Research Note: Rawls Revisited: Can International Criminal Law Exist?

KIRSTEN J. FISHER *University of Western Ontario*

John Rawls's theory of justice and its international application have been extensively discussed in relation to questions of distributive justice. Interestingly, though, commentators largely ignore questions of international criminal justice as they debate the merits and demerits of Rawls's state-centric *Law of Peoples*. This omission is understandable, since the emphasis of this work is on what can be required of the foreign policies of liberal states. However, there are two reasons for paying the matter of criminal justice close attention. The first arises from Rawls's explicit aim to accord with recent dramatic shifts in international law (1999a: 27). One such shift, arguably among the most dramatic, is the move to hold individuals criminally accountable for international crimes—a radical departure from centuries of state-centric jurisprudence. The second reason arises from Rawls's own argument. As I will show, his own theory directly demands individual accountability for the crimes that it condemns (Rawls, 1999a: 94–95), at the expense of its own state-centric approach.

An assessment of Rawls's *Law of Peoples* through the lens of international criminal law requires that in order to take human rights seriously and be capable of prosecuting the full range of criminal offences laid out by the Rome Statute, Rawls's commitment to peoples must be abandoned for a more cosmopolitan social contract. His theory, as he describes it, cannot even accommodate his own limited claims to take human rights seriously. Committed as it is to recognizing states as the primary actors,[1] Rawls's theory of international justice cannot effect international prohibitions against genocide or crimes against humanity, or even some of the articulations of war crimes.

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Kirsten J. Fisher, University of Western Ontario, Department of Political Science, Social Science Centre, London ON Canada N6A 5C2; kfisher6@uwo.ca

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International criminal law, as administered by international tribunals and the International Criminal Court (ICC), focuses on the prosecution of individual actors with the aim to protect and promote individual human rights. International criminal law has developed in line with a growing appeal to end actions that demonstrate the worst humans can do to each other. Accordingly, the 1998 Rome Statute of the ICC lists four categories of international crime:

(a) the crime of genocide,
(b) crimes against humanity,
(c) war crimes, and
(d) the crime of aggression (UN, 1998: Article 5).

Part of what makes these particular political crimes egregious enough to be worthy of international attention is that, with the possible exception of the crime of aggression, they target individuals in a horrendous manner and violate fundamental human rights.

Rawls also offers a list of international principles, positive standards extracted from the hypothetical international Original Position, according to which international behaviour is to be evaluated. We should be able to appraise the ICC's list of international crimes according to how well each crime corresponds to one of the eight principles that "constitute the basic charter of the Law of Peoples" (1999a: 37). The eight principles are:

(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-defence but no right to instigate war for reasons other than self-defence.
(6) Peoples are to honour 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 unfavourable conditions that prevent their having a just or decent political and social regime (Rawls, 1999a: 37).

It is mainly from principle 6 that we should be able to extract a basis for international criminal law that promotes and protects human rights. However, as I will argue, principle 6, which demands respect for human rights, cannot properly be seen as an outcome of Rawls's Original Position. In fact, any interpretation of Rawls's application of his Original Position model to the international level seems unable to supply a foundation for a conception of international criminal law that aims to take human rights

Abstract. Questions concerning how Rawls's theory of justice accords with international criminal justice are largely ignored in favour of extensive debates on questions of distributive justice and how they relate to his theory and its international application. This lack of attention to international criminal law is significant since Rawls claims that his theory of justice is developed to correspond with recent dramatic shifts in international law. This paper argues that it is impossible for Rawls's account, state-centric as it is, to accord with advancements in international law that have increasingly asserted recognition of individuals in the global context.

