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Ben Crum

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From Public Reason to Multi-Layered Justice

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Abstract

From Public Reason to Multi-Layered Justice*

by Ben Crum

This paper seeks to lay out a theory of multi-layered political obligations that, on the one hand, allows for their projection to the international level and, on the other hand, recognizes the privileged status of the nation-state. To arbitrate between the range of the duties that can be imposed at the different levels, I adopt the Rawlsian concept of public reason to submit that duties of justice can only be imposed to the extent that the actors involved command a shared set of reasons by which these can be justified. The paper's argument follows Rawls in using public reason to justify a qualitative distinction between the demands that derive from the domestic and the international domain of justice. It criticizes Rawls, however, for misjudging the radical implications of this position in a world that has become much more internationalized than he recognized it to be. This empirical critique paves the way for a multi-layered conception of justice in an internationalizing world that is based on the effective operation of public reason.

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Key words: multi-layered political obligations, nation-state, public reason.

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1. Introduction

In an internationalizing world, effective political demands of justice no longer only obtain within nation-states but also across them. As a consequence, established domestic conceptions of justice need to be opened up to transnational demands. At the same time, there remain qualitative differences between the claims of justice that can be sustained within states and those that can be sustained across them. This condition is probably most starkly reflected within the European Union. Clearly, the social fates of Europeans have become deeply interdependent and the way these interdependencies play out depends very much on the common 'basic structure' that has emerged between them. Yet, it is also clear that the EU member states remain the primary providers of social justice and that there is little of an overarching EU conception of social justice.

Such a condition of a multi-layered political order raises the question on what grounds we can legitimately delineate the scope of the claims of justice emerging from different levels. This paper proposes to develop such a foundation for a multi-layered conception of justice on the basis of John Rawls's conception of public reason (Rawls 1993: Ch. VI; 1999b) (Section II below). Public reason, in Rawls's view, defines the form and range of arguments that are considered to have a claim to validity in public debate. Rawls's adoption of this notion in his later work serves to recognize that the reasons that are deemed acceptable by citizens, and the duties that can be justified by them, are to some extent contingent on the specific historical and social conditions of their society (cf. Rawls 1993: 251). This suggests that the scope of obligations of justice is constrained by the depth of public reason: we can only oblige each other to political norms (or laws) to the extent that we command a shared set of reasons by which these can be justified.

It is exactly on this ground that public reason is pivotal in the way that Rawls, famously, distinguishes the domain of international justice, and the demands that follow from it, from the domain of domestic justice. The reconstruction of this argument in Section III underlines that Rawls does not argue that there is no public reason beyond borders, but that it is thinner and of a qualitatively different nature. Following this argument, public reason emerges as the metric by which to estimate the scope and depth of the political obligations that we can impose upon each other at different levels of

political organization. While I hold this to be a logically and normatively coherent argument, I posit that Rawls downplayed the radical implications of this position in a world that has become much more internationalized than he recognized. This empirical critique paves the way for a multi-layered conception of justice in an internationalizing world that is based on the effective operation of public reason, a conception that I outline in Section IV.

Ultimately, the multi-layered conception of public reason offers a context-sensitive, hermeneutic, account of justice in an internationalizing world with overlapping political constituencies. In doing so, it moves beyond pluralist conceptions of international justice that adopt a rather intuitive approach in arbitrating between different grounds of justice (Risse 2012; de Bres 2012). More directly, it challenges functional approaches to international justice that maintain that claims from competing conceptions of justice can effectively be arbitrated by reference to quasi-objective standards like affectedness (Gould 2004; Fraser 2009) or ‘the mutual production of collective goods’ (Sangiovanni 2013: 220).

2. Rawls’s Idea of Public Reason

Public reason, as it is conceived by John Rawls in his *Political Liberalism*, defines the form and range of arguments that are considered to have a claim to validity in public debate, in particular the norms that govern the process of justification, and eventually the process through which the ideas that become publicly validated are differentiated from those that are not (Rawls 1993: Ch.VI). Essentially, the idea of public reason serves to delineate ‘the kinds of reasons [citizens] may reasonably give one another when fundamental political questions are at stake’ (Rawls 1999b: 132).

