

Just War

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John Rawls discusses just war doctrines in four of his works. The earliest place is in a few paragraphs in *TJ* (§58). The other three places are in the articles “The Law of Peoples” and “Fifty Years after Hiroshima” and in the book *The Law of Peoples*. But the discussions of the doctrines of just war in the two articles are mostly incorporated into his discussions in *LP*. There are certain recurring themes in Rawls’s discussion of the doctrines of just war. From his early discussion in *TJ* onward, Rawls holds the view that the doctrines of just war are part of a larger account of international justice. And the discussions in the later three works stress the importance of human rights to the doctrines of just war. Although in *TJ* considerations of just war are tangential to Rawls’s focus, by *LP* they are an important element in his non-ideal theory of international justice and are directly related to a central question of that work, namely what the proper scope of toleration is in the foreign policy of liberal peoples.

After briefly discussing aspects of the tradition of just war theory, I turn to Rawls’s comments in *TJ*. Then I move directly to Rawls’s best developed discussions of the doctrines of just war and related ideas in *LP* where I discuss the place of these doctrines in Rawls’s account of the law of peoples, the importance of human rights to the accounts, and Rawls’s account of the conditions in which the hope for peace is reasonable. Where there are relevant differences between the account in *LP* and the two articles I note them.

1. The Just War Tradition

Just war theorizing in Western moral and political thinking occupies the middle ground between two views. One view is attributed to Athens in Thucydides’ Melian Dialogue during the Peloponnesian war, namely that there is no moral standard that properly constrains the use of force in times of war. “[I]n human disputation justice is then only agreed on when the necessity is equal; whereas they that have odds of power exact as much as they can, and the weak yield to such conditions as they can get” (1839–1845 [431 BCE], vol. 9, para.

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89). Views similar to this in contemporary times are referred to as “political realism” or “international relations realism.” The other view is pacifism. Historically, the early Christian church interpreted several New Testament passages as requiring pacifism. For example, in the Beatitudes Jesus proclaims “blessed are the peacemakers” (Matt. 5:9). And in the Sermon on the Mount says “if any one strikes you on the right cheek, turn to him the other also” (Matt. 5:39).

The Christian view regarding war eventually changed. And it provided the intellectual basis for the contemporary doctrines of just war, which take wars to be morally permissible only if they satisfy moral criteria concerning (at least) the conditions under which a war may be initiated – *jus ad bellum* – and the means that may be used in prosecuting a war – *jus in bello*. St Augustine is perhaps the first Christian theologian receptive to the idea that wrongdoing may justify war, although he believes that everyone should be greatly pained by the circumstances that would provide the justification:

For it is the wrongdoing of the opposing party which compels the wise man to wage just wars; and this wrong-doing, even though it gave rise to no war, would still be matter of grief to man because it is man’s wrongdoing. Let everyone, then, who thinks with pain on all these great evils, so horrible, so ruthless, acknowledge that this is misery. And if any one either endures or thinks of them without mental pain, this is a more miserable plight still, for he thinks himself happy because he has lost human feeling. (1887 [426 CE], Book 19, ch. 7)

This is nothing like a theory of the justice of war, but it captures the basic attitude of the tradition. War is a regrettable evil, but one that can sometimes be justified.

The conditions justifying war get refined and developed by St Thomas Aquinas, who argues that a just war must satisfy three conditions. It must be prosecuted by sovereign political authority, not by individuals. It must have a just cause, involving a fault by those who are attacked. And the intention of those prosecuting must be right; they must seek to advance the good or at least avoid evil (1920 [1265–1274]). The first Western philosopher to seek an account of just war wholly on the secular grounds of natural law is Hugo Grotius. Grotius argues that humans naturally seek the society of others and that natural reason recommends that we do that which conduces to living in society (2005 [1625], Book 1, ch. 1). Natural reason finds war abhorrent to human society although possibly justified to preserve self or society (ch. 2). The secular natural law tradition of theorizing about the just war is carried on further by other writers in the modern tradition, including Samuel Pufendorf (1991 [1673]) and Emmerich de Vattel (2008 [1797]). Although Rawls’s account of justice is not based on natural law, as an heir to the modern tradition of social contract theory, he follows broadly in the footsteps of these just war theorists.

2. A Theory of Justice

The discussion of the just war doctrines in *TJ* is brief and entirely in the service of an account of conscientious refusal to fight in war. Rawls is not interested in making a new contribution to just war theory. Rather, his concern is to account for the conditions in which conscientious refusal to fight in war might be justified. These include when just cause for the war does not exist and when “the moral law of war is being regularly violated” (*TJ*, 334). Just cause is a

requirement of *jus ad bellum*; and “the moral law of war” refers to the principles of *jus in bello*. He also suggests that if these moral conditions are violated to a sufficiently strong degree, “one may have duty and not only a right to refuse” to participate in a war (*TJ*, 335).