Résumé. Les questions concernant comment la théorie de justice de Rawls est en accord avec la justice criminelle internationale sont en grande partie ignorée, même pendant qu'en même temps sa théorie et son application internationale sont profondement discutée par rapport à la justice distributive. Ce manque d'attention à la loi criminelle internationale est important, puisque Rawls prétende que sa théorie de justice est développée en correspondance avec les récents changements dramatiques au niveau de la loi internationale. Cette exposé argumente qu'il est impossible que l'explication de Rawls, état-centré comme elle l'est, s'accorde avec les avancements en la loi internationale qui affirment de plus en plus la reconnaissance des individus dans le contexte global.

seriously. This argument, accompanied by the assumption that a primary purpose of international criminal law ought to be the protection and promotion of human rights globally, broadly reinforces claims for a cosmopolitan application of Rawls's model at the global level if, as Thomas Pogge says, it is to "afford some remedies to persons against abuse by their own governments" (1989: 246).

Original Positions, Individual Agency and Human Rights

The *Law of Peoples* imagines a two-tiered approach to determining just global institutions. First, there is the original Original Position, the model against which we can assess domestic laws and institutions. It directs the structure of the liberal democratic states, in which Rawls is mainly interested. It is his attempt to apply this theory to an international context that leads him to attribute special moral status to states as actors. Both the domestic and international applications suggest that what is primarily important is devising institutions that regulate behaviour between agents and promote the most freedom for all of them. On the domestic level, the agents take the form of individual members, who collectively comprise the state for which the institutions are devised. On the international level, the agents are no longer individuals, but states (1999a: 82–83), and Rawls's reason for limiting international agency to states is only slightly compatible with a concern for individuals. At the global level, he allows only decent states—those that allow true meaningful participation in political life, either as part of a consultation hierarchy or a liberal democratic system—to participate in the Original Position (Rawls, 1999a: 63). Once assured that the domestic situation of the states is sufficiently representative, Rawls focuses on states and their participation

in the deliberative process to determine which laws and institutions are fair to regulate international relations (1999a: 23).

Not surprisingly, for Rawls, it is the individual who represents the ultimate morally significant unit of concern. This is evident from his substantial body of work deliberating just domestic social institutions.[2] For his international theory of justice, he focuses on states that exhibit liberal democratic characteristics and on how they ought to evaluate international institutions and respond to other international actors. This focus extends the domestic social contract to the international sphere by ensuring that individuals are represented on the international level by their elected politicians. It is because of this great attention to the individual at the domestic level that his abandonment of absolute concern for individuals' interests at the international level is so remarkable. Transplanting a domestic social contract theory, which takes seriously the interests of individuals, to the international level, in which states are recognized as the actors, will not tender a conception of justice that would be most conducive to peaceful global institutional cooperation among states and, at the same time, ensure the interests of individuals are also met, unless all states are liberal democratic or similarly decent.

However, according to Rawls, his international model would develop laws that would promote equality and sovereignty of states (with some limitations) and contracts between states and, simultaneously, human rights. The international laws Rawls proposes can be divided into two distinct sorts. The first sort recognizes states as discrete units that interact; these laws demand respect for each actor and determine the rules of play. The second sort, represented by principle 6 and by the qualification on principle 4, which makes an exception in cases of "grave violations of human rights" (1999a: 37), is premised on the belief that the primary unit of concern is individuals within states. An extension of the Original Position model, which understands actors at the global level to be states, cannot convey both of these sorts of international laws. This model cannot confer laws of the second sort, laws that promote and protect human rights.

The original Original Position forms what we can regard

> as fair and reasonable conditions for the parties, who are rational representatives of free and equal, reasonable and rational citizens, to specify fair terms of cooperation for regulating the basic structure of this society. Since the original position includes the veil of ignorance, it also models what we regard as appropriate restrictions on reasons for adopting a political conception of justice for that structure. (1999a: 30)

The basis of political legitimacy, for Rawls, originates from a commitment to what he terms the Principles of Justice, that is, what it is possible for everyone to accept. His justification for the principles of

justice, applied to the domestic level, is an appeal to what is fair for all persons, since only individual persons are intrinsically valuable. Rawls's justification for his principles of justice is that "an agreement on these principles is the best way for each person to secure his ends in view of the alternatives available" (1971: 103). Rawls, concerned with defining the fullest freedom for each individual that is compatible with comparable freedom for others, demonstrates his commitment to the dignity of individual humans as rational beings. The institutions that would develop from this deliberation would be fair, since the parties are reasonable and will make decisions from appropriate motives, given that they do not know which particular positions they hold in life or which qualities or skills they possess. The idea is that since the original Original Position is attentive to the interests of all parties, we can hold our institutions to the standards that would be set by the parties deliberating in the Original Position; thus, we can legitimately assess our institutions' fairness.