Public reason basically is an exclusionary device as it rules certain kinds of argument off limits in the justification of fundamental political institutions. Most importantly, it disqualifies nonpublic reasons from operating as adequate grounds in public debate, i.e. reasons that may be valid within the civil associations of like-minded people but that are inherently based in a particular conception of the good life (Rawls

1993: 220f.). In a pluralist society, public reason has to appeal to grounds that are in principle acceptable to citizens regardless of their particular worldviews or religious convictions. More broadly, one would expect public reason to exclude reasons that are illogical, non-generalizable (i.e. discriminating) and that rely on claims that are widely recognized to be plainly false.

In more positive terms, public reason can be seen to correspond to a kind of ethos of the citizen in a pluralist society. Rawls thus suggests that public reason reflects 'a conception of democratic citizenship in a constitutional democracy' (Rawls 1999b: 136). In this sense, public reason essentially models the terms of engagement between citizens and delineates the grounds on which they can compel each other to obligations to each other qua citizens. This conception of democratic citizenship presumes citizens to be reasonable in the claims they put forward in the public realm, which requires them to recognize one another as free and equal and to sincerely strive for fair terms of social cooperation (Rawls 1999b: 136). It furthermore involves a sense of reciprocity in adducing reasons that one expects also to be reasonably acceptable to others who do not share one's own conception of the good life, and a willingness to compromise and to accept reasonable terms proposed by others.

Besides involving guidelines for political exchange, the idea of public reason stands in a recursive relation with the political conception of justice of a society (Quong 2013: Section 4). While public reason involves the articulation and discussion of different political views, it proceeds within the particular political conception of justice obtaining in a society (Rawls 1999b: 144). At the same time, the use of public reason allows citizens to exchange views with each other and to further develop the political conception of justice under which they are united.

Both elements of public reason – the guidelines for political exchange and the political conception of justice that it involves – contain universalistic and more contextual elements. For one, logic and generalizability would appear as guiding principles with universal validity. As regards the political conception of justice, Rawls (1993: 223; 1999b: 141) maintains furthermore that there are three (universal) essentialia to any such conception: a list of basic rights, liberties, and opportunities; an assignment of special

priority to these rights, liberties, and opportunities that protects them against competing political considerations; and measures ensuring that all citizens have adequate all-purpose means to make effective use of these freedoms. He concedes however that these basic requirements allow for a “family” of liberal, political conceptions of justice. While both kinds of universal elements (logical and substantial essentialia) thus constrain the character that public reason may take, they are indeterminate as to its specific contents. Principles of argumentations or claims to rights that carry particular weight in one political society, need not necessarily carry the same weight in others.

If the idea of public reason then serves to identify the grounds on which valid justifications are to be discriminated from invalid ones, it essentially operates as an extension of the idea of ‘the original position’, as it is fundamental to Rawls’s *A Theory of Justice* (1971). The original position serves as a ‘device of representation’ of the ideal situation in which persons meet ‘as free and equal, and as properly informed and rational’ (Rawls 2001: 16) to determine the essentials of the constitutional fundamentals under which they are to live together. For this purpose, these persons are to be stripped of the particular circumstances, experiences, capacities, worldviews etc. that define them in actual life and may provide them with special interests and advantages. These distinguishing features are to be covered up by a so-called ‘veil of ignorance’ (Rawls 1971: § 24). Thus, rather than having the knowledge of their eventual station of life, rational persons are to consider society as a collection of positions where they have an equal chance of ending up in any of them: they may be born rich or poor, with few or many capacities, female or male, as part of any ethnic group, etc. In this way, Rawls ensures a sense of generalized reciprocity, as in principle you are to identify with each and every member of the political community (cf. Rawls 1993: 25). Crucially, the ‘test’ of the original position requires individuals to detach from their immediate interests, to incorporate the perspectives of others in forming their political judgments, and to justify these judgments with reasons that they expect to be reasonably acceptable to all.

