WAR

ESSAYS IN POLITICAL PHILOSOPHY

EDITED BY LARRY MAY

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Essays in Political Philosophy

War has been a key topic of speculation and theorizing ever since the invention of philosophy in classical antiquity. This anthology brings together the work of distinguished contemporary political philosophers and theorists who address the leading normative and conceptual issues concerning war. The book is divided into four parts: historical background, initiating war, waging war, and ending war. The contributors aim to provide a comprehensive introduction to each of these main areas of dispute concerning war.

Each essay is an original contribution to ongoing debates on various aspects of war and provides a survey of the main topics in each subfield. Serving as a companion to the theoretical issues pertaining to war, this volume also is an important contribution to debates in political philosophy. It can serve as a textbook for relevant courses on war offered in philosophy departments, religious studies programs, and law schools.

Larry May is Professor of Philosophy at Washington University in St. Louis and Research Professor of Social Justice at the Centre for Applied Philosophy and Public Ethics at Charles Sturt and Australian National Universities. He is the author of many books, most recently *Crimes against Humanity*, which won an honorable mention from the American Society of International Law and Best Book award from the North American Society for Philosophy, and *War Crimes and Just War*, which won the Frank Chapman Sharp Prize for the best book on the philosophy of war and peace from the American Philosophical Association.

War

Essays in Political Philosophy

Edited by

LARRY MAY

Washington University in St. Louis

WITH THE ASSISTANCE OF EMILY CROOKSTON

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Contributors

James Bohman is Danforth Professor of Philosophy at St. Louis University. He is author of *Democracy across Borders* (MIT Press, 2007); *Public Deliberation: Pluralism, Complexity and Democracy* (MIT Press, 1996); and *New Philosophy of Social Science: Problems of Indeterminacy* (MIT Press, 1991). He is currently working on a book on cosmopolitan aspects of republican political theory.

Emily Crookston is just completing her Ph.D. in philosophy at Washington University with a dissertation on Locke's theory of political obligation and natural law.

Michael Davis is Senior Fellow at the Center for the Study of Ethics in the Professions and Professor of Philosophy, Illinois Institute of Technology, Chicago. Among his recent publications are *Thinking Like an Engineer* (Oxford, 1998); *Ethics and the University* (Routledge, 1999); *Profession, Code, and Ethics* (Ashgate, 2002); *Actual Social Contract and Political Obligation* (Mellen, 2002); and *Engineering Ethics* (Ashgate, 2005).

Marilyn Friedman is Professor of Philosophy at Washington University in St. Louis and Research Professor of Social Justice at Charles Sturt and Australian National Universities. Her most recent books are *Autonomy, Gender, Politics* (Oxford, 2003) and *Women and Citizenship* (edited, Oxford, 2005).

Trudy Govier is Associate Professor of Philosophy at the University of Lethbridge in Alberta, Canada. She is the author of a widely used text on practical argument and a number of other works, including, recently, *Forgiveness and Revenge* (Routledge, 2002) and *Taking Wrongs Seriously* (Humanity Books, 2006).

Cindy Holder is Assistant Professor of Philosophy at the University of Victoria. She has published on self-determination of peoples, human rights, and the rights of indigenous peoples and is the co-author of "Who's Sorry Now? Government Apologies, Truth Commissions and Indigenous Self-determination," a forthcoming article in *Human Rights Review.*

Thomas Hurka is Chancellor Henry N. R. Jackman Distinguished Professor of Philosophical Studies at the University of Toronto and specializes in moral theory. He is the author of *Perfectionism* (1993); *Principles: Short Essays on Ethics* (1993); and *Virtue, Vice, and Value* (2001). His writings on the morality of war include "Proportionality in the Morality of War," *Philosophy and Public Affairs* (2005), and "Liability and Just Cause," *Ethics and International Affairs* (2007).

Steven P. Lee is Professor of Philosophy at Hobart and William Smith Colleges. He has recently edited *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory* (Springer, 2007).

David Lefkowitz is Assistant Professor of Philosophy at the University of North Carolina Greensboro. He writes on issues of war and morality, as well as political obligation, and has articles recently published or forthcoming in *Ethics*, *Utilitas*, and the *Journal of Moral Philosophy*.

David Luban is University Professor and Professor of Law and Philosophy at Georgetown University, Washington, D.C. His most recent book is *Legal Ethics and Human Dignity* (Cambridge University Press, 2007), and recent papers include "Preventive War," "Preventive War and Human Rights," and "On the Commander-in-Chief Power."

Larry May is Professor of Philosophy at Washington University in St. Louis and Research Professor of Social Justice, Centre for Applied Philosophy and Public Ethics, Charles Sturt and Australian National Universities. He is in the midst of a multi-volume work on the normative foundations of international criminal law (including *Crimes against Humanity: A Normative Account*, *War Crimes and Just War*, and *Aggression and Crimes against Peace*) that is being published by Cambridge University Press.

Jeff McMahan is Professor of Philosophy at Rutgers University and the author of *The Ethics of Killing: Problems at the Margins of Life* (Oxford University Press, 2002).

Gregory M. Reichberg is Research Professor at the International Peace Research Institute, Oslo (PRIO), where he heads the program on Ethics,

Norms, and Identities. He has recently published "Preventive War in Classical Just War Theory" in the *Journal of the History of International Law* (2007) and has co-edited two volumes, *The Ethics of War: Classic and Contemporary Readings* (Blackwell, 2006) and *Ethics, Nationalism, and Just War: Medieval and Contemporary Perspectives* (The Catholic University of America Press, 2007).

Nicholas Rengger is Professor of Political Theory and International Relations at St. Andrews University and editor of *The Review of International Studies.* He has published in many areas of political theory, intellectual history, and international ethics and has just completed a study to be called *The Judgement of War: Political Theory and the Uncivil Condition.*

Nancy Sherman is University Professor of Philosophy at Georgetown University and from 1997 to 1999 was inaugural holder of the Distinguished Chair in Ethics at the United States Naval Academy. She is the author of *Stoic Warriors: The Ancient Philosophy behind the Military Mind* (Oxford University Press, 2005) and the forthcoming *The War Within* (W. W. Norton). Her other books include *Making a Necessity of Virtue: Aristotle and Kant on Virtue* (Cambridge University Press, 1997), *The Fabric of Character: Aristotle's Theory of Virtue* (Oxford University Press, 1989), and the edited collection *Critical Essays on the Classics: Aristotle's Ethics* (Rowman and Littlefield, 1999).

Christopher Heath Wellman teaches philosophy at Washington University in St. Louis and is a Professorial Fellow at the Centre for Applied Philosophy and Public Ethics, Charles Sturt University. He works in ethics, specializing in political and legal philosophy.

Introduction

Larry May and Emily Crookston

Philosophers have written about war for as long as there have been philosophers. Indeed, the pre-Socratic philosopher Heraclitus (c. 502 B.C.), from whom we have only a few scattered words remaining, talks about war and uses war as his main analogy to understand all other relations.[1] Since ancient Greek times, nearly every major philosopher has had something to say about war, and many have written special treatises on the topic. There are several obvious, and several not so obvious, reasons why philosophers have been intrigued by war. Most obviously, many lived during times of war and war tends to color every part of one's experience. War is also the kind of experience that calls out for attempted justification, given the sheer amount of horror that often accompanies it. And war also offers considerable puzzles to be solved, such as why the killing of soldiers in war could be condoned but seemingly lesser offenses such as mistreating soldiers who have been captured would be so strongly condemned.

Perhaps more subtly, war has intrigued philosophers because the morality of war is thought to be special and somehow different from the morality of normal life. And this has also caused a reexamination of whether it is indeed true that death is the worst of harms that can befall an individual person. The issue of war has also inspired philosophers to think about collective action (and the metaphysics of groups) in ways quite different from individual action. In addition, war is perceived as both horrible and attractive at the same time – making many philosophers wonder about what it is about human nature that could account for both of these responses.

[1] G. S. Kirk and J. E. Raven, *The Presocratic Philosophers,* Cambridge: Cambridge University Press, 1957, fragment 215: "War is father of all and king of all, and some he shows as gods, others as men; some he makes slaves, others free."

In the just war tradition of the Middle Ages and early modern period, philosophical discussion of war crystallized in a way that is true for few philosophical debates. At that time, all the major philosophers argued about the criteria for a just war, coming up with a dozen principles that were meticulously refined. What is even more unusual, the principles that philosophers developed were referred to by kings and emperors, generals and foot soldiers. Today, the just war principles, especially the principles of necessity, proportionality, just cause, and discrimination (or distinction), have formed the basis for the international law of war. Indeed, contemporary international lawyers continue to discuss war in terms of the Latin categories of the Middle Ages, namely, in terms of *jus ad bellum* and *jus in bello*.

War is the oldest of topics in applied philosophy, but it is more than this. As we indicated, since Heraclitus war has been a metaphor for how one should view other human relations. For there is an enduring connection, especially when trying to provide timeless rules of conduct that should govern everyone, even in how to treat one's most despised enemy. Consequently, the morality of war has provided some of the best examples of lasting normative rules. For instance, for 2,500 years the use of poisons during battle has been forbidden, and this is true regardless of whether one has no other effective means of defending oneself from imminent attack. Nothing that specific has been part of the moral code of so many peoples for such an extended period. Thinking about the rules of war, such as prohibiting the use of poisons, makes it possible to think concretely about universal moral norms, both their nature and efficacy.

Thinking philosophically about war also brings to the foreground the more general issue of the justifiability of violence, what must be done or shown prior to the act of violence as well as what must be done or shown after the violence occurs. Traditional just war theory distinguished among three questions: When is it just to initiate war? What tactics are just during war? And what must be done in the aftermath of war? These questions will frame the discussions that will ensue. We here present 15 essays by contemporary philosophers who attempt, collectively, to survey the current philosophical issues on war and to offer their own original insights into the philosophy of war and peace. After an initial exploration of the historical background, the anthology proceeds thematically evaluating justice at each stage in the war process: initiating war, waging war, and ending war.

In Part I, Greg Reichberg and Nicholas Rengger each explore the historical background to the normative perspective on war. First, Reichberg

discusses the nature and scope of the principle of *jus ad bellum*, or just grounds for resorting to war, focusing upon the tradition as formulated by medieval and early modern thinkers such as Gratian, Aquinas, Cajetan, Vitoria, Suarez, and Grotius. He argues that three opposing positions defined the development of the just war doctrine: pacifism, political realism, and bilateral rights. The correlative response to each of these positions from just war theorists led to increasingly sophisticated accounts of what it means for a state to have just grounds to enter into war. Second, Rengger traces the development of the other category used to delineate the criteria by which wars ought to be judged, *jus in bello*, or just conduct during war. However, Rengger warns against the tendency of modern just war theorists to structure the debate around the distinction between *jus ad bellum* and *jus in bello*. Indeed, according to Rengger, consideration of the *jus in bello* actually evolved from questions of *jus ad bellum* and that evolution hinged upon the "problem of simultaneous ostensible justice" or whether it is plausible to think that both parties in a conflict have just cause for waging war against the other. Rengger argues that because there is often an epistemological barrier to knowing which party has justice on its side, contemporary just war theorists ought to think about the relationship between war and morality in terms similar to those Francisco de Vitoria and his colleagues of the School of Salamanca used during the sixteenth century. They were correct to say that we ought to treat our enemies under the assumption of invincible ignorance rather than lawless malfeasance. This assumption necessarily leads to a rule of restraint during war.

Next, the essays in Part II concentrate upon justifications for initiating war. First, Larry May examines the principle of just cause in contemporary international law arguing that we need a bifurcated just cause test, one that applies to the regulation of states and another that applies to the prosecution of individuals. He examines two examples of unjust war, war fought for the conversion of heathens and war fought for the sake of promoting democracy, as well as the paradigmatic example of just war: war waged for self-defense. May argues that the principle of just cause should be reconceptualized to be preventing or stopping a wrong committed by a state, or statelike entity, against another state, or subsection of a state, that is sufficiently morally serious to be analogous to the risk of large loss of life that war involves. On May's understanding, just cause and proportionality are closely related. Though this way of thinking reduces the number of just causes for determining when to sanction a state for acts of aggression, in considering individual responsibility for aggressive

war he argues that it should be easier to prove that one has a just cause for war. From here, Jeff McMahan discusses aggression and punishment. Diverging from the standards of contemporary just war theory that deem aggressive and punitive wars always unjust, McMahan argues instead that aggressive war can be just and punishment can be a just cause for war. He shows that the tendency within the just war tradition to rule out aggression *tout court* stems from the idea that striking the first blow in a struggle is somehow inherently wrong. However, McMahan suggests that this is not necessarily the case. He recognizes that in recent years the paradigmatic just cause seems to have shifted away from state self-defense and toward prevention of individual human rights abuses; so it is conceivable that aggression, for example, unilateral humanitarian intervention, is permissible so long as its aim is defensive. Likewise in the case of punishment, McMahan distinguishes between two possible aims of punishment, defense (or deterrence) and retribution, arguing that, with the exception of retributive wars, it is possible to wage a punitive war with the aim of defense. Therefore, it is fallacious to pronounce punitive wars patently unjust.

The final two articles in Part II examine particular cases of potentially just causes for waging war: humanitarian intervention and promotion of democracy. Cindy Holder discusses the complex relationship between sovereignty and humanitarian crises. She argues that the problem that the international community faces regarding humanitarian crises is closely tied to the problems of intrastate conflict and the neglect of human rights. Because solving these problems necessarily involves debates about how to deal with states, Holder argues that the corresponding response to humanitarian crises necessarily involves nonideal theorizing. Successfully confronting the problem of humanitarian intervention, then, depends upon recognizing the injustices inherent in the state-based system and finding the appropriate response while working within that system. Holder recommends adopting a presupposition against military intervention and favoring mediation as the best method of intervention. Finally, James Bohman considers whether it is ever justified to go to war with the main goal of democratizing another nation. He argues that although it seems that the emergence of democratic states should lead to an increase of peace in the world, war is not a plausible means of achieving the democratic peace and has actually served to undermine that effort. According to Bohman, the current international situation requires a different solution: “the formation of institutions by which democratic states and the international system may become more

democratic in a mutually reinforcing way." His argument proceeds in three steps. First, he argues that war is not a plausible means of establishing democracy. Second, current internal and external conditions undermine the democratic peace hypothesis because war undermines the very conditions that help citizens of democracies to avoid evils such as famine. Third, using the European Union as an example, Bohman argues that interaction among institutions can have the same democratizing effects as wars for the sake of spreading democracy, but without the threat to peace.

