

On International Criminal Law (A) and Global Economic Inequality (B)

Today's reading cuts a rather wide swathe, so I can't reasonably discuss more than two works in any detail: I am skipping over Twining¹ and Pogge² to outline Singer (A) and then briefly on discuss Garcia's response to Rawls (B).

Peter Singer's indictment of Israelite treatment of the neighboring Midianites is a telling example of selective memory, as I have yet to hear of this passage being quoted extensively during a sermon. Singer posits that because violence and even genocide may be hard-wired into the human experience, 'mere' poverty alleviation and economic development may not suffice to stem the genocidal tide. Rather, he looks to international criminal law, which at Nuremberg established three categories of crimes: crimes against peace, war crimes, and crimes against humanity. Singer then gives a bare-bones outline of the subsequent UNGA and ILC formulation of international criminal law principles. He traces the Eichmann, Pinochet, and Rwandan cases before establishing the International Commission of Jurists' seminar on establishing the "Princeton Principles of Universal Jurisdiction."

Then, following a brief overview of the fracas over the International Criminal Court, Singer moves in to humanitarian intervention. In the utilitarian language one would expect from Singer, he supports Gareth Evans' "responsibility to protect" above and beyond a "right to intervene," (Singer, 120) citing Kant (negatively) and J.S. Mill (positively) as precedents. In searching for Mill's "definite and rational test" (Singer, 121), Singer mentions Oppenheim and Walzer's "shock the conscience" (Singer, 123) requirement. He prefers, however, Kofi Annan's requirement of mass death and

¹ I agree with Twining that "we need a revival of general jurisprudence" (Twining, 2). However, as Prof. Glennon keeps informing me, law these days seems to be the study of what is, not of what ought to be; this needs some work, in my view, although I agree with Glennon's assertion that maximum utility can be achieved by properly understanding what is rather than seeking some Holmesian 'brooding omnipresence in the sky'.

² Thomas Pogge's article is too detailed and too responsible to properly do it justice here. In fact, I can't help but feel that Rawls' actual arguments are getting short shrift in our choice of reading; although I have read all of *A Law of Peoples* and pieces of *A Theory of Justice*, it's hard to properly respond to Pogge, Garcia, and Beitz without first clearly establishing Rawls' position. That being said, Pogge does a good job of presenting both Rawls' positions and his own problems with them.

suffering, insofar as “interracial sex, atheism, and mixed bathing” (Singer, 122) have shocked various national consciences.³ In Singer’s view, Annan’s proclamation requires the further specifications laid out in the 1948 Genocide Convention (recapitulated in the 1998 ICC Rome Statute).

In classic Singerian fashion, he pushes the boundaries of what might meet the genocide standard to possibly include massive environmental degradation and species extinction. He then admits, however, that “it is better to begin modestly” (Singer, 126) by supporting Evans’ and Sahnoun’s two fundamental criteria in *The Responsibility to Protect*: “large-scale loss of life” and “large-scale ‘ethnic cleansing’.” (Singer, 126)

Singer next examines the legality of humanitarian intervention under the UN Charter, acknowledging that Annan “understandabl[y]...should have been willing to stretch the language of [the] Charter to breaking point.” (Singer, 132). However, he goes on to state that a consequentialist ethic should take seriously the threat of an excessively unconstrained Security Council

Next he attacks a variant of the democratic peace theorem which states that democracies will not commit genocides. Citing Rwanda and Bosnia/Kosovo, he denies that majority rule can prevent terrible crimes. Rather, as in the case of the Weimar Republic’s collapse to a democratically elected Hitler, majorities can inflict horrible crimes on domestic minorities. Singer defends a more Habermasian ‘public sphere’ requirement, stating that “open procedures and public scrutiny may not be a perfect bulwark against genocide, but they do help.” (Singer, 137)

I remember a passage from the next section, “avoiding cultural imperialism,” quite well (indeed, I remember reading it aloud to my girlfriend a few years back because I was struck by its potency⁴): “if we happen to live in a culture that honors those who

³ For a case in point, recent polls indicate that atheism still shocks the American conscience: around 60% of US respondents would not vote for an atheist candidate for president, and shockingly few people accept the validity of Darwinian evolution in the USA. As an atheist-leaning agnostic, I find this to be extremely worrisome.

⁴ I purchased this book from my local bookseller in San Diego two years ago. As an aside, it deserves noting that Singer’s *One World* bridges the popular/academic divide, and thus may fall short of certain standards of academic vigor when compared to the other works read for today. Rather, I read *One World* as

subdue other societies and suppress their cultures—and the very same people who defend moral relativism are often heard to assert that this *is* the Western tradition—than that is our morality, and the relativist can offer no cogent reason why we should not simply get on with it....We should reject moral relativism.” (Singer 140) Habermas levels a similar critique against Foucault’s (and, by extension, Marx’s) philosophy of pure power politics.

Instead, Singer points out that some notion of reciprocity is universal to pretty much all cultural moral codes, citing references to the “Golden Rule” from Zoroaster to Kant (Singer, 141). He closes this passage of *One World* with a call to reform the UN Security Council and to demographically democratize the UN General Assembly; I strongly agree with both, but acknowledge that change might be heavily opposed and slow in coming.

Near the end of Singer’s passage on law, he presents a society that reasonably approximates Rawls’ “decent society” from *A Law of Peoples*, asking why, precisely, they would be better off as a democracy. The basic inconsistency between *A Law of Peoples* and *A Theory of Justice* is precisely the topic of Thomas Pogge’s paper. In *A Theory of Justice*, as Garcia’s work on trade and inequality⁵ points out, Rawls seeks to “elaborate a theory which “nullifies the accidents of natural endowment”.” (Garcia, 998, citing *A Theory of Justice*, 15) This is done by establishing a rationally acceptable ‘original position’ entailing the ‘veil of ignorance’ and the resulting ‘maximin’ strategy that seeks to “maximize the minimum share allocated under the system of primary social goods.” (Garcia, 1001)

At the international level, both Pogge and Garcia argue that Rawlsian ‘justice as fairness’ needs to be broader and deeper. Indeed, both Garcia Pogge feels that Rawls *A Law of Peoples* did not go far enough in approximating the method of *A Theory of Justice*. In my view, Rawls’ abstention was potentially wise in terms of political feasibility and the desire to forestall and, if possible, prevent a Huntingtonian clash of

informative background and an elucidation of Singer’s utilitarian and consequentialist ethics applied to various global issues.

⁵ In addition to Rawlsian egalitarianism, Garcia discusses Mill’s utilitarianism and Nozick’s radical libertarianism. I only discuss the first here, although utilitarianism in particular undergirds all of Singer’s work.

civilizations between political Islam (the obvious template for his hypothetical decent society) and the West.

Having said that, Pogge and Garcia's (and Beitz's) assertions that there are no truly economically closed societies in the Rawlsian sense does beg the question of how to address global economic equality. Rawls defends his much-assailed action on the ground that "an international original position would not result in a choice of the difference principle." (Garcia, 1012) However, Garcia backs up Beitz's argument extending Rawls' assertion that natural goods like intelligence are arbitrary and unmerited to the fact that national resource endowments are equally arbitrary and unmerited. (Garcia, 1015) I personally agree with both of these statements. Ultimately, I don't see why Garcia's basic argument, that "international trade law already includes elements that can be understood as redistributive mechanisms" (Garcia, 1048) and that can constitute the internationalization of justice as fairness, can't complement rather than contradict Rawls' argument in *A Law of Peoples*.