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The Instability of *The Law of Peoples* and a Suggested Remedy

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*Abstract:* In this work I argue that John Rawls' *The Law of Peoples* is vulnerable to the critique of becoming a modus vivendi, a point that has been given little consideration until now. A modus vivendi is an arrangement of coordinated self-restraint of competitive behavior between two or more parties in the hopes of self-interest maximization and a peaceful coexistence. I cite two reasons: his oversight of what I call the aggressive state, and the restricted operation of public reason in the Society of Peoples. I ultimately suggest that adopting a model of public reason widened to permit participation of qualified individuals external to the Society of Peoples, in conjunction with revisions to the grounds for just intervention in the Law of Peoples, alleviates both of these issues.

To execute this project I begin by explaining Rawls' conception of global justice and public reason as seen in *The Law of Peoples*. From here, I elaborate on my critique of instability, illustrating why Rawls' model has the potential for becoming a modus vivendi. I then explain how *The Law of Peoples* permits aggressive states – a type of state not included in Rawls' account. Next, I spell out my two-part remedy for the instability that is exemplified by the room left for the aggressive state: extending the permissible grounds for intervention from just human rights violations to also include the defense against unjust inequalities being imposed upon one state or peoples by another, as well as a more inclusive conception of public reason that permits all reasonable citizens – not merely representatives – to participate. I offer this particular remedy to stay in keeping with the Rawlsian tradition. While doing this, I consider and refute objections to both of my proposed components. In refuting these objections I confirm that my suggested modifications to the *Law of Peoples* should be adopted so that the threat of instability can be definitively eliminated from Rawls' account of global justice.

### The Instability of *The Law of Peoples* and a Suggested Remedy

Among the many criticisms of Rawls' account of global justice, little consideration is given to the pivotal point that the model is unstable due to its potential for becoming a *modus vivendi*.<sup>1</sup> A *modus vivendi* is an arrangement of coordinated self-restraint of competitive behavior between two or more states in the hopes of self-interest maximization and a peaceful coexistence. I argue here that Rawls' *The Law of Peoples* is vulnerable to this critique for two reasons: the oversight of what I call the aggressive state, and the restricted operation of public reason in the Society of Peoples. I ultimately suggest that adopting a model of public reason widened to permit participation of qualified individuals external to the Society of Peoples, in conjunction with revisions to the grounds for just intervention in the Law of Peoples, alleviates both of these issues.

In Section I, I explain Rawls' conception of global justice and public reason as seen in *The Law of Peoples*. In Section II, I elaborate my critique of instability, illustrating why Rawls' model has the potential for becoming a *modus vivendi*. In Section III, I explain how *The Law of Peoples* permits aggressive states. In Section IV, I spell out my two-part remedy for the instability exemplified by the aggressive state: one, extending the permissible grounds for intervention from just human rights violations also to include the defense against unjust inequalities being imposed upon one state or peoples by another, as well as two, a more inclusive conception of public reason that permits all reasonable citizens – not merely representatives of liberal and decent peoples – to participate. While doing this, I consider and refute objections to each of these

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<sup>1</sup> Most criticisms are primarily concerned with his characterization of human rights. For a sampling of literature treating this issue see Allen Buchanan's *Taking the Human out of Human Rights*, David Reidy's *Political Authority and Human Rights*, or Wilfred Hinsch and Markus Stepanians' *Human Rights as Moral Claim Rights*

components. In refuting these objections I confirm that my two suggested modifications to the *Law of Peoples* should be adopted so that the threat of instability can be definitively eliminated.

### I. Rawls' *The Law of Peoples*

To determine the nature of global justice, Rawls implements a second original position.<sup>2</sup> This differs from the first original position, a key component of his account of justice on the domestic scale presented in *A Theory of Justice*, in a few ways. First, in the second original position, peoples have representatives and these representatives are taken to be rational. Second, unlike individuals in the first original position, these peoples, taken as a single body, do not have comprehensive doctrines of the good. The absence of such doctrines is because a liberal society does not have a conception of the good, only the individuals within the society do. So representatives of the peoples do not operate behind the veil with a particular comprehensive doctrine of the good in mind because there is no comprehensive doctrine that can be ascribed to the peoples as a whole. Third, a peoples' fundamental interests are specified by their political conception of justice, not by the principles they agree to within the Law of Peoples. This situation is unlike the first original position because individuals' fundamental interests are specified by their conception of the good. Fourth, peoples select principles of justice from varying interpretations of the pre-set list of eight principles of the Law of Peoples. This limitation is placed on peoples so that their rights and duties are derived, "...from the Law of

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<sup>2</sup> For Rawls' treatment of the second original position and the principles of the Law of Peoples, see *The Law of Peoples*, 32-40.

