

Prepared for *The Ethics of Assistance: Morality and the Distant Needy*, ed. Deen Chatterjee (Cambridge University Press, forthcoming 2004).

Human Rights and The Law of Peoples*

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One of the many contributions to international thought of *The Law of Peoples* is a distinctive and unorthodox view about human rights.¹ In this essay, I would like to explore the prospects for a political theory of human rights suggested by certain features of this view. I do not pretend to offer an interpretation, or even a variant, of Rawls's view, since in some respects I differ with it. But I believe the conception of human rights in *The Law of Peoples* poses an instructive challenge to adherents of more familiar philosophical views and I want to concentrate here on what might be learned from it.

Introduction: human rights in political practice

Philosophical conceptions of human rights can go wrong by failing to take seriously the idea of a human right as we find it in international law and politics. We need a political theory of human rights because the international *practice* of human rights is problematic—it is unclear, for example, how these objects called “human rights” should be conceived, why certain values but not others should count as human rights, and what responsibilities, and for whom, attach to human rights. Any theory aiming to shed light on these problems should take account of the elements of international practice that give rise to them.

* For comments on earlier drafts, I am grateful to Deen Chatterjee, Joshua Cohen, Thomas Pogge, Nick Rengger, Marion Smiley, and Andrew Williams, and to audiences at St. Andrews, Harvard and Yale Universities.

¹ John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999) (henceforth, *LP*).

The contemporary practice of human rights originated during World War II and achieved its first and defining public expression in the Universal Declaration of 1948.² The aim was to establish common minimum standards for the legal, political and economic institutions and practices of states, whose achievement could be regarded as a matter of international concern. The manner in which this concern might justifiably be expressed has been a subject of dispute from the outset and international practice has evolved. For example, the original Human Rights Commission discussed and then abandoned a proposal that the U.N. be authorized to use military force against states in cases of egregious violations.³ Yet in the last decade human rights violations have been accepted as justifications of (“humanitarian”) intervention in cases ranging from Bosnia to East Timor. One should not, however, be misled by the dramatic character of military intervention; more often, and usually less controversially, human rights have justified less momentous forms of international action. For example, human rights have served as standards of public evaluation of the domestic performance of regimes by international organizations. Adherence to human rights has been imposed as a condition of membership in some international organizations and as a qualification for participation in aid and development schemes. Concerns about human rights abuses have also motivated and shaped the work of a growing number of nongovernmental organizations devoted to standard-setting and monitoring of domestic government performance, advocacy of political change, public education, and coordination of transnational political activity.⁴

² The declaration and other pertinent documents can be found in Ian Brownlie, ed., *Basic Documents on Human Rights*, 3d ed. (Oxford: Clarendon Press, 1992). I have discussed the political role of human rights in “Human Rights as a Common Concern,” *American Political Science Review* 95, no. 2 (June 2001), 269-82.

³ M. Glen Johnson, “A Magna Carta for Mankind: Writing the Universal Declaration of Human Rights,” in *The Universal Declaration of Human Rights: A History of its Creation and Implementation*, ed. M. Glen Johnson and Janusz Symonides (Paris: UNESCO, 1998), p. 32.

⁴ This role of human rights doctrine is emphasized in William Korey, *NGOs and the Universal Declaration of Human Rights: “A Curious Grapevine”* (New York: St. Martin’s Press, 1998) and Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998).

Within the human rights community, international efforts to protect against violations are typically referred to as “enforcement.” The modes of action I have just listed are “political enforcement.” There is also “judicial enforcement,” which can occur at both the domestic and international levels. Many of the framers of modern international human rights doctrine believed that enforcement would ideally take place through national courts, perhaps applying provisions in national constitutions for which the international declarations would function as models and stimulants. But of course, local judicial enforcement may not take place, and from the outset, both global and regional mechanisms have also been envisioned. So, for example, in Europe, Africa and Latin America, regional human rights regimes enable individuals to hold states accountable for infringements of human rights and prescribe sanctions for noncompliance (the regional codes tend to be narrower in scope than the principal U.N. instruments). There is, relatedly, the rise of the idea that because human rights abuses constitute violations of a state’s legal responsibilities to all (“*erga omnes*”), they may be enforceable by all (not only by the victims of abuses or their fellow citizens).⁵

Abstracting from the details about enforcement, we might say that the role of human rights in international political discourse has two aspects: first, human rights violations may serve to justify interference in the internal affairs of states or other local communities; second, they may argue for various external agents, such as international organizations and other states, to commit the resources required for effective interference. Often they do both.

This formula may seem excessively simple when we reflect on the substantive breadth of human rights doctrine. International doctrine recognizes a surprisingly wide range of values as human rights. A crude, initial classification would include rights against certain

⁵ This idea first appeared in dicta in the International Court of Justice’s opinion in *Barcelona Traction, Light and Power, Ltd.* (Belg. v. Spain), 1970 I.C.J. Reports. 3 (Feb. 5), paras. 33-34. For its general acceptance, see American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, Minn.: American Law Institute, 1987), sec. 702.

forms of mistreatment of the person (for example, torture), rights to institutions with certain desirable features (periodic elections), and rights to have access to certain goods (an adequate standard of living). The simple idea that human rights violations provide reasons for outsiders to interfere in a society on behalf of its own members might appear to conceal the diversity of moral issues that can arise in practice. For example, some forms of interference, which aim to change the conduct of local authorities, are unwanted by them and may require the use of force to succeed. Both the use of force and the violation of local political autonomy require a justification. Other forms of interference aim to promote institutional reform, and although not overtly coercive, might employ modes of influence aimed at changing local political preferences over time, without the consent of those acted upon. Here a different problem of justification arises. And still other forms of interference consist of providing assistance to a receptive local government. Here there is neither coercion nor a violation of local autonomy; the main ethical problem is to determine the amount of assistance owed and the appropriate distribution of the cost of providing it.

