Human Rights and Duties of Assistance

Wilfried Hinsch and Markus Stepanians, Saarbrücken

I. Human rights in Rawls' *The Law of Peoples*

Human rights play an important role in John Rawls' conception of international justice in *The Law of Peoples* (LP). The sixth entry in his "basic charter of the Law of Peoples" requires that peoples honor human rights (LP 37). These rights set a limit to a regime's internal autonomy (LP 27, 42, 79f.). According to Rawls, the violation of human rights is, next to self-defense, one of only two reasons capable of justifying not only diplomatic and economic sanctions but, as a last resort, also military interventions (LP 37f., 81, 93f.n). Only societies that honor the human rights of their members (and are non-aggressive) may consider themselves save from the threat of external political sanctions and international intervention. They, and only they, can claim a right to war in self-defense (LP 92). Clearly, human rights matter. Given their significance for his Law of Peoples, it is surprising how little Rawls says about the nature of human rights. It seems as if human rights were taken by him as more or less firmly established elements of our moral common sense: "I leave aside the many difficulties of interpreting these rights […] and take their general meaning and tendency as clear enough" (LP 27). All we get in terms of explanation from reading *The Law of Peoples* is basically this:

(1) Human rights are neither constitutional rights nor rights "that belong to certain kinds of political institutions". Rather they set a "necessary, though not sufficient, standard for the decency of domestic political and social institutions" (LP 79f.).

(2) Human rights are 'universal rights' in that "they are binding on all peoples and societies, including outlaw states" (LP 80f.).

(3) Human rights are necessary conditions of social cooperation that are recognized by all decent regimes (LP 65, 68).

(4) Human rights are not supposed to be justified in terms of any particular comprehensive religious, philosophical, or moral doctrine, because doing so would be divisive in a pluralistic world (LP 68, 81).

(5) Human rights are a proper subset of the basic rights and liberties protected by liberal societies (LP 68, 78f., 81). They are particularly "urgent rights" (LP 79). On page 65 of LP Rawls lists the following rights: the right to life (including a right to

the means of subsistence and security), the right to liberty (including freedom from slavery and serfdom and "a sufficient measure" of liberty of conscience), the right to (personal) property, and the right to formal equality.

More comprehensively, Rawls takes all rights specified in the articles 3 to 18 of the *Universal Declaration of Human Rights* from 1948 to be "human rights proper" (LP 80n). Rawls' reference to the *Universal Declaration* adds to the list on page 65 freedom of movement and the right to immigration (art. 13, for immigration see also LP 74.), the right to asylum (art. 14), the right to a nationality (art.15), and equal rights to marry without being subject to ethnical or religious discrimination for men and women (art. 16). Articles 6 to 12 give us a more fine grained account of the right to formal equality (before the law) and the protections of *habeas corpus* and due process.

(6) Conspicuously not included in the Rawlsian list of human rights is the right to equal political participation and the right to an unconstrained liberty of conscience (cf. LP 65n, 74). Also missing is the demand of full equality for women. Rawls stresses, though, that decent societies must make special efforts to strengthen the representation of women in their consultation hierarchies (LP 75) and also "elements" of equal justice for women are required by a well-ordered society (LP 117).

(7) Well-ordered societies are supposed to establish "new institutions and practices" in order to protect human rights beyond their own borders (LP 48, 93).

By and large, this brief synopsis covers everything about human rights to be found in LP. Given the scarcity of explanatory help from Rawls, it is small wonder that the human rights minimalism[1] of the Law of Peoples did not yet find much approval. It defies much of contemporary human rights activism. Nevertheless, we shall propose a somewhat sympathetic interpretation of the Rawlsian approach. Section III contains a qualified defense of the rather austere list of human rights in LP. The conceptual basis for our interpretation will be laid out in section II. There we explain what we think is the most appropriate understanding of international human rights and how this understanding tallies up with Rawls' Law of Peoples. In section IV we briefly discuss a problem of duty allocation (not peculiar to the Rawlsian approach) that arises because not all duties that derive from international human rights (in particular duties of assistance) can be seen as general duties that have to be fulfilled by everybody.

[1] We kindly borrow this term from John Tasioulas 2002, 380.

II. Human rights as universal claim-rights

It is understood that the human rights of the Law of Peoples are not constitutional or legal rights. But what kind of right or, more generally, what kind of normative standard are they? One way to make sense of what Rawls' says about human rights in LP is to conceive of them as *universally valid moral rights*. Following this line of thought, what we want to know is firstly, what makes a particular normative standard a *right*; secondly, what makes it a *moral* right; and thirdly, what makes it a *universal* moral right. Unfortunately, Rawls does not give us much of an answer to these questions. But an answer we need in order to assess the various misgivings about Rawls' account of human rights brought forward among others by Fernando Tesón (1995), Charles Beitz (2000), and John Tasioulas (2002).

In the light of what is said in LP it seems defensible to understand Rawls' Law of Peoples on the basis of something like the "classical view" about rights. The classical view takes human rights to be "claim-rights" in Hohfeld's sense and not merely valid moral claims. Even in their simplest form these rights are not merely two-term relational claims between a person and a good the person has a claim to (e.g. life, liberty, and security). Rather they are three-term relational claims between a person as the claim-holder, a good and another person who bears the corresponding (relational) duty to make good on the claim in question. Since the existence of a duty-bearer is a necessary condition for the existence of a claim-right, it takes at least two agents for a right to exist. Simple (three-term) claim-rights are, in contrast to mere (two-term) claims, interpersonal relations between a right-holder and a duty-bearer. And since we are talking about *human* rights, the person in the claimant position is a human being (a natural person) whereas the duty-bearer may either be a natural or a non-natural person (e.g. a state or state agency).

