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JUSTICE IN THE INTERNATIONAL SYSTEM

Thomas M. Franck*
Steven W. Hawkins**

I. INTRODUCTION

"Justice," Rawls claims in A Theory of Justice,1 "is the first virtue of social institutions. . . ."2 The principles of justice of which Rawls speaks, however, except for a brief excursion, "apply only within the borders of a nation-state."3 Our purpose is to see whether justice is also the first virtue of the international system, the social institutions of the community of nations. More specifically, is justice the definitive virtue by which to judge international law? This article seeks to answer those questions by examining the concept of justice as developed by various theorists, culminating in the contemporary Rawlsian theory of justice. It then examines whether the international application of the Rawlsian concept of justice can serve as a useful guide to those participating in the building of an international system with the help of laws and law-making institutions. To this end, we test the Rawlsian concept of justice in three existential situations where popular claims of justice appear to be in conflict, to see whether the Rawlsian concept is capable of providing a definitive answer to the problem of indeterminacy. Finally, this article explores the relationship between justice and a related concept, legitimacy, in the international system.

Why bother with justice? What is the payoff? Msgr. Ronald Knox, when asked by a student: "Why study ancient Greek?" is said to have replied: "Aside from the fact that Greek happens to be the native language of the Holy Ghost, it is a requisite for social advancement at the universities." One might venture a paraphrase: "Aside from the fact that justice is the historic global aspiration of all humanity, it is the enduring intellectual preoccupation of those at the univer-

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2. Id. at 3.
sities with any jurisprudential inclination." There are also considerations that are more utilitarian. The international community makes its rules primarily by bargaining. In the negotiations leading up to an international treaty, it is tactically useful to be able to argue a case based not only on self-interest but on the coincidence (or an accommodation) between self-interest and justice. To do that, a negotiator must have a theory of justice which transcends national interest and is universally cognizable. Thus, the pursuit of such a theory is not a purely intellectual-philosophical conceit.

Moreover, the ability of a treaty to obligate, even one which has been signed and ratified by most states, will depend in part on whether it appears to operate in accordance with generally recognized principles of justice. This is not identical to whether the treaty embodied just principles when it was drafted. The utilitarian considerations, however, are similar. It will be easier to persuade a state or states to obey the treaty if it is seen to be just "on its face" and if it appears to be operating justly: that is, in accordance with a generally accepted notion of what justice is. Conversely, the costs in community disapproval incurred by a state which fails to comply with a treaty commitment will vary in proportion to the general perception of the textual and existential justice or injustice of the obligation. Thus there are practical as well as philosophical reasons to concern oneself with the notion of justice in the international community.

These reasons are not refuted by the vulgarization of the concept in the superficial propagandistic rhetoric of statecraft. It is strategically beneficial, not merely morally satisfying, for a state to be able to argue convincingly to the governments of the world that it is acting justly, or against injustice. However, the operative word, here, is "convincingly." This means that the justice claim must resonate in the hearts and minds of the governing elites and attentive publics of the nations of the world, at a minimum. To be at all effective, the justice claim must be framed in globally cognizable terms. This is not easy, but it happens to correspond quite closely to Rawls's notion of what it takes to arrive at a principle of justice.

II. HISTORICAL FOUNDATION OF RAWLS'S THEORY

Rawls's theory of justice is based upon a negotiating metaphor in which the persons (representing themselves, or, in one scenario, nations) come together to work out rules for survival, commerce and other aspects of social accommodation and progress. The metaphor, it is apparent, is closely related to others used to explain the consensual or congruent basis of certain kinds of socio-political association.
necessarily, it is kin to the idea of a social contract as the basis of govern-
ance, and it is there that the study of the Rawlsian concept of justice
must begin.

In order to understand the elaboration of social contract theory
proposed by Rawls in *A Theory of Justice*, it is necessary to examine
the historical foundation upon which he builds. Beginning with Hobbes’s
semeinal study, *Leviathan*,⁴ social contract doctrine has been re-
efined by Locke’s *The Second Treatise of Civil Government*,⁵ Rousseau’s
*On The Social Contract*,⁶ and Kant’s ethical works, notably *The Foun-
dations of the Metaphysics of Morals*.⁷ Rawls regards the work of
Locke, Rousseau and Kant as definitive of the social contract tradi-
tion,⁸ and so we begin our analysis with them.

III. *THE SECOND TREATISE OF CIVIL GOVERNMENT, ON THE
SOCIAL CONTRACT, AND THE FOUNDATIONS OF THE
METAPHYSICS OF MORALS*

Locke, like Hobbes, maintains that we are by our nature free, equal
and independent beings.⁹ Consequently, we can only be deprived of
our estates and of our liberty, and subjected to the political control of
another, if, and to the extent that, we agree to empower such author-
ity. We do this, as Locke states, “by agreeing . . . to join and unite into
a community for [our] comfortable, safe, and peaceable living one
amongst another, in a secure enjoyment of [our] properties and a
greater security against any that are not of it.”¹⁰

The community formed by the consent of each individual acts as
one body under the will and determination of the majority.¹¹ Each
person, in consenting to form a united body politic under one govern-
ment, is obligated to submit to the “determination of the majority, and

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⁴. T. HOBBS, LEVIATHAN (1651), reprinted in 3 THE ENGLISH WORKS OF THOMAS HOB-
BES OF MALMESBURY (W. Molesworth ed. 1839).
⁸. RAWLS, supra note 1, at 11 n.4.
⁹. Locke describes our natural condition — i.e., our status as free and equal beings — as the
state of nature. It is a state of perfect freedom, whereby we order our actions and dispose of our
possessions as we see fit. It is a state of equality, “wherein all the power and jurisdiction is
reciprocal” and creatures of the same species are “equal one amongst another without subordina-
tion or subjection.” See J. LOCKE, supra note 5, at 118. The state of nature is only bound by the
laws of nature, which proscribe each person from divesting another of the inalienable rights to
life, liberty and property. Id. at 119-20.
¹⁰. Id. at 164.
¹¹. Id. at 165.
to be concluded by it." Were it otherwise, the original social compact would be meaningless, and we would "be left free and under no other ties than [those existing] before in the state of Nature." Moreover, where the majority cannot make a determination or draw a conclusion, it cannot act as one body, and therefore dissolves.

Writing nearly a century later, Rousseau observed that the social compact is "a form of association which defends and protects with all common forces the person and goods of each associate. . . ." Properly understood, the compact for "the total alienation of each associate, together with all of his rights, to the entire community." However, this arrangement does not depreciate an associate's person and property, but rather appreciates them. Associates in the social union, by giving themselves and their belongings to the community, actually give all this back to themselves, in somewhat altered form. What they acquire back are precisely the same rights that they yield to others. They thereby gain an equivalent for everything that they lose. In addition, they gain an augmented collective force for the preservation of what they now have.

Although associates in a political community relinquish their natural liberty and right to adversary possession, they gain civil liberty and the proprietorship of all they possess. In weighing one against the other, Rousseau distinguishes natural liberty, "which is limited solely by the force of the individual," from civil liberty, "which is limited by the general will" and possession, "which is merely the effect of force or the right of the first occupant," from proprietary ownership, "which is based solely on positive title.

Moreover, the social contract creates obligations. Associates have obligations both to themselves and to every member of the union. These obligations civilize and socialize the members. As they move "from the state of nature to the civil state . . . duty replaces physical impulse. . . ." Notions of justice replace instinct as guides to their conduct, thereby giving their actions the morality that had been wanting. "[They are] forced to act upon other principles and to consult [their] reason before listening to [their] inclinations." This alone,
Rousseau maintains, makes an associate "truly the master of himself. For to be driven by appetite alone is slavery, and obedience to the law which one has prescribed for oneself is liberty."20

Kant seeks to further our understanding of parties to the social compact by explaining their actions in terms of the "categorical imperative."21 In other words, they act on the basis of general principles which are intuitively recognized and not self-contradictory. Examples include the keeping of promises or the telling of truth. It implies that each individual "act according to that maxim which you can at the same time will to be a universal law."22 The categorical imperative therefore enables the freedom of each person's will to exist together with the freedom of others according to mutually recognized principles.

Kant also places great emphasis, as did his contemporary, Rousseau, on human dignity. For him, rational beings exist as ends in themselves, and not merely as the means to an end.23 The systematic union of individuals by common objective laws is called a "kingdom of ends" because these laws have in view the relation of these beings to one another as ends.24 In this realm "everything has either value or dignity. Whatever has a value can be replaced by . . . [its] equivalent."25 Because persons are ends, and may not be used merely as means, they are above all price, and have no equivalent. They therefore possess dignity.

