nations should not and do not ratify such treaties. He conspicuously refrains from stipulating that they have already met, domestically, the human rights norms spelled out in them. Only in the few areas covered by the small number of human rights norms he does recognize (to be discussed shortly) do transnational norms have the power to affect domestic structures; but it has already been assumed that all the nations involved already incorporate these human rights norms. Any extension of human rights thinking, by which nations decide to change their structures in response to international debate, is precluded by Rawls's assumptions.

In TJ, I argued, the assumption of fixity and finality means that we get no interesting account of why states and their basic structure matter. This problem, which persists in LP, is made more acute by a distinction between states and peoples that Rawls now makes central to his argument. It is worth spending some time on this distinction, since it surfaces often in thinking about the international realm. Although Rawls at first appears to treat states, and their basic structures, as his starting point, further examination shows that he does not in fact do so. Instead, he insists that the principles of international relations apply in the first instance among "peoples" and not among states. What is a "people," and why does Rawls make this distinction? If a "people" is a group of human beings who share a comprehensive conception of the good,¹⁰ or at least a set of traditions that come close to that, then it is a recognizable concept, but we should not imagine that we shall often find any coincidence between a people and national boundaries. Even in a nation with a strongly dominant religious tradition, such as Italy, there are religious minorities and nonreligious citizens. Religions themselves contain serious internal differences.¹¹

¹⁰ The term "comprehensive conception" is introduced by Rawls in PL, to distinguish the political conception from citizens' religious and secular overall conceptions of the meaning of life, ethical requirement, and so forth.

¹¹ As Fred Kniss has argued in Kniss (1997), even the Mennonites, often cited as an example of a small and homogeneous religion, actually have numerous and intense disagreements about basic elements of the conception of the good.

Moreover, in any group the women of that group may well not share in all respects the comprehensive doctrine of the men. What parades as the tradition or doctrine of a group is all too often a male construct, from the making of which women have been excluded.

If we now turn away from small and relatively homogeneous states to larger nations such as India, Peru, Turkey, and the United States, we find very pronounced divisions of comprehensive doctrine within the nation, just as we do in the domestic society envisaged by Rawls in PL. According to Rawls's own views, this heterogeneity is no accident, since he agrees with Charles Larmore that reasonable disagreement about comprehensive doctrines is a characteristic feature of modernity under conditions of freedom of thought (see PL 54-8). LP has assumed that at least some degree of freedom of thought is observed in all the participating societies, so on that account LP should anticipate a reasonable pluralism of comprehensive doctrines in all the societies in question. Thus we should not expect to find any of these societies meeting the conditions for being a people, if they are taken to include a shared comprehensive doctrine.

Rawls suggests, however, that the requirements for being a people are somewhat weaker than that of sharing a comprehensive doctrine: only "common sympathies" are required; and "common sympathies," in turn, do not require a common culture with common language and history, though these, he says, are certainly helpful in constituting a people (LP 24). Do the societies he is considering constitute peoples so defined? At this point the concept may have become too vague to offer any guidance. It seems likely that women around the world have "common sympathies" with women in other nations to a greater degree than women do with men in nations characterized by sex hierarchy. Indeed when people live close together in conditions of inequality, resentment and lack of mutual sympathy are especially likely to be found, more likely than when people live at a distance and see each other rarely. To the extent that we are inclined to say that the people in a nation have "common sympathies," it is usually because we manage to overlook such facts of subordination and to take the dominant group's word for how

things are. Such facts are quite well known to Rawls elsewhere: in PL, his very concept of the state, and of community within it, is built upon such facts about pluralism and disagreement. It is for such reasons that Rawls repeatedly insists that the individual person is the only appropriate subject of a theory of justice.¹²

If we leave "common sympathies" to one side, we are left with Rawls's other necessary condition for being a people, a willingness to live together under the same set of democratic institutions. But this brings us back to the state, and alludes to what Grotius and other writers in the tradition would characterize as the fundamental bond between citizens and the basic structure within which they live. We do not need an extra concept to talk well about this bond, and the concept of "people", with its vague suggestion of social homogeneity, offers no useful clarification. Why, then, does Rawls express skepticism about the concept of the state, and hold that international relations must be seen primarily as relations between peoples and not relations between states?

At this stage, his argument takes a strange turn: for he speaks not of the state simpliciter, but of "states as traditionally conceived" (LP 25), and characterizes the state in a way that builds into it certain powers that states are traditionally believed to have, such as war-making powers. Because he wants to deny that states rightly have such powers in a well-functioning international society, he concludes that the state cannot be the subject of a theory of international justice. Why not conclude, instead, that the traditional conception of the state is, in part, mistaken, ascribing to the state certain powers that states, rightly understood, do not really have? Such a line of argument would serve Rawls's overall purpose better.

Again, Rawls argues that states are rational actors pursuing self-interest alone (28); here he refers to traditional realist conceptions of foreign policy. But once again: why not

¹² See for example TJ 264-65: "We want to account for the social values, for the intrinsic good of institutional, community, and associative activities, by a conception of justice that in its theoretical basis is individualistic. For reasons of clarity among others, we do not want to rely on an undefined concept of community, or to suppose that society is an organic whole with a life of its own distinct from and superior to that of all its members...From this conception, however individualistic it may seem we must eventually explain the value of community."

simply say that these conceptions of the state, like narrow economic conceptions of the person, are mistaken: states are both self-interested and moral? Such a line of argument would have served Rawls's overall purpose well. If Rawls had criticized the traditional conception of the state and advanced a more moralized conception, similar to that of Grotius, he would then have had no need to build his argument on the idea of respect for putatively homogeneous peoples, an idea that seems confused and confusing.

In certain ways, then, the formulations in LP are more confusing and less adequate than those in TJ.

