

Nussbaum versus Rawls:
Should Feminist Human Rights Advocates Reject the Law of Peoples
and Endorse the Capabilities Approach?

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Two widely respected contemporary philosophers have recently presented importantly different theoretical conceptions of human rights: John Rawls in *The Law of Peoples* (1999)² and Martha Nussbaum in *Frontiers of Justice* (2006).³ Since Nussbaum makes incisive criticisms of Rawls's view and defends a list of human rights that differs markedly from his, these two conceptions of human rights initially appear incompatible. However, in fact they are not significantly incompatible, or so I will argue. If they were, it would be unfortunate, because both theories can be of great value to the oppressed and their allies in advocating that their human rights be respected and secured.

Women and girls continue to suffer significant discrimination in all parts of the world, despite progress made in the twentieth century, including the adoption by the United Nations General Assembly of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979.⁴ The number of states that have ratified this convention is greater than the number of states ratifying almost any other convention.⁵ However, many of the ratifying states have declared reservations; many of these reservations are stated in broad terms and apply to the most important parts of CEDAW; and few states have fully incorporated CEDAW into their domestic legal systems.⁶ Moreover, compounding the wrong of discrimination and unequal treatment, in many parts of the developing world women and girls suffer severe deprivation. Not

only is their quality of life lower than that typically enjoyed by members of wealthier societies, and lower than that typically enjoyed by male members of their own societies, but many females are deprived relative to any plausible universal standard of basic human rights. Clearly, getting states to ratify conventions and treaties is not enough: governments must be persuaded, assisted, pressured, or forced—whether by their own populations, foreign human rights advocates, non-governmental organizations, or other state governments and international organizations—to secure at least the most basic human rights for all members of their society and to change discriminatory laws, policies, and practices.

Persuasive arguments for human rights, made in public as well as private forums, can raise awareness and generate motivation and pressure for change. Although it may not be essential for effective political action, clear thinking about human rights can facilitate such action, and at the very least “it can help to unmask the arguments of dictators and their allies.”⁷ Moreover, shared understandings and reasoned convictions among human rights advocates can strengthen their solidarity and make their collective efforts more effective. However, philosophers continue to disagree about what human rights are and how they are to be justified and specified.

Nussbaum provides powerful arguments that everyone, female as well as male, is entitled to the fundamental requirements of a life with dignity, as specified in her list of ten Central Human Capabilities; she contends that “a society that does not guarantee these to all its citizens, at some appropriate threshold level, falls short of being a fully just society” (FJ 75). However, Nussbaum’s Capabilities Approach (hereinafter ‘CA’) lacks, and needs, a well-developed account of a certain proper subset of human rights -- namely,

those that are internationally enforceable. In this paper I will argue that such an account can be derived from Rawls's Law of Peoples (hereinafter 'LP'), if the latter is reconstructed and interpreted as I propose; so understood, LP evades Nussbaum's criticisms and does not in fact conflict with CA. As I interpret LP, it provides powerful arguments supporting the claim that the international community should recognize a state's government as legitimate, and should regard that state as therefore immune from coercive humanitarian intervention by other states, *only if* it secures basic human rights for all its members, whatever their sex or gender.

In the next section of this paper I briefly explain Nussbaum's conception of human rights, and in the following section I briefly explain Rawls's. I then argue that Nussbaum misinterprets LP. In the remainder of the paper I contend that insofar as LP and CA address different questions about human rights, the two views do not conflict. If my arguments are correct, then oppressed women and their allies can draw arguments from both LP and CA to advocate that the full range of women's human rights be respected and secured.

1. Nussbaum's Version of the Capabilities Approach.

Nussbaum has been writing about capabilities since the late 1980s, further developing a theoretical approach to assessing quality of life that Amartya Sen had introduced into the field of economics several years earlier.⁸ This approach, CA, has become highly influential: it is used by a number of international agencies and non-governmental organizations, including the United Nations Development Program, which employs a capability metric to determine each country's score on the Human Development Index for its annual *Human Development Reports*.⁹ Nussbaum's version of

CA differs from Sen's, as she points out, "in its emphasis on the philosophical underpinnings of the approach" (which she understands partly in terms of Aristotle's ideas of human functioning and Marx's use of these ideas), as well as "in its readiness to take a stand on what the central capabilities are."¹⁰

In Nussbaum's view, CA can provide "definite and useful guidance, and prove an ally in the pursuit of sex equality, only if we formulate a definite list of the most central capabilities, even one that is tentative and revisable" (CFE 36). Therefore she has formulated such a list.¹¹ Each item on the list is a category of capabilities, each of which Nussbaum explains briefly.¹² She argues that the capabilities on this list ground "a set of basic entitlements without which no society can lay claim to justice" (CFE 36). Does she regard these basic entitlements as basic human rights? Her answer to this question seems to be "no and yes," with an increasing emphasis on the "yes" in recent years. If CA is a conception of human rights, then in order to assess it one should compare it to other contemporary conceptions of human rights and consider whether it does better the work that such conceptions should do. Such a comparison is also appropriate even if CA is not a conception of human rights, since Nussbaum has claimed that CA is "in some ways superior to" the "familiar human rights paradigm" (CFE 36). I will compare CA with John Rawls's conception of human rights, but before doing so, I will briefly present Nussbaum's account of capabilities, focusing on her account of the relationship between capabilities and human rights.

1.1. Capabilities and human rights

Nussbaum distinguishes three kinds of capabilities. *Basic capabilities* are "the innate equipment of individuals that is the necessary basis for developing the more

advanced capability" (CHR 289). Non-basic, or *advanced*, capabilities are either internal or combined. *Internal capabilities* are "states of the person herself that are . . . sufficient conditions for the exercise of the requisite functions" (CHR 289). *Combined capabilities* are "internal capabilities *combined with* suitable external conditions for the exercise of the function" (CHR 290, italics in original).