Rawls's second application of the Original Position follows the original closely; however, rather than merely enlarging the pool of actors to include all individuals globally, he bases the legitimacy of international law on a hypothetical social contract between states. He claims that the rights and duties of states in regard to their sovereignty are "derived from the Law of Peoples itself, to which they would agree along with other peoples in suitable circumstances" (1999a: 27). If all states were structured according to liberal democratic ideals, this application could very likely be deemed quite sensible and prudent. A community of well-ordered states would likely have little need for an international criminal legal system capable of dealing with serious human rights violations, since each state would have internal mechanisms for such purposes. In fact, it seems that respect for human rights is essential to the concept of a people, as depicted by Rawls (Beitz, 2000: 674; Buchanan, 2000: 699). Safeguards, such as rescue treaties, might be employed to protect liberal democracies from the threat of a breakdown of the state, but this is an entirely different concern than building international protection for individuals from crimes against humanity and from genocide. Aside from this argument, Rawls's second application of the Original Position runs into much more serious problems due to the fact that the world's many states and their corresponding governments are comprised of very different characters.

It is easy to see how states as agents in the international sphere would agree to laws of the first sort, ones that protect the equality and sovereignty and freedom of states. It is not as clear why they would decide to institute laws to regulate their internal politics. Rawls expresses respect for human rights as "familiar and traditional principles of justice among free and democratic peoples" (1999a: 37) and claims that:

> [t]he list of human rights honoured by both liberal and decent hierarchical regimes should be understood as universal rights in the following sense: they are intrinsic to the Law of Peoples and have a political (moral) effect whether or not they are supported locally. That is, their political (moral) force extends to all societies, and they are binding on all peoples and societies, including outlaw states. (1999a: 81)

It seems unlikely, however, that states in the Original Position would, as Rawls suggests, insist that other states respect the human rights of their own members. There are two possible reasons why decent states might work this requirement into the Law of Peoples. Perhaps it is, as Rawls claims, that "liberal and decent peoples have the right, under the Law of Peoples, not to tolerate outlaw states [states that do not respect the human rights of their citizens, since] ... outlaw states are aggressive and dangerous; all peoples are safer and more secure if such states change, or are forced to change, their ways ... otherwise they deeply affect the international climate of power and violence" (1999a: 81). This specific argument, however, seems unfounded and merely an excuse to include this particular limit to sovereignty and rights, and to insert the obligations of liberal democratic states to protect global human rights. As David Luban points out in a similar criticism of Rawls's international theory, there are stable societies that pose no external threat, yet they violate the human rights of their own citizens in horrendous ways (2004: 132).

Another possible reason for Rawls to build respect for human rights into the principles of justice is simply the fact that decent states have such a strong commitment to human rights that they desire the human rights of all persons be respected. Rawls claims that "this refusal to tolerate those states [that violate human rights] is a consequence of liberalism and decency" (1999a: 81). However, whatever the truth of his prediction, he makes no argument for this second alternative in the relevant terms, that is, as a product of deliberation in the international Original Position. Well-ordered states, the only states allowed a voice in the deliberation process, already respect the human rights of their own members; thus, there is no obviously necessary reason to build a requirement into the principles of justice among free and democratic states that all states respect the human rights of their citizens. It seems that Beitz is right when he argues that "human rights are ultimately justified by considerations about the reasonable interests of individuals, not those of whole societies conceived as corporate entities" (2001: 277). Since the motivation and knowledge of the representatives of the well-ordered states are not clearly outlined in Rawls's theory, though, we need to question further whether a scenario in which this requirement would be agreed to is likely.