It would be a mistake, of course, to believe that there is any very neat mapping of forms of political action onto categories of rights. Not implausibly, for example, the industrial countries could do more to promote economic development in poor societies by changing world trade rules that allow agricultural protection than by increasing direct development assistance. So we should not simply assume that rights of access to certain goods are associated with duties on others to provide those goods. Nevertheless, it has to be acknowledged that international human rights doctrine embraces a diversity of values and that the protection of these values under a variety of political and social circumstances could call for many different kinds of political action—and indeed, by many different political actors (not only states and international organizations). I do not believe these facts argue against our earlier description of the role of human rights so much as complicate it. They emphasize that a realistic understanding of contemporary human

rights practice must work with a broader interpretation of the ideas of “interference” and “enforcement” than the conventional meanings of those words might suggest.

Two approaches to human rights

Most philosophers who have written about human rights adopt one or another variant of what I shall call the “orthodox” conception. In contrast, I shall say that the view of human rights in *The Law of Peoples* represents a “practical” conception.⁶ In this section, I try to explain the difference.

John Simmons recently described human rights as follows:

Human rights [his emphasis] are rights possessed by all human beings (at all times and in all places), simply in virtue of their humanity.... [They] will have the properties of universality, independence (from social or legal recognition), naturalness, inalienability, non-forfeitability, and imprescriptibility. Only so understood will an account of human rights capture the central idea of rights that can always be claimed by any human being.⁷

These remarks occur in an essay devoted to human rights in the political theories of Locke and Kant. Although there is no explicit reference to modern international doctrine, Simmons writes that a comparison of these theories “should help us to see more clearly the range of options available to contemporary defenders of human rights.”⁸ Simmons’s characterization of these rights represents with unusual clarity the view I believe is orthodox among philosophers.

The distinguishing feature of this conception is the idea that human rights have an existence in the moral order that is independent of their expression in international doctrine. Typically, they are thought to reside at a deep, perhaps even a fundamental,

⁶ A similar—although perhaps not the same—distinction is described by Peter Jones in his illuminating article, “International Human Rights: Philosophical or Political?,” in *National Rights, International Obligations*, ed. Simon Caney, David George, and Peter Jones (Boulder: Westview, 1996): 183-204.

⁷ A. John Simmons, “Human Rights and World Citizenship,” in *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001), p. 185.

⁸ *Ibid.*, p. 180.

level of our moral beliefs and to be discoverable by reason or rational intuition. Thus, human rights are sometimes said to be “natural” or to belong to persons “as such” or “simply in virtue of their humanity.” On such views, international human rights — that is, the rights of the declarations and covenants — derive their authority, to whatever extent they have authority, from these underlying values that constitute their foundation. The task of the theorist of international human rights doctrine is to describe or discover these objects properly called “human rights” and then to say which of the entitlements alleged to be human rights in international doctrine pass muster.

The practical view, by contrast, takes the doctrine and discourse of human rights as we find them in international political practice as basic. Questions like “What are human rights?,” “What human rights do we have?,” and “Who has duties to act when human rights are violated?” are understood to refer to objects of the sort called “human rights” in contemporary international life, however these are best conceived. There is no assumption of a prior or independent layer of fundamental values whose nature and content can be discovered independently of reflection about the international realm and then used to interpret and criticize international doctrine. Instead, the functional role of human rights in international discourse and practice is regarded as definitive of the idea of a human right, and the content of international doctrine is worked out by considering how the doctrine would best be interpreted in light of this role.

The distinction between orthodox and practical views of human rights is not the same as that between foundationalist and nonfoundationalist (or “sentimentalist”) conceptions suggested by Rorty.⁹ It is true that orthodox views are foundationalist in an obvious sense: they interpret international human rights as the public, doctrinal expression of a distinctive underlying (or foundational) order of moral values conceived as rights. It does

⁹ Richard Rorty, ““Human Rights, Rationality, and Sentimentality,” in *On Human Rights: The Oxford Amnesty Lectures 1993*, ed. Stephen Shute and Susan Hurley (New York: Basic Books, 1993), pp. 115-17. Rorty attributes the idea of human rights foundationalism to the Argentinian jurist Eduardo Rabossi.

not follow, however, that practical views are nonfoundational, if by this is meant that such views must deny that there are intelligible moral grounds for international human rights. It would be better to put the contrast as follows. Orthodox views treat the justification of international human rights as internal to the conception of a human right: once we understand the nature of a human right, we shall understand what must be said to justify claims about the legitimate content of international doctrine. By contrast, practical views treat the question of the justification of human rights as separable from the question of their nature. It is comprehensible, on such a view, that people might agree about the nature of international human rights but disagree about the kinds of considerations that ground them. It is hard to see how adherents of the orthodox view could make sense of this prospect.