Morality, autonomy of will, and human dignity mold Kant's political theory, which focuses on the concept of right,26 equality before the law,27 and the need for an educational process that increases enlightenment.28 On the international level, Kant argues for a system of world peace and for world citizenship.29 Optimistically, he believes that the guarantee of perpetual peace was given by nature, which

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20. Id.
21. For an explication of the categorical imperative, see I. KANT, supra note 7, at 317-24.
22. Id. at 324.
23. Id. at 329-30.
24. For a discussion of this concept, see id. at 334-35.
25. Id. at 335.
27. Kant viewed equality before the law as an a priori principle of a civil state. See part II of Kant's essay On the Common Saying: This May be True in Theory, but It Does Not Apply in Practice, in KANT'S POLITICAL WRITINGS 74-77 (H. Nisbet trans., H. Reiss ed. 1970).
28. See § 3, ch. 10 of Kant's The Contest of Faculties (1798), reprinted in id. at 188-89.
shows a design to make harmony spring from human discord.³⁰

IV. RAWLS'S THEORY OF JUSTICE

Rawls has built a theory of justice on these contractarian notions of Locke, Rousseau, and Kant, adapting the idea of the social compact to formulate principles of justice by which to measure its presence or absence in the basic structure of any society. While Rawls does not seek to advance any particular form of government, his theory is intended to facilitate fairness and justice in the rules and institutions of any social system. Thus, he defines justice not in terms of a particular kind of association capable of producing a designated social good, but as one based on a rule of procedure, of decision. Rawls's principles of justice are whatever "free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association."³¹ The process by which principles of justice are defined is of crucial importance. What the principles produce in the way of "goods" is not irrelevant, but of secondary importance.

Crucial to this process-oriented concept of justice is the notion of an initial situation of equality. Rawls refers to it as the "original position," a purely metaphoric allusion in the tradition of social contractarianism. In this original position, parties to the social compact are unaware of their social or class status. They choose principles of justice behind a veil of ignorance, by which is meant that they would make their choice lacking specific knowledge of who they are in the real world: that is, in ignorance of their relative strengths, vulnerabilities and weaknesses. As noted by Rawls:

This [the veil of ignorance] assures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.³²

The veil of ignorance is the essential element of the original position since it implements the element of fairness that is essential to Rawls's theory. But there are three other essential components of the original position which also need to be understood before seeking to apply Rawlsian notions of justice to the international system: the cir-

³⁰ See first supplement (On the Guarantee of a Perpetual Peace) of Kant's Perpetual Peace, Kant's Political Writings, supra note 27, at 108-09.
³¹ J. RAWLS, supra note 1, at 11.
³² Id. at 12.
cumstances of justice, formal constraints on the concept of right, and rationality of the parties. We shall describe each in brief.

V. CIRCUMSTANCES OF JUSTICE, FORMAL CONSTRAINTS ON THE CONCEPT OF RIGHT, AND RATIONALITY

Circumstances of Justice\textsuperscript{33} refers to the background conditions which make social cooperation necessary in the original position. From an objective standpoint, there must exist a condition of moderate scarcity. By this Rawls means that parties must be in a situation of mutual co-existence with numerous claims to limited resources. In a Garden of Eden, the notion of justice would be irrelevant and the need to develop its principles behind a veil of ignorance would be a non sequitur. Subjectively, parties must possess their own life plans, which Rawls refers to as conceptions of the good, and these conceptions must consequently come into continuous conflict, each person being primarily interested in promoting his or her own well-being. Only in these circumstances is a notion of distributional justice relevant. As Rawls points out, "circumstances of justice obtain whenever . . . persons put forward conflicting claims to the division of social advantages under conditions of moderate scarcity."\textsuperscript{34}

Formal constraints of the concept of right\textsuperscript{35} are procedural limitations which Rawls believes must operate in the original position if principles of justice are to be negotiated successfully. The first constraint is that all principles of justice agreed upon must be general in form: "it must be possible to formulate them without the use of what would be intuitively recognized as proper names, or rigged definite descriptions."\textsuperscript{36} Second, they must be universal, holding for everyone by virtue of their being moral persons.\textsuperscript{37} Third, there must be publicity. Everyone in the community must be able to know what principles have been accepted. Fourth, there must be a process by which conflicting claims arising in respect of the application of an agreed general principle can be ordered through a process independent of such factors as the parties' social position, or intimidation and coercion. Fifth, the system of principles established in the initial position must be final in that "[t]here are no higher standards to which arguments in support of

\textsuperscript{33} See id. § 22, at 126-130.
\textsuperscript{34} Id. at 128.
\textsuperscript{35} See id. § 23, at 130-36.
\textsuperscript{36} Id. at 131.
\textsuperscript{37} Rawls explains that generality and universality are distinct. For example, if everyone has to serve the interests of a dictator, there exists the latter but not the former. See id. at 132.
claims can be addressed."\textsuperscript{38} In sum, Rawls states, "a conception of right is a set of principles, general in form and universal in application, that is to be publicly recognized as a final court of appeal for ordering the conflicting claims of moral persons."\textsuperscript{39}

Rationality of the parties\textsuperscript{40} is assumed in discussion of the original position. As explained by Rawls, "[a] rational person is thought to have a coherent set of preferences between the options open to him. He ranks these options according to how well they further his purposes; he follows the plan which will satisfy more of his desires rather than less, and which has the greater chance of being successfully executed."\textsuperscript{41} Consequently, the principles of justice are derived through a process that seeks to maximize the self-interest of each participant in the social compact, given their limited information about the community and their role in it. In other words, the parties are deemed to have in their heads a map of the sort of society to which they want to belong even though they do not know what their role in it will be. They are assumed to intend to pursue the building of such a society in a rational manner by negotiating applicable general principles to govern that society's operations. Stated another way, "persons in the original position try to acknowledge principles which advance their system of ends as far as possible. They do this by attempting to win for themselves the highest index of primary social goods, since this enables them to promote their conception of the good most effectively whatever it turns out to be."\textsuperscript{42}

VI. LIBERTY AND EQUALITY: THE PREEMINENT PRINCIPLES

Having outlined the characteristics of the Rawlsian original position, the stage is set to approach his principles of justice. We know that parties will negotiate the social compact behind a veil of ignorance, which guarantees that they will choose neutral principles because they lack biasing knowledge of their role, circumstances, talents and infirmities in "real" life. We also know that they will bargain in socio-economic conditions of moderate scarcity and that the parties will have conflicting claims to limited resources that will reflect their various conceptions of the social good.

What choices will such negotiators make? Where will their preferences overlap to form general principles? Rawls believes that under

\textsuperscript{38} Id. at 135.

\textsuperscript{39} Id.

\textsuperscript{40} See id. § 25, at 142-50.

\textsuperscript{41} Id. at 143.

\textsuperscript{42} Id. at 144.
the posited conditions, parties acting rationally and in compliance with the formal constraints of the concept of right will agree on two principles for ordering the basic institutional structure of society. The first, The Principle of Liberty, would state that "Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."\(^4\) The second, The Principle of Equality, would state that "Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."\(^4\)

Moreover, these two principles would emerge in "lexical order." Rawls explains that "[t]his is an order which requires us to satisfy the first principle in the ordering before we can move to the second. . . . [T]he basic structure of society is to arrange the inequalities of wealth and authority in ways consistent with the equal liberties required by the preceding principle."\(^4\)

**VII. THE RAWLSIAN THEORY OF INTERNATIONAL JUSTICE**

Rawls's concepts have been addressed, essentially, to justice in national community, to what he refers to as "a special case of the problem of justice."\(^4\)\(^6\) By this he means that his notions of how principles of justice are negotiated behind the veil of ignorance assumes that the negotiators are drawing up rules "for the basic structure of [a] society conceived . . . as a closed system isolated from other societies."\(^4\)\(^7\) Thus, his principles are not necessarily applicable to a multinational gathering of negotiators, and Rawls admits that "the law of nations may require different principles arrived at in a somewhat different way."\(^4\)\(^8\) Nevertheless, after describing the principles for domestic justice (the basic institutional structure for any society),\(^4\)\(^9\) Rawls does briefly consider the problem of justice in the international arena.\(^5\)\(^0\)

43. *Id.* at 60.
44. *Id.* at 83.
45. *Id.* at 43.
46. *Id.* at 7.
47. *Id.* at 8.
48. *Id.*
49. Parties only reach the question of international justice after having first dealt with the basic structure of social institutions and, secondly, with natural duties, obligations and permissions of individuals. The order of progression is supposed to create a coherent set of principles for justice as fairness. And, presumably, by the time the issue of the law of nations is reached, conceptions of international justice are sufficiently circumscribed by the constraints of institutional and individual justice. See schematic diagram and discussion, *id.* at 108-11.
50. See *id.* § 58, at 377-82. Rawls considers the situation of a conscientious objector to a war
He begins by reinterpreting his concept of the original position as follows:

One may extend the interpretation of the original position and think of the parties as representatives of different nations who must choose together the fundamental principles to adjudicate conflicting claims among states. Following out the conception of the initial situation, I assume that these representatives are deprived of various kinds of information. While they know that they represent different nations each living under the normal circumstances of human life, they know nothing about the particular circumstances of their own society. Once again the contracting parties, in this case representatives of states, 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 original position is fair between nations; it nullifies the contingencies and biases of historical fate. Justice between states is determined by the principles that would be chosen in the original position so interpreted.

Rawls does not argue for any specific international principles, but, instead, presumes that states would agree to principles that are already familiar to us. Citing Professor Brierly, he does suggest what some of these are likely to be. The first might be that states are endowed with certain fundamental equal rights, ones which are analogous to the equal rights of citizens under a constitutional government. Starting here, Rawls finds it possible to deduce some other principles to which states would agree in the original position, including those that approximate "liberty." Thus, in addition to the notion of equality, states might agree to the principles of nonintervention and self-determination.