The next five essays, constituting Part III, address just and unjust methods of waging war. The issues examined here are proportionality and necessity, collateral damage, weapons of mass destruction, torture, and terrorist methods. First, Thomas Hurka discusses the deontological and consequentialist aspects of two conditions used to evaluate whether a state is meeting the *jus in bello* requirement, namely, proportionality and necessity. Although just war theory evaluates acts of war in terms of their consequences, it does not do so in a purely consequentialist way. Rather than weighing all benefits and harms equally, just war theorists employ deontological considerations in order to assess *which* harms and benefits are morally relevant. Just war theory, then, rules out certain types of harms and benefits taking into consideration their causal history, including the intentions of particular actors. The resulting morality of war, which takes a distinctive deontological approach to assessing the consequences of war, is sometimes more and sometimes less restrictive than consequentialism. Second, David Lefkowitz continues the discussion of the consequences of war asking what, if anything, morally justifies acts of war that cause one consequence in particular, collateral damage. Collateral damage is harm done to illegitimate targets in war as a side effect of attacking legitimate targets in war. Lefkowitz looks at both the nonconsequentialist and consequentialist justifications for collateral damage arguing that both types of justification fail. Therefore, Lefkowitz takes a skeptical position toward the morality of acts of war that cause collateral damage and given the inevitability of the occurrence of this consequence of war, concludes that it is practically impossible to fight a morally justifiable modern war.

The final three articles in Part III examine particular cases of violations of normative principles concerning how wars should be fought. Steven P. Lee asks whether the special moral status bestowed upon weapons of mass destruction (WMD) is actually warranted. He looks at each of the traditional classes of WMD, nuclear, biological, and chemical, and argues that on the basis of the simple criterion of destructiveness, these three

types ought not be lumped together under the same terrifying banner. However, the three types of weapons do share a common quality in virtue of which they violate the standard of *jus in bello* and so may appropriately be conflated, namely, indiscriminateness. These findings have ramifications for thinking about the permissibility of having these weapons in one's arsenal during times of war. Ultimately, Lee argues that from the perspective of *jus ad bellum* nuclear (and perhaps biological) weapons are allowable for purposes of deterrence, that is, when two states each have the capacity to destroy each other. But from the perspective of *jus in bello* and its principle of discrimination, all three types of weapon are prohibited. Michael Davis argues that because of its inherent inhumanity, there is no sense in which torture could be morally justified as an act of war. He even rejects the permissibility of torture in the famous ticking-time-bomb case. In fact, Davis rejects all forms of inhumane treatment as impermissible on deontological grounds regardless of specific circumstances or consequences. In the final essay of Part III, Marilyn Friedman discusses terrorism and gender. Friedman addresses three basic questions: (1) how best to define terrorism, (2) whether terrorism is ever defensible, and (3) whether female terrorists should be held to the same standards of moral responsibility as their male counterparts. With regard to the definitional question, she argues that a wider definition of terrorism – one that covers acts beyond intentionally aiming at the death of innocents – would allow for fruitful debate on the important question of whether terrorism is ever justified. Second, Friedman thinks that certain terrorist acts may be justified within a narrow set of circumstances. If a state forcefully denies a group its right to self-determination and violates its members' other human rights, then the group may be justified in using acts of terrorism as a last resort to defend its members. Finally, drawing an analogy between the military "superior orders" defense and women's subordination within male-dominated societies, Friedman concludes that there are weighty reasons for thinking that the coercive socialization to which women in some societies are subject exempts them, to a greater degree than men, from moral responsibility for terrorist acts.

Part IV concerns the aftermath of war and ways of moving forward for all relevant parties. Just war theory and other philosophical considerations of war have rarely raised the issues involved in regaining justice and peace after the conclusion of war, sometimes referred to as *jus post bellum*. So this final part of our volume represents an especially significant addition to the normative debate. First, Trudy Govier tackles the difficult question of reconciliation including the relationships between persons and groups

who had various roles during the war. Govier begins by looking at criteria for *jus post bellum* and argues that some form of reconciliation is necessary as a precursor to the satisfaction of these conditions. Additionally, Govier contrasts two conceptions of justice in the debate over the appropriate way to end wars. The traditional framework has been that of retributive justice, which focuses upon the punishment of those who perpetrated injustice. However, besides the many practical problems with this type of penal justice, Govier says that the obligations of retribution ought not take priority over seeking peace. Rather she argues that the framework of restorative justice, which focuses upon restoring the relationships needed for a functioning society through remorse, restitution, and reconciliation, has a better chance of helping individuals rebuild those relationships destroyed by war. Second, Christopher Heath Wellman explores the advantages and disadvantages of offering amnesties to participants in wartime atrocities. He deals with three questions: (1) Under what conditions is it rational to grant an amnesty? (2) Under what conditions is it morally permissible to grant an amnesty? and (3) Under what conditions must the international community respect amnesties granted by individual state governments? Wellman shows that it is wise to begin with a strong presumption against amnesties insofar as a fully functioning legal system is only possible within a legal climate in which criminals are systematically pursued, prosecuted, and punished. However, the permissibility of any particular amnesty does not depend upon its being perfectly rational. So, Wellman allows for the possibility that amnesties may be permissible so long as they are issued in the genuine pursuit of important moral purposes. As for the role played by the international community, Wellman recommends that the global community act as a monitoring agency reviewing and deciding upon the validity only of amnesties the terms of which have been previously negotiated within individual countries. He emphasizes that above all the international community ought to respect amnesties granted by the free and informed decisions of a domestic population as a whole.

The final two essays in this section address significant problems that people face in attempts to achieve reconciliation after war's end. First, David Luban discusses war crimes and criminal trials. Before sketching the history, structure, and justification of laws backed by criminal punishment with regard to war, Luban proceeds by historical example asking whether it even makes sense to claim that war is restrained by law. Perhaps unsurprisingly, he concludes, against the Hobbesian realist, that the basic project of establishing and enforcing a code regulating the conduct of

war wins the day. Yet, this project has its complications. For example, there is the demarcation problem: it is fairly clear that morality within war is different from ordinary, everyday morality, but what is the proper principle governing this distinction? Luban argues that at least part of the solution to these complications requires a greater emphasis on an ideal of military discipline and personal responsibility. Still he admits along with Trudy Govier and Christopher Heath Wellman that alternatives to criminal trials such as truth and reconciliation commissions or amnesties might better accomplish the social healing needed truly to serve peacekeeping needs. Finally, Nancy Sherman addresses the main barrier to peace and security after the devastation of war: the human thirst for revenge. In the light of an underlying dialectic between Stoic and Aristotelian images of the good warrior, Sherman argues for a fresh look at the moral psychology of contemporary warfare. Sherman's hope, in the end, is that the empowering aspects of feelings of revenge might be harnessed and exploited by military leaders, absent the more objectionable elements.

As Sherman's essay illustrates, even in war's aftermath there are troubling implications of war for how we understand human nature. Many times over the course of history, people have called for the elimination of war. And yet, war remains. There is a sense in which war serves some primeval need of humans: to separate themselves into groups and then to confront one another violently. Hobbes may not have been all that far off when he identified the natural human state with the state of war. But there is also a very strong human desire to live peaceably with even one's enemies so that maximal efforts can be used to attain an ever higher quality of life.

The philosophical debates about war are debates about how to harness some of the darker sides of human nature so that peace may obtain. Of course, peace at the cost of justice is not the preferred state of affairs. Sometimes wars need to be fought to stop injustice or at least to make a just peace more likely to last. Here is where the philosopher can enter the public debate: indicating when it is indeed justified to go to war, what are legitimate tactics during war, and what should be done to reconcile people after war has run its course. Surely the importance of such issues is the reason nearly all the great philosophers have examined the questions in this book. And surely this is why some of the leading political and moral philosophers today also have written new essays for our volume. War calls out for philosophical analysis. We believe that the essays to follow advance the long-standing debates about war and justice.

ONE

HISTORICAL BACKGROUND

1

Jus ad Bellum

Gregory M. Reichberg

If we take into account the broad historical scope of moral reflection on resort to armed force, the expression *jus ad bellum* is of fairly recent coinage. Its employment as a term of art dates roughly from the nineteenth century, when international lawyers who had taken inspiration from the earlier work of Wolff and Vattel sought to separate questions relating proper conduct in war (*jus in bello*) from the substantive reasons states might have for resorting to war (*jus ad bellum*). The supposition was that each state could decide for itself whether going to war would serve its vital interests (the doctrine of *raison d'état*). By contrast, the rules governing proper conduct in war were thought to have a firm legal content and were deemed to be applicable to all sovereign states. Thus, whereas the *jus in bello* was accorded an objective status, the *jus ad bellum* was largely relegated to the private conscience of each sovereign.

The conception that has just been described was reversed in the early to mid-twentieth century, when a series of international treaties – the League of Nations (1919), the Pact of Paris (1928), and the United Nations Charter (1945) – sought to regulate the *jus ad bellum* by reference to a set of objective rules. Noteworthy in this regard were the Nuremberg proceedings of 1946, wherein several Nazi leaders were tried under the charge of "aggression." The court took as a given that unlawful commencement of war was a grave crime for which harsh penalties should rightly be meted out. The idea that political leaders should be held personally accountable for violations of the *jus ad bellum* has persisted into our own day. Indeed, the Rome Statute of the International Criminal Court (2002) has included aggression among the crimes that fall within the court's jurisdiction, although the specifics have yet to be worked out.

The idea that decision making about war should adhere to a set of objective normative standards is far from an innovation of twentieth-century

lawyers. The recent legal initiatives in this domain are in fact the outcome of a long process of moral and legal reflection that reaches back to the Christian Middle Ages, with even deeper roots in ancient Greece and Rome. Usually described under the heading of the "just war tradition," this age-old inquiry into the reasons, good and bad, for waging war stems from the contributions of a varied group of philosophers, theologians, and lawyers. While they often built on each other's ideas, they also disagreed on points of doctrine large and small; we accordingly should not think of *just war* as one static idea or set of criteria, but rather as a living tradition in constant development. The burden of this chapter will be to show how its leading proponents articulated the nature and scope of the *jus ad bellum*. The focus will be on the tradition as it was formulated in the Middle Ages and early modernity by thinkers such as Gratian (twelfth century), Aquinas (ca. 1225–74), Cajetan (1468–1534), Vitoria (ca. 1492–1546), Suárez (1548–1617), and Grotius (1583–1645).[1]

I. Between Pacifism and Realism

Arising as it did in the context of Christianity, much of the just war literature was elaborated in explicit contrast to *pacifism*: the conviction that deliberate resort to armed force was perilous to the soul and should be avoided by disciples of Christ. The dominant viewpoint within the church during its first three centuries, this renunciation of violence was inspired by a set of passages from the New Testament, such as Matthew 5:39, "If anyone strikes you on the right cheek, turn to him the other also." More of a lived commitment than an expressly formulated doctrine,[2] this early pacifism did not take on sharp relief as a precisely defined theological option until much later, the twelfth century to be exact, when it served as a foil for the newly emergent doctrine of just war.

Whereas the fifth-century writings of Augustine indeed made occasional reference to the idea of just war, the refutation of pacifism came up only obliquely, as for instance, when he sought to discredit the claim put forward by the Manicheans (a Gnostic sect) that the God of the Old Testament could not be deemed a true God because he had

[1] These authors will be cited mainly from the texts assembled in Gregory M. Reichberg, Henrik Syse, and Endre Begby, *The Ethics of War: Classic and Contemporary Readings* (Malden and Oxford: Blackwell, 2006).

[2] For a good discussion of early Christian pacifism, see James Turner Johnson, *The Quest for Peace: Three Moral Traditions in Western Cultural History* (Princeton, NJ: Princeton University Press, 1987), 3–47.

commanded unconscionably cruel acts of war. But not until Augustine's disparate statements on war had been assembled into compilations, the most famous of which was the *Decretum Gratiani* (ca. 1140), did pacifism and just war emerge as distinct and antinomic doctrines. In this work, the Italian canon lawyer Gratian devoted an entire section (causa 23) to problems associated with armed coercion from a Christian perspective. Based almost entirely on citations, with brief interjectory comments by Gratian, causa 23 brought together the building blocks that succeeding generations of church lawyers and theologians would use to erect their own theoretical constructions on the ethics and legality of war.

Opening his discussion of war with the question "whether it is a sin to serve as a soldier," Gratian reproduced the standard passages from the Bible that had been alleged by earlier writers to indicate an evangelical rejection of all martial pursuits.[3] He then proceeded to explain (mainly on the basis of citations from Augustine) how, rightly understood, these passages were meant only to warn against certain excesses that might arise in a military context, but not the outright condemnation of war as such. At the limit, it could be conceded that certain persons would not be allowed to take part in war by virtue of their specific role, namely, priests and those bound by vows of religion, but otherwise soldiering could be deemed an upright and even meritorious profession.

Gratian's rebuttal of pacifism was two-pronged. First, citing Augustine, he argued that the "precepts of patience" (those passages from the New Testament that enjoined passive rather than active endurance of evil) should be taken as referring to the inner realm of the soul ("animus" or "state of mind") and not precisely to external acts. When adopting "necessary" measures against wrongdoing, even to the point of using lethal force, Christians were expected to refrain from sentiments of hatred and lust for revenge and to treat the vanquished with mercy. Later classified by Thomas Aquinas under the heading of "right intention," the thrust of this teaching was that war should never be undertaken in a spirit of cruelty or a desire to dominate, but only in order to gain peace. "Be therefore peaceable while you wage war, so that you may in winning lead over to the benefit of peace those whom you defeat." Hence, when Christ said "turn the other cheek," this was taken to refer to the inner movements of the heart, and not necessarily to outward deeds.[4]

[3] See Gratian, *Decretum,* causa 23, question 1, in *The Ethics of War,* 109–111 (right column).
[4] For Gratian's discussion of the "precepts of patience," see ibid., canons 2–4, 111– 112.

Secondly, Gratian sought to give a positive justification for resort to armed force by reference to a twofold rationale. On the one hand, force could be used to ward off an attack, either from oneself or from one's associates. But force could also be used to avenge wrongdoing. While war in the former sense took on the character of legitimate defense, in the latter it was akin to a judicial sentence by which a prince or magistrate handed down a penalty to punish evil action.[5] These two rationales – defense and penalty – would constitute the basic armature by which all subsequent authors would discuss the *jus ad bellum*. We will accordingly study them in greater detail in the following.

Pacifism would remain the foil against which the just war doctrine was defined for many centuries after Gratian. Persisting well into the seventeenth century, when, for instance, we find the Jesuit theologian Suárez beginning his treatment of just war with the assertion (accompanied by supporting arguments) that "war, absolutely speaking, is not intrinsically evil, nor is it forbidden to Christians."[6] Yet during this same century, a new foil appeared, one that would take on increasing importance as the moral problems associated with war began to be discussed in secular rather than religious terms. This was political realism (as it is called today), namely, the doctrine that resort to war is to be judged first and foremost in terms of what conduces to the prince's (or the state's) maintenance of power. Made famous by Machiavelli, who was arguably the first to introduce this perspective into Western philosophical discourse, it was however two ancient Greeks, Carneades and Thucydides (whose writings were newly being studied after a long period of neglect), that the humanist thinkers of the period would associate with the realist point of view. Among just war theorists, the shift from a pacifist to a realist foil is most strikingly visible in Grotius, who directed the Prolegomena of his monumental work *De jure belli ac pacis* (On the Law of War and Peace)[7] specifically toward the refutation of this ancient realism, which had been reactualized by Hobbes within the political philosophy of the day.