Rawls's theory hypothesizes reasonable decisions that would be made in an imaginary situation by well-ordered states deliberating behind a

veil of ignorance. Since this scenario is hypothetical, chances are that there may be an account of knowledge and reasonable motivation that would provide a basis for the development of a human-rights-protecting law. Can we assume that the representatives of the well-ordered states know that they represent well-ordered states, but not the form of each state? Are they motivated by the liberal ideals on which their states are based? Rawls does not allow personal ideologies to influence the original Original Position, but it seems that this must be somewhat different for the international Orginal Position or there would be no point to excluding non-well-ordered states from participating. However, even if the participants do know that they are well-ordered states, the problematic principles, which are expressions of the second sort of law, are as unlikely to be agreed to as if the participants did not know.

Participants represent their own states as discrete units in the Original Position. The assumption is that the individual members of the state, and their particular interests, have been taken care of by the domestic Original Position. The representatives on the international level would agree to principles that would ensure the fullest freedom for each state that is compatible with comparable freedom for others (as the individuals did in the domestic Original Position). This situation would give us the first five principles that comprise the basic charter of the Law of Peoples (all of these are expressions of the first sort of law). What, then, can be made of principles 6 through 8? These three principles seem to fall less squarely into the category of laws that protect the equality, sovereignty and freedom of states.

Principle 8 claims that states have a duty to assist other states living under unfavourable conditions that prevent their having a just or decent political and social regime. These states, "while they are not expansive or aggressive, lack the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources to be well-ordered" (Rawls, 1999a: 106). This particular requirement makes sense if the representatives do not know they are well ordered themselves or if it is regarded only as a rescue clause. Both of these options fit the purpose of the first sort of laws. States, not knowing if they would be burdened by poverty or lack of technical or political know-how, would likely strive for a requirement of assistance for burdened states. Well-ordered states, on the other hand, could have cause to worry about meeting unfortunate circumstances and could be supposed to agree to a law that would protect each of them and require that they help each other in such cases.

Principle 7 puts limits on the conduct of war. Broadly interpreted, this principle speaks directly to the purpose of laws of the first sort. Specific restrictions in the conduct of war would likely be agreed to by states faced with the potential for conflict. Discord between states must be

expected and laws are created to control and minimize the negative outcomes of the conflict for the actors affected. This principle can easily be read as a contract between states for a defence of their assets against unnecessary damage in the event of a clash. A state's most important assets worthy of protection may include vital institutions and their buildings, natural resources and citizens—both as civilian and military personnel.

Can we make a similar claim for a rescue clause for principle 6 (requiring peoples to honour human rights) as we did for principle 8? A positive answer to this question seems doubtful. A rescue clause for this purpose seems unwarranted in any scenario of the international Original Position. A state that already honours human rights and is organized in such a way as to ensure the meaningful participation of its members in its politics is going to be less afraid of becoming a human-rights violating institution than it is of others judging it as such as a pretext for interference in its internal workings. It has no reason to believe that other societies will be able to offer judgement that is superior to its own. If the motivation of the participants in the international Original Position is similar to that of the participants in the original one, then they are motivated by protecting their freedom to act according to their own particular comprehensive doctrines, while allowing others a similar freedom. The protection of the rights of their own citizens by other societies does not follow from this objective.

A possible way in which Rawls's inclusion of human rights protection does fit with his Original Position model could be if his social contract theory were built on pre-existing moral principles. If his theory originated from the morally relevant commitment to the equality of all persons, it could, in fact, include a moral first principle that demands protection for human rights. Yet, for this defence of Rawls's inclusion of human rights protection to be viable, he would have had to spell out the pre-existing moral principles that his social contract is built upon. Rawls's theory does not itself meet this requirement. Others, however, such as Charles Larmore, have argued on Rawls's behalf that such an underlying moral principle is an essential feature of his political theory. Larmore claims that Rawls's theory draws upon "certain moral convictions" (1999: 605), originating from "a principle of *respect for persons*" (1999: 607).

