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Groups, Histories, and the International Law

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Introduction

Reading the international pages of the newspapers day after day, one sometimes gets the feeling that the stories never change. Many of the problems that we are concerned with today are almost the same as ten, twenty, or even more years ago. Some recurring problems—such as environmental degradation, epidemics of infectious diseases, drought, or famine—seem largely technological, and it is easy to understand why progress in resolving them might have to await scientific advances. But other problems—such as conflicts in South Africa, the Middle East, India, Armenia, or Ireland—are problems of human violence. As to these, the naive might think that progress ought to be more within human control.

The fact that problems of human violence persist demonstrates that this naive and optimistic view is sadly mistaken. Problems of human violence linger on, festering in a special way. Some of the most intractable problems in contemporary international politics concern the claims of non-state groups. The example that comes most readily to mind is the Palestinians' continuing claims against the state of Israel. This dispute not only endangers the lives and property of the immediate participants, but also seriously colors relations among other states in the vicinity, as when Saddam Hussein claimed solidarity with the Palestinian cause as a defense for his invasion of Kuwait. The claims of non-state groups are not unique to the Middle East, of course. Other group conflicts add seriously to international instability. Certainly the civil wars in Yugoslavia, Somalia, and Ethiopia have elicited well-warranted international concern. The situation in Kashmir threatens to trigger a nuclear war between Pakistan and India. What all of these problems have in com-

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mon is that they are not just traditional international disputes between state actors. One or more of the disputants are non-state groups.

It is no coincidence that many of our most pressing current problems concern the rights of non-state groups. This essay investigates the reasons that the international system has not been able to resolve such problems. Implicit in this analysis may be some prescriptions about how the international system would have to change to become better suited to dealing with problems of this sort. But I am actually fairly pessimistic. The changes necessary for my prognosis to improve are so substantial that it is unlikely that they will occur.

The main problem with resolving the claims of non-state groups is that many such claims are based on corrective justice: they are claims, in other words, to right past wrongs. International law is not good at providing corrective justice and thus is unlikely to resolve problems in a way that satisfies groups with historical grievances. Aggrieved groups must, of necessity, take things into their own hands. Hence the international instability. Furthermore, non-state groups are less able than traditional state actors to resolve disputes definitively because they lack a strong centralized command structure. Unless the group as a whole recognizes a proposed solution as a satisfying response to its felt grievances, a non-state actor may be unable to commit to the solution because of internal group dynamics.

There are two parts to this essay's claim: first, that international law is not adept at righting historical wrongs, and second, that many group claims are claims of this sort. International law is not well-suited to promoting corrective justice because it works primarily through incentives rather than sanctions. The fact that international law cannot provide corrective justice affects the claims of non-state groups because non-state groups are largely defined by their histories. The argument is not intended as a technical contribution to the international legal literature, but as a more jurisprudential observation about the international legal system. After making this two-step argument, this essay will conclude with a few remarks about its relevance to some current problems.

I. International Law and Corrective Justice

It is sometimes said that international law is not really law at all because there are no international legal sanctions.[1] Because there is no centralized enforcement mechanism, it is said, states obey international law or not, as they please. This is something of an overstatement, for international sanction processes do exist. Some are formal, such as World Court proceedings or the United Nations Security Council's measures against Iraq after its invasion of Kuwait. More commonly, sanctions are

1. For a discussion of and challenge to this claim, see Anthony D'Amato, *Is International Law Really "Law"?*, 79 NW. U. L. REV. 1293 (1985). *See generally* LOUIS HENKIN, HOW NATIONS BEHAVE 1-27 (2d ed. 1979). *Cf.* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 3-26 (1990).

informal and include economic boycotts, diplomatic pressure, and world public opinion.[2]

But even if an overstatement, the point nonetheless has some force. Although domestic legal sanctions are not perfect, in comparison international legal sanctions seem considerably less developed. Getting international legal sanctions to work requires political organization, persistence, and sometimes luck. The underdeveloped nature of the international sanctioning process is part of the reason that international law is ill-equipped to dispense corrective justice.

The relative lack of international sanctions means it is difficult to force a state to go along with something that is not in its self-interest. International law necessarily puts a premium on accommodation and conciliation; it is better at cajoling than compelling. For this reason, the most effective international remedies offer something to both sides of a dispute. When the status quo is unattractive to both sides, international law may help resolve a dispute because both sides have incentives to agree to the proposed international solution. However, when one side prefers the status quo to all other options, the international system is hard put to force that side to cooperate.