On some vexing issues left over from TJ, however, the new work makes progress. Recall that the analogy between states and persons suggested that states somehow represent the interests of the people within them; this, however, we said, is not true of many nations in the world. Rawls now officially recognizes this fact and gives it structural importance. The second-stage Original Position includes only states that respect human rights and have either a liberal-democratic constitution or a "decent hierarchical" arrangement that includes a "common good conception of justice" and a "decent consultation hierarchy." On the outside of the Society of Peoples are "outlaw states," which do not respect human rights, and "burdened societies," which are defined as not only poor but also politically badly organized. Rawls holds that one important task of the Society of Peoples is to restrain the outlaw states. In this way, the argument has at least some bearing on the opportunities of people who are oppressed by these societies. All members, moreover, have duties to assist the burdened societies, which primarily means, for Rawls, helping them to develop stable democratic institutions, which he takes to be the main ingredient of their eventual prosperity. This is a limited understanding of what we owe other nations, but at least it is something.¹³

¹³ Who are the "burdened societies"? Rawls's lack of realism shows up once again in the thin specification of this concept. These societies are said to "lack the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources needed to be well-ordered" (106). But this is very vague.

The most important development beyond the approach of TJ, however, lies in Rawls's recognition of the transnational force of human rights. Membership in the Society of Peoples requires respect for a list of such rights, which constrain national sovereignty. Respect for these rights is sufficient to exclude forcible intervention by other nations (80). The list is understood to be only a sub-group of those rights that liberal societies typically protect internally, "a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide" (79). Although this is a clear progress beyond TJ, it is important to notice how thin the list of rights is: it explicitly omits more than half the rights enumerated in the Universal Declaration, including full equality under law (since unequal liberty is permitted), the freedom of speech and opinion, the freedom of assembly, the free choice of employment, the right to equal pay for equal work, and the right to education.¹⁴ Moreover, as I have observed, the fixity of the basic structure entails that no international agreement in the area of human rights going beyond this thin menu will have the power to alter domestic institutions.

So: Rawls makes only a little progress toward a richer conception of international society. Insofar as he does make progress, we can now observe, this progress is made possible not by the contractual approach itself, but by some very dramatic departures from it, in the direction of an approach more like the one I shall favor, which defines a minimal conception of social justice in terms of the realization of certain positive outcomes, what people are actually able to do and to be. The criteria used to judge who is part of the Society of Peoples and who is not include ethical outcomes-oriented criteria: respect for human rights.¹⁵ The fulfillment of these human rights sets the stage for the limited use of a contractual approach. In

¹⁴ This is clear because Rawls refers to the Universal Declaration, saying that his group of rights include Articles 3 to 18 (but, as I have noted, it really cannot include the full version of Article 7, equality before the law), but excludes the other rights enumerated in the subsequent Articles of the Declaration.

¹⁵ This stipulation also limits the degree of ignorance the parties can have in the Original Position.

that sense LP ceases in some crucial ways to be a contractarian approach at all: some especially important matters are settled in another way, before the contract even gets off the ground.

Moreover, it appears that Rawls may have jettisoned the traditional Humean criterion of rough equality, in the sense of similar economic circumstances. For clearly enough, nations that uphold human rights and are either liberal or "decent" are not rough equals at all. Rawls seems to imagine the contract as taking place between the United States and Canada and the nations of Europe and Australasia (adding in Japan and South Korea?), nations that might at least be claimed to be rough equals. But where do we place nations such as India, Bangladesh, Turkey, and South Africa, liberal rights-respecting democracies that are grossly unequal to the Australia and the others in basic economic advantage? The GDP per capita of the United States, we recall, is \$34,320, that of Bangladesh \$1610, that of India \$2840, that of Turkey \$5890, that of South Africa \$11,290. (Real differences are probably greater than these figures suggest.) So these nations are extremely far from being rough equals of the nations of North America, Europe, Australasia, and (parts of) East Asia, and also far from being rough equals of one another.

The upshot is as follows. Either Rawls will have to admit that the principles and circumstances that bring societies together to form the second-stage contract are very different from the Humean "circumstances of justice," with their focus on rough equality and mutual advantage, or he will stand firm on those conditions. If he departs from Hume, relaxing the condition of rough equality and the associated understanding of the motivation of the parties (they can all expect to gain from cooperation), then he can include all the nations I have mentioned, with their staggering inequalities. But then he will have to offer a new account of why they cooperate together, since the contract can no longer be seen as one for mutual advantage. Peace, of course, is in the interests of all human beings, but, as with

the "outlaw states," peace can be promoted externally, so to speak, and need not be promoted by including the poor democracies in the contract itself. So we must have a richer account of the purposes these very different nations pursue together. If, on the other hand, Rawls stands firm with Hume and with classical social contract doctrine, then he ought to say that India, Bangladesh, Turkey, and South Africa do not belong in the second-stage contract, much though his other criteria tell in favor of their inclusion. They are just too poor for the richer nations to gain anything from treating them as rough equals. They will have to be grouped with the "burdened societies" – although this grouping itself would show a problem with that category, since it cannot plausibly be claimed that what these societies need is help developing democratic institutions.

If Rawls takes this course, excluding the poorer nations from the second-stage contract, he will be right in line with the current world order, in which most decisions about important economic matters are made with little input from the poorer nations, who are certainly not heard as equals, even when they are heard.¹⁶ Rawls has not thought this through; his lack of clarity at this point makes LP an unsatisfactory work.

There is a striking parallel between the situation of poorer nations and the situation of people with disabilities. In both cases, the human dignity of people who are fully human is omitted from the crucial stage of the political contract in which basic principles are chosen, because they are not "rough equals" of the contracting parties in power and capacity. For that reason a contract for mutual advantage cannot include them as equal participants. They are a drag on the whole system, and different principles will have to be chosen to deal with them. Furthermore,

¹⁶ See Stiglitz (2002), who describes a notorious photograph in which a French representative of the IMF stands over a seated Indonesian leader, arms crossed, in a posture of high colonial condescension, delivering the wisdom of the rich nations and their agencies.

because the contractarian approach conflates the framers of the contract with the primary subjects of justice, they cannot count as primary subjects of justice.

Such a strategy is objectionable for nations as it is for persons: they (or their citizens) are bearers of equal human dignity, and if they have special problems those problems need to be addressed from the start, in the design of the entire system of global justice, not as an afterthought and a matter of charity. But including them fully from the start requires a different account of the purposes of social cooperation. Rawls veers in the direction of a new account with his inclusion of human rights requirements; but his shift is timid, and does not amount to the wholesale rethinking of the contract framework that seems to be required.