Larmore's argument is persuasive, but we cannot use this moral foundation of equality to give us the protection for human rights that Rawls wants. While Rawls would agree that all persons have equal moral worth and that this fact grounds the moral legitimacy of his hypothetical social contract theory, he would argue that it could not directly ground any elements of domestic institutions or the Law of Peoples. Only reasonable agreement can produce the basic institutions that govern interactions between agents. Respect for the equality of persons provides a reason for

demanding that each person and his or her interests be represented in deliberation, but it does not offer any particular assertions about the structure of institutions. In fact, Rawls argues not that protection for human rights originates from a foundational moral principle but, rather, that liberal states would agree to it in the deliberation process of the Original Position. Since it seems unlikely that either well-ordered or non-well-ordered states would actually have reason to want this externally imposed restriction to their internal politics, Rawls's theory lacks grounds for incorporating the protection of human rights into the Charter Principles.

International Crimes

Rawls's theory of international law occupies an untenable midpoint between a cosmopolitan view and the Westphalian notion of states. It is motivated by a liberal concern for individuals but it defers too much to the agency of socially organized groups as discrete units in questions of international law and international relations. Because it abandons individuals as agents at the international level, Rawls's theory cannot accommodate current conceptions of international criminal law. Although there are debates raging over the morally and prudentially right guidelines by which to protect human rights globally, most can agree that the advances in international criminal law aiming to promote and protect human rights must be accommodated in some way by any worthwhile liberal theory of international law.

Rawls's *Law of Peoples* denies individual agency at the international level and therefore, according to an accurate development of his theory, criminal prosecution should stem from the authority of a state over its own members in reference to the fair and right institutions and laws erected by that particular state. Since the Law of Peoples guides the behaviour of states towards each other, international law that develops from the international Original Position should cover only interactions between states. In apparent contrast, of the four categories of international crime, three develop directly from an international aim to protect individuals worldwide from the worst humans can do to each other.

The crime of aggression, the fourth category, clearly applies to the protection of the sovereignty and territorial integrity of states, and therefore plainly fits into what I have termed laws of the first sort. Although this category of crime is not clearly outlined in the Rome Statute, the latest inclusion to the Documents on the Crime of Aggression (UN, 2003) claims that "a crime of aggression is committed by a person who, being in the position of effectively controlling or directing the political, economic or military actions of a State, orders, authorizes, permits or participates actively in the planning, preparation, initiation or execution of

an act which directly or indirectly undermines the sovereignty, the territorial integrity or the political or economic independence of another State, or in any other manner inconsistent with the Charter of the United Nations."

The crime of aggression does, however, assume prosecution of a person rather than a state, and this causes problems for a theory of justice that does not recognize individuals in the global context. Rawls, consistent with ICC intentions, wants to be able to punish outlaw state leaders rather than subject the outlaw states themselves to sanctions. He claims that the Law of Peoples "must carefully distinguish three groups: the outlaw state's leaders and officials, its soldiers, and its civilian population" (1999a: 94). In situations of unjust war, the leaders and officials "are responsible; they willed the war; and, for doing that, they are criminals ... but the civilian population, often kept in ignorance and swayed by state propaganda, is not responsible" (1999a: 95). There is, clearly, a considerable tension between what his state-centric approach is capable of and Rawls's wish to single out individual leaders. For his theory to do what he wants of it, Rawls really needs some method of holding individuals accountable.