We will use these hypothetical principles to test the applicability of Rawls's notion of justice to the international community. To do so, it is not necessary to agree that they are the principles on which agreement would actually be reached by states' representatives negotiating behind a global veil of ignorance in accordance with the applicable Rawlsian strictures described in section 5, above. It is our purpose merely to examine whether any general principles of justice arrived at in the prescribed manner could serve as a reliable yardstick with which to measure actual normative distance in the real world: that is,
to judge the justice of actual state conduct and of specific international agreements.

The ensuing sections of this essay will attempt such an application of hypothetical principles of justice. It is assumed that 1) certain principles have been agreed by the representatives of states; 2) that in particular existential situations or crises, the meaning and application of those principles is put in question; and 3) that the outcome of resolution of the existential situation will, in part, depend upon whether a specific, convincing just solution can be derived from a general principle. In other words, are general principles of justice able to offer guidance to just action in particular situational conflicts? It should again be recalled that, even if the answer to this question is in the affirmative, this would only demonstrate that principle as justice could be a factor relevant to the resolution of actual problems in the life of the community of states. It does not demonstrate that nations would choose to act justly. As we noted in the introduction, however, justice has politico-social "clout" as leverage in negotiating solutions to contested problems, quite aside from its intrinsic philosophical merit as evidence of the grace of states.

VIII. Nonintervention

Suppose control of the sovereign state of Malarkey with a population of 7 million had been seized from a democratic but corrupt government by an army coup headed by a paranoid colonel who had instituted a reign of terror against the middle class, professionals, civil servants and anyone with more than an elementary education. In the first twelve months, a million civilians had been executed summarily, half a million were arbitrarily imprisoned or had disappeared. The economy was destroyed and two million starving refugees had relocated in neighboring states. The foreign ministers of these neighbors have gathered to discuss the situation. There is talk of collective intervention in Malarkey. Would Rawlsian general principles of justice be relevant to such a conference? If considerations of justice are assumed to play a role in the outcome of these states' deliberations, what would be the applicable principles of justice? Is it possible to state relevant principles of justice that would be convincing to the world's governments and attentive publics?

As noted in the previous section, Rawls has addressed this problem briefly. Using his veil of ignorance metaphor, he has pictured representatives of states, unaware of which states they represent, arriving at a general principle of nonintervention. In his conception of the international original position, Rawls postulates a world of separate and
equal states, sovereign and autonomous entities, analogous to persons as Kantian ends in themselves.\textsuperscript{53} As representatives of these societies, parties to the negotiations behind the veil of ignorance naturally would be guided by considerations of equality between “independent peoples organized as states,”\textsuperscript{54} since that is what the negotiators represent, and they are ignorant of whether “their” states are powerful or weak, threatened or threatening. Acting in rational self-interest they would therefore concur in a principle of nonintervention: the sovereign right of each state to settle its own internal affairs without external pressure.

This general principle, however, happens to be identical to the Hobbesian understanding of the state of nature, which should give pause to anyone seeking to define principles of justice. For Hobbes, the state of nature is a state of equality among people. There is no political authority towering over them. Each person acts only for autonomous, selfish reasons. In those circumstances, Hobbes said, no moral principles can govern. The absence of a government to reward compliance or punish noncompliance with a moral code means that persons would not obey one. There would be no rational basis for yielding autonomy because no one would believe that, in the absence of a leviathan capable of enforcing normative obligations, compliance by one would be reciprocated by the many.\textsuperscript{55}

Hobbes postulates international relations which correspond with this state of nature. Thus, among states there can be no guiding moral principles. All “kings, and persons of sovereign authority, because of their independence, are in continual jealousies, and in the state and posture of gladiators [the state of war] . . . .”\textsuperscript{56} Moral constraints are unfettered because “in states, and commonwealths not dependent on one another, every commonwealth . . . has an absolute liberty, to do what it shall judge . . . most conducing to [its] benefit.”\textsuperscript{57} Professor Charles Beitz characterizes this as “international moral skepticism.”\textsuperscript{58} Professor Antonio Cassese has recently demonstrated that the moral climate in Hobbes’s time was not so different from ours. He argues

\textsuperscript{53} Rawls here follows the thoughts of early theorists like Wolff, who wrote in 1749 that “[n]ations are regarded as individual free persons living in a state of nature.” 2 C. Wolff, Jus Gentium Methodo Scientifica Pertactatum 9 (J. Drake trans. 1934). Upon this view, “states might be conceived as moral beings which are organic wholes with the capacity to realize their nature in the choice and pursuit of ends.” C. Beitz, \textit{Political Theory and International Relations} 76 (1979) (footnote omitted).

\textsuperscript{54} J. Rawls, supra note 1, at 378.

\textsuperscript{55} T. Hobbes, supra note 4, at 116-17.

\textsuperscript{56} Id. at 115.

\textsuperscript{57} Id. at 201.

\textsuperscript{58} For Beitz’s analysis of moral skepticism in the international state of nature see C. Beitz, supra note 53, at 27-34.
that the principle of nonintervention has become more, rather than less, dominant in the thinking of states in the post-colonial era dominated — at least numerically — by new nations jealously guarding their hard-won sovereign prerogatives.59

While that may be the condition of contemporary realpolitik, it tells us nothing about principles of justice applicable to Malarkey. It would be odd, indeed, if Rawlsian justice and this persistent international state of nature were to coincide, since the former is an idealized construct and the latter a mere mirroring of current political realities. Such coincidence warns us that something must be wrong with a process which necessarily leads to the conclusion that the requisites of justice are satisfied by a Hobbesian notion of the prevalent sovereign atomism of states.

According to such an account of justice, a state would never be justified in intervening in the internal affairs of any other. The agreement reached behind the veil of ignorance would require states to leave Malarkey alone to sort out its own problems, no matter how egregious. Applying such a concept of justice to recent real-life events, India must be judged to have acted unjustly in intervening to end Pakistani oppression in what is now Bangladesh and Vietnam would have acted unjustly by intervening in Cambodia to stop the Khmer Rouge's reign of genocidal terror. Justice would have been served when the world left Field Marshal Idi Amin free to decimate the population of Uganda.

This seems an odd result for a theory of justice. It becomes odder still when one contrasts it with Rawls's conjecture that, behind the veil of ignorance, states' representatives would endorse the right of each nation to be defended by other states against external threat to its citizens' liberties.60 Justice, he posits, sustains the use of force by one state in defense of the liberties of another. Can justice then fail to authorize the use of force by states against a regime which ravages its own people? Such a paradox may well be shrewd assessment of contemporary political realities, but surely falls short of any principled account of the requisites of justice.

Intuitively, we know these to be untenable results, for we are led to something more like Hobbes's state of nature than Rawls's community of just principles. While such results may stir doubts about the applicability of Rawls's concepts to a search for international justice, the defect lies not in the model but in its incorrect application. So, back to

59. A. CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 144-46 (1986).
60. J. RAWLS, supra note 1, at 380.
the drawing board we go. In the negotiations between representatives of states in the original position behind the veil of ignorance are 159 foreign ministers, who know that they represent states, but have no idea whether those states are rich or poor; white, brown, yellow or black; democratic, authoritarian or totalitarian. They do know, however, that in the real world each of these circumstances and conditions exist. Would they agree upon a rule of nonintervention that precludes collective action against Malarkey? Probably not.

While the representatives undoubtedly would agree on a general principle of nonintervention (since they could imagine themselves as the weak, poor, perhaps even democratic victims of strong, rich, perhaps totalitarian interventionist forces), rational self-interest would also cause them to agree on certain exceptions. Chief among these would be conditions similar to those existing in Malarkey. There is absolutely no reason to believe that any foreign minister, negotiating behind the veil of ignorance, would wish to promote a principle protecting the mad excesses of the Malarkian colonel. On the contrary, it would be rational for each negotiator to assume: 1) that it would be very unlikely that his or her nation would need to be rescued from a murderous dictator, since the prerequisite conditions occur but rarely in such aggravated form as in Malarkey, and 2) that he or she would welcome external rescue, were the worst to happen. Foreign ministers, after all, tend to be among the first victims after a seizure of power by such regimes as that of Malarkey. Thus rational negotiators seeking to define a principle of justice would opt for a Malarkian exception to the general norm of nonintervention.

Rawls, in his brief attempt to apply his theory to international affairs, did not make such a refinement. Real nations, in the real world of multilateral diplomacy, also have failed to do so, despite this demonstrable degree of correlation between the demands of political self-interest and of justice. This cannot be mere perversity. It is instructive to examine why nations still prefer a Hobbesian rule of nonintervention despite its evident injustice, an injustice easily comprehended intuitively.