One more aspect of LP's inadequacy remains to be noted. As we have said, Rawls's Society of Peoples admits "decent hierarchical societies."¹⁷ Rawls justifies this move by appeal to a principle of toleration that makes a highly questionable use of the state-person analogy. Rawls argues as follows:

Surely tyrannical and dictatorial regimes cannot be accepted as members in good standing of a reasonable society of peoples. But equally not all regimes can reasonably be required to be liberal, otherwise the law of peoples itself would not express liberalism's own principle of toleration for other reasonable ways of ordering society nor further its attempt to find a shared basis of agreement among reasonable peoples. Just as a citizen in a liberal society must respect other persons' comprehensive religious, philosophical, and moral doctrines provided they are pursued in accordance with a reasonable political conception of justice, so a liberal society must respect other societies organized by comprehensive doctrines,

¹⁷ An initial problem in assessing Rawls's theory in this area is its historical vagueness. Rawls has nothing to say about actual hierarchical societies in the contemporary world. (His fictional example derives from the Ottoman Empire.) In "LP," as in earlier writings, Rawls presents his own liberal principles as grounded in a specifically "Western" heritage, and characterizes liberalism itself as "Western," even as based on "Western individualism." In the book, references to the West are dropped, in favor of a schematic distinction between liberal and non-liberal societies. But Rawls still seems to be thinking primarily of Western democracies, not of India, Bangladesh, and so forth. The omission of these societies is striking when we arrive at the principle of toleration, for if the rationale for his uncritical attitude toward the "decent hierarchical societies" involves the idea that they have a different set of historical traditions and cannot plausibly have been expected to be liberal, that rationale is undercut by the fact, if it were to be acknowledged, that many non-Western nations have in fact adopted liberal constitutions. (Of course the very distinction between "Western" and "non-Western" is itself a Western construct, and not a very useful way to think about these varied societies with their heterogeneous traditions.) Moreover, the core ideas of Rawls's political theory are known to have deep roots in other political traditions: India, for example, had a well-developed and politically effective idea of religious toleration long before Europe: see Sen (1997). To the extent that Rawls justifies his relaxed treatment of certain nonliberal societies by appeal to differences in history, then, these claims are not, and could not be, borne out.

provided their political and social institutions meet certain conditions that lead the society to adhere to a reasonable law of peoples. ("LP" 42-3)

In other words: Just as Americans are required to respect the comprehensive doctrines of believing Roman Catholics, and Buddhists, and Muslims, provided they respect the reasonable political conception of justice defended in PL, so too a liberal society is required to show respect both for other liberal societies and for decent hierarchical societies, provided that these societies adhere to the constraints and standards spelled out in the Law of Peoples. Toleration is said to require not only refraining from exercising military, economic, or diplomatic sanctions against a people, but also recognizing the nonliberal societies as equal members of the Society of Peoples.

Let us now examine this analogy. In fact, there are both analogy and disanalogy.

Inside a liberal society, there are many hierarchical conceptions of the good.

These conceptions will be respected as reasonable, provided that their adherents accept, as a constituent part or "module" within their comprehensive doctrine, the principles of justice that shape the basic structure of their society.¹⁸

In other words, the religious conceptions must include Rawls's principles of justice, even if originally they did not do so. Comprehensive doctrines that promulgate teachings conflicting with those will not find their members' speech suppressed, except in the exceptional conditions Rawls specifies in his doctrine of free political speech (a grave constitutional crisis). Nonetheless, such unreasonable comprehensive doctrines will not be respected in society's constitutional structure, in the sense that principles that conflict with these doctrines will be entrenched in the nation's constitution; for this reason their proposals will not be allowed to come forward for straightforward majority vote.

In the transnational case, things are very different. The religious or traditional doctrine is tolerated, in the sense of being recognized as belonging to the community of peoples as a member in good and equal standing, whenever certain far weaker conditions obtain. There must still be respect for a small list of human rights. But it is clear that a people may win equal respect in the community of

¹⁸ For this language, see PL 144-5: "the political conception is a module, an essential constituent part, that in different ways fits into and can be supported by various reasonable comprehensive doctrines that endure in the society regulated by it."

peoples even if property rights,¹⁹ voting rights, and religious freedom are unequally assigned to different actors within the society – men and women, for instance.²⁰ The requirements of political democracy, equal liberty, and universal suffrage²¹ are replaced by the weaker requirement of a "reasonable consultation hierarchy." Even free political speech need not be accorded to all persons, so long as certain "associations and corporate bodies" allow them to express dissent in some way, and take their views seriously. A decent society may also give different groups unequal situations with respect to discrimination in the workplace.²²

In the domestic case, Rawls's principle of toleration is a person-centered principle: it involves respecting persons and their conceptions of the good. In the transnational case, although Rawls depicts himself as applying the same principle, the principle is fundamentally different: it respects groups rather than persons, and shows deficient respect for persons, allowing their entitlements to be dictated by the dominant group in their vicinity, whether they like that group or not. Rawls still focuses on persons to the extent of insisting on a small list of urgent human rights. But he allows groups to have a power in the national case that they do not have in the domestic theory.²³

This asymmetry is especially peculiar in light of the fact that Rawls's central objection to Utilitarianism, in TJ, was that it is not sufficiently person-centered: By treating

¹⁹ LP 65 stipulates that the right to property is part of the basic list of human rights, but Rawls is careful to avoid insisting on equal property rights.

²⁰ See LP 65 n. 2: "this liberty of conscience may not be as extensive nor as equal for all members of society: for instance, one religion may legally predominate in the state government, while other religions, though tolerated, may be denied the right to hold certain positions."

²¹ See LP 71: "...all persons in a decent hierarchical society are not regarded as free and equal citizens, nor as separate individuals deserving equal representation (according to the maxim: one citizen, one vote)..."

²² LP's requirements of "formal equality...(that is, that similar cases be treated similarly)" (65) notoriously does not suffice for non-discrimination, since some allegedly relevant difference between women and men can always be produced: see "Difference and Dominance" in MacKinnon (1987). In describing Kazanistan, Rawls states that minorities are not "subjected to arbitrary discrimination," but that very phrase allows that some types of discrimination are merely arbitrary and others justified by a difference.