How orthodox views mislead

Orthodox views can yield skeptical results. For example, Maurice Cranston famously held that the only rights worthy of the adjective “human” were the contemporary descendants of (what he thought were) the classical natural rights to life, liberty, and property. The rest—in particular, so-called “economic and social rights”—were elements of a political ideal without either the universality or the preemptory force he believed should attach to genuine human rights.¹⁰ Cranston wrote at the height of the Cold War, and his position has often been criticized on substantive grounds. But his critics have seldom disputed the premise he shares with other adherents of the orthodox view

But I believe the premise is suspect. Orthodox conceptions tend to distort rather than illuminate international human rights practice and therefore produce unjustifiably skeptical conclusions about international doctrine. Perhaps there are objects of the kind that orthodoxy considers to be “human rights,” but those objects, if they exist, are to be

¹⁰ Maurice Cranston, *What Are Human Rights?* (London: Bodley Head, 1973), pp. 65-71.

distinguished from the objects referred to in international doctrine and practice as “human rights.” Orthodoxy about international human rights seems to me, finally, dogmatic.¹¹

According to the orthodox view, human rights—that is, the underlying moral values that international human rights seek to express—share several distinguishing characteristics with “natural rights.” First, human rights are pre-institutional—that is, they are rights one would have in a pre-political “state of nature.” Second, human rights belong to people “solely in virtue of their common humanity.” They are grounded on characteristics that people might be said to possess when they are considered in abstraction from any social situation; therefore the reasons why we should care about them must not refer to aspects of people’s merely contingent social relationships. Finally, human rights are timeless—all human beings at all times and places would be justified in claiming them.

A moment’s reflection will show that the combined effect of these conditions is to limit severely the values that can be counted as genuine human rights. This is why adherents of the orthodox view tend to be skeptical that human rights should be construed as embracing the very wide range of political values found in international doctrine. But it is a serious question why international human rights should be interpreted in this way. Why not say that the assimilation of human rights (as found in international doctrine) to human rights (construed as fundamental moral values) is an elision?

Why, for example, conceive of human rights as pre-institutional? The idea simply would not occur to anybody not already in the thrall of the natural rights tradition. The reason is that natural rights and the human rights found in international doctrine do not fill the same conceptual space. Principles of natural right, at least in the more liberal variants (such as Locke’s) that modern theorists typically have in mind, were attempts to formulate constraints on the use of a government’s coercive power in circumstances of

¹¹ I explain why in “What Human Rights Mean,” *Daedalus* 132, no. 1 (Winter 2003): 36-46, on which I rely for the argument in the next few paragraphs.

religious and moral diversity. They make sense only against a background assumption that a central problem of political life is the protection of individual freedom against a predictable threat of tyranny or oppression. But no disinterested reading of the historical and political record could represent the motivating concern of international human rights as this limited. To make sense of the human rights of the international declarations one must suppose they have a larger aspiration—for example, to describe social conditions conducive to the living of dignified human lives. They represent a more ambitious assumption of responsibility for the public sphere than was required by the motivating concerns of classical natural rights theories. One is entitled to believe this is wrong-headed, but such a belief would be a substantive position in political theory, not a deduction from a proper understanding of the idea of a human right.

Or consider the idea that human rights belong to people “solely in virtue of their common humanity” and without reference to their affiliations and memberships.¹² Philosophical acceptance of this idea owes a great deal to the influence of H.L.A. Hart’s article, “Are There Any Natural Rights?”¹³ Hart distinguishes between “general rights” and “special rights.” Special rights arise out of “special transactions [or] special relationships” such as promises, contracts, or membership in a political society, whereas general rights belong to “all men capable of choice ... in the absence of those special conditions which give rise to special rights.”¹⁴ Hart holds that natural rights must be “general” because they belong to men “*qua* men and not only if they are members of some society or stand in some special relation to each other.”¹⁵ Hart himself never mentions the phrase “human rights,” but those influenced by Hart’s distinction have thought that

¹² One might believe this characteristic follows from an understanding of human rights as “universal,” but this would be a mistake. The Declaration holds that human rights are universal in the sense that everyone is entitled to claim them: human rights are universal in application. Nothing obviously follows about their justification.

¹³ H.L.A. Hart, “Are There Any Natural Rights?,” *Philosophical Review* 64, no. 2 (1955): 175-91.

¹⁴ *Ibid.*, pp. 183, 188; on political society as a cooperative scheme, see p. 185.

¹⁵ *Ibid.*, p. 175. Compare Peter Jones, *Rights* (New York: St. Martin’s Press, 1994), p. 81.

human rights, because they are supposed to be claimable by anyone, must be “general rights” in his sense.

This, again, is a highly restrictive premise. It would, for example, most likely exclude the right to an adequate standard of living (Universal Declaration, art. 25.1) from the catalog of genuine human rights. We shall consider the grounds of such a right at greater length below. For now the question is: why accept an analytical premise that excludes such a right *tout court*? Human rights of the kind found in international doctrine, or at least some of them, might rather be conceived as a category of “special rights”—for example, rights that arise out of people’s relationships as participants in a global political economy—or as political conclusions derived from an array of ethical considerations, including those of humanity, reciprocity, and perhaps compensation. These possibilities are obscured if one infers from the fact that human rights are supposed to be *claimable* by everyone, that they must be *general* in Hart’s sense. But I can see no good reason for the inference. To hold that a right to an adequate standard of living cannot be a human right because it does not fit the paradigm of a “general right” seems, once again, to achieve a normative conclusion by conceptual fiat.

