

# The Law of Peoples under the Empire

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*Document Version*  
Final published version

*Publication date:*  
2005

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*Citation for published version (APA):*  
Sørensen, A. (2005). *The Law of Peoples under the Empire*. Department of Management, Politics and Philosophy, CBS. MPP Working Paper No. 5/2005

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Download date: 10. Aug. 2022



**The Law of Peoples under the Empire**

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**WP 5/2005**

**MPP Working Paper No. 5/2005 ©**  
**May 2005**  
**ISBN: 87-91181-91-7**  
**ISSN: 1396-2817**

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## “The Law of Peoples under the Empire”

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1. Introduction: Just war

Bruce Springsteen once made huge crowds sing “War, what is it good for? Absolutely nothing!”, and by doing that created a wonderful feeling of being together for a good cause. This, however, is a perfect example of the kind of reasoning, which is at the same time constitutive and detrimental for practical philosophy. It is intrinsically ethical and political in the sense that it express a sincere hope for a change to something better, in this case, peace on earth, but it undermines the credibility of this aspiration itself by denying facts in an all too obvious way. Everybody knows that wars are good for something and someone. Wars are instrumental in achieving goals within the political and economical sphere; the problem is only that these goals can be difficult to justify within ethics and political philosophy as it is normally understood.

In a minimal sense the concept of just war specify that some wars might be justified. That marks an important distinction within the assessment of wars. In this sense the concept of just war is progressive in moral terms, since it makes clear that war is a human activity consisting of a complex of human actions, which like every other human actions can be more or less justified. War is not something natural like thunderstorms, vulcano eruptions or Tsunamis, which we simply must accept as a natural condition of life on earth. War is neither something which we just can regard aesthetically from a safe distance, experiencing with awe the sublime grandeur of the event, like Kant describes it in *Critique of Judgement*. War is not an event that simply happens. War is human activity, consisting of human action, which because it is the greatest man made evil always is in need of justification. The concept of just war in its minimal sense makes us responsible for only conducting war, if it as human action can be given legitimacy by a deduction from principles already accepted. This is simply a particular instance of the general idea of enlightened thought, stressing that human beings are – and must be – reasonable and rational creatures, which means that there can be – and must be – given reasons for every human action.

In this perspective the concept of just wars does not, however, say anything about the kind of justification needed, it does not say anything about the content, only something about the logical form. The question then is what makes a justification of war a legitimate justification. In traditional realist International Law war is legitimate when in the rational interest of the state. Clausewitz is usually taken to consider war as a part of the normal social and political life of human beings. Politics is taken to mean forcing the opponent to accept our will, and war is simply the continuation of this kind of politics with other means. War is to Clausewitz a political instrument and as such just as legitimately justified as politics in general. War is not something to be justified in it self; it is justified, if it is instrumental in effectively achieving legitimate political goals, which transfers to politics the burden of justification. This, however, just raises other questions such as what are legitimate goals within politics, or what is the nature of politics?

The realist pragmatic approach makes it possible to think of wars as in need of justification, and sometimes actually justified, namely if it is a rationally chosen means to a political end. But politics is not only the rational calculation of how to acquire power or wealth for a particular group of people by suppressing and exploiting the rest of the population. Politics is ideally about realizing political ideals beyond particular interests and must therefore be based on practical reasoning, values, ideas or norms, which serves the community as such, or even mankind. As Eisenhower once put it, “A government without ideology, is a conspiracy for power.” In other words, Clausewitz was simply wrong, and that is why political philosophy together with ethics has always been part of practical philosophy. In a practical philosophical perspective the idea of just war is therefore extended to something more than just being instrumentally efficient, namely that just war should be justified in relation to an idea or concept of justice.