²³ For a longer version of this argument, see Nussbaum (2002b).

the community as a super-person and treating all satisfactions as fungible within this single structure, it neglects the fundamental distinctness of persons and their lives, treating them as "so many different lines along which rights and duties are to be assigned (27).²⁴ Rawls's theory of international justice does what his domestic theory of justice persuasively argues against: it neglects the inviolability of each person that was a key to Rawls's domestic theory. But persons are persons, and violation is violation, wherever it occurs.

Furthermore, in the domestic case, any concessions that are made to the group are made against the background of exit options: persons are free to depart from one religion and to join another, or to have no religion at all. Rawls knows well that the basic structure of a nation offers no, or few,²⁵ exit options; this is why he thinks it is so important that the institutions that form part of the basic structure should be just. The basic structure shapes people's life chances pervasively and from the start. And yet in the transnational case, Rawls has lost sight of this insight, allowing a local tradition to shape people's life chances pervasively, in ways that depart from principles of justice, even though there are no exit options for those who do not endorse that doctrine. Indeed, by assuming that there will be no immigration, Rawls has removed from his ideal theory even those exit options that reality sometimes offers. (We are now reminded of yet one more reason for immigration that is not adequately covered in Rawls's discussion of that topic.)

Rawls might reply that this argument against his analogy presupposes a peculiarly Western concern with the individual. In "LP", for example, he writes, "Many societies have political traditions that are different from Western individualism in

²⁴ Cf. TJ 27, 29, 185-9.

²⁵ In his formulation, none, since the society is assumed to be closed.

its many forms" (69).²⁶ Now I have already argued that there is nothing particularly Western about the idea that each and every person has certain basic rights, just as there is nothing particularly Western about corporatist or associationist views of rights – a point that Rawls seems to grant in LP by citing Hegel as an example of the latter view. In India, for example, the shoe is often on the other foot: Western colonial traditions that included a strong corporatist element (giving political power to established churches, for example) are increasingly inhibited by ideas of human dignity that derive from a long Indian tradition of thought about persons and their dignity. These ideas may have some resemblance to some Western ideas, but judicial opinions often cite indigenous sources in order to make the multiple origins of these ideas clear. What happens in Rawls's argument, then, is that the very same traditions, whether Western or non-Western, are treated differently because of the accident of setting up as a separate state, not because of any deeper phenomenon of organic unity or universal consent. If the corporatist tradition happens to dominate in a separate state, it gets to prevail; if it is but one element in a liberal state, it does not prevail.

But we can go further than this: it seems extremely likely that there is no tradition anywhere, nor ever has been, in which its subordinated or minority members simply endorse the lower lot in life they are offered. Women, for example, are often cowed, isolated, unable to resist effectively. But their "everyday resistance" has been amply documented all over the world.²⁷ So the very idea that women (or other minorities) do not see themselves as distinct persons who

²⁶ Isn't it time to declare a moratorium on the use of the word "individualism", with its multiple ambiguities? If it means "egoism" (psychological or ethical) or even a belief that self-sufficiency is best, few Western thinkers have held such views. If it means that each person should be treated as an end, many Western thinkers have held this view (as have many "non-Western" thinkers), but it seems to be a good view to hold; and we would be unlikely to see "the notion that each person is an end" used as a term of abuse, as if just to bring it up made argument unnecessary. See my "The Feminist Critique of Liberalism," in Nussbaum (1999a).

²⁷ See again Agarwal (1994).

have lives to plan, separate from those of the males (or the dominant group) with whom they live, is an idea that would be extremely difficult to establish, and one that probably could not be established.

I conclude that Rawls's analogy is deeply flawed. So far as his argument goes, at least, there seems to be no moral obstacle to justifying a single far more expansive set of human rights, or human capabilities, as fundamental norms for all persons.

IV. Justification and Implementation

There is another issue that troubles Rawls, however, and it ought to trouble us.

Rawls clearly thinks that if we conclude that another nation has defective norms we will intervene in some way, whether through military intervention or through economic and political sanctions. Usually he treats the question, "Is this nation worthy of respect as a member of the society of peoples?" as if it is equivalent to the question, "Should we refrain from intervening in that nation to seek the implementation of our own moral standards?" Indeed, it is in large part because, for Kantian reasons, he believes that intervention into the sovereign affairs of another republic is morally problematic that he is eager to conclude that we may respect hierarchical nations as members in good standing of the Society of Peoples.

But of course the two questions need not be linked in this way. We may think that the standards of a given nation are defective, and that we can justify as applicable to that nation a more extensive menu of basic rights and liberties than it now recognizes, thus making justified criticisms of that nation, without thinking that we have the right to intervene in its affairs, either militarily or through economic sanctions. We may take this line if we believe that there are independent grounds for refraining from interference with other nations under certain conditions, grounds

that do not depend on our believing that we ought to express respect for the hierarchies around which this society has organized itself.

What might those independent grounds be? I believe that they are the very grounds suggested by Kant in Perpetual Peace: a moral loathing of colonial domination and a related moral belief that one should respect the sovereignty of any nation that is organized in a sufficiently accountable, whether or not its institutions are fully just. Recognition of the moral importance of the state as an expression of human autonomy is already a prominent feature of Grotius' discussion of humanitarian intervention in De Iure Belli Atque Pacis (On the Law of War and Peace): by forming sovereign states and giving themselves laws, human beings assert their moral autonomy.²⁸ Because one respects the citizens of a nation, and because one believes that the nation is, if in many respects imperfect, still above a certain threshold of inclusiveness and accountability, therefore one will refrain from military intervention into the affairs of that nation, and one will negotiate with its duly elected government as a legitimate government.

This recognition of a salient distinction between justification and implementation is typical of the modern human rights movement, which uses persuasion in most cases and urges forcible intervention in a very small number of cases. The U. S. receives heavy international criticism for its recognition of the death penalty, but there is no mainstream campaign for military or economic intervention against the United States on this account. Cases of genocide, torture, and other very severe human rights violations do give rise to discussion of forcible intervention, or economic sanctions (for example, in the case of apartheid in South Africa).