According to Paul Sieghart, the view of rights underlying international human rights law takes the existence of a duty-bearer not only to be necessary but to be sufficient as well: "In all legal theory and practice, rights and duties are symmetrical … if I have a right, *someone else* must have a correlative duty; if I have a duty, *someone else* must have a corresponding right" (Sieghart 1985, 43). But despite Sieghart's assurance to the contrary, the second implication from legal duties to legal rights is, at least in this unqualified form, doubtful and highly controversial. Many lawyers would argue that having a legal duty towards someone is a necessary, but by no

means a sufficient condition for someone else's possessing a correlative legal right. Moreover, *moral* theory and practice seems to allow for "imperfect" moral duties towards others without those others having corresponding rights. Candidates for such imperfect duties are, for example, duties of charity and benevolence towards everyone (Mill 1974, 305). Whatever the truth in this matter, for our purposes it is sufficient to endorse the considerably weaker conceptual implication that *if* A has a claim-right to X against B, *then* there must be a B that has a correlative duty concerning X towards A.

We take it that the human rights identified by Rawls as a part of the Law of Peoples are best understood as claim-rights in this technical sense. Consider the family of rights guaranteed by article 3 of the *Universal Declaration*: "Everyone has the right to life, liberty and security of person." Here we have three fundamental values life, liberty, and security of person and we have the idea that these values are to be protected by a right, or more precisely, by a complex multitude of rights against many persons, with the familiar structure of "claim-rights". Claim-rights imply multitudes of pretty specific duties. To endow one person with a claim-right is *e definitione* to impose corresponding duties on one or more others. And the violation of a person's claim-right implies the non-fulfillment of at least one of these duties, be they negative duties of non-interference or positive duties of providing a certain good or service. Hence, proceeding from the human right stated in article 3 of the *Universal Declaration*, we may promptly arrive at the prohibition of article 4, "No one shall be held in slavery or servitude", which imposes on everyone negative duties of not holding other human beings in slavery or servitude. Or, take the human right of equal recognition as a person before the law (art. 6) and of equal protection of the law (art. 7), and you readily derive not only the prohibitions of article 9, "No one shall be subjected to arbitrary arrest, detention or exile", imposing certain negative duties on courts and state agencies, but also positive duties of public recognition and protection.

Violating a human right, then, consists in the non-fulfillment of rather clear-cut negative or positive duties that go along with the right and account for its respective *regulative force*. Indeed, if human rights are more than mere 'considerations' to be taken into account but not necessarily acted upon, this is because they impose pretty specific duties — i.e. peremptory demands to perform certain actions or to abstain from their performance — on more or less well-defined agents, be they natural or non-

natural persons. It makes sense, then, to speak of the *violation* of a human right exactly to the extent to which it is possible to identify the duties implied by this right. And in order to identify these duties we need, firstly, to identify the duty-bearers and, secondly, to specify the content of their respective duties, i.e. what they have to do in order to meet their obligations.

Note, that on this understanding it is not the existence of institutionalized enforcement mechanisms that gives practical importance to these claim-rights in the first place — even though these mechanisms will normally increase their effectiveness — but the individual and social recognition of the implied duties.

The duties following from human rights do not only involve primary duties of direct compliance with the requirements of the right in question but also secondary, auxiliary duties of assistance or protection. The latter have to be discharged if the primary duties go unfulfilled or can be expected to go unfulfilled. They are 'secondary' or 'auxiliary duties' because the requirement to act on them is contingent upon the non-fulfillment of other (primary) duties.[2] The right to life, for example, imposes negative primary duties of not killing others on everybody and it also imposes auxiliary duties of protection and assistance for the (potential) victims of violent crimes at least on some agents. For example, there may be corporate agents that have been established *inter alia* for protecting people against violent crime (like the state) and there may be natural duty-bearers that, in a given situation, can provide the necessary help at acceptable costs. It follows from the fact that human rights do not only involve correlative primary but also secondary auxiliary duties that not only primary duty-bearers can violate a person's human rights but also auxiliary duty-bearers, viz. if they fail to discharge their duties of protection or assistance towards those whose rights are not respected.

This links up with another important aspect of the classical understanding of rights: the requirement of their social protection. John Stuart Mill has emphasized this aspect in his *Utilitarianism*. A right, Mill maintains, is something "which society should protect me in the possession of" (Mill 1974, chap. V). Given this understanding, it is part of the definition of a right that it involves a general requirement of its

[2] Cf. Shue's account of what he calls "default duties" (and what we call "secondary" or "auxiliary duties") Shue 1996, 170-78, passim.

social protection and, under suitable circumstances[3], may impose auxiliary duties of protection and assistance. At this point, it is important to carefully distinguish two distinct claims. There is the claim (A) that rights, in virtue of their definition, involve a *normative* requirement of social protection (they *ought* to be protected by society) and hence, under suitable circumstances, impose auxiliary duties of protection and assistance on third parties. And there is the claim (B) that rights, in virtue of their definition, actually have to be enforceable. We deny (B) but affirm (A).

Our understanding of human rights as moral claim-rights comprises, then, three main elements: (1) a fundamental human value; (2) claims that arise from that value, but by themselves do not imply concrete duties of specified agents; and finally, (3) the (primary and secondary) duties implied by the right which are a necessary condition of its existence.

Ad (1): At the core of every human right lies a value which the right is meant to protect for the benefit of the right-holder. We may call this core the *value basis* of the claim-right. Often this value basis is merely hinted at in a very abstract way, as in loose talk about rights to "life, liberty and security of the person". Ad (2): The understanding of human rights as claim-rights in the classical sense requires that these abstract hints at values be replaced by descriptions of valuable actions. The abstract claim to "life", for example, becomes a moral claim that others perform certain actions that protect the claim-holder's life. Such a claim, however, falls short of being a full right if its fails to imply concrete duties of specified agents. Ad (3): Therefore, for such claims to certain actions to qualify as full claim-rights against agents with clear-cut duties, we have to specify the corresponding duties and identify their bearers. The attempt to understand human rights as classical claim-rights is therefore confronted with the problem of allocating the implied duties and to specify the corresponding duty-holders (see section IV below).