That they have done so is readily apparent. When it comes to military intervention, the United Nations usually has opted not to differentiate between just and unjust social arrangements, but instead favors treating all states, probably even such as Malarkey, as autonomous entities entitled to be left alone. In the public pose, nations pretend to believe, with Hobbes, that in the world "nothing can be unjust. The
notions of right and wrong, justice and injustice have no place." Article 2(4) of the U.N. Charter proscribes the "threat or use of force against the territorial integrity or political independence" of any nation, whether Malarkey or Switzerland. And nothing in the Charter is regarded as authorizing the international community "to intervene in matters which are essentially within the domestic jurisdiction of any state" (Article 2(7)). Moreover, much of the U.N. Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States is devoted to enunciating principles of nonintervention and sovereign equality of states. The sole exception, in texts and in practice, is a tolerance for, and encouragement of, external support for insurgent forces fighting residual colonialism, foreign occupation (the West Bank) and South Africa's brand of racism.

The practice of the U.N. in applying these principles of nonintervention may well confirm the continued prevalence of Hobbesian moral skepticism among states. But that does not transform a repertoire of practice into a general principle of justice. Despite ample, validated reports of genocide in Kampuchea, the Organization largely ignored that atrocity, choosing, instead, to deplore Vietnamese intervention against the offending regime. Similarly, in 1971, the U.N. called on India (albeit not by name) to withdraw its troops and observe a cease-fire after the Indian army had joined Bengali insurgents to end Pakistan's bloody repression in the territory that became the state of Bangladesh. Yet both Vietnamese and Indian interventions relieved what, in any nation's conception of justice, surely was recognizable intuitively as horrendous injustice.

Regrettably, states seem reluctant to distinguish between interventions that may be said to advance human rights — as in the cases of Kampuchea or Bangladesh — and interventions, such as those of the

61. T. HOBBES, supra note 4, at 115.
64. G.A. Res. 2625, id., provides that where a state deprives "peoples" of "their right to self-determination and freedom and independence . . . such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter."
65. This is not surprising since "[t]he Assembly has never been able to bring itself to address the extirpation of entire populations—some seven to nine million persons—in Burundi, Kampuchea and Pakistani Bengal." See Franck, Of Gnats and Camels: Is There a Double Standard at the United Nations?, 78 AM. J. INT'L L. 811, 825 (1984).
67. The resolution was addressed to both India and Pakistan, but since Pakistani troops were not on Indian soil, it was obviously aimed at New Delhi. G.A. Res. 2793 (XXVI), 26 U.N. GAOR Supp. (No. 29) at 3, U.N. Doc. A/8429 (1971).
Soviets in Afghanistan\textsuperscript{68} and the U.S. in Nicaragua,\textsuperscript{69} which — arguably — do not. Yet that reluctance is understandable. Part of the reason is the difficulty, in the absence of impartially assessed facts, of distinguishing between the categories of just and unjust intervention. This makes real-life application of a general principle of justice highly imprudent, for smaller nations, in particular, fear that a rule permitting just interventions would be a hunting-license for the powerful to do whatever they wished. In the real world \textit{and} in the hypothetical original position agreement on a principle of just intervention would encounter this practical obstacle. Nations would not agree on a general principle unless it were applied in particular instances by a process they recognized as legitimate.

Nevertheless, nations know very well that justice requires distinctions to be made between circumstances in which intervention is contemplated. They merely do not think it safe to say so, or to formulate a public principle. Thus lip service continues to be paid to the invariable application of the nonintervention rule. However, the rule is ignored in practice in at least some of the most egregious instances where it would lend support to an unjust result. For example, Tanzania was not criticized for the invasion of Uganda, which at last toppled Idi Amin. India, while told to withdraw its troops, was not actually condemned for invading East Pakistan (Bangladesh), nor was Israel penalized, or even seriously reprimanded, for its invasion of Uganda to liberate hostages from its hijacked aircraft.\textsuperscript{70}

Still, in the verbal behavior of most states, all interventions tend to be lumped together.\textsuperscript{71} Some nations’ representatives at the U.N. privately expressed relief that the U.S. invasion of Grenada had rid that nation of another homicidal military dictator, but publicly voted to


\textsuperscript{70} The Security Council failed to act in response to Uganda’s complaint. SCOR, Mtgs. 1939-1943, 9-14 July 1976.

\textsuperscript{71} Franck, \textit{supra} note 65, at 811-19.
deplore the rescue as a violation of the sacrosanct nonintervention principle.\textsuperscript{72} What is going on, here? Why do the nations seem to prefer a Hobbesian principle of nature to a Rawlsian one of justice? And why, having expressed this odd preference, are they inclined to modify their formal adherence to the Hobbesian world by practical considerations of justice, thereby tempering their actual level of response to instances of intervention? Why, in other words, do nations continue schizophrenically both to adhere to the Hobbesian principle of nonintervention while informally recognizing a principle of just interventions in egregious cases?

The answer is that this is precisely what states' representatives would do behind the veil of ignorance, negotiating a principle of justice in the original position, if they knew that there would be no legitimate authority in the community of nations to implement the principle on which they came to agree. In the absence of such a legitimate implementing authority, the representatives of states would have to settle for a total prohibition on intervention, knowing that whatever exceptions might be agreed upon in principle could all too easily be perverted in practice by unilateral, self-judging claims enforced by the rich and powerful against the poor and weak. A total ban on intervention would be perceived as less unjust than a principle that, in practice, would permit anything.

This does not mean, however, that states in the original position would not agree that, in a more perfect world community, justice would require exceptions to the rule of nonintervention. They would agree that these exceptions would not be asserted unilaterally but would first have to be validated by a legitimate international forum: whether a court, a probative fact-finding institution, or other multilateral body acting in a disinterested manner.

If the negotiators, behind the veil of ignorance, could assume that any principle on which they agreed would only be implemented if it were found applicable in specific circumstances by a legitimate process, then they would probably produce a general principle that did not adopt Hobbesian cynicism as its surrogate for justice. We can imagine that, set free to think only of principles of justice, they would aver that societies could become so unjust as to make external intervention the just remedy.\textsuperscript{73}

\textsuperscript{72} Discussions conducted by Franck with U.N. ambassadors at pertinent times in 1983-84. For a discussion of the Grenada intervention in the context of international law pertaining to humanitarian intervention, see Verwey, \textit{Humanitarian Intervention in International Law}, 32 NETH. INT'L L. REV. 357 (1985).

\textsuperscript{73} Regardless of a society's conception of justice, all parties would agree that certain social arrangements — e.g., the practice of genocide — are indicative of an unjust society.
One model of a general principle of justified intervention has been proposed by Professor Mark Wicclair:

It is legitimate for one nation N1 to temporarily intervene in the affairs of another nation N2 provided: (1) The basic political, economic, and/or social arrangements of N2 are grossly unjust. (2) The government of N2 has consistently failed to take positive steps toward promoting just arrangements, and in the absence of external intervention it is unlikely that any timely and significant improvement will occur. (3) One of N1's goals is the promotion of more just arrangements in N2. (4) There is a reasonable likelihood that N1 can successfully accomplish the goal referred to in (3).74

This is less incompatible with Rawls's expressed thoughts than might, at first, appear. It seems logical to us that in a world where grave injustice is known to be the lot of people oppressed by their own governments, parties in the original position would opt for some rule permitting just intervention, as long as they could expect a legitimate international body to decide whether the rule justifies any particular intervention.75 Rawls's prediction that states in the original position would nominate nonintervention as a basic principle of justice was based on a quite different assumption: that the negotiators in the original position would not reach issues of international justice until after agreeing on the principles of justice that must apply to their domestic systems. In negotiating the domestic principles of justice, the first principle Rawls believes the parties would choose is one which dictates that all persons within every society be treated with the greatest equal liberty, compatible with a like liberty for all. Therefore, mutual noninterference (equal liberty or nonintervention) as guiding principle in relations between nations would be appropriate in the postulated circumstances of equal liberty within nations. Another way to put this is that the principle of nonintervention would be recognized as just only among states which have accepted, and applied domestically, the basic principles of human rights.

The assumption that negotiation of principles of justice for the world could only occur after each nation had agreed on principles of justice applicable domestically allows us to reach the same result by a different route. As Professor David Richards notes:

[C]ontractors are basically concerned that the institutional structure of a nation itself satisfies the first principle of justice. And thus, where there is a grave violation of equal liberty within institutions, the contrac-

75. Wicclair warns that given the nature of international politics, the appointment of a multinational body could actually have the unwanted effect of diminishing the chances of intervention ever being approved. Id. at 302.
tors will view war . . . [as] a justified means in stopping this. . . . Import-
antly, the contractors are concerned not with the well-being of
institutions . . . but with the well-being of persons; and thus, it is per-
fectly natural that the contractors may approve the destruction of a cer-
tain nation, if it severely frustrates the interests of its populace. 76

Of course, the parties would also realize that individual nations
could not be the judge, jury and executioner in deciding claims to in-
tervention. Richards maintains that "contractors would agree that
some form of supreme supra-national authority, having the final
power over the exercise of coercive power, should be created in order
to make wars morally unnecessary, and to ensure that coercion is
more justly executed in forcing obedience to moral principles." 77

Therefore, in examining the principle of nonintervention through
the lens of global justice, we must initially determine if the institutions
within a given society are just or likely to become so without external
interference. 78 If so, there can be no justification for intervention, cer-
tainly not of a military nature, but also not by "subversion, payoffs to
government officials, conditional bilateral aid, and similar techniques
of influence." 79 However, if institutions are sometimes unjust and un-
likely to change internally, then intervention may be permissible
within specified limitations. These might be fourfold: first, that the
intervention be able to bring about the desired event — that is, the
promotion of just institutions; second, that it must not be for the ad-
vancement of any particular socio-economic system; 80 and, third, that
the intervention must not prove too costly to the interveners nor to
other goals and objectives of the global community. 81 An intervention
leading to a world nuclear war, for example, would be both foolish and
unjust since it would not achieve the liberation of an oppressed people
but, instead, cause widespread suffering to oppressors and oppressed
alike. Fourth, whether the preceding three conditions for just inter-
vention have been met in any particular instance would have to be
determinable by recourse to a legitimate decision-making process.