Rawls understands the doctrines of just war theory in light of an extension of the original position in which parties represent “different nations who must choose together the fundamental principles to adjudicate conflicting claims among states” (*TJ*, 331). In this extension of the original position the parties “know that they represent different nations each living under the normal circumstance of human life,” but “they know nothing about the particular circumstances of their own society, its power and strength in comparison with other nations, nor do they know their place in their own society” (*TJ*, 331–332). This is an underdescribed version of a second original position. Not enough is known about the motivations of the parties, the interests of states, and the content of sets of principle to deduce the choice of such parties. Rawls offers only a general description that the “representatives of states are allowed only enough knowledge to make a rational choice to protect their interests but not so much that the more fortunate among them can take advantage of their special situation” (*TJ*, 332).

2.1 Jus ad Bellum

The result of the extension of the original position is a set of four principles for justice between states (*TJ*, 332):

- 1 The principle of equality of states: States have equal fundamental rights.
- 2 The principle of self-determination: The right of states to settle their own affairs without foreign intervention.
- 3 The right of self-defense against attack, including the right to form defensive alliances.
- 4 The duty to keep treaties, which are consistent with the other three principles.

Rawls claims that principle (1) is analogous to the equal rights of citizens in domestic justice. Both the extension of the original position to the justification of the principles of international justice and the analogy between the content of the two sets principle stand in the tradition of Vattel’s argument that the natural law of nations bears analogy to the natural law between persons.¹

Principles (2) and (3) concern matters of *jus ad bellum*. Principle (2) prohibits all wars that are contrary to the self-determination of states. Hence, a war of conquest that advances the interests of a state is unjust. This appears to give tremendous license to states to do as they please within their borders and to their populations. The license is not as great as it appears, however, since the extension of the original position that produces this principle is based on the assumption that “we have already derived the principles of justice as these apply to societies as units and to the basic structure” (*TJ*, 331). Principle (2) then assumes compliance with the two principles of domestic justice. Principle (3) licenses wars of direct self-defense and of aid to those who are defending themselves against a state or an alliance of states that is unjustly intervening. Taken together, principles (2) and (3) establish a version of the traditional *jus ad bellum* criterion of just cause (*TJ*, 332). A cause of war is just if and only if the war is one of self-defense, or of assistance in the self-defense, of a just state that has suffered aggression.

2.2 Jus in Bello

Rawls also notes the importance of considerations of *jus in bello*, and he departs from some traditional versions of just war theory by asserting that what is permissible *in bello* varies with the justice of the cause: “where a country’s right to war is questionable and uncertain, the constraints on the means it can use are all the more severe. Acts permissible in a war of legitimate self-defense, when these are necessary, may be flatly excluded in a more doubtful situation” (*TJ*, 332). He does not, however, elaborate on which *jus in bello* constraints he takes to be more severe in doubtful wars. Perhaps he has in mind the principle of noncombatant immunity, which in *LP* he takes to be defeasible in cases of supreme emergency.² Presumably, a war in pursuit of an unjust cause could never satisfy the requirements of a supreme emergency; and therefore intentionally targeting noncombatants would be “flatly excluded” when the cause is unjust.

Rawls does not explicitly state the principles comprising the doctrine of *jus in bello*. One thought for why this is the case is that the four principles of justice are to be taken as the ideal theory of international conduct, and principles of *jus in bello* need not be stated on the assumption of strict compliance since then there is no war. This assumption, however, seems contradicted by (3), the principle of self-defense against attack, which need not be stated if (2), the principle of self-determination, enjoys strict compliance. Thus, the assumption of strict compliance cannot explain why Rawls fails to lay out the principles of *jus in bello*.

Another interpretation is that Rawls does not take the principles of *jus in bello* to be principles of justice between states at all, but to be natural duties, which govern relations between persons but which “have no necessary connection with institutions or social practices” (*TJ*, 98). Rawls claims that the principles of *jus in bello* follow from taking the justified interests of states to be best served by the observance of the natural duties in times of war:

The representatives of states would recognize that their national interest, as seen from the original position, is best served by acknowledging these limits on the means of war . . . Granting these presumptions, then, it seems reasonable to suppose that the traditional prohibitions incorporating the natural duties that protect human life would be chosen. (*TJ*, 332–333)

Non-combatant immunity then seems to be an expression of the natural duties not to harm or to injure and not to cause unnecessary suffering (*TJ*, 98). The absence of *jus in bello* principles in the principles of justice between states would be explained by the architectonic of Rawls’s grander account that places the natural duties and the law of nations in different parts of the concept of right (*TJ*, 94).

The interpretation of the previous paragraph, however, is also problematic. For the quotation cited above has the principles of *jus in bello* chosen in the extension of the original position that sets out principles of justice between states. They would seem then to be part of the doctrine of justice between states, but a part that Rawls does not express. This is consistent with his introduction of the four principles with the claim that they are “only an indication of the principles that would be acknowledged” (*TJ*, 332).