The design of the original position, its appeal to rationality, and its bracketing of contingent features suggest that it can, in principle, be rather unproblematically extended to a universal, world scale (cf. Pogge 1989). However, in hindsight, one can recognize the original position as not just an instrument for abstract rational choice but rather as a

mechanism that calls upon a sense of mutual engagement and reciprocity with *genuine* people in one's *actual* society. Rawls did premise his theory of justice on the pre-existence of a bounded society. What is more, he also insists that the device of the original position does not operate by itself, but only comes of use in relation to an actual political society. Crucially, from its original inception, Rawls (1971: 20f.; cf. Ron 2006) has insisted on the reflexive nature of the thought process that the original position engages one in. It is in the interplay of the political structure as we encounter it and the thought-experiment of the original position that our rational judgment is formed: the original position leads us to consider whether indeed each of the members of a certain community could be expected to give his or her consent to the basic political structure (Rawls 2001: § 10.4).

Rawls most forcefully makes the point that the original position should not be seen as a purely rational and non-historical model when in 1993 he restates its aim as follows: “[I]t models what we regard—here and now—as fair conditions under which the representatives of free and equal citizens are to specify the terms of social cooperation in the case of the basic structure of society; and since it also models what, for this case, we regard as acceptable restrictions on reasons available to the parties for favoring one political conception of justice over another, the conception of justice the parties would adopt identifies the conception of justice that we regard—here and now—as fair and supported by the best reasons”. (Rawls 1993: 25–6). Rawls thus emphatically ties the original position to the “case” at hand and to the “here and now”.

Indeed, in Rawls's later work the notion of the original position retreats behind the more general idea of ‘public reason’ – even if, arguably, the original position remains its most articulate representation and one that is particularly apt for our Western societies. More directly than the original position, the idea of public reason can acknowledge that which reasons are deemed acceptable to citizens is to some extent contingent on the specific historical and social conditions of their society (ibid. 1993: 251). Onora O’Neill (1997: 420) even reads Rawls as assuming that ‘public reason can have currency only among fellow citizens in a closed society who share a common political identity’.¹ While this is, I think, an overstatement, it does underline how much Rawls has moved away from

¹ As O’Neill (1997: 424) suggests, in light of the Kantian account idea of public reason, Rawls's idea of public reason has some rather private traits as it is actually oriented to a restricted public of insiders.

the quasi-universalist – rational and a-historical – model of the original position.

3. Public Reason beyond Borders

Rawls's treatment of the issue of international justice in his *The Law of Peoples* (Rawls 1999a) has been much contested and many have tended to consider it as an aberration from his preceding work on (domestic) justice. Notably, his treatment fundamentally diverges from those (most notably Beitz 1979; Pogge 2002) who had previously extended his original theory of justice into the international domain to defend a cosmopolitan position in which the principles of social justice obtain universally, irrespective of any particular national bonds. On the other hand, *The Law of Peoples* has been taken to reserve the domain of justice to conditions in which political sovereignty is effectively in place (Nagel 2005).

In contrast, I want to propose that the way that Rawls distinguishes between the domains of domestic and of international justice is best understood as informed by his understanding of public reason. In this reading, the idea of public reason essentially provides the overarching normative frame that reconciles Rawls's law of peoples with his theory of justice, and helps to appreciate the continuity between *Political Liberalism* (and even *A Theory of Justice* in the way I have reconstructed it in the previous section) and *The Law of Peoples*. Importantly, and against Nagel (2005), the idea of public reason does provide a foundation for claims of international justice, even if these fall short of those of domestic justice.

The most fundamental difference that separates Rawls's law of peoples from his theory of justice is that its subjects are not individuals but their collectivities, the peoples, or – for most practical purposes – the (government) representatives by which they are incorporated. Rawls defines a people by the sharing of a political structure, cultural orientations (or 'common sympathies') and a political conception of justice (cf. Rawls 1999a: 23/4). It is within a people that the capacity of self-government can be realised, as its members are together engaged in the development of a shared sense of public reason and of a common conception of justice (cf. Macedo 2004). As a consequence, outsiders who

do not have part in these processes can only at the margin assess the political rightness of the people's affairs and hence are bound to respect – within certain universal bounds, like the respect for basic human rights – whatever arrangements the people comes to adopt.

As Rawls considers peoples to be the proper subjects of the law of peoples, he refuses to apply his initial conception of the original position to determine the fair terms of cooperation between them. Instead, he outlines a second, international, original position that is fundamentally different from the first. While the national original position requires all positions in society to be represented, the international original position involves representatives of the different peoples rather than the whole range of individual positions within them (Rawls 1999a: 30, fn. 32). As a consequence, the norms that emerge from the international original position have as their object the proper conduct between peoples organized in their national communities rather than that between all of them as individuals (cf. Beitz 2000: 678–9).

