

# Denver Journal of International Law & Policy

---

Volume 5  
Number 2 *Fall*

Article 13

---

January 1975

## International Law and Rawls' Theory of Justice

Anthony D'Amato

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

---

### Recommended Citation

Anthony D'Amato, International Law and Rawls' Theory of Justice, 5 Denv. J. Int'l L. & Pol'y 525 (1975).

This Comment is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [digitalcommons@du.edu](mailto:digitalcommons@du.edu).

---

## International Law and Rawls' Theory of Justice

### Keywords

International Law: History, Environmental Law, Jurisprudence

# FACULTY COMMENT

## International Law and Rawls' Theory of Justice

ANTHONY D'AMATO\*

Few books have achieved the status of classics as quickly as *A THEORY OF JUSTICE* by Professor John Rawls.<sup>1</sup> Published in 1971 the work has been acclaimed as a monumental contribution to political theory and philosophy in a torrent of favorable reviews. For this reason alone, what Rawls has to say about international law in his book—despite the brevity of his comments on that subject—should be of great interest to international lawyers. But, more importantly, the complexity of present-day international law stands in an uneasy relation to the scheme of justice propounded by Rawls, indicating that Rawls' conception may either already be dated or may be too simplistic. Indeed, it may not be from want of interest or familiarity with international law that Rawls deals with that subject so briefly in his long work, but rather that the problems now facing international lawyers may pose a conceptual threat to some of the fundamental bases upon which Rawls builds his entire theoretical edifice.

Rawls' work will be analyzed often in the months and years to come, and thus the present essay is merely an early attempt to contribute to the dialogue. No pretension of definitiveness is made here; quite the contrary, I want to reserve a full option to revise my opinions based upon further study of Rawls and of the commentaries engendered by his book.

### I.

The most fundamental problem suggested by an international perspective upon Rawls' work is his choice of a "society" as the unit for assessing justice. He starts by defining society as "a more or less self-governing association of persons who in their relations to one another recognize certain rules of conduct as binding and who for the most part act in accordance with them."<sup>2</sup> It is a "closed system iso-

---

\* Professor of Law, Northwestern University Law School; Visiting Professor 1973-74, Oregon Law School; A.B., Cornell University, 1958; J.D. Harvard, 1961; Ph.D. Columbia, 1968. Copyright 1975 by Anthony D'Amato. This essay is part of a study of jurisprudence written under a grant from the National Science Foundation and awarded by the National Endowment for the Humanities.

1. Harvard University Press, Cambridge, MA 02138 (1971); L.C. 73-168432 [hereinafter cited as *RAWLS*].

2. *RAWLS* at 4.

lated from other societies,"<sup>3</sup> at least for the purpose of most of the analysis of the book. Later on, in specifying the "circumstances of justice," Rawls adds to this conception of society the idea that it involves "many individuals coexist[ing] together at the same time on a definite geographical territory."<sup>4</sup> These, then, are the characteristics of society. Rawls endeavors to show what constitutes a "just society," and he terms his entire study an essay in social justice.<sup>5</sup>

No one can object if a moral philosopher chooses to study the problem of justice solely within a particular unit, such as a "society," just as no one can criticize a study of justice within a "family." But it is legitimate to criticize a study that purports to speak of larger aggregations while focusing upon a small unit. Rawls tends to extend his discussion beyond social units to an international or world basis in two ways. First, at one point in his book he directly analogizes a nation to a person, and says that ethics among persons may be directly extended to the ethical foundations of international law.<sup>6</sup> Second, in an indirect way Rawls conveys the impression that his theories concern mankind in general; this is accomplished by talking about universal traits of persons (moral sentiments, for the purposes of Rawls' study) and by dealing with societies abstractly rather than as particular societies in today's world. Indeed, Rawls believes that ethical theories cannot be particularistic:

[I]t must be possible to formulate [ethical principles] without the use of what would be intuitively recognized as proper names, or rigged definite descriptions. . . . [P]rinciples are to be universal in application. They must hold for everyone in virtue of their being moral persons.<sup>7</sup>

Let us postpone for the moment the direct comparison Rawls makes between nations and individuals, and examine the claim that his theories apply to moral persons in general.