Another problem is to understand the reasoning that leads to the principles of *jus in bello* in the original position. One possibility is that Rawls has them chosen by means of the following inference: The only reason to choose principles that would require violating natural duties would be their service in prosecuting a war of aggression, but prior principles have

already ruled out such wars. Hence, principles for the conduct of war should express natural duties. This seems faithful to the text of the quotation above, but it is dubious because the first premise is implausible. It might be very effective to fight a war of self-defense by targeting the civilian citizens of an aggressive state, as both the United States and England did during several bombing campaigns in World War II. Another possibility is that Rawls is asserting that the same kind of moral constraints that rule out wars of aggression also rule out violations of principles of *jus in bello*. Such an interpretation, however, requires taking violations of the principle of self-determination to involve violations of natural duties (since the *jus in bello* principles express natural duties). It is not clear how Rawls might maintain that, given the architectonic, which places the law of nations and the natural duties in different parts of the concept of right (*TJ*, 94). There may be no satisfactory interpretation of Rawls's reasoning leading to the choice of the principles of *jus in bello* in the extension of the original position. This is somewhat mitigated by a recognition that his purpose is to develop an account of conscientious objection, not a doctrine of just war. But insofar as the conditions of justified conscientious objection include violations of the principles of *jus in bello*, a better developed account of the reasons supporting the latter would better support his purpose.

2.3 Contingent Pacifism

Although Rawls affirms that in principle wars may be just when satisfying the conditions of *jus ad bellum* and *jus in bello*, he also expresses support for a policy of general and radical skepticism that this is usually the case: "Given the often predatory aims of state power, and the tendency of men to defer to their government's decisions to wage war, a general willingness to resist the state's claims is all the more necessary" (*TJ*, 335). He argues that conscientious refusal is justified when a war is unjust for reasons either of *jus ad bellum* or *jus in bello*. The unlikelihood of satisfying the demanding conditions of these doctrines lends support to the position of contingent pacifism.

[T]he conduct and aims of states in waging war, especially large and powerful ones, are in some circumstances so likely to be unjust that one is forced to conclude that in the foreseeable future one must abjure military service altogether. So understood a form of contingent pacifism may be a perfectly reasonable position: the possibility of just war is conceded but not under present circumstances. (*TJ*, 335)

3. The Law of Peoples

Rawls's first clarification that considerations of just war are part of the nonideal theory of international justice comes in "The Law of Peoples," where he claims: "the only legitimate grounds of the right to war against outlaw regimes is defense of the society of well-ordered peoples and, in grave cases of innocent persons subject to outlaw regimes and the protection of their human rights" (*CP*, 556). And in *LP* Rawls explicitly takes the right to war to be a matter of international justice. "Although domestic principles of justice are consistent with a qualified right to war they do not of themselves establish the right. The basis of that right depends on the Law of Peoples . . ." (*LP*, 26). Since the Law of Peoples involves a commitment to a set of human rights and is developed as a guide for extending the liberal idea of toleration

to foreign policy, Rawls's account of just war theory, unlike some traditional accounts, is enmeshed in a rich set of practical commitments for international relations.

3.1 *The Law of Peoples*

As in *TJ* Rawls takes the justification of the principles of international justice to follow from a choice of parties in a second original position. In *LP* this is a two-step process. In the first step representatives of liberal peoples choose principles. In the second step representatives of decent hierarchical societies (or decent consultation hierarchies)³ affirm the same set of principles. The principles are the following (*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 parties to the agreements that bind them.
- 4 Peoples are to observe a duty of nonintervention.
- 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 regime.⁴

With some differences in order these eight principles seem to include the four from *TJ*, with the possible exception of the first. The first principle of the *LP* – *LP* (1) – however might play the same functional role in the overall account as the first principle in *TJ* – *Theory* (1) – namely, the principle of equality. *LP* (2) is equivalent to *Theory* (4); *LP* (4), which states a duty of nonintervention, is the correlate of the right to self-determination stated in *Theory* (3); and *LP* (5) includes *Theory* (3), licensing wars of self-defense but also adding the prohibition of other grounds for war.

Rawls notices in *LP* that some principles are superfluous in the doctrine of the ideal theory of the Law of Peoples; among these he lists (7), which seems to stipulate observance of traditional principles of *jus in bello*, and (6), which requires respect for human rights (*LP*, 37). Principle (7) is not needed because given strict compliance to (4) there is no war. Principle (6) is redundant because liberal societies are committed to human rights along with other rights to liberal and democratic governance, of which human rights are an especially urgent subset (*LP*, 78–79). It is not clear at this point why, since the apparently superfluous reference to human rights is included, the complete package of rights to liberal and democratic governance is also not included. Presumably (6) is affirmed because parties have an interest in protecting their liberal conceptions of justice, and human rights are a piece of that conception. But that same interest would lead parties to include the full package of rights to liberal and democratic governance. Moreover, the representatives of egalitarian liberal societies would on the same grounds seek agreement on a principle affirming the importance of egalitarian distributive requirements.

The considerations of the previous paragraph have direct importance to Rawls's account of *jus ad bellum* because he takes both the duty to respect the external sovereignty of states

expressed in (4) and the right to exercise internal sovereignty, which seems entailed by (1), to be qualified by (6), requiring the observance of human rights (*LP*, 37–38). The argument in defense of these two claims would seem to be that because the parties have interests in the protection of their liberal conceptions of justice, they agree that intervention may be justified to protect human rights. But the same premise would also allow for the possibility of intervention to protect the broader set of liberal and democratic rights. And if the parties were only representatives of egalitarian liberal peoples, that premise would accept interventions to protect egalitarian institutions. Now, if Rawls had endowed the parties with especially great concern for a smaller set of urgent rights, there would be grounds for limiting the qualifications of (4) and (1) to observance of such rights. In the absence of such concern there are no grounds for limiting the qualifications of (4) and (1), as long as the parties represent only liberal societies.⁵ Hence, the inclusion of principle (6) begs the question of why both other rights to liberal and democratic governance and a principle of distributive egalitarianism are not also agreed upon.