Finally, consider the thought that human rights are timeless. The idea is tempting as an inference from the condition of universality, and because the natural rights of the tradition were supposed to be timeless. But again I believe this encourages a misconception of the point of international human rights. It seems unlikely that its framers intended the doctrine of human rights to apply, for example, to the ancient Greeks or to China in the Ch’in dynasty or to European societies in the Middle Ages. International human rights, to judge by the contents of the declaration and covenants, are suited to play a role in a certain range of societies. Roughly speaking, these are societies which have at least some of the defining features of modernization: e.g., a minimal legal system (including a capability for enforcement), an economy with a portion of employment in industry rather than agriculture, some participation in global cultural and

economic life, and the existence or prospect of a public institutional capacity to raise revenue and provide essential collective goods. The human rights of international doctrine are protections against a variety of threats to basic human interests which predictably arise in societies with these features.¹⁶ This means it would be unrealistic to regard the catalog of internationally protected human rights as fixed or invariant across time. This fact would be troubling if there were some reason, external to international practice, to believe that human rights should be eternal. But what reason might that be?

These reflections do not amount to a refutation of orthodox views, but I hope to have accomplished two more modest results. The first is to show that the inferences drawn from any such conception about the scope and content of international human rights are normative conclusions requiring a defense; it is a sleight-of-hand to present them as analytic. The second is to raise doubt about the relevance of such an exercise to the main theoretical questions about international human rights. These questions pertain to a developing political and social practice which is in important respects historically novel. It is just dogmatic to hold that any adequate understanding of this practice should *begin* by identifying the objects of theoretical interest with objects that originated in a particular philosophical tradition and were constructed for quite different purposes.

Toward a practical conception: Rawls on human rights

The account of human rights found in *The Law of Peoples* points toward a more constructive understanding of human rights. According to Rawls, human rights “express a special class of urgent rights” whose violation “is equally condemned by both reasonable liberal peoples and decent hierarchical peoples.” Their political function is to “restrict the justifying reasons for war and its conduct, and they specify limits to a regime’s internal

¹⁶ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, N.Y.: Cornell University Press, 1989), p. 26. On rights as guarantees against “standard threats,” see also Henry Shue, *Basic Rights*, 2d ed. (Princeton: Princeton University Press, 1996), pp. 13, 32; and T.M. Scanlon, “Human Rights as a Neutral Concern,” in *Human Rights and U.S. Foreign Policy*, ed. Peter G. Brown and Douglas MacLean (Lexington, MA: Lexington Books, 1979): 83-92.

autonomy.”¹⁷ The consistency of a regime’s domestic law with human rights is necessary for the regime to be a member “in good standing in a reasonably just Society of Peoples” and “is sufficient to exclude justified and forceful intervention by other peoples.”¹⁸

Although he holds that human rights “are binding on all peoples and societies,”¹⁹ Rawls does not claim that they belong to human beings “as such” or “in virtue of their common humanity,” nor that they are universal in the sense of being recognized by all significant cultural moral codes. They can be said to be common to all persons only in a special sense, internal to the Law of Peoples: they are compatible with all reasonable political doctrines, including those of both “liberal” and “decent” peoples.²⁰ This conception of human rights is self-consciously eclectic: for the purposes of the Law of Peoples, Rawls explicitly disowns an orthodox idea of human rights as based on “a theological, philosophical, or moral conception of the human person.”²¹

What is going on here? Some light may be shed by considering Rawls’s remarks, in *A Theory of Justice*, on the distinction between the role and the content of justice. He suggests that although people may disagree about the content of principles of justice—that is, they may hold different *conceptions* of justice—they may nevertheless agree about the role these principles should play in moral and political thought. The *concept* of justice is identified by the discursive role commonly presupposed by these

¹⁷ “In this way,” Rawls continues, “they reflect the two basic and historically profound changes in how the powers of sovereignty have been conceived since World War II. First, war is no longer an admissible means of government policy and is justified only in self-defense, or in grave cases of intervention to protect human rights. And second, a government’s internal autonomy is now limited.” Rawls, *LP*, p. 79.

¹⁸ *Ibid.*, p. 80.

¹⁹ *Ibid.*

²⁰ This idea of the “commonness” of human rights needs elucidation. I consider it in “Human Rights as a Common Concern,” pp. 274-76.

²¹ *Ibid.*, pp. 78, 81.

conceptions. It is then left open to moral argument to settle on one of the rival conceptions as the best or most reasonable interpretation of the concept.²²

The brief remarks on human rights in *The Law of Peoples* might reflect a similar line of thought. One might believe that although people disagree about the content of human rights, they can agree about the role that human rights play in practical reasoning about international affairs. Agreement about the role of human rights defines the kind of thing that particular conceptions of human rights are conceptions *of*; that is, of that about which normative disagreement typically occurs. Writing about the concept of justice, Rawls says that agreement about the role of principles does not settle any important questions about their content.²³ It does, however, give some structure to dispute about the attractiveness of the various alternative conceptions, since some of these will be better suited to the public role of justice than others. Similarly in the case of human rights, some views about the content of human rights may be more persuasive, once we understand what human rights are for, than others. And indeed, when he turns to consider the content of human rights doctrine, the reasons Rawls adduces to explain why some but not other values should count as human rights are of just this character: they refer to the capacity of a doctrine of human rights with a certain content to serve as a shared public basis of action for both liberal and decent societies committed to preserving a world in which such societies can prosper.²⁴

I noted earlier that a practical conception would treat the justification of human rights as a distinct problem from that of their content. Rawls's view about human rights has this feature. Human rights "are a proper subset of the rights possessed by the members of a liberal constitutional democratic regime, or of the rights of the members of a decent

²² John Rawls, *A Theory of Justice*, rev. ed. (Cambridge: Harvard University Press, 1999), p. 5. Rawls's remarks, as he notes, are influenced by H.L.A. Hart's distinction between a concept and its conceptions in *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 155-59.