²⁸ See my treatment of Grotius in Nussbaum (forthcoming). So expressed, the view sounds like a comprehensive doctrine, and Grotius surely does not distinguish between political and moral autonomy, as I (with Rawls) would like to do. So my version of the Grotian argument would say, instead, that by giving themselves laws, human beings assert a political autonomy that can be agreed to be important even by citizens who differ about the value of a comprehensive moral autonomy.

What is the rationale for this deference to the state, if one believes that one can justify certain moral principles as binding on all? There may, of course, be strong prudential arguments against countenancing widespread humanitarian intervention. Such interventions may destabilize the world; moreover, the more powerful states are likely to view any robust practice of moralistic intervention as an excuse to tyrannize over the weaker. Kant already pointed out that colonial domination, in his time, proceeded behind a mask of moral improvement.

But Grotius' reflections on national sovereignty suggest a deeper argument against widespread intervention, one that derives from the dignity of the individual human being. The ability to join with others to give one another laws is a fundamental aspect of human freedom. Being autonomous in this sense is no trivial matter: it is part of having the chance to live a fully human life. In our day, as in Grotius' time, the fundamental unit through which people exercise this fundamental aspect of human freedom is the nation-state: it is the largest and most foundational unit that still has any chance of being decently accountable to the people who live there. International agencies and bodies like the U. N. are simply not (or not yet) accountable in this way; even the EU raises serious issues of accountability. Nor do local exercises of autonomy, at the city or village or even state level suffice, for the reason given by Rawls: the "basic structure" of the nation-state influences people's life chances pervasively and from the start. Thus the nation-state, and its basic structure, are, as Grotius already argued, a key locus for persons' exercise of their freedom.

This argument concerns the state, and the institutions that form its basic structure. It is an argument about laws and institutions. It has nothing at all to do with the murky question of "peoples" with "common sympathies," a notion that I have already criticized as not very helpful in the context of our questions. This argument is just as

applicable to India, heterogeneous and polyglot as it is, as to Bangladesh, far smaller and at least a little more homogeneous.

Following Grotius and Kant, we are working our way toward what the contractarian approach was unable to supply: a moral/political argument for the salience of national sovereignty. Rawls simply begins from the state (setting aside, for a moment, his detour through the concept of a "people"). In today's world, however, one cannot simply take the state as given (if one ever could), since national sovereignty is actually under threat from a variety of directions, above all from the influence of multinational corporations and the global economic structure. Rawls can give us no insight into why we might care about state sovereignty or try to prop it up against its competitors; our Grotian argument gives us at least the germ of such an insight.

Consider in the light of this argument the case of a nation that fails, for example, to offer women equal property rights. (India is an example of such a nation.²⁹) So long as this nation is above a certain threshold in terms of democratic legitimacy, much though one might deplore the inequalities of women under that state's constitution, it would not be right to intervene in coercive ways. These threshold conditions would be weaker than those required for being respected as a fully and equally just society in the society of peoples. Most nations in the world today are unjust in one or more respects, and it is right for discussions in international society to argue that they are unjust and to hold up to them standards of full equality and dignity that one can recommend as applicable to them. But it would not be right to impose economic sanctions on them, far less military force, so long as they pass

²⁹ See Agarwal (1994). Laws vary from state to state and from religion to religion. Christian property law (which gave daughter's one-fourth the share of sons) has been declared non-applicable to Christian women in Kerala; but in many states Hindu property law still contains large inequalities, giving women smaller shares and in some cases tying property to jointly owned family consortia, in such a way that a woman who leaves a family cannot extricate and separately control her share. Subsequent work by Agarwal has shown a high correlation between land ownership and the ability to resist domestic violence: so this issue is of consequence for more than one capability.

a much weaker test of accountability, a test that today's United States and today's India, for example, will both pass, even though both fall well below the standards of full human rights protection that we can justify and rightly recommend. The case of South Africa under apartheid was different: a large majority of the population was completely excluded from governance. India acquired problematic status after the genocide and mass rapes in Gujarat, and before the electoral defeat of the Hindu right.³⁰ By even the narrowest and most traditional accounts of humanitarian intervention, Gujarat was a case for it. The argument against intervention in that case is in part prudential: intervention would surely have created far more problems than it solved, and we can now see in retrospect that internal electoral processes worked very well. But there is a further argument to be made on the basis of an idea of citizen autonomy: so long as democratic processes in India are robust, as they were and are, we should prefer to allow them to take their course, out of respect for these processes themselves and the citizens who involved in them, in the hope that over time duly elected officials and duly appointed courts will bring the offenders to book and prevent further abuses, as seems to be happening in the aftermath of the elections of May 2004. In such a case, intervention can appropriately be confined to diplomatic efforts and public persuasion – although there might have been more of that than there was.

What is the threshold of legitimacy? A reasonable accountability of government to people: and here Rawls's conception of a "reasonable consultation hierarchy" may offer good guidance. We should note, however, that the case of women is extremely difficult in this regard. If South African apartheid met the criteria for intervention, there are many such cases in the world regarding women. Often they are not given equal voting rights, sometimes no voting rights; their property rights are unequal. Would such human rights violations be sufficient to warrant economic

³⁰ See Nussbaum (2003c).

sanctions? In moral terms there is a strong case to be made, and it is shocking that one hears so little about this in international debate.³¹ Brutal and oppressive discrimination on grounds of race is taken to be unacceptable in the global community; but brutal and oppressive discrimination on grounds of sex is often taken to be a legitimate expression of cultural difference. Clearly, we can justify the same norms for all nations. But any complete or virtually complete exclusion of women from the political process gives rise, as well, to a moral case for economic sanctions or some other form of coercion. The arguments against such policies will be primarily prudential.

Someone might ask whether we do really show respect for a state and its people, if we criticize it and suggest that it violated important moral norms that can be justified for all. It is important to approach this question by insisting at the start that no existing state is fully just. All contain violations of important moral principles. It is surely not respectful of another nation when state actors or concerned citizens criticize only other nations and fail to criticize their own. For example, if the U. S. keeps on harping on human rights violations abroad and fails to take cognizance of the fact that its own stance on capital punishment is unacceptable to the international community, and that its situation with regard to social and economic rights lags well behind that of most developed nations, this seems disrespectful. On the other hand, it is perfectly possible to express criticism in the context of an acknowledgement of one's own failure fully to live up to principles of justice.