Against Carneades, who had sought to reduce the notion of justice to mere utility ("all creatures, men as well as animals, are impelled by nature toward ends advantageous to themselves," such that "he does violence to

[5] Ibid., 109 (right column), "The point of all soldiering is either to resist injury or to carry out vengeance."

[6] Francisco Suárez, Disputation "On War" ("De bello"), section 1, in *The Ethics of War*, 340.

[7] See *The Ethics of War*, 387–392, for the relevant passages from the Prolegomena to the *De jure belli ac pacis*.

his own interests who consults the advantage of others"),[8] Grotius maintained that in the most challenging of all settings – war – principles of law and morality do indeed occupy a central place. In response to the Roman adage "In war the laws are silent," Grotius countered that this holds true only of the civil laws proper to each individual polity; such laws, he conceded, do not stipulate how nations are to conduct themselves in their dealings with each other. But above the different regimes of civil law, there exists, he says, an "unwritten law," that gives expression to norms arising from our shared human nature. Applicable "both to war and in war" this "common law among nations" (*inter populos jus commune*)[9] has a universal reach: it makes known to all that "war ought not to be undertaken except in pursuit of what is right."[10] More specifically, with regard to the *jus ad bellum*, Grotius held that a sovereign should never look solely to the narrow interests of his own individual nation; his decisions should also reflect the advantage of the "great global community" (*universitatis*).[11] To act otherwise (i.e., to make decisions based exclusively on the realist postulates of Carneades) would be to invite collective disaster, which Grotius had ample opportunity to witness in his own time.

Thucydides' *History of the Peloponnesian War* provided Grotius with evidence of a related view that today is standardly associated with political realism. In the conduct of their external affairs, states, it is said, only pay lip service to morality while in reality they (i.e., their leaders) are motivated solely by a calculation of basic interests. By extension, states inevitably dress their reasons for resorting to armed force in the clothing of morality or law, thereby alleging specific grievances as the *casus belli*, but usually the deeper, truer motivation lies elsewhere. In this connection Grotius quoted Plutarch, who wrote that "most kings make use of two terms, peace and war, as though they were coins, to obtain not what is right but what is advantageous."[12] The contrast between publicly stated reasons for war versus the hidden yet real motivation is repeated throughout the *Peloponnesian War*, where it functions as a sort of leitmotif. Indeed, at the very outset of the work, Thucydides informs his readers that despite the reasons alleged by Sparta (a dispute over the status of Corcyra) its principal motivation for launching the war was to stem the growing power

[8] Ibid., sect. 5, 388.
[9] Ibid., sect. 28, 390.
[10] Ibid., sect. 25, 390.
[11] Ibid., sect. 16, 389.
[12] Grotius, *De jure belli ac pacis*, II, XXII, IV; *The Ethics of War*, 410.

of Athens.[13] To eliminate the risk of future domination Sparta decided to attack first, while it could still prevail over Athens. Grotius viewed this line of reasoning as an attempted justification of preventive war, which he, writing as a proponent of the just war doctrine, sought vigorously to rebut.

II. Just Cause and Regular War

Thus far we have considered the two main positions – pacifism and political realism – against which the developing doctrine of just war was defined by its leading proponents. There was however a third position, less often discussed in treatments of just war theory, that also served as an important point of reference. This was the idea, articulated first by the ancient Roman legal theorists (jurisconsults), and later by Raphaël Fulgosius (1367–1427), Andreas Alciatus (1492–1550), and other civil lawyers of the Latin West, who viewed armed conflict as a contest between juridically equal belligerents. Owing to their sovereign status, these belligerents were deemed to possess a similar capacity to wage war, regardless of the cause that had prompted the conflict. As in a legal process in which two litigants are presumed to have entered the proceedings in good faith, they were likewise entitled to exercise the same legal prerogatives (in this case resort to armed force) vis-à-vis each other. By the same token, once war was under way, they were expected to abide by a uniform code of conduct. To underscore how the same set of rules (rights and duties) would apply to all sovereign belligerents, regardless of the justice or injustice of their cause, this would later be referred to as the idea of *regular war* ("guerre réglée").[14]

At its core, the regular war approach consisted in setting aside the idea of just cause, in favor of *bilateral* rights of war.[15] The first explicit account

[13] Thucydides first states this view in bk. I, chap. 23.

[14] The term was coined by Vattel in his *Droit des gens* ("The Law of Nations" – 1758), bk. III, chap. IV, § 66 (*The Ethics of War*, 514, footnote 10). In line with its French equivalent, the English adjective *regular* is here taken to designate what is "conformable to some accepted or adopted rule or standard; made or carried out in a prescribed manner; recognized as formally correct" (Oxford English Dictionary, fifth sense of *regular*). By extension it is said of a "properly and permanently organized" military force of a state (seventh sense), as in *regular army* or *regular soldiers*. For a historical analysis of the regular-war idea, see Peter Haggenmacher, "Just War and Regular War in Sixteenth Century Spanish Doctrine," *International Revue of the Red Cross* 290 (1992), 434–445.

[15] See the editors' introduction to *The Ethics of War*, chap. 20, on Fulgosius (227–228). For a fuller account, see Gregory M. Reichberg, "Just War and Regular War: Competing

of this approach may be traced to a short text by Raphaël Fulgosius,[16] in which the Italian jurist argued that in a war between independent peoples or kings, and in the absence of a common judge over the parties, the very juridical status of the adversaries precludes reference to a just cause. Each of these belligerents has as much right to fight as any other; for this reason victory alone will serve as the final arbiter of the conflict. While Fulgosius did not entirely forgo the vocabulary of just war, he very clearly redefined it so that it become an equivalent for public war (*bellum publicum*), a war that is waged between independent nations or kings, each of which recognizes the sovereignty of the other. As a corollary to this structural fact of mutual sovereignty, Fulgosius deduced that just cause will be indeterminable in concrete cases: "for how can it be known, and who is to be the judge in this matter, deciding that one side wages a just war, the other an unjust war," or, as he writes at the beginning of the same passage, "it [is] uncertain which side wage[s] war rightfully."[17]

The inherent incertitude of just cause became a prominent topic of discussion among later thinkers of the regular-war cast. Some maintained that this uncertainty results from the fact that warring parties easily err in assessing the justice of their respective causes, because it is difficult if not impossible to be an "objective" judge in one's own case; others held that the rights and wrongs leading to war were distributed on both sides in such fashion that neither could claim an exclusive prerogative to use force.

It must be emphasized how this conception of a bilateral *jus ad bellum* ran directly counter to the central "axiom"[18] of the just war doctrine according to which war could be warranted only as a unilateral response to prior wrongdoing. "The sole and only just cause for waging war is when harm has been inflicted," wrote the Spaniard Francisco de Vitoria in his systematic examination of the normative foundations of war.[19] On this understanding, just cause is necessarily *unilateral* in character, for if one party is entitled to apply a sanction, or to enforce its rightful claim, the other party must be in the wrong. Strictly conditioned by its underlying

Paradigms," in David Rodin and Henry Shue, eds., *Just and Unjust Warriors: Moral Equality on the Battlefield* (Oxford: Oxford University Press, 2008).

[16] *In primam Pandectarum partem Commentaria,* ad Dig. 1, 1, 5; translation in *The Ethics of War,* 228–229.

[17] Ibid., 229.

[18] To use the phrasing of the Scholastic theologian Domingo Bañez (1528–1604); see *The Ethics of War,* 227, footnote 1.

[19] *De jure belli* (*On the Law of War*), qu. 1, art. 3, § 4; *The Ethics of War,* 314.

cause, the legal effects of a just war could thus only benefit the righteous belligerent. The unjust adversary had in principle no right to fight or even to defend itself (no defense being allowed against a legitimate defense).

Consequently, as the idea of bilateral rights of war became more widely disseminated, just war theorists were compelled to respond to this challenge by articulating successively more sophisticated accounts of just cause. These accounts would develop along two lines. On the one hand, the epistemic conditions attendant upon the apprehension of just cause in concrete circumstances would receive explicit treatment on its own terms. The pioneer in this domain was Vitoria. On the other hand, the objective, substantive reasons that might warrant resort to armed force would be elaborated more systematically and in much greater detail than had hitherto been the case. This was the great achievement of the Dutch jurist Hugo Grotius.

III. Simultaneous Ostensible Justice

Early treatments of just cause as can be found for instance in Augustine, Gratian, or Aquinas discussed it largely as an objective criterion, with little or no attention being paid to the epistemic conditions of the person – usually a prince or similar authority – who would be responsible for making decisions about the *jus ad bellum*. By the sixteenth century, however, this line of inquiry became more urgent to address, as a result of both the growing influence of civil lawyers of the regular-war orientation, and (perhaps even more importantly) the discovery of new lands in the Americas, whose inhabitants quite obviously did not reason with the same set of cultural expectations as their European counterparts.

Among the first of the just war thinkers to show an awareness of the epistemic complexity surrounding the apprehension of just cause was Vitoria, who raised this problematic in his university lectures on the American Indians (*Relectio de Indis*). Assessing the Spaniards' use of force against the native Americans, he remarks that this will be legitimate, at a minimum, when the invaders are possessed of an objectively just cause, for instance, violation of their right of "innocent passage."[20] But taken alone this would be an insufficient ground for war, since the Spaniards also have

[20] *De Indis* (On the American Indians), qu. 3, art. 1; *The Ethics of War*, 300–301. Appeal to a right of "innocent passage," and the violation thereof as a ground of war, may be found as early as Augustine and was subsequently listed as an authoritative teaching (a "canon") by Gratian; see Decretum, causa 23, qu. 2, canon 3; *The Ethics of War*, 113.

an obligation to communicate their grievances to the alleged offenders before resorting to the sword. At this juncture, Vitoria recognizes that the Native Americans, by reason of their "ignorance" (cultural backwardness), will

> be understandably fearful of men whose customs seem so strange, and who they can see are armed and much stronger than themselves. If this fear moves them to mount an attack to drive the Spaniards away or kill them, it would indeed be lawful for the Spaniards to defend themselves, within the bounds of blameless self-defense. . . . So the Spaniards must take care of their own safety, but do so with as little harm to the barbarians as possible since this is merely a defensive war. It is not incompatible with reason, indeed, when there is right on one side and ignorance on the other, that a war may be just on both.[21]

This last sentence alludes to the possibility, further developed by Vitoria in his subsequent lectures on the Law of War (*De jure belli*), that that opposing parties to an armed conflict may each firmly believe in the rightness of their cause. If this impression were objectively sustainable, it would contradict the very logic of the just war theory, since both belligerents would then be innocent and neither would have justification for using armed force against the other.[22]

Vitoria's response was to distinguish *true* (objective) from *merely ostensible* justice. Objectively, justice cannot reside on both sides at once, at least with respect to the reasons that justify going to war. The impossibility of simultaneous justice is implied by the very notion of just cause, which, as we have seen, may be claimed only by reference to another party's wrongdoing. Vitoria acknowledges, however, that error may induce a belligerent to believe that it is in the right when in fact it is squarely at fault. This gives rise to a situation in which the wrongful party (sincerely yet erroneously) believes itself to be innocent, arising from an interplay of factors beyond its voluntary control. Borrowing from Aquinas,[23] Vitoria attributed this sort of error to "invincible ignorance," thereby underscoring how it should not be imputed to the agent as a personal fault. On this basis, he concluded that when a (objectively) just belligerent encounters an adversary who, in good faith, is unaware of the de facto injustice of his cause, he should be treated less harshly than would otherwise be the case. For under this scenario, even the unjust side will, for subjective reasons,

[21] *De Indis*, qu. 3, art. 1, fifth proposition; *The Ethics of War*, 303.
[22] See *De jure belli*, qu. 2, art. 1, § 1; *The Ethics of War*, 318.
[23] *Summa Theologiae* I–II, qu. 76, art. 2– 3.

be entitled to defend itself, and the just belligerent should accordingly refrain from exercising over such an opponent the full rights of war.

Vitoria's doctrine of simultaneous ostensible justice does not amount to an endorsement of belligerent equality (bilateral *rights* of war) as was articulated by authors in the tradition of regular war. For Vitoria the unjust adversary is indeed held accountable for material wrongdoing, yet, by reason of an extenuating circumstance – invincible ignorance – he is *excused* from the blame that would ordinarily attach to his action. This exculpation could apply both to leaders (political or military) and to rank-and-file soldiers. The first application is suggested by the passage quoted previously, where Vitoria had observed how the native Americans (their leaders in particular) understandably misconstrued the intentions of the foreign visitors to the New World, thereby using force against Spanish traders and missionaries who (on Vitoria's understanding) wished them no harm.[24] In a related example from his own European context, Vitoria mentions a dispute between France and Spain over the ownership of Burgundy: "In the mistaken but colourable belief that [this province] belongs to them" the French could thereby be deemed subjectively justified in defending the territory by armed force, even though, objectively (again, on Vitoria's assessment), the "emperor Charles V [of Spain] has a certain right to that province and may seek to recover it by war."[25] Finally, the case of subordinates under command offered Vitoria a second opportunity to expound on the doctrine of simultaneous ostensible justice, when he noted that "invincible error is a valid excuse in every case. This is often the position of subjects: even if the prince who wages war knows that his cause is unjust, his subjects may nevertheless obey him in good faith. . . . In such situations, the subjects on both sides are justified in fighting."[26]

IV. Hard Cases

Alongside this doctrine of ostensible bilateral justice, Vitoria and his successors also discussed the related problem of "doubtful causes of war" (today we would speak of "hard cases"). Under circumstances where factual claims were disputed they recognized it would be extremely difficult to disentangle which of the two parties to a conflict was effectively possessed of the just cause. Vitoria makes clear that this does not cover all

[24] *De Indis*, qu. 3, art. 1, fifth proposition; *The Ethics of War*, 303.
[25] Ibid.
[26] *De jure belli*, qu. 2, art. 4, § 2; *The Ethics of War*, 322.

instances of war making, since for him it is undeniable that belligerents sometimes (often perhaps) resort to armed force for "patently unjust" reasons.[27] "Doubtful cases" nevertheless represented a very real category for Vitoria and his fellow Scholastics, and to guide action in this domain they devised a subtle casuistry with a set of standard rules. For instance, decision makers were expected to exercise due diligence about the issues at stake, and generally to conduct themselves with the probity akin to that of a judge.[28] Heads of state should submit their grievances to arbitration[29] or be willing to attend conferences where the competing claims could be dispassionately discussed.[30] Contested land should never be unilaterally seized, and compromise solutions should be actively sought.[31] The existence of a strong presumption against resorting to force in the face of such disputes was the generally recognized view, for, in the words of Grotius, "in the midst of divergent opinions we must lean towards peace."[32] Quite significantly, the regular-war practice whereby two parties voluntarily engage in armed conflict as a mutually agreed upon method of settling their dispute, thus allowing, by a quasi-contract, the victorious party lawfully to seize the property of the vanquished, was condemned as "unjust in the sight of God."[33] In other words, it was deemed inconsistent with the demands of Christian charity.