Eventually, the principles included in the law of peoples involve, among others, the mutual recognition of freedom and independence of (communities of) peoples, the duty to observe treaties, the duty of non-intervention and the right to self-defense (Rawls 1999a: 37). Furthermore, Rawls's principles of the law of peoples include the obligation of peoples to honor human rights and the duty of assistance towards peoples living under extremely unfavorable conditions. Yet the obligations towards members of another people, especially those involving the redistribution of social and economic goods, fall far short of the duties that Rawls assumes to obtain between the members of one and the same people.

Importantly, Rawls (1999a: §6) justifies his alternative modeling of the international choice situation with reference to the idea of public reason. While one might, with Onora O'Neill (1997: 420), have expected the domain of public reason to be confined to a people, Rawls actually does recognize some form of public reason to operate between different peoples (cf. Brown 2010; Smith 2011). In parallel to the way that public reason within a people is informed by the mutual recognition among its members as free and equal persons, the public reason between peoples is informed by the principle of their operating as free and equal peoples. However, while public reason within liberal societies appears to be relatively thick so that it allows citizens to exchange views between each

other and to develop the political conception of justice under which they are united, international public reason is taken to be much thinner (Forst 2001: 170), as it amounts to little more than a duty to justification and lacks a broader context of common standards by which the validity of these justifications can be assessed. Notably, Rawls (1999a: 56–7) suggests that the parties representing peoples are ultimately not held to account in the international domain but only in the context of their own domestic public reason.²

Rawls's distinction between the domestic and the international domain essentially serves as a buffer for the political autonomy that citizens realize domestically under conditions of a thick public reason. This political autonomy needs to be protected against external claims that stand on a thinner foundation of justification. The flipside of this political autonomy is that a people also carries considerable responsibility for its achievements and its prosperity (cf. Macedo 2004). Typically, Rawls (1999a: 108) submits that, when it comes to the wealth on which a people can draw, '[t]he crucial elements that make the difference are the political culture, the political virtues and civic society of a country, its members' probity and industriousness, their capacity for innovation, and much else'. Hence, he refrains from requiring full international solidarity for any economic misfortune a people may suffer (beyond the extreme of a sudden crisis that calls for immediate relief). Instead, the international duties of social justice that he does recognise remain limited to a 'duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime' (Rawls 1999a: 37; §15). It is this conclusion in particular that sets Rawls apart from advocates of cosmopolitan justice who hold that the principles of social justice obtain universally, irrespective of any particular, national, bonds (e.g. Beitz 1979).

Rawls's international original position captures the diversity that separates different peoples (nations); how their positions are inherently marked by different interests, cultures and histories, even if they may be able to maintain peaceful and cooperative relations with each other. Hence, it is to the merit of Rawls's conception of the law of peoples that it recognizes the value of nation-states as established political embodiments of self-governing communities with their own conception of justice (Macedo

² Compare the way that Cohen (2004) builds upon Rawls to propose a concept of 'global public reason' that provides minimal standards by which to assess (other) political societies.

2004: 1723; Rummens 2009; cf. Cohen 2004: 197/8). There is a need to recognize the value of the established national communities and the fact that, historically, only in their presence have we been able to effectively address the questions of justice and democracy in the first place (cf. Follesdal 1997; Miller 2009). Importantly, however, being premised on the notion of public reason, his distinction between the domestic and the international is not absolute but relative, with a people enjoying a privileged position exactly because of the particular thickness of public reason it engenders.