3.2 Jus ad Bellum

The incorporation of the requirement that peoples observe human rights and the constraints that this places on invoking (1) and (4) entails a principle of just cause that is more complex than that contained in *TJ* (but recall in *TJ* the assumption is that states adhere to justice as fairness). A cause of war is just if the war is one of self-defense, or of assistance in the self-defense, of a state that has suffered aggression and the state observes human rights; just cause may exist even if the war is neither one of self-defense nor of assistance in self-defense, if the intervention responds to human rights violations that are sufficiently grave (*LP*, 38, 78, 80). Rawls leaves the notion of the gravity of the violation of human rights vague, but the one example he imagines (*LP*, 94 n6) of a society containing slavery and human sacrifice seems to fall short of genocide, which is on some accounts is the only humanitarian ground for intervention (see Walzer 2006, 108). There is in any case never just cause for war against a society that does not threaten the self-determination of another state and that honors human rights (*LP*, 92).

Human rights then play an especially important role in the account of *jus ad bellum*. Their observance is sufficient to make intervention unjust. And a failure to observe them, if sufficiently grave, may license intervention. There is a small set of rights that Rawls has in mind for this special role: life (including subsistence and security), liberty (including freedom from servitude and liberty – albeit not equal liberty – of conscience), personal property, and formal equality under the law (*LP*, 65).

Unlike the account of justice between states in *TJ*, which envisions only an international society of states adhering to justice as fairness, *LP* explicitly includes a class of nonliberal societies as full members of international society. These are decent hierarchical societies or decent consultation hierarchies. An explicit aim of *LP* is to work out how far a principle of toleration in international affairs may be extended beyond liberal societies. Since decent societies are imagined to be nonaggressive and to affirm the list of human rights stated above, they may not be attacked. Rawls also imagines another class of societies, benevolent absolutisms, which because they are nonaggressive and honor human rights may not be attacked (*LP*, 92). The existence of the latter is tolerated, but they are not full members of international society.

Decent societies are (i) non-aggressive, (ii) respectful of human rights, (iii) sufficiently legitimate to impose real legal obligations on their citizens, (iv) adherents to a common good idea of justice that takes into consideration what the conception of justice counts as the interests of everyone, and (v) in possession of a judiciary that has a sincere and not unreasonable belief that the law is guided by a common-good idea of justice. Because of these features they are respected as full members of international society (*LP*, 67). Additionally, Rawls holds that the condition that the judiciary possesses a sincere and not unreasonable belief that the law is guided by the common-good idea of justice requires that decent societies include institutions of group consultation (*LP*, 72–73). Because of their respect for human rights and their various legitimate institutions, such societies are worthy of the full respect of liberal societies, even though they are not just (*LP*, 84). This moral judgment, and not the interests and motivations of the parties in the original position, best explains the logically problematic inclusion of the set of human rights – an inclusion which begs the question of the absence of other rights of liberal and democratic governance – in the first step of the original position. Rawls seeks to extend the liberal idea of toleration to the relations between liberal and decent peoples.

In contrast to benevolent absolutisms and decent hierarchical societies, outlaw states fail to comply with the Law of Peoples. Recalling the Athenian argument, such regimes hold that “a sufficient reason to engage in war is that it advances, or might advance, the regime’s rational (not reasonable) interests” (*LP*, 90). They therefore fail to uphold principle (4), the duty of nonintervention; and they may also be oppressive regimes with internally “unjust and cruel” institutions (*LP*, 93). Unlike the existence of benevolent absolutisms and decent hierarchies, the existence of outlaw states poses a danger; and “all peoples are safer and more secure if such states change, or are forced to change their ways” (*LP*, 81). The last clause suggests that Rawls is open under the appropriate conditions to wars of regime change. Although peoples have the right of self-defense under principle (5), the long-term objective of policy toward outlaw states is to bring them into compliance with principle (1), which entails self-determination, and principle (4), which requires nonintervention, and when necessary also to force them to respect the human rights covered under principle (6).

In *LP*, as in *TJ*, Rawls does not discuss any other criteria for *jus ad bellum*. But his example of intervention to defend the human rights of slaves and the victims of human sacrifice only after the society has failed to respond to sanctions suggests a commitment to a version of the criterion of necessity. Furthermore, he might be interpreted as allowing preemptive wars in the case of sincere and reasonable belief of attack. For he says, “Well-ordered peoples, both liberal and decent, do not initiate war against one another; they go to war only when they sincerely and reasonably believe that their safety and security are seriously endangered by the expansionist policies of outlaw states” (*LP*, 90–91). If there could be such reasonable belief before an actual attack, then wars of preemption in those cases would be justified.

3.3 Jus in Bello

The human rights principle in *LP* avoids the puzzle in *TJ* regarding the justification of the principles of *jus in bello*. In *TJ* Rawls holds that there is some sort of connection between the commitment not to engage in wars of aggression and the affirmation of the principles of *jus in bello*. But the connection is obscure. In *LP* we have more to work with. If the principles of *jus in bello* are justified by a commitment to human rights, as one influential account

argues (Walzer 2006, 137), then the commitment to human rights in principle (6) secures the commitment to the principles of *jus in bello* in principle (7).