77. Id. at 138.
78. In our definition of a just society we recognize that there are various socioeconomic and
cultural differences among societies, and that principles of justice appropriate to many existing
social systems diverge from the principles propounded in western theories of justice.
79. C. Beitz, supra note 53, at 92.
80. Richard Falk makes the argument that an international body properly constituted to
reflect diverse ideologies and cultures could decide when intervention is necessary for global
justice, and in this way provide assurance against self-serving unilateral intervention by states.
81. For an analysis of each condition see C. Beitz, supra note 53, at 90-92.
Imagine a sovereign state of Euphoria with a population consisting of two different ethnic groups: the Sucrose and the Lactose peoples. The former inhabit the northern region, the latter the south. Sucrose people make up 60 percent and Lactose 40 percent of the population. For generations, the Sucrose have dominated the Lactose. By virtue of their numerical superiority, the Sucrose have dominated Euphoria's elected parliament and used this majority to impose various restrictions on the Lactose minority. Lactose citizens are restricted to 20 percent of jobs in the public sector of the economy, 20 percent of the land, and that in the inclement northern mountains of the country, and 20 percent of places in the public schools and universities. Legislation enacted ten years ago by the parliament has imposed a stiff poll tax on Euphoria's voters which effectively disenfranchises most Lactose citizens, who are poor. Sucrose has been made the sole official language of the nation. The effect of all this has been to create a Lactose secessionist movement, with a political wing which campaigns peacefully for a Lactose homeland in the northern region, and an underground army, which fights for the same objectives through a level of violence approaching civil war.

The political and military struggle in Euphoria has been underway for a decade, since the enactment of the poll tax. It has disrupted life not only in Euphoria, but also in the three neighboring states, where thousands of refugees — both Sucrose and Lactose — from Euphoria's civil strife are now camped and causing severe economic, social and political dislocation. The foreign ministers of these neighboring states are meeting to do something about the Euphoria crisis.

Would Rawlsian principles of justice be relevant to such a conference? If considerations of justice are assumed to play a role in the outcome of these states' deliberations, what would be its applicable principles?

Once again, as noted in section 7, Rawls has addressed this problem briefly. Behind the veil of ignorance, he has suggested, rational state representatives would agree upon a right of self-determination as a general principle of justice. Let us examine whether, and how, the principle might guide the neighboring countries' foreign ministers in dealing with Euphoria.

As noted by Professor Beitz, the concept of self-determination can be regarded as the "positive" aspect of state autonomy. While the
principle of nonintervention protects the rights of states already independent, self-determination protects the option to choose independence of nations under foreign control. Nonintervention is conservative, tending to preserve the international status quo. Self-determination, however, is dynamic in that it may sanction change in the structure of the international order. It is apparent that the two principles, rather than invariably supporting one another, actually may sometimes conflict.

The notion that national or ethnic groups are entitled to "self-determination" began to be applied in the settlement of post-World War I land claims. The United States delegation to the Versailles Peace Conference was instructed to apply ethnic criteria in the resolution of all European territorial disputes. Towards that end, President Woodrow Wilson saw to it that his negotiating team at Versailles included historians, ethnologists, and geographers.83 Moreover, he insisted that settlements be based on "racial aspects, historic antecedents, and economic and commercial elements."84

After World War II, the principle of self-determination was expanded beyond the boundaries of Europe to include the movement towards colonial independence. The U.N. Charter expressed a general obligation of member states to bring inhabitants of non-self-governing territories to the point at which they could make a meaningful choice as to their destiny. By joining the U.N., parties accepted "a sacred trust" to "develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions...."85 This led to dramatic events. After the early post-war decolonizations of India, Burma and Ghana, nearly one billion people gained rights to self-determination within only 30 years (1947-1977). During that period, U.N. membership nearly tripled as many more newly-independent nations joined the organization.

However, while the European application of the principle of self-determination in the 1920s encouraged the breakup of multi-ethnic nations like Austro-Hungary and the rearrangement of boundaries as various groups elected to shift allegiance, the principle operated differently in Africa and Asia in the period following World War II. In the latter, self-determination was defined in almost every instance as a right exercisable by the people of a colony — regardless of ethnicity —

83. 1 R.S. BAKER, WOODROW WILSON AND WORLD SETTLEMENT 109 (1923).
84. Id. at 187.
85. Charter of the United Nations, supra note 62, at art. 73.
within its established territorial boundaries. These had been created quite arbitrarily by the imperial powers and frequently embraced peoples of disparate races, cultures and religions. Thus, self-determination, defined in this way, frustrated the ambitions of various tribes and other groups. Nevertheless, most indigenous leaders of the third world agreed to this limitation because they feared that self-determination would otherwise lead to a fragmentation which would result in a proliferation of impoverished, highly vulnerable, tribal mini-states. 86

Thus it was that the period of decolonization was also one of growing ambiguity about the principle from which it had gained its philosophical impetus. Third world drafters of the U.N. Declaration on Granting of Independence to Colonial Countries and Peoples, 87 in proclaiming the principle that “[a]ll persons have the right to self-determination” 88 also added the caveat that “[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the United Nations.” 89 On this basis, Nigeria denied the ethnically and religiously distinct Ibo tribe its right to self-government when it sought statehood for Biafra. 90 Even earlier, India’s armed forces had thwarted the desire of the people of Kashmir for self-rule (or union with Pakistan), despite the fact that the bulk of the populace was quite alien to India ethnically, culturally and religiously. 91

These denials of self-determination were condoned by the international community, which has consistently refrained from criticizing the use of force by new nations to crush secessionist movements, in marked contrast to the intense criticism of the force sometimes used by European powers to quell agitation for independence in their colonies. Powerful African and Asian states, themselves only recently freed from alien rule, felt free to send military aid to other governments dealing with disaffected minorities seeking independence. Most remarkable is the recent spectacle of India providing troops to suppress the secessionist movement in Sri Lanka mounted by Tamils of Indian origin. There are other such paradoxes. Nigeria sought and received military assistance from its former colonial masters, the British, to extinguish the secessionist Ibo state of Biafra. Zimbabwe, hav-

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86. For further discussion see Franck, The Stealing of the Sahara, 70 Am. J. Int’l L. 694, 697-98 (1976).
88. Id. at art. 2.
89. Id. at art. 6.
91. India Independence Act, 1947, 10 & 11 Geo. 6, ch. 30.
ing only recently gained control of the country from its white settlers\textsuperscript{92} vigorously used a largely white-led militia to suppress secessionism among the Ndebele tribe in the western region.\textsuperscript{93} As for the United Nations, it actually dispatched a large multinational military effort led by Irish and Swedish troops to prevent a populist tribal secession in the Katanga province of newly independent Zaire.\textsuperscript{94}

This seeming "checkerboard"\textsuperscript{95} practice, comporting with the ambivalent text of the General Assembly's enunciation of applicable general principles in the Declaration on Granting of Independence to Colonial Countries and Peoples, gives rise to the suspicion that the U.N. Charter's frequent references\textsuperscript{96} to the principle of self-determination merely camouflages an absence of any coherent principle. Against this actual performance of states can be set Rawls's belief that self-determination is a general principle of justice at which nations would arrive in a negotiation behind the veil of ignorance. Is self-determination a potentially meaningful concept of justice, one which could help guide the foreign ministers addressing the problems of Euphoria, or is it — as the post-decolonization practice may suggest — an opportunistic shibboleth lacking any moral content?

As we have observed, Rawls postulates negotiations between representatives of states who do not know which country they represent but who do have some information about the realities of the world. Is there a rational principle of justice at which such negotiators would arrive? They would know that many states are multi-ethnic and that

\textsuperscript{92.} Zimbabwe came into official existence at midnight on April 17, 1980, thus bringing to a close the former white-ruled government of Rhodesia, which was first established by the United Kingdom under the Constitution of the Federation of Rhodesia and Nyasaland. See 318 PARL. DEB., H.C. (5th ser.) 899-996 (1953).

\textsuperscript{93.} After a new outbreak of killings by anti-government rebels in late 1982, the Zimbabwean government deployed the army's Fifth Brigade in Matebeleland North in late January, 1983. Amnesty International reported allegations of executions, torture and detention carried out by the Brigade against the Ndebele in its effort to quash the dissidents. See AMNESTY INT'L, COUNTRY REPORTS: AFRICA 123 (1984). Yet, to Robert Mugabe's credit, his ruling ZANU party has made peace with ZAPU, the opposition party led by the Ndebele leader, Joshua Nkomo. Their alliance, hopefully, spells the end to ethnic division that has plagued Zimbabwe since independence. See N.Y. Times, Dec. 23, 1987, sec. 1, at 3, col. 4. Indeed, a promising sign is seen in the fact that with Mugabe's inauguration as Zimbabwe's first Executive President, Nkomo has also been named Vice President and Second Secretary of Mugabe's party. See N.Y. Times, Jan. 1, 1988, sec. 1, at 3, col. 4.