While Rawls's account of international justice can thus be defended in principle, I believe its fundamental flaw lies in the way he applies, or operationalizes, it. Specifically, I hold that Rawls ignores the variations that there are in the thickness of public reason across borders and that he underestimates the extent to which it may actually have become a lot thicker than he suggests. Even if Rawls shuns the concept of the state, his conception of the parties representing 'peoples' is very much informed by a state logic, the classical *raison d'état* (Buchanan 2000: 702). Thus, the prime virtue of the law of peoples is to provide stability and peace (cf. Rawls 1999a: §5), which supposedly serves the mutual interests of states in protecting their sovereignty and security. Arguably, indeed, these concerns constitute the (lowest) common denominator of the rationality (or 'public reasons') one can expect to maintain among states that operate under conditions of equality and reciprocity (cf. Rawls 1999a: § 6). However, in a world in which nation-states are increasingly interdependent, additional elements may be adduced to the public reason obtaining between them that do not only rely on the negative common good of averting conflict and war but also on more positive common goods, like international financial stability, open trade and the prevention of climate change. This is particularly apparent in the context of regional integration as it has taken place in Europe.³ However, this is a condition that Rawls's conception of the law of peoples is not prepared for.

³ Notably, pressed by an exchange with Philippe Van Parijs (Rawls and Van Parijs 2003), Rawls (1999a: 43, fn.53) dedicated a footnote to the possibility of liberal societies desiring to form something like 'a single federal union'. The procedure he sets out for such a move involves two steps. First, each society for itself needs to have a debate and an election on the question of whether or not to join the proposed federal union. Then, among those who agree to join, a second common debate and vote has to take place on 'which political conception [of justice] they believe to be the most reasonable' from the conceptions available between them, which is to govern their common affairs from then on. Notably, in this procedure, before members of different peoples are to engage with each other directly, they first have to decide on the dissolution of their own people. Rawls excludes the possibility of direct transnational engagement between persons who are, and continue to be, part of separate peoples.

4. A Multi-Layered Conception of Public Reason

The central claim of this reconstruction of Rawls's concept of public reason is that the scope of obligations of justice is constrained by the depth of public reason: we can only oblige each other to political norms (or laws) to the extent that we command a shared set of reasons by which these can be justified. Public reason thus emerges as the metric by which to estimate the scope and depth of the political obligations that we can impose upon each other. In spatial terms, one distinguishes different circles of involvement and of corresponding levels of public reason that are nested within each other. Thus, the public reason we share and the political obligations that it can serve to justify emerges as a multi-layered construction, with a thick body of (domestic) public reason at the foundation and a much thinner body of public reason at the global top (cf. Tinnevelt and De Schutter 2008; Rummens 2009).⁴

Such a multi-layered perspective does not contest that the capacity to reason is universal. There are reasons that enjoy validity across the globe, in particular the argument of human dignity that goes to justify essential human rights. Also certain kinds of reasons are by definition excluded from qualifying as public reasons, for instance because they are inconsistent or offend against the principle of generalizability. However, the scope of validity of many reasons is more limited and contextual. Consider for example the value that different peoples may ascribe to the family or to work.

In line with Rawls's understanding, public reason transcends the differences between people in terms of the interests they have or the conceptions of the good life that they hold. Indeed, public reason is a precondition for them finding common norms to accommodate these differences and to live on peaceful and fair terms. Public reason thus

⁴ Cf. Matthias Risse's (2012: 49) concept of 'graded internationalism', which 'holds that different principles [of justice] to apply depending on the associational (social, legal, political, economical) arrangements'. Risse (2012: esp. 10ff.) even goes one step further in advocating a 'pluralist internationalism', which suggests that there may be multiple grounds of justice that need not only vary along one dimension (like the degree of association *or* the thickness of public reason) but which may in fact draw on multiple dimensions (e.g. degree of association, degree of co-responsibility *and* functional imperatives/entangled fates).

manifests itself as an overlapping consensus to which people can come from different perspectives but still agree on a set of shared reasons that are recognized to be valid between them.

Public reason always operates in a given context; and it relies on certain common practices. Indeed, the more substantial the common practice, the thicker the public reason is likely to be (cf. Sangiovanni 2013: 220). In general, one may say that public reason tracks common practices and, even more so, common political arrangements. The absolute minimum of such a common practice would be the mere mutual awareness of each other as basic rights bearing individuals. A next step can consist of interactions between elites acting as representatives (i.e. diplomacy) or of economic transactions. Such interactions presuppose some shared understandings or norms, and by actually engaging in them they may serve to deepen public reason. Obviously this is even more the case when people are brought under a common political structure, like an international organization. The mutual engagement within its confines and the public deliberation about the norms (laws) that it is to adopt are to facilitate the evolution of a body of common standards of reasoning.