The remedy proposed by the international system must be, as the economists would put it, Pareto superior to the status quo. Both sides to the dispute must see some advantage to the proposed solution because it is difficult to force either side to comply. But corrective justice remedies are not Pareto superior; they are intrinsically zero sum. The object is to redress the injury to the complaining party by forcing the alleged wrongdoer to disgorge unjust benefits and to make the complainant whole.[3] The alleged wrongdoer is unlikely to view this prospect in a positive light because it gains no advantage. Thus, it will almost certainly prefer the status quo to a corrective justice remedy.

To the extent that international law cannot offer the victim a remedy, the victim is bound to be dissatisfied. With no legal remedies available, its only solution is self-help. Whether or not the alleged wrongdoer is in fact culpable, the complaining party feels agrieved because it has no opportunity to make its case.[4] Hence the violence, which is designed to make the status quo unlivable for the wrongdoer.

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2. *See generally* Lea Brilmayer, *International Remedies*, 14 YALE J. INT'L L. 579 (1989).

3. It is possible, of course, that a remedy might be neither Pareto superior nor zero sum. A remedy might be negative sum, or it might be positive sum with the gain distributed in such a way as to make one party worse off. The point here is simply that a remedy that transfers utility from the wrongdoer to the victim, as corrective justice does, is zero sum and thus not Pareto superior.

4. Although I refer below to "victims" and "wrongdoers," it is of course possible that the complaining party may be mistaken about its right to corrective justice. What matters, however, is the fact that it *believes* that it has been wronged. Because there is no good process for achieving corrective justice, the self-defined victim will continue to believe that it has been unfairly denied a remedy, resulting in the long running historical disputes that I describe.

Through terrorism or open insurrection, the complaining party seeks to bring the alleged wrongdoer to the bargaining table. Extralegal means are used to achieve what legal means cannot.

Even if the victim succeeds in bringing its opponent to the bargaining table, there is still no guarantee of corrective justice. The wrongdoer will not necessarily agree to correct historical wrongs; it will not agree to a remedy that puts it in a worse position than where it currently stands. Tolerating the existing level of violence may be preferable to disgorging unjust advantages. The victim's ability to pressure the wrongdoer, rather than its historical entitlements, determines its remedy.

The international system works better with forward-looking solutions to problems than with remedies for historical wrongs. Unlike corrective justice, forward-looking solutions need not be zero sum and, in some situations, may make everyone better off. Treaty regimes typify such situations: states agree to cooperate in controlling environmental degradation or armaments because all expect to gain an advantage. Election monitoring represents another situation in which all parties may benefit. In Namibia and Cambodia, for example, all sides sought to gain from the increased stability and electoral opportunities that United Nations monitoring could provide. All sides of the dispute had incentives to abandon the status quo.

In contrast, the international system rarely has been able to provide corrective justice. Although two possible examples that come to mind are the Nuremburg trials and the Persian Gulf war, neither is a paradigm of corrective justice; both, to the contrary, are examples of "victors' justice." Although in both cases the outcomes were defensible in the sense that the guilty party was punished, a proceeding in which an interested party determines the scope of retribution is hardly impartial.[5] More to the point for present purposes, such examples are quite rare and depend upon a display of force that the international system typically does not or cannot provide.[6]

The inability of international law to provide corrective justice is self-perpetuating because the longer that corrective justice goes unenforced, the less possible it becomes to institute it at a later point. Once one starts to undo history, there is no stopping point. One group of individuals claims a piece of territory on the grounds that, at some point in the

5. In both cases, in other words, there was a genuine international crime that warranted a forceful response. However, control over enforcement was largely vested in the hands of parties with their own stakes in the dispute. In this sense, the process was not a paradigm of corrective justice.

6. Interestingly, even in the Persian Gulf war, where there was United Nations authorization for intervention, the Coalition forces did not attempt to right all the historical wrongs that they might have addressed. The Kurds sought regional autonomy, citing promises made to them earlier by Iraq as well as human rights abuses. The Coalition did not attempt to resolve this problem, preferring simply to maintain the status quo through establishment of safety zones with no independent international state status.

past, it was wrongfully taken away from them. But was their own possession of the territory legitimate? Very likely, there are arguments that it was not. Some earlier group may have its own claim of even earlier ownership. If we could simply trace back to the point where all possession was rightful, corrective justice would require returning matters to this original status quo. But there probably is no such point, and if there were, it would be too long ago to be useful because the injustice has gone uncorrected since time immemorial. The difficulty of choosing some arbitrary Archimedean point from which "justice" will be measured contributes to the continuing inability of international law to satisfy grievances based on perceptions of historical injustice.