Practical philosophy consists of ethics and politics; there is, however, a difference between ethics and politics, no matter how they are conceived of. Ethics concerns small scale relations between individuals, that is, ones relation to oneself and the other, whether these relation are thought of as immediate or mediated by a community, some universal principles, or God. Compared to ethics political philosophy concerns large scale and collective entities, that is, how the society as a whole should be structured and run mainly in terms of money and power. This implies primarily discussing, how the government should be formed, and how it can handle those, who are subject to its power. Still, in practical philosophy ethics and politics often converge, since a government consists of individuals just as the subjects, and both parties are expected to live up to universal norms for human beings. With regard to politics, something similar can be said in democracies, since government and governed can switch places, whereas authoritarian regimes make a more clear separation between those governing and those governed.

Following prevalent ways of thinking philosophically about normative questions, for a war to be just, it should either be conducive to realise justice as a consequence or in accordance with principles of justice. Both can make wars not only allowed for, but sometimes even an ethical duty for the ones adhering to the principles of justice specified, whether consequentialist or deontological, for instance principles of distributive justice concerning power or wealth. Planning to kill the opponent in a war is not about killing as such, but of doing away with injustice. This makes it possible to say that war is not intrinsically bad or evil, but can be justified in relation to justice, in short, that a war can be just in it self, and this brings war within the sphere of practical philosophy.

According to a typical consequentialist war is still to be justified instrumentally, as is any other human action; what is important is that the result realized by war is better than alternative possibilities in relation to a generally recognized value as for instance, universal happiness of mankind. Within such a perspective war can still be considered an evil in itself, but a particular war can be justified, if there is something worse than that particular war. It is only if war is considered – as above – the greatest man made evil in relation to the values accepted, that war cannot be justified as a duty by a consequentialist.

Deontology is in angloamerican mainstream philosophy traditionally thought of positively as justifying actions without regard of the consequences, doing the duty whether anybody likes it or benefits from it. Deontology in this sense can, depending on the principles adopted, justify either war or peace, and this in such a strict way that in the first case ‘just war’ almost becomes ‘holy war’, whereas in the second case it becomes a refusal of participating in any kind of war without

exceptions. This kind of justification, however, has been labelled – for instance by Rawls – as outright crazy (*ToJ* 26), and therefore not a position that can be held within a reasonable practical philosophy, that is, not something to be taken serious as a position based on practical reason. There can only be practical philosophy if the reason employed in the reflections is sensitive to the both the sufferings and the good life – the happiness, if you like – of human beings. It is only within a religious perspective that war can be intrinsically just and for some even holy, but having such deontological justification for the idea of just or holy war is dogmatic, fundamentalist or fanatical; it abides the rules of formal deductive logic, but is beyond the idea of practical reason, which can be considered constitutive of practical philosophy.

Acknowledging the religious aspect and thus the ethical weakness of this traditional conception of deontology has in the last decades reduced deontology to be conceived only negatively in relation to the dominant consequentialist reasoning as non-consequential restraints, that is, duties which cannot – ought not – be rationalized away in a rational calculus of means and ends. In this negative sense deontology functions as a justification of ethical safeguards against instrumentalist reasoning; it is therefore not possible to think of a deontological position in this sense, which could justify war as just.

In stead of making consequentialism and deontology the point of departure for an ethical discussion of just war, one can as a matter of principle state that the actions that constitute war must never merely be considered technically, but always also ethically and politically. Warfare is a sum of actions concerned with human beings and relations, and employing the Aristotelian distinction between *praxis* and *poiesis*, war cannot just be a technical activity constituted by doings with goals outside themselves, but must be an ethical or political activity constituted by actions, which have their goals in themselves. It must not the same to act in relation to things and to human beings. As Kant puts it, human beings must never be treated merely as means, but always also as goals in themselves.

This approach, however, makes it hard ever to justify war, since war precisely is the activity, where some people – kings, politicians, generals – send other people – soldiers – out to fight on behalf of the firstmentioned to achieve goals, which are determined by the same firstmentioned, that is, kings, politicians, generals. In other words, in war the chief of command has to be strategic, calculate gains and losses on the battlefield, without knowing the rank and file, and that makes it very difficult not to treat the majority of the human beings necessary for conducting a large scale war as merely means.