²³ Rawls, *A Theory of Justice*, p. 5.

²⁴ *LP*, p.80 n. 23, and p. 81.

hierarchical society.”²⁵ Members of each type of society would presumably be drawn to human rights for their own reasons, taking into account the need for an international doctrine that could also be supported by societies of the other type. There is no need for a single, commonly agreed justification of human rights.²⁶ In this respect, Rawls’s approach to human rights recalls the view taken by the framers of the Universal Declaration of 1948. They deliberately refrained from proposing any foundational theory, believing that adherents of diverse ethical traditions would find reasons of their own to support the standards set forth in the declaration.²⁷

How accurate is Rawls’s account of the role played by human rights in moral discourse about international affairs? The main point of similarity, of course, is the recognition of human rights as justifying grounds of interference by the international community in the internal affairs of states. There are also some differences. For example, Rawls does not describe human rights as enforceable entitlements, as they are regarded in the regional human rights courts. He notices but does not take into account the broad array of noncoercive political and economic measures that might be used by states and international organizations to influence the internal affairs of societies where human rights are threatened. These measures importantly include what might better be classified as assistance than interference. And he does not represent human rights as justifications for individuals and nongovernmental organizations to engage in reform-oriented political action. In all of these respects, Rawls’s conception of the political role of human rights is narrower than what we observe in present practice (though it is not inconsistent). Rawls

²⁵ Ibid., p. 81.

²⁶ To think about human rights in this way would be to regard human rights, in Rawls’s phrase, as a “political doctrine” constructed for a certain role in world politics. See Jones, “International Human Rights: Philosophical or Political?,” pp. 186ff. Rawls’s reservations about Jones’s interpretation of the view (*LP*, p. 81 n. 25) do not seem to go to this characterization. Rawls himself describes the Law of Peoples as a “public political conception of justice” for the Society of Peoples (p. 123).

²⁷ See Mary Ann Glendon’s sensitive account of these deliberations which, among other things, challenges the widespread idea that the content of the declaration is simply the result of a political compromise between East and West. *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), ch. 3.

offers no account of the variations, and I believe it would be better, in a theory aimed at interpreting present practice, to adopt the broader and more realistic conception.

Rawls's view diverges more substantially from international doctrine in connection with the content of human rights. He distinguishes human rights in the Law of Peoples—for convenience, “human rights proper” (Rawls's phrase)—from a conception of human rights that “simply expands the class of human rights to include all the rights that liberal governments guarantee.”²⁸ Human rights “proper” include rights to life (including “the means of subsistence”), personal liberty (including liberty, though not equal liberty, of conscience), personal property and equal treatment under law. These rights are essential to any “common good idea of justice” and therefore are not “peculiarly liberal or special to the Western tradition.”²⁹ Among the rights included in international doctrine but omitted from Rawls's list are freedom of expression and association (beyond whatever is required for freedom of conscience and religious practice) and the rights of democratic political participation, as well as economic rights that cannot be understood as applications of the right to the means of subsistence. These rights distinguish liberal democratic societies from “decent hierarchical societies” as Rawls understands them. He observes that these and certain other rights of the declaration “seem more aptly described as stating liberal aspirations” or “appear to presuppose specific kinds of institutions.”³⁰

Rawls is certainly correct that any plausible theory of human rights should enable us to distinguish between genuine human rights and the objects identified as human rights in political practice. Otherwise, the theory would yield no critical leverage. His own account of the distinction relies on an idea of reasonable toleration among peoples—specifically, toleration by liberal societies of those non-liberal societies which he labels as “decent

²⁸ Rawls, *LP*, p. 78.

²⁹ *Ibid.*, p. 65.

³⁰ *Ibid.*, p. 80, n. 23.

hierarchical peoples.”³¹ I have considered some objections to this account elsewhere.³² Here, I would like to concentrate on the more abstract and constructive idea behind it, which would survive even if the objections were accepted.

This is the perception, which is essential to any practical conception, that the public role of a political doctrine of human rights constrains its content. The most important consequence of this is that the doctrine should be constructed so that appeals to human rights, under conditions to be specified, will suffice to justify interference by the world community or its agents in the internal affairs of states. This is one important respect in which a practical approach to human rights can be critical of existing practice.

I believe that this requirement will limit the content of a plausible doctrine of human rights in at least three ways. First, it will exclude from the catalog of genuine human rights those that protect interests that could not be seen as significant by most members of any existing society. I do not mean that genuine human rights should be restricted, as John Vincent once put it, to the “least common denominator” of the world’s moral cultures.³³ Such a restriction makes human rights doctrine objectionably dependent on the range of actual agreement. A better way to state the condition would be that human rights should constitute principles of action that persons in any culture would have reason to accept. This is a complicated idea and I cannot offer an analysis of it here.³⁴ But if interference in defense of human rights is to be distinguished from an unwarranted imposition of alien values, then some such condition is essential.