According to Nussbaum, basic capabilities are closely related to human rights, understood as rights that people have whether or not their circumstances enable them to exercise or enjoy these rights. We use the term "human rights" in this sense when we say that people "have a right to X," even when their society does not secure such a right to them. Human rights in this sense typically "are thought to derive from some actual feature of human persons, some untrained power in them that demands or calls for support from the world" (CHR 293). To declare a human right, so understood, is to assert that all persons have an urgent, morally justified claim to have a certain *advanced* (i.e., *internal* or *combined*) capability secured to them, for the reason that they are human and/or that they have certain *basic* capabilities. Nussbaum explains it as follows:

The right to political participation, the right to religious free exercise, the freedom of speech, the freedom to seek employment outside the home, and the freedom from unwarranted search and seizure are all best thought of as human capacities to function in ways that we then go on to specify. The further specification will usually involve both an internal component and an external component: a citizen who is systematically deprived of information about religion does not really have religious liberty, even if the state imposes no barrier to religious choice. On the other hand, internal conditions are not enough: women who can think about work outside the home, but who are going to be systematically denied employment on account of sex, or beaten if they try to go outside, do not have the right to seek employment. (CHR 292-293)

Here, by saying that women in such circumstances do not have the right to seek employment, Nussbaum is saying that they lack the relevant combined capability to

function: they are not able to seek a job outside the home, even though their basic capabilities give them an urgent, morally justified claim to have that combined capability secured to them.

According to Nussbaum, combined capabilities “are the *goals* of public planning,” in the sense that the state should respond to its citizens’ human rights by undertaking to enable the citizens to have combined capabilities (CHR 293, italics in original). “It is in this sense,” she writes, “that capabilities and rights should be seen as equivalent” (CHR 293). Summarizing her view, Nussbaum says:

capabilities as I conceive them have a very close relationship to human rights, as understood in contemporary international discussions. In effect they cover the terrain covered by both the so-called first-generation rights (political and civil liberties) and the so-called second-generation rights (economic and social rights). And they play a similar role, providing the philosophical underpinning for basic constitutional principles. (WHD, 97)

Note that Nussbaum has distinguished two related notions. Human rights in one sense (HR1) are grounded directly in basic capabilities and constitute urgent, morally justified claims to advanced capabilities; here, the advanced capabilities are understood as the contents or the objects of the human rights, as what they are rights *to*. When human rights (HR1) are recognized in international laws and policies, they are human rights in an additional sense (HR2). Note that international legal or political recognition does not necessarily entail domestic legal recognition. Therefore, even when international declarations assert that constitutions should secure certain advanced capabilities, people may not actually have those capabilities.

Note also that Nussbaum’s assertion of the equivalence of rights and combined capabilities may be misleading, if by “equivalent” we take her to mean “interchangeable” or “identical.” Combined capabilities are not identical with human rights in either of the

two senses of “human rights” distinguished above. Capabilities are not rights but instead the grounds, contents, or objects of the rights. However, one familiar and plausible interpretation of the idea that everyone has human rights is the idea that all governments ought to secure certain combined capabilities for everyone; that is, that these capabilities should be the goals of public planning.

1.2. Nussbaum’s publications on CA and human rights:

Nussbaum discusses the relation between capabilities and human rights most extensively in the article “Capabilities and Human Rights” (1997), which in her later works she cites, summarizes, and revises. She explains that she and Amartya Sen favor CA partly because they find “the language of rights” unsatisfactory: despite its prevalence and its moral resonance, it lacks theoretical and conceptual clarity, and many important theoretical questions about rights remain unresolved (CHR 273-275).

Nussbaum thinks the language of rights is "not especially informative . . . unless its users link their references to rights to a theory that answers at least some of these [important] questions" (CHR 275). She and Sen have offered CA as such a theory.

In *Women and Human Development* (2000) Nussbaum argues for her own version of CA, including its list of the central human capabilities. She also distinguishes between a stronger and a weaker use of CA. In its weaker use it "specifies a space within which *comparisons of life quality* (how well people are doing) are most revealingly made among nations" (WHD 6, italics in original). In its stronger use it provides the philosophical basis for an account of fundamental constitutional principles establishing "a bare minimum of what respect for human dignity requires," which "should be respected and implemented by the governments of all nations" (WHD 5).

In *Frontiers of Justice* (2006) Nussbaum argues that constitutions should require that all of the central human capabilities be secured to each and every citizen, “at least up to the threshold level,” and that an appropriate threshold level for each capability can be determined via “the judicial process” (FJ 175). Before I present my account of LP, I want to take a closer look at what Nussbaum says in FJ about several of LP’s main topics: societal justice, governmental legitimacy, state sovereignty, and humanitarian intervention. Nussbaum discusses these topics in light of her distinction between justification and implementation.

1.3. Nussbaum on Justification and Implementation

According to Nussbaum, societies should aim at raising all of their citizens above a certain threshold level for each of the central human capabilities: the level “beneath which . . . truly human functioning is not available to citizens” (WHD 6). Although attaining this goal may not make a society just, she says, it will make it far more just than any society now is (WHD 75). Every national constitution should be based on the fundamental political principles provided by CA; however, implementation of these principles must be left largely to the “internal politics” of each nation (WHD 105). Although the same moral norms apply to all nations (FJ 257-260), she emphasizes that to say that we can *justify* the same norms for all nations is not to say that we are morally entitled to *implement* these norms everywhere (FJ 260).