Peoples itself, to which they would agree along with other peoples in suitable circumstances.”<sup>3</sup>

These eight principles are:

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political or social regime.<sup>4</sup>

Like in the first original position, representatives operate behind a veil of ignorance that prevents them from knowing such things as level of economic development, resources, features of the population they are representing, or the size of the territory the population occupies.<sup>5</sup> They do know, however, that there are reasonable and favorable conditions being fulfilled that make a constitutional democracy plausible. Representatives negotiate to determine the terms of cooperation that are fair, just as in the first original position, but this negotiation is done only in terms of the eight principles. Negotiating over just these principles helps ensure that “...inequalities are designed to serve the many ends that peoples share” while the representatives of peoples try to maintain the equality and independence of their own society.<sup>6</sup> It is mandatory that the eight principles satisfy the

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<sup>3</sup> *ibid.*, 28, 40.

<sup>4</sup> *The Law of Peoples*, 37. Rawls acknowledges that this list may be incomplete, or have superfluous principles.

<sup>5</sup> *ibid.*, 32-33.

<sup>6</sup> *ibid.*, 41.

criterion of reciprocity, because Rawls holds this criterion as characteristic of liberalism. The criterion of reciprocity requires that "...when terms are proposed as the most reasonable terms of fair cooperation, those proposing them must think it at least reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated or under pressure caused by an inferior political or social position."<sup>7</sup> This criterion aids in ensuring that global disparities in power or wealth are acceptable to those affected. Reasonable pluralism, like the criterion of reciprocity, is crucial for a global structure to attain liberalism. Rawls claims that public reason can serve as the basis from which a diverse<sup>8</sup> array of peoples can develop the Law of Peoples within a liberal conception. Public reason is discussed in more detail below.

The Society of Peoples is composed of only peoples that subscribe to the ideals and principles of the Law of Peoples, which are determined by implementing the second original position. Two types of peoples are members of the Society of Peoples: liberal peoples and decent peoples. Liberal peoples have three features: (i) they have, "...a reasonably just democratic government that serves their fundamental interests..." (ii) the citizens are united by common sympathies, which is essentially synonymous with a feeling of nationalism, and (iii) a moral nature.<sup>9</sup> By virtue of (i), liberal peoples respect human rights. It is easiest to understand the status of decent peoples (as well as those not included in the Society of Peoples) if one first examines the role of human rights in *The Law of Peoples*.

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<sup>7</sup> *ibid.*, 14.

<sup>8</sup> By diverse peoples Rawls means peoples with "...distinctive institutions and languages, religions and cultures, as well as their different histories, variously situated as they are in different regions and territories of the world and experiencing different events" (55).

<sup>9</sup> *ibid.*, 23.

According to Rawls, human rights are a special class of urgent rights that include “...the right to life; to liberty (... a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property...; and to formal equality... (that is, that similar cases be treated similarly).”<sup>10</sup> Human rights set a necessary – though not sufficient – standard for the decency of an institution, and they are intrinsic to the Law of Peoples.<sup>11</sup> Human rights have three features: (i) fulfillment is a necessary condition for a society’s institutions and legal order to be considered decent, (ii) fulfillment is sufficient to exclude “justified and forceful intervention by other peoples”, and (iii) they set a limit to reasonable pluralism.<sup>12</sup> Reasonable pluralism is the idea that free institutions tend to have and foster a diversity of comprehensive doctrines among their (the institution’s) members.<sup>13</sup> I take this to mean that when human rights set a limit to reasonable pluralism, they deem unreasonable those comprehensive doctrines that fail to respect human rights. Essentially, if the standards set by human rights are not met, the Society of Peoples has *prima facie* justification for intervention of various kinds.

Decent peoples, like liberal peoples, respect human rights.<sup>14</sup> This prohibits liberal peoples from intervening upon them. Decent peoples also respect their members’ rights to be consulted in political decisions and to voice dissent, despite members not having democratic rights. Dissenters must be heard fairly, and not dismissed as incompetent solely in virtue of being a dissenter. Perhaps most importantly, decent peoples lack aggressive aims and must seek legitimate ends through peaceful channels (such as

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<sup>10</sup> *ibid.*, 65.

<sup>11</sup> For Rawls’ discussion of human rights, see *The Law of Peoples*, 78-85.

<sup>12</sup> *ibid.*, 81.

<sup>13</sup> *Political Liberalism*, 36.

<sup>14</sup> For Rawls’ explanation of decent peoples, see *The Law of Peoples*, 60-65.



diplomacy and trade). It is thought that these features of decent peoples afford them the opportunity to transform into fully liberal peoples eventually.

Outlaw states, however, refuse to abide by a reasonable Law of Peoples.<sup>15</sup> Because of this refusal, they cannot participate in the Society of Peoples. Rawls characterizes outlaw states as regimes that justify engaging in war to potentially advance their rational (yet unreasonable) interests. Rawls also mentions an alternative form of outlaw state in a passing footnote. This outlaw state violates human rights, but is not well-ordered<sup>16</sup> and is not aggressive. The violation of human rights means not only that they violate rights recognized by the Society of Peoples as reasonably just, but also that peoples may permissibly intervene upon them.