A prohibition against war crimes, one of the categories of international criminal law that forbids certain human rights violations, may make it onto a list of laws originating from Rawls's international Original Position, but only because it can satisfy the purpose of laws of the first sort. Even though it speaks to the actions and protection of individuals, an international law prohibiting certain war crimes may be a reasonable outcome of the Original Position, because it demands that states ensure their soldiers obey internationally agreed-upon rules in their dealings with other states. An assumption of strict reciprocity applies. We can accept that most reasonable states would agree to this type of law, whether they were well ordered or not, for many different reasons. We could imagine a scenario in which states would agree to rules of war that forbade actions that unnecessarily targeted state resources, in this case citizens. Most acts of war crimes covered by Article 8(b) of the Rome Statute concern the targeting of civilians or non-military property.

Article 8 also prohibits torture or the inhumane treatment of combatants. It is more difficult to make a case for these laws as an outcome of the Original Position. But, I think it is likely that they would, in fact, be agreed to. Again, we can rely on the fact that citizens are a resource. If a captured soldier is returned to his or her state of origin, the state has not lost anything other than his or her fighting power during the period of captivity. Similarly, tortured soldiers are more likely to give up important secrets they could have kept under humane treatment. It may also be more difficult to recruit good soldiers when mistreatment by the enemy is likely. There are many reasons that certain restrictions about how com-

batants can be treated would be agreed to by reasonable international actors.

When we look at the remaining two categories of international crime, the crime of genocide and crimes against humanity, international criminal law completely diverges from probable outcomes of the international Original Position. The essential characteristic of both types of crimes is internal attack on members of a state. While they may "shock the conscience of humanity" (UN, 1998: preamble), these crimes are unlikely to limit the freedom of members of other states to pursue their interests according to their own personal comprehensive doctrines. As a reasonable representative of a particular state, no actor in the Original Position is going to request that its internal politics be examined and judged according to the ideals and conceptions of the good life held by other states.[3] Nor should any actor be so required. Rawls made this argument for individual actors in the domestic model; fairness entails granting as much freedom for each actor to pursue his or her own ends as is compatible with a similar freedom for all other actors.

International Legal Authority

We are left with one final question: Even if liberal peoples would agree to human rights protection, what gives them the authority to enforce it? Even though I argued that there are no reasonable grounds for human rights protection to result from an international Original Position, we can still recognize that a problem with authority would arise if this requirement did, in fact, develop from the deliberation process. The authority problem that arises from the attempt to extract a theory of international criminal law from an international Original Position as Rawls describes it is that his theory cannot ground the authority to prosecute international criminals. By this, I mean that his theory does not support a moral argument for international prosecution to fall to any particular state, group of states or international institution. Rawls claims that the list of human rights honoured by well-ordered states should be understood as universal rights that are binding on all states, but even if states have a moral responsibility to obey these laws, where does the right and responsibility to prosecute fall?

Rawls does not necessarily have to give an answer to this question. Since he acknowledges that there is a divide between what philosophy can tell us and what politics should determine, he is free to say that whatever is fairly decided in the Original Position can be seen as a morally legitimate transfer of authority. However, this theory runs into some problems, given that only well-ordered states have a voice in the Original Position. A section of the affected parties is denied participation, but is

then forced to comply. This situation often occurs in power politics, but cannot be seen as a legitimate outcome of a liberal theory of fair international law.

A Rawlsian answer might be that we are only interested in what well-ordered representative states would reasonably agree to so that we can determine what is fair and right, and on this account we are not interested in a genuine agreement between all states. This is true—we are not concerned with the particular interests of all states being represented in deliberation. And, Rawls would argue, as he does in *Political Liberalism*, that it is quite acceptable to exclude unreasonable agents from the deliberation process since, he claims, political liberalism requires "a consensus of reasonable (as opposed to unreasonable or irrational) comprehensive doctrines" (1996: 144).

