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Rawls’s Law of Peoples: Rules for a Vanished Westphalian World*

Allen Buchanan

I. THE LAW OF PEOPLES

In The Law of Peoples, Rawls provides the long-awaited extension of his theory of justice beyond the individual state. Rawls modifies his hypothetical contract device so that the parties for choosing the law of peoples are representatives of peoples—not individuals—and concludes that they would choose these principles:

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

Some critics have complained that Rawls’s Law of Peoples is a betrayal of liberalism because it accords legitimacy to very inegalitarian regimes, including those that deprive women of important rights, such as the right to education and to equal opportunity in employment, that are not included in Rawls’s basic human rights.² For the most part, those who voice this objection blame the inegalitarianism of the Law of Peoples on

¹ I am indebted to Kristen Hessler, Christopher Griffin, and Thomas Christiano for their astute comments on an earlier draft, and to Cindy Holder for her research assistance.
Rawls’s key assumption that the parties who choose the Law represent peoples, not individuals. To say that the parties represent peoples is, in effect, to ensure that the fundamental principles of international law that will be chosen reflect the interest of those who support the dominant or official conception of the good or of justice in the society, and this may mean that the interests of dissident individuals or minorities are utterly disregarded.

I am in sympathy with this objection. If anything, I believe it does not cut deep enough. The problem is not simply that by having the parties represent peoples (or rather dominant societal views), Rawls gives short shrift to dissenting individuals and minorities. There is, in fact, an additional reason why a moral theory of international law that only reflects the perspective of “peoples” must be inadequate. At least in the modern world, individuals often do not live their whole lives in the society into which they are born. What this means is that there is a need for principles that track individuals across borders—principles that specify the rights that individuals have irrespective of which society they happen to belong to, and which reflect the independence of individuals from any particular society.

So, I agree with those critics who object that moral principles for international law derived solely from the perspective of “peoples” are inadequate. Principles for individuals as individuals are necessary. However, my aim in this article is to proceed on the assumption that at some point a fully adequate moral theory of international relations must include principles that specify the relationships among “peoples.” To see that this is so, we must first be clear about what Rawls means by “peoples.”

Rawls takes great pains to distinguish between peoples and states. For Rawls, peoples are groups that are united by “common sympathies” and who have a shared sense of justice or conception of the good (p. 25). Rawls also tends to use the term ‘societies’ interchangeably with ‘peoples.’ However, the term ‘society’ probably is used by Rawls to indicate that peoples are organized groups. Their organizing structures include independent, territorially based political institutions—what one would normally call states (pp. 38–39). Unless by ‘peoples’ Rawls means groups that have their own states, it would make no sense for him to attribute (most of) the familiar powers of sovereignty to peoples, as he does in his eight principles of the Law of Peoples; only groups with states can have such powers. Thus for Rawls, ‘peoples’ are groups with their own states.

However, Rawls insists that peoples differ from states in two fundamental respects. First, peoples do not have all the powers of sovereignty traditionally associated with states: they do not have the right to go to war to further their interests or policies, only the right to self-defense; second, states, as traditionally conceived, have the right of noninterfer-
ence in their internal affairs; peoples, in contrast, must meet certain minimal standards, which Rawls calls human rights properly speaking, in their internal affairs (pp. 25–26). (It might be more perspicuous had he said that peoples are groups that have their own states but that the powers that their states have, or the powers they exercise through their states, do not include two of the powers traditionally ascribed to states.) Rawls adds that states, as traditionally conceived, do not have a moral character, whereas peoples, at least those who qualify for membership in the Society of Peoples, do have a moral character (p. 27).

To summarize: for Rawls, peoples (or their societies) are politically organized, and their form of political organization is that of statehood, even if, normatively speaking, they do not have all the traditional powers accorded to states. So it is appropriate to describe the principles of Rawls’s Law of Peoples as interstate principles, so long as we keep in mind Rawls’s distinction between peoples (as politically organized into states with limited sovereignty) and states as traditionally conceived (where these limitations on sovereignty were lacking). In some ways, this seems more illuminating since calling them laws for relations among peoples or societies does not highlight the fact that these laws apply to groups that have their own state structures nor does it make clear the crucial point that these laws are intended to identify the rightful powers that are to be exercised through those state structures.

Rawls’s special use of the term ‘peoples’ comes at a price: it may lead some to think that he is talking about all groups that form distinct societies and are united by common sympathies and conceptions of justice or of the good, rather than those that enjoy the highest level of political organization (statehood). Nowhere in The Law of Peoples does Rawls suggest that peoples that are not organized in states are equal participants in the society of peoples for whom the Law of Peoples is developed. Yet by using the term ‘peoples’ rather than the phrase ‘peoples organized in states’, Rawls courts confusion: given that the term ‘people’ is often used to refer to ethnic or national groups, including those that lack their own states, he might be read as offering a much more radical theory of international relations than he is—one that ascribes many of the powers of sovereignty, including that of self-determination, to hundreds, if not thousands, of groups that exist within state boundaries but which do not have states of their own.

Moreover, the traditional view of the state that Rawls wishes to avoid has already been successfully challenged in the decades since World War II, at least in international legal doctrine, if not always in practice. States are now conceived as not having the kind of unlimited sovereignty that Rawls associates with that term. International law determines the powers of sovereignty, and current international law recognizes both that states do not have the right to go to war to further their interests, but only the right to self-defense or defense of other states against ag-
gressors, and that the internal sovereignty of states is limited by human rights. Post–U.N. Charter human rights developments have challenged the two powers of sovereignty Rawls rightly rejects, and the liberal theory of international relations has challenged the assumption that states are amoral actors—but neither has found it necessary to reject the term ‘state’ and replace it with the dangerously ambiguous term ‘people.’