³¹ Ibid., pp. 62-70, 83-84.

³² See “Rawls’s Law of Peoples,” *Ethics* 110 (2000), pp. 684-88. The subject of international toleration deserves more extensive consideration on another occasion.

³³ R. J. Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986), pp. 48-49.

³⁴ T. M. Scanlon’s remarks about the identification of “a system of moral goods and bads” that any reasonable person would recognize are instructive. See “Value, Desire, and Quality of Life,” in *The Quality of Life*, ed. Martha Nussbaum and Amartya Sen (Oxford: Clarendon Press, 1993), pp. 195-99.

Secondly, it should be possible for political agents to regard the doctrine, taken as a whole, as a reasonable basis for cooperation in international schemes to enforce its requirements. Whatever its form, cooperation to advance human rights will impose costs on some agents; the ends achieved by these enforcement schemes should be sufficiently urgent to provide a reason for agents to accept these costs. I put the point in this awkward way because the protection of human rights on a particular occasion is not best seen as a one-off affair; however incomplete, there is an international practice of human rights, and it is cooperation in the practice that should be reasonable for its participants. This means that human rights doctrine—that is, the set of standards that can trigger international action—should be appraised as a package of requirements. It is more than an arbitrary historical fact that human rights as we find them embody a negotiated compromise among states, and the 1993 Vienna Declaration’s insistence that international human rights are “indivisible and interdependent and interrelated”³⁵ did not so much state a philosophical thesis as express a political logic.

A third consideration concerns the means of interference. Whatever its form—and as I have suggested we must read “interference” or “enforcement” broadly—interference in a society to protect human rights constitutes political action and therefore falls under ethical constraints that apply to any such action. These constraints have to do, broadly speaking, with economy of force and respect for innocent life. Here it may be suggestive to think of the *jus ad bellum*. So, for example, the means of interference should obey analogs of the conventional constraints of discrimination and proportionality, and there should be a reasonable expectation of success in accomplishing its aims. Values for which there are no means of interference realistically available satisfying these constraints could not count as human rights.

³⁵ United Nations, “Vienna Declaration and Programme of Action,” adopted by the World Conference on Human Rights, June 25, 1993 (A/CONF.157/23) ([http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)).

Obviously, these conditions need interpretation and defense. I cannot attempt that here. I state them as grounds for the conjecture that a practical theory could achieve some significant critical leverage on the practice as we observe it by taking seriously the interference-justifying role of human rights. Such a theory need not be, as one might have thought initially, simply an endorsement of present practice.

The human right to an adequate standard of living

So far I have described a practical conception of human rights and drawn the contrast with orthodox views. In this section I would like to explore how these relatively abstract ideas bear on some questions about a particularly important and controversial human right. This is the right, proclaimed in Article 25.1 of the Universal Declaration, to “a standard of living adequate for the health and well-being of [oneself] and of [one’s] family.” Here, as clearly as anywhere in the Declaration, the central concerns of this volume are brought into sharp relief.

Three questions are particularly important: Is the standard of living the kind of value that could qualify as the subject matter of a human right at all? What would it mean for there to be such a right? If such a right were violated, who would have obligations to act, and why?

How might a practical theory of human rights reply to these questions? We do not find much help in *The Law of Peoples*. It is true that Rawls counts among genuine human rights a right to “the means of subsistence” But he says very little about the grounds of this right, aside from the (important) observation that “the sensible and rational exercise of all liberties, of whatever kind ... always implies having general all-purpose economic means.”³⁶ In particular, there is no explanation of the nature and extent of the duties associated with this right or the reasons why those who might be called upon to contribute to its satisfaction should believe themselves obligated to do so. Moreover,

³⁶ *LP*, p. 65 n. 1.

given Rawls's conception of human rights, it is unclear what could be the practical force of a human right to subsistence. He holds that human rights are conditions whose violation would justify coercive intervention by outsiders in a society's internal affairs, but it seems unlikely, except in rare cases (like that of Somalia), that failures to satisfy subsistence rights would yield to coercive intervention.³⁷

So we are left to consider for ourselves how someone who takes a practical view might answer these questions. Let us ask first whether the standard of living is an appropriate subject matter for a human right at all. On this point the most important conclusion from our earlier discussion is negative: if we give up the familiar forms of orthodoxy, we obviate the need to conform a conception of international human rights to the formal constraints of the foundational moral idea. We need not worry, for example, whether, given a philosophically defensible conception of *natural* rights, there could be natural *welfare* rights. That question simply does not arise.

On a practical view, the question whether the standard of living is an appropriate subject-matter for a human right is answered differently: by considering whether such a right could play the functional roles for which human rights are intended. In the previous section, I listed three conditions a human right should satisfy to qualify under this criterion. I cannot carry out the exercise here, but I believe brief reflection shows that a human right to an adequate standard of living would qualify under all three conditions.