There are two other categories of societies that cannot partake in the Society of Peoples. The first is the burdened society: a society that is greatly disadvantaged in the pursuit of becoming either a decent or liberal peoples due to external historical, social, and economic circumstances. The second is the benevolent absolutist state: a society that is non-aggressive and respects human rights, but fails to be well-ordered because it does not give its members a role in political decisions.

In order to have a full understanding of *The Law of Peoples*, one must understand the notion of public reason and its important role in global justice. On Rawls' model, free and equal peoples participate in the public reason of the Society of Peoples, hashing out

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<sup>15</sup> For Rawls' treatment of non-liberal and non-decent societies, see *The Law of Peoples*, 90-92.

<sup>16</sup> For a society to be well-ordered it has three features: (i) everyone accepts and has knowledge that everyone else accepts the same principles of justice, (ii) its basic structure satisfies the accepted principles of justice and this is known, and (iii) its citizens have a sense of justice that guide them to generally comply with the basic institutions that are regarded as just. For a more thorough explanation, see Rawls' *Political Liberalism*, 35-40.

what their mutual relations, as peoples, should look like.<sup>17</sup> His reasoning for claiming that only members of the Society of Peoples can engage in public reason follows from his stipulation that only they have the capacity for a moral nature, making them capable of carrying out the moral duty of public reason. States lack this moral nature, being moved purely by their rational interests. This moral deficiency makes states unsuitable candidates to reasonably consider how to advance the project of liberalism in the forum of public reason. The content of public reason consists of the criteria, ideas, political concepts, and principles of the Law of Peoples. It is important to note that "...public reason is invoked by members of the Society of Peoples, and its principles are addressed to peoples as peoples. They are not expressed in terms of comprehensive doctrines of truth or of right... but in terms that can be shared by different peoples."<sup>18</sup> Discussing principles in shared terms ensures that public reason can properly serve as the basis for a broad spectrum of peoples to develop and refine the Law of Peoples.

The ideal of public reason is realized when government officials – acting as representatives – follow and act on the Law of Peoples. These representatives explain to other peoples their reasons for enforcing or "...revising a people's foreign policy and affairs of state that involve other societies."<sup>19</sup> Private citizens can achieve the ideal of public reason by imagining themselves as government officials and considering what foreign policy they would think it reasonable to advance. It should be noted, though, that while private citizens can achieve the ideal of public reason, the conclusions they reach carry no weight in the global discussion and their achieving the ideal does not amount to

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<sup>17</sup> For Rawls' discussion of public reason in the Society of Peoples, see *The Law of Peoples*, 54-58.

<sup>18</sup> *ibid.*, 55.

<sup>19</sup> *ibid.*, 56.

it being realized. Rather, private citizens' capacity for achieving the ideal ensures that they (the citizens) will hold their representatives (government officials) to the appropriate standard for participation in public reason. Rawls holds that public reason "...is part of the political and social basis of peace and understanding among peoples" when this disposition among citizens is "firm and widespread".<sup>20</sup> When public reason is widespread in this way peoples are properly suited to discuss in shared terms – and eventually determine – how to address critical issues.

## II. The Instability of *The Law of Peoples*

Rawls' model for global justice, as it stands, is vulnerable to the critique that it is inherently unstable due to the likelihood of devolving into a modus vivendi.<sup>21</sup> As previously mentioned, I take a modus vivendi to be the coordinated self-restraint of competitive behavior between two or more parties in the hopes of self-interest maximization and a peaceful coexistence. The parties involved care little for the interests of each other, and since self-interests are the primary concern of parties, the modus vivendi will not be based upon shared values between parties; it is not a value-based world order. Once self-restraint is established between the parties, the modus vivendi perpetuates itself by "...ensuring that each party has sufficient incentives to participate so long as most others are participating as well."<sup>22</sup> This arrangement ensures continued participation by making it the case that a party is damaged if it ceases participating.

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<sup>20</sup> *ibid.*, 57.

<sup>21</sup> One might claim that Thomas Pogge raises a similar criticism in his work *Realizing Rawls* concerning Rawls' brief explanation of global justice presented in *A Theory of Justice*. I maintain, however, that there are substantial differences in our reasoning that brings us to the same conclusion. I do, however, utilize Pogge's description of what a modus vivendi is and its implied dangers.

<sup>22</sup> *Realizing Rawls*, 219.