My suggestion, then, is this: I agree with Rawls’s critics that he has overlooked the need for some international principles that apply to individuals as individuals. Suppose the critics are also correct in assuming that an appropriate way to generate these principles is by a hypothetical choice situation in which parties represent individuals. It may nonetheless be true that in addition to these individual principles, principles are needed for determining relations among Rawlsian societies—that is, “peoples” organized in states, understood as territorially based independent political units. We may call these principles the Law of Peoples, or we may call them intersociety or interstate principles (so long as we do not assume that states have the unlimited sovereignty of the pre-charter period and do not understand them to be amoral agents as depicted in so-called Realist Theory, prior to the advent of the liberal theory of international relations). The assumption that there is a need for what I prefer to call interstate principles will be valid as long as there are states, or at least as long as states are among the principal actors recognized by international law. In what follows, I will assess the fruitfulness of Rawls’s Law of Peoples, understood as a set of rules for relations among states, where ‘state’ is short-hand for societies or peoples organized in their own states. If one believes, as Rawls appears to, that the traditional notion of the state as having unlimited sovereignty simply cannot be expunged from our thinking whenever the term ‘state’ is used, then one may substitute ‘intersociety rules’ for ‘interstate’ rules. My critique of Rawls will be unaffected.

If we interpret Rawls’s choice of principles by representatives of peoples as a method for deriving interstate principles (or, if you insist, principles for societies, or peoples organized in their own states) rather than as a method for deriving all the principles for a moral theory of international law, it looks much more plausible. Whatever else a morally defensible international legal system will include—and I believe it will include principles for individuals—it will include principles for relationships among states, at least if it is to supply any direct normative guidance for our world, in which the international legal system gives a prominent role to states.

I will argue, however, that the device of having representatives of peoples choose principles yields quite different principles from those that Rawls believes it does, once two important facts are appreciated. The first is that there is a global basic structure, which, like the domestic basic structure, is an important subject of justice because it has profound and
enduring effects on the prospects of individuals and groups, including peoples in Rawls’s sense. The second is that the populations of states are not “peoples” in Rawls’s sense and are not likely to become so without massive, unjustifiable coercion, but rather are often conflicting collections of “peoples” and other groups.

Furthermore, I will argue that Rawls’s failure to take these two facts into account explains two puzzling omissions in the Law of Peoples: the lack of principles of international distributive justice and the lack of principles addressing intrastate group conflicts. The former omission is surprising and disappointing for those who recognize that global economic institutions profoundly influence the prospects of individuals and groups, including “peoples” in Rawls’s sense. The latter omission is remarkable and disturbing to those who are aware that increasingly the most serious and destructive conflicts occur within states, rather than between them.3

In brief, I shall argue that because of his failure to appreciate the fact that there is a global basic structure and the fact that the populations of states are not peoples in his sense, Rawls’s Law of Peoples, even if understood as supplying only that part of the moral theory of international law dealing with relations among states, is a set of rules for a vanished Westphalian world and hence is of limited value for our world. I will also argue that Rawls cannot dissipate the force of this criticism by insisting that he is concerned primarily with ideal theory.

II. THE WESTPHALIAN WORLD

By a Westphalian world, I mean the world as represented in the international legal system that grew out of the Peace of Westphalia in 1648.4 There are two fundamental features of a Westphalian world. States are conceived of (1) as more or less economically self-sufficient units that are also distributionally autonomous and (2) as politically homogeneous, unified actors, without internal political differentiation. Let us consider each of these two features in some detail.


States are more or less economically self-sufficient if and only if they can (at least when reasonably well-governed) provide adequately for the material needs of their populations. Economic self-sufficiency is distinct from distributional autonomy. A state is distributionally autonomous if and only if it can determine how wealth is distributed within its borders. A state might be economically self-sufficient, in the sense that it has the capacity to produce the goods its people need, but be unable fully to determine how those goods are distributed among its people.\(^5\) Dependency theorists have argued that in order to keep their economies healthy, states must attract and sustain capital investment, that in a world in which capital is highly mobile this makes states vulnerable to dependency on capital, and that this dependency constrains the ways in which governments are able to control the distribution of wealth within states.\(^6\) In particular, governments will be reluctant to institute more egalitarian redistributive policies, for example, by levying higher taxes on corporations or on the wealthy, if they fear this will lead to a flight of capital to other countries. According to dependency theory, a government may have to choose between being able to attract and sustain enough capital investment to have a strong economy and being able to determine how wealth is distributed.

The Westphalian world was one in which many states were much more economically self-sufficient and distributionally autonomous than any states currently are. It is, therefore, not surprising that the system of international law to which the Peace of Westphalia gave birth conceived of the relations between states as being primarily military rather than economic: interstate relations consisted mainly of actual conflicts or of alliances designed to prevent conflicts or to ensure success when conflicts occurred. Trade relationships existed, of course, though mainly between individuals or alliances of merchants rather than between states. To the extent that states did engage in trade relations with one another, these were plausibly conceived of as consensual, discrete bilateral arrangements, bargains struck as it were de novo, episodic departures from a state of nature, understood as a noninstitutional, noncooperative status quo. Trade relations were not seen as patterns of transactions occurring within a framework of enduring global economic structures that influence the prospects of all peoples and individuals everywhere, that shape the bargaining positions of parties to these

\(^5\) I am grateful to Kristen Hessler for bringing this point to my attention.

transactions, and that are by no means created through consent by all whom they affect.

The Peace of Westphalia also affirmed the principle, enunciated in the earlier Peace of Augsburg (1555), that the head of state determines the religion of the people within the state (\textit{cujus regio ejus religio}). It is true that while the Westphalian settlement affirmed the Augsburgian principle, one of its two documents, the Treaty of Osnabruck, recognized exceptions to the principle, securing a limited religious freedom for certain religious groups (though Protestant worship was explicitly excluded from the entire territory of the House of Austria). However, the assumption of political homogeneity was maintained insofar as the exceptions were only for conducting private worship.\(^7\)

The principle \textit{cujus regio ejus religio} was designed to prohibit religious imperialism with its inevitable destruction and instability, but it helped to nurture a much more general principle prohibiting intervention against sovereign states that has come to be a central tenet of the international system that grew out of the Peace of Westphalia. To the extent that the Westphalian system recognized sovereign states as the subjects of international law, states were treated as unified actors, that is, as if they were politically homogeneous and devoid of internal political divisions. This Westphalian or, perhaps more properly, Augsburgian assumption of political homogeneity in effect denies the existence of distinct “peoples” with different conceptions of public order within states. From this perspective, intrastate conflicts are not viewed as falling within the domain of international law.

III. THE GLOBAL BASIC STRUCTURE

Both of the Westphalian assumptions are not only present in Rawls’s moral theory of international law; they are also essential to it. They determine the content of the Law of Peoples, explaining the absence of principles of global distributive justice and of principles addressing intrastate conflicts. But they also express an understanding of the subject matter of international law, that is, that international law is nothing more than a set of rules stating the rights and duties of states understood as politically homogeneous, more or less economically self-sufficient, and distributionally autonomous territorial political units. Or, if one adheres to Rawls’s scruples about the term ‘state’, one can say that for him international law is a set of rules for economically and distributionally autonomous societies.

Rawls subscribes to the economic self-sufficiency assumption in the following remarkable passage, in which he discusses the problem of societies (read: peoples organized in states) that are in “burdened” economic conditions. In the Amnesty International Lecture, “The Law of

\(^7\) Gross, p. 22.
Peoples,” out of which the book of the same title developed, Rawls offers the following conjecture:

Moreover, the problem is often not the lack of natural resources. Many societies with unfavorable conditions don’t lack for resources. Well-ordered societies can get on with very little; their wealth lies elsewhere; in their political and cultural traditions, in their human capital and knowledge, and in their capacity for political and economic organization. Rather the problem is commonly the nature of the public political culture and the religious and philosophical traditions that underlie its institutions. The great social evils in poorer societies are likely to be oppressive government and corrupt elites. . . . Perhaps there is no society anywhere in the world whose people, were they reasonably and rationally governed, could not have a decent and worthwhile life.  

In *The Law of Peoples*, he takes much the same line: “I believe that the causes of the wealth of a people and the forms it takes lie in their political culture and in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as in the industriousness and cooperative talents of its members, all supported by their political virtues. I would conjecture that there is no society anywhere in the world—except for the marginal cases—with resources so scarce that it could not, were it reasonably and rationally organized and governed, become well-ordered” (p. 108). What counts as a decent and worthwhile life in the first passage here is not clear. It could mean a life in which (what Rawls calls) the human rights properly speaking, including the right to subsistence, is enjoyed or it could mean a life that is decent and worthwhile according to the conception of the good or of justice distinctive of the society in question. These two interpretations cannot be assumed to be equivalent, because some societies may have conceptions of the good or of justice according to which more than the satisfaction of Rawls’s basic human rights is required. However, regardless of which interpretation of a decent and worthwhile life one chooses, it would be correct to assume that well-governed states can always ensure this for all their citizens only if it is the case that being well-governed ensures both economic self-sufficiency and distributional autonomy. In other words, it is not enough for a society to be able to produce enough; it must also be able to control distribution so as to ensure that everyone has what is required for a decent and worthwhile life (or so that its society’s distinctive conception of justice or of the good is satisfied).

If there is such a thing as a global basic structure—the international analog of the basic structure of a single society as Rawls under-

stands it—then being well-governed does not ensure either economic self-sufficiency or distributional autonomy. Being well-governed does not ensure that a society will be able to provide a decent and worthwhile life for all members nor that its distinctive conception of justice or the good can be adequately implemented. A well-governed society might be seriously disadvantaged by the global basic structure, if there is one. The workings of the global basic structure might either prevent the society from producing what is required or might constrain its ability to determine the distribution of what it produces, or both. Notice that in the second passage cited above, Rawls simply assumes that it is only “the basic structure of their society” that is relevant to whether a people prospers or not (emphasis added).

Recall Rawls’s introduction of the term ‘basic structure’ in A Theory of Justice and his argument that the basic structure is the primary subject of justice. The basic structure is “the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.” It is because of the nature of the distributional effects of the basic structure that it is the primary subject of justice: “The basic structure is the primary subject of justice because its effects are so profound and present from the start. The intuitive notion here is that this structure contains various social positions and that men born into different positions have different expectations of life determined, in part, by the political system as well as by economic and social circumstances. In this way the institutions of society favor certain starting places over others. These are especially deep inequalities.”

If there is a global basic structure—a set of economic and political institutions that has profound and enduring effects on the distribution of burdens and benefits among peoples and individuals around the world—then surely it is a subject of justice and a very important one. Whether the basic structures of individual societies are more primary will depend upon whether or not their distributional effects are even greater than those of the global basic structure (and which is more primary might change over time). But in either case, if there is a global basic structure, principles of justice for it will be required, just as principles of justice are required for domestic basic structures.

There is a global basic structure. Its existence and major features are documented in a vast and growing interdisciplinary literature that goes under various headings: globalization, structural dependency, and theory of underdevelopment. Among the elements of the global basic

10. Ibid.
11. A critical survey of these literatures from a liberal economic perspective can be found in Robert Gilpin, The Political Economy of International Relations (Princeton, N.J.):
structure are the following: regional and international economic agreements (including General Agreement on Tariffs and Trade, North American Free Trade Agreement, and various European Union treaties), international financial regimes (including the International Monetary Fund, the World Bank, and various treaties governing currency exchange mechanisms), an increasingly global system of private property rights, including intellectual property rights that are of growing importance as technology spreads across the globe, and a set of international and regional legal institutions and agencies that play an important role in determining the character of all of the preceding elements of the global basic structure.

The growing literature on the global basic structure delineates its distributional effects. No attempt will be made here to summarize these findings. The chief point is that, like a domestic global structure, the global basic structure in part determines the prospects not only of individuals but of groups, including peoples in Rawls's sense. It is therefore unjustifiable to ignore the global basic structure in a moral theory of international law—to proceed either as if societies are economically self-sufficient and distributionally autonomous (so long as they are well-governed) or as if whatever distributional effects the global structure has are equitable and hence not in need of being addressed by a theory of international distributive justice.

Rawls's picture of international economic relations is thoroughly Westphalian: he says that members of the society of peoples will negotiate "fair" trade agreements among themselves (p. 69), but he never considers the implications of the fact that negotiations occur within the parameters of the global basic structure and will be shaped by whatever

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inequities characterize the global basic structure. Recall that, in *A Theory of Justice*, Rawls, for the very same reason, rejected the simple libertarian view that whatever bargains parties agree to are just. He argued that unless the background institutions of the basic structure are just, injustices may be perpetuated by “voluntary” agreements.

Rawls offers no support for his sweeping generalization that good government ensures that a society can provide a “decent and worthwhile life” for all its citizens. If there were no global basic structure, then this generalization might be plausible—indeed it would come close to being tautological. But since there is a global basic structure, Rawls’s good government generalization needs a justification. And this is true regardless of whether “a decent and worthwhile life” means “a life in which one enjoys Rawls’s basic human rights” or “a life that is decent and worthwhile according to the conception of justice or of the good that is distinctive of a particular society.” There is simply no reason to believe that a global basic structure that is not regulated by principles of justice will happen to ensure that every well-governed society will be so distributionally autonomous as to be able to see that either of these standards is met for all of its citizens.

In addition, once we acknowledge the existence of the global basic structure, it is not at all obvious that the appropriate standard for evaluating its distributive effects is the rather minimal one of “a decent and worthwhile life.” It is clear why Rawls thinks this is the appropriate standard: he argues that every society must exemplify a “common good conception of justice” and that doing so requires respect for what he calls the basic human rights, or human rights properly speaking. The thought, presumably, is that where these basic human rights are respected for all, all will be able to live a decent and worthwhile life.

According to Rawls, the basic human rights include a right to material subsistence, a right against religious persecution, and a minimal right to liberty that rules out slavery, serfdom, and forced occupations. Rawls believes that to require any society to do more than respect these basic rights would be to be guilty of intolerance.

Suppose we accept arguendo Rawls’s conclusion that tolerance mandates that the international legal order can only require societies to respect the basic human rights of their members—that requiring them to treat their members more equally would be intolerant. Nevertheless, we may ask: why shouldn’t we consider a full range of alternative conceptions of justice for the global basic structure, including some that might require greater equality?

Notice that it will do no good for Rawls to reply that to consider more egalitarian principles of global distributive justice would be to transgress the bounds of tolerance by imposing liberal conceptions of distributive justice on well-ordered societies that are not liberal. The charge of intolerance might be valid if the proposal were to require egal-
tarian distribution within societies. However, the proposal is to consider a full range of possible standards for global distributive justice—principles for the global basic structure—including some that are more egalitarian than is necessary to ensure that individuals within societies must be able to live decent and worthwhile lives.

If we follow Rawls’s path of having the parties who choose the principles of the Law of Peoples represent peoples, then such representatives, who we must presume are aware that there is global basic structure, will be concerned about its distributive effects on their societies. But if this is the case, then why should these parties settle for a Law of Peoples that only includes the minimal distributional constraints on global economic institutions that are mandated by a commitment to ensuring that the basic human rights are respected in all societies? Instead, why wouldn’t parties representing peoples strive to ensure that their societies are not disadvantaged by the global basic structure?

There are two distinct and powerful reasons why parties who represent peoples would choose principles of justice for the global basic structure. First, in their capacities as representatives of peoples, each party will be concerned to ensure that the global basic structure’s distributional effects do not impede his society’s capacity to achieve its own conception of justice or of the good. And there is no reason to assume either that this conception of justice will be limited to the achievement of a “decent and worthwhile life” for all members of the society or merely to respect for the basic human rights. (This is true regardless of whether we assume, as Rawls does, that the parties choosing the Law of Peoples know the content of their societies’ conception of justice and the good, or they are behind a veil of ignorance in this regard.) Only if we assume, as Rawls does without justification, that societies are distributionally autonomous, self-sufficient economic units, are we entitled to assume that there is no need to ensure that global institutions do not impair our society’s ability to implement its own conception of justice or its own conception of the good.

There is a second reason parties representing peoples would choose a Law of Peoples that includes principles of distributive justice for the global basic structure. This reason parallels Rawls’s reason for concluding, in A Theory of Justice, that the parties choosing principles for the domestic basic structure would choose his egalitarian principles. In the case of the choice of principles of domestic justice, the parties are concerned about how various principles will either support or undermine the self-respect of individuals living under them. Because the parties in the domestic original position are represented as “free and equal,” they will avoid principles that might turn out to assign them to an inferior status. Similarly, the parties to the choice of the Law of Peoples would be concerned to choose principles that would ensure fundamental equality for their societies vis-à-vis other societies. And this means choosing prin-
principles for a global basic structure that would at least rule out those inequalities among peoples that are incompatible with preserving the social bases of self-respect for all peoples.

To summarize, regardless of whether one represents a people whose internal conception of justice is egalitarian or hierarchical, one’s commitment to protecting both the capacity of one’s society to implement its conception of justice and one’s commitment to securing equal status in the international community for one’s society require the choice of principles of justice for the global basic structure. And there is no reason to assume that these principles will allow the tremendous inequalities among peoples that are compatible with the Rawlsian requirement that all societies respect the basic human rights of their own members. Rawls takes great pains to construct a law of peoples that affirms the equality of peoples. He is to be commended for emphasizing that interference in societies that differ from ours can be a repudiation of this equality. But if my argument is sound, Rawls has overlooked a fundamental dimension of the equality of peoples by ignoring the fact that the global basic structure can undermine the equality of peoples unless it is regulated by principles of distributive justice.

Moreover, even if Rawls were justified in assuming that well-governed societies can be economically self-sufficient and distributionally autonomous enough to ensure a decent and worthwhile life for all their members (or to implement their distinctive conception of justice or the good), it would not follow that there is no need for principles of global justice. For it might turn out that the capacity of a people to achieve good government is itself influenced significantly by how they are affected by the global basic structure. Indeed, there is a substantial literature that argues that this is the case, that is, that the inequitable effects of the global basic structure help foster or at least to sustain just the sort of elitist, inefficient, and corrupt government that Rawls assumes is the chief cause of poor economic performance.  

The extent to which various global financial regimes, governance structures, economic agreements, and private property rights systems affect the distribution of benefits and burdens among peoples and individuals is certainly open to dispute. What is not open to dispute is that these institutions do have distributional effects, and that means that there is no denying that there is a global basic structure. But if there is a global basic structure, then a moral theory of international law cannot afford to ignore its existence.

I have already noted Rawls’s chief reason for denying that the parties choosing the Law of Peoples would not choose principles of global distributive justice. This is the misdirected charge that anyone who proposes principles of distributive justice for inclusion in the Law of Peoples transgresses the bounds of toleration by imposing liberal principles on well-ordered illiberal societies. For, as I have just argued, representatives of illiberal societies would be concerned about global distributive justice—both to ensure that their societies have the capacity to implement their (illiberal) conceptions of justice or of the good and in order to ensure their peoples equal status in the Society of Peoples. Egalitarian principles for determining the distribution of benefits and burdens among peoples are not inconsistent with inegalitarian distributions within peoples. Rawls’s argument against inclusion of principles of global distributive justice confuses the two types of principles. Rawls admits as much when he advocates a law of peoples that recognizes the equality of peoples but argues that this is compatible with hierarchically ordered, that is, inegalitarian, societies being members of the Society of Peoples.

There is one element of Rawls’s Law of Peoples that addresses some of the inequalities between rich and poor peoples. As already noted, he recognizes a duty of better-off peoples to aid “burdened societies.” Although he does not elaborate on the form such aid should take, Rawls seems to envision transfers of food, or funds, or perhaps technology, or the provision of credit. There is no indication that this duty of aid is to be understood as the collective responsibility of the society of peoples and no mention of a right on the part of “burdened societies” to receive it. In other words, the duty as Rawls conceives it seems to resemble an imperfect duty of charity rather than a duty of justice. Be that as it may, if there is a global basic structure, then there is no more reason to believe that discharging such a duty to aid burdened societies will achieve justice than there is to believe that the inequities produced by a domestic basic structure can be adequately offset by acts of charity. Once again, the same reasons Rawls gave in *A Theory of Justice* for insisting on principles

of distributive justice for the domestic basic structure speak in favor of including principles of distributive justice for the global basic structure in the Law of Peoples. Because the distributional effects of a basic structure are profound and enduring, justice requires systematic principles that are applied to the basic structure, not merely principles of aid to be applied by individuals, whether the individuals be persons or particular societies.

It is not my goal here to provide a theory of global distributive justice. Instead, I only wish to show that and why Rawls’s approach to the Law of Peoples wrongly avoids the task of providing such a theory. However, I do want to make a prima facie case that once we take seriously the idea that there is a global basic structure, Rawls’s device of having parties to an agreement on international principles represent peoples would yield at least three types of principles of global distributive justice that go far beyond the duty to aid burdened societies: a principle of global equality of opportunity, a principle of democratic participation in global governance institutions, and a principle designed to limit inequalities of wealth among societies.

Suppose that we revise Rawls’s characterization of the problem of choosing the Law of Peoples to include a clear recognition that there is a global basic structure. Conscientious and informed representatives of peoples will choose principles designed to ensure that the global basic structure does not disadvantage the peoples they represent. But the global basic structure, as I have already noted, includes economic institutions as well as extremely powerful private economic actors, in particular, global corporations with vast assets and correspondingly great powers. Surely parties representing peoples would choose a principle of global equality of opportunity—a principle designed to ensure that their societies are not disadvantaged as a result of their members not having fair access to desirable positions and roles in the most important international economic institutions and in global corporations. Successful implementation of such a global equality of opportunity principle might, in fact, require significant redistributions of wealth, just as some have argued that Rawls’s principle of equal opportunity, applied domestically, would. Notice that global equality of opportunity is compatible with lack of equality of opportunity within states. A hierarchical society might limit those who are allowed to compete for positions and roles in the global basic structure to those of a certain class.

Furthermore, parties concerned to protect the interests of the peoples they represent would choose a principle of democratic participation in the most important global governance institutions. As it is, these institutions are highly undemocratic, disproportionately controlled by persons representing the interests of the richest and most powerful states. A principle of democratic participation in global governance institutions would have significant implications for reform. For
example, it might well require restructuring the U.N. Security Council, either by abolishing the veto of the permanent members or by opening up the permanent membership to states from the Southern Hemisphere. (To say that parties representing peoples would choose a principle of democratic participation in the global basic structure in itself says nothing about the extent of global governance they would choose. They might in fact limit the scope of global democratic procedures so as to preserve a great deal of independence for peoples.)

Whether, in addition, Rawlsian parties cognizant of the existence of the global basic structure would also choose other distributive principles, including perhaps something like a global difference principle that would require inequalities among “peoples” to work to the maximal advantage of the worst-off “peoples” is perhaps less clear. The main point, however, is that once we take the idea of the global basic structure seriously and recognize that a law of peoples can include principles of distributive justice that take peoples (rather than individuals within states) as the recipients of just shares, global egalitarian justice is not ruled out by the Rawlsian commitment to tolerance. It is not ruled out because there is no inconsistency in representatives of peoples choosing egalitarian principles for determining distributive shares among societies while reserving the right to implement inegalitarian distributive principles within their societies. Recall that Rawls himself contends that representatives of inegalitarian societies would choose principles for the law of peoples that express the equality of peoples. My point is that once we acknowledge the existence of the global basic structure, the equality of peoples requires more than Rawls believes. The way is then open for constructing a law of peoples that takes global distributive justice seriously.14

Note that my argument for including principles of global distributive justice in the law of peoples depends upon two claims: (1) that there is a global basic structure, and (2) that the same reasons Rawls adduces in *A Theory of Justice* for framing principles of distributive justice for the domestic basic structure also require principles for the global basic struc-

14. Pogge (“An Egalitarian Law of Peoples”) has argued that a Rawlsian Law of Peoples should include a Principle of Greatest Equal Liberty for all persons, as well as a global version of Rawls’s second principle of justice, which includes the Principle of Fair Equality of Opportunity and the Difference Principle. It appears, however, that his view differs significantly from the one advanced in the current article. Pogge does not distinguish explicitly between an argument for egalitarian principles that apply to the global basic structure but which allow inequalities within different societies and an argument for egalitarian principles that apply both to the global basic structure and within societies. However, he seems to be advocating the latter. My argument is that even if Rawls is correct in his view that tolerance requires inequalities within societies that would not be countenanced by liberal principles, he is still wrong to conclude that there are no egalitarian principles of justice that apply to the global basic structure.
ture. Rawls might agree with the first claim but attempt to reject the second, for either of two reasons. First, he might argue that any attempt to frame principles of distributive justice for the global basic structure is an idle exercise because there are no global governance institutions capable of implementing such principles. Even if there is a global basic structure just as there are domestic basic structures, individual states (generally) have institutional resources for implementation of principles of justice that are lacking at the international level. The best we can do is encourage better-off societies to act on the imperfect duty to aid burdened societies. Call this the infeasibility objection. Second, Rawls might argue that quite apart from whether mechanisms for implementation exist, something else is lacking: sufficient consensus among peoples on the content of global distributive justice principles. Call this the lack of consensus objection.

The infeasibility objection wrongly assumes that principles of justice have no useful role to play prior to the point at which they can be successfully implemented. This is not the case. Principles of justice can play a role in helping us to determine what sorts of institutions we need to build in order to be able to achieve justice. And this is true in the domestic case as well as globally. Also, one should not assume that the "successful implementation" of principles of justice requires that they be perfectly satisfied. Rawls certainly does not. (Recall that he distinguishes between ideal, that is, full compliance, and nonideal, or partial compliance, theories.)

Just as important, one should not assume that adequate implementation depends upon the existence of a world government in the sense of a centralized, ultimate enforcement mechanism that is the global analog of the individual state. Rawls suggests in A Theory of Justice that sanctions for compliance are needed to solve the assurance problem—to give us reasonable assurance that if we comply with institutional rules and laws designed to satisfy the principles of justice for the basic structure, others will reciprocate. But sufficiently effective sanctions may be of different kinds, and it is an empirical question of great complexity as to whether or to what extent various combinations of sanctions of different kinds will need to be backed at certain points with the credible threat of coercion.

Furthermore, it would be a mistake to assume that even where coercion is needed, it must be coercion supplied by a single, centralized, ultimate global enforcer. It might instead be provided by international collective authorization of private enforcement—as was recently the case when the United Nations authorized a coalition of countries to enforce a resolution to counter Iraq’s invasion of Kuwait. So, both because

15. I am grateful to Christopher Griffin for bringing this point to my attention.
principles of justice need not be fully implementable in order to serve their distinctive normative function and because implementation may require less than a full-blown global enforcement mechanism, it is a mistake to infer from the fact that individual states have capacities for enforcement that are lacking at the international level that framing global principles of justice is an idle exercise.

Nor is the lack of consensus objection compelling. I have already explained why, despite differences in their domestic conceptions of justice, parties representing societies would at least choose a global principle of equality of opportunity and a principle of democratic participation in global governance institutions. They would do so for the same reason that Rawls says they would choose the principle of noninterference and the principle that peoples are “equal parties to their own agreements”—namely, to ensure the equality of peoples. Rawls himself assumes that the parties will agree on the latter principles of equality among peoples, despite whatever differences may exist among them concerning domestic justice. But if so, then the same commitment to equality of peoples will lead them to choose a global equality of opportunity principle, to ensure that members of their societies have access to important positions and roles in the global basic structure, and to choose a democratic participation principle, to ensure that their societies are not excluded from key global governance processes. Whether they would choose a global Difference Principle to guarantee equitable shares of the world’s wealth to their societies may be more questionable. However, if, as seems appropriate, the parties representing peoples are behind a veil of ignorance regarding the assets of their own societies, then it seems that they would choose a principle that would protect two fundamental interests that Rawlsian peoples have: the interest in having sufficient resources within their control so as to be able to implement their conception of the good or of justice, within their own society, and the interest in having the material means to be able to exercise effectively in the international realm the rights that the Law of Peoples accords them.

Rawls might object that while there is sufficient consensus among societies to support the commitment to the equality of societies expressed in his eight principles, consensus on global redistributive principles is not available because peoples think of themselves as being entitled to the resources within their territories. But the fact that actual peoples think of themselves as having a claim to resources within their borders is not more relevant here than the parallel claim that actual individuals think of themselves as having entitlements to wealth in the choice of principles of domestic distributive justice. The question is not whether real world individuals or societies would choose redistributive principles, but whether parties to an ideal contract, behind a veil of ig-
norance, would. My aim here is not to argue that representatives of peoples would choose an interstate analog of the Difference Principle, but only to suggest that they would be concerned to secure distributive benefits for their societies. And as I have already argued, given their awareness of the effects of the global basic structure on their society’s prospects, they would not and should not be content with a duty of charity, but they would instead choose a genuine principle of global distributive justice, one that governs the global basic structure.

Buchanan Rules for a Vanished Westphalian World

16. Kristen Hessler (personal communication) poses the following question: what if there are some peoples whose representatives wish to dismantle the global basic structure because they view it as a threat to the distinctive values of their societies? My initial response is that it is more likely that representatives of peoples would be concerned to insulate their societies from certain aspects of the global basic structure than to try to get rid of it. For representatives to choose to destroy the global basic structure would seem to be irresponsible since they would thereby cut off future generations of their peoples from any benefits that depend upon its existence. I would also argue that it is realistic to stipulate that the parties to the agreement on a law of peoples are to operate on the assumption that there is and will continue to be a global basic structure—that dismantling the global basic structure is not feasible, whether or not it is desirable. A complex story would have to be told to explain why dismantling the global basic structure is not feasible. That story would include an account of how the global economy generates preferences that people are not likely to abandon, as well as an account of how various barriers to collective action make it unlikely that an agreement to dismantle the global basic structure would be stable, given the benefits of defecting from such an agreement. This explanation of why dismantling the global basic structure is not a feasible alternative would also emphasize the difficulty of achieving a sufficient reduction in the world’s population to make a return to nonglobalized economies feasible without great loss of life or quality of life. Assuming that these arguments can be fleshed out adequately, representatives of peoples concerned to protect their own societies’ interests and equal status will operate on the assumption that there will be a global structure and will, as I have argued, choose principles of justice for it. This response to Hessler’s question looks more attractive once one realizes that the implementation of principles for the global basic structure is compatible with some societies choosing to pursue an isolationist policy, though this would mean refusing the benefits they would be entitled to under those principles. (Similarly, individuals in a Rawlsian domestic society may refuse to utilize what they are entitled to according to the principles of justice.) If we assume that there is and will continue to be a global basic structure for the indefinite future, then agreement on principles of justice for the global basic structure can be seen as reducing societies’ vulnerability to being disadvantaged by it.

17. Rawls argues that parties representing peoples would not choose a principle of global distributive justice (LP, pp. 116–17): such a principle would be unacceptable because it would in effect reward poor investment decisions on the part of the recipient of redistribution and unfairly penalize societies that invest more wisely. Charles Beitz (“Rawls’s Law of Peoples,” in this issue) offers what is, in my opinion, a conclusive refutation of this argument. Beitz points out that the implicit analogy with redistribution between individuals is faulty because many in the poorer society will not have had any influence on the choices that led to poor investments. Given that this is so, it is not clear that requiring better-off societies to redistribute wealth is unfair. In addition, I would emphasize that Rawls’s chief complaints about global distributive justice principles seem to be applicable only to what might be called open-ended redistributive principles—those that require never-ending redistribution in the direction of equality or of maximizing the prospects of the worst-off. He
IV. THE REALITY OF INTRASTATE POLITICAL DIVISIONS

As we have seen, Rawls’s Law of Peoples includes no explicit reference to intrastate conflicts (in Rawlsian terms: conflicts that occur within the geographical boundaries of societies, i.e., within the territories of peoples’ states). Here, too, Rawls seems uncritically to assume the Westphalian paradigm. In the Westphalian system, in accordance with the Augsburgian principle, deference to the religion of the monarch submerges religious differences among his subjects. In Rawls’s system, the fiction that the population of a state is a “people” unified by a single political culture removes problems of intrastate conflict from the domain of international law. The question of whether, and if so how, international legal institutions should respond to intrastate conflicts cannot even be raised within Rawls’s framework because the parties who choose the Law of Peoples are understood to be representatives of “peoples,” groups characterized by deep political unity and already possessing their own states. Rawls’s political homogeneity assumption is not a mere detail; it shapes his understanding of what international law is for, by eliminating from the Law of Peoples principles designed to cope with important conflicts that arise within states.

Rawls does include a principle of self-determination in the Law of Peoples (p. 37). However, this principle appears to address only one particular instance of self-determination—cases where a Rawlsian “people” has been unjustly incorporated into another state and seeks to recover its independence. Recall that Rawls attributes the right of self-determination to peoples, and by peoples he means societies, peoples with their own states, not ethnic groups, national minorities, or indigenous groups that do not have their own states.

So, apart from the case of secession to recover unjustly extinguished state sovereignty, Rawls’s principles do not address the various problems of intrastate conflict which have become the focus of current international peace-keeping efforts and humanitarian intervention, as well as the subject of much recent work in political theory. To limit the principle of self-determination to cases where groups who had their own

is wrong to assume, however, that these are the only alternatives. The parties might choose a kind of limited egalitarian principle to constrain inequalities without undertaking the open-ended commitment Rawls fears.

states are allowed to recover them is still to operate within the confines of the Westphalian paradigm. It is to think of international law as consisting solely of the law of states (in Rawlsian terms, “peoples” with their own states). It is to ignore the plight of groups that seek, but have not in the past had, their own states. And it is to fail to consider the possibility that international law should say something about the rights of groups to various forms of autonomy within states.

Why would Rawls ignore these problems of intrastate conflict? My hypothesis is that he does so because (1) his ideal theory assumes away the problem of divisions within the state and (2) once the assumption of unity within the state is made, he feels constrained, in the name of tolerance, to omit any principles that would infringe on the right of each people to determine its own internal affairs, so long as basic human rights are respected.

If the populations of states were, in fact, peoples in Rawls’s sense, groups unified by deep agreement on conceptions of public order, then Rawls’s talk of the rights of peoples to pursue their own conceptions of justice or the good without interference would make more sense. There would be no need to consider rights of groups within states. But the populations of states are not in fact peoples in Rawls’s sense. They are, in almost every case, collections of groups, and in some cases the groups are distinguished by quite different conceptions of justice or the good. In addition, in many cases, groups within the state either deny that they should be within that state or they demand special group rights, including rights of limited self-government within the state, beyond the individual basic human rights that Rawls says international law should recognize.

Rawls assumes that, for purposes of a moral theory of international relations, the standard case is that of a state whose population is unified by a shared political culture, a common conception of public order—in other words, a state within which there are no conflicts over fundamental issues of justice or the good and no divisions over which groups are entitled to their own states or to special group rights. Why is this the standard case? If by the standard case, we mean the typical case, it is certainly not the standard case in our world, nor is it likely to become standard.

Perhaps Rawls means that a society thus unified is the appropriate case for ideal theory. The difficulty with this interpretation is that it is hard to see how an ideal theory that ignores intrastate conflict by assuming deep political unity within states can serve as the ultimate benchmark for progress from our nonideal situation. The problem is not simply that Rawls’s ideal theory, founded as it is on the assumption of deep political unity within states, has nothing to tell us about our nonideal situation, in which such conflicts are common. The more serious problem is that to

the extent that we succeed in approximating the implementation of Rawls’s ideal principles, we are barred from embracing a role for international law in intrastate conflict. For remember, according to Rawls’s ideal theory, any attempt by international legal agencies to require states to recognize even limited rights of self-government for national minorities or for indigenous peoples is an unjust interference. It is a violation of the right of self-determination of Rawlsian “peoples,” and it is only peoples in this latter sense that have standing in international law according to Rawls’s theory.

Although Rawls does distinguish between ideal and nonideal theory in the Law of Peoples, nothing he says suggests that his nonideal theory relaxes his Westphalian assumption of deep political unity within states. Rather, the only difference between ideal and nonideal theory is that the latter deals with two cases of failure to implement fully the principles of ideal theory—the case of outlaw societies and that of burdened (economically undeveloped) societies (p. 90). Rawls nowhere suggests that the shift from ideal to nonideal theory requires expanding the set of principles to recognize rights of self-determination or other minority rights (beyond the right against religious persecution included in the basic human rights) for groups within states.

Rawls might, of course, argue that there are no rights of self-determination or other special group rights for groups that do not have their own states (or have had their own states in the past but have been deprived of them). To make this claim at all plausible, Rawls would have to argue that all of the legitimate concerns of groups within states can be adequately met if the basic individual human rights of their members are respected. But Rawls does not take up the formidable challenge of showing that in all cases his rather lean list of basic individual human rights will suffice, and he does not engage the large literature that purports to show that even a richer set of individual rights is not sufficient.20

Perhaps Rawls does believe that all of the legitimate interests of groups within the state can be adequately addressed by the rather lean set of individual rights he regards as human rights properly speaking and that, where these rights are respected, no substate groups have the right of self-determination. In other words, perhaps Rawls has already made up his mind on these much-disputed issues and is merely using the origi-

nal position with parties representing peoples as a device of representation to articulate his view and to present his conclusions, not his reasons for them.

This would be a rather desperate defense, however. It invites us to view Rawls’s Law of Peoples as merely assuming answers to some of the most disputed issues of political philosophy, while at the same time offering a method for choosing principles that prevents us from even raising them. The point—the crucial point—is that Rawls’s theory provides no resources for developing support for the view that the individual rights he proposes are sufficient because the assumption of political unity upon which he proceeds does not even allow the issues for which many think individual rights are inadequate to be raised. It is one thing to advance a theory that takes a position on a deeply disputed issue but provides the resources for working out a defense of that position. It is quite another merely to assume one very controversial resolution of the issue in the context of a theory that has no resources for defending that resolution. In Rawls’s theory, principles are chosen by parties who represent politically unified groups within their own states; hence, there is no way of arguing the issues of intrastate pluralism within the confines of the theory. The theory provides no resources for defending the disputed assumption that individual human rights are sufficient.

Alternatively, Rawls might argue that even if certain groups within the state do have rights of self-determination or other special rights, it is not the business of international law to recognize these rights. But Rawls nowhere even sketches such an argument. This would be a difficult case to make, given what Rawls acknowledges, namely, that the protection of individual human rights cannot be left solely to the discretion of states but is a primary concern of international law. Given that he has already rejected the traditional view that sovereignty prohibits international legal scrutiny of individual human rights violations, Rawls cannot simply assume, without argument, that the protection of groups within the state is off-limits to the international community because it would violate sovereignty. Simply on the basis of historical experience, a strong case can be made that unless intrastate rights of self-government and other minority rights do receive international legal support, they are not likely to be respected in the cases in which they are most needed. (Consider several recent examples: Ethiopia’s violation of the federal status of Eritrea, Sudan’s violation of the self-government status of southern Sudan, Iraq’s violation of its autonomy agreement with the Kurds, and Serbia’s abolition of the autonomy of Kosovo.)

Note that the situation of deep political unity Rawls takes as standard would be the favored case, the normative ideal, for a theorist, if he were an advocate of national self-determination, where a ‘nation’ is understood, not as an ethnic group, but as a group defined by ties of sympathy and a shared conception of justice or the good—that is, a
Rawlsian people. By ‘national self-determination,’ I mean the view that such groups have a right to, or at least a strong prima facie case for having, their own state. But Rawls has not made a case for national self-determination. Instead, he only advocates self-determination for those peoples that already happen to have a state of their own (or who had one that was unjustly taken from them). It appears, then, that Rawls’s assumption that the populations of states are characterized by deep political unity is unjustified, regardless of whether it is understood as a claim about what is typical or about what is ideal. In any case, the ideal theory upon which this assumption is built appears to shed no light on some of the most important problems for which a moral theory of international law is needed, and the nonideal theory retains this same problematic assumption.

I have argued that Rawls’s Law of Peoples, in both its ideal and nonideal versions, has nothing to say about important intrastate conflicts. I have also argued that the ideal theory, if taken as a specification of the rights of “peoples” that we ought to strive to respect, actually rules out international legal support for various autonomy regimes and minority rights within states. As it stands, Rawls’s ideal theory seems to be a rather abstract exercise in determining the principles that would be appropriate for a world in which a one-to-one correlation between states and “peoples” had already been achieved—a world in which all deep political divisions within states had been overcome. The problem is that even if this exercise is successfully completed, its usefulness as a guide to the moral evaluation of international law in our world is very limited.

At the beginning of this article, I voiced agreement with those who complain that Rawls’s Law of Peoples does not afford adequate protection for individual rights. In this section, I have argued that it also fails to provide guidance for international responses to intrastate conflicts and that, in fact, it cannot even permit principled discussion of urgent issues concerning group rights, including rights of self-determination for groups that lack their own state. It is beyond the scope of this article to construct an alternative moral theory of international law that would remedy these defects.21 Here my aim is more limited: to determine the resources and limitations of Rawls’s view for providing a moral theory of international law and, in the process of doing so, to indicate the full range of issues such a theory should shed light upon.

V. CONCLUSIONS

I have argued that Rawls’s work on the law of peoples not only does not, but cannot, provide guidance for two of the most important topics a moral theory of international law must address: global distributive justice

and intrastate conflict. Rawls is barred from making a contribution in these areas because his theory is founded on a denial of two basic features of the world for which a moral theory of international law is needed: the fact that there is a global basic structure and the fact that the populations of states are not “peoples” in Rawls’s sense, but rather are collections of different groups, often with different and conflicting views concerning justice and the good, as well as conflicting positions on the legitimacy of the state itself. It would be a mistake to conclude that the problems I have identified can be remedied by modifying Rawls’s theory—by adding the assumption that the parties who choose the law of peoples know that there is a global basic structure and that the populations of states are not politically homogeneous. Such a “modification” would radically change the character of his theory. It would express a quite different view about what the subject matter of international law is. Adding the global basic structure assumption and dropping the assumption that states are politically homogeneous (that there is a one-to-one correlation of “peoples” and states) opens the door to a much richer conception of what international law is about.

Rawls stresses that his Law of Peoples departs from the Westphalian paradigm by recognizing that sovereignty is limited by the need to respect basic human rights and the prohibition against aggressive war. He is correct to see this departure as progress. What he has failed to appreciate is how Westphalian his theory nonetheless is and, thereby, how debilitating the limitations of the Westphalian framework are.