Or would it? Someone might object that international institutions are weak and dispose very limited resources of wealth and power. In view of this, the objection holds, it would be best to limit the possible causes of international action so that scarce resources can be sufficiently concentrated to have real effect. To do otherwise diverts

³⁷ Perhaps Rawls recognizes that human rights play a more complex role in international relations than is reflected in his official view about their political significance. In a discussion about the development of poor societies, he emphasizes the importance of an "insistence on human rights." But he does not say what this might mean for political action. *LP*, p. 109.

attention from the most important deprivations and devalues the currency of human rights by reducing the chances that efforts to defend them will succeed.³⁸

The objection cannot be dismissed as arising from a faulty conception of human rights; it takes seriously, as it should, the concern that a doctrine of human rights be suited for its intended public role. However, I believe the objection rests on an excessively pessimistic estimate of the available international capacity to protect human rights joined with a failure to register an accurate comparison of the relative urgency of protecting various categories of rights. On the first point, it should be remembered that interference to protect human rights can take many forms and that the resources needed for success may not be fungible. For example, there may not be any way to redeploy funds and technology devoted to agricultural development assistance so as to encourage respect for the rule of law or to discourage cruelty and political oppression. On the second point, it is hardly obvious that it would always be better or more urgent—assuming this were realistically the choice—to save some people from the cruelty of oppressive political rule than to save others from the depredations of malnutrition and preventable childhood disease. How, exactly, such an unhappy choice should be made is a complicated question, but there do not seem to be grounds for thinking that either alternative is categorically to be preferred.

The second question is: What would it mean for there to be a human right to an adequate standard of living? When we assert its existence, what are we asserting? To be clear: the question is not, “What is an adequate standard of living?” I assume for present purposes that we can give an analysis of this idea, following the views of Amartya Sen, in

³⁸ See Ignatieff, *Human Rights as Politics and Idolatry*, p. 90. Compare Cranston: “[T]he effect of a universal declaration that is overloaded with affirmations of economic and social rights is to push the political and civil rights out of the realm of the morally compelling and into the twilight world of utopian aspirations.” “Are There Any Human Rights?,” p. 12.

terms of the development of basic capabilities.³⁹ The question I mean to ask is different: What would it mean to have a *human right* to an adequate standard of living?

A plausible reply might go as follows. The primary responsibility to satisfy human rights rests with domestic-level societies, so the most elementary implication of the claim that people have human rights to an adequate standard of living is that states should take steps to ensure that their people have access to sufficient resources to achieve their basic capabilities. But human rights are supposed to state conditions whose satisfaction is a matter of global concern. So a human right to an adequate standard of living must have at least two further features, corresponding to two reasons why a government or society might fail in these responsibilities. First, a government might have the capacity to undertake policy measures aimed at securing the substance of the right, but fail to do so (or fail to do so effectively). The fact that there is a human right means that a government cannot object that external interference aimed at making good this failure, assuming this were to be feasible and likely to succeed, is a violation of its sovereign prerogatives. Second, a society might have the will but lack the capacity to achieve an adequate standard of living through indigenous efforts. In such cases, the human right to an adequate standard of living serves as the ground of a duty on appropriately placed outside agents to assist the society to satisfy the right.⁴⁰

The relevant idea of assistance will plainly be fairly broad and will leave considerable room for quasi-empirical dispute about how it would be best accomplished. Among other things, this means that an individual whose human right is violated does not necessarily have a claim-right against any specific individual agent for direct provision of the substance of the right—for food, for example, or for shelter or health care. This seems to

³⁹ See Amartya Sen, *The Standard of Living*, ed. Geoffrey Hawthorn (Cambridge: Cambridge University Press, 1987), and “Capability and Well-Being,” in *The Quality of Life*, ed. Martha Nussbaum and Amartya Sen (Oxford: Clarendon Press, 1993), esp. pp. 40-42.

⁴⁰ Rawls himself does not ground the duty to assist burdened societies on considerations about human rights. His account of this duty refers, instead, to the “long-term goal” of liberal and decent societies to bring “burdened societies” into the “Society of Peoples.” *LP*, pp. 109, 106.

depart from the ordinary understanding of a right and might therefore prompt an objection. What could be the practical value of human rights if they cannot be depended on to serve as grounds of claims?

To reply: human rights do indeed serve as grounds of claims—just not, or not necessarily, claims against particular agents for direct provision of the substance of the right. Human rights are standards for law and public policy whose breach on a sufficient scale constitutes a *pro tanto* justification of remedial international action. If an individual whose human right is unsatisfied has a claim—that is, a moral claim—it is a claim, in the first instance, on her own society to undertake whatever public policies would be required to ensure the satisfaction of the right, and derivatively, on capable and appropriately placed external agents for political action to remedy the breach.⁴¹ This is not odd, once we grasp the political role of human rights.

Finally, there is the question of responsibility for human rights. When the human right to an adequate standard of living is not satisfied at the domestic level, who is responsible to do what, and why? The first part of this question has been well discussed by Henry Shue in connection with subsistence rights and I believe substantially all of his account applies here.⁴² The short of it is that a judgment about who is responsible to act depends on the intersection of considerations of causal responsibility for a deprivation and capacity to intervene effectively. Any such judgment is complicated by the fact that the world lacks a global institutional capacity to allocate and coordinate obligations. Agents often must decide how and when to act without knowledge or assurance about the plans of others. There are analogs of the familiar problems associated with providing public goods under anarchy. This means that judgments about responsibilities to act will have to be pragmatic (or, as Shue says, “strategic”).