V. Justifying versus Merely Persuasive Causes of War

While acknowledging the possibility of doubtful cases, the main thrust of the just war tradition, as articulated by authors from Aquinas to Grotius, was to elucidate the legitimate grounds for waging war. Much of this discussion was conducted on a theoretical plane, with occasional application to concrete events by way of example. The fundamental line of demarcation, distinguishing just from unjust causes of war, was the issue of prior wrongdoing. "The sole and only just cause for waging war is when harm has been inflicted."[34] In line with Aquinas's canonical formulation

[27] *De jure belli*, qu. 2, art. 2, §1; *The Ethics of War*, 318. Such a situation of patent injustice gives rise to a duty of conscientious objection, when a subject "must not fight even if he is ordered to do so by the prince").

[28] *De jure belli*, qu. 2, art. 3. § 3; *The Ethics of War*, 321.

[29] See, for instance, Suárez, "De bello," sect. VI, § 5; *The Ethics of War*, 358–359.

[30] Grotius, *De jure belli ac pacis*, II, XXIII, VII.

[31] Suárez, "De bello," sect. VI, §§ 3–4; *The Ethics of War*, 357–358.

[32] *De jure belli ac pacis*, II, XXIII, VI; *The Ethics of War*, 413.

[33] Suárez, "De bello," sect. VI, § 22; see *The Ethics of War*, 367, footnote 21.

[34] Vitoria, *De jure belli*, qu. 1, art. 3, § 4, *The Ethics of War*, 314.

in *Summa theologiae* II-II, qu. 40, art. 1 ("those who are attacked should be attacked because they deserve it on account of some fault"),[35] just war was thus defined as a *response* to grave wrongdoing, with the supposition that the wrong in question was objectively determinable. On this understanding, *just war* had the status of a sanction by which the injured party pressed its claim by dint of force. It was an extension of the rule of law (i.e., determinable rules of right conduct) into a realm where the standard *procedures of law* (i.e., the enforceable decisions of courts of law) no longer applied. As a consequence, any motivation for war that did not spring from the opposing side's determinate wrongdoing would be excluded from membership in the category of "just cause." In this connection, Vitoria mentioned "difference of religion" and "enlargement of empire" as illicit reasons for waging war.[36] Grotius considerably expanded this list of "unjust causes" of war with the inclusion of additional reasons such as "fear of a neighboring power," "desire for richer land," or "the desire to rule others against their will on the pretext that it is for their good." However "persuasive" in light of their immediate advantageousness these causes might be, they could never provide a "justifying" moral warrant for war.

The next step would naturally consist in identifying what sort of wrongdoing would merit a response as severe as war. "Since all the effects of war are cruel and horrible – slaughter, fire, devastation – it is not lawful," wrote Vitoria, "to persecute those responsible for trivial offenses by waging war upon them"; hence "not every or any injury gives sufficient grounds for waging war."[37] To give some specification to the idea of just cause, thinkers in the tradition appealed to the distinction, first enunciated by Gratian, between defense and punishment as the two primary rationales for a justifiable resort to armed force. The first looked to an injustice, involving grave harm to person or property, that was in some measure ongoing, while the latter regarded a harm that was past and done.

VI. Defensive War

The standard teaching in the just war tradition on defensive military action dates from the Middle Ages, when the doctrine was defined in some detail by canon lawyers of the period. This doctrine was assumed, with few substantive changes, into the writings of later theorists. It comprised the

[35] *The Ethics of War*, 177.
[36] *De jure belli*, qu. 1, art. 3, §§ 1–2; *The Ethics of War*, 313.
[37] Ibid., § 5, 314.

protection of one's own person (private self-defense), an entire nation (collective self-defense), or innocent third parties. With respect to the last-mentioned, it should be noted how, from the very beginning, the tradition included a robust teaching on what today is termed "humanitarian military intervention." Unlike the use of force in private self-defense, which was considered optional (for Augustine one should be willing to forgo it in the higher interests of charity), the protection of innocent people under attack was deemed an obligation especially for those in a position of authority. Devoting a section of the *Decretum* (causa 23, question III) to the theme of "repelling injury from associates (*socii*)," Gratian quoted Ambrose to the effect that "he who fails to ward off injury from an associate if he can do so, is quite as blamable as he who inflicts it."[38]

The general theme of defensive force was by taken up by one of Gratian's commentators, in a gloss entitled "Resist injury" (*Qui repellere possunt*).[39] Despite its brevity, the gloss advanced one of the first explicit theories of legitimate defense in Western Christianity.[40] Adhering closely to the rules on self-defense which had earlier been set forth in Roman law, it broke new ground when it discussed self-defense as a special kind of action that could be undertaken by individuals and polities alike. In this respect, it went well beyond the conception that had been articulated in ancient Rome, where the law of self-defense applied solely to the interrelations of private individuals, and not to the public domain of war.

The gloss asserted that force could be employed in self-defense only if two key conditions were met: it must be exercised in the heat of the moment and the defender should limit himself to using only so much force as was necessary to ward off the attack. Today we would term the first condition *immediacy* (or "imminence") and the second *proportionality*.

In discussing *immediacy* (*in continenti* was the Latin term used) the gloss distinguished between defense of persons and defense of property. It made clear that the defense of persons (either of oneself or of others who might be in harm's way) allowed for some forward looking (preemptive) action, while the latter generally did not. Although the gloss did not elaborate on this distinction, it made clear that Christians, both clerical and lay, who used force to defend themselves were entitled to engage in more than simple blocking motions. They were also permitted

[38] *The Ethics of War*, 114.

[39] *The Ethics of War*, 109–111, left column.

[40] This exposition of medieval canon law views on legitimate defense draws from Gregory M. Reichberg, "Aquinas on Defensive Killing: A Case of Double Effect?" *The Thomist* 69 (2005), 341–370, on 354–361.

to strike back, even to the point of killing an assailant, either preemptively, as, for instance, to ward off an ambush, or, after the attack had already been initiated, to prevent its renewal. This active resistance to injury the author sharply distinguished from revenge. Defense and revenge were thus construed as two contrasting reasons for the sake of which someone might return violence for violence.

In a text written some 50 years later (ca. 1240), the legal casuist Raymond of Peñafort proposed an expanded version of the main principles outlined in *Qui repellere possunt.*[41] As his predecessor had, Raymond emphasized how the condition of immediacy was meant to distinguish the force used in countering an attack, that is, defense, from any resort to force that had punishment (revenge) as its primary goal.

The problem, of course, was how exactly to define the immediacy in question. On this question, Raymond adhered closely to the teaching of *Qui repellere possunt.* Upon observing how some people say restrictively "that no one ought to repel force unless it has [first] been applied," he made clear on the contrary that such force may also justifiably be repelled in anticipation of the actual attack, stating that the defender is even permitted "to kill an ambusher and one who intends to kill" "if there is no other way to counter the threat of the ambusher."[42] This last phrase points to what is today termed *necessity*,[43] the condition that a forcible defensive action will be justified only when no other mode of recourse (say, by seeking aid from one's superior – prince or judge – who would ordinarily be entrusted with protecting the innocent from violations of the law) lies open to the defender.

If "necessity" allowed the defender some degree of anticipatory action, it also, on Raymond's account, permitted him a reasonable delay in undertaking his response to an unjust attack.

> If force is directed against property, then one is permitted to repel it, whether it has already occurred, or is planned, but rather, that is, most of all, when it has already occurred; provided this happens immediately, that is, as soon as one knows that the attack has occurred, and before one turns to a contrary action.[44]

In other words, far from signifying a necessity so overwhelming that it could leave no time for deliberation, the requirement of immediate

[41] *Summa de casibus poenitentiae*, II, §§ 17–19; in *The Ethics of War*, 134–147, left column.
[42] Ibid., § 18, 140, left column.
[43] For a good account of the threefold requirement of proportionality, immediacy, and necessity, see David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002), 40–48.
[44] *The Ethics of War*, 140, left column.

response was construed to be fairly elastic. Strictly speaking, the defender was not obliged to mount his counterattack contemporaneously with the assault, for he was allowed to set aside time to prepare an adequate defense, under condition, however, that, in the interim, he did not engage in a "contrary action."

In sum, then, medieval canon law treatment of legitimate defense did allow for some forms of preemptive action, as long as these remained within the bounds of necessity, immediacy, and proportionality. Moreover, the texts that we have considered implicitly distinguished between two sorts of preemption. One sort could be exercised against an aggression that was about to begin for the very first time, the other within the context of an aggression that had already occurred but would likely be renewed.

Finally, it should be noted that although the preceding account of defense was considered applicable to both private and public exercises of defensive force, authors in the tradition recognized that the latter enjoyed a considerably greater latitude of action than the former. "More things are allowable to a given city or commonwealth with regard to its own defence than to a private person," wrote Suárez, "because the good defended in the former case is common to many, and is of a higher grade, and also because the power of a commonwealth is by its very nature public and common."[45] Elaborating on this point, Grotius commented that when defensive military action is exercised by a state, it will usually be conjoined with the prerogative of punishing violations of the law. As a consequence, states may be justified in undertaking long-term preemptive military action against would-be violators of the peace, when there was evidence that the target of such action had conspired to commit future aggression. Under this scenario, the use of force would have the character of deterrent punishment, a mode of action not permitted to private individuals.[46]

VII. Preventive War

In the contemporary literature on just war, *prevention* is usually contrasted to *preemption*.[47] While both sorts of defense are anticipatory (they aim at

[45] "De bello," sect. II, § 3; *The Ethics of War*, 345.

[46] Grotius, *De jure belli ac pacis*, II, I, XVI; *The Ethics of War*, 404.

[47] This distinction may be found for instance in "Anticipations," in Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1992), 74–85. For a historical account of normative thinking about preventive war, see my "Preventive War in Classical Just War Theory," *Journal of the History of International Law* 9, issue 1 (2007), 5–33.

countering attacks that have not yet occurred), the latter is most often taken to designate an armed action against an offensive that, by demonstrable signs, is imminent, while the former presupposes a longer time frame. Prevention thus seeks to counter an adversary who either is preparing to mount an attack at a still undetermined point in the future, or, still more remotely, has acquired a military capability that, if exercised, would have devastating consequences for the defender.

The medieval discourse on anticipatory defense concentrated mainly on the permissibility of preemption. It was not until the sixteenth and seventeenth centuries that we find authors mounting arguments for and against prevention, probably as a result of reading Thucydides, who (as was noted previously) described Sparta's attack on Athens as motivated by fear of future harm.

One of the first authors to take up the problem of preventive war was the Protestant Alberico Gentili (1552–1608), who became a professor of law at Oxford University after his family had fled their native Italy to avoid religious persecution. A leading proponent of the regular war idea, he focused on the practical incertitude surrounding decision making in situations of conflict; that emphasis was one of two key factors that led him to endorse the strategy of preventive attack. Under conditions of uncertainty, he argues,

> no one ought to expose himself to danger. No one ought to wait to be struck, unless he is a fool. One ought to provide not only against an offence which is being committed, but also against one which may possibly be committed. Force must be repelled and kept aloof by force. Therefore one should not wait for it to come; for in this waiting there are the undoubted disadvantages.[48]

The other factor that moved Gentili to adopt this position was the conception of self-defense that he had inherited from ancient realists such as Carneades. Viewing self-defense as a natural right (*jus naturae*) that applied to brutes and human beings alike, the Italian jurist held that it proceeds not from some rational argumentation; rather, we (and presumably brutes as well) are persuaded of it by a kind of inborn power. Since it arises in us naturally, spontaneously, as it were, the acts to which it inclines have no inherent connection with the rational order of justice. It answers rather to the law of necessity.

From this account of self-defense, it follows, quite logically, that preventive strategies need not be justified first and foremost on grounds of

[48] Alberico Gentili, *De jure belli libri tres* (On the Law of War), bk. I, chap. XIV; *The Ethics of War*, 376.

justice and of law. To the contrary, this sort of defense pertains to a realm more basic than law, where one's very survival is at stake. Not long thereafter, Hobbes would develop this view into an elaborate normative theory of social interaction.

However, among thinkers of the just war orientation, Gentili's innovation did not go unnoticed. Hugo Grotius, in particular, argued vigorously against the new doctrine of preventive war. Discussing what he later classified among the "unjust causes of war,"[49] Grotius asserted unequivocally that "a public war is not admitted to be defensive which has as its only purpose to weaken the power of a neighbor":

> Quite untenable is the position, which has been maintained by some, that according to the law of nations it is right to take up arms in order to weaken a growing power which may do harm, should it become too great. . . . That the possibility of being attacked confers the right to attack is abhorrent to every principle of equity. Human life exists under such conditions that complete security is never guaranteed to us.[50]

On moral grounds, Grotius thus concluded that when a neighboring country has grown in power but has not yet manifested an evil intent (say, by breaking a sworn treaty or other such agreement), countering the risk by building one's own system of defense remained the only allowable course of action. Preventive attack was emphatically ruled out:

> Wherefore we can in no wise approve the view of those who declare that it is a just cause of war when a neighbor who is restrained by no agreement builds a fortress on his own soil, or some other fortification which may some day cause us harm. Against the fears which arise from such actions we must resort to counter-fortifications on our own land and other similar remedies, but not to force of arms.[51]

In adopting this critical line on preventive war, Grotius would be followed by subsequent just war theorists, who distinguished themselves from the rising tide of realism precisely by the primacy accorded to justice over considerations of political expediency.

VIII. Offensive War: Recuperation and Punishment

Although the terminology of *offensive* and *defensive* war seems to have originated with Vitoria,[52] the distinction itself was already a mainstay

[49] *De jure belli ac pacis*, II, XXII; *The Ethics of War*, 409–412.
[50] Ibid., II, I, XVII, 405.
[51] Ibid., II, XXII, V, § 2, 411.
[52] Vitoria, *De jure belli*, qu. 1, art. 1, replies, § 1, fourth proof; *The Ethics of War*, 310.

of the just war literature as early as the thirteenth century. Particularly noteworthy was the treatment of this theme by Innocent IV (pope from 1243 to 1254).[53] Building on Gratian's contrast between the twin rationales for war, defense and punishment, Innocent held that only when force was employed for the latter end did it require a special mandate from legitimate authority (for which reason he termed it an "exercise of jurisdiction"); defensive force, by contrast, could be resorted to even by private individuals. He made clear, moreover, that this widening of the authority condition was purchased at the cost of a significant narrowing of what could be deemed legitimate in the name of private defense. Not only would it be allowable only under the press of necessity, in the heat of an attack, as it were, but in addition, the standard legal effects of war (seizure of booty, imprisonment and enslavement of captives, etc.) would be inoperative in such a case.