The basic question thus becomes: how can a universal system of justice be worked out for persons if we refuse to examine issues that transcend national boundaries? Or, in other words, can Rawls defend his limitation of inquiry to given societies rather than all (international) societies? This abstract question can best be handled by some concrete examples. For instance, Rawls considers one principle of social justice to be the "difference principle," that is, social and economic inequalities are permissible if and only if the arrangements generating them work out better for the most disadvantaged person

---

3. *Id.* at 8.

4. *Id.* at 126.

5. *Id.* at 8-9.

6. *Id.* at 377-82.

7. *Id.* at 131-32.

(the "worst-off" position) than would any more equal structure.<sup>8</sup> Such a principle would clearly imply, among other things, that a new tax law should be passed which takes from the rich and gives (via what one might call a "negative income tax") to the poor, and this money transfer should occur unremittingly up to the point that any further taking-from-the-rich would reduce the capitalist's production incentive to the point where the poor would be worse off due to the drop-off of capital investment. Now this principle, to be sure, may be difficult to interpret in practice. How can we tell, for example, when a disincentive to invest further actually sets in? Would we wait for rich persons to quit their corporate jobs and make public statements that they are not any longer able to keep enough after taxes to make it desirable for them to put in another day's work? And how about corporations pondering long-term capital investments or research and development programs? Nevertheless, difficulties of interpretation aside, the ethical principle asserted by Rawls is that a person can get richer only if he is helping everyone else to become richer as well, via the fruits of his labor or his business acumen. A person does not have an ethical claim to get richer at society's expense. Yet, even if this principle is operationalized within a society, can it apply across societies? Should there be enormous taxes upon the incomes of rich persons in industrialized societies so that the money can be paid over to masses that are near starvation in India, China, and other populous and developing nations? Should there be an "excess profits" tax levied upon individuals and corporations for this purpose? To some extent, of course, the "have-not" nations are making this claim today; it takes the form of demands upon limited United Nations resources and capital, explanations for expropriation of foreign-owned industries, justifications for exploiting oceanic resources, and so forth. The "relative deprivation" sensed by disadvantaged nations is itself put forward as a justification for international measures designed to reduce the disparity of wealth between rich and poor nations. Rawls' book would probably provide an ethical basis for such claims, assuming that his scheme can transcend social boundaries.

But can the logical leap across such boundaries be justified? There are two important factors, I believe, that argue against it: one on the "supply" and one on the "demand" side of the picture. On the supply side, we have a world that is not infinitely rich in resources. We cannot talk of a "cowboy economy" internationally; rather, basic minerals, food, and resources are limited and the supplies are being

---

8. *Id.* at 75-83. "[T]he higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society." *Id.* at 75.

used up. In Rawls' hypothetical society, resources are sufficiently abundant to make it possible for the best-situated person to argue that further incentives paid to him will result in increased exploitation of natural resources so that the poor will also benefit from them.<sup>9</sup> But if there are only limited resources, then further exploitation by the rich can only be at the expense of the have-nots. For example, the United States could not, under this formulation, argue that its consumption of thirty percent of the world's energy is needed to raise the standard of living of the masses in India. Thus, Rawls' difference principle would boil down to a straight tax, taking from the rich and giving to the poor, with little room, if any, for the argument that the tax should stop at a point above that of total equality for everyone so that incentives can be maintained. Thus, we arrive at the conclusion that either all economic disparities in the world should be eliminated (as an ethical proposition), or that there are counter-arguments that Rawls has omitted which change the ethical calculus.