Rawls' model leaves open the possibility of an extremely unbalanced distribution of power by giving little consideration to socioeconomic inequality, and this unbalanced power or lack of consideration for inequality, in turn, allows unjust inequalities to arise. Consider the following case: a party, Haplessburg, enters the modus vivendi at a disadvantage compared to most parties participating, due to a lack of natural resources. Haplessburg enters the modus vivendi to trade for needed natural resources. Even if Haplessburg might instead continue in isolation (to their detriment), it seems additionally preferable to participate in the modus vivendi because Haplessburg will obtain protection from being attacked or enslaved by the other participants in virtue of a modus vivendi being an arrangement of coordinated self-restraint. As Haplessburg continues to participate in the modus vivendi, it turns out that they continually lose power<sup>23</sup> to the point where they wholly depend upon maintaining membership in the modus vivendi, even if it is no longer self-interest maximizing. The room left for unchecked inequality means that Haplessburg can no longer consider leaving the modus vivendi in favor of isolation. As the modus vivendi moves forward, Haplessburg remains weak because they have no option but to comply.

From this example, it is easy to see that parties cannot prevent bad outcomes. Since the modus vivendi is unstable, participants, like Haplessburg, may fear falling into the vicious cycle described above and decide to enter war in hopes of establishing protection and power. An alternative to this is that the parties involved with greater power may preempt the weaker party's attack. Either way, these measures intended to

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<sup>23</sup> The continual loss of power occurs despite the arrangement satisfying Haplessburg's minimal declared interests.

protect "...can lead to a partial or complete breakdown of ordered relations."<sup>24</sup> Even if the arrangements of the *modus vivendi* happen to withstand these attacks, it may be at the cost<sup>25</sup> of the existence of some of the *modus vivendi*'s participants.

Finally, it is not difficult to imagine how a party may be pragmatically incapable of giving precedence to its own values, when they run the risk of not even surviving participation in the *modus vivendi*. If parties fear one another, they will focus upon survival and long-term security of their values, rather than short-term actualization of said values. It is unlikely that a party would exercise restraint, despite ethical qualms, when their existence hangs in the balance, especially when success in prevailing seemingly ensures that their values will win out in the end.

For these reasons, it is evident that for a *modus vivendi* to materialize is undesirable. Instability from an extremely unbalanced distribution of power, lack of protection for parties against horrible outcomes (including being dissolved), and an inability to give precedence to one's values all contribute to the conclusion that a *modus vivendi* will be neither peaceful nor just.

None of the eight principles address these issues. One may argue that (8) – peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political or social regime – does address this issue by requiring liberal and decent peoples to help burdened societies that are prevented from establishing just or decent institutions by "unfavorable conditions". But Rawls does not clearly stipulate what precisely amounts to "unfavorable conditions", making abiding by

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<sup>24</sup> *Realizing Rawls*, 221.

<sup>25</sup> The cost is that participants will likely be demolished or taken over by whichever party exercised the greatest power.

this principle difficult, at best. Additionally, (8) says nothing about preventing severe socioeconomic disparity between liberal and decent peoples that have achieved just and decent institutions respectively. It is not difficult to imagine a society that is socioeconomically disadvantaged, but meets the minimum standards for a decent society, preventing it from being classified as a burdened society. There is nothing in Rawls' model to aid these peoples. This situation is problematic because Rawls states that the Law of Peoples "...holds that inequalities are not always unjust, and that when they are it is because of their unjust effects on the basic structure of the Society of Peoples, and on relations among peoples and among their members."<sup>26</sup> Yet it is precisely the latter case that I am concerned with.

It might further be claimed that discussing this principle in the forum of public reason could give rise to revisions that would address this issue. There is no guarantee, however, that liberal and decent peoples would see to it that extreme socioeconomic disparities be protected against because such extremes are not a primary concern of Rawls' liberalism. Rather, the Law of Peoples is concerned with the wellbeing of individuals, as well as justice and stability for the right reasons; not distributional inequalities.<sup>27</sup>

Furthermore, Rawls' model fails to adequately address what Thomas Pogge refers to as the situated assurance problem. The situated assurance problem arises when a party's reasons for accepting the burdens associated with social cooperation are undermined due to a lack of assurance that other parties will adhere to the same standards

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<sup>26</sup>*The Law of Peoples*, 113.

<sup>27</sup> *ibid.*, 120.

of social cooperation.<sup>28</sup> As a result, the situated assurance problem “...threatens pervasive noncompliance with existing ground rules.”<sup>29</sup> One might suggest that principle (2) does sufficiently address this issue. (2) States that, “...peoples are to observe treaties and undertakings.”<sup>30</sup> This, however, is merely a superficial demand. There is no hint at the repercussions for failing to observe treaties, and other components of Rawls’ model preclude sanctions unless a human rights violation is involved. Additionally, public reason is limited only to discussion of the Law of Peoples, not to mechanisms external to the Law of Peoples that would ensure enforcement.

Even if enforcement mechanisms are developed, backing (2) more substantially contradicts the sufficient condition of merely satisfying human rights – which liberal and decent peoples do by definition – to escape intervention with sanctions. Setting consideration of these potential mechanisms aside, the Society of Peoples is left with no substantial method for considering enforcing that peoples reasonably observe treaties. The same problem arises if one were to cite Rawls’ claim that peoples must be respectful of each other and, because of this, treat each other as equals and observe treaties. Once again, there is no method in place to ensure that respect is maintained. Rawls’ failure to address the situated assurance problem leaves open the possibility that peoples that play by the rules will suffer while other peoples ignore them with no repercussions.