\textsuperscript{95.} Professor Ronald Dworkin first makes use of this term in the context of political compromise. For him, "checkerboard" laws describe arbitrary distinctions drawn on matters of principle, leading only to incoherence and irrationality. See R. DWORLIN, LAW'S EMPIRE 178-84 (1986).

\textsuperscript{96.} Charter of the United Nations, supra note 62, at arts. 1(2), 73, 76.
some of these have secessionist movements. They would also know that many states oppress or deprive groups, some of which seek emancipation through secession. They would know that some secessionist groups, although not manifestly oppressed, seek independence to preserve their religious, racial or historic identity. Knowing all this, are there any just general principles of self-determination on which rationally self-interested representatives of states could agree in their original position, ignorant of which state they represent?

Obviously, identifying such principles of self-determination-as-justice will be more difficult, given the complexities of the real world which the just principle must address, than was the search for a just principle of nonintervention. It is highly unlikely that the negotiators would agree on the Wilsonian principle that every discrete ethnic group is entitled to self-determination “on demand” and regardless of circumstances. Even Wilson compromised the principle in such cases as the Rhineland.\(^7\) In its purest form, the principle has been championed by John Stuart Mill, who wrote: “Where the sentiment of nationality exists in any force, there is a *prima facie* case for uniting all the members of the nationality under the same government, and a government to themselves apart.”\(^8\) In practice, however, few, if any, genuine representatives of governments, even behind the veil of ignorance, would subscribe to a principle of justice defined with so little regard for the national security, economic well-being and stability of nations.

One way to overcome this dilemma, perhaps the one Rawls might choose, is to reiterate that, in the international version of the original position, parties would already have decided on the basic requirements of a just national socio-political system, utilizing the considerations of equality and liberty discussed in section 6, above. When they next begin to negotiate general principles of justice applicable to the community of states they would be able to assume that they came from a state which had agreed on the principles of justice applicable domestically. The notion of the equality of all citizens would be the first of these agreed principles, whether or not it was actually being implemented by any particular nation’s system of government. A shared

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97. The separation of the Saar basin or Rhineland from Germany posed a clear conflict with the Wilsonian principle of self-determination, since its four million inhabitants were ethnic Germans. However, the President submitted the geopolitical logic — the creation of a buffer Rhenish Republic would help prevent a German resurgence. The compromise eventually worked out by the powers at the Versailles Peace Conference led to the formation of a Saar territory which was not to be independent but administered through the League of Nations. See C. Seymour, *The Intimate Papers of Colonel House* 334-35, 345 (1928). See also 2 H.W.V. Temperley, *A History of the Peace Conference of Paris* 182 (1924).

notion of equality-as-justice thus already would have shaped each na-
tion’s view of what justice in the context of the international commu-
nity should say about the conditions in Euphoria and what the
neighboring states would be entitled to do, in the name of justice,
when those conditions were not met.99 The answer is that states in the
original position would agree that justice entitles minorities which per-
sistently are denied equal rights to separate from the oppressing state
and form their own nation, and entitles neighboring states to help
them achieve it where that is the only, or the fastest, least costly and
painful way to realize their right. On the other hand, minorities100 not
subject to persistent discriminatory treatment would have no such jus-
tice claim to self-determination, let alone to external help in pursuing a
secessionist agenda.

The principle of justice endorsed by the nations would not likely be
that championed by J.S. Mill or Woodrow Wilson. “No fault” self-
determination “on demand” based solely on distinct racial, cultural or
religious characteristics would be resisted by rational negotiators in
the original position because they represent states. They would reflect
states’ resilient determination to survive internal or external efforts at
dismemberment. They would also know or believe that secession
might lead to great economic injustices being inflicted upon the re-
main ing (non-seceded) population if territorial realignment gave sepa-
ratists most of a state’s natural resources.101 Consequently, a group’s
secession claim would require a justification powerful enough to over-
come a rationally-deduced presumption that existing state configura-
tions should not be disturbed. Moreover, any justification which
states’ representatives would agree to be sufficient to overcome the pre-
sumption in favor of unity, would have to be of an order which posed
no threat to the sort of state the negotiators could logically believe
themselves to be representing. A rule validating only claims based on
grossly unequal treatment meets these tests. Self-determination for

99. The situation does not have to be limited to former colonies. There can be secessionist
movements even within the ex-imperial powers — for example, the Basque separatists in Spain
and the I.R.A. in England. We couch the conflict in a colonial context because it shows most
vividly competing interests of territorial integrity and post-independence solidarity versus the
desire of groups with similar cultural and spiritual values to form their own society.

100. For a judicial interpretation of what constitutes a “community” for purposes of crossing
the threshold to the question of entitlement to self-determination, some guidance is afforded by
the opinion of the Permanent Court of International Justice in the Greco-Bulgarian “Communi-
ties” case, where it was defined as “a group of persons living in a given country or locality, having
a race, religion, language and traditions of their own, and united by the identity of such race,
religion, language and traditions in a sentiment of solidarity....” 1930 P.C.I.J. (ser. B) No. 17,
at 33.

101. This would have happened if the oil-rich Ibos seceded from Nigeria; people of the
princely-state of Kashmir left India; or mineral-laden Katanga separated from Zaire.
religious or tribal groups would not be endorsed by a principle of justice unless such group actually and egregiously were denied equal access to rights and benefits. Equal access, in this context, would mean entitlements not necessarily equal in result but only as nearly equal as is compatible with the efficient organization of the society for order and economic development.

Even if these stiff criteria for rebutting the presumption favoring national unity were met, however, the rationally-agreed principle would be unlikely to sanction self-determination until it is clear that the injustice is not likely to be remedied by the existing processes of the unjust state. A group alleging injustice would not be entitled to invoke self-determination — let alone have it enforced by the intervention of other states — until it became apparent that the denials of equality and liberty have become so hopelessly impacted that the unjust system is incapable of remedying itself.102

As with the principle of nonintervention, there is likely to be much hesitation by states’ representatives behind the veil of ignorance when faced with the choice whether to endorse a general principle of justice which would validate a decision by the foreign ministers of neighboring states to employ military force to redress the injustices visited on the Lactose people by the Sucrose majority in Euphoria. This hesitation would not stem from ambiguity about a suitably circumscribed substantive principle of the kind we have been discussing which would endorse the justice of collective redress of injustice. Rather, the doubts would arise because of the lack of legitimate procedures for ensuring that the decision to use force is not made in inappropriate circumstances, as a cover for self-serving intervention by strong nations to achieve dominance over the weak.103 Only when that hesita-

102. Such was the case in Baker v. Carr, 369 U.S. 186 (1962), where the Supreme Court ruled that federal courts could and must decide constitutional challenges to state representation at the suit of qualified voters who claimed impairment of their right to franchise. In Baker, Blacks in Tennessee complained that the state’s Apportionment Act denied them representation in state government. Although the Court ordinarily would have been loath to meddle in a state’s political process, Justice Brennan opined that here there was no choice. The appellants had demonstrated that “because of the composition of the legislature effected by the 1901 Apportionment Act, redress in the form of a state constitutional amendment to change the entire mechanism for reapportioning, or any other change short of that, [was] difficult or impossible.” Id. at 193.

103. As one of the authors has observed, “[a] study of interventions in practice . . . reveals that most have occurred in situations where the humanitarian motive is at least balanced, if not outweighed, by a desire to protect alien property or to reenforce socio-political and economic instruments of the status quo.” Franck & Rodley, After Bangladesh: The Law of Humanitarian Intervention by Military Force, 67 AM. J. INT’L L. 275, 278-79 (1973). Indeed, the humanitarian grounds advanced as justification for the Soviet Union’s interventions in Hungary and Czechoslovakia, as well as those of the United States in Vietnam and the Dominican Republic, were largely bogus. Id. at 285-87.
tion can be allayed by a legitimate process of validation and implementation would states' representatives in the original position be likely to endorse a principle of self-determination enforceable by other states in cases where liberty and equality were denied to a distinct group by those with power within a state.

Indeed, the international community has already expressed itself unambiguously in support of such firm but flexible principles through a Declaration on Human Rights and two Human Rights Covenants,\(^\text{104}\) as well as enumerations of principles against racism\(^\text{105}\) and religious intolerance.\(^\text{106}\) Even states which clearly have failed to eradicate all of these wrongs have adhered to such obligations in principle\(^\text{107}\) and the community of states, in its political and social organs, has voted to investigate or censure at least some ostensible violators.\(^\text{108}\) Consistently, however, the human rights standard expected of states is to move in the right direction, not to arrive at instant perfection.