Where there is a gap between what we can justify morally for all and what we are morally entitled to implement, what should we do? One obvious thing we may and should do is to work out international treaties protecting the human rights that we believe we can justify and then work to get the nations of the world to adopt and

³¹ Catharine MacKinnon developed similar ideas very convincingly in "Women's 9/11," a Dewey Lecture delivered at the University of Chicago Law School.

implement them. Beyond this, it seems to me that nations are often entitled to offer aid in ways that reinforce causes they believe important. Thus it would be legitimate for the U. S., in giving aid to India, to target education, health care, and, as Clinton did, the empowerment of poor women, and to try to make sure that the aid gets used on these things rather than on building more nuclear bombs or "Hinduizing" textbooks.³² It would also be legitimate to use diplomatic exchange as a way of drawing attention to those issues, as when Clinton used the occasion of his visit to India to draw attention to the situation of poor rural women struggling for credit and property rights. In the case of India, the legitimacy of this way of proceeding is uncontroversial, given that the cause of female empowerment and equality is a deep part of the Indian constitutional tradition itself. To the extent that a nation fails to endorse such goals publicly and constitutionally, we would be right to proceed in a more cautious way, but we would probably still be entitled to focus aid on projects that seem to us morally good. And of course individuals are always free to focus their aid on projects they favor.³³

At this point Rawls might say that I have conceded his basic point: that we should treat nations as decent members in good standing of the society of peoples on a much weaker showing of liberal freedom and equality than we would demand within a liberal society. And indeed Rawls and I have converged in some respects on a set of practical principles. Am I not in effect conceding that we refrain from these impositions out of respect for a people and its traditions?

No, I am not. First of all, my argument has had no use for the concept of a people. I am arguing that we ought to respect the state, that is, the institutions of the basic structure of society that a given group of people have accepted, and that are

³² A prominent pillar of educational policy under the BJP government was the rewriting of national textbooks to bring them into line with the view of history and culture held by the Hindu right; education minister M. M. Joshi was one of the most vehement partisans of a Hindu-supremacist vision of society. This unfortunate policy is now being reversed under the new government.

³³ On these matters, see further Nussbaum (2001b).

accountable to them. The state is seen as morally important because it is an expression of human choice and autonomy: and of course it is the state that expresses the desire of human beings to live under laws they give to themselves, not the "people." It makes no difference to my argument whether the inhabitants of the state can be said to constitute a people in Rawls's sense, that is, sharing traditions and a relatively extensive conception of the good. Nor does my argument require us to relax in any way the moral judgments we make about the wrongness of actions in another nation, as Rawls's argument clearly does. It does not rely on any recognition of group rights, as Rawls's appears to, and it continues to maintain that the person is the basic subject of the theory of justice. It simply recognizes the fundamental bond between citizens and the basic structure of the state that is theirs, and it shows respect for that bond, as a way of respecting persons. More simply put, it is an argument about implementation, not justification, and it insists that there is a basic distinction between those two issues.

V. Assessing the Two-Stage Contract

Our close examination of Rawls's two-stage contract has put us in a position to assess, more generally, the prospects and defects of the two-stage social-contract structure. The approach has grave difficulties as an approach to problems of global justice. Starting from the nation-state as its basic unit, it fails to take cognizance of the global economic order and the disadvantages it imposes on poorer nations. Nations are supposed to solve their problems by thrift and good character, as if there were no transnational structural obstacles to their doing well. The assumption of the fixity and finality of the domestic basic structure prevents serious consideration of economic redistribution across national boundaries, and it also precludes a role for treaties and international agreements in prompting domestic

political change. Nor can the two-stage contract even offer an attractive account of why national sovereignty should be thought morally salient, because it is simply taken for granted as the starting point.

Rawls's analogy between persons and states, buttressed by his second-stage principle of toleration, is, moreover, insufficiently respectful of disadvantaged groups within each nation. His toleration argument justifies as fully and equally just systems that violate many of the human rights that the international order currently recognizes. No convincing argument is given as to why a much richer and deeper set of norms could not be justified for all the world's people, taking the person as the basic subject of justice.³⁴ To the extent that human rights do enter the picture, their role in the theory represents a departure from the contractarian approach, in the direction of an outcomes-oriented approach.

Even more fundamentally: the contractarian approach, based as it is on the idea of mutual advantage, requires that all parties believe they have something to gain by departing from the State of Nature and entering into a contract. They must be rough equals, in Humean circumstances of justice (if we assume that Rawls still accepts that requirement): no one can dominate all the others, and none is so disabled as to be a drag on the cooperative enterprise. This is not the situation of the world. Rawls's attempt to address this problem by separating "burdened societies" from the ones who make the contract represents, once again, a departure from the contractarian approach, in that he allows the parties to use empirical information about global inequalities to structure the contract. Moreover, even this departure is insufficient: for the inequalities that obtain among liberal democratic states are extremely severe, some having GDP per capita approximately thirty-four times as great as others. So the problem is not removed –

³⁴ Rawls never quite says that a fuller set of norms cannot be justified, but he does suggest that it is for this reason that we should focus not on the entirety of the Universal Declaration but only on a few urgent rights.

unless we simply rule by fiat that South Africa, Bangladesh, India, and so forth are not members in good standing of the Society of Peoples, and thus not participants in the contract. But why should we say this? No good reason has been offered to exclude them. Even the admission that there is a problem about including them betrays the contractarian's reliance on mutual advantage as the cement of the contracting group.

VI. The Global Contract: Beitz and Pogge

A far more appealing use of a contractarian approach is made by Charles Beitz and Thomas Pogge.³⁵ For both of these theorists, the right way to use Rawlsian insights in crafting a theory of global justice is to think of the Original Position as applied directly to the world as a whole. The insight guiding this strategy is that national origin is rather like class background, parental wealth, race, and sex: namely, a contingent fact about a person that should not be permitted to deform a person's life.³⁶ People's basic opportunities in life should not be violated by unfair hierarchy, whether the hierarchy is based on race or sex or class, or on birth within a particular nation.