Finally, Rawls’ focus on shared fundamental values accompanied by the concern of peoples about complications arising from the situated assurance problem plausibly leaves peoples pragmatically incapable of giving precedence to the shared values of their

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<sup>28</sup> *Realizing Rawls*, 100.

<sup>29</sup> *ibid.*, 101.

<sup>30</sup> *The Law of Peoples*, 37.

citizens. Peoples will understandably be more urgently concerned with simply protecting themselves and ensuring survival within the global structure. Only once a peoples has secured its survival can it concern itself with promoting the values of its own citizens. One might respond as above, claiming that (2) resolves the situated assurance problem and relieves this concern of peoples. Just as before, this is merely a superficial demand until it is backed with legitimate clout. It should again be noted that backing (2) more substantially contradicts the sufficient condition of merely satisfying human rights to escape intervention with sanctions. Until this problem is solved, the peoples' fear stemming from the situated assurance problem is warranted.

These three deficiencies in Rawls' account suggest that his value-based world is inherently unstable since it is capable of devolving into a *modus vivendi*. This possible devolvement means that Rawls' account may not be peaceful or just, which is a problem Rawlsian scholars ought to take seriously, given how Rawls considers stability a necessary component of any theory of justice. He takes stability to be an institution's ability to remain just when changes are made to accommodate new social circumstances. If there is a deviation from justice, the institution will still be considered stable if said deviations are "...effectively corrected or held within tolerable bounds by forces within the system."<sup>31</sup> Additionally, Rawls values stability for the right reason – a reasonable interest "...guided by and congruent with a fair equality and a due respect for all peoples" – over stability as a balance of forces.<sup>32</sup> He is concerned that peace between states gained when stability is of the latter form will "...be at best a *modus vivendi*, a stable balance of

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<sup>31</sup> For Rawls' treatment of institutional stability, see *A Theory of Justice*, 401.

<sup>32</sup> *The Law of Peoples*, 44-45.



forces only for the time being.”<sup>33</sup> As established above, a *modus vivendi* is evidently unstable. If a model of global justice is capable of devolving into a *modus vivendi*, it too is inherently unstable. It follows from this that Rawls’ global order is neither peaceful nor just.

### III. The Aggressive State

To strengthen my criticism of instability, I present the aggressive state. Rawls does not consider the possibility of the aggressive state, and as a result overlooks a powerful objection to his view that there is a clear-cut case exemplifying his weakness.<sup>34</sup> Aggressive states lead to further unsatisfactory conclusions for his account, typifying his inability to handle a type of institution capable of destabilizing his global order.

The aggressive state recognizes human rights of its own citizens and citizens of other states and peoples, thus meeting some of the necessary (though none of the sufficient) conditions for having its institutions and legal order considered decent. This state’s recognition of human rights does, however, meet the sufficient condition to be protected from intervention, either by sanction or military involvement. Unlike decent peoples, this state does not consult members on political decisions, nor does it fairly listen to dissenters. In addition, this state seeks its ends aggressively rather than peacefully. Thus the aggressive state does not abide by seven of the eight principles that constitute the Law of Peoples.

Consider the following example, intended to illustrate the nature of the quintessential aggressive state: imagine two states that rely upon each other for limited

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<sup>33</sup> *ibid.*45. Italicizes author’s.

<sup>34</sup> In their work *Are Liberal Peoples Peaceful?* Leif Wenar and Branko Milanovic claim that a state with the same features as the aggressive state is a type of outlaw state considered by Rawls. In support of this claim they cite *The Law of Peoples*, 64. It is not apparent from the text, however, that Rawls explicitly or implicitly considers this type of state, or would consider it an outlaw state.

natural resources: K and A. K keeps to itself while A is aggressive. Now imagine that A threatens to invade K, unless K exports its natural resources to A for no compensation. Here A has aggressively imposed a demand on K that K can do little about without losing the much needed natural resource it receives from A. K is prohibited from intervening upon A on Rawls' model unless (i) A violates human rights in some manner, or (ii) A *actually* attacks K. That is, pre-emptive self-defense in the face of a threat is impermissible according to Rawls.<sup>35</sup> Rawls' model consequently allows A to extort K while facing no repercussions for reprehensible behavior until their (A's) actions have escalated to the point of attack.

As mentioned above, Rawls definitively states, “[human rights] fulfillment is sufficient to exclude justified and forceful intervention by other peoples, for example by diplomatic and economic sanctions, or in grave cases by military force.”<sup>36</sup> If we are to take Rawls' model seriously, the aggressive state is protected from intervention due to its satisfaction of human rights. It is a mistake to say, however, that the aggressive state must be fully immune to intervention initiated by the Society of Peoples despite its aggressive aims, failure to have a consultation hierarchy, and failure to fairly listen to dissenters. This is because of the threat the aggressive state poses to not only the rational self-interests of other states and peoples, but also the shared values of the Society of Peoples, and as a result, the stability of the global order. Determining appropriate standards for handling this society seems possible, but at a cost.<sup>37</sup>

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<sup>35</sup> For Rawls' treatment of the circumstances of entering a just war, see *The Law of Peoples*, 89-93.