Nussbaum says that the fullest justification for implementing CA would be a worldwide reflective-equilibrium-type consensus. However, even before such a consensus is reached, pro-CA nations may appropriately “commend this norm strongly” to other nations, and even make CA part of international as well as national law by

endorsing international treaties, covenants, or conventions based on it (WHD 103-105). They may also try to convince or compel other nations to do likewise, e.g., via diplomatic exchanges and aid policies. Furthermore, pro-CA national governments and international agencies may, in especially grave cases, justifiably employ economic or political sanctions intended to compel nations to implement CA-based constitutional principles (WHD 104). Nussbaum acknowledges that a nation may fail to secure all of the capabilities up to their threshold levels because it is unable to do so, e.g., due to dire poverty and disease. However, she does not think such cases raise any new questions of justice, but only “a purely practical question what to do next,” for “[t]he question of justice is already answered: justice has not been fully done here.”¹³

Nussbaum points out that the modern human rights movement “uses persuasion in most cases and urges forcible intervention in a very small number of cases,” thus recognizing the distinction between justification and implementation (FJ 256). Here “implementation” evidently means employment of some form of pressure or coercive force, by nations acting alone or in concert, in order to compel (rather than persuade) another nation to change its policies and practices. When and why is implementation, so understood, permissible according to Nussbaum? Her answer is brief and unclear, and she offers little argument to support it. In general, Nussbaum says, “one should respect the sovereignty of any nation that is organized in a sufficiently accountable way, whether or not its institutions are fully just” (FJ 256). As long as a nation, though imperfect, is “still above a certain threshold of inclusiveness and accountability,” respect for the nation’s citizens and for their state as an expression of their human autonomy should lead

other nations to “refrain from military intervention into the affairs of that nation,” and to “negotiate with its duly elected government as a legitimate government” (FJ 256).

What is a “sufficiently accountable” way of organizing a nation, according to Nussbaum? At various points in the text, she seems to suggest that only procedurally democratic regimes can be sufficiently accountable and thus legitimate.¹⁴ However, at other points Nussbaum expresses agreement with Rawls, who denies that only states with democratic regimes can, in principle, have the right against coercion by other states.¹⁵ Moreover, Nussbaum does not systematically and fully address what reasons may justify state actions or policies aiming to compel other states to respect human rights. No conception of human rights should be regarded as complete and satisfactory unless it adequately addresses this issue, both because the term “human rights” figures in justifications for international actions and policies, and because such actions and policies can have such important consequences for people’s lives.

Above I suggested that Nussbaum’s claim that there is a “basic distinction” between justification and implementation means that, although there may be conditions in which we are not morally entitled to implement CA by means of coercive force, this implies neither that CA is not justifiable nor that it is not justifiably implemented by other means (FJ 262). This interpretation is supported by the fact that Nussbaum criticizes Rawls for holding (she claims) the contrary position (FJ 255). She accuses him of conflating the question of whether a nation is “worthy of respect” as a member in good standing of the Society of Peoples with the question of whether we should “refrain from intervening in that nation to seek the implementation of our own moral standards” (FJ 255). But these are distinct questions, she argues:

We may think that the standards of a given nation are defective, and that we can justify as applicable to that nation a more extensive menu of basic rights and liberties than it now recognizes, thus making justified criticisms of that nation, without thinking that we have the right to intervene in its affairs, either militarily or through economic or political sanctions. (FJ 255-256)

In fact, however, Rawls does distinguish these questions; Nussbaum is mistaken in confidently asserting the contrary.¹⁶ In LP Rawls undertakes to answer several related questions which presuppose and employ (1) the distinction between a fully just society and a decently well-ordered society, and (2) the distinction between societies that meet all of the criteria of decency (and are thus entitled to the rights of members in good standing of the Society of Peoples) and states that do not (whether because they are unwilling or because they are unable). LP takes a clear and consistent position on the question of whether only states with democratic regimes can have immunity from coercive intervention by other states, and it addresses this issue directly and systematically, as part of a broader inquiry into universal human rights. If my interpretation of LP is correct, Nussbaum misunderstands its aims as well as its arguments, and her criticisms therefore miss their target.

2. Rawls's Conception of Human Rights¹⁷

Liberals regard all non-liberal societies as unjust, at least to some degree and in some respects, including in particular that their form of government is not democratic. However, it seems clear that such a judgment does not by itself constitute even *prima facie* moral justification for liberal societies to employ coercive force to compel any or all non-liberal societies to adopt a democratic form of government. Yet it also seems clear that if there are grave and widespread violations of basic human rights in a society, this does provide at least *prima facie* moral justification for the use of some form of coercive

force by other states to stop those violations. So liberal societies face the question of what principles should govern their relations with other societies, in order to (a) try to ensure that all societies secure human rights for the people they govern or affect, while at the same time (b) minimizing the risks of war and (c) allowing all societies to govern themselves, work out solutions to their own problems, and progress toward their own social ideals in their own ways, free from undue interference. In LP Rawls takes initial steps toward determining where a just system of international law would set the limits of states' rights of self-determination and non-intervention.

Rawls develops his conception of human rights (more precisely, his conception of internationally enforceable basic human rights, hereinafter 'IEBHRs') in the context of his conception of the moral basis of a just system of international law, which he calls "the Law of Peoples." In his long essay by the same name,¹⁸ he defends a set of principles of international cooperation as suitable for inclusion in the foundation charter of a Society of Peoples (the nucleus of a law-governed international community that can develop into a fully just global order). These principles, among which is one requiring that all societies honor human rights, constitute the moral basis and framework of a system of international law that can develop into a just system of global public law.

Clearly, it is necessary to specify the meaning of the requirement that all societies honor human rights. To do so requires specifying both the sense and the reference of the term "human rights," as it is used in the statement of this principle. To specify its reference requires developing a list of human rights that would be suitable for use in interpreting an enforceable legal requirement that all societies honor human rights.

The sense of the term "human rights," as Rawls uses it in LP, is that of

internationally enforceable basic human rights, understood as urgently important rights that all individual persons may validly claim and that all governments are obligated to respect, because no government can plausibly claim legitimate authority unless its legal and political system ascribes such rights, and no society can plausibly claim to be just unless it has a legitimate government. These rights are grounded in principles of justice that apply to all governments and that set constraints on their use of political power in making and implementing foreign as well as domestic policy. To determine which rights belong in this category, one would have to determine which principles of justice apply to all governments. In LP Rawls undertakes this task. In doing so, he reasons from liberal premises and considers what principles should guide the foreign policy of liberal-democratic states. However, he argues that these are principles which all decent societies can endorse as constituting the moral basis of international law and as applying to international relations among all societies.