Despite the inclusion of (7) in the Law of Peoples, Rawls takes the principles of *jus in bello* to be primarily principles of nonideal theory (LP, 94). This is a plausible approach since if principles (4) and (5) were strictly complied with there would be no wars of defense against aggression, and if principle (6) were complied with there would be no wars to defend the human rights of citizens oppressed by their governments. Nonideal theory offers guidance in bringing about the long-term goals of ideal theory. Taking principles of *jus in bello* as principles of nonideal theory need not deny that they are also required by human rights or natural duties, but it is to emphasize their instrumental value in the long-term project of achieving international justice.

The instrumental value noted above helps to explain the six considerations that Rawls states regarding *jus in bello*. The first holds that the aim of a just war is a just and lasting peace, suggesting that wars are only ever justified as a matter of nonideal theory (LP, 94). The second holds that liberal and decent peoples only wage war against states with expansionist aims that threaten the security and institutions of liberal and decent peoples (LP, 94). Neither of these two consideration is strictly a principle of traditional *jus in bello* since both concern when it is just to resort to war. Considerations three through six are more in accordance with the traditional understanding of *jus in bello*.

Consideration three distinguishes between an outlaw state's leaders and officials, its soldiers, and its civilian population (LP, 94). Rawls's intention here is not made clear, but apparently the distinction serves certain traditional claims of *jus in bello* that involve discriminating between targets within an enemy population. For example, Rawls argues that the leaders are responsible for the war and are therefore criminals (LP, 95). The distinction between leaders and soldiers seems to entail that only leaders are subject to prosecution. Assuming the combatants observe the laws of war, they are not then to be treated as criminals when captured. Rawls does not develop the idea further but he might be gesturing toward the traditional principle that combatants are subject to benevolent quarantine.⁶ And because soldiers are not taken to be responsible for the war, attacking them is justified only on grounds of necessity (LP, 96).⁷ The distinction between both leaders and soldiers on the one hand and civilians on the other hand would support the principle of noncombatant immunity, although once again Rawls does not explicitly state the principle. Noncombatant immunity entails that the killing of noncombatants cannot be justified on grounds of military necessity.

Consideration four makes explicit the dual value of principles of *jus in bello* as protectors of human rights and as instrumental to just ends:

Well-ordered peoples must respect, so far as possible, the human rights of the members of the other side, both civilians and soldiers, for two reasons. One is simply that that the enemy, like all others, has these rights by the Law of Peoples. The other reason is to teach enemy soldiers and civilians the content of those rights by the example set in the treatment they receive. In this way the meaning and significance in of human rights are best brought home to them. (LP, 96)

Failures to comply with the principles of *jus in bello* are then wrong both because of the human rights violations that they constitute, but also because they frustrate the objectives of nonideal theory to propagate respect for human rights. Consideration five holds that the

proclamations of the leaders of well-ordered peoples should also play a teaching role; they should foreshadow the aims of a just and equitable peace (*LP*, 96).

Consideration six expresses the limits of justifying actions on grounds of military necessity by asserting that “practical means-end reasoning must always have a restricted role in judging the appropriateness of an action or policy. This mode of thought . . . must always be framed within and strictly limited by the preceding principles and assumptions” (*LP*, 96). Hence, although military necessity may dictate a strategy designed to kill as many enemy combatants as possible, it could not normally be grounds for accepting a strategy that involves targeting civilians in contravention of the principle of noncombatant immunity. This approach to practical reasoning is characteristic of Rawls. In *LP* the defining property of peoples, as opposed to states, is that they accept that their sovereignty is constrained by the law of peoples (*LP*, 27). “A difference between liberal peoples and states is that just liberal peoples limit their basic interests as required by the reasonable” (*LP*, 29). The constraint, expressed in the sixth consideration, is simply the mark of moral and reasonable action, according to Rawls.

3.4 Supreme Emergency

One important feature of international society, according to Rawls, is that it might give rise to circumstances in which it is reasonable to suspend the otherwise reasonable constraints on rational action. Rawls follows Michael Walzer in referring to these circumstances as “supreme emergencies” and generally adopts Walzer’s account of them (*LP*, 98–99).⁸ In particular these are circumstances in which the principle of noncombatant immunity is suspended. As an example of this, Rawls follows Walzer in discussing the British bombing of German cities after the fall of France in June, 1940, until the Soviet Union had demonstrated its capacity to fend off the Nazi assault in the late summer and fall of 1941, and perhaps even through to the end of the defeat of Germany in the battle of Stalingrad in February of 1943.

To justify the application of the supreme emergency exemption during this period, Rawls makes two claims: “First, Nazism portended incalculable moral and political evil for civilized life everywhere. Second, the nature and history of constitutional democracy and its place in European history were at stake” (*LP*, 99). He echoes here the characterization that Walzer makes of a military leader wagering to suspend the principle of noncombatant immunity during in response to a supreme emergency: “But I dare to say that our history will be nullified and our future condemned unless I accept the burdens of criminality here and now” (Walzer 2006, 260). Elsewhere Rawls refers to Hitler’s conception of the world and the Holocaust itself as “demonic” (*LP*, 20, 21).