<sup>36</sup> *ibid*, 80.

<sup>37</sup> In *Are Human Rights Mainly Implemented by Intervention?* James Nickel suggests building in space for what he refers to as a delinquent state. Taken alone this seems like a suitable solution, but it is unlikely that Rawls would accept it due to their fundamental disagreement over the definition of intervention.

To maintain Rawls' framework one may either bite the bullet and grant full immunity to aggressive societies or, alternatively, reconsider basing his framework for intervention solely upon human rights. Granting full immunity is simply not an acceptable option for reasons discussed below. In considering basing the framework for intervention, one logically has three routes to choose from: (i) maintaining that human rights violations are the only justification for intervention, (ii) completely disposing of human rights violations as the only justification for intervention, or (iii) claiming that human rights violations and something more (taken together or separately) are the only justifications for intervention. If one takes the first route and insists that human rights are the unique basis for intervention, one must at least conduct a substantive overhaul of the necessary and sufficient conditions pertaining to them. I set this option aside in favor of the third course. Taking the second course seems wholly unreasonable, namely because it is an obsolete held position that institutions should sit idly by while human rights violations are occurring. If one takes the third course and adds unjustly imposed inequality upon one state or peoples by another as a basis for intervention, in conjunction with a more inclusive account of public reason, then the threat of instability presently faced by Rawls' model is resolved. I discuss these modifications at length below.

As it is currently formulated, Rawls' position lacks the tools to deal with the aggressive state that exemplifies the inherent instability of his model. The dangers that the aggressive state pose to other peoples and states while going unchecked account for Rawls' deficiency. If the aggressive state is permitted to carry on because it is free from intervention and sanctions, the peoples that were not concerned about the situated

assurance problem prior to its recognition should certainly be concerned afterwards. Moreover, the fundamental assurance problem is more likely to be instantiated.

Those threatened by the aggressive state risk being attacked or thoroughly disbanded. Prior to attack, the threatened cannot place sanctions on the aggressive state precisely because it (the aggressive state) is respecting human rights. The threatened also may not preemptively attack the aggressive state, because Rawls would consider such an attack to be a violation of just war doctrine.<sup>38</sup> Once attacked, liberal and decent peoples may go to war to defend themselves, but there is no guarantee that they will prevail. If the aggressive state prevails, the overpowered peoples will likely lose all of their control. One may respond by citing the Law of Peoples as providing protection for those peoples overpowered by the aggressive state. But as it stands, it is not clear to what extent liberal or decent peoples can permissibly aid those peoples in unfavorable conditions arising from being overpowered. Depending upon what formally amounts to intervention, liberal or decent peoples may not be able to provide aid to the overpowered peoples without intervening against the aggressive state. Note that intervention may merely be strong-arming or a trade sanction intended to weaken the aggressive state and aid the overpowered. But, once again, these measures of intervention are prohibited under Rawls' model, since the aggressive state respects the limited account of human rights up until they become militarily aggressive.

The presence of the aggressive state within Rawls' model makes devolving into a *modus vivendi* even more plausible than I previously suggested. The plausibility of this occurrence, in turn, illustrates the inherent instability of his model. Given Rawls' explicit

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<sup>38</sup> *The Law of Peoples*, 90-91. Rawls merely states that "...any society that follows and honors a reasonably just Law of Peoples [has the] right to war in self-defense."

acknowledgement of the importance of stability for any theory of justice, his failure to consider the aggressive state is a serious oversight. This instability can be remedied, though, by a substantial revision of public reason and an amendment to when intervention is permissible.

#### IV. A Suggested Remedy

I suggest revising Rawls' account of public reason to include reasonable citizens of all states, rather than only the representatives of peoples that comprise the Society of Peoples. When paired with the amendment that a state or peoples having unjust inequalities imposed upon it by another state or peoples can permissibly intervene against its oppressor, these revisions successfully handle all three issues that contribute to my criticism that Rawls' model is unstable. Additionally, this remedy ensures stability and its maintenance through advancing the project of liberalism, in keeping with the spirit of Rawls' project. To recall, these three issues are the sparse consideration of socioeconomic inequality that gives rise to an extremely unbalanced distribution of power, failure to address the situated assurance problem, and peoples being pragmatically incapable of giving precedence to the shared values of their citizens.