One counter-argument comes from the "demand" side of the picture, mentioned previously. Advantaged nations tend to be less populous than disadvantaged nations. For one thing, they tend to hold down the birth rate voluntarily. Secondly, the very fact of a lower population increases per capita wealth and perhaps is implicit in the concept of an advantaged nation. Now, should a populous disadvantaged nation have an ethical claim to the wealth of a less populous advantaged nation? Or might the latter reply that its own population control undertaken to provide a "better life" for all its citizens should not be undercut by claims from a nation that has not similarly restrained itself? Rawls discusses the population problem only briefly, and from the standpoint of classical utilitarianism and not his own theory of justice.<sup>10</sup> But what is at stake for Rawls' own theory is conceptually fundamental. We might say that a rich nation is "rich" in terms of material wealth but not "rich" in terms of the number of persons in it.

In other words, a nation may become rich in part by limiting its population. A smaller family size not only increases per capita wealth, but also frees the time of individuals to innovate and make large capital improvements in society without having to feed and take

---

9. Rawls uses the condition of "moderate scarcity," which means that "[n]atural and other resources are not so abundant that schemes of cooperation become superfluous, nor are conditions so harsh that fruitful ventures must inevitably break down." *Id.* at 127.

10. He states that the classic principle is inferior to that of the average utility principle in that the former, in maximizing satisfactions over the whole of society, can allow for an indefinitely increasing population so that the sum of utilities added by the greater number of persons makes up for the decline in per capita shares of wealth. *Id.* at 162-63.

care of the family. On the other hand, of course, a population that is too small lacks the labor force to develop large industry and large-scale farming. Thus, by limiting population I mean limiting it up to a point. A rich nation thus trades off its potential for population increase for material things. We have often heard the expression "He may be a rich man, but he has no children, and therefore he's really very poor." Similarly, a family in the United States that has two children may be "poorer" in a very real way compared to a family in India that has ten children. But then, why should the Indian family have a claim against the U.S. family for a portion of the latter's material wealth?

I think this question goes unanswered in Rawls' theory because Rawls focuses upon the individual man's claim to being a morally ethical person. He takes the individual as given, without considering the dynamics of the fact that individuals can be produced in the same sense that food is produced. In stating that every man should be equal, Rawls overlooks the fact that some men have lots of children while others do not. By granting their children immediate equality in his ethical theory, Rawls overlooks the trade-offs stemming from the probability that the man who had fewer children probably acquired more material wealth. The latter's greater wealth "cost" him something, namely, fewer children. Thus it would be unjust to take from him his wealth which he may have acquired at the cost of a smaller family and hand it over to the man who produced a larger family. At least, it would be unjust from the point of view of a comprehensive ethical theory such as Rawls' which would seem to require such a result. I am not saying that there may not be some claims that are not entirely just on the part of the masses in disadvantaged societies. But the justness of these claims would have to be evaluated in far greater detail than Rawls' ethical theory seems to permit. The result may very well be that a certain amount of "excess profits" tax, perhaps labelled "foreign aid," should be paid to disadvantaged nations; but if this amount falls short of making everyone in the world equally wealthy, the shortfall should not be viewed as an ethical compromise, as Rawls' theory perhaps would require.

A second counter-argument to the levelling tendency in Rawls' theory points back to the "supply" side of the picture: the earth's resources are finite and non-infinitely renewable. Now suppose that Rawls' "difference principle" applies between advantaged nation A and disadvantaged nation D. Nation A would then be constrained by the principles of justice to pay foreign aid to nation D until such time as A loses its capital-formation incentives due to the heavy nature of the "tax" that comprises this foreign aid. So, let us establish a maximum for the tax; say, forty percent of all income. If this forty percent is five billion dollars per year, then A would pay to D five billion