2.1. Societal Justice and Governmental Legitimacy

Taking a bottom-up or "at-least" approach, Rawls starts from the idea that a just society has at least a legitimate government, which must be understood as at least a system of law such that the people governed are not merely forced but instead obligated to obey it. Thus he develops an argument aiming to show that at least a proper subset of the basic rights of the citizens of a fully just liberal-democratic society are universal and internationally enforceable basic human rights: that all individuals are entitled to claim them, that all governments are obligated to respect and secure them, and that the international community may and should enforce them worldwide (via appropriate procedures and measures), for moral reasons that do not depend on states having

explicitly committed themselves to respect and secure these rights.¹⁹ Rawls aims to show this by means of arguments that no government can reject while plausibly claiming legitimacy.

In developing his conception of a fully just liberal democratic society, which he calls Justice as Fairness (JF),²⁰ Rawls analyzes the idea of fair social cooperation among individual human beings who are members of the same society, all free citizens of equal political status. He argues for two fundamental, general principles of societal justice,²¹ which are to guide and constrain the citizens of a democratic society (i.e., one characterized by popular sovereignty) in using the coercive powers of their government domestically. These two principles are to constitute its foundation charter.

Analogously, in LP Rawls argues for certain fundamental, general principles of fair social cooperation among legitimately governed states,²² which are to guide and constrain the international uses of their coercive powers. These principles spell out some of the logical implications of an abstract idea of social cooperation among states aiming to establish a just and stable system of international law. The principles are to be included in the foundation charter of such a legal order.

To determine whether the set of internationally enforceable basic human rights is coextensive with the set of the basic rights of the citizens of a fully just liberal democratic society, Rawls takes a top-down approach. He starts from JF and asks whether *all* of the basic rights of such a society's citizens, i.e., the rights specified by JF's two principles of justice, should count as basic human rights. His answer is no, not all of them: internationally enforceable basic human rights are a proper subset of those citizens' rights.²³

Rawls emphasizes that certain long-standing principles of international conduct (i.e., that states are to observe a duty of non-intervention, and that states have the right of self-defense but no right to instigate war for reasons other than self-defense) have rightly been revised in recent years²⁴ to allow for intervention in cases of "grave violations of human rights" (LP 37). In developing his conception of the moral basis of a just global system of public law, Rawls further modifies these principles by substituting the term "peoples" for the term "states"; thus, he puts the normative idea of a well-ordered society under a legitimate government (an ideal to which he refers using "peoples" as a technical term) in place of the idea standardly used in political science (particularly in realist international-relations theory) according to which a state is a rational, self-interested collective agent that mainly aims to acquire and retain military, economic, and diplomatic power over other states. He imagines the governments of peoples setting up a system of international law, and argues that all and only peoples, which are societies under governments satisfying criteria of decency which include honoring certain basic human rights, are entitled to the rights traditionally ascribed to all states.²⁵

2.2. The criteria of decency

Rawls's first criterion of decency requires non-aggressiveness vis-a-vis other societies. His second criterion comprises three conditions of governmental legitimacy, one of which requires respect for the basic human rights. Rawls's justification of his second criterion of decency may be summarized as follows. A system of laws must meet certain conditions if it is to be viable. However, if those to whom the laws are applied have *bona fide* moral duties and obligations to obey them, the legal system must meet not only the conditions of viability but also a further condition: the officials of the

government must be trying in good faith to govern justly and to ensure that the laws accord with their conception of justice and its idea of the common good of the society.

Furthermore, argues Rawls, a society's political and legal system can be regarded as morally defensible, and the society as well-ordered, only if the political and legal system is structured so as to ensure that everyone's fundamental interests (as it understands them) are secured. In addition, the governing conception of justice must understand the fundamental interests of those to whom the laws are applied in a way consistent with recognizing them not only as human beings but also as moral persons, for their being moral persons is entailed by the very idea of a political and legal system ordered in accordance with a conception of justice that imposes *bona fide* moral duties and obligations upon them. This holds for women as much as for men: to require anyone to obey laws is to recognize them as persons with the requisite capacities for moral as well as prudential reasoning, judgment, and action. Thus everyone, regardless of gender, is equally entitled to the universal human rights for which Rawls argues.

2.3. A sketch to be further developed

Rawls presents his proposed list of internationally enforceable basic human rights as an incomplete, abstract sketch.²⁶ It functions mainly to indicate that the list of human rights appropriate for inclusion in a Law of Peoples would largely agree with classic bills of rights, but that not all of the rights listed in the UDHR should be classified as permissibly enforced internationally, in principle, on moral grounds independent of official commitments to secure them. Rawls's proposed list can be variously interpreted, since each of the rights on the list is described only briefly and abstractly. And it can get expanded if suitable arguments for further rights are developed. Although LP is in some

respects merely a sketch, it provides strong arguments for excluding certain rights from the category of IEBHRs, as well as strong arguments for including a number of rights in this category; it also shows how to develop such arguments regarding other rights.

3. How Nussbaum Misinterprets LP

In the rest of this paper, I present some of Nussbaum's main criticisms of LP and show that they do not apply to it as I interpret it. I will focus on two key points, each of which will require some discussion. Nussbaum asserts that (1) Rawls conflates justification with implementation, and that (2) Rawls unjustifiably excludes "burdened" societies from the Society of Peoples, thus in effect denying that they are entitled to assistance from wealthier societies.

Regarding point (1), Nussbaum asserts: "Rawls clearly thinks that if we conclude that another nation has defective norms we will intervene in some way, whether militarily or through economic and political sanctions."²⁷ She bases some of her harshest criticisms on this interpretation.²⁸ However, it is contradicted not only by my interpretation of LP but also directly by Rawls's text.