Historically, the level of the nation-state has come to claim a special position within the multilayered structure of public reason (cf. Risse 2012: Chs.2 and 3). Conditions like determinate and strong external borders, an extensive state apparatus, monolingualism, integrated national mass media and a national party structure have been particularly conducive to facilitating the deepening of public reason in the national domain. There is nothing special to the level of the nation-state per se, the nation-state can claim a privileged position in the imposition of political obligations to the extent that it has been able to foster the emergence of public reason and, hence, has allowed for the exercise of collective political autonomy. Importantly, however, this claim is a function of the thickness of public reason achieved and it is certainly not a claim that excludes the operation of public reason beyond the nation-state.

Indeed, to the extent that states increasingly engage in international agreements and their citizens are involved in transnational interactions, the scope of public reason beyond the nation-state steadily expands, even though (for now) it is likely to remain at

considerable distance from the level secured within nation-states. Thus, while the grounding of political obligations in public reason does recognize the normative relevance of contingent historical conditions (the nation-state in particular), it does not hinge on the hypostatization of the national community. Instead, it is inherently dynamic; as changing transnational relations allow public reason to evolve, so the grounds and scope of political obligations can shift.

In principle, the nature of public reason allows it to be of a continuous character, sliding from thick to thin as the circle of social engagement expands. In practice, however, public reason tends to crystallize around certain social structures, like the nation-state, a linguistic community, the European Union or, indeed, the world at large, and these social structures then also have the capacity to serve as carriers of conceptions of justice. What is more, the multi-layered perspective should not be taken to imply that the body of public reason at a lower level naturally envelops the public reason operative at a higher level. Depending on the character of interactions at each level and the degree and forms of norm institutionalization, public reason takes on different qualities in different contexts. Thus, public reason at the domestic level is conditioned by the legal form that most norms adopted take and the centrality of the values of order and welfare at that level. In contrast, public reason at the international level has to take account of the fact that politically binding arrangements at that level tend to take the form of international treaties in the adoption of which states, as collectivities representing their people, claim a central role.

At the same time, the different levels of public reason cannot be thought to form some kind of hierarchy. Not only is each form of public reason qualitatively distinct. More fundamentally, the very notion of public reason implies each level of public reason a sphere of autonomy that is not subordinate to a higher actor or level. In fact, given the nature of public reason, lower levels take in principle primacy over higher ones; in the case of any conflict of norms, the burden of argument is on the higher level. Grounding political obligation in public reason thus involves a bottom-up logic, in which priority is given to the thicker public reason in local (decentralized) settings (cf. Rummens 2009). At the same time, the inherently public character of public reason gives it a definite expansive orientation. In the end, then, the relation between the different levels of public reason is best thought of in terms of complementarities and the challenge then is to find

ways in which the conceptions of justice that they convey can reinforce each other.

5. Conclusion

This paper has set out to defend the position that the scope of political obligations is constrained by the depth of public reason: we can only oblige each other to political norms to the extent that we command a shared set of reasons by which these can be justified. Following John Rawls's cue, public reason is taken to be multi-layered in character, with thick public reason obtaining within well-integrated political societies and a much thinner form operating between. By implication, political obligations are also taken to have different forms at different levels of political association. Thus, this perspective does allow for transnational obligations of justice to arise. At the same time, it recognizes the level of the nation-state to claim a privileged normative position, without however immunizing it to change.

Grounded on the notion of public reason, the multi-layered perspective thus confirms the appropriateness of the continued primacy of the EU member states in matters of social justice. As public reason remains relatively thin at the supranational level, there is little ground for a comprehensive European conception of justice. Still, it is clear that the social fates of Europeans have become deeply interdependent and that the way these interdependencies play out depends very much on the common 'basic structure' that has emerged between them. Thus, instead of thinking of the EU as an emerging welfare state writ large, social Europe is better thought of as a multilevel construction. In such a multilevel perspective, supranational duties of justice may emerge to reflect international convergence on specific substantial principles and institutions, and even serve to reduce arbitrary inequalities between citizens across countries. Above all, however, the supranational level has a crucial role in protecting and reinforcing the capacity of its member states to maintain their own conception of social justice.

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