In the wake of Innocent's treatment, the normative issues surrounding offensive war were given especially clear articulation by Thomas de Vio (Cajetan) in his commentary (ca. 1517) to Thomas Aquinas's *Summa theologiae* II-II, qu. 40, art. 1.[54] Interpreting Aquinas's account of *bellum justum* as pertaining specifically to offensive, not defensive war, Cajetan equated this mode of warfare with the administration of "vindictive justice." No political community could be deemed self-sufficient (a "perfect commonwealth") if it did not possess the power to exact just retribution against its internal and external foes. In a later writing, the *Summula* (ca. 1524), Cajetan likened just war to a criminal proceeding in which the righteous belligerent takes on the office of both prosecutor and judge. Although ordinarily they were equals, one sovereign could thereby assume authority over another by reason of the latter's fault (subjection *ratione peccati*).

Although most later representatives of the just war idea would endorse Cajetan's theory of just war as a kind of legal proceeding, with the righteous belligerent functioning as judge and executioner,[55] some would take care not to conflate this form of war with punishment. Already implicit in the writings of Vitoria, the point would be discussed at some

[53] For a translation of the relevant passages from Innocent's decretal commentaries, see *The Ethics of War*, 150–152.

[54] Translation in *The Ethics of War*, 441–445. Rarely cited today, Cajetan's commentary to Aquinas's qu. 40 "De bello" was an important point of reference for classical just war thinkers such as Vitoria, Molina, Suárez, and Grotius.

[55] Cajetan's successors dropped his image of the just belligerent as a prosecutor, focusing instead on the role of judge and adding to it the role of executioner.

length by his fellow Spaniard Luis de Molina (1525–1600).[56] Distinguishing "material" from "formal" injury, Molina argued that an offensive war could be carried out for ends other than punishment, say, to reclaim stolen goods or otherwise seek redress for wrongs done, yet without presupposing the personal guilt (*mens rea*) of one's adversary. Grotius likewise distinguished, with respect to the causation of injury, between *maleficium*, whereby a party was compelled to make restitution for the harm done, and *delictum*, whereby it merited punishment for engagement in intentional wrongdoing.[57] Hence wars undertaken to recover stolen property, to force repayment of debts, or even to effect a change of political regime (for instance, to aid an oppressed people), although nondefensive in character, were still not to be placed in the category of punitive war.

None of the just-mentioned authors denied that punishment, if merited, could serve as a legitimate aim of war; yet, unlike Cajetan, they tended to view this not as an aim that should be achieved during the war itself but rather as something to be secured afterward, once the enemy had been defeated. In other words, the thrust of their teaching was that war should not be conducted as though it were itself a form of punishment. In this fashion, they established one of the central premises on which the modern notion of *jus in bello* would be built.

Of the writings in the classical just war tradition, the most extensive normative analysis of the *jus ad bellum* may be found in Grotius's treatise *De jure belli ac pacem*. The lengthy book II of his work was in fact devoted to a systematic discussion of just cause, organized around the fourfold division of defense of self or property from attack, recovery of things wrongly taken, exaction of outstanding debts, and punishment of wrongdoing.[58] Prefigured by his youthful work *De jure praedae* (On the Law of Prize and Booty), Grotius's treatment of just cause was embedded within detailed analysis of specific rights. In opting for this approach, his aim was to elaborate, as exhaustively as possible, all of the rights (*jura*) whose violation could justify resort to armed force. Historically this was very significant, since it represented the first attempt at organizing the *jus ad bellum* around a system of subjective (claim) rights. By the same token, it was one of the principal roots of modern human rights doctrine.

[56] *De Justitia et Jure opera omnia*, tract II, disp. 102, 2; *The Ethics of War*, 334–338.
[57] *De jure belli ac pacis*, II, XVII, XXII; II, XXI, I.
[58] *De jure belli ac pacis*, II, I, II, § 2; *The Ethics of War*, 402.

2

The Jus in Bello in Historical and Philosophical Perspective

Nicholas Rengger

The traditional distinction that is often held to define the just war tradition – between *jus ad bellum* (justice of war) and *jus in bello* (justice in war) – is, of course, a very familiar one to us today. It is as well to remember, therefore, that in fact, it has a history and that the history it has is by no means devoid of general philosophical interest. My chief task in this chapter is to look at the history and emergence of the *jus in bello* and I shall get onto that task shortly. But I want to dwell for a moment on that "general philosophical interest" that I take the history to have, since I shall want to return to it towards the end of this chapter.

I have elsewhere argued[1] that among the more[2] important aspects of the recent development of the tradition has been the move to a particular kind of jurisprudential logic for it, one that has partially replaced or overlaid the earlier casuistic form that the tradition took in its medieval and Scholastic heyday and that included a rather different form of jurisprudential reasoning. Without repeating that argument in detail here, let

[1] See Nicholas Rengger "On the Just War Tradition in the Twenty First Century," *International Affairs* 78, no. 2 (April 2002): 353–63, and "The Judgment of War: On the Idea of Legitimate Force in World Politics," *The Review of International Studies,* special issue December 2005. Of course other scholars have noted this as well, as I pointed out in both those articles. See, especially, Geoffery Best, *War and Law since 1945* (Oxford: Clarendon Press, 1994) and James Turner Johnson, *Ideology Reason and the Limitation of War: Religious and Secular Concepts 1200–1740* (Princeton, NJ: Princeton University Press, 1975).

[2] I am grateful to Larry May for inviting me to contribute to this project, for some very helpful conversations in the Interstices of the 2006 meeting of the St Andrews "Rethinking the Rules" project, and for general (though rapidly diminishing) forbearance over my rather relaxed attitude towards deadlines. I would also like to thank Chris Brown, Bob Dyson, Caroline Kennedy-Pipe, Tony Lang, and Steven P. Lee for discussions about the just war tradition from which I always learn.

me just suggest that among the reasons for this shift is the dominance of the *jus in bello* in the literature of the just war roughly from the early to the mid-seventeenth century onwards. This fact has not, perhaps been as much discussed as it really warrants: in Geoffery Best's very apt words, during the modern period "while the *jus ad bellum* withered on the bough, the *jus in bello* flourished like the Green Bay Tree."[2] In other words, the particular history of the *jus in bello* in the early modern – and then the later modern – periods has played a large role in shaping the just war tradition as a whole in the modern world. The significance of this in more general terms I shall return to later on but wanted merely for the moment to comment on the obvious implication that it is the *jus in bello*, and not, in fact, the *jus ad bellum* – in recent times much the more fully discussed part of the tradition – that has structured the inner logic of the tradition in the modern context.

This has a number of implications for the way we think about the tradition itself, for example, if we ask the obvious question as to what the tradition allows us to do. In the first place, the just war tradition cannot tell us – and is not designed to tell us – whether this or that particular instance of the use of force is "just" or not in the generality. To quote Oliver O'Donovan:

> It is very often supposed that just war theory undertakes *to validate or invalidate particular wars*. That would be an impossible undertaking. History knows of no just wars, as it knows of no just peoples. . . . One may justify or criticize acts of statesmen, acts of generals, acts of common soldiers or of civilians, provided one does so from the point of view of those who performed them. I.e., without moralistic hindsight; but wars as such, like most large scale historical phenomena, present only a question mark, a continual invitation to reflect further.[3]

What, then, *is* the tradition designed to do? We can grasp something of this, I think, if we reflect for a moment on one aspect of the tradition little considered by moderns: right intention. James Turner Johnson, in his account of the tradition, accepts that this aspect of it is "not explicitly addressed" in the modern just war, being subsumed under questions of just cause and right authority.[4] Yet in classic just war writing, from

[2] Best, *War and Law*, p. 20.

[3] O'Donovan, Oliver. *The Just War Revisited* (Cambridge: Cambridge University Press, 2003), p. 15.

[4] Johnson, *Morality and Contemporary Warfare* (New Haven, CT: Yale University Press, 1999), p. 30.

Augustine to the sixteenth century, right intention was most emphatically not so subsumed. Partly this was because it cut across the "dividing line" of *jus ad bellum* and *jus in bello*.[5] While part of the "right intention" discussion is meant to apply to rulers – they must not have the intention of territorial or personal aggrandizement, intimidation, or illegitimate coercion – part of it is also meant to apply to those who do the fighting: the enemy is not to be hated, there must be no desire to dominate or lust for vengeance, and soldiers must always be aware of the corruption that can flow from the *animus dominandi*.

The point here, of course, is that what the tradition – from Augustine onwards – insisted upon, and what right intention was meant to gesture towards, was the extension into the realm of war of the normal practices of moral judgment. Of course, classic just war thinkers – Augustine above all – also recognized that war was an extreme realm and so such an extension represents (in O'Donovan's formulation) "an *extraordinary extension* of ordinary acts of judgment"[6] but an extension of them all the same. This was why the two poles of the classic just war tradition were always authority on the one hand and judgment on the other, and why, when we come to think about judgment, the two central terms of reference were (as they are now known to us) discrimination and proportion. In the classic treatments of the tradition it is *these* distinctions that give rise to discussions about just cause, right authority, and right intent (for example) not the later tendency to divide questions about war into the *jus ad bellum* and the *jus in bello*. O'Donovan refers to this distinction as a "secondary . . . and not a load bearing"[7] distinction, which I think nicely captures how we should view it. It is a useful heuristic, no more. The problem, as we shall see, is that the modern revival of the tradition has elevated it to an architectonic. It is the implications of this that I want to examine in the concluding section of this chapter; for the moment, however, we need to turn to the emergence of the distinction itself and the evolution and significance of the *jus in bello*.[8]

[5] For an extremely powerful account of the views on war of the school of Salamanca in general and Vitoria in particular, see the introduction to Anthony Pagden and Jeremy Lawerence, ed., *Francisco de Vitoria: Political Writings* (Cambridge: Cambridge University Press, 1991). An extremely good account of the background can also be found in Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500–1800* (New Haven, Ct.: Yale University Press, 1995).

[6] O'Donovan, *The Just War Revisited*, p. 14, emphasis added.

[7] O'Donovan, *The Just War Revisited*, p. 15.

[8] The preceding couple of paragraphs draw on Rengger, "The Judgment of War."

I. The Just War Tradition and the *Jus in Bello*

At this point we should perhaps introduce a further distinction. As a number of scholars have noted, normative attitudes on what it is permissible to do in war are features of virtually every culture and period. In European history, such constraints can certainly be traced back to classical antiquity, if not before. The Greek practice of war, for example, operated under a series of conventions that were, for the most part, adhered to and that, when violated, drew genuine opprobrium, and sometimes worse, on the heads of the violators. The ransom of prisoners, the possibility of burying the dead who had fallen on the battlefield, the honoring of certain sacred truces (such as those celebrating the Olympic Games): these were conventions that had the effective force of law, and when they were violated, the shock and anger were heartfelt, as Thucydides makes clear in his account of the Peloponnesian War.[9] Though it is perhaps worth adding that many of these restraints were meant to apply in general only in intra-Greek wars, they were not held to apply to wars with others (though some, perhaps including Plato, may have dissented from this view).[10] The Romans, by contrast, while they also had complex conventions concerning war – indeed, in Rome the whole process of going to war was heavily formalized – had few *in bello* constraints at hand once a war was itself deemed legitimate, and that led some medieval writers to invent a class or type of war – the *bellum Romanum*, a war without limits or restraints.[11]

The just war tradition itself, however, emerges out of the encounter of such general practices of war fighting and legitimation with specifically

9 See Thucydides, *The Peloponnesian War*, trans. Thomas Hobbes, ed. David Grene (Chicago: University of Chicago Press, 1989).

10 See, for a good introduction, Josiah Ober, "Classical Greek Times," in Michael Howard, George Andreopoulos, and Mark R Schulman, ed., *The Laws of War: Constraints on Warfare in the Western World* (New Haven, CT: Yale University Press, 1994). Plato's ambivalence to the traditional Greek "particularist" view of conventions in general, and war in particular, can perhaps be seen in a number of places in the Dialogues and Letters (notwithstanding the dubious authenticity of many of the latter), perhaps most clearly in the passage in the *Republic* where Socrates refers to the city built in speech as viable also for non-Greeks "beyond the limits of our vision" (though, of course, there is a question about how one interprets the specific sense of any remark in the Dialogues). It is also perhaps not entirely without significance that a number of the Hellenistic schools that were avowedly critical of traditional Greek civic morality – for example, the Cynics and the Epicureans – claimed Platonic licence for this view.

11 A good discussion of how the Romans saw war in general is in F. E. Adcock, *Roman Political Ideas and Practice* (Ann Arbor: University of Michigan Press, 1964). See also the discussion in Bruno Coppieters and Nick Fotion, eds., *Moral Constraints on War: Principles and Cases* (Lanham, MD: Lexington Books, 2002).

Christian concerns about the legitimacy of fighting at all.[12] And it is this encounter that gives the tradition its early logic, much of its power, and a good deal of the tensions that still exist within it and, in particular, creates the assumptions out of which the distinction between *jus ad bellum* and *jus in bello* grow. However, it is worth pointing out that the distinction does not appear at all in the work of those thinkers most associated with the early development of the tradition, Augustine of Hippo and Thomas Aquinas. Indeed, one of the most influential contemporary interpreters of the tradition today, James Turner Johnson, goes so far as to say that to all intents and purposes, "there is no just war doctrine, in the classic form as we know it today, in either Augustine or the theologians or canonists of the high Middle ages. This doctrine in its classic form, including both a *jus ad bellum*... and a *jus in bello*... does not exist before the end of the middle ages. Conservatively, it is incorrect to speak of classic just war doctrine existing before about 1500."[13]

Johnson's argument here is predicated on the claim that what joined to create what he terms "classic just war doctrine" were a religious (that is to say, theological and canonical) doctrine largely concerned with questions about the right to make war and a secular doctrine whose content was largely confined to discussions of the proper mode of fighting and that was derived from cultural constraints on violence, such as the knightly code and the civil law.