This, however, also makes obvious, that even though both those governing and those governed face ethical issues in relation to war, the perspective and the particular cases are very different. Ethics as such must presuppose some degree of freedom in the choice of action, but it makes a big difference whether things are seen from above or below in a society. Sometimes a government must live up to its political responsibility for the community and do something, which the individual citizens consider unfair or wrong, and the political question of just war is, if conducting a war belongs to this class of things or not. The ethical question of just war must be posed in a another way, since the scale and perspective is determined by the individual, and it must also reflect that ethical principles can have different meanings and consequences depending on where in society the action in question has to be made. The ethical issues facing a secretary of state in relation to war are different from those facing a conscript soldier and the ethics of just war thus will look very different from the two perspectives. Thinking ethics as constituted by principles, which hold for all people under all

circumstances, is religious in the same way as criticised in the case of deontology, and therefore not reasonable in the practical philosophical sense.

Within the perspective of ethics, then, war cannot be anything but bad or evil. The only question is how bad it is, how great an evil, it is to be considered. Is it simply hell on earth, or is it something which can be considered justified in some special cases? Even though war in general is hell, not all wars are equally bad. In other words, can it within the perspective of ethics be both justified and just to reason mainly instrumentally, calculating the expediency of war in relation to higher order interest of humanity? Or is war so bad that a moral philosopher must let that kind of reasoning be restricted by deontological considerations? Or is war simply not allowed in an ethical perspective?

## 2. The idea of just war according to Rawls

Rawls *Laws of Peoples* is presented as a development of the indication in *Theory of Justice* of how to apply 'justice as fairness' to international law (*LP* 4). It is also presented as a part of *Political liberalism*, as the principles that should govern the foreign policy of liberal peoples (*LP* 82). However, in *ToJ* Rawls did not make the distinction between 'political' and 'comprehensive' doctrines (*PL* xviii), and since *PL* focuses on politics, the Rawls ethics of just war must be found in *ToJ*, whereas *LP* treatment of just war within the limitations of a political doctrine must be expected to be different.

In *ToJ* the question of just war is clearly treated as an ethical question, namely within the perspective of the possibility of a justification for civil disobedience and in particular a justification of refusal of individuals to carry out certain acts of war with reference to *jus in bello* and conscientious refusal to participate in war with reference to *jus ad bellum* (*ToJ* 331). This justification is according to Rawls to be conceived of in political terms with reference to justice as fairness, but still the point of departure is one person confronting an ethical problem or dilemma. When it comes to refusal to carry out certain acts of war, Rawls simply sticks to well acknowledged principles of international law, which makes it legitimate for a soldier to act in accordance with his "natural duty" and not his "duty to obey" and therefore decline following orders.

When it comes to refusal to participate in war Rawls is more subtle. He admits on the one hand that conscription is permissible, if it is demanded for the defence of liberty wherever it might be threatened (*ToJ* § 58, 334), that is, not just at home in the US, but by implication also in Korea or Vietnam. This brings him on line with official cold war propaganda of that time. Then on the other hand, he says that if the objectives of war is economic advantage or national power, which infringes the liberty of other peoples, then citizens has the right to decline doing their military service. And even more, if the aims of the conflict are dubious, one may have the "duty and not only the right to refuse" (*ToJ* 335). For Rawls what is needed is not general pacifism, but "a discriminating conscientious refusal to engage in war in certain circumstances". General pacifism Rawls considers unworldly, no doubt because of the arguments against deontology mentioned above. What is most important for Rawls, however, is that given the "often predatory character of state power" (*ToJ* 335), civil disobedience against conscription can contribute to making unjust wars impossible.

The principles that can justify conscientious refusal in both cases is to Rawls simply the familiar principles of international law, and these principles must be justified by considering nations as the parties in the original position restricted by the veil of ignorance regarding their power and strength.

Even though the original position is thought of as applicable to states and the justification of their foreign policy, Rawls' main concern is to justify disobedience to the state, and the primary individual parties involved in the original position are the soldier and the citizen. It is their rational interest which makes a justification acceptable and therefore legitimate. The sovereignty rests in the people as a sum of individuals, which means that political legitimacy comes from below, and that the state is a problem in itself.