What makes a right a *moral* right, we suggest, is that the involved claim to something can be justified with exclusive reference to the value basis at its center, the intuitive idea being that people have moral rights because of the importance of the core value for their autonomy and well-being as human persons. The claim that human rights are *universal* moral rights may then be explained as follows: They are (a) universal in the sense of having a universal value basis the values of which (life, liberty, secu-

[3] Only under 'suitable circumstances' because, as a matter of fact, it may be impossible to provide protection and assistance at acceptable costs.

rity) are of such a significance for a human life worth living that their protection normally[4] cannot be reasonably denied to any human being. In virtue of their universal value basis human rights are (b) universally valid claims, i.e. valid claims all individuals have to certain goods. They are universal in the sense that every person has these rights.

Note that this terminology is at odds with Rawls' saying that human rights are "universal" in that "they are binding on all peoples and societies, including outlaw states" (LP 80) in two respects. Firstly, we think that a special justification is required for restricting the scope of possible duty-bearers and rights-violators, as Rawls does, from all agents (including natural persons, organizations, and institutions) capable of protecting or violating rights to peoples, societies and states only. This should in any case not be done from the outset through the choice of a certain terminology. Secondly, we think it more in line with common practice to reserve the attribute "universal" for rights *everybody has*, i.e. human rights. However, it is nonetheless important to distinguish clearly between *everybody's having a right* and *having a right against everybody*. We mark this distinction terminologically by calling a right "universal" if and only if everyone possesses it; but a right is "general" right if and only if it is held against everybody. The significance of the distinction between right-holder universality and duty-bearer generality lies in the fact that it allows for the possibility of non-universal, but general rights as well as universal, though non-general, i.e. special rights.[5] Indeed, there are human rights against *some*, but not necessarily *all* other agents. We shall argue in section IV that human rights to protection and assistance have to be understood as universal, but non-general rights in this sense.

We emphasize again that it is the implied duties that turn a valid moral claim into a claim-right and not its institutionalization or entrenched practices of mutual criticism and (formally or informally) socially enforced compliance. To say that something is a moral *right* is to say that it has a certain relational normative structure involving (1) a right-holder, (2) a duty-bearer, and (3) a content that specifies what the right-holder has a right to. There is no denying that established institutions and recognized practices of criticism typically enhance the regulative force of (moral) rights. Indeed, such institutions and practices are, practically speaking, prerequisites of any form of

[4] 'Normally' because there are situations in which the protection and realisation of human rights values cannot be secured for all individuals.
[5] For a clear view of this distinction and its importance, cf. Peter Koller 1998.

social order that effectively protects the moral rights of individuals. Nevertheless they are, in our view, not constitutive elements of the concept of a right. What is constitutive for the existence of a right is a normative requirement of its social protection, which in turn, under suitable circumstances, gives rise to specific duties of protection and assistance.

Clearly, Rawls' account of the human rights that are a part of his Law of Peoples ultimately has to rely on some such non-institutional understanding of human rights in order to make good on the claim that these rights are universal and general rights irrespective of already existing institutions and entrenched social practices.

III. Human rights minimalism and the problem of justification

To allow for an unforced agreement on the Law of Peoples that is not parochial or subject to the charge of Western imperialism, human rights must not be expounded in terms of controversial comprehensive philosophical or religious doctrines (LP 68, 81). That much seems uncontroversial. Still, we need an account of these rights that explains why they are universally valid and generally binding and why they are so important. After all, not only comprehensive doctrines of all sorts are subject to reasonable disagreement. Human rights are contested as well. In view of the rather sparse and minimalist account of human rights in LP, one may also wonder why so many rights acknowledged as human rights in international declarations and covenants are not included in Rawls' shortlist.

In his earlier work, Rawls conceives of basic rights and liberties — the rights and liberties incorporated in his first principle of justice and effectively guaranteed in well-ordered liberal democracies — as *basic goods* that all persons need in order to adequately develop and exercise the capacities constitutive for their moral agency, i.e. their capacities for rational action, fair cooperation and for the pursuit of the individual and the common good (cf. PL VIII). Since Rawls considers the human rights of the Law of Peoples to be a subset of the rights identified by his first principle of justice (LP 68, 78f., 81) human rights clearly qualify as basic goods, too. There is no reason, then, to assume that their value basis is different from the value basis of those liberal basic rights and liberties that are part of the first principle of justice as fairness. And there is no reason to assume that the rationale for the human rights of the Law of Peoples is basically different from the rationale for the basic rights and liberties of domestic justice in Rawls' earlier writings. In some way or other, individuals

need the social protection of these rights as a precondition for the development and exercise of their moral powers, and this is supposed to hold true independently of how the conceptions of rationality, fairness, and the good involved are spelled out.

Both in LP and in his earlier work, Rawls seems to rely on the same general (and hard to reject) notions of social cooperation and moral agency. It is worth remembering how Rawls in *Political Liberalism* (PL) derives his idea of the citizen as a person with two moral powers from the idea of social cooperation as a mutually advantageous social activity that is regulated by reciprocally recognized rules (PL I.3). The Original Position is used in this context as a device of representation to derive from these fundamental ideas specific principles of justice that, among other things, demand equal basic rights and liberties for all citizens (PL I.4).

Now compare Rawls' account of human rights in *The Law of Peoples*. Following the argument in LP 8.2-4, not only liberal societies but all decent societies affirm a law of peoples that guarantees certain basic human rights. Decent societies endorse these rights for the simple reason that they are *decent* societies, i.e. forms of social cooperation rather than mere command systems. It is part of the definition of a decent society that it be internally regulated by an idea of the common good that includes the good of all its members and that it is based on reciprocal obligations rather than mere command by force. (LP 65ff.).[6] The requirement to honor human rights joins in with this idea of a decent society. "What have come to be called human rights are recognized as necessary conditions of any system of social cooperation. When they are regularly violated, we have command by force, a slave system, and no cooperation of any kind" (LP 68, cf. 65).