In this way, the mandates of self-determination and nonintervention are reconciled in principle. Only where it has been credibly determined by a legitimate process of decision that egregious denials of equal treatment and basic liberties have become irremediably impacted in the governance of a state may the international community


\(^{107}\) For example, the Soviet Union ratified the Covenant on Civil and Political Rights on October 16, 1973 and the United Kingdom did the same on May 20, 1976. See Multilateral Treaties Deposited with the Secretary-General: Status as of 31 December 1987, U.N. Doc. ST/LEG/SER.E/6, at 128 (1988). While both nations are persistent advocates of the principles enunciated in the Covenant, they continue to ill-treat parts of their population — Soviet Jews and Northern Irish, respectively.

\(^{108}\) The U.N. Economic and Social Council, through its Human Rights Commission, has empowered numerous Special Rapporteurs to investigate charges of human rights violations in countries and to report their findings. For example, the Commission last year requested a Special Representative “to present an interim report to the General Assembly ... on the human rights situation in the Islamic Republic of Iran” and extended his mandate to investigate for another year. E.S.C. Res. 1987/55, 43 U.N. ESCOR Supp. (No. 5) at 121, U.N. Doc. E/CN.4/1987/60 (1987). After hearing the Representative’s report, the Assembly voted to express “deep concern” over the allegations of human rights abuses in Iran and urged that government to respect and abide by the Covenant on Civil and Political Rights. G.A. Res. 42/136, Press Release G.A./7612, at 436 (1987).
take collective steps to enforce the justice claims of a minority (or majority) to self-determination.

X. EQUALITY AND DISTRIBUTIVE JUSTICE

It is intuitively apparent that the greatest injustices in the international system are to be found in the global economy. The great and growing disparities between rich and poor are the major scandal of humanity at the end of the twentieth century. Does Rawlsian justice provide a framework within which this problem can be addressed?

The international system is based on a notion of state equality. The U.N. Charter, in article 2, states that the organization is "based on the principle of sovereign equality of all its Members." If nations' representatives were to meet in the original position behind the veil of ignorance, it seems most likely that they would agree very quickly that state equality is a fundamental norm of any Rawlsian system of justice in the international community.

At the same time it is clear that states are not equal in practice, especially in the economic field. What are the practical implications of a Rawlsian notion of equality as it applies to the redistribution of global resources?

The scope of the problem is readily identified, but the causes and cures are more elusive. Students and theorists of national social and economic underdevelopment argue that a colonial people's right to self-determination is not fully realized with liberation if they are still dependent upon their former colonizers and other industrialized nations for economic survival. They see some third world nations as barred indefinitely from developing economic infrastructures because they fail to emerge from a self-perpetuating neocolonial stage at which they serve only as sources of raw materials and cheap labor.

Moreover, because of disparities in natural resource endowments, capital accumulation and technological advancements between developed and developing states, "free" trade may be perceived as causing or perpetuating relative, if not absolute, declines in the well-being of the least


110. It is worth noting that Frantz Fanon believed that neocolonialism, by impeding the growth of domestic institutions, helped to foster those religious and ethnic conflicts that led to secessionist movements. See his excellent discussion of this phenomenon in F. FANON, THE WRETCHED OF THE EARTH 148-205 (1963).
advantaged.  

On the other side, believers in efficient market theory are of the view that past colonialism and imperialism are not to blame for widespread economic failure in the third world. They argue that developing countries insist on producing commodities for which there is little demand, and that foreign aid too often subsidizes such folly. For them, only development of market-oriented policies will induce long-term economic growth for these nations. They cite the Republic of China (Taiwan), Hong Kong, South Korea and Singapore as examples of economic development through market-led initiatives.

As the above views suggest, there are great differences of opinion regarding the root causes of inequalities between rich and poor nations in their share of global wealth and resources. Suppose the Ministers of Economic Affairs of each nation in the world were to gather at a conference to consider various schemes for global redistribution of resources; that is, a mandatory scheme to reduce extreme disparities between rich and poor. Would Rawlsian principles of justice have anything relevant to say about the forms and substance such a scheme might take? Rawls's theory of justice does not address this question directly. "Moderate scarcity" may not do justice to the global situation. Rawls, as we have seen, focuses on self-sufficient national societies and not on the far more complex interdependent system of autonomous states and economies.

It is nevertheless instructive to imagine the world as a self-contained entity, made up of countries that are economically and fiscally interdependent, and to imagine parties in the international original position negotiating principles of economic justice applicable to this community of states.

Behind the veil of ignorance, the parties would not know which nation they were, but would know that states vary unconscionably in their economic development, both the real per capita income of their populations and the life prospects and expectations of their populations. Yet, behind the veil of ignorance, the parties would not know whether they represented a developed or developing nation, and thus would want to search for principles as fair as possible to all.

At first, we might conjecture that parties would simply agree to a

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111. In support of the position that trade absolutely impoverishes developing nations see M. Brown, The Economics of Imperialism 96-126 (1974).


113. See J. Rawls, supra note 1, at 8, 457.

114. David Richards provides an excellent discussion of the parties' decision-making process for principles of international distributive justice. See D. Richards, supra note 76, at 138-41.
principle requiring equal distribution of wealth between rich and poor, with appropriate transfers of income and resources from the former to the latter. On further consideration, however, it might seem more likely that the parties would realize that immediate equality of wealth by such transfers would have an adverse impact on the global economy, by decreasing productive efficiency, investment, research and technological advancement. This would precipitate a long-run decline in the standard of living or, at least, the rate of economic growth, for all countries. As Richards notes: "While such transfers from rich to poor nations might raise the life prospects of desire satisfaction of all the present standard classes of underdeveloped countries, . . . it also involves lowering the life prospects of desire satisfaction of future generations in [those] standard classes."\(^{115}\)

Consequently, parties might reject absolute statistical equality through redistributive transfers. In doing so, they would be adopting the global analog of Rawls's second principle of justice, which he has designated the "difference principle." This holds that although justice is usually best served by an equal distribution of resources, this would not be so if the result were to reduce the resources available to all. In that case an unequal distribution is permissible so long as the resources available to the least advantaged is thereby increased significantly.\(^{116}\) For example, let us suppose that X represents the most advantaged nation and Y is the least advantaged. No matter how much a proposed course of action would improve X's situation, justice would not be served unless: 1) Y also benefitted and 2) the gap between X and Y decreased. Thus Rawls's notion is not tantamount to acceptance of the free-market principle because it would reject a policy which led to absolute growth of the world economy at the cost of a greater comparative disparity between the rich and the poor. Even a program which would increase the quantity of goods or benefits available to X and Y would be unjust if it did not create a greater proportion of benefit for Y and thereby decrease the relative degree of inequality.\(^{117}\) In addition, an unjust distribution may also be said to exist when inequality is excessive. Excessiveness in this sense, means any hypothetical situation in which a theoretical decrease in X's share would bring about an equal or greater increase in Y's share. Put an-

\(^{115}\) Id. at 139.

\(^{116}\) For schematic diagrams of the difference principle's operation in domestic distributive justice see J. Rawls, supra note 1, at 75-80.

\(^{117}\) The difference principle is more egalitarian than a utilitarian calculus whose aim is to maximize the aggregate level of global wealth. Utilitarianism dictates a greater portion to X if doing so increases the aggregate beyond that reached by the difference principle, even though this would make Y worse off and/or promote larger inequalities. Id. at 77-78.
other way, justification for any policy which yields unequal distribution of benefits would require — to meet the expectation of justice — that the poorer states would also benefit and that they would suffer no comparative loss in their entitlement to benefits.

The trouble with these notions of global resource reallocation is that we have been using the state as the basic integer, rather than the individual. This condition, in the name of distributive justice, has a tendency to magnify distributive injustice, because it promotes resource transfers from poor people in rich countries to rich people in poor countries. Rawlsian justice would not ratify such a result. Since the Rawlsian analysis supposes that a negotiation among representatives of states to arrive at principles of international justice could only occur after agreement on principles of justice has been reached by negotiations among the people within each national society, it follows that the parties to the international negotiation would press for global principles which would be compatible with the principles of justice — equality and liberty — which have already been adopted domestically. If that precondition is met, the representatives of the negotiating states, behind the veil of ignorance, would have to include domestic distributional principles in any agreed definition of international distributive justice. In other words, the international principles of distributive justice would necessarily have to narrow, not widen, the gap between rich and poor within each state as well as between states.

Thus one might expect the parties to agree that the first claim of justice was to raise the living standards not of the poorest nations — which can be done by further enriching the elites within those states — but of the poorest populations within every nation. Put another way, the requisites of distributive justice might be defined in terms of minimal entitlements to food, shelter, clothing and education and a just system of redistribution would aim to achieve that minimum level within each state. This would ensure that very rich third world nations, as well as developed first and second world states, would contribute to the redistribution. Moreover, very rich classes within third world nations might be expected to contribute to poor classes in other (including developed) states.

The first principle of international economic justice to which states, representatives rationally might agree, negotiating behind the veil of ignorance in the original position, is that resources should be directed from populations with greatest surplus to populations with greatest deficit. The simplest, although not necessarily the most efficacious way to implement such a principle would be by a global income tax based on per capita income. Thus it might be agreed that nations
whose per capita income (PCI) was in excess of $X would contribute 1% of their gross national product (GNP) to a resource reallocation fund; those with PCI above $Y would contribute 2% of GNP and those with PCI above $Z would contribute 3% of GNP. The means by which these contributions would be raised by the nations with resource surplus could be left to implementation in accordance with the principles of justice operating within each state. Payments out of the resource allocation fund might be made in accordance with an inverse version of the same formula, which would guarantee payments to each state for programs directed to those in its population most egregiously in resource deficit, total payments varying with the proportion of those entitled to the recipient state's total population.