This is not as clearly the case in the political doctrine of *PL* and *LP*. Whereas Rawls in *ToJ* talks indiscriminately of 'state' and 'nation', in *LP* he clearly distinguishes between the two (*LP* 25), and it is from the concept of 'nation' as a cultural unity that he develops his concept of 'people'. Peoples have governments, but the power of governments and thus states are limited by the power of the peoples, which in turn must be in accordance with the 'law of peoples' (*LP* 26). Law of peoples is the principles, that should govern international relations whether the peoples are united by a state or not. The people is the basic entity, which should count in international law, not the state. But the people are no longer a collection of liberal individuals with natural rights and duties. In *PL* people is not a central term. The ideal is a liberal society, which respects the political doctrine of liberalism and the ideals of an overlapping consensus of reasonable comprehensive doctrines. Rights can be considered as parts of both comprehensive and political doctrines (*PL* 109), and the basic moral duty in a liberal political society is the duty of civility, that is, the duty to be ready to discuss in a reasonable way the justification of principles on which the society should be governed (*PL* 217 f.).

However, in such a conceptually ideal society apparently there is no need to consider the moral duty sometimes to disobey those in command. The perspective in the justification has been displaced from the individual negotiating the best possible contract to the ideal ruler wanting to organize the collective the best way possible for the citizens, and the traditional liberal distrust in power out of principle is not as clearly marked. Even though Rawls thinks that a community which shares a comprehensive doctrine can only be upheld by state repression (*PL* 37), he nevertheless takes over the collective perspective of communitarianism.

In *LP* this has implications for the idea of just war. Rawls distinguishes between 'liberal people', who within a 'liberal society' have a democratic constitution, and 'decent hierarchical people', who in their 'decent hierarchical societies' only have a 'decent consultant hierarchy', which allows the people to be heard. Both are 'well ordered' peoples, who respect basic human rights, which are necessary for any system of social cooperation, and human rights are thus not the same as liberal democratic rights. In this respect well ordered peoples and societies are different from 'outlaw states', which precisely because of their lack of respect for human rights are intolerable for all well ordered people. The basic law of peoples is an ideal conceptual theory, but conditions are not ideal in the real world, and well ordered people therefore need an 'nonideal theory' to guide them in how to treat 'non-well-ordered' peoples (*LP* 89). This non-ideal theory should then consider which policies and courses of action can be morally justified and are politically possible, and it is in this connection the question of just war arises.

Rawls is again rather traditional in his recommendations, following the principles of modern international law, and stating as both a fact and a norm that well-ordered people do not wage war against each other (*LP* 94). When it comes to *jus ad bellum* the controversial point is that Rawls allows for military interventions in sovereign states in two cases. In the first case interventions are allowed, if at not-well ordered "states expansionist aims threaten the security and free institutions of



well ordered regimes and bring about the war”, which – taken to limit – can legitimate preventive attacks at the conceptual level. The second case concerns human rights violations, where – if all other means have been tried – intervention is “acceptable and called for” (*LP* 94), making intervention not just a right, but a duty. When it comes to the conduct of war, *jus in bello* the only controversial point is Rawls’ admissions to realist politics when it comes to non-combatants. In a war against non-well-ordered people Rawls allows for a ‘supreme emergency exemption’, which in extreme cases can justify mass destruction of civilian targets including the civilians themselves (*LP* 98-9).

Again Rawls is in line with official US rhetoric, where the Bush administration has labelled some specific states as ‘pariah’, ‘rogues’ and ‘outlaws’, constituting the famous ‘axis of evil’, an expression, which in itself makes it a legitimate concern for all decent people to engage in criticism and consider armed intervention. It is the conceptual duty of any good person to fight evil. Rawls is careful to distinguish between these states and the people, who must suffer living within the sphere of outlaw power, but by generally making people and not states the active part in the fight between well ordered and not well ordered, he blurs the perspective from which he is speaking. In *LP* the concerned parties are not those people repressed by an outlaw state, but those well ordered peoples in other societies, who witness the suppression of the not well ordered people. The argumentative weight is not put on the right of any people to overthrow their own government under certain conditions, as it is stated in the American constitution, but on the duty of well ordered people to assist not well ordered people by a military intervention to overthrow their outlaw state. Just war in the strong ethical sense is then allowed on the conceptual level, if the attack at the same time can be justified as a defence of the human rights denied to people in an outlaw state.