Applying the supreme emergency exemption involves political judgment, which Rawls maintains might be disputed (*LP*, 99). Walzer argues that the bulk of the British terror bombing of German cities came too late to be justified by the exemption (2006, 261). Rawls rejects the fire-bombing of Japanese cities in the spring of 1945. And both philosophers strongly condemn the obliteration of Hiroshima and Nagasaki by atomic bombs (*LP*, 99–101).⁹ Clearly, the exemption may not be casually invoked. It is never the product merely of military necessity or even of there being a just cause for war. Walzer is unremitting in seeing employment of the exemption as a kind of serious evil, albeit a lesser one, perpetrated against defenseless civilians:

We can recognize their horror only when we have acknowledged the personality and value of the men and women we destroy in committing them. It is the acknowledgment of rights that puts a stop to such [utilitarian] calculations and forces us to realize that the destruction of the innocent, whatever its purposes, is a kind of blasphemy against our deepest moral commitments. (2006, 262)

The two justifying conditions that Rawls invokes for applying the supreme emergency condition to England's bombing of German cities are demanding. But they are also jointly insufficient since those conditions were in place later in the war as well. Rawls is implicitly relying on a third condition, a principle of a necessity.

The second of the two justifying conditions for applying the supreme emergency exemption to England's bombing of German civilian centers, that "the nature and history of constitutional democracy . . . were at stake," bears partial analogy to Rawls's priority rule for the equal basic liberties principle of justice as fairness:

The first principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty: There are two cases: (a) a less extensive liberty must strengthen the total system of liberty shared by all, and (b) a less than equal liberty must be acceptable to those citizens with lesser liberty. (*TJ*, 220)

The analogy to the first of these two conditions is straightforward. The violation of the human rights of the German civilians that occurred when they were killed and injured and their homes were destroyed is permissible only if it is necessary for the survival of the society of liberal and decent peoples, who honor human rights. In the case of the second condition of the priority rule for liberty Rawls has in mind justified paternalism, which allows us "to argue that with the development of recovery of his rational powers the individual in question will accept our decision on his behalf and agree with us that we did the best thing for him" (*TJ*, 219). But Rawls does not also require of the application of the supreme emergency exemption that it be retrospectively justifiable to the people who suffered as a result.

Rawls's affirmation of the supreme emergency exemption, however, does not sit entirely comfortably with his aim of admitting decent societies into the Law of Peoples. To see why, we must appreciate that Rawls takes the Law of Peoples to be a political conception of justice (*LP*, 104). As such, presumably it is directed solely toward the institutions and practices of international society; it is freestanding with respect to comprehensive conceptions of the good; and it is expressed by means of ideas that are fundamental to an international society of liberal and decent peoples.¹⁰ The content of the Law of Peoples also establishes the constraints on reasonable public criticism. "The Law of Peoples with its political concepts and principles, ideals and criteria, is the content" of the public reason in a society of liberal and decent peoples by means of which members debate "their mutual relations" (*LP*, 55). Rawls takes the constraints on debate to apply "whenever chief executives and legislators, and other government officials, as well as candidates for public office, act from and follow the principles of the Law of Peoples and explain to other peoples their reasons for pursuing or revising a people's foreign policy and affairs of state that involves other societies" (*LP*, 56). Moreover, the constraints on public reason apply to citizens considering such matters. "As for private citizens, we say, as before, that ideally citizens are to think of themselves *as if* they were legislators and ask themselves what foreign policy supported by what consideration they would think more reasonable to advance" (*LP*, 56–57). The tension arises because Rawls

freely admits that the supreme emergency exemption – a doctrine in the domain of international public reason – explicitly contradicts the moral principles of certain comprehensive conceptions of the good, Catholicism in particular, which never permits intentionally killing noncombatants. Otherwise-decent hierarchical societies organized around religious conceptions that reject all intentional killing can affirm the Law of Peoples only if they reject certain tenets of their belief.¹¹

The options available for responding to otherwise-decent societies religiously opposed to all intentional killing are not particularly satisfactory. Either they fall out of the Law of Peoples altogether, or the Law of Peoples is amended, or they have some sort of partial membership. Given that Rawls places so much emphasis on the disrespect that is expressed by nonadmittance as a member in good standing in the society of peoples (*LP*, 62), the first is not a happy option if the peoples on all other counts satisfy the conditions of membership. The second option is far from satisfactory if the arguments of Rawls and Walzer are correct regarding the importance of the supreme emergency exemption in certain limited circumstances. To prohibit the exemption is to allow the preventable triumph of demonic forces. Although according to some religious worldviews this may be an acceptable cost, to a great many other religious and secular people it is not. The third option comes at the cost of expressing a kind of disrespect. The reasons that otherwise-decent hierarchical societies employ to justify their objection will be considered outside the scope of public reason by other well-ordered societies. The objections will be judged unreasonable. This is especially important because in the circumstances envisaged by Rawls the stakes are very high indeed. Nonetheless the third option seems the best reconciliation.