What Rawls clearly thinks is that any society that is not a liberal democracy has norms that are defective in some way. He says this more than once and in more than one way.²⁹ With regard to the question of justified intervention, Rawls argues that we must take note of the morally significant differences among four kinds of non-liberal societies: (1) aggressive "outlaw states," which refuse to comply with any reasonable Law of Peoples (LP 4, 5, 48, 80-81, 90); (2) non-aggressive societies that are willing but unable to secure their people's basic human rights;³⁰ (3) non-aggressive societies that secure their people's basic human rights but deny them any "meaningful role in making political

decisions”;³¹ and (4) decent, well-ordered societies that not only secure their people’s basic human rights but also enable them to play a “substantial role” in making political decisions, although not within a democratic structure in which they are all citizens with equal political rights (but instead within, e.g., a reasonable form of consultation hierarchy) (LP 4, 71-75). Rawls argues that liberal societies should recognize *only* non-liberal societies of type (4) as entitled to *bona fide* membership, i.e., full membership in good standing, in the Society of Peoples (LP 61, 80). However, since societies of type (3) secure their people’s basic human rights (at least those on the list in LP), other societies cannot justifiably intervene or coerce them to reform. More generally, when a society’s domestic political, economic, and social institutions secure its people’s basic human rights, it is unjustifiable for other societies to intervene militarily or even to impose economic or diplomatic sanctions.³² Contra Nussbaum, Rawls clearly *does not* think that “if we conclude that another nation has defective norms we will intervene in some way, whether militarily or through economic and political sanctions.”³³

Regarding point (2), Nussbaum says that according to Rawls, ‘burdened peoples’ will “on account of their poverty,” not “be part of the Society of Peoples” (FJ 239, 247). She evidently ascribes to Rawls the view that better-off societies may or even should exclude worse-off societies from the Society of Peoples in order to avoid having to assist them. But in fact, Rawls holds the contrary view: “Well-ordered peoples have a *duty* to assist burdened societies” (LP 106, italics in original). Since burdened societies have dysfunctional political, economic, and/or social institutions, they do not meet the criteria of decency and cannot engage in international cooperation guided by the Law of Peoples, as the well-ordered societies can. What this means is not that well-ordered societies may

simply exclude burdened societies and disregard their needs, but rather that the former must undertake to assist the latter to reform or rebuild their institutions so that they meet the criteria of decency.³⁴

Nussbaum does acknowledge³⁵ that Rawls holds that all well-ordered peoples have a duty to assist the burdened societies. However, she mentions this only briefly and inaccurately: “For Rawls, such assistance chiefly entails helping [the burdened societies] to develop stable democratic institutions, which he takes to be the main ingredient of their eventual prosperity” (FJ 247). In fact, Rawls holds that well-ordered peoples should provide diverse forms of assistance, including but not limited to financial and material aid. Rawls makes it very clear that assistance to burdened societies may require much more than merely giving money: “What must be realized is that merely dispensing funds will not suffice to rectify basic political and social injustices (though money is often essential)” (LP 108-109). A “burdened society,” as Rawls defines the term, is one that “lack[s] the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources needed to be well-ordered” (LP 106). Therefore burdened societies typically need not merely additional material resources, but also other kinds of assistance. Rawls emphasizes that no matter how and why the society is burdened, “the duty of assistance is in no way diminished” (LP 108).

What kinds of non-material assistance does Rawls think well-ordered societies should provide to burdened societies, in addition to material resources? High on the list is helping them to educate their populations and to acquire needed technology (LP 106). Also high on the list is helping the policymakers in resource-poor countries to understand how to avoid overburdening their nation’s lands and economy with an unsustainably

large population (LP 108). If a country needs to change some of its institutions or practices, well-ordered societies may be able to accelerate and support the reform efforts of its governmental and non-governmental organizations. However, there is, as Rawls says, “no recipe, certainly no easy recipe, for well-ordered peoples to help a burdened society to change its political and social culture” (LP 108).

One form of assistance that well-ordered societies can and should offer, Rawls emphasizes, is human-rights advocacy. They should demand that callous and corrupt rulers respect at least the basic human rights. Referring to Sen’s work,³⁶ Rawls says that “Insisting on human rights will, it is to be hoped, help to prevent famines from developing, and will exert pressure in the direction of effective governments in a well-ordered Society of Peoples” (LP 109).

As mentioned above, Rawls holds that one of the crucial elements determining whether resource-poor countries can be well-ordered is the country’s population policy (LP 108). This provides a further reason for burdened societies to respect human rights, he contends: “A decisive factor here [regarding population pressure] appears to be the status of women” (LP 109-110). Referring to China’s harsh policies and contrasting them with those of the Indian state of Kerala (which rapidly reduced its birth rate by empowering women to own and manage property, to acquire education, and to vote and participate in politics), Rawls says that “The simplest, most effective, most acceptable policy is to establish the elements of equal justice for women” (LP 110). Well-ordered societies, when advocating that burdened societies respect human rights, can point this out and urge them to “pay particular attention to the fundamental interests of women” and

to reform the country's political procedures in whatever ways are "necessary to prevent violations of the human rights of women" (LP 110).

Rawls explains that the aim of the duty of assistance is "to help burdened societies to be able to manage their own affairs" and "to realize and preserve just (or decent) institutions" (LP 107, 111). As noted earlier, meeting Rawls's criteria of decency does not necessarily require that a society's government be procedurally democratic. So the text of LP contradicts Nussbaum's assertion that for Rawls, assistance to burdened societies "chiefly entails" helping them "to develop stable democratic institutions" (FJ 247). It also contradicts Nussbaum's assertion that Rawls uses Sen's theory "to deny that richer nations need to give economic aid to poorer nations" (FJ 316).