The intuitive idea of the argument is simple enough and quite persuasive. If human rights are basic goods that individuals need to develop and exercise the basic capacities constitutive of their moral personality, no society that fails to protect these rights can reasonably claim to promote the common good of its people and can demand compliance as a matter of obligation rather than brute force. Both the argument in PL and the argument in LP rely on the normative idea of social cooperation (as opposed

[6] Indeed, not only decent societies meet this minimal requirement of decency but also 'benevolent absolutisms', which for that reason may rightfully resist a military intervention and have a right to self-defence if they are non-aggressive (LP 92). Nevertheless, they are not well-ordered and decent societies (and, hence, no 'members in good standing' of the society of peoples) because "they deny their members a meaningful role in making political decisions" (LP 63, cf. 92). Rawls does not say whether benevolent absolutisms deserve respect or not.

to mere command by force) and trade on the fact (explicitly in PL, implicitly in LP) that cooperation unlike a mere command system of social coordination presupposes a form of human agency that is conditional upon a sufficient degree of social protection for certain basic individual rights.[7]

Still, there are differences in how the idea of social cooperation is spelled out in detail in both arguments, the main differences being that what is constitutive of decent societies is social cooperation *simpliciter* whereas what is constitutive of liberal societies is social cooperation *among free and equal citizens*. However, given the background structure of arguments to be found in PL and given Rawls account of human rights in LP, what seems in need of justification is not so much that there are generally binding human rights. What seems puzzling is rather that according to Rawls, not all basic rights and liberties (identified as basic goods in the context of the conception of justice as fairness) are human rights that every social order must protect. Assuming that the argument for the human rights of the Law of Peoples and the argument for the scheme of equal basic liberties in Justice as Fairness are really as closely connected as we suggest, the question arises how the same kind of argument can yield two different kinds of moral standards: the minimalist human rights standard of decency and the more ambitious standard of equal basic rights and liberties of fully just liberal societies.

Now, the development and exercise of moral capacities and the realization of the corresponding values of human autonomy and individual well-being may come in varying degrees. Both the argument for human rights and the argument for the equal basic liberties, therefore, have to rely on a threshold notion of "adequate develop-

[7] Admittedly, it is not entirely clear that Rawls would have endorsed this line of reasoning. It presupposes the idea of the moral person from political liberalism. But in LP we read that "the Law of Peoples does not say, for example, that human beings are moral persons" (LP 68). We must, however, keep certain points in mind. (1) Surely, we need some account of human rights to explain their importance and universal validity. We also need to be able to say why "a slave system" is not a suitable form of social organisation for human beings. It seems difficult, therefore, if not impossible, not to presuppose some idea of the person as a moral agent in thinking about human rights. (2) According to Rawls, the principles of the *Law of Peoples* are primarily guidelines for the foreign policy of liberal democracies and not principles of justice for a global basic structure of world institutions (LP 9f.; Beitz 2000, 675). The first question, therefore, is why *liberal democracies* in their foreign policies must insist on the generally binding character of the human rights contained in the Law of Peoples. From the vantage point of political liberalism it is the idea of the person with two moral powers that gives the answer to this question. Nevertheless, the idea of the moral person is not part of the content of the human rights themselves. Peoples who reject allegedly liberal notions of the moral person can, therefore, recognize the rights in question without recognizing, at the same time, the underlying notion of the moral person, provided, of course, that they have other (philosophical or religious) grounds for recognizing human rights.

ment and exercise" or "adequate realization" where adequacy is judged from an appropriately defined moral point of view. What seems adequate from one point of view may be inadequate from another. Hence, different standards for the protection of basic rights — the minimal human rights standard of decency and the equal basic liberty standard of fully just liberal societies — may be in order from different evaluative perspectives. Off hand it also seems clear that the standards defining the fair terms of cooperation *among free and equal citizens* must be more ambitious standards than those defining the line between a "a slave system" and a scheme of social cooperation based on a common good conception of justice.

We shall not go into the sparse details of Rawls' account of this distinction and whether he actually draws the line where it should be drawn. There will be reasonable disagreement about whether a society can fail to protect certain rights — say, fail to protect full equality for women or equal political liberties for all citizens — and still be a decent society rather than (at least partially) a system of mere command by force. There also may be reasonable disagreement about what counts as a 'regular violation' of those most basic human rights that define the minimal threshold of decency. But there can hardly be reasonable disagreement that some threshold of human rights protection has to be met in order to confer at least minimal moral standing on a social system and it also should be clear that the requirements of this threshold have to be considerably weaker than the equal basic liberty requirement for fully just liberal societies.

Rawls' contention that not all societies need to meet the standards of full liberal justice in order to be considered decent societies that deserve respect and toleration has been sharply criticised. Early on in a discussion of Rawls' Amnesty Lecture in Oxford 1993, Fernando Tesón argued that Rawls is "too forgiving of serious forms of oppression" because his list of basic human rights neither includes the rights of freedom of expression and association nor the rights of democratic participation (Tesón 1995, 79). Tesón blames Rawls, in particular, for being insufficiently sensitive to the concerns and problems of democratic dissidents and human rights reformers in non-liberal hierarchical societies (Tesón 1995, 88f.). Sure enough, a decent hierarchical society is characterized by a decent consultation hierarchy. Minorities and dissenters that do not endorse the comprehensive conception of the good regulative in their society have to be heard and responded to in the society's political decision-making process (LP §9). Once political decision are taken in line with the regulative compre-

hensive conception, however, the lack of freedom of expression and association precludes that further opposition may be publicly organized and voiced (Tesón 1995, 82). Moreover, given that the freedoms of liberal democracy are not on Rawls' short-list of basic human rights, dissidents in hierarchical societies cannot hope to find the public support of liberal democracies that accept the Rawlsian guidelines of foreign policy (Tesón 1995, 89). Tesón sees this as an unacceptable constraint on international free speech and concludes that Rawls' minimalism "inflicts a serious blow to human rights activism […] by weakening the grounds on which nations can press each other" (Tesón 1995, 89). Tesón also argues that Rawls' minimalism is at odds with the development of international law after the Second World War and "fails to meet the considered moral judgments of the international community. The range of human rights that is now recognized by international law considerably exceeds the modest requirements of legitimacy proposed by Rawls" (Tesón 1995, 91).