Societies opposed to the extreme emergency exemption in international society might be treated on the analogy to treatment of Quakers in domestic society. Of the latter Rawls says that they

can join an overlapping consensus on a constitutional regime, but they cannot always endorse a democracy's particular decisions – here to engage in a war of self-defense – even when those decisions are reasonable in the light of its political values. This indicates that they could not in good faith, in the absence of special circumstances, seek the highest offices in a liberal democratic regime. (*LP*, 105)

Otherwise-decent hierarchical societies, which abjure all intentional targeting of civilians, could presumably never have a role in the security council of an international society organized according to the Law of Peoples. Still the analogy to Quakers is imperfect since Quakers do not necessarily reject either of the two principles of justice as fairness, but otherwise-decent hierarchical societies that reject all intentional killing seem to reject a principle of international justice, or more precisely a clause in principle (7) once it is fully specified.

3.5 *The Democratic Peace*

Rawls takes Kant's *Perpetual Peace* as a guide for the development of his views in *LP* (*LP*, 10). But nothing could be further from Kant's concerns in *Perpetual Peace* than the interest that Rawls has in incorporating principles of just war into the Law of Peoples. Kant is openly hostile to just war principles and is scathing in his criticism of his predecessors who sought to develop the doctrines of just war.

[I]t is astonishing that the word “right” has not yet been entirely banished from the politics of war as pedantic, and that no state has yet ventured to publicly advocate this point of view: For Hugo Grotius, Pufendorf, Vattel and others – Job’s comforters, all of them – are always quoted in good faith to justify an attack, although their codes, whether couched in philosophical or diplomatic terms, have not – nor can have – the slightest legal force, because states, as such, are under no common external authority; and there is no instance of a state having ever been moved by argument to desist from its purpose, even when this was backed up by the testimony of such great men. (Kant 1917 [1795], 131–132)

According to Kant, war can never be stopped by a merely moral doctrine such as those concerning the justice of war.

Rather than comforting a sorrowful and suffering Job with a moral doctrine, intelligent institutional design is called for to guide the creation of a world without the sorrows and suffering caused by war. Although Kant takes war to be evidence of “the depravity of human nature” (1917, 131), he nonetheless sees reason for hope:

This homage which every state renders – in words at least – to the idea of right, proves that, although it may be slumbering, there is, notwithstanding, to be found in man a still higher natural moral capacity by the aid of which he will in time gain the mastery over the evil principle in his nature, the existence of which he is unable to deny. (1917, 132)

In the domain of international affairs Kant sees our moral capacity as gaining mastery over the evil principle, not by limiting wars to just war principles, but by creating a *foedus pacificum* or covenant of peace among republican states that puts an end to war forever (1917, 134).

Republican states come together to form a peaceful international compact just as individuals come together to form a republican state. According to Kant the republican form of government alone is inclined to a peaceful compact because it is only in such a regime that the decision to go to war is in the hands of those who bear the costs of war.

If, as must be so under this constitution, the consent of the subjects is required to determine whether there shall be war or not, nothing is more natural than that they should weigh the matter well, before undertaking such a bad business. For in decreeing war, they would of necessity be resolving to bring down the miseries of war upon their country. This implies they must fight themselves; they must hand over the costs of the war out of their own property; they must do their poor best to make good the devastation which it leaves behind; and finally, as a crowning ill, they have to accept a burden of debt which will embitter even peace itself, and which they can never pay off on account of the new wars which are always impending. (1917, 122–123)

So, the advent of republicanism creates the possibility of a peaceful international order because states are controlled by those who would bear the costs of war.

There are echoes of Kant’s view in Rawls. “One does not find peace by declaring war irrational and or wasteful, though indeed it may be so, but by preparing the way for peoples to develop a basic structure that supports a reasonably just or decent regime and makes possible a reasonable Law of Peoples” (*LP*, 123). Despite the departure that Rawls makes from Kant by incorporating the principles of just war into the theory of international justice, Rawls’s invocation of the democratic peace stands in the tradition of Kant’s *foedus pacificum*. Rawls claims that history supports the empirical generalization that “major established democracies” do not go to war with each other (*LP*, 52). His explanation of these peaceful relations

is not, however, the same as Kant's. Peace does not come merely by ensuring that the decision to go to war is in the hands of those who bear its costs. Instead, Rawls endorses a version of Raymond Aron's thesis of peace by satisfaction (1960). "There is true peace among them [peoples] because all societies are satisfied with the status quo for the right reasons" (*LP*, 47). Continuing on, "Domination and striving for glory, the excitement of conquest and the pleasure of exercising power over others, do not move them against other peoples. All being satisfied in this way, liberal peoples have nothing to go to war about" (*LP*, 47).

The domestic conditions that Rawls takes to be necessary to produce satisfaction for the right reasons are demandingly egalitarian. Rawls discusses the following five conditions: (a) fair equality of opportunity, especially in education and training; (b) a decent distribution of income and wealth, assuring all citizens the all-purpose means necessary for them to make intelligent and effective advantage of their basic freedoms; (c) society as the employer of last resort; (d) basic health care for all citizens; and (e) public financing of elections and making available public information on matters of policy (*LP*, 50). These conditions are sufficiently egalitarian to rule out libertarian societies from having stability for the right reasons (*LP*, 49–50). This is a remarkable claim, which Rawls makes only in passing. But the account of the conditions of satisfaction for the right reasons entails that libertarian peoples would not normally be sufficiently egalitarian to be satisfied in the relevant sense. To the extent that this is the case, libertarian societies will not be parties to the democratic peace, and thus not be members in good standing in The Law Peoples.