4. The Appearance of Conflict between LP and CA

Rawls's LP and Nussbaum's CA initially appear to conflict. This is so not only because Nussbaum contends that they conflict, but also because both theories are conceptions of human rights and global justice, yet each presents a different list of human rights. However, the appearance of conflict is largely, if not entirely, misleading. Both CA and LP are incomplete conceptions of human rights and global justice, each focusing on different important questions about human rights.

Rawls develops his open-ended list of human rights as a proposed answer to the following question: Which rights must be included on a list of urgently important human rights suitable for use in interpreting an enforceable international legal requirement that all societies honor human rights? He does not fully answer this question; instead he indicates a method for answering it, and he takes a number of the initial steps of the

reasoning for us, thus generating his proposed provisional list of internationally enforceable basic human rights.

Nussbaum develops her open-ended list of human rights (or, in her terms, central human capabilities to which everyone is entitled) as her proposed provisional answer to the following question: What are the central human capabilities implicit in the idea of a life worthy of human dignity, such that every society should aim to raise all of its members above the threshold level of each of these capabilities, and should establish a constitutionally guaranteed social minimum based on these threshold levels? Clearly this question is quite different from Rawls's; unsurprisingly, her answer is different as well.

These different questions are associated with different inquiry-specific aims which exert opposing pressures on each philosopher's list of human rights. Rawls's aim in LP is to develop a principled general justification for international use of coercive force to stop grave violations of basic human rights, without weakening too much the prohibition on non-defensive war. The latter concern acts as a constraint keeping Rawls's list of basic human rights shorter than the list of the basic rights of citizens of liberal-democratic societies, and much shorter than Nussbaum's list of central human capabilities.

Nussbaum, on the other hand, aims to develop a justification for advocating that we, and in particular those of us wielding power (whether in governments or non-governmental organizations), undertake to secure for everyone worldwide a social minimum of such a kind and at such a level that everyone can enjoy at least a decent human life and possibly also a flourishing one. This aim functions to lengthen her list of human rights.

5. Conclusion

Nussbaum rightly claims as an advantage of CA that “by focusing from the start on what people are actually able to do and to be, it is well placed to foreground and address inequalities that women suffer inside the family: inequalities in resources and opportunities, educational deprivations, the failure of work to be recognized as work, insults to bodily integrity” (FJ 290). However, her claims that CA is a better “model of global development” than LP, and that CA is a more promising “way of thinking about the goals of development in this increasingly interdependent and interconnected world” than is LP, are partly true and partly false (BSC 2004, 4). In determining what the goals of development should be, we must consider what structure a just global order would have. According to both Nussbaum and Rawls, it would be an order of politically independent states regulating their relations with each other according to the requirements of a just system of international law. So in determining what the goals of development should be, we must consider what moral principles would ground and structure a just system of international law. But CA does not do this, whereas LP does. On the other hand, Nussbaum’s list of the central human capabilities arguably provides good guidance to those undertaking to interpret lists of abstractly formulated basic rights (such as LP’s list or the lists that may be included in international declarations or national constitutions) that are to be implemented in laws and policies.

Advocates for the human rights of women and girls need clear and well-justified replies to challenging questions, including: (1) Why should states respect and secure the rights listed in CEDAW? (2) Are the states that have ratified CEDAW obligated to implement it, not only in virtue of the fact that they (or their former political

representatives) have ratified it, but also for moral reasons that are independent of such ratification? (3) Are the states that have not ratified CEDAW obligated morally, if not legally, to respect and secure the rights listed in it? (4) When, why, and how may the international community or any of its component agents (individual or collective) justifiably pressure or coerce a state (whether or not it has ratified CEDAW) to respect any or all of the rights listed therein? LP offers partial answers to the first three questions, in abstract and general terms (i.e., without specific reference to CEDAW) and with reference to only some of the rights it lists (those corresponding to the IEBHRs on LP's list). CA proposes different partial answers to the same questions, also in general terms, but with reference to all of the rights listed in CEDAW, and on the basis of different arguments. Regarding the fourth question, LP provides most of the necessary components of a good abstract answer to it, while CA has comparatively little to say.³⁷

CA does provide powerful arguments for securing the human rights of women and girls. These arguments are based on CA's central claims: that all human beings are entitled to respect, that all governments should enable their people to live lives worthy of human dignity, and that the ideas of human dignity and respect should be fleshed out in terms of Nussbaum's list of central human capabilities.³⁸ However, to the extent that CA's conception of the responsibilities of government or its interpretations of the ideas of respect and human dignity are open to reasonable dispute, so are arguments based on them. Therefore advocates for the human rights of girls and women have reason to base their arguments not only on CA but also on LP. And they can do so without inconsistency since, as I have argued, CA is not significantly incompatible with LP.³⁹

LP is a basis and source of especially powerful arguments for respecting and securing the basic human rights of women and girls. They are especially powerful in that they employ premises presupposed by any government that sincerely and plausibly claims to exercise legitimate political authority (i.e., claims that the people it requires to obey its laws are not merely coerced but instead obligated to obey them), and that requires not only men but also women to obey its laws. To regard women as obligated to comply with legitimate laws is to regard them as capable of doing so, thus capable of carrying out the necessary reasoning: it is to regard them as possessing the powers of rationality and reasonableness to at least the minimum degree necessary for compliance with legitimate law.⁴⁰ A government claiming legitimate political authority over women cannot consistently require them to exercise powers of reasoning and judgment, yet deny to girls and women the conditions and resources necessary for developing and exercising those powers.

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² Cambridge, MA: Harvard University Press, 1999 (hereinafter 'LP').

³ Cambridge, MA: Harvard University Press, 2006 (hereinafter 'FJ').