Many details of Tesón criticism of Rawls' Amnesty Lecture from 1993 cannot be upheld after the publication of *The Law of Peoples* in 1999.[8] Moreover, what Tesón says about the broader understanding of human rights in contemporary international law is questionable. *Firstly*[9], there seems to be wide agreement now that the international declarations and covenants drafted after the *Universal Declaration of Human Rights* of 1948 have more entries for human rights than could be reasonably recognized as universal moral standards generally binding irrespective of local institutions, traditions, and circumstances. An example often mentioned is the alleged right to "periodic holidays with pay" stated in article 24 of the *Universal Declaration*. Indeed, the unprincipled proliferation of human right claims in international documents explains why Rawls (and others[10]) began to pursue more austere approaches. It is this fact that motivates his distinction between "human rights proper" and mere "liberal aspirations" (LP 80n)[11]. *Secondly*, we cannot take the international human rights documents at face value, so to speak, if we wish to find out which human rights are binding law. All the major human rights instruments of contemporary international law are subject to extensive reservations by state parties, typically made in order to

[8] This is true, for example, of Tesón's claim that from a Rawlsian perspective democratic dissidents in hierarchical societies appear to be "political misfits who battle mindlessly (and unjustifiably) against tradition" (Tesón 1995, 88) and also of his statement that Rawls' Law of Peoples, once implemented, would force Amnesty International out of business (Tesón 1995, 96n).We do not need to address the question here whether these were valid points of criticism against the earlier Amnesty Lecture.
[9] In this and the next two points we follow Tasioulas 2002, 382f.
[10] Cf. Griffin 2001a/b.
[11] See also Nickel's article in this volume.

protect national political structure, domestic religions, or local traditions. *Thirdly*, states are parties to international human rights agreements for all kinds of political considerations and sometimes for cynical reasons that have nothing to do with the "considered moral judgments of the international community" (Tesón 1995, 91). Even if the international community had "considered moral judgments", there is little reason to assume that positive international law gives us a clear idea of what they are.

Still, Tesóns straightforward criticism of Rawls' Amnesty Lecture has set the stage for the ongoing critical discussion of the Law of Peoples. Charles Beitz (2000) agrees with Tesón that the Law of Peoples endorses too limited a range of human rights and is "excessively deferential to societies with discriminatory or undemocratic institutions" (Beitz 2000, 687). Beitz also notes that Rawls account of human rights is at odds with contemporary international law but he does so in a more general and, indeed, more convincing way than Tesón. According to Beitz, Rawls ends up with his shortlist of human rights —not including the rights constitutive of liberal democracies as identified e. g. by the articles 19-21 of the *Universal Declaration* — because of his narrow understanding of the role of human rights in international politics.

Rawls' account of human rights contrasts, indeed, starkly with what Beitz calls the "conventional view" which found expression, for example, in the *Universal Declaration*. The "conventional view" gives human rights a broad political role. According to the *Universal Declaration*, human rights serve as "a common standard of achievement for all peoples and nations" (Preamble; cf. Beitz 2000, 687). They are standards of conduct not only for governments and international institutions but also for the various nongovernmental organisations in the emerging global civil society. Human rights are seen as "shared goals of political reform (Beitz 2000, 687f.) and not, as does Rawls, merely as a constraint on political sovereignty. On his understanding human rights (proper) regulate the legitimacy of international intervention: regimes that meet the minimum standard are save from external interferences whereas regimes that do not meet that standard are properly subjected to external sanctions and even military interventions (cf. LP 37f., 81, 93f.n).[12] Indeed, on the basis of this

[12] Note, however, that in Rawls view only intervention by other governments or by international institutions like the International Monetary Fund or the Worldbank is regulated by the minimal human rights criterion. The lawful pursuit of "liberal aspirations" beyond the Rawlsian shortlist of human

basis of this role, nothing may be considered a human right that could not, at least in principle, function as a warrant for foreign interference and, as a last resort, for military intervention. It goes without saying that not all rights identified as human rights (say, in the *Universal Declaration*) meet this criterion. As Beitz points out, it is the narrow understanding of the role of human rights — viz. to regulate and to justify external interference and intervention — that explains the minimalism of the Rawlsian human rights list: "[A] less restricted understanding of the political role of human rights would suggest a different view of their justification and, most likely, a more expansive interpretation of their content" (Beitz 2000, 688).

John Tasioulas has taken up this line of argument and has given it a conceptual twist. Like Tesón and Beitz, Tasioulas has serious misgivings in particular about the exclusion of democratic participation rights from Rawls' shortlist. In his analysis, Rawls' minimalism follows from a conflation of questions concerning the recognition of rights in an ideal theory of justice and questions concerning the enforcement of rights (e.g. by military intervention) in the non-ideal world in which not all agents comply with the norms of ideal theory. Establishing the existence of a human right as a matter of ideal theory is, Tasioulas argues, independent of establishing the remedial question of how violations of such norms are best dealt with" (Tasioulas 2002, 386).

It would be a shame, if it were true, that Rawls conflated questions of ideal theory with questions of law enforcement. Rawls is quite explicit in his intention to separate questions of the ideal theory of right and justice from the problems of public international law and its enforcement: "This monograph is neither a treatise nor a textbook on international law" (LP 5). Moreover, it is a classroom exercise to show that one may recognize the existence of a particular (moral) right and still deny that it should (or even could) become positive law or that it should (or even could) be enforced on a particular occasion. Concerning this point we are in full agreement with Tasioulas (see section II above). Is Rawls (notwithstanding his better intentions) actually guilty of making the fundamental mistake Tasioulas ascribes to him? We do not think so.