And corrective justice, in some circumstances, creates new injustices of its own. The longer that a wrong has gone unremedied, the more likely it is that expectations have settled around the status quo. This is particularly true concerning territorial acquisitions. New residents may well be quite innocent of the original wrongdoing. They settle, make both economic and psychological investments in their new homes, and build new lives. When the time comes to correct the original wrong, the parties who now bear the costs of the remedy may not be those who were responsible. The longer that the status quo remains unchallenged, the less likely that corrective justice will be felt only by the individuals who wrongfully created it.

II. Groups, Histories, and Corrective Justice

What has all of this to do with non-state groups? First, many of the claims made by non-state groups demand corrective justice. The corrective justice claims of non-state groups contribute significantly to violence and instability in the contemporary world. Second, non-state groups find it relatively difficult to relinquish corrective justice claims and to settle for accommodation with opponents. Non-state groups' inability to compromise stems from intragroup dynamics, particularly their inability to force a compromise solution upon their members, and from the fact that non-state groups are often largely defined by their histories. Unlike state actors, abandonment of a group's historical claims threatens the group's very identity.

Let me start by mentioning some examples of group claims that rest on corrective justice. The first I addressed at some length in a previous article: the right of secession.[7] My argument was that secessionist demands necessarily involve a claimed right to territory. Secessionists must show a right to territory because they are claiming a right to some particular piece of land on which to establish a state of their own. In most instances, the claim to territory will be based upon some historical argument that the territory was once theirs but was wrongfully taken from them. This, of course, is a claim of corrective justice.

7. Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991).

A second example is similar, although "secession" is not really the right word to describe it. The Palestinians claim a historical right to a particular piece of land, one to which the Israelis claim a competing historical entitlement. Because the occupied West Bank does not now lie clearly within the recognized borders of Israel, one cannot call the Palestinian argument "secessionist." The structure of the demand is similar, however, because it is based upon claims of historical entitlement to the West Bank or, indeed, to Israel itself.

A third example deals with the rights of native peoples. This sort of claim has not, by and large, given rise to as much instability as the claims discussed above—probably because many indigenous groups are geographically dispersed, economically disadvantaged, and otherwise not well-situated to fight for what they believe to be properly theirs. Native rights are, however, a good example of how group rights tend to be tied to historical claims. Whether one thinks of the claims of the Native Americans of North America, the aboriginal peoples of Australia, or the black inhabitants of South Africa, the historical grievances are palpable.

The fact of these historical grievances does not mean that corrective justice is always the best strategy for arguing Natives' rights claims. Indeed, it would be unwise to rely entirely on corrective justice; for in most of these cases, the probability of full reparations is next to zero, and the claimants appreciate that a full corrective justice claim stands no chance of success. Corrective justice claims may be coupled with demands for amelioration of ongoing conditions, however. Demands for wealth redistribution, for instance, may be based on historical occurrences, such as colonialism, and be inspired by the wish to obtain at least partial compensation for past harms and indignities. But these demands may also be founded on inequities that exist today and that will continue to exist tomorrow unless changes occur.

It seems worth asking, therefore, whether there is a reason that so many group claims are tied to group histories and historical group injuries. There is more involved than mere coincidence. Groups are defined, in part, by their histories. It should be no surprise that group demands are shaped by those histories and by the wrongs groups feel they have suffered. History is the glue that cements a collection of disassociated individuals into a group. True, a group is bound together by its present and its future as well as its past. A group's language, religion, and culture are part of its present and contribute to its cohesiveness; the future that the group envisions for itself contributes to the group's identity as well. But language, religion, and culture are a product of a group's past, and a group perceives a common future largely because it already possesses a common identity, an identity forged by the past. It is hard to imagine a fully committed group that does not share a common past. Solidarity comes from continuity over time, not from the chance coincidence of shared characteristics in the present and certainly not from the chance that common characteristics may exist in the future. One of the most unifying experiences that a group can share is a com-

mon and horrible injustice, especially if there is some possibility that working together might bring about redress.

It is precisely this sort of solidarity, coupled with a burning desire for corrective justice, that makes certain international problems so intractable—especially when historic injustice is perceived by both sides. How can the Serbs and the Croats solve their disputes given a history of mass extermination? How can the Palestinians and the Israelis make amends given what both groups have gone through? If collective amnesia were somehow possible (and if it were worth the costs—another matter, which we cannot go into here), the opposing groups would still find it difficult to sort things out. Issues such as the division of territory and resources, of providing for the rights of minorities, of making sure that horrible injustices cannot occur again in the future would remain. But things become much more difficult, however, given that most groups cannot, or will not, forget.