dollars annually. But what would D do with the money? If D used the money for capital-formation, then in the course of time we might expect the people of D to approach in personal wealth per capita the people of A (assuming that there is no runaway population growth in D, as per the preceding argument). But why would D necessarily have the incentive to save and invest the money paid over by A? Human nature being what it is, D might simply decide upon a program of hedonistic consumption, spending for short-run pleasure five billion dollars per year, secure in the knowledge that next year another five billion dollars will be received from the hard-working people of A. In other words, while the forty percent tax on A might not wipe out the incentive to invest and produce within A, the payment of that forty percent tax might wipe out any incentive to invest and produce within D. As a result, a reckless consumption program may be set up, cutting into the earth's stock of nonrenewable resources, to the detriment of all nations. D would proceed (in theory) on its merry way, knowing that only by spending all of the five billion dollars per year the people of D will remain technically "poor" and thus will ensure, under Rawls' theory, continuing annual receipts of this amount of foreign aid. Clearly, from a global perspective, this result is unjust. It is unjust since it puts a premium upon short-run consumption of natural resources. It is unjust because it induces the people of D to spend, losing the virtue (if there is one) of thrift and saving. And it is unjust to the people of A to take away forty percent of what they earn by their labor so as to increase consumption in another country.

If we were dealing with a single society, the above consequences of Rawls' theory might not apply. The institutions of a given society might, for instance, restrict population growth, or put disincentives upon large families. Also, laws might be passed that the recipients of welfare must make an effort to find jobs or to save a portion of their welfare payments or at least to refrain from a Veblenian kind of conspicuous consumption. But once we look at international society, we have the separate sovereignties (such as A and D) where rules like this cannot necessarily obtain (even if they would be some inherent part of Rawls' theory of a single society—and his book does not make this clear by a long shot).

Rawls bases his theory of justice on the social contract model as shaped by Kant, Locke, Rousseau, and, to a certain extent, Hobbes. This is a relatively old political theory; it certainly antedates utilitarianism, Rawls' chief theoretical protagonist. Social contract theorists probably were justified in looking at a single society before the days when mass media and rapid travel made the world seem small. But I tend to think that Rawls' book, no matter how up-to-date it sounds in the invocation of recent economic theory, is somewhat anachronistic in that the vast problem of world justice that now confronts us is



treated as largely irrelevant. Of course, as I said before, and the point is worth repeating, one cannot fault Rawls for choosing to deal only with the problem of justice within a given society. But it is necessary for us to contextualize Rawls' work, to realize that a "solution" to the problem of justice in a given society is not extendable by simple extrapolation to the problem of world justice.

## II.

Only at two brief and widely separated points in his book does Rawls deal with the issue of justice transcending the self-contained national communities which form the subject matter of his theory of social justice,<sup>11</sup> and there only to say that the question entails the derivation of principles of justice for the law of nations. The law of nations is explicitly considered in only one section of the book in the context of a discussion of conscientious refusal.<sup>12</sup> A conscientious objector to a war which he considers illegal under international law would cite the injustice of his nation's war policy. Thus Rawls finds it important to examine the moral basis of the law of nations.

Rawls derives the ethical foundations of international law by the use of his "social contract" technique which forms the basis of his entire work. The social contract theory briefly involves a hypothetical situation of men coming together in what Rawls calls the "original position" to decide upon basic constitutional rules for their society. The men in the original position operate under a "veil of ignorance:" they do not know how their decisions will affect their own particular case because they do not know their own particular circumstances.<sup>13</sup> Thus they will choose principles that minimize their potential losses under the constitution (using the maximum concept of the theory of games<sup>14</sup>). In particular, they will not choose the utilitarian principle, since the maximization of the sum of advantages in a society can be at the expense of a minority of the population (for example, if a minority slave population would greatly increase the happiness of the majority, then classical utilitarian theory would appear to countenance slavery<sup>15</sup>). Since no one, in the original position, knows what his subsequent personality or social status will be, he will not vote for a principle that allows a chance that he will be among the greatly disadvantaged class. It follows deductively (according to Rawls) that the men in the original position will first of all choose "equal liberty" for all:

---

11. *Id.* at 8, 457.

12. *Id.* at 377-82.

13. *Id.* at 136-37.