Indeed, we deny that Rawls' account of human rights is flawed because it presupposes a tight connection between human rights (proper) and reasons for intervention. It would be a mistake to define international human rights as norms whose grave violation by a political regime justifies (in principle) international intervention *by*

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rights by citizens and nongovernmental organisations of all kinds is fully compatible with Rawls human rights minimalism, cf. LP 85.

military force. Doing so would set up an entirely arbitrary threshold for membership in the class of human rights. It would by fiat exclude all rights compliance with which could always be achieved in better ways than trough military intervention (or could never be achieved by military intervention but perhaps in other ways) without even taking notice of the value of these rights for their holders and of how serious the violations that have to be dealt with are. However, Rawls says nowhere in LP that *military intervention* defines the crucial benchmark for membership in the class of human rights. Rather, he speaks of 'forceful intervention': The fulfilment of human rights by a society "is sufficient to exclude justified and forceful intervention by other peoples" (LP 80). It is obvious from the immediate verbal context that "forceful intervention" in the quoted passage cannot mean "military intervention" because the passage continues: "… for example, by diplomatic and economic sanctions, or in grave cases by military force" (ibid.). Hence, Rawls does not claim that there is a necessary connection between human rights and military intervention in particular but only between human rights and the justifiability of intervention in general.[13]

One could, of course, endorse Tasioulas more radical critique and argue that even maintaining a more general (but still necessary) connection between human rights and (military or non-military) intervention is still unacceptable. It may be seen as resting on a conflation of the two questions (a) which rights exist and (b) which reactions to the violation of existing rights seem appropriate upon due consideration of all relevant circumstances. In the light of what we said in section II two comments seem in order.

Firstly (and obviously), to say that violations of human rights *in principle* justify "forceful intervention" is not to say that whenever human rights are seriously violated an intervention is justified. Whether, all things considered, an intervention is actually justified depends in every particular case on the circumstances. Even in the case of serious human rights violations on a large scale, there may be decisive countervailing reasons not to intervene. Since, practically speaking, we can never rule out the existence of countervailing reason in advance, it is clear that all the rights on

[13] We should like to point out that neither Beitz nor Tasioulas say anything to the contrary. The reason why all interventions (and not only military interventions) may be considered 'forceful' interventions is that they always involve the exertion of pressure of governments against other governments — if not other (non-military) coercive measures — intended to influence political decision making processes of sovereign political societies. Rawls' Law of Peoples contains a general duty of non-intervention (principle 4, LP 37) and even justified non-military intervention may be seen as an infringement of sovereignty rights by force.

on Rawls' shortlist (or, indeed, on any human rights list one might think of) can only provide *pro tanto* reasons for intervention in other countries.

Secondly, to maintain that international human rights by themselves are not even *pro tanto* reasons for intervention, as Tasioulas does (2002, 384-87), strikes us as an extravagant and eventually untenable position. Why should we care so much about whether a certain right qualifies as a universally valid international human right, if we did not believe that these rights, at least in principle, justify international action aiming at the protection of fundamental human values all over the world? In section II we have opted for the "classical view" of rights which explains the *regulative force* of rights in terms of their correlative duties. It is not, we said, the existence of institutionalized enforcement mechanisms that gives practical significance to a right in the first place but the social recognition of the corresponding duties. These duties involve, as we have seen (in section II), not only primary duties of direct compliance but also auxiliary duties of protection and assistance. If we take it (a) that the point of human rights is to protect individuals and to secure the realization of certain basic for them by imposing duties on others, and if we also accept (b) Mill's statement that it is constitutive for a right that it involves a requirement of its social protection, than it seems hard to deny (c) that human rights provide at least *pro tanto* reasons for third party intervention whenever they are violated. And since we are discussing *international* human rights, i.e. rights that are binding on political regimes, the auxiliary duties of protection and assistance are naturally conceived of as duties that transcend the borders of domestic societies and constitute *pro tanto* reasons of international intervention by other governments and international institutions.

How do these rather abstract considerations about rights and duties bear on the question of whether there is a right, say, to democracy or to full gender equality? As they stand, they fail to provide us with concrete answers, positive or negative. However, they tell us something about the kind of argument we need to support the answer we eventually come up with. If human rights are conceived as claim-rights the existence of which requires not only a sound value basis but an appropriate allocation of correlative duties, the crucial test for establishing the existence of a particular right is this. We have to check whether, on balance, the value basis of the right warrants the imposition of the respective duties (including duties of third party intervention) or whether the fulfilment of these duties would require sacrifices that from a moral point of view seem unacceptable. And this test applies, of course, for any candidate

for the list of human rights proper, be it the right to democracy or the right to full gender equality.

Rawls clearly maintained that hierarchical societies, which meet his minimum threshold of decency but fall short of political equality, nevertheless meet moral requirements that are "sufficient to override the political reasons we might have for imposing sanctions on, or forcibly intervening with, its people and their institutions and culture" (LP 83). There will always be reasonable disagreement about this answer. Balancing the value of democracy against the value of political sovereignty and independence and evaluating the chances and long term consequences of international interventions of all sorts is a difficult business. Therefore, the only point we want to make here is that to simply do away with the idea that rights imply duties, including duties of assistance, is not a satisfactory solution to the problem of identifying human rights. The gains we could make that way in terms of entries in our list of human rights would come at the price of a significant loss of regulative force for each of them.

One difficulty one still may have with Rawls' idea of a minimal standard of decency is that Rawls seems to derive it from one set of considerations — dealing with the adequacy of political, economic, and military sanctions (cf. LP 83f.) — but that he subsequently applies this idea in a very different setting, dealing with the question which societies should be regarded as 'members in good standing' of a Society of Peoples and are therefore represented in the second Original Position where the principle of international justice are selected (cf. LP 59f.). It is one thing, one may object, to say that as a matter of practical international politics, societies that meet Rawls' standards of decency should be tolerated and not subjected to any kind of external sanctions. But it is another to grant these societies, in effect, a veto power in the determination of the principles of international justice. Meeting minimal standards of basic human rights protection and political participation may suffice to warrant respect and toleration and may yet not be enough for equal veto powers. After all, the principles of justice chosen in the second Original Position must not be compromised by the existence of injustice. And, of course, for Rawls merely decent societies are not fully just societies (LP 78, 83).

The answer to this problem depends on whether we conceive of the Law of Peoples as a set of norms that in the absence of countervailing reasons should (if possible) be

enforced or not. If we follow Rawls (LP 25ff., 81 and our own argument in this section), the minimal standards of decency that warrant respect and toleration also warrant equal representation in the second Original Position. Otherwise, the inconsistency could arise that the norms of international justice selected only by well-ordered liberal societies (requiring, perhaps, full liberal justice) in the second Original Position must at the same time be enforced and not enforced. They must be enforced because they are part of the Law of Peoples; and they must not be enforced because the societies that violate them are *decent* societies that may claim respect and tolerance for their form of social order even tough they do not meet the requirements of fully liberal justice.