The robust social conditions that would produce satisfaction for the right reasons explain by their absence "the great shortcomings of actual, allegedly constitutional democratic regimes" (*LP*, 53) which have used war to oust democratically elected governments in countries where democracy is less well established. "[T]he United States overturned the democracies of Allende in Chile, Arbez in Guatemala, Mossadegh in Iran, and, some would add, the Sandinistas in Nicaragua" (*LP*, 53). Rawls's diagnosis of each of these crimes against democracy is roughly Leninist:¹² "Whatever the merits of these regimes, covert operations against them were carried out by a government prompted by monopolistic and oligarchic interests without the knowledge or criticism of the public" (*LP*, 53). Additionally, "Though democratic peoples are not expansionist, they do defend their security interest, and a democratic government can easily invoke this interest to support covert interventions, even when actually moved by economic interests behind the scenes" (*LP*, 53). Rawls's solution, of course, is not Lenin's prescription for socialist revolution. Rawls holds that a liberal society that satisfies the five conditions above is one that both insulates democratic institutions from economic power and through distributive institutions produces a population that would be unmoved by the pleasures of dominating others.

This account of peace by satisfaction creates a second obstacle to the aim of incorporating decent peoples into The Law of Peoples. As these peoples are imagined by Rawls they contain neither the institutional mechanisms that would insulate political power from capture by economic interests nor the distributive institutions that would prevent the population from becoming sufficiently dissatisfied so as to be susceptible to the desires for glory and domination. In the absence of these, the basis for Rawls's extension of the democratic peace to cover decent hierarchical societies is lacking. Rather, than developing that basis in detail he merely stipulates that such people are peaceful.

The stipulation that decent societies are peaceful might be defended as unproblematic since Rawls claims his "remarks about a decent hierarchical society are conceptual" (*LP*, 75

n16). Moreover, he does not even suppose that liberal peoples satisfying the conditions for a satisfied people exist. “In the case of democratic peoples, the most we can say is that some are closer than others to a reasonably just constitutional regime” (*LP*, 75). But there are three problems with such a defense of the stipulation. The first is that it is in tension with Rawls’s reliance on the actual or alleged history of peace between major established democracies. If the concern is merely to develop the conceptual possibility of peace between states, then an appeal to history is superfluous. The second is that it is hard to understand why in the case of liberal societies Rawls would go to the effort of providing the institutional requisites for peace by means of satisfaction if nonbelligerence could simply be stipulated. Finally, and perhaps most importantly, the bare conceptual possibility of peaceful nonliberal peoples provides very weak grounds for a realistic hope for a peaceful world order comprising liberal and decent peoples (*LP*, 6).

The problem remains: if Rawls takes seriously the domestic institutional requirements necessary for peace by satisfaction, the hope for a peaceful order of liberal and decent peoples seems misplaced. Rawls maintains that it would be unrealistic to hope for an international society comprised entirely of liberal peoples (*LP*, 78). The account of peace by satisfaction suggests, however, that hope for a peaceful world order is perhaps best characterized as the hope for a world eventually constituted of egalitarian liberal peoples.

Notes

- 1 “We must therefore apply to nations the rules of the law of nature, in order to discover what their obligations are, and what their rights: consequently the *law of nations* is originally no other than the *law of nature applied* to nations. But as the application of a rule cannot be just and reasonable unless it be made in a manner suitable to the subject, we are not to imagine that the law of nations is precisely and in every case the same as the law of nature, with the difference only of the subjects to which it is applied, so as to allow of our substituting nations for individuals” (Vattel 2008 [1797], Preliminaries §6, 31).
- 2 The supreme emergency exception is defended in Walzer 2006, 251–263. In his later work Rawls explicitly agrees with Walzer (*LP*, 98–103). So, it might be that Rawls has something like that in mind in *Theory* as well.
- 3 The term “decent” does not yet appear in “The Law of Peoples.”
- 4 The first seven of these principles appeared first in “The Law of Peoples” (see *CP*, 540) in a different order.
- 5 This paragraph repeats an argument made in Moellendorf 1996 and in 2002, ch. 2.
- 6 For more on benevolent quarantine see Walzer 2006, 46.
- 7 See also Walzer 2006, 144–145 for the doctrine of military necessity applied to the justification for killing combatants.
- 8 For Walzer’s account see Walzer 2006, 251–268.
- 9 See also Rawls, “Fifty Years after Hiroshima,” and Walzer 2006, 263–268.
- 10 These three conditions are the approximate international analogues of the conditions for domestic society expressed in *PL*, 11–15.
- 11 A similar problem would apparently arise in societies affirming certain forms of Buddhism in which strictures on intentionally killing are even more severe. See Harvey 2000, ch. 6.
- 12 In *Imperialism: The Highest Stage of Capitalism* (1963 [1916]) Lenin argues that advanced capitalist societies are led to war to defend the economic interests that domestic capitalists have in foreign states, interests produced by the mechanism of monopoly capitalism domestically.

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