In the case of well ordered peoples, it is unclear who is actually to be instrumental in the realization of the law of peoples. Rawls speaks in the name of peoples as a cultural unity united by common sympathies, but backing up the collectives concern of well ordered peoples for human rights is very different from backing up an individuals right to refusal to participate in war. In *LP* the individual has no ‘natural duty’ to back up his or her refusal to participate in wars conducted by decent or liberal people. The weight of the argument is put on the duty to fight violators of human rights, not the duty not to participate in illegitimate war. By conceptually making the people the basic entity of international relations and not making clear who is in command of that entity, Rawls makes himself conceptually blind to the possible conflicts between individuals and collectives governed by other individuals in well ordered societies. Rawls put his faith in the ideal of the ‘statesman’, but that seems a very weak conceptual solution for a liberal democratic society of the possible conflicts between individual and people. Both hierarchy and democracy can in *LP* be legitimate political structures, and there is no backup to the individual, who suspects the picture of an outlaw state to be created by errors, ideological blindness or propaganda of mass-medias or of the government. Well ordered peoples are apparently to Rawls self governing, active political entities, in which there are no conflicts of interests or values between classes, groups or individuals, and which cannot as a whole be wrong or biased. With Rawls liberalism has become something very different from the original conception, which is now denounced as libertarianism (*PL* lviii).

Whatever the reason – being struck by Bush the older and Clintons doctrine of a new world order and humanitarian intervention based on respect for international law as organized by UN, or simply identifying gradually more and more with the ruling classes of a society – Rawls does not consider the conflict of interest between peoples and individual as a conceptual problem in the same way as he clearly sees the conflict between state and citizen to be a problem. Away is the ethical dilemma

confronting the citizen, away is the perspective of man as such when confronted with war, and therefore away is the specifically ethical approach to the discussion of just war. We are left the so-called 'realist utopian' public reason of the people as a self-governing collective entity, but this political reason is very close to the realist *raison d'état*. Rawls is therefore correct in calling his Laws of people utopian in the traditional political sense; the question is whether it is a realist political utopia on conceptual terms, or it is just another rationalist construction, which unconscious of its own ideological bias, naively aims to justify the universal hope for perpetual peace. Is it, to use Kant's words, just another adventure of reason, or does it keep within the boundaries of experience? To answer this question, I will now turn to one interpretation of what the current empirical conditions are for international law, namely Hardt and Negri's *Empire*.

### 3. Current changes in political sovereignty according to Hardt and Negri

For Hardt & Negri the return of the discussion of just war is connected with the recent change in the concept of sovereignty, which in turn is connected to the material changes caused by the change in the mode of production and distribution. In short, taking the concept of just war seriously is part of the political ideology of Empire, that is, of a world dominated by post-modern globalized market economy. Empire thus in the context of international law threatens to undermine one of the great achievements of the 20<sup>th</sup> century, namely the ban of all kinds of military aggression, no matter what the pretext. This ban in combination with the acceptance of national sovereignty limited the idea of just war to merely defending oneself or ones allies against aggression; one nations attack on another was simply wrong. Even Hitler recognized the force of international law by stating as his reason for engaging in war that German nationals were in acute danger, first in Sudeterland, and later in Danzig. However, as we have been made well aware of today, this concept of international law does nothing to help those populations, who are unfortunate to live under not well ordered regimes. International law is then instrumental in banning wars, but it does not ban suppression and exploitation within the recognized boundaries of a sovereign nation.