IV. The Allocation Problem

The problem with any account of human rights that requires more than the fulfillment of negative duties of non-interference but also enjoins positive action is this: that in many cases it is utterly difficult to specify in sufficient detail what these rights involve in terms of specific duties of particular agents.[14] As they stand, many human rights do not lend themselves easily to a specification, neither of the duty-bearers involved nor of what they have to do to discharge their human rights based duties. Take again the rights guaranteed by article 3 of the *Universal Declaration*: "Everyone has the right to life, liberty, and security of person." This formulation leaves little doubt as to who the holders of the right to life, liberty, and security are. In our terminology, they are universal rights: everyone has these rights, i.e. every human being. But who are their addressees, the bearers of the corresponding duties including the auxiliary duties of protection and assistance? And what is the exact content of the duties those addresses have and what counts as fulfilling them? Or take the right to subsistence claimed by Rawls, and others (cf. LP 65), obliquely expressed in article 22 of the *Universal Declaration*, and the same problem occurs.

Let's concentrate for now on the first question of the missing addressee. The problem is that the two-term formulations of typical statements of human rights tell us who the right-holders are ("everyone") and provides us at least with an abstract description of the right's content ("life, liberty, security") by specifying the value basis of a particular right. But they contain no third term and therefore no hint as to the ad-

[14] This is a point Onora O'Neill and others have often made, cf. O'Neill 1996, chap. 5.2 & 2001; Feinberg 1970. For a reconstruction and defense of O'Neill's argument, see Stepanians 2005.

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dressees of the rights ascribed through them. For classical rights-theorists who regard rights essentially as relations between at least two persons, such formulations are in a serious way incomplete. Joel Feinberg has proposed to call incomplete rights without an identified duty-bearer "manifesto rights", in order to contrast them with the proper and complete rights of the form "*x* has a right to *y* against *z*" (Feinberg 1980, 153). From the classical point of view, having a manifesto right is like being married without knowing to whom. Manifesto rights, in Feinberg's sense, are morally valid claims that fall short of imposing duties on individuals or institutions and hence cannot be violated in *sensu strictu* but can only remain unfulfilled. More specifically, the valid claims expressed in human rights would be *claims of need* since humans *need* the protection of these rights in order to realize the values of human agency and well-being at least in a minimally acceptable way.

However, the finding that the alleged human *rights* are merely valid moral *claims* rather than moral rights in the strict sense explained in section II is not the end of the story. The obvious way out is to turn what looks like a mere manifesto right into a proper right by completing the right-ascription and adding the missing term for an addressee. According to many legal theorists there is nothing easier than that. At least for the human rights acknowledged by international law, they say, the missing addressee is a legal person by the name of "the state" (cf. Sieghart 1985, 43). If this proposal is correct, the completed version of article 3 of the *Universal Declaration* reads: "Everyone has the right to life, liberty, and security of person *against the state*."

There is much to be said in favor of this view. *First* of all, there are important human rights that only states or state agencies can honor or violate notwithstanding the fact that they may also have far reaching implications for individual conduct. This is true for all rights the content of which cannot be explained without reference to state agencies or state-like institutional arrangements, for instance due process and habeas corpus rights, or rights to political participation. *Secondly*, if we line up behind Mill and say that a right is something that ought to be socially protected, it comes close to a conceptual truth that human rights imply claims against the state give the factual need of protection for human rights and given the prerequisites of coordinated social action aimed at protecting human rights. *Finally*, even with regard to those rights that may be seen to impose primarily negative duties of non-interference on individuals (not to kill, not to rape, not to torture, not to starve) we have to take into account the

auxiliary duties of protection and aid that have to be discharged when important rights are in danger of being violated or have already been violated. Again, given the need of coordinated social action for the protection of these rights, states and state-like institutional arrangement are obvious addresses of human right claims.

Taking the state and state agencies to be the primary addressee of human rights claims seems also to be pretty much in line with what Rawls says in LP except for his distinction between states and peoples which we shall ignore. Following Rawls, human rights have the role of setting limits on a *government's* internal sovereignty and its right to self-defense (LP 27, 42). Outlaw *states* figure in the book as the most prominent example for human rights violators (LP 37, 81), and it is also said that *social systems* violate or recognize human rights (LP 65, 68). Principle eight of Rawls' Law of Peoples requires *peoples* to honor human rights (LP 37). Unless we have missed something, there is no passage in LP where Rawls talks about individuals as the addressees of human right claims.

From an analytic point of view, the exclusive focus on states, social systems, and peoples rather than individuals in constructing a normative theory of human rights is unfortunate. Indeed, the very notion of the state as having duties to protect the human rights of its citizens presupposes that other agents than the state have duties deriving from the human rights of others that can be violated. Moreover, in our world there is no such thing as "the state", but a plurality of states. Which is the one everyone has the right to life, liberty, and security against? Is it the state whose citizen the right-holder is? If so, there is no such thing as "the" (single) right to life, etc., only many rights which share a common content but hold against different states. Or is it the state on whose territory the right-holder happens to be? If so, we loose and acquire new rights every time we cross a state border. Or are *all* states that have signed the *Universal Declaration* under the corresponding duties towards every right-holder?

Even if international lawyers have clear and unambiguous answers to these questions, as they certainly do, it cannot possibly be the case that only states are capable of violating or honoring human rights. Is it really plausible to assume that no individual and no organization, party, or company can ever violate a human right, and that this impossibility is part of the very *concept* of a human right? Even if this were true by definition for the legal concept as it is understood in international human rights law, it is certainly not true for human rights as moral rights. It is hard to see

why any entity capable of intentionally killing a person could be excluded from being a potential violator of rights in general and human rights in particular. All agents and certainly all human persons are potential violators of rights and therefore possible addresses of rights like the right to subsistence. More in tune with widely held intuitions and, of course suggested by our analysis of moral rights in section II is the proposal to regard human rights as holding against every person capable of harming the right-holder.