14. *Id.* at 152-54.

15. *Id.* at 158-59. Rawls acknowledges that classical utilitarians have attempted to refine their theories so that this particular result does not obtain. The reader must judge at what point utilitarianism is vitiated by such refinements.

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.<sup>16</sup>

The other major principle that the men in the original position will choose recognizes that there will be social and economic inequalities in society (otherwise there would be no incentive to save, invest, and produce, but mitigates the inequalities by requiring that they be arranged so that they: (a) are attached to offices open to all under conditions of fair equality of opportunity<sup>17</sup> and (b) accrue to the greatest benefit of the least advantaged (the "difference principle" discussed earlier).<sup>18</sup>

When he turns to the question of conscientious refusal and international law, Rawls simply extends the above interpretation of the original position to apply to representatives of the different nations. The representatives know nothing about the particular circumstances of their own nations, such as power, strength, geographical position, population, or other factors. Thus the original position is "fair between nations; it nullifies the contingencies and biases of historical fate," according to Rawls.<sup>19</sup> Not surprisingly, then, the nations, representatives would choose the principle of equality as the most important ethical basis of international law. Rawls briefly lists the consequences of the principle of equality:

- (1) self-determination, without the intervention of foreign powers;
- (2) the right of self-defense against attack, including the right to form defensive alliances to protect this right;
- (3) the rule that treaties are to be honored, provided they are consistent with the other principles governing the relations of states;
- (4) principles regulating the means that a nation may use to wage war.<sup>20</sup>

Rawls does not elaborate on these consequences, giving the impression that they speak for themselves and are relatively unambiguous. However, international law, particularly with respect to recent international developments, raises complexities that in my opinion not only make it difficult to apply the above concepts, but also render them, in some cases, internally inconsistent. Take the matter of self-determination. The difficult problem is, self-determination over what particular area? Nation A may claim that it is having an internal civil war over the question of its national boundaries, but group B, the rebels, may claim that B is a nation that is being invaded by A. Often, A characterizes the conflict as between one section of the country and another (North and South Korea, North and South Viet-

---

16. *Id.* at 302.

17. *Id.* at 83-89.

18. *Id.* at 75-83; *see also, supra* note 8.

19. *Id.* at 378.

20. *Id.* at 378-79.

nam, East and West Pakistan). But B will characterize the war as one between two separate nations ("Bangladesh").

Other nations will respond variously to these claims, supporting one characterization or the other. Thus, we really have a threshold question, under the Rawls analysis, as to what is a "nation" that may claim self-determination. Who is to be a "representative" of a "nation?" Does East Germany have a right to have a representative in the Rawlsian "original position?" If we cannot decide this in an *a priori* fashion, then there appears to be an inconsistency in the "self" part of the phrase "self-determination." At least when Rawls is dealing with people, he distinguishes one person from another, and says that all are entitled to equal liberty. But when nations are considered, it is sometimes very hard to distinguish one nation from another when the very issue is whether a distinction should be made, or whether it is simply another "civil war."

Another dilemma, short of the civil war situation, arises when a nation decides to intervene in the internal affairs of another nation for the purpose of preserving the liberty or lives of an oppressed minority group within that nation. (Present-day examples may include the situation of the Black-Africans in Namibia or the Palestinians in Israel.) The nation involved will cite the principle of equality, the concept of sovereignty and self-determination, the principle against intervention, and related rights stemming from what Rawls calls the original position. They will also deny that the minority group is oppressed. Rawls would appear to support the non-interventionists, and indeed there is nothing in his book that would indicate his recognition of an exception to the non-intervention consequence of the principle of equality of nations. Yet, interestingly, without realizing the potential contradiction, Rawls at another point writes of a justification of military conscription:

Conscription is permissible only if it is demanded for the defense of liberty itself, including here not only the liberties of the citizens of the society in question, but also those of persons in other societies as well.<sup>21</sup>

In other words, Rawls recognizes that persons may be justly conscripted to fight in a war that is in defense of the liberties of persons in another society. Yet is not that precisely the justification of the Vietnam War that was used to support conscription in the United States? Were not Americans being drafted to preserve the liberty of certain South Vietnamese citizens who were resisting the Communist movement for the unification of Vietnam. (I do not think that anyone can claim that there were *no* South Vietnamese whose liberty was directly threatened and who welcomed our support; the only issue

---

21. *Id.* at 380.

that divides those who supported and those who opposed the Vietnam War was the number of these South Vietnamese citizens and perhaps their representativeness.)