International law has always as its only basis of legitimacy had consensus (*E* 18), and it has never been stronger than this consensus, all the time threatened by both realist politics of states, economical interest and ideological forces. So international law has not ruled out wars, but has created institutions, which has condemned for instance US mining of Nicaragua harbours and the ethnical cleanzning in former Yugoslavia as unlawful. What worries Hardt and Negri is that the concept of just war involves a banalization of both war itself and of the enemy. If war is considered instrumental in achieving the absolute ethical goals of world order and peace, that makes war justified in it self as an ethical instrument (*E* 12-3), just as in the traditional holy war concept mentioned above. The concept of holy war is legitimized by an ideal of a universal order. What is new is that it for the first time is possible to talk about the global market as something empirical and that the political world order of Empire is global in the same sense.

In this world order the nation states, which were the fundamental entity of the world order in the 20<sup>th</sup> century, are gradually losing their importance and legitimacy, and in stead the individual becomes the basic entity as it is shown by importance given to the concept of human rights. Hardt & Negri shows that actually this development has been underway for a long time, prefigured by Hans Kelsen, who already around the First world war argued that the national state was an obstacle to the realization of the idea of right. Kelsen supported the idea of a universal state and later the formation of United Nations, and Hardt & Negri considers the actions and policies of UN as a

whole to be guided by the realization of this “fantastic utopia” (*E* 6). It is within the experiences with the UN that they see the emergence of Empire as a juridical concept, and their aim is to explore the notions of right and legitimate authority in the imperial constitution, which they see as emerging in the development of Empire as the new global order.

As mentioned Hardt & Negri see the renewed prominence of the concept of just war as a step towards banalization of war, and by its very scale Empire actually adds to this. The decline of the sovereignty of the nation-state and the rise of a global sovereignty through UN makes the concept of war almost nonsensical. Wars are fought by two or more sovereign powers, and the order of Empire sovereignty is for the first time universal and undivided, realizing the concept as it was originally conceived of by Bodin (*E* hhh). Within the global order of the emerging Empire, which by definition aims for peace and stability (*E* hhh), wars can only be considered police actions, interventions, or civil wars (*E* 189). All of these are exceptional cases or emergency measures to be applied only in exceptional situations, but what is normal and exceptional is something, which depends on the power to define both what is exceptional and what are the right of the police, just as it depends on the capacity to deploy the necessary police force. Together the definitional and the material power define the imperial model of legitimate authority (*E* 17).

This could make one think that what Hardt & Negri is describing is just the rise of USA as the new imperialist superpower, spending more than the rest of the world on what they call ‘defence’ and using this defence wherever they see it fit. This is however not the case. Hardt & Negri insists that the concept of sovereignty is in the process of being redefined as part of the material development of the global market economy, and that this transformation not only affects the relations between nation states but also the domestic laws of nation states, including US. In this process imperialism is only one step towards the realization of the imperial sovereignty of Empire.

On the material level there is according to Hardt & Negri an intrinsic relation between capitalism and expansion, and capitalism thus inevitably leads to imperialism (*E* 221). Following Marx they argue that the surplus value extracted from the exploitative production must be realized through consumption, but as the productivity rises the powers of consumption in the local working class diminishes, and this demands an expansion of the market (*E* 224). The process of realization shows that capitalism needs an outside, but this outside is internalized through the process of capitalization, which is the continuing opening of primitive accumulation in non-capitalist environment, in territories, social forms, cultures, productive processes. This accumulation brings the outside inside, and thus makes it necessary to expand further on. The process of realization and capitalization thus undermines each other (*E* 227), and this was what made Rosa Luxemburg, Hilferding, Lenin and other Marxist think that imperialism was the terminal stage of capitalism.

Hardt & Negri, however, draws attention to Lenins critique of imperialist organization of exploitation, which tends to create monopolies, and thus undermine the competition and development of capitalism towards the full realization of the world market. According to Lenin capitalism must in the end overcome the imperialist stage and destroy the barriers between the inside and the outside (*E*234). This is precisely what happens with capitalism at the stage where the order of Empire emerges and the nation states declines (*E*236).