Such a tax formula would not solve global problems of economic inequality. It is cited here merely as an example of a principle of reallocation that meets the test of a Rawlsian principle of justice. This can be contrasted to other global tax proposals which would fail any such rational test. For example, the commonly advanced notion that all countries should contribute a fixed percentage of their GNP fails because it focuses on the hypothetical capacity of states to pay, rather than the resource surpluses and deficits of persons as reflected by each nation's PCI. Thus justice ordains that Luxembourg, with a PCI of $13,380, and Kuwait, with a PCI of $14,270, pay far more than China, with a GNP 64 times that of Luxembourg and 13 times that of Kuwait. Rawlsian principles of justice require that redistribution be achieved by transfers from individuals in surplus to those in deficit, rather than merely from high to low GNP economies. This would ensure that the international principle reinforces, rather than operates at cross-purposes to, the applicable domestic principle of distributive justice. It also ensures that all states would derive some benefit for their poorest classes, a result likely to be efficacious in promoting acceptance of the principle by states which could expect to be large contributors to the redistributive resource pool.

As the above analysis of global distributive justice reveals, economic aid from developed countries should not be viewed as a form of international charity, but as an obligation stemming from social duty


owed by members of a community to one another. Moreover, in a justice-based system of reallocation, contributions of foreign aid are not morally discretionary. Beitz argues that aid "should not be regarded as a voluntary contribution . . . but rather as a transfer of wealth required to redress distributive injustice."  

The obligation of rich members of the community of states to aid the poor is the basis for the United Nations General Assembly's adoption of the Declaration on the Establishment of a New International Economic Order ("NIEO"). NIEO seeks redistribution of global resources by "devoting particular attention to the adoption of special measures in favor of the least-developed . . . countries." It espouses, among other things, "[i]mproving the competitiveness of natural materials facing competition from synthetic substitutes," granting "[p]referential and nonreciprocal treatment," and providing "favorable conditions for the transfer of financial resources" to developing countries. Unfortunately, the appeal of this program to developed first- and second-world states is slight. In part this is due to its weak justice claim, weakened by the NIEO's failure to address the needs of poor people in all countries, as opposed to the needs only of poor countries. The poor people of poor countries therefore have not been able to make common cause with poor people in richer countries because the NIEO places them in a hypothetically adversary, rather than allied, position. This illustrates an important lesson. Rawlsian justice must not be seen solely as a philosophical construct, but also as an important strategic tool of statecraft to rally support for major political projects.

Once again, it is apparent on examination that the willingness of state negotiators to agree on principles of resource equalization is likely to depend on agreement to institute a clear, rational redistributive formula and a credible instrumentality to apply the formula fairly, case-by-case, in disputes that are likely to arise. For example, parties

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120. For example, aid should be directed towards those who are the worst-off in any developing country, but this does not mean that an inability to do so is a reason for not giving aid. Moreover, in countries where extreme poverty is a result of domestic income inequalities, then pressure should be asserted for social reforms within that society. See id. at 172-73.


122. Id. at art. 4(e).

123. Id. at art. 4(m).

124. Id. at art. 4(n).

125. Id. at art. 4(o).
to the General Agreement on Tariffs and Trade\textsuperscript{126} have agreed to a rule — the Most Favored Nation (MFN) principle — which theoretically banishes preferential treatment\textsuperscript{127} while also accepting a Generalized System of Preferences\textsuperscript{128} for the least developed\textsuperscript{129} which is unavailable to the more prosperous members.\textsuperscript{130} This complex double helix of an operational principle has been acceptable in part because of its manifest justice,\textsuperscript{131} reinforced by a carefully-drafted rule and the existence of a credible mechanism for resolving disputes over its interpretation.\textsuperscript{132}

\section*{XI. Justice and Its Relation to Legitimacy}

Justice and legitimacy are concepts which are related, often confused, but significantly different. It is useful to an understanding of either to examine it in its relationship to the other.

Legitimacy is the quality of a rule or principle which conduces to the perception, on the part of those to whom it is directed, that it ought to be obeyed because of the rightness of the way, and the form, in which the rule has evolved or been enacted. Max Weber has defined the legitimacy of a rule primarily in terms of legislative, executive and judicial process,\textsuperscript{133} whereas Jurgen Habermas has focused on discursively validated and informed social consent.\textsuperscript{134} Marxists tend to define legitimacy in terms of outcomes, which bear a close affinity to

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\item MFN provides that “any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” \textit{Id.} at art. 1(1).
\item Id. at para. 6.
\item Id. at para. 1.
\item The effect of GATT has been to improve trade mainly among developed states. The purpose of GSP is to aid the less developed. As stated earlier, an increase in the share allocated to the most advantaged nations is only commensurate with justice if the effect is to make the least advantaged state proportionally better off.
\item An example of this is the GATT process invoked when negotiations failed to resolve U.S. complaints against Japan regarding access to the latter’s market for beef and citrus produced by the former. The parties agreed to let a GATT panel adjudicate the dispute. \textit{See N.Y. Times, May 3, 1988}, sec. D, at 1.
\item Weber postulates the validity of a rule in terms of its being regarded by the obeying public “as in some way obligatory or exemplary” because it defines “a model” that is “binding” and to which the actions of other “will in fact conform. . . .” \textit{See M. WEBER, I ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY} 31 (G. Roth & C. Wittich eds. 1968).
\item Habermas believed that “[w]hat are accepted as reasons and have the power to produce consensus . . . depends on the level of justification required in a given situation.” \textit{See J.
\end{enumerate}
\end{footnotesize}
perceptions of justice, but some neo-Marxists have urged the replacement of the concept of legitimacy with the more empirical notion of "rational grounds for action."

In our discussion of Rawlsian justice, we have also noted an affinity between legitimacy and justice, yet not one based on similarity between the two notions. In our Weberian view of legitimacy, its relationship to justice is less conceptual than structural, that is, the legitimacy of a rule or principle does not necessarily ensure its justice, and, conversely, the justice of a rule need not correlate with its degree of legitimacy. However, principles of justice are very difficult to define without recourse to a supporting institutional structure to implement the agreed principle. The degree to which such a structure is perceived to be legitimate, and employs what are recognized as legitimate procedures to implement the agreed principle of justice, will determine, at least in part, whether a principle can be negotiated in the original position and what its content will be. Clearly, a rule enacted in accordance with established procedures, and in compliance with the rules about rules (such as the U.S. Constitution), might well be legitimate, yet also unjust in the Rawlsian sense. Much U.S. law exemplifies both legitimacy and injustice. Yet legitimacy and justice are also symbiotic, in the sense that principles of justice need infra-structural support from principles of legitimacy.

In our efforts to find and apply Rawlsian general principles of justice in three specific international contexts — the principles of nonintervention, self-determination and equality — it has become apparent that states' representatives negotiating in the Rawlsian original position behind the veil of ignorance would be more likely to agree on an applicable principle of justice if they knew that the principle would be implemented case-by-case through a legitimate process, rather than through self-serving interpretation by partisans. The legitimacy factor thus is an important infrastructural prerequisite to agreement on general principles of justice.

This means that the ability of parties in the original position to arrive at general principles of justice depends upon their being assured that the principles will be applied in a fashion, and by a process with characteristics that would induce all the negotiators — not knowing who they represent in the real world of states — to place their confi-
dence in the principle and in the institutional process by which it is implemented.

Whether such a legitimate process is available might well determine whether a general principle of justice can be negotiated and also its content. To put it less abstractly, the extent to which justice claims can be formulated and implemented in the international community will be determined to a significant degree by perceptions of the principle’s legitimacy and the legitimacy of the process by which it is implemented.

XII. CONCLUSION

The concept of justice has conceptual and strategic value. Governments are not indifferent to justice claims: not only because they cannot afford, as a matter of public relations, to be seen to be so, but also because justice claims, made credibly, strengthen political claims with which they coincide.

Justice claims can be made by anyone. To be credible, however, the claim must be based on a principle to which other members of the community would subscribe in the abstract. The Rawlsian theory of justice helps us to identify such principles. In the international community, which Rawls addresses only briefly, the theory is only applicable if two additional conditions apply. First, those negotiating the content of general principles of global justice in the original position behind the veil of ignorance must be assumed to represent states whose peoples have already agreed on the principles of justice applicable to each of their societies. This does not mean that aberrational departures from the implementation of those principles cannot occur (as in Malarkey), but it signifies that the negotiators would only agree to international principles which enhance, or, at least, do not encumber their domestic principles of justice. Second, it must be assumed that the negotiators have agreed upon (or accept ex hypothesi) that the principles upon which they agree will be implemented in practice subject to their interpretation by a process — judicial, arbitral or other — which is perceived to be legitimate as to its mandate, its composition and its modus operandi. With these caveats, the Rawlsian theory is eminently applicable to the identification of the principles of justice in a community of nations.