Pogge and Beitz argue convincingly that the only way to be sufficiently respectful of the individual as subject of justice, within a Rawlsian framework, is to imagine that the whole global system is up for grabs, and that the parties are contracting as individuals for a just global structure. Both argue, in different ways, that the resulting structure will be one that optimizes the position of the least well off. For Beitz, natural resources will no longer be viewed as the property of the nation within whose territory they lie. Instead, a global redistribution principle will be created to

³⁵Beitz (1979), Pogge (1989).

³⁶ Pogge (1989), 247.

govern rights over these assets. For Beitz, natural resources are like natural talents: and he interprets Rawls as holding that individuals do not have ownership rights in their natural talents (136-42). Pogge points out, correctly, that Rawls's view is subtly different: individuals may keep and use their natural talents, but they do not have an unqualified right to the profit derived from those talents. The overall system will ensure that advantages derived from these talents are used in a way that optimizes the position of the least well off.

Beyond this, Pogge's view (which he calls "only illustrative speculation" [273]) envisages an initial global agreement on a list of human rights, which, over time, becomes more robust, including a system of global economic constraints. The list of human rights is considerably thicker than that defended by Rawls: it includes the entirety of the Universal Declaration, plus an effective right to emigrate (272).

Natural resources are also subject to redistribution. Pogge does not insist that all nations satisfy Rawls's Difference Principle internally, so long as they bring it about that the position of the least advantaged people in the world is optimized.

The Pogge-Beitz proposal is a big improvement over the two-stage contract. The global Veil of Ignorance is an insightful way of capturing the idea that a just global order will not be based on existing hierarchies of power, but will be fair to all human beings, who all count as moral equals. The proposal also embodies an attractive idea of human freedom, in that it depicts all parties as equal choosers of the global order that will ensue.

One significant difficulty with these proposals is their vague and speculative nature. We are not told in detail exactly how the design of the global Original Position will work. For example: what kinds of general information will the parties have and not have? Obviously they are not supposed to know what their own nation is; but if Rawls's idea is really being followed through with literal accuracy, they should not

know their century either, and this means that they should not know whether their world has technology or not, whether it contains nation-states or not, whether it contains multinational corporations and global trade agreements or not. But that is far too much vagueness. If you do not know that a multinational corporation exists, you will probably not imagine one as a part of an ideal structure of global justice; but then you will not have anything useful to say about how to control such entities, how to relate them to nation-states, and how to make sure that they take on some important moral commitments in their dealings with others. If you do not know about the internet, it will not be easy to imagine it: but then you will not be able to address the inequalities created by differential access to it. And so on.

In short, the world we live in exhibits changing configurations of power at the level of basic structure itself; even one hundred years ago it would have been difficult to predict what those structures would be. The new structures govern people's life chances pervasively and from the start. To require so much ignorance is to make the project utopian in a bad and unrealistic sense; it ensures that pressing problems of justice will be ignored. But if general social facts like these are to be known to the parties, then we need an account of what they know and what they don't know.

A related area of unfortunate vagueness concerns the role of the nation-state. Pogge and Beitz set out to question the finality and closed character of domestic state structures. But they do not tell us how far they really want to go. Are we standing back so far from current events that the very concept of the state will have to be reinvented, and considered against other options for arranging people's lives? But it is hard to arrange human lives in a complete vacuum. How can we say whether the state is or is not a good structure, without first assessing its relation to other aspects of life, such as trade, the flow of information, the presence of international agencies and agreements? The moral arguments that commend

the state as an important expression of human autonomy did not arise in a vacuum, and it is not clear that they can be successfully made in a vacuum. Moreover, it seems an empty exercise to justify the state unless and until we have a sense of what the real forces are that might undermine it, or provide alternatives to it. Without this knowledge we cannot choose well. If the parties do have such historical knowledge at their disposal, Pogge needs to be explicit about this departure from Rawls.

Finally, we need know more about what primary goods the parties are imagined as pursuing. Pogge depicts himself as following Rawls closely, and yet he also thinks that his parties will agree on a long list of human rights, going well beyond the Rawlsian list of primary goods and also beyond the thin list of rights recognized in LP. Following the Universal Declaration, against both the Rawls of TJ and the Rawls of LP, Pogge links the sphere of liberty and the economic sphere very closely together, arguing that the major liberties have a material aspect. And like the Universal Declaration, Pogge seems to measure relative social positions by the fulfillment of rights, rather than by income and wealth. Once again, Pogge needs to tell us how far he really intends to depart from Rawls's idea. If his primary goods are human rights, understood in a way that links liberty with its material underpinnings, then his view will converge substantially with the capabilities approach, in ways that seem to take it away from Rawls's own view.

These are all questions that might be answered, although an adequate response will probably require departures from the Rawlsian framework in the area of information and in the conception of primary goods. At this point, however, we arrive at the most serious difficulty with the Pogge-Beitz proposal: what is the contract all about? The Rawlsian social contract takes place in Humean circumstances of justice, and it is a contract for mutual advantage. Pogge has focused on the requirement of fairness that is built into Rawls's Veil of Ignorance

and simply omitted mention of Rawls's endorsement of Humean circumstances of justice as the starting point for the contract. As Rawls insists, the requirement of equality among the parties is his analogue to the State of Nature in classical social contract doctrine, so Pogge would also appear to have omitted the State of Nature. At least he does not mention it. But if that is omitted we have a major departure from the social-contract tradition. Pogge certainly does not tell us that he is departing from that tradition: for example, he does not endorse Scanlon's pure Kantian contractarianism or Barry's political version of it. He focuses on Rawls, and apparently refuses to modify Rawls's theory in the direction of a pure Kantian contractarianism of the Barry/Scanlon type.³⁷ He clearly keeps Rawls's Veil of Ignorance and the moral equality it imposes. But it looks as if he simply has not taken a stand on the issue of rough equality and Humean circumstances of justice, crucial though that issue is for the interpretation of his theory.