According to Lenin the political significance of imperialism is the export of class struggle and civil war in order to preserve order and sovereignty at home (*E* 232). But as capitalism internalizes the outside, the class struggles cannot be exported, and the modern New Deal capitalism of high

production and high consumption develops an order, which Hardt & Negri with reference to Foucault calls a disciplinary society, which in fact is the factory society (*E* 243). As they say, modernisation is industrialisation (*E* 280). To make the story short, this society creates a more free labourer than the traditional society, and thus a new desire for liberation (*E* 252), but such a disciplinary society cannot in the end fulfil the desire for liberation and control the liberalization of desire itself (*E* 256). The social struggles for liberation forced a rise in the cost of reproduction, but also a change in nature of labour (*E* 273). The model for labour is no longer just material production, but immaterial handling of information and human care (*E* 293). Faced with this situation, capitalism, however, simply adjust to the new forms of labour, reproduction and consumption. Capitalism no longer looks outside, but rather inside its domain, its expansion is thus intensive rather than extensive (*E* 272), and the subsumption of labour under capital real rather than just formal (*E* 255). Thus transformed, today capitalism appears as healthy as ever with a very robust accumulation (*E* 270).

So Empire is not just the imperialist order in a world now dominated by US military. It is a political and juridical order for capitalism beyond the limitations of imperialism, and the realization of imperial sovereignty is reflected in the development of US constitutional history (*E* 168). In the US constitution liberty is made sovereign, and sovereignty is defined as radically democratic with an open and continuous process of expansion. US sovereignty is located in space, but always in the process of transgressing its frontiers, liberating desire to free activity beyond restrictions. Sovereignty in this form does not presuppose scarcity, as in the traditional European form of sovereignty (*E*169). US sovereignty prefigures imperial sovereignty, where the space is always open (*E* 167) and which does not presuppose any spatial location at all (*E* 190). The power of the new global order does not have a special centre of power, but only a centre of control, which coordinates interventions. Neither can imperial sovereignty be defined by a borderline between an inside and an outside. And it is not defined by people; people are spatially located in relation to its outside (*E* 194-5), whereas the multitude is everywhere. US's enemy in the war against terror is not spatially located, it is nowhere and everywhere, inside and outside. War is not something special, which needs to be declared formally, but something banal, which is defined as intervention and is regarded as police-actions within Empire. Interventions against terrorists and to protect human rights can be made everywhere, and the separation of the tasks of CIA and FBI becomes increasingly vague (*E* 189).

#### 4. Consequences for the idea of just war and international law of this concept of sovereignty

Hardt & Negri brought us from a focus on the axis of evil different from us to the development of evil empire, which we are part of. What can be said of Rawls concepts of just war within such a framework? A short answer is that his development from *ToJ* to *LP* reflects the transition described by Hardt & Negri, since Rawls goes from accepting international law as such legitimizing the refusal to be conscripted, to formulate a law of peoples that legitimize the disregard of nation states and the intervention by some people in the affairs of other people, if the state of the latter is defined as outlaw. Rawls also allow for exceptions, where the people and not the rulers can be the target of attack, and in neither of the cases does he reveal any consciousness of the importance of the inequalities regarding the power to define and the capacity to intervene. He might say, that he is only developing the conceptual scheme for justifying war as just, but even on the conceptual level these inequalities must be reflected, if such a justification is not to serve as mere ideology for those in power.

Rawls, Hardt and Negri all share the liberal conception of the state as a repressive institution, which we were better off without, but when it comes to the other entities – people, nation, community and multitude – which can influence world order, they depart. For Rawls the nation is tied to the people, but this nation is only political in Rawls' restricted sense, not defined by accepting a comprehensive doctrine. Hardt & Negri ties the nation to the state, stating that a nation is only liberating in opposition; in power a nation is as a nation-state always repressive (*E* 109, 336). For Rawls it is the community, not the nation, which demands the constant support of state repression (*PL* 37), whereas Hardt & Negri links the community to the multitude. However, whether or not the community is pluralist or monist, one can ask as in the communitarian critique, if Rawls' distinction is viable, if people can really distinguish in their views and actions between the basic primary goods, which is a political matter, and other goods, which belongs to a comprehensive doctrine, and should not be considered within the political discussion.