⁴¹ This is in accord with Thomas Pogge’s “institutional understanding of human rights,” described in “How Should Human Rights Be Conceived?” *Jahrbuch für Recht und Ethik* 3 (1995): 103-20.

The second part of the question asks why an agent that is in a position to act has reason to do so. The most straightforward case is that of an agent that could avoid a deprivation by changing conduct that brings the deprivation about; here, the agent has, at least *prima facie*, a responsibility grounded on a general duty not to cause harm. It is important to observe, as Thomas Pogge argues, that the ethical implications will be more far-reaching than they may seem if the deprivations are the avoidable results of policies enforced by existing global institutions, for then it could be said that those who support and participate in these institutions thereby acquire responsibilities based on the duty not to cause harm.⁴³

Considerations of this kind do not, however, exhaust the reasons to act in support of a human right to an adequate standard of living. If we take the focal case of wealthy countries that are in a position to contribute to international development efforts, then I believe that considerations of both humanity and international justice will provide independent reasons to contribute. The application of considerations of humanity will be obvious. There is a great deal that might be said about reasons of international justice. The point I would like to emphasize here is that one does not need an ambitiously cosmopolitan theory of global justice to explain obligations to contribute to the satisfaction of a right to an adequate standard of living.⁴⁴ Indeed, I believe an argument is

⁴² Shue, *Basic Rights*, pp. 35-64 and 153-66 (in the 1996 Afterword). See also Shue's contribution to this volume, p. 000 below. See also James Nickel, *Making Sense of Human Rights* (Berkeley: University of California Press, 1987), pp. 54-55, on which Shue's remarks in the Afterword rely.

⁴³ Thomas Pogge, "A Global Resources Dividend," in *Ethics of Consumption: The Good Life, Justice, and Global Stewardship*, eds. David A. Crocker and Toby Linden (Lanham, Md: Rowman and Littlefield, 1998): 501-536. The point is emphasized in Pogge's contribution to this volume, pp. 000-000 below [insert inclusive page refs to Pogge paper.] For similar reasons, rich countries may have responsibilities to desist from internal policies that have the predictable effect of imposing economic costs on poor countries; consider, e.g., farm subsidies in the U.S. and E.U. which artificially reduce prices of domestically-grown crops and deprive poor countries of export markets.

⁴⁴ For an outline of one such theory, see my *Political Theory and International Relations*, rev. ed. (Princeton: Princeton University Press, 1999), part III.

available in the spirit of the political theory of *The Law of Peoples* (though, of course, Rawls himself does not offer such an argument).

Since I cannot develop the argument here, I simply offer it as a conjecture.⁴⁵ Imagine a global original position composed of representatives of peoples, with the interests of peoples interpreted as being sensitive to the interests of the individual persons who compose them. (“Sensitive to” need not cause the argument to collapse into some form of cosmopolitanism; a people’s interests can be sensitive to the interests of individual persons without being constructed exclusively from them.) Suppose that the parties are deprived by a veil of ignorance of information about the economic circumstances of their societies. The conjecture is that under these circumstances the representatives would agree to a principle establishing a human right to an adequate standard of living with the elements described earlier (including, in relevant conditions, a requirement of international contribution to the costs of satisfying it). The conjecture is motivated by two thoughts. First, the parties would understand, as Rawls observes in his account of subsistence rights, the central importance, for persons, of the means of life: having a threshold of material means is necessary for satisfying virtually any rational human interest. Second, the parties would see that acceptance of an international responsibility to ensure a material minimum is an essential element of a complete doctrine of human rights which, considered as a package, could constitute a basis of willing cooperation among (liberal and decent) peoples.

An argument along these lines would establish that the right to an adequate standard of living is an element of the Law of Peoples, or as we might say, a requirement of international justice.⁴⁶ It states a condition that anyone could reasonably expect social institutions to satisfy, and whose satisfaction in all societies represents a reasonable long-

⁴⁵ Compare Thomas Pogge, “An Egalitarian Law of Peoples,” *Philosophy and Public Affairs* 23 (1994), esp. parts III-IV, pp. 208-14.

⁴⁶ But not “global justice,” if that phrase is understood to invoke cosmopolitan considerations.

term goal of the international community. In this respect it fits the practical conception of a human right that we discussed earlier.

Concluding comment

Let me conclude by noting very briefly an objection to the general conception of human rights advanced in this essay. According to this view, the objection holds, human rights, or anyway those like the right to an adequate standard of living, seem to be no more than highly desirable social goals. But this omits what is really important about human rights. Rights have a preemptory quality—they demand immediate satisfaction, not simply efforts to satisfy them at some future time. This feature of rights is present in the orthodox view, as it was in traditional conceptions of natural right. A conception of human rights that cannot make sense of this quality, the objector might say, is radically incomplete.

In reply, two observations. First, according to a practical conception, human rights are not simply desirable goals; they are morally necessary ones. To say that something is a human right is to say that social institutions that fail to protect the right are defective—they fall short of meeting conditions that anyone would reasonably expect them to satisfy—and that international efforts to aid or promote reform are legitimate and in some cases may be morally required. To say this is to say something—in fact, it says quite a lot. Second, to the extent it must be conceded that human rights, unlike the familiar natural rights, do not always issue in directives for immediate remedial action when they are violated, one might wonder whether anything is lost in the concession. If we understand international human rights practically, what more might we reasonably wish to say?