We have already seen that when the contract is envisaged as taking place among nations, it cannot be cast in standard social-contract form unless we omit not only non-liberal states, but also pretty much everyone except the G8. If we imagine the contract as taking place among individual persons, things are indeed different: for the individual persons of the world are at least morally equal, and in some ways they – all those who are not disabled, that is! -- might be argued to be roughly equal in basic economic productivity and life chances, before the contingencies of life begin to affect them. But when is that? Surely not at any time after birth, for every child is born into a world that begins to affect its life chances directly and dramatically, through differential nutrition, differential cognitive stimulation, differential exposure to kindness or violence, and so on. As we have seen, life

³⁷ There are questions of chronology here, but Scanlon was working on his theory for many years before the publication of his book, and had published crucial parts of it in article form; moreover, Pogge could have made a move in that direction independently, for example by announcing that he is keeping the Kantian element in Rawls's theory but rejecting its social contract component and its allegiance to Hume's Circumstances of Justice.

expectancy at birth in the poorest nations is less than half of what it is in the richest nations; these aggregate figures derives from all kinds of differences at the level of individual lives.

Are individuals equal in life chances before birth? Surely not. Whatever account we give of the fetus, we must say that by the time a human being is born, differences in maternal nutrition, health care, bodily integrity, and emotional well-being, not to mention HIV status, have already affected its life chances. The prenatal transmission of HIV affects staggering numbers of people in Africa today. For that matter, even getting the chance to be born is not a matter with respect to which there is rough equality: the alarming rise in sex-selective abortion in many developing countries means that females conceived in some parts of the world are grossly unequal in life chances both to boys in that same part of the world and to girls and boys in other parts of the world.³⁸

Unfortunately, then, the inequalities between nations that make the two-stage contract exclude some nations in order to conform to the Humean circumstances of justice are translated into inequalities between persons in basic life-chances. There is no time when a human or even a potential human is alive that such inequalities do not obtain.

Pogge and Beitz abhor such inequalities in basic life chances. To cope with them, providing a philosophical rationale for an ambitious commitment to global redistribution, is the whole point of their project. But what I am trying to bring out is that this commitment is not so easily reconciled with the Rawlsian framework, even in the improved non-Rawlsian way in which they use it. It is all very well to say that the Original Position should be applied at the global level; that idea does dramatize some important issues of fairness. But once we go into things in more

³⁸ See Drèze and Sen (2002), 257-62.

detail, we find that the global contract they propose actually requires a departure of major proportions from the Rawlsian framework. For it requires abandoning the Humean circumstances of justice as setting the stage for the contract, and including from the start all who are currently unequal in power. Above all, it requires admitting from the start that the point of the contract is not, and cannot be, mutual advantage among "rough equals." It must be human fellowship, and human respect, in a more expansive sense.

Perhaps it is not surprising that in the light of these problems Pogge has turned, in recent work, toward a full-fledged human-rights approach, very close to the capabilities approach that I shall favor, and away from Rawlsian proceduralism.³⁹

VII. Prospects for an International Contractarianism

In the international domain, contractarianism of a Kantian type has strong attractions. To begin with, it is a normative ethical approach to international relations. As such, it is superior to Hobbesian⁴⁰/realist approaches that see the space between nations as a space devoid of binding moral requirement, a space where nations may unrestrainedly pursue power and security interests. Such approaches have dominated in the international sphere in recent years, as they apparently did in the time before Grotius, and they have led to a debasement of international relations. Among the ethical approaches we might use, contractarianism seems greatly superior to economic Utilitarianism. It takes seriously the equal dignity of each and every human life, as Utilitarianism, committed as it is to aggregation, cannot fully do. And it takes seriously as well the idea that preference and desire can be deformed by unjust background conditions; so it

³⁹ Pogge (2002).

⁴⁰ But note that Hobbes's own approach is more complex, since he recognizes at least some role for justice and moral obligation in the State of Nature, although he also holds that these concerns will be impotent: see ch. 1.

does not attempt to build up the political account of basic justice simply from a reliance on people's preferences. In all these ways, contractarianism agrees with the approach that I shall ultimately favor.

Moreover, the central idea of contractarianism, that of fair terms of cooperation, is a powerful and necessary idea, which is captured elegantly in the procedural device of the Original Position. In the world arena even more than in the domestic sphere, it is immensely valuable and clarifying to insist that we want the basic principles that govern people's life chances to be fair to all of them, and chosen in such a way that nobody could reasonably reject them. These ideas, as well, will play a role in my own normative approach.

The most severe difficulties with Rawlsian contractarianism come, once again, from the elements in contractarianism that I have singled out as problematic from the start: the commitment to a rough equality of power in framing the initial contract situation and the associated commitment to mutual advantage as the goal of the contract. Can a contractarian give up the commitment to mutual advantage, along with the whole idea of the State of Nature? Not unless there is another account of the purposes of social cooperation, and another story about what goods the parties are imagined as pursuing. Once again, a contractarianism along Scanlonian lines, equipped with a suitable political theory of primary goods, can still perform an important philosophical task, and such a theory will remain one of the important alternatives to an entitlement-based theory of the sort that I shall offer. There will be great convergence between such an approach and mine, because that approach will need an account of the good, and mine needs a role for rational acceptability in its account of a potential overlapping consensus in the international domain.

Can a contractarian approach also do away with the new difficulty that Rawls's theory had in the global domain, namely its commitment to the fixity and finality of the domestic basic structure? Again, I see no reason why not, once it is prepared to jettison the classical idea of choosing principles in a State of Nature, which does strongly suggest the classical doctrine that the parties are choosing principles for a state of some sort. There are strong reasons why no contractarian approach currently on offer is responsive to the changing configurations and loci of power in today's world, including multinational corporations and international agencies alongside states in its thought about basic justice. But a Scanlonian type of contractarianism can probably include those entities and can also treat domestic basic structures as modifiable by international agreements.

Expressed in Scanlon's way, then, the idea of fair terms of cooperation (terms that cannot be reasonably refused) is a powerful intuitive way of capturing the idea that human beings are moral equals despite their widely differing circumstances in an unequal world. This idea is important in the discussion of global justice. But it can do little work in political thought without a political account of the good, particularly an account that specifies the basic entitlements of all human beings. The capabilities approach begins from such an account.