Forgetting would help, in part, because if groups were not saddled with the fear of history repeating itself, they might face their opponents with enough generosity and courage to induce a generous and courageous response. More importantly, perhaps, forgetting would help because groups would not have to feel that every concession to opponents would betray friends and family members who have already suffered. "Why should we make concessions that only reward their crimes?" ask the victims. Corrective justice becomes something owed to predecessors as well as something entitled to from adversaries. How can justice be traded for a chance to live more securely or comfortably in the future? To abandon the group's claim to corrective justice is to abandon the group, for part of what holds the group together—part of what distinguishes the member from the nonmember—is commitment to justice for the group.

This inability or unwillingness to forget applies to a certain degree to state as well as non-state actors. States also have a deeply felt need to hold on to the experience of unjust treatment and to do whatever possible to obtain retribution. As with non-state actors, the inability of international law to dispense corrective justice may be a hurdle preventing achievement of international stability and peaceful coexistence.

I would argue, though, that the abandonment of corrective justice claims threatens non-state groups more than traditional state actors because non-state groups lack international legal personality. Non-state group identities are more precarious, and such groups must be careful to conserve those resources that will keep them together, including a shared sense of injustice. Their cohesiveness—indeed, their existence—depends on it.

Leaders of groups know that they put their authority at risk when they neglect the indicia of identity. Not only do they allow the disintegration of group boundaries, erasing the lines that differentiate their members from outsiders, but they leave themselves vulnerable to other

would-be leaders who pay those boundaries greater attention.[8] The leader who neglects to emphasize the distinctiveness of the group or who is too willing to forget the past wrongs that the group has suffered loses his or her constituency. The more fractured the group, the greater the threat that other leaders will take advantage of a sense of historical injustice that the current leader has de-emphasized.

Again, the Israeli-Palestinian case provides examples. The Palestinian leadership obviously cannot afford to leave behind its claims of historical injustice. What would be the Palestinian reason for existence once the group sets history aside? The group is defined in part by its experience prior to and since Israeli independence. Israel, of course, is also defined by its sense of historical injustice. Most recently, the Holocaust and the Arab-Israeli violence have helped to pull the Israeli nation together although, of course, the Israelis share a much longer history that also figures into the sense of group identity. Today, it is not certain that a major Israeli party could consummate a peace agreement even if it wanted to, given the possibility that smaller parties are able to capitalize on any willingness to sell short Israel's perceived claims to historic justice. As a traditional state actor, however, Israel's ability to reach compromise is stronger than that of the Palestinians.

III. Prognosis

So long as the Palestinian-Israeli dispute is perceived primarily in terms of corrective justice, there will be no solution. Each side would undoubtedly want an international solution framed in terms of corrective justice—but only so long as its own version of history was adopted. Each side would most prefer an authoritative declaration that it has been wronged and should now be entitled to full redress at the expense of the other. But if anything is clear in this dispute, it is that international involvement will not take the shape of corrective justice. The international community is unlikely to approach the problem in terms of historical fact: Who did what and lived where and at what time? Who received what promises and from whom and with what authority? Who was first responsible for the continuing round of violence? Did that party have a valid excuse? The problem is not so much that it is impossible, now, to determine those things—although certainly there is no denying the difficulties. The problem is that what matters now to most of the international community is fixing things for the future, not apportioning blame. And that is the form that an international remedy must assume. The solution must look to the future, not the past.

And yet it is hard to discount the human passion for corrective justice, the human tendency to see things in exactly these terms. The mere fact that both sides seem to agree that corrective justice matters—when they agree on almost nothing else—strongly suggests the inevitability of

8. *See generally* DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 346 (1985) (discussing "outbidding" for ethnic support by emphasizing diligence).

this perspective. And it is hard to say that the world would be better off if human beings did not care about such things. Certainly, the international community should care about doing justice. But if it should care about doing justice, then why should it not also care about *undoing injustice*? Perhaps what the international system most needs to learn is how to identify the point at which corrective justice must be left behind, to determine the point at which groups and states should start to continue on with life, looking forward to the future instead of back to the past.

Group claims persist and cause recurring violence because groups have a capacity for self-help that individuals rarely do. Few individuals have the material or spiritual capacity to mount a sustained campaign to right injustice in the international arena. Individuals, in particular, cannot carry on their fight beyond the range of a single lifetime. Unfortunately, groups have the need as well as the ability to carry on their claims because they cannot afford to set aside the very histories that give them their common existence. International law, however, does not have the luxury of focusing on symbolic or historic grievances of the sort that help to make such groups cohere. Except in the unlikely event that an international system should come into existence that would right collective wrongs, the inability of international law to deal with the rights of non-state actors seems likely to persist.