⁴ See, for example, *Women's Empowerment: Measuring the Global Gender Gap* (World Economic Forum, 2005). Feride Açar, Chairperson (1997-2004) of the United Nations Committee on the Elimination of Discrimination Against Women, has stated that "No country in the world has fully implemented the human rights of women, and full *de jure*, let alone *de facto*, equality has not been achieved anywhere in the world." ("Recent Key Trends and Issues in the Implementation of CEDAW," in *Gender and Human Rights in the Commonwealth*, [London: The Commonwealth Secretariat, 2004], p. 30.)

⁵ Shanthi Dairiam, “Progress, Achievements, Constraints and Key Priorities” in *Gender and Human Rights in the Commonwealth*, op. cit., p. 3. As of November 2, 2006, 185 states had ratified CEDAW. The USA is not among them: it signed the treaty in 1980 but has not ratified it (<http://www.un.org/womenwatch/daw/cedaw/states.htm>, read in January 2006).

⁶ CEDAW has more reservations than any other human rights treaty. Feride Açar, op. cit., p. 21.

⁷ Jack Donnelly, *Universal Human Rights in Theory and Practice*, second edition (Ithaca, New York: Cornell University Press, 2003), p. 3.

⁸ Here I will limit my attention to Nussbaum’s version of CA, discussing Sen’s only in relation to hers and only as she characterizes the relationship. For an account of the relation between Nussbaum’s and Sen’s views, see David Crocker, “Functioning and Capability: The Foundations of Sen’s and Nussbaum’s Development Ethic, Part I,” *Political Theory* 20 (1992), 584-612, and “...Part II,” in *Women, culture, and development: a study of human capabilities*, edited by Martha C. Nussbaum and Jonathan Glover (Oxford: Clarendon Press; New York: Oxford University Press, 1995), 153-198; also see Nussbaum’s “Capabilities as Fundamental Entitlements: Sen and Social Justice”, in *Feminist Economics*, 9 (2-3), 2003, 33-59 (hereinafter ‘CFE’).

⁹ Nussbaum expresses dissatisfaction with this: “The use of capabilities in development is typically comparative merely, as in the *Human Development Reports* of the UNDP” (CFE, 35).

¹⁰ *Women and Human Development* (Cambridge: Cambridge University Press, 2000), 70 (hereinafter ‘WHD’).

¹¹ Nussbaum has been revising and specifying the list so that it may “do real work guiding public policy” (“Capabilities and Human Rights,” *Fordham Law Review* 66 (1997), 277 (hereinafter ‘CHR’). One revised version of the list appears in CHR, 287-288, another in WHD, 78-80; the latest version, entitled “The Central Human Capabilities,” appears in FJ, 76-78.

¹² The categories are:

(1) “*Life*. Being able to live to the end of a human life of normal length....” (2) “*Bodily Health*. Being able to have good health, including reproductive health....” (3) “*Bodily Integrity*. Being able to move freely from place to place; to be secure against violent assault....” (4) “*Senses, Imagination, and Thought*. Being able to use the senses to imagine, think, and reason – and to do these things in a ‘truly human’ way....” (5) “*Emotions*. Being able to have attachments to things and people outside ourselves....” (6) “*Practical Reason*. Being able to form a conception of the good....” (7) “*Affiliation*.” (7A) “Being able to live with and toward others....” (7B) “Having the social bases of self-respect and non-humiliation....” (8) “*Other Species*. Being able to live with concern for and in relation to animals, plants, and the world of nature.” (9) “*Play*. Being able to laugh, to play, to enjoy recreational activities.” (10) “*Control over One’s Environment*.” (10A) “*Political*. Being able to participate effectively in political choices that govern one’s life; having the right of political participation, protections of free speech and association.” (10B) “*Material*. Being able to hold property...; having the right to seek employment on an equal basis with others;....”

¹³ FJ, 175. What she means by this is not clear. Is she saying that situations in which nations are unable to secure all of the capabilities of all of their citizens up to their threshold levels raise only practical, not moral questions? This would be an implausible view, so I hesitate to attribute it to her. The most plausible construal seems to be that the infeasibility or even moral impermissibility of implementing her conception of justice at a particular time and in a particular country undermines neither its justification nor its applicability to that country.

¹⁴ In addition to the passage from FJ, p. 256, quoted above, there are several other passages. For example: “Consider...the case of a nation that fails...to offer women equal property rights. ... So long as this nation is above a certain threshold in terms of democratic legitimacy, much though one might deplore the

inequalities of women under that state's constitution, it would not be right to intervene in coercive ways" (FJ, 258). Commenting on the genocide and mass rapes in Gujarat, India, in March 2002, Nussbaum says that there were arguments both for and against intervention, and that one argument against was the following: "So long as democratic processes in India are robust, as they were and are, we should prefer to allow them to take their course, out of respect for these processes themselves and the citizens involved in them, in the hope that over time duly elected officials and duly appointed courts will bring the offenders to book and prevent further abuses..." (FJ, 259).

¹⁵ Here are two examples: "What is the threshold of legitimacy? A reasonable accountability of government to people: and here Rawls's conception of a 'reasonable consultation hierarchy' may offer good guidance." (FJ, 259). "At this point Rawls might say that I have conceded his basic point: that we should treat nations as decent members in good standing of the Society of Peoples on a much weaker showing of liberal freedom and equality than we would demand within a liberal society. And indeed Rawls and I have converged in some respects on a set of practical principles." (FJ, 261).

¹⁶ "Rawls *clearly* thinks that if we conclude that another nation has defective norms we will intervene in some way, whether militarily or through economic and political sanctions" (FJ, 255, emphasis added).

¹⁷ In this section I briefly summarize ideas and arguments which I develop more fully in the following four articles: "Democratization as an Aim of Intervention: Rawls's Law of Peoples on Just War, Human Rights, and Toleration," in *Archiv für Rechts und Sozialphilosophie*, Beiheft Nr. 95 (Franz Steiner Verlag, 2004); "A Human Right to Democracy? Legitimacy and Intervention," in *Rawls's Law of Peoples: A Realistic Utopia?*, eds. Rex Martin and David Reidy (Blackwell, 2006); "Justifying Universal Human Rights via Rawlsian Public Reason," forthcoming in *Archiv für Rechts und Sozialphilosophie*; and "Human Rights, Global Justice, and Disaggregated States: John Rawls, Onora O'Neill, and Anne-Marie Slaughter," in *The Challenges of Globalization: Rethinking Nature, Culture, and Freedom*, eds. Steven Hicks and Daniel Shannon (Blackwell, c. the American Journal of Economics and Sociology, 2007).