Judging from the authorities he cites, Rawls seems to side with those who resisted the draft for the Vietnam War. However, his own admission that one may be legally and justly drafted to fight to preserve the liberties of persons in another country seems to undercut his own position. Much more significantly, it undercuts his theory about the equality of states in the original position giving rise to the principle of non-intervention.

Could Rawls dispense with the principle of non-intervention? I do not think that would help resolve the dilemma just stated, since the dilemma goes to the heart of the theory that nations can start out in an "original position" the same way that persons can. For in devising a theory of justice, any philosopher has to decide what it is that is basic to his theory. Rawls seems to have made the decision throughout most of his book (even if it is unclear or missing in the particular section I am now criticizing concerning the law of nations) that what is basic is the equal liberty of persons. Equal liberty is so important that it may be viewed not as a derivation from the "original position" but as a characterization of it. Although Rawls does not want to make this kind of concession, arguably equal liberty of persons forms the basis of his description of how persons in the original position come to agreements with each other. (If they were not already equal, then some would be able to push through principles that would favor themselves at the expense of others, a possibility that Rawls does not and cannot acknowledge.) In any event, whatever one decides on the priority of equal liberty or the original position, it is clear that the equal liberty of persons is at the cornerstone of the edifice constructed by Rawls.

Now, taking the principle of the equal liberty of persons, one might ask whether an analogous principle of the equal liberty of nations could be in conflict with the equal liberty of persons. Rawls assumes that no conflict can arise. But clearly, in his own example of permissible conscription, a conflict does arise. In order to protect the equal liberty of persons in nation B, nation A must violate the equal liberty of nation B and intervene in B's internal affairs. If nation A did not do this, then the persons in nation B would be deprived (by their own government) of their equal liberty. Nor could Rawls escape this dilemma by arguing that, therefore, B is simply an unjust society, for if it is unjust, the issue of its internal unequal liberty is not relevant to Rawls' book. For then the question would simply reappear on another plane; namely *should* just and unjust nations be given equal liberty in the original position? If they should,

then as a consequence some persons will be deprived of equal liberty (those persons in unjust nations). And thus Rawls' own theory will result, at the outset, in a deprivation of some persons' equal liberty, under the banner of equality of abstract concepts (nations). I doubt whether Rawls would welcome such a consequence of his theory of justice; it certainly seems to be utilitarianism writ large (that is, the equal liberty of persons in some societies, and the equal liberty of societies themselves, outweigh the unequal liberties of other persons in unjust societies).

If we look to the other consequences of Rawls' concept of the equality of nations, we may find similar disabilities. Are all treaties to be kept? What about "unequal" treaties—those imposed by the larger power upon the smaller? Does this deprive the citizens of the smaller power of their just share or equal liberties, all in the name of a concept that sanctifies treaties? What is self-defense? The "self" in "self-defense" may be as ambiguous as the "self" in "self-determination." And so on. Instead of continuing along this line, let us step back and take a larger look at the implications of this discussion.