To handle those states and peoples that suggest and forcefully implement unjust inequalities upon other states or peoples, I argue it is permissible for the affected state or peoples and third-party defenders to intervene upon the oppressor by sanction, or in grave cases, by military force. Recall that inequalities are unjust when they have unjust effects on the basic structure of the Society of Peoples, and the relations between peoples and

between their members. This amendment to what warrants intervention alleviates not only the threat posed by the aggressive state, but also the threats posed by all other states and peoples that refuse to play by the rules at any given time. As a result, instability due to devolving into a *modus vivendi* is no longer a danger for Rawls' model, despite the plausibility of the aggressive state. By revising the grounds for intervention, the Law of Peoples is backed with the necessary legitimate clout that addresses the three issues Rawls' model was previously incapable of handling. The potential for a dangerously, and unjustly, unbalanced distribution of power is no longer likely due to peoples and states having an enforcement mechanism available to protect against unjust impositions. This protection ensures that peoples and states reasons for accepting the burdens associated with social cooperation will not be undermined due to a lack of assurance that other parties will adhere to the same standards of social cooperation. And when peoples are no longer concerned with the situated assurance problem, the inability of peoples to give precedence to the shared values of their citizens is no longer an issue.

One might object to this amendment to the Law of Peoples, claiming it is *ad hoc*, added merely to address the issue of those imposing unjust arrangements and is not cohesive with Rawls' overall project. I maintain, however, that this amendment to the grounds for intervention simply follows from the other eight principles of the Law of Peoples. Rawls himself acknowledges that this "...statement of principles is, admittedly, incomplete" and "other principles need to be added".<sup>39</sup> The amendment to intervention that I propose adding aids in ensuring that the first three principles regarding freedom and

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<sup>39</sup> *The Law of Peoples*, 37.

independence, observance of treaties, and respecting equality are upheld. Furthermore, it does not go against any of the pre-existing eight principles.

One might claim that I problematically uphold that states may also protect themselves against unjustly imposed inequalities, despite their not being liberal or just. It is questionable at best, though, that states must be subject to unjust inequalities in light of their not being wholly just themselves. This amendment to permissible grounds for intervention – taken with an altered account of public reason – not only resolves the aforementioned issues that lead to instability, it is also cohesive with other aspects of Rawls' project.

By making public reason more inclusive, alterations to the Law of Peoples are not made by only the peoples enforcing the eight principles – the Society of Peoples. Instead, all citizens that are inherently affected by decisions pertaining to the global institution (the Society of Peoples) will have the opportunity to engage in public reason, provided they are reasonable. I adopt Rawls' tenants of reasonableness, which he presents in *Political Liberalism*.<sup>40</sup> A reasonable individual both willingly proposes and abides by fair principles of cooperation among equals, and readily accepts the burdens of judgment when engaging in public reason. While this definition of reasonable is not made explicit in the account of public reason given in *The Law of Peoples*, it is implicit by way of the principle of reciprocity and the fact that representatives of peoples are negotiating terms that they know their peoples will be subject to if they wish to maintain membership in the Society of Peoples.

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<sup>40</sup> For Rawls' treatment of what it means for an individual to be reasonable, see *Political Liberalism*, 48-54.

Rawls holds that participating in public reason is an intrinsically moral duty, like other political rights and duties.<sup>41</sup> Recall that his reasoning for claiming that only members of the Society of Peoples can engage in public reason follows from his stipulation that only they have the capacity for a moral nature, allowing them to realize the moral duty of public reason. In contrast, states lack this moral nature, making them unsuitable candidates for participation in public reason. But it does not clearly follow from the nature of states that the state's citizens, when taken independently, are also incapable of advancing liberalism. One can easily imagine a citizen of a state that has a moral nature and satisfies reasonableness. The moral nature and reasonableness of said citizen allows the citizen to imagine herself as a government official and consider what foreign policy she would think it reasonable to advance, enabling her to achieve the ideal of public reason. When citizens from around the globe that share these qualities engage in public reason together, they will be able to realize the ideal analogously to how representatives realize the ideal, according to Rawls.

I uphold, like Rawls, that contributing to the dialogue of public reason is a moral duty. This means that on my model reasonable citizens with a moral nature have a moral duty to contribute to the dialogue of public reason, and the Society of Peoples should recognize this moral duty, seeing as its fulfillment is crucial to furthering the project of liberalism. This is primarily because Rawls intends for the global institution to uphold the tenants of liberalism. Thus the global institution must recognize the moral duty of reasonable citizens to participate in the public reason that shapes said institution, seeing as it is the global institution's aim to be a liberal democracy that would grant citizens

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<sup>41</sup> *The Law of Peoples*, 56.



democratic rights. Additionally, it seems inappropriate for the Society of Peoples to determine independently what amounts to and triggers aid given to other institutions (peoples or states). Those reasonable citizens with membership in states or peoples subject to inequalities imposed by other states or peoples should be able to aid in the revision of those conditions that impact the institutions they live within, both globally and domestically. The global institution lived within is the Society of Peoples, while the domestic institution is the citizen's state or peoples. This idea appeals to the principle of affected interests, which states individuals should be able to influence decisions that affect them.<sup>42</sup> Decisions that are not influenced by those affected may not appropriately consider their interests. In order to maintain the fairness that Rawls deems crucial to the political processes of the Society of Peoples' basic structure, it seems appropriate that all reasonable citizens – not merely representatives of peoples – have the opportunity to determine what size contributions are acceptable for a given predicted return and what inequalities are just.<sup>43</sup> Furthermore, to arbitrarily exclude the perspectives of some individuals affected by distributional concerns merely by their state membership contradicts the call for reasonable pluralism that Rawls values so highly.