¹⁸ It appears in the volume entitled *The Law of Peoples*, which includes a long essay entitled "The Idea of Public Reason Revisited."

¹⁹ I do not interpret Rawls as holding that states may legitimately act to enforce rights merely because the rights are justifiable via sound moral and philosophical arguments, even though they are not recognized in positive law.

²⁰ See *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971/1999), *Political Liberalism* (New York, New York: Columbia University Press, 1993/1996), and *Justice as Fairness* (Cambridge, Mass.: Harvard University Press, 2001). Hereinafter, 'TJ', 'PL', and 'JF', respectively.

²¹ "(a) Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle)" (JF, 42-43).

²² The principles of LP are as follows (LP, 37):

- (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 and social regime.

²³ I develop this argument in "A Human Right to Democracy? Legitimacy and Intervention," op. cit.

²⁴ This is not to say that they have been revised for the right reasons or in precisely the right ways.

²⁵ Here I disagree with Nussbaum's understanding of the term "a people" as used in LP (FJ, 243). For a lucid discussion of Rawls's use of this term, see pp. 423-424 and p. 427 of Samuel Freeman's excellent review essay, "Frontiers of Justice: The Capabilities Approach vs. Contractarianism" in *Texas Law Review*, December 2006, Vol. 85, Issue 2, pp. 385-430. I encountered Freeman's review after having written and publicly presented the present paper; I was pleased to see both that we agree and also that he does not present the arguments I present in this paper. Freeman discusses LP and Nussbaum's criticisms of it on pp. 421-427 of his review.

²⁶ "Among the human rights are the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly)." LP, 65, footnotes suppressed.

²⁷ FJ, 255. Nussbaum earlier made an almost identical statement in "Beyond the Social Contract: Capabilities and Global Justice," in *Oxford Development Studies*, Vol. 32, No. 1, March 2004, p. 10 (hereinafter 'BSC 2004').

²⁸ FJ, Ch. 4, section iv: "Justification and Implementation."

²⁹ "A decent hierarchical society...does not treat its own members reasonably or justly as free and equal citizens, since it lacks the idea of citizenship" (LP, 83). "To repeat, I am not saying that a decent hierarchical society is as reasonable and just as a liberal society" (ibid.).

³⁰ Rawls describes these societies as "burdened by unfavorable conditions," in that their "historical, social, and economic circumstances make their achieving a well-ordered regime, whether liberal or decent, difficult if not impossible" (LP, 4, 5, 90, 106).

³¹ Rawls describes these societies as "benevolent absolutisms" (LP, 4, 63).

³² The rights in the special class that Rawls calls "human rights" have three roles: (a) they "set a necessary, though not sufficient, standard for the decency of domestic political and social institutions;" (b) if a society fulfills them, then other societies lack adequate justification for coercive intervention; (c) they "limit admissible domestic law of societies in good standing in a reasonably just Society of Peoples." (LP, 80).

³³ FJ, 255. Note that Nussbaum says "will," not "should." If we interpret her statement as a prediction or as a statement of an empirical law of some kind, we find even less support for it in the text of LP.

³⁴ Rawls says: "the long-term goal of (relatively) well-ordered societies should be to bring burdened societies...into the Society of well-ordered Peoples." (LP, 106).

³⁵ She acknowledges it on p. 247 of FJ, then denies it on p. 316 of the same book.

³⁶ Sen has written about empirical research showing that famines do not occur in countries with political and legal systems that meet certain criteria, foremost among which are democracy and a free press. Sen argues that the main cause of famines is not a sudden sharp drop in food production but the failure of the country's government to take action to prevent starvation by distributing and supplementing the country's

supply of food. See Amartya Sen, *Poverty and Famines* (Oxford: Clarendon Press, 1981) and Amartya Sen and Jean Dreze, *Hunger and Public Action* (Oxford: Clarendon Press, 1989).

³⁷ It is important to keep in mind the difference between judging that interstate coercion is in principle justifiable in certain kinds of cases, and judging that in some particular case coercive force should be used. One can endorse LP while opposing the use of coercive force when other means of securing human rights would be sufficiently effective. On this topic see, for example, James Nickel's essay, "Are Human Rights Mainly Implemented by Intervention?" in Rex Martin and David Reidy (eds.), *Rawls's Law of Peoples: A Realistic Utopia?* (op. cit.). However, there is an especially strong moral case for respecting and securing a particular basic human right if a sound argument shows that a law-governed international community such as LP's Society of Peoples could justifiably include that right in its foundation charter.

³⁸ The capabilities approach "considers the account of entitlements not as derived from the ideas of dignity and respect but rather as ways of fleshing out those ideas." (FJ, 174).

³⁹ Here I have argued that CA and LP are not significantly incompatible. Samuel Freeman argues in support of the broader claim that CA is "more complementary to, rather than competitive with, Rawlsian contractarianism than [Nussbaum] intends" in his review article, "Frontiers of Justice: The Capabilities Approach vs. Contractarianism" (op. cit.).

⁴⁰ Here I am using the terms 'rational' and 'reasonable' to draw a distinction like that drawn by W. M. Sibley, according to Rawls's summary of Sibley's view: "[K]nowing that people are rational we do not know the ends they will pursue, only that they will pursue them intelligently. Knowing that people are reasonable where others are concerned, we know that they are willing to govern their conduct by a principle from which they and others can reason in common; and reasonable people take into account the consequences of their actions on others' well-being." (PL, 49, note 1).