There are further important reasons for not focusing too narrowly on collective and institutional agents in an analysis of human rights, as Rawls does. It seems more appropriate to begin at the elementary level with single individuals and their rights and duties. Collectives like 'peoples' or 'the international community' are often not capable of coordinated rational action because of the well-known problems of collective action that derive from incomplete information among the members of a group and prisoners-dilemma like social settings. Assuming that 'ought' implies 'can', a consequence of these collective action problems is that collectives as such cannot be duty-bearers and, hence cannot violate human rights either. This follows from our analysis of what it means to violate a human right in section II. Still, governments and states as organized (corporate) agents are normally capable of rational collective action (indeed, that is what they are about) and also of protecting or violating the human rights of their citizens. But they cannot be the only agents of this kind. Otherwise no non-state agent could ever have a human rights based duty to intervene in one way or other, if a particular state violates the human rights of its citizens. In particular, the citizens of a state whose government violates human rights could never be under a duty to do anything in order to change the ways of their government, even if they were actually capable of doing so. This strikes us as absurd and we take it that all agents (individual, collective, corporate, or institutional) who are capable of violating the human rights of individuals are in the scope of human right claims and possible duty-bearers.

This, however, leaves us with what we shall call the allocation problem, the problem of identifying with regard to particular cases of human rights the relevant duty bearers. This may not be much of a problem with regard to the so-called negative duties that can be derived from the familiar set of basic human rights. If a person has a human right not to be tortured, nobody must torture her. That's easy to see because in this case we have a human right that is at the same time universal and general. It is

less easy however, with rights like the right to subsistence mentioned by Rawls (LP 65). This is certainly a universal right, but it cannot be generally binding because not everybody has to provide the means of subsistence for every other person. But, sure enough, somebody has to do something to meet the claims of need of the starving and the question is who. This is the allocation problem and the rest of this section indicates some of the difficulties in finding a solution for it in moral theory. What follows is not any longer meant as a criticism of John Rawls' account of human rights and duties of assistance in LP. Nobody seems to have a theoretically satisfying answer to the allocation problem yet. The only complaint we have about Rawls in this matter is that regarding human rights as "binding all peoples and societies" (LP 80) is not very helpful.

We shall use the right to subsistence mentioned by Rawls to illustrate the allocation problem and we shall assume throughout that meeting the valid human right claims of those who globally, for one reason or other, cannot secure their means of subsistence on their own, requires international cooperation on a large scale. From this, it immediately follows that the individual duties implied by the human rights arising from severe poverty cannot be ascertained merely on the basis of the claims of need aspect of these rights, but only by taking into account existing and possible frameworks of social and international cooperation. At the beginning, these duties and their bearers can only be described in a highly abstract form. A complete and workable specification of these natural duties will eventually require their explicit recognition and acceptance as conventional duties that arise only in the context of existing (or possible) schemes of a socially cooperative fight against poverty.

Whether a certain claim of need or a full claim-right imposes specific duties on agents or not is not a metaphysical or purely semantical quality of the claim or right *in abstracto* but to a large extend a question of empirical and institutional context. The moral claims of a person who in the event of a car accident on a lonely highway needs help impose rather specific duties on me *if I am the only one around*. It would be much less clear what my duties are, if there were other people who could also provide the necessary assistance (say, a car ride to the next hospital), and, of course, it is just a matter of contingent empirical fact that I am the only one around. The moral claims of orphans who need a decent upbringing are by themselves not claims against any specific individual with the responsibility to take care of them. Given an appropriate scheme of social institutions like guardian courts and orphanages, how-

ever, these claims may impose rather specific (legal and also moral) duties on judges, guardians, and others.

One way of addressing the problem of specifying the duties and responsibilities deriving from human right based claims of need in ideal theory, so to speak, is what we may call the natural-duty-cum-cooperation approach. Duties deriving from valid claims of need may be seen as natural duties of mutual assistance. We owe them to others simply because they are human beings irrespective of the special relationships we might have with them and independent of existing schemes of social cooperation. Now, given the global scope of severe poverty, fulfilling our natural duties of assistance properly requires social cooperation with an efficient and fair division of labor among those capable to contribute to the elimination of global poverty. Having said that, the answer to the problem of assigning specific duties and responsibilities correlative to the relevant human rights may seem obvious. Everyone has exactly those duties and responsibilities an efficient and fair system of cooperation assigns to him or her. The duties assigned by such a system of cooperative help are, of course, no longer natural duties. They are conventional duties, since they depend on specific social arrangements. However, they still derive their normative and motivational force from natural duties of mutual assistance.

Unfortunately, this solution only works in ideal theory, but not in moral practice. *Firstly*, we simply do not know what an efficient and fair system of cooperative help would require us to do, because it's hard, if not impossible, to figure what such a global system in reality would look like. And, *secondly*, in practice it may be the case that we have either to do more or to do less than our 'fair share' in an ideal scheme of cooperation in order to meet our moral obligations. If others do less than their fair share — act as free-riders in a public good scenario —, we may be obliged to do more to meet urgent claims of need. If others, say, out of sympathy and compassion, do more than their fair share, we may not even be obliged to do ours, because the relevant claims of need are already met without our contribution. Consequently, the ideal of an efficient and fair scheme of global cooperation does not give us sufficient guidance as to what our specific duties and responsibilities deriving from the claims of need of others are.

The classical understanding of human rights as claim-rights emphasizes the need to give strong regulative force to these rights and it provides us with a conceptual basis

to defend Rawls' human rights minimalism. But it also confronts the yet unresolved allocation problem, which does not only arise with regard to the duties implied, for example, by the right to subsistence (acknowledged by Rawls in his shortlist of human rights) and other so-called "social" or "economic rights". Since all human rights involve auxiliary duties of protection and assistance that typically require positive services of some kind, the allocation problem arises for all of them. It has to be solved if we want to maintain the idea of human rights as normative standards with strong regulative force.

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