In this chapter I shall largely agree with Johnson that, understood as an identifiable part of the just war tradition and as a coherent body of thought, the *jus in bello* does not predate the sixteenth century. While I do think that there is much of interest that touches thinking about how war should be conducted in earlier writers (most especially, I think, Augustine), Johnson's argument has the merit of allowing us to concentrate on the key periods in the evolution of the *jus in bello*, roughly the early modern period (about 1500–1758) and what I shall call the period of

[12] It is well known that early Christian communities were largely pacifist, influenced by a literal reading of the Sermon on the Mount and by a particular view of the character of Christian witness. It is this view that one finds held up as the legitimate way of thinking about war in many modern Christian pacifists, perhaps most notably John Howard Yoder and Stanley Hauerwas. See for a brilliant historical interpretation of the debates between early Christians on this topic Peter Brown, *The Rise of Western Christendom*, 2nd edition (Oxford: Blackwell, 2003). Yoder's account of the Christian basis of pacifism can be found in his *The Politics of Jesus* (Grand Rapids, Michigan: Eerdmans, 1972).

[13] See Johnson, *Ideology, Reason and the Limitation of War*, pp. 7–8.

international legalization (roughly 1800–1950). Let me say something about each period in turn.

A. *The Early Modern* Jus in Bello

Johnson's basic argument is that the modern *jus in bello* comes about largely through the rejection, initially by the Neo-Scholastics and after them by many others, of the key arguments developed in the late medieval period for a parallelism between the just war doctrine and holy war doctrine. In this respect, it is a critique of the familiar claim – made by, amongst others, Roland Bainton – that thinking about war in the medieval period and after can basically be divided into a tryptich: pacifist, just war, and holy war.[14] By contrast, Johnson's view (and mine) sees holy war doctrine in the late medieval and early modern periods as a version of just war, not as something separate from it – that is to say that for Johnson the language of holy war in the sixteenth and seventeenth centuries arises out of the same heritage of Christian thinking about war that generates what he refers to as modern just war thinking. The reason for this is straightforward enough. Holy war theorizing comes out of the medieval just war doctrine partly as a reaction to the political events of the late medieval and early modern periods, specifically the Reformation and Counter Reformation and the wars these movements engendered. As Johnson puts it, "Holy war doctrine and modern just war doctrine developed out of their common source during the same period of time – the approximately one hundred years of serious and virtually continuous warfare between Catholics and Protestants, the end of which might be put at the close of the thirty years war, but which in truth did not finally conclude until the Puritan revolution was fought in England."[15] The point, then, is that holy war theorizing is really about how and why God might require us to use force to pursue his ends; it is about war for religion.

This claim can be strengthened still further if we ponder the additional claim, found perhaps most persuasively in Quentin Skinner's *Foundations of Modern Political Thought*, that many humanist responses to war – such as Erasmus's celebrated *Querela Pacis* (*The Complaint of Peace*), to which Bainton alludes in his discussion of pacifism – were also in very large

[14] The mature statement of this view is to be found in Roland Bainton, *Christian Attitudes towards War and Peace* (Nashville, Tenn: Abingdon Press, 1960).

[15] See Johnson, *Ideology Reason and the Limitation of War: Religious and Secular Concepts 1200–1740* (Princeton, NJ: Princeton University Press, 1975), p. 82.

part reactions to – and in some cases adaptations of – the medieval just war doctrine. As Skinner says, glossing Erasmus, "Christians often claim, [Erasmus] says, to be fighting a 'just and necessary war,' even when they turn their weapons 'against another people holding exactly the same creed and professing the same Christianity.' But it is not necessity and justice that make them go to war; it is 'anger, ambition and folly' that supply 'the compulsory force.' If they were truly Christian, they would instead perceive that 'there is scarcely any peace so unjust that it is not preferable, upon the whole to the justest war. For Peace is 'the most excellent of all things' and if we wish to 'prove ourselves to be sincere followers of Christ' we must embrace Peace at all times."[16]

We can agree, then, that rather than there being three separate doctrines justifying war we have at most two and even pacifism is strongly dependent upon the way that the just war is understood. That takes us to the real origins of the manner in which we have come to understand the *jus in bello* in the modern period. The wellspring from which all else flows in this context is simple enough in outline; it is the school of Salamanca. To be sure, there are also influential voices in England (especially) and the Netherlands who shaped this particular climate of opinion – Johnson, for example, mentions especially Mathew Sutcliffe, William Fulbecke, and William Ames – but the essential logic – which is what is central for us here – was provided by the school of Salamanca, and by two members of the school in particular, Francisco de Vitoria and Francisco Suarez.

Before turning to the specific arguments relevant to our concerns here, let me say something about the school itself. Salamanca was one of the most important and prestigious universities in Catholic Europe, and its most important chair of theology was held by Vitoria for 20 years until his death in 1546. His lectures, on a wide variety of subjects, became central to the revival of Scholastic and Thomistic philosophy both in his own day and for several centuries afterwards. He is generally regarded as the founder of the school, broadly Neo-Scholastic and Neo-Thomist in general philosophical and theological orientation, and sharing with Aquinas and with many of his own successors membership in the Dominican order. The school went on to boast a distinguished roster of theologians, including Vitoria's two immediate successors in the Pontifical Chair of Theology, Melchor Cano and Ferdinand de Soto; his supporter and representative of the school in their debate with the Spanish Crown at the

[16] Quentin Skinner, *The Foundations of Modern Political Thought,* Vol. 1. *The Renaissance* (Cambridge: Cambridge University Press, 1978), p. 246.

famous Valladolid debates in 1550, Bartoleme de Las Casas; and perhaps his greatest philosophical descendant, Suarez.

Vitoria lectured many times on topics connected with war, including on conquest and the laws of war.[17] But the issues that occasioned his most influential reflections on the topic were all connected with the Spanish conquest of America and its treatment of the native inhabitants, and his two most influential *relectiones*, *On the Indians* and *On the Laws of War*, both delivered in 1539, came about through his reflections on it.

Vitoria showed the direction his recasting of the just war was to take quite unambiguously in *De Indis* (more properly *De Indis et de Jure Belli Relectiones*).[18] Vitoria is straightforward: "Difference of religion," he says, "is not a cause of just war"; the only justification for war is wrong received, and the only way of identifying wrong received and therefore whether a war is just or not is through the application of the natural law, common to all, Christian and non-Christian alike. It was this claim that led him to state, controversially in his own day (to say the least), that the Spanish Crown was not justified in using force against the non-Christian inhabitants of its new world colonies in order to deprive them of their property. This basic argument was supported and then developed by Suarez, and it is important to see that while the basic position is predicated on traditional questions of what becomes (during the process of this elaboration) what we now call the *jus ad bellum*, it, in fact, begins to create that part of the tradition we call the *jus in bello* as well.

The pivot on which this evolution hinges is what Johnson calls the problem of simultaneous ostensible justice. The traditional view, in earlier just war thinkers and still in much of the secondary literature, both historical and philosophical, is that it is plainly incoherent to talk of a war's being "just on both sides." Aquinas, for example, is usually read as insisting that a just war is one fought in response to some fault, a view we have seen Vitoria agreeing with. Yet if this *is* the case, then clearly there cannot be

[17] The best contemporary collection of Vitoria's writings relevant to our concerns is Anthony Pagden and Jeremy Lawrence, eds., *Vitoria's Political Writings* (Cambridge: Cambridge University Press, 1991).

[18] Vitoria, as was the custom of the day at Salamanca, has left us with two collections of texts: lectures on Aquinas's *Summa Theologiae* and the *Sentences* of Peter Lombard, on both of which he lectured every year at Salamanca, during his 20-year tenure of the chair, and a set of "Relectiones" – literally "Re-Readings" – delivered on more formal occasions and as commentaries of particular passages or problems in a text. *De Indis* was initially delivered as a relection at Salamanca in 1539, after a period of growing concern on Vitoria's part with both the practice and the justification of the actions of the Spanish Crown in its new world colonies.

justice on both sides, and, indeed, this is the traditional view: "In the case of each of the prospective belligerent's having a claim on something in dispute, there must be no war, and if one occurs, it is not just but unjust on both sides at once."[19]

But the position in Vitoria in particular is far more complex than this. He suggests that the possibility of justice on both sides presents us with an ethical *dilemma*: "If each side is just, neither side may kill anyone from the other and therefore such a war both may and may not be fought."[20] One reading of Vitoria on this topic suggests that he counsels (as many later Catholic thinkers, for example, Jacques Maritain, have also done) arbitration in these contexts. But he also suggests that one has to make a distinction between *genuine* just cause and *believed* just cause, or what he calls, in a key passage in *De Indis*, "invincible ignorance." The relevant passage is as follows:

> There is no inconsistency . . . in holding the war to be a just war on both sides, seeing that on one side there is right and on the other side there is invincible ignorance. . . . The rights of war which may be invoked against men who are really guilty and lawless differ from those which may be invoked against the innocent and the ignorant.[21]

The point about this is that, as William Fulbecke makes clear,[22] it behooves people fighting a war to assume that those opposing them are guilty of ignorance rather than genuine malfeasance; in other words, it emphasizes – and this is something Vitoria and Suarez both elaborate later in their work – that while *in truth* (i.e., in the sight of God) there is no such thing as a war just on both sides, human knowledge is not up to judging this with any degree of accuracy. The natural implication is that in fighting a war, one should develop as many restraints as possible, given that those who oppose you may not be guilty of genuine fault, but merely of invincible ignorance.

It is this that raises the significance of the *jus in bello* and begins the process of separating out the two parts of the tradition as we understand it today. And Vitoria, for example, was very well aware of the significance of this. It is in Vitoria that we first find the development of the Augustinian notions of right intent and the existing contemporary restrictions via canon law and the customs of arms, *taken together*, as a restriction on how

[19] This is Johnson's formulation; Johnson, *Ideology, Reason and the Limitation of War*, p. 186. He is here citing and discussing a classic "traditional" Catholic reading, Alfred Vanderpol, *La Doctrine Scholastique du droit de guerre* (Paris: Pedone, 1919).

[20] Johnson, *Ideology, Reason and the Limitation of War*, p. 187.

[21] Vitoria, *De Indis*, section III, 7. This passage is highlighted also by Johnson.

[22] See Johnson, *Ideology, Reason and the Limitation of War*, p. 189.

we should understand who is legitimately a combatant. The *jus in bello*, in other words, grows out of the notion of noncombatant immunity, and it does so because, as we have already seen, for Vitoria a just war can only be waged to right a wrong done, and wrongs are not done by an innocent person and thus war cannot be waged on the innocent.

Working from the position established by the school of Salamanca, the *jus in bello* develops in leaps and bounds in the ensuing period, although hardly in a linear fashion. It is generally assumed that the two most important contributors, after Vitoria and Suarez, were the Dutch humanist, jurist, and political actor Hugo Grotius (1583–1645) and the German philosopher Samuel Pufendorf (1632–94), and that this movement of thought reaches its climax in the thought of Emmerich de Vattel (1714–67).

Grotius, for example, develops the arguments of his Neo-Scholastic predecessors in various ways, especially with regard to the *jus ad bellum*, but in the case of the *jus in bello*, his views are somewhat less restrictive than Vitoria's had been, though he admits that charity (at least for Christians) should limit the manner in which wars are prosecuted.[23] Then also, Grotius's thought has rather more to say about the *jus ad bellum* than the *jus in bello*, though he also has a good deal to say about the latter. The principles of noncombatant immunity and their root in the *jus gentium* rather than theological speculation – and thus their significance for the *jus in bello* – are carried much further, however, by Locke and then by Vattel, in whom the tradition very much in its modern form is very clear. Indeed, it is in Vattel that the kinds of distinction relating to noncombatant immunity and indeed other kinds of restrictions of war's destructiveness begin to emerge recognizably in its modern form. For Vattel it is not merely what one might call the "attitude of innocence" that matters but rather the social function an individual performs.

B. From Jus Gentium *to the Laws of War*

Key to the development of the *jus in bello* in its modern form were the developments sketched previously, but to those we should add also the changes in military tactics and technology that the modern period

[23] The key text is, obviously, *De Jure Belli ac Pacis*. For the most interesting and thorough recent treatment of Grotius's arguments in connection with war and international relations see Renee Jeffery, *Hugo Grotius in International Thought* (London; Palgrave Macmillan, 2006). A discussion of the material relevant to Grotius, Locke, and Vattel can be found in Chris Brown, Terry Nardin, and Nicholas Rengger, *International Relations in Political Thought: Texts from the Ancient Greeks to the First World War* (Cambridge: Cambridge University Press, 2002). See especially chapter 6.

witnessed. As is well known, beginning in the seventeenth century European armies began to develop levels of organization and discipline[24] unknown since Roman times, and this, coupled with the accelerating pace of technological change, led to new strategies and tactics, new military institutions and processes, and, of course, new attempts to restrain war and new developments in the context of theorizing about both war and its restraint. But there was already at hand the just war tradition as we have seen it emerge from the fifteenth and sixteenth centuries, with the *jus in bello* very much to the fore, and so it is hardly surprising that it was in the language of this tradition that much of the new context was stated.

To begin with, the changes to this were relatively mild. The eighteenth century, often seen as a period of "limited war," of course saw the emergence of various different versions of the just war, most especially Vattel's as discussed earlier, but after the Napoleonic wars more radical changes were made to the established *jus in bello*.

In particular the growing significance of formal international law in the years after 1860 became central to the changing character of the *jus in bello*; another significant departure was the issuing of general regulations to established armies, the most celebrated example being the General Orders No 100, or *the Instructions for the government of armies of the United States in the Field* prepared and mainly written by Francis Lieber at the invitation of General in Chief Henry Wager Halleck, during the American Civil War.[25] In both cases the concern springs initially from the problem of defining who are combatants and who are not, and, of course, it does so in the context of a civil war that requires a treatment of irregular warfare that had previously not been discussed (except in the occasional discussions of the ethics of siege craft in medieval writing on the just war) and that gave rise to a considered discussion of duties owed to prisoners of war, a subject only cursorily treated by theorists such as Grotius, Pufendorf, and Vattel. At roughly the same time, the gradual process of the codification of international law – indeed what one might call the "project" of international law itself – begins to take shape,[26] and

[24] For a thorough and fascinating survey of the evolution of military technologies, strategies, and tactics in the modern period see, especially, Geoffery Parker, *The Military Revolution: Military Innovation and the Rise of the West 1500–1800* (Cambridge: Cambridge University Press, 1996).

[25] See, for an excellent discussion, James Turner Johnson, *The Just War Tradition and the Restraint of War* (Princeton, NJ: Princeton University Press, 1981).

[26] See the account offered in Marti Koskiniemmi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1880–1960* (Cambridge: Cambridge University Press, 2003).

this has pronounced effects, as the *jus in bello* includes the formal adoption of agreements limiting and banning certain classes of weapons or particular types of action.

Such attempts predated the nineteenth century, of course, as Roberts and Guelff point out, citing as an example the 1785 Treaty of Amity and Commerce between the United States and Prussia, which "concluded with two articles making explicit and detailed provision for observance of certain basic rules if war were to break out between the two parties. The first article defined the immunity of merchants, women, children, scholars . . . and others . . . the Second specified proper treatment of prisoners of war."[27] The latter part of the nineteenth century, however, saw a great increase of this kind of provision, and the high water mark was unquestionably the adoption of the 1899 and 1907 Hague conventions on the law of war.