Hardt & Negri thinks of desire as something, which constantly can develop its form and change its object (*E* 349), and this must affect what is and can be considered desirable. If one does not presuppose that something can be universally desirable, independent of time and place, then it is then very hard to uphold a distinction like the one made by Rawls. Still, one can argue that precisely because Empire is a stage, which we have to go through in order to realize the communist ideals of self-valuation, cooperation, and self-organisation (*E* 409) worldwide, Rawls actually with his intellectual authority helps to legitimize a concept of just war, which will contribute to the both ideal and necessary historical development of sovereignty.

However, one could also argue that ideals as those which are articulated by international law only function properly as ideals, if they are thought to be universal and utopian in this way, that is, that they should not only be considered regulative ideas in the Kantian sense, but actually be regarded as true ideals which ought to be realized as such by the actors on the international scene. History is driven forward by what Lenin called useful idiots, and international law should therefore be formulated in terms of unconditional restrictions in the hope that the people of action actually let themselves be guided by these restrictions. In this case, however, Rawls is not unconditional enough, letting himself be influenced by the current decline of international law, whereas Hardt & Negri's utopian ideal beyond Empire gets more legitimacy, being the answer to the unconditional strive for liberation of human desire. As it is often stated today, the recognition of such ideals as unconditional and universal tend to create fanatics, but without this kind of closure, no action is possible. In other words, I do not really know what to say!

The question at stake between the two approaches is something fundamental, namely whether it is actually possible for people to distinguish in a final way between a comprehensive and a political point of view, and if this is possible, whether they can let their action mainly be determined politically out of an unchangeable conception of public reason? Or on the other hand, if their actions will always be determined by a historically formed conception of desire and what is desirable. Ought implies can, and this question is crucial to determine whether Rawls' law of peoples can be considered a realist utopia, or is simply a rationalist dream. Rawls let reason play a bigger part in the general motivation behind an action than Hardt & Negri, and the historical examples of civilized social life can be brought forward to support that trust in reason. Hardt & Negri would claim that there is a darker side of every civilisation, that civilisation presupposes discipline from outside or internalized control, and that desire can get crumpled in the process.

But even if the political position in *LP* is not so easily justified, one can still ask whether Rawls ethical approach to the question of just war in *ToJ* is justified. Here the justification is given by, what a rational and – adding the addition of *PL* – reasonable individual would consider in his or her best interest in the original position. However, since Rawls in *ToJ* accepts the well established principles of international law as the most likely outcome of such a process, one should simply accept being drafted, if the war can be justified accordingly. But here we are taking the perspective of the individual, which is not immersed in some unspecified acting collectivity, and that makes it possible to formulate the possible conflicts between individual and collectivity as part of the considerations, which has to reach a reflective equilibrium, and this secures a critical distance between individual and collective, which is absolute essential, when the collective wants to stage a so-called just war.

To sum up: In an ethical perspective, I do not see any legitimacy in the idea of just war. War is inherently instrumental with regards to human beings, and this cannot be right. One has therefore very strong reason to refuse a draft on moral grounds; the only reason Rawls can argue for the legitimacy of conscription as such, is because he confuses the political and comprehensive perspective in *ToJ*. Conscientious refusal is to be based on a comprehensive doctrine, not a political. Within politics things are much more complicated, and one can only be happy that at least in principle and officially most states recognize the validity of international law. Within the limits put by practical philosophy politics must be said to defend what it needs defending with a minimal cost of human lives. In this connection it is certainly, as Hardt & Negri notes, troubling, that the idea of just war seem to be getting renewed legitimacy, since it marks a return to those religious perspectives discussed in the introduction, which has other values than just the good life of human beings within a just society.

## 5. Litterature

Hardt, Michael & Antonio Negri:

- *Empire*, Cambridge, Mass.: Harvard University Press, 2000 (*E*)

Rawls, John:

- *A Theory of Justice*, revised ed., Cambridge, Mass.: Harvard University Press, 1999 (*ToJ*)
- *Political Liberalism*, paperback ed., New York: Columbia University Press, 1996 (*PL*)
- *The Law of Peoples*, Cambridge, Mass.: Harvard University Press, 1999 (*LP*)