However, this position seems unacceptably illiberal. The veil of ignorance that shelters actors in the hypothetical Original Position from their particular interests and ends is the safeguard Rawls built into his theory precisely to avert such limitations to fairness and participation. Nevertheless, Rawls's veil of ignorance does seem to be powerless to resolve the problem of having to accommodate unreasonable perspectives or demands in the deliberation process. Even though the veil of ignorance prevents participants in the Original Position from knowing their own particular circumstances and interests, it cannot guarantee that they have the required disposition or approach to deliberation necessary for productive participation in the Original Position.[4] However, even so, the exclusion of certain international agents from participation from behind a veil of ignorance is unwarranted in a liberal theory that develops from a foundation of respect for all individuals. And, excluding certain actors from the creation of the contract invalidates the authority that the contract confers if its legitimacy extends from this liberal foundation. Indeed, Rawls does not provide an adequate excuse for his deviation from the liberal commitment to participation as the moral foundation for a hypothetical social contract theory.

We can assume, though, that the authority for certain international prosecutions could arise from Rawls's theory. I alluded to this issue of authority earlier in this discussion when I looked at whether it would make sense for states in the international Original Position to agree to an international legal institution that would prosecute their own citizens for international crimes such as war crimes or crimes of aggression. It is not my aim to argue that it is obviously the case that states would agree to this arrangement, but I did concede that this agreement could follow from the Original Position. It could be in the interest of states to agree to transfer some authority to an international body that would prosecute the international crimes they have agreed to institutionalize when the states from which the perpetrators originate cannot or will not prosecute the crimes

themselves. This regulation is consistent with the current parameters of ICC jurisdiction.

What I have been able to show in this section is that, simply in terms of authority, Rawls's theory has difficulty extracting a basis for international criminal prosecution of laws of the second sort, those that aim primarily at the promotion and protection of human rights globally. As long as the global actors are states, only the interests of states as discrete units will be addressed in the hypothetical deliberation process. And the authority to enforce international laws can only be seen as legitimate if they are laws for which all states, not knowing of their internal constitutions, would agree to transfer authority to an international institution.

Conclusion

Rawls's contribution to international justice misses the mark in its attempt to "fit [the] two basic changes, and give them a suitable rationale" (1999a: 27). The two basic changes in international law that Rawls is concerned with are its tendency to limit a state's right to wage war to instances of self-defence and its tendency to restrict a state's right to internal sovereignty. While his theory is capable of accommodating the first and justifying its inclusion in a just international system, it cannot, Rawls's aspirations notwithstanding, endorse the inclusion of the limits to internal sovereignty based on concern for human rights. This theory cannot provide a foundation on which concern for human rights can reasonably be based, and even if human rights did find their way into the principles determined by the international Original Position, Rawls's theory cannot satisfy questions of legitimacy concerning the authority to prosecute crimes of international human rights violations.

Cosmopolitan thinkers such as Charles Beitz, Allen Buchanan and Thomas Pogge have argued, in reference to issues of distributive justice, that Rawls's theory of justice, in order to accomplish what it intends, must recognize individuals as the primary actors in the international Original Position. Rawls would most likely agree with Buchanan when he claims 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" (2000: 698). The problem is that Rawls's international theory, while focused on questions of justice related to interstate relations, cannot accommodate these principles.

We need to look to a cosmopolitan understanding of his theory in relation to international criminal law for the theory to yield some true semblance of global protection for human rights and international individual responsibility and for it to accord with the evolution of inter-

national law, which has already started down this path. A global version of Rawls's social contract, along the lines promoted by Beitz (1979) and Pogge (1989), is more consistent with the individualism that is the focus of Rawls's broader work. This version is a more faithful expression of Rawls's liberal concern for individuals and provides the only way for his theory to respond, as he intends, to the dramatic shifts in international law.

Notes

1 Although Rawls focuses on "peoples" in his work, I will use the term "states" to refer to both states and state/society complexes.
2 See *A Theory of Justice* (1971), *Political Liberalism* (1996) and his collection of papers edited by Samuel Freeman, *Collected Papers* (1999b).
3 This is not to suggest that human rights violations would be consistent with any society's comprehensive doctrines.
4 I need to thank one of the anonymous reviewers for this JOURNAL for his or her help in identifying this weakness in the Veil of Ignorance and for pressing me to contend with the limits of this particular theoretical tool.

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