And since that point, the "laws of war" have expanded and developed with new conventions being adopted and new machinery being developed on a fairly constant basis. These developments became yet more central after the Second World War with the Nuremberg and Tokyo tribunals and the adoption in 1948 of the Universal Declaration of Human Rights and the Genocide Convention. After the end of the cold war in 1991, with the old deadlock removed, still more effective legal action seeking to restrain types of warfare was promoted, culminating in the establishments of the ad hoc tribunals for Rwanda and the former Yugoslavia and then, in 1998, the creation of a permanent International Criminal Court, to mention merely the most prominent such attempts.[28]

By this point, however, the *jus in bello* had effectively become "juridicalized" in a manner unforeseen by its creators in the sixteenth century. The *jus in bello* had moved from being seen as part of the *jus gentium* (law of nations) to being seen as the laws of war, part of a *jus inter gentes* (law between nations). And given the prevailing view of the character of law, this marked a very real change in the way in which the *jus in bello* was understood. Since I will return to it briefly in a moment, it might be worthwhile saying something about the significance of this distinction. To explain this I should say something first about the origins of the term

[27] Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd edition (Oxford: Oxford University Press, 2000), p. 4.

[28] The best general treatment is Best, *War and Law since 1945*, though it does not include detailed discussions of the International Criminal Court.

jus gentium. The root, of course, is Roman law. The Romans distinguished between *jus*, that is, customary law, and *lex*, essentially enacted law. *Lex*, because it *is* enacted at a particular time and place, can be repealed or amended, but *jus* was part of what we would now call case law. Civil law governing relations between Roman citizens – specific allocation of rights and responsibilities – was therefore *lex*, but civil law governing relations between Romans and others, or between others generally, if under Roman authority, was a matter of *jus*. Hence the general term that came to be used for these kinds of discussions was the *jus gentium* (law governing *gentes* – nations).[29]

By the early modern period – when, as we have seen, the key moves in developing the distinction between the *jus in bello* and the *jus ad bellum* were made – there was a widespread discussion of the appropriate relationship between the *jus gentium* and other parts of law, especially natural law, but it gradually became clear that there are two distinct meanings to the term *jus gentium* that did not always sit happily together; it is significant that among the first to discuss this in detail was one of the most important thinkers in the history of the *jus in bello*, Francisco Suarez. Suarez insists that while *jus gentium* is used to refer to the common laws of individual states that are in accordance with similar laws elsewhere and thus "commonly accepted," it *ought* only to be used for "law which all the various peoples and nations observe in their relations with one another."[30]

Gradually, during the latter part of the seventeenth and in the eighteenth century this indeed is what happened. But even by Vattel's time, while the *jus gentium* was seen in this way, it was still seen also as part of the natural law, as being intimately connected with other aspects of law. Thus, *Law of Nations* contains discussions of matters internal to states as well as matters that would now be seen as matters of relevance to public law as well as to "international" law, as we understand it today. The real change – the change that marks, I suggest, a crucial difference – does not occur until the nineteenth century and the dominance of legal positivism and an international law constructed in its image. But more of that in a moment. What might we say, in conclusion, about the *jus in bello*?

[29] For a more elaborate discussion of this point see Brown, Nardin, and Rengger, *International Relations in Political Thought*, pp. 318–23.

[30] This reference is from Suarez, "On Laws and God the Lawgiver," *in Selections from Three Works*, trans. G. L.Williams (Oxford: Clarendon Press, 1944), cited in Brown, Nardin, and Rengger, *International Relations in Political Thought*.

II. The *Jus in Bello* Today: Problems and Perspectives

Today, in terms of the just war tradition as a whole, the *jus in bello* is still very much the dominant part, precisely because it can be and has been juridicalized so effectively. As international law and various kinds of legal instruments and institutional settings have proliferated, especially since the end of the Second World War, the body of law usually referred to as the laws of war (or now sometimes international humanitarian law) has expanded exponentially. While the *jus ad bellum* has, of course, become a matter of debate once more (as it was not for Vattel, for example), while many contemporary just war writers – most influentially Paul Ramsey and Michael Walzer[31] – have argued with subtlety and skill about it, and while it clearly becomes an issue of public debate – as in the case of the Iraq conflict in 2003 – it is still much harder to juridicalize effectively, in the required manner, than is the *jus in bello*. A clear example of this can be seen in the agreement to establish the Permanent International Criminal Court. The court has jurisdiction over four classes of crimes: (a) genocide, (b) crimes against humanity, (c) war crimes, and (d) the crime of aggression. Of these, however, only the last is effectively an *ad bellum* crime, yet while the court has jurisdiction over it, its jurisdiction is essentially pointless, as there is no agreed definition as to what is to count as aggression.[32]

That the *jus in bello* in its juridicalized form is still the dominant partner does not mean that it has no critics, however, and before I return to the concern I flagged at the outset it is perhaps as well to rehearse some of the more general criticisms one can find of the contemporary state of the *jus in bello*. In what follows, I run together some criticisms that have been made severally, and I do not always attribute them; they are sufficiently general to make specific identification unnecessary.

One of the longest-standing criticisms of the *jus in bello* – indeed of the just war tradition as a whole – is that it simply encourages rather than discourages the use of force; that it is, effectively, complicit with a ruinously expensive (in both material and moral senses) war system. This kind of complaint goes back at least (as we have seen) to Erasmus. To this can be added the modern concern that the *in bello* constraints,

[31] See, of course, Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977) and Paul Ramsey, *The Just War: Force and Political Responsibility* (New York: Scribner's, 1968).

[32] See Rome Statute of the Permanent International Criminal Court in Roberts and Guelff, *Documents*, p. 673.

which effectively recognize and formalize the legality of at least some aspects of war fighting, clash with a presumed illegality of the use of force as such, which seems to be implied by some international agreements (for example, the Kellogg-Brian pact of 1928 and the United Nations Charter). As Roberts and Guelff point out,[33] however, neither of these two documents completely rules out resort to force, and the whole point and thrust of the development of the *jus in bello*, as we have seen, has been to seek their implementation even in situations where there may not be a “legitimate” *ad bellum* reason. Furthermore it seems unlikely (to put it mildly) that the use of force by states, or other agents in world politics, will cease, whether or not there is a just war tradition, and so it can hardly be said that the tradition “encourages” a practice that seems pretty permanently present anyway. The use of force for political ends, I suggest, hardly needs the just war tradition to encourage it.

A second criticism often made with respect to the evolution of the laws of war since the middle of the nineteenth century is that they are effectively a sliding scale, constantly playing a game of catch-up with new developments in military technology. The role of submarines in both the First and the Second World Wars is an example that has been often discussed here. Sinking merchant shipping was deemed to be against the laws of war, and yet no punishment was visited on the perpetrators and the rules were not basically changed. There is, I think, something to this and it might be added that the requirements of framing particular instances of law may often also run this risk since the very specificity necessary will require close attention to the particularities of whatever is involved (a particular weapons system, for example). However, it is certainly also true that some successes seem to have been had in (for example) banning certain classes of weapons pretty effectively (chemical weapons, land mines) even if there are some violations of such agreements. So it would seem that while this is a danger, and should be guarded against, it is by no means inevitable and so cannot be held to invalidate the *jus in bello* by definition.

A third area of criticism points to the inherently ambiguous character of the *jus in bello*. It claims to restrain war, for example, but acknowledges rules like military necessity that permit the overcoming of such restraints. Many other similar alleged contradictions can be found. The nub of this criticism is that, to all intents and purposes, the *jus in bello* – and again perhaps the just war tradition as a whole – is like trying to repair an amputated limb with sticking plaster. In the event of a clash, military necessity

[33] See Roberts and Guelff, *Documents*, p. 28.

always triumphs and so the rules are only obeyed when there is no real cost to obeying them, and that suggests that they are not really *rules* at all. At one level this criticism merely points out the inherent difficulty of restraint in an environment of extremes, which few, if any just war theorist would deny, and the fact that such judgments are inherently difficult and often messy does not imply that they cannot or should not be made at all. Another point is that the force of this criticism also rather depends on how the notion of a rule, in this context, is understood. On some understandings of what is involved in rule-bound behavior the criticism may have some weight, but on others it most certainly has not; a lot will stand or fall on how you understand the character of the rules in question.[34]

And that takes me to a third point on which I want to dwell for a moment here since it returns us to that phrase of Oliver O'Donavan's quoted at the outset, to the effect that the distinction between the *jus ad bellum* and the *jus in bello* should be seen as a secondary and not a "load bearing" distinction.

We have seen that the distinction grew out of the attempt by Vitoria to deal with the question of simultaneous ostensible justice and his suggestion that we assume a stance of ignorance rather than one of malevolence of our adversaries. In the early renderings of this view in the sixteenth and seventeenth centuries, however, this view was combined with the general concerns of what was rapidly becoming the *jus ad bellum* in a manner that sought to do justice to both. The distinction was then largely a secondary one and the manner in which the judgments were made blended custom, precedent, formal agreements, and experience in almost equal measures. This is what Johnson means, I think, when he suggests that the just war tradition between the fifteenth and the seventeenth centuries becomes "'non-ideological' – as opposed to the 'ideological' form it had taken during the religious wars that preceded this period."[35]

But one might characterize this change in a rather different way; the reason for the change, one might say, lies less in the character of the just war tradition itself than in the manner in which law itself was being understood.

As Koskiniemmi has argued,[36] the project of international law was one that was very much in keeping with both the progressive liberalism and

[34] For further elaboration of this point, see Anthony Lang, Jr., Nicholas Rengger, and William Walker, "The Role(s) of Rules: Some Conceptual Clarifications," *International Relations* 20, no. 3 (2006): 274–94.

[35] See Johnson, *Ideology, Reason and the Limitation of War*, p. 261.

[36] In Marti Koskiniemmi, *The Gentle Civilizer of Nations.*

the legal positivism that were largely dominant in the mid- to late nineteenth century and that were then to have a central role in shaping the way that the juridicalizing of the *jus in bello* took place. In this respect, one might say that the casuistic, flexible, and open discourse of the *jus in bello* from its infancy up until (roughly) the time of Vattel became much more constrained and hemmed in by a legal positivism that gave to it an "ideological" character it had up to that point surrendered. Of course the *content* of the ideology was very different – a liberal, progressivist, positivistic one, rather than a theological one justification for religious war – but its effect was not dissimilar. Rather than allowing the *jus in bello* to *balance* competing demands and competing claims – as the tradition from Vitoria down to Vattel had done very ably – it tended to force the *in bello* constraints into one particular shape, that of modern, positive international law. Understood in this way, some of the criticisms mentioned earlier do begin to take on a rather more serious form because it will be much more difficult for the laws of war to do what they were originally designed to do, which is to act as the bridge between moral reality and political necessity, human frailty and human agency.

What we perhaps need, then, in the twenty-first century, is to rethink the character of our understanding of the relationships among law, morality, and politics in ways not dissimilar to the ways in which Vitoria and his colleagues had to do in the sixteenth. But in doing that, we will, of course, have to rethink much of the manner in which we think about law as such and the role it plays in (and between) our societies. There is encouraging evidence that a number of political philosophers, international relations scholars, and legal theorists are beginning to do just that.[37] But in any event the example of the school of Salamanca is at least an optimistic sign; for as we saw, the result of their refiguring of the tradition gave it a new lease on life and helped develop an understanding of the possibility of combining morality, politics, and charity in ways that have helped to increase our understanding of, and mitigate the worst excesses of, one of the most terrible but persistent human practices. Perhaps it is time to look for our very own school of Salamanca.

[37] See, for example, amongst a wide set of encouraging signs, Terry Nardin, *Law Morality and the Relations of States* (Princeton, NJ: Princeton University Press, 1983); Philip Allott, *Eunomia* (Oxford: Clarendon Press, 1992); Allen Buchanan, *Justice, Legitimacy and Self Determination: Philosophical Foundations for International Law* (Oxford: Oxford University Press, 2003); and Larry May, *Crimes against Humanity* (Cambridge: Cambridge University Press, 2005) and *War Crimes and Just War* (Cambridge: Cambridge University Press, 2007).

TWO

INITIATING WAR

3

The Principle of Just Cause

Larry May

In the just war tradition, a distinction is drawn between the justification of initiating and waging war, *jus ad bellum*, and the justification of tactics during war, *jus in bello*. The main *jus ad bellum* normative principle is called "just cause." Traditionally, just cause referred to a wrong that a state had committed, which initially legitimated war as a response.[1] The two main just causes were unprovoked attacks on a State, either one's own State or another State. In the past, just causes could involve either the prevention of those attacks or the punishment of them. Today, punishment is a highly contentious just cause, whereas prevention of attack on self or other is still considered to be the most important of the just causes to go to war. Just cause only addresses a prima facie case to go to war, where there are other conditions that also need to be satisfied, principally proportionality, in order for the war to be just.

The principle of just cause is also at the core of what constitutes an aggressive war in contemporary international law. Traditionally, *jus ad bellum* principles were employed to determine whether a state was justified in its use of force. In the trials at Nuremberg, *jus ad bellum* principles were employed to determine whether individuals should be prosecuted for initiating aggressive war, and, more recently, the International Criminal Court is considering the prosecution of aggression as well.[2] In this essay, I will argue that the principle of just cause needs to be reconceptualized, especially when we are discussing responsibility of individual defendants rather than states.

[1] See Stephen C. Neff, *War and the Law of Nations: A General History*, Cambridge: Cambridge University Press, 2005.

[2] Today there are no prosecutions of individuals for the crime of aggression, even though the International Criminal Court has jurisdiction to do so, because of a failure of the international community to agree about what constitutes state aggression, one of the elements in the crime of aggression.

The structure of the essay is as follows. In the first section I will discuss two examples of war thought to satisfy the just cause principle, conversion of the heathens and promotion of democracy, and begin to explain what is a just cause to wage war. In the second section I briefly discuss some problems even for the paradigmatic example of just cause to wage war, namely, self-defense. In the third section, I reconceptualize the principle of just cause. I argue that just cause is best seen as a wrong committed by a state that threatens the lives or human rights of a sufficiently large number of people to offset the threat to lives and human rights that waging war poses. In the fourth section I discuss the relation between proportionality and just cause. In the fifth section I discuss how we should understand just cause in criminal trials for waging aggressive war and defend the view that we should have a bifurcated set of principles of *jus ad bellum*. In the sixth section, I draw out some implications of my view for the relationship between *jus ad bellum* and *jus in bello*.

I. Conversion of Heathens and Promotion of Democracy

There are cases where intervention for seemingly good reasons should be condemned as not satisfying the just cause principle for waging war and that hence could count as aggression. In this section I will look at two such cases: the sixteenth-century case of wars fought by the Spaniards to convert the heathen Indians in South America and wars fought by contemporary Western democratic states to promote democracy in non-Western states. I draw parallels between these two cases and then give a preliminary sense of what the principle of just cause should mean in determining when a state can resort to war and when its acts of war will not be considered aggression.