While it cannot be decisively determined what conclusions those participating in this comprehensive public reason will come to – as this is an empirical question – there is reason to be optimistic. As more participants are welcomed – due to their moral obligation rooted in their being reasonable moral citizens – to engage in public reason it is likely that the ideal of public reason will be achieved. As citizens move towards the

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<sup>42</sup> *The Principle of Affected Interests: An Interpretation and Defense*, 2.

<sup>43</sup> For Rawls' discussion of fairness related to distributive justice among peoples see *The Law of Peoples*, 113-115.

disposition to “...repudiate government officials and candidates for public office who violate the public reason...” of free and equal citizens, the political and social basis of peace and understanding will be strengthened, just as Rawls had hoped.<sup>44</sup> The achievement of the ideal of public reason will feasibly ensure that inequalities that do arise are just in nature because there has been true fairness in participation and consent. If it is the case that there has been true fairness in participation and consent, inequalities will not contribute to the situated assurance problem or the inability of peoples to give precedence to the shared values of their citizens, unlike in Rawls’ original model. It is in this way that revising public reason not only aids in ensuring stability, but also advances the project of liberalism as explained by Rawls.

One might wonder why I have decided to argue for all reasonable citizens to participate in public reason, rather than just representatives of citizens. I do so for two reasons. The lack of inclusivity in Rawls’ public reason arises from only reasonable representatives – government officials of the members of the Society of Peoples – being permitted to participate. In order to recognize the sentiments of those individuals affected by global policies, more than just reasonable representatives need to be included. The need for consideration of reasonable individuals arises out of the government officials of states being, by nature, unreasonable due to their abstaining from becoming liberal or decent. Additionally, the government officials of states may not serve as representatives of their state’s members, depending upon what type of government the state has. Some examples include a patriarchy without elected representatives, or a state where elections are notoriously fraudulent. When dealing with outlaw states, according to Rawls, the

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<sup>44</sup> *The Law of Peoples*, 57.

leaders and officials of said state should be distinguished from civilian members because “[the leaders and officials] are responsible... the civilian population, often kept in ignorance and swayed by state propaganda, is not responsible.”<sup>45</sup> If government officials are the only people that are permitted to participate in public reason, then there is the potential for all voices of a given state’s citizens to go unheard. But the voices of those affected being unacknowledged goes against the principle of affected interests. By obligating all reasonable citizens of all states and peoples to participate in public reason, there is no longer a concern of lack of representation in the dialogue.

One might suggest that rather than obligating all reasonable citizens to participate, there should be a shift in what it means to be a representative. However, including all reasonable citizens is preferable to this move because altering the definition of representative presents a host of issues and is ultimately inconsistent with Rawls’ project, which I aim to leave intact. If one changes what it means to be a representative from being the sole representative of a state or peoples to being the representative of a collection of individuals based on some shared interest, then the formal equality that Rawls values so highly is abandoned. I am taking shared interest to be something like feminist values, subscription to a religion, persons with disabilities activism, or an interest in racial equality. The problem with this type of representation is that an individual might – and likely does – have multiple interests, and so they will either be forced to choose a primary interest by which they will be represented, or be represented by a multitude of interests. For individuals to be forced to choose a primary interest may deny other components of their identity, which is a violation of the human right to liberty

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<sup>45</sup> *ibid.*, 95.

of consciousness. For individuals to have varying numbers of representatives respective to their interests does not amount to formal equality, and thus violates the human right to formal equality. If individuals act as their own representatives, as I suggest, then liberty of consciousness and formal equality is maintained because each reasonable individual eligible to participate in public reason is granted the same weight. It is for these reasons that I offer the solution of participation of all reasonable individuals, rather than merely representatives of one form or another.

## V. Conclusion

In short, I have illustrated how *The Law of Peoples* is vulnerable to the criticism of instability, which is exemplified by Rawls' oversight of the aggressive state. In order to address this criticism in keeping with Rawls' overall project, I have argued that the grounds for intervention be amended so that it is also just for a state or peoples to intervene upon another state or peoples when unjust inequalities are being imposed. I have also argued that Rawls' conception of public reason is too narrow, and must be expanded to include participation of all reasonable citizens, not merely representatives of the peoples with membership in the Society of Peoples. In refuting objections to each of these alterations, I have established that this two-part revision is the most favorable route to be taken in addressing the concern of instability while remaining in keeping with Rawls' overall project.

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