### III.

In the first place, one might conclude that Rawls has not been persuasive in analogizing nations to individuals in the original position, and therefore if we want individual justice we may have to forego the concept of equality of nations. However, if this is true, it will not be because Rawls has proved it, since he tried to show something quite different. A much different theory would have to be advanced for this proposition, with greater explicit concern for international legal principles. To some extent, principles have been urged in recent years that can be characterized as treating nations unequally. The Clark and Sohn proposal for weighted voting in the United Nations, taking into account the population of nations and some related factors that are not evenly distributed, was an attempt to adjust voting principles to what Clark and Sohn viewed as the facts of international life.<sup>22</sup> From a functionalist standpoint, some nations are represented on more international organizations than other nations; perhaps this is a recognition of inequality. Professor McDougal and his associates have at times argued for a view of international law that would treat some nations as non-participants or outlaws; this too indicates inequality.<sup>23</sup>

---

22. G. CLARK & L. SOHN, *WORLD PEACE THROUGH WORLD LAW* (2d ed. 1960).

23. I have discussed this more fully in A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 218-20 (1971).

However, nations probably will never accept a principle of less than one-nation-one-vote. Why should they, as nations? I would like to see international law viewed as a creation of nation-states that is functionally adapted to solving a number of the problems that arise in inter-state dealings, particularly problems of jurisdiction. But international law certainly does not solve all problems. It has limited usefulness, within its own sphere.

Thus, secondly, we should ask whether one ought to revise the principle of equality of nations in order to comport with the thrust of Rawls' arguments concerning social justice. I would contend that such a revision would only serve to discredit international law in the areas where it now serves us well. I cannot see that international law would retain much moral force if nations were treated differentially under it. In the sense of providing moral force to legal institutions, I would agree with Rawls' characterization of the principle of equal liberty as the cornerstone of justice.

A third possibility is to retain equality of nations, but to incorporate into the fabric of international law other principles that more fully realize the equality of man. This is the hard approach, but it is one which, I believe, is slowly working itself out in practice even if it is not articulated too often. The Genocide Convention<sup>24</sup> has gradually come to be recognized as this sort of breakthrough. In it, nations voluntarily agreed that some kinds of treatment of their own nationals within their own boundaries were not internationally acceptable. Now, one might say that the principle of equality of nations was acknowledged in that the signatories were free to ratify or not to ratify the Genocide Convention. Thus, if they voluntarily agreed to compromise the general principle of self-determination, then the resulting consequence of a potential intervention in domestic affairs (authorized, at least theoretically, by the Convention) was at least self-willed.

But this kind of analysis is not wholly satisfactory from an ethical standpoint. Analogously, suppose someone of his own free will sold his person into slavery; his slavery "contract" would nevertheless be unenforceable in most legal regimes. So too, if nations voluntarily compromise their initial equality, it might be argued that such a compromise is unenforceable (for example, a nation that someday actually commits genocide will undoubtedly argue to the world that it renounces the Genocide Convention and regards it as an unwarranted present intrusion upon national sovereignty. Therefore, we have to search for deeper principles than "national equality." A more detailed theory of justice as applied to nations would attempt to

---

24. 78 U.N.T.S. 277 (1948).

articulate principles and priority rules that would account, say, for both the legal equality of states and the legality of intervention to save minority groups that are threatened with actions that would contravene the Genocide Convention.

More generally, all international law affects, to some extent, the domestic jurisdiction of a state. Consider, as the easiest example, whether a national traveling abroad carries with him a protective shield of domestic law or whether he is subject to the law of the foreign country. Any court award against a nation intrudes upon its domestic affairs; if it has to pay money damages, the money has to come out of the domestic treasury. What constitutes "foreign relations" is thus a relative question, and it may be an expanding concept depending upon what states do and how they articulate what they do.<sup>25</sup> Thus, in one sense, the equality of nations has always been subject to the strictures, qualifications, and confinements of international law. More recently, the enterprise is exploding with the emerging human rights laws. I would argue that we cannot begin to assess the ethics of the law of nations without first becoming familiar with the content of international law in both its present and its emerging form. Perhaps in our lifetimes we shall not see the emergence of a complete theory of international justice. But at least we should recognize the importance of such a venture.

---

25. I have expanded on this in D'AMATO, *supra* note 23 at 79-81.