Let us begin with Vitoria's treatment of the Conquistadors' claim that they had a just cause to wage war against the Indians as a means to stop them from practicing the wrong religion and to convert them from heathenism to Christianity. Following the just war tradition, especially that version espoused by Thomas Aquinas, Vitoria draws the following conclusion:

> If the faith be presented to the Indians in the way named only and they do not receive it, the Spaniards cannot make this a reason for waging war on them or for proceeding against them under the law of war.[3]

[3] Francisco Vitoria, *De Indis et De Ivre Belli Reflectiones* (*On the Indians and Reflections on War*) (1536), edited by Ernest Nys, Washington, DC: Carnegie Institution, 1917, p. 143.

The main reason that Vitoria gives in support of his claim is that the Indians "are innocent in this respect and have done no wrong to the Spaniards."

Vitoria then gives a concise statement of the medieval doctrine of just cause: "They who are attacked for some fault must deserve the attack."[4] Since the Indians are without fault in the sense that they have done no wrong to the Spaniards and their heathen practices are similarly non-faulty, their heathenism cannot be the ground for a just war against them. The latter claim is based on Vitoria's argument that the heathens do not have to convert because they "are not bound, directly [as] the Christian faith is announced to them, to believe it."[5] The heathens were not deserving of attack before they heard the word of Christianity, says Vitoria, and it is surely no different now that they have heard it. They have committed no wrong of the sort that warrants an attack because of their not believing what the Christian Conquistadors have told them to believe.

The first question to examine is whether it is defensible to think of "just cause" in terms of whether those attacked deserve to be attacked. In the next section I will discuss self-defense cases, but here I wish to note that there may be innocent threats that raise self-defense concerns: that is, a person who is a threat may not be aware that she poses this threat and may not intend to be a threat and hence may be innocent and not deserving of being attacked, and yet the person threatened may have a just cause to employ violent means to defend himself. Insofar as the innocent threats are imminent and serious, those self-defense concerns might be sufficient to establish a just cause to engage in war even though those attacked have not done anything wrong that would make them deserve to be attacked. Such considerations should make us reluctant to follow Vitoria in thinking that just cause must be linked to deservingness to be attacked. But in the case at hand, this will not be as important as it will turn out to be later since the Indians were certainly not a threat to the Spanish Conquistadors any more than they had done wrong to the Conquistadors by their continued adherence to a set of heathen religious beliefs. Of course, if the heathen religious beliefs were being evangelized the way that the Conquistadors evangelized Christianity, they might be a threat to Christian culture, but that was surely not the case in the middle of the sixteenth century in South America.

[4] Ibid.
[5] Ibid., p. 142.

The second question to ask is what sort of wrongs or threats must the attacked state have engaged in that justified the attacking state's waging of war. Could it ever be a wrong to a state for another state to believe or practice the "wrong" religion? Let us imagine that the religion in question involved human sacrifice, as the Conquistadors claimed to be true of certain South American religions. Of course it would matter whether the human sacrifice was itself a wrong, not merely done out of the wrong beliefs. But if there were mass slaughter of innocents by the leaders of this religion, this could be counted as a wrong. Such a wrong would not necessarily be based on the "wrong" religious beliefs, instead of the obviously wrong murderous practices.

The question is really whether the tenets of the religion themselves could constitute a kind of wrong that could be a just cause for war to force the Indians to change their religion. Let us assume, for the sake of argument, that the heathen religion is the "wrong" religion in the sense that it does not contain true beliefs about human nature and the normative relationship between God and humans. Is this the kind of wrong that could be a just cause for war? I agree with Vitoria that it could not be seen as a wrong done *to* the Spaniards, even though it might be a wrong in other respects. The Spaniards could still practice their own religion even living near the heathens, unless the heathens did become evangelists like the Christians, but apparently there was no evidence of that either.

What of the wrong done to the Indians themselves by the perpetuation of a societywide religion that was "wrong"? Is the wrong done to the Indians themselves grounds for the Conquistadors to wage war to change that religion? Vitoria says no, arguing that the wrong must be done to the Conquistadors for them to have grounds to wage war against the heathens. Is this a defensible view? Could this not be a case of "defense of others" as grounds for waging nonaggressive war?[6] Is subscribing to the "wrong" religion a wrong or harm to the people who so subscribe, especially if they are forced to subscribe? It may be, but if the people themselves do not object to this imposition, it certainly seems unjustifiably intrusive for the Conquistadors to force the Indians to stop practicing the religion they want to practice or at least do not object to practicing.

We might also think about a more contemporary case, the waging of war to promote democracy. The administration of U.S. President George

[6] Some theorists want to include defense of others as well as self-defense as just causes to go to war. Indeed, Augustine, arguably the founder of the just war tradition, saw defense of others as better than self-defense as a just cause since the former is more selfless.

W. Bush stands in a long line of recent state governments that have openly suggested that promoting democracy can be a just cause to wage war. It seems to me that an interesting way to approach these claims is by comparison with the claims in the sixteenth century that converting the heathens could be a just cause to wage war. Let us separate the question into two parts, those people who seemingly acquiesce in a nondemocratic government and those people who rebel against the nondemocratic government but seem to need help to achieve democracy. The first case seems closer to the converting the heathens case, whereas the second raises a separate set of problems.

As in the case of holding of the wrong religious beliefs, a state that is nondemocratic might be said to practice the wrong form of government. The people may be wronged or harmed by this, but it is surely not necessarily a wrong or harm to the state that will attack to change this form of government. For this reason, and since the people in question do not complain, it would seem to be unjustifiably intrusive for one state to force the nondemocratic state to change its form of government. It may truly be for the best interests of the people to have their government forcibly changed, but it seems nondemocratic to do so unless the people themselves request such a change. And given that the issue is the promotion of democracy, it seems odd indeed to seek to justify war that nondemocratically forces people to change their practices in the name of democracy itself. If there were some other human right at stake, such as in cases of genocide, there may not be as much importance placed on whether the people want intervention to stop the abuse as is true if we are talking about lack of democracy.

Matters are quite different if the people in question, say, a sizable subsection of the population of a state, ask for help in overthrowing a nondemocratic government and replacing it with a democratic government. Here we have the combination of a kind of wrong being done by a state, in that it represses a portion of its population and forces them not to live under a democracy, with the fact that that population group complains and rebels against this policy. It no longer is clearly intrusive for another state to intervene to help them. This goes a long way to establishing that the intervention might be justified. But does it provide a just cause for war, given the enormous harm caused by war? I will delay giving a full answer to this question until we consider the principle of proportionality that forces us to ask these comparative harm questions. Suffice it here to say that this case will be easier to fit under the category of just cause than the case discussed in the previous paragraph.

But the problem remains that the state being attacked has not done a wrong to the state doing the attacking; indeed the attacking state appears to be the first striker. While there may be a prima facie plausibility to say that the attacking state is justified because its cause of promoting democracy to those who ask for it is just, there is also a prima facie implausibility of such an attack since the attacking state has not itself been attacked first. We will need to figure out how to weigh such considerations in subsequent sections of this essay. But my tentative conclusion is that it is not obvious that promoting democracy will always outweigh other considerations, and hence not obvious that promoting democracy is a clear-cut just cause to wage what would otherwise be unjustified aggressive war.

II. Paradigmatic Just Cause: Self-Defense

In this section, I discuss a seemingly paradigmatic case of a war fought for a just cause, and hence wars that are generally believed not to be aggressive. Article 51 of the United Nations Charter provides a paradigmatic exception to the general prohibition on state use of force. That article says:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.[7]

This canonical statement seemingly sets up two cases that are clear-cut cases of waging war for a just cause in *jus ad bellum* normative principles of contemporary international law: individual or collective self-defense. In this section I will examine individual state self-defense as an aid to thinking about how we might want to reconceptualize the principle of just cause today.

Let us examine what it is about self-defense, collective or individual, that has seemed to so many to be paradigmatic of a just cause for war, and then try to understand why even this may be problematic in certain cases. In the seemingly simplest case a single state has been attacked and launches a war to defend itself against that attacking state. The attacked state seemingly has a paradigmatic just cause to wage war to stop the attacking state, namely, self-defense. But what if the initial attack is not

[7] Charter of the United Nations, T.S. 993, 59 Stat. 1031, 1976 Y.B.U.N. 1043 (June 26, 1945), Art. 51.

followed by an invasion or even by any indication that there will be further attacks? If the border is crossed and no one is hurt, and the offending state quickly returns to its own territory, it is unclear why this attack would count as a just cause for waging war, given that war involves such horrible risks. I would say that we might not even want to call this single attack a just cause for war.

A more standard case of individual state self-defense is the case of a state that is being attacked and needs to engage in war to repel the attack and prevent itself from being completely overrun, and subjugated, by the attacking state. Here we clearly have a just cause for initiating war, but again, for how long? Once the attacking state has been stopped and pushed back across the common border, does the attacked state have a just cause to continue the war, now marching into the attacking state's territory until it has subjugated that state? The intuitive answer to this question is not at all clear. In some contexts we might want to give an affirmative answer, and in other contexts a negative answer. The answer is not clear because of the fact that the first strike is not necessarily of such magnitude as to warrant continuing rather than very temporary self-defensive measures, and yet we were supposedly considering a paradigmatic case of just cause to wage war.

I would challenge this beginning idea by arguing that protecting state territory is not sufficient to warrant the taking of human life that is a nearly inevitable part of war. Invasion of territory does not necessarily mean that innocent people are attacked. Indeed, territory can be uninhabited, for instance, as in the case of certain small islands. If one state claims these islands and another state captures them, is this enough to count as a just cause for a war where it is highly likely that people, both combatants and noncombatants, will be killed? It can also be true that some islands claimed as part of a state's territory provide no particular military or economic advantages for the state that claims them. If these islands were captured by another state, it would be unclear that the interests of the state, such as its ability to defend the populated mainland, or to have economic self-sufficiency for the populated mainland, would also be adversely affected. So, it is not initially clear why simple invasion of one state's territory by another state is a just cause for the invaded state to go to war.

Self-defense should also not be identified with merely repelling invasion. The contrary position is supported by an analogy between states and individual human persons. The self of the human person is the person's body, and the corresponding self of the state is its territory. If a person's body is attacked, this is the kind of aggression that will trigger a criminal

trial. If a state's territory is attacked, this is also supposed to be the kind of aggression that could trigger an international criminal trial. But there is a significant disanalogy. If a physical attack occurs on a person's body there are serious repercussions for the rest of the body – any attack will cause bruising or bleeding that will adversely affect the functions or stability of the rest of the body. But states can have, as part of their territories, land that is not contiguous to the mainland, or in any event land that when attacked will not necessarily affect the rest of the state's territory or "body."[8]

Another objection could be made on similar grounds – namely, to the idea that aggression can involve the repelling of a state that has invaded the territory of a friendly state. Again, since the friendly state's territory is not analogous to a human person's body, it is not clear why invasion per se should count as aggression that warrants retaliation that is not then itself considered aggression. In this section, our brief examination has supported the conclusion that some supposedly paradigmatic cases of just cause, even self-defense, may be problematic. I next turn to a reassessment of the idea of just cause and the corresponding idea of waging aggressive war.

III. Reconceptualizing the Principle of Just Cause

Traditionally, it was thought that invasion, or threatened invasion, gave the invaded state a just cause for waging war. I reject this way of understanding the principle of just cause. In my view, states are not justified in going to war against other states merely to protect territory or property, unless that territory was occupied. The reason for this is that war involves the killing of many people and it is not at all clear why it would be a just cause to wage a war that involved such killings merely to preserve territory. Indeed, if the state in question is not protecting the rights of its members, it is also unclear why a state would be justified in going to war to preserve its sovereignty. My proposal about reconceptualizing the principle of just cause is that we figure out a way to connect just cause better with what the principle is prima facie to justify, namely, the killing of many people in war.

Any plausible reconceptualizing of the principle of just cause must limit just cause to those circumstances where going to war will provide

[8] On the strategy of employing an analogy between the individual human person and the state, see David Rodin, *War and Self-Defense,* Oxford: Oxford University Press, 2002.

overriding reasons to counter the presumption that war is nearly always wrong because of the risk of killing the innocent. If we are going to go to war and risk killing many people, some of whom will surely be innocent, there must be something at stake that is at least as important as what is risked. Lots of killing is always risked when a state resorts to war, and this must be balanced against what is to be gained from the war. Here the most important consideration is that recourse to war not be even prima facie permitted unless what war aims at is morally significant, and on the order of preventing the killing of lots of people. We should restrict what counts as just cause to connect to the minimization of the destruction of human life or at least to the promotion of human rights.

Some, seemingly such as Vitoria, have argued that just cause should be seen as a kind of threshold consideration – whenever a wrong has been done, then, prima facie, war can be initiated to stop or avenge that wrong. What I am suggesting is that this traditional way to understand the principle of just cause is too broad since the number of wrongs a state can commit is too large to warrant war even in the prima facie way that the principle of just cause allows, given all of war's attendant horrors. Some wrongs are not sufficiently grave to count as just causes that warrant war as a response. A state, or person, may make itself liable to be blamed or even to be punished for a wrong committed, and yet such liability does not extend to being attacked, as would occur during war. One can here think of the analogy to capital punishment – not all wrongs render one liable to be executed for what one has done; indeed only the most serious of offenses, if any, will warrant the death penalty, and surely not such offenses as would occur in the mere destruction of property or the trespass on another's land. War, like capital punishment, involves the killing of people and needs a justification that is as strong as what is being justified as a response.

My proposal is that just cause be reconceptualized to be preventing or stopping a wrong committed by a state, or statelike entity, against another state, or subsection of a state, which is sufficiently morally serious to be analogous to the risk of large loss of life that war involves. On my proposal, just causes for war concern preventing or stopping wrongs from occurring, not retaliating against states for committing wrongs. Just causes for war are not merely violations of territorial integrity, but only ones that involve threats to the lives, or human rights, of the members of a state. Just causes for war are not merely violations of a state's sovereignty by another state, unless the state whose sovereignty is violated

is protecting the human rights of its members, or where its collapse jeopardizes human rights in some significant way. Just causes for war thus involve only certain wrongs committed by the state that is to be attacked, namely, wrongs that threaten the lives or human rights of a sufficiently large number of people to offset the threat to lives and human rights that is involved in the waging of the war in question. This way of understanding the principle of just cause makes it intimately connected to the *jus ad bellum* principle of proportionality, as I will discuss in Section IV of this essay.

One objection to my proposal, often made over the centuries, is that to allow one state ever to violate the territorial integrity or sovereignty of another state is indeed to risk major loss of life or violation of human rights