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

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

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

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

Since the Theory of Justice first came out with its rather short remarks about international relations, people have speculated about their possible application to international law. Now Rawls has worked out a Law of Peoples, widely published in various forms, most recently in his collected essays (1999). Rawls’ Law of Peoples reveals how incompletely thought out his international theory really is. His essay is deeply troubling. First, simply because Rawls has not thought his theory out fully, but second because anyone who does try to work through the implications of Rawls’ theory for him will quickly see fundamental problems. The improbable assumptions that Rawls makes are so obvious to persons with a background in international law that any educated person would be better off going directly to the legal issues at hand, without Rawls help.

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

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

This is obviously a very bare-bones sketch of his position, and Rawls admits that his statement of principles is very incomplete. Other principles would need to be added, (he admits) and would require much explanation and interpretation. For instance, there would need to be principles for forming and regulating federations or associations of peoples and formal standards of fairness for trade and other cooperative arrangements. There should be certain provisions for mutual assistance between peoples in times of famine and drought, and provisions for insuring that in all reasonably developed liberal societies the citizens’ basic needs will be met. This is all that Rawls says about the obviously extraordinarily important issue of international economic and social
inequity. His principles are tossed off so lightly that one can hardly discern where they came from. Rawls’ principles are mostly rather nice principles. They appeal to the better side of human nature. But he never fully explains what they are, or where they come from. Rawls appears to believe that the mere attractiveness of his conclusions will motivate us to adopt his theory. Why should it? Other theories could generate the same principles. Rawls’ conclusions cannot justify his premises. They’re simply conclusions that are attractive in their own right.

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

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

The second distinctive aspect of Rawls’ methodology is that when he finally does extend his theory to international relations he takes it for granted almost without examination that the morally relevant entities in the international arena are states. International lawyers and theoreticians will recognize this at once to be an enormously problematic assumption.

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

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

Many scholars over the years have noticed this statist outlook in Rawls. Not only are his conclusions statist, but so is his whole methodology, to such an extent that it would have been a surprise if Rawls had reached anything but statist conclusions. Rawls’ problem grows out of the progression of his writing. Since he already had an answer in place concerning domestic political justice, it would not have made sense to start again from the beginning in addressing international affairs. So naturally he looked to states (not individuals) as the building blocks of his new international order.
Rawls’ two methodological assumptions are both profoundly flawed, so much so that they vitiate his entire enterprise. In developing his “constructivist” (i.e. contractarian) theory, Rawls begins with the basic structure of a closed and self-contained democratic society, which he then extends forward to future generations, outward to encompass foreign peoples, and inward to cover special social situations. Each time the constructivist procedure is modified to fit the subject in question. In due course all the main principles are on hand, including those needed for the various political duties and obligations of individuals and associations.

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

The same thing happens with Rawls’ persistent assumption of statist premises. Rawls must be sensitive to the question of statism, because so many of the principles that he chooses have significant statist aspects to them, and Rawls has been widely criticized for this. He is surely aware that his decision to base his contractarian analysis on the preferences of states is deeply controversial. Rawls recognizes the problem, without offering any satisfactory response. Having worked out “justice as fairness” for domestic society, he moves on as if the same structures will apply in other contexts. Rawls transposes his familiar domestic methods to construct a “law of peoples” and justifies this by observing that peoples as corporate bodies organized by their governments already exist in some form all over the world. These existing entities must agree to any proposed political reforms. This being the case (Rawls believes) all principles and standards proposed for the law of peoples must be acceptable to the considered and reflective opinion of “peoples” and their governments.

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

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

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

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

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

Any international lawyer would recognize that not all international actors are states. By beginning his analysis with statist assumptions Rawls builds statist structures right into his philosophical conclusions. Rawls’ original position, from which he constructs his “law of peoples” is composed only of a group of states, making their own social contractarian analysis behind a veil of ignorance. That just is not how things are. The world is not composed only of states, or of “peoples,” but also of people. There are non-governmental organizations, universities, human rights organizations, churches, mosques and many other institutions that have just as much independent validity internationally as states do, from a purely theoretical point of view. There is no reason theoretically to start with states as the relevant actors. Or if there is a reason, Rawls does not provide it. The detailed attention that international lawyers have long given to these questions shows how very far ahead of Rawls they already are. There would be no point in applying Rawls’ theory of justice to the international arena.

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“THE USEFULNESS OF WHICH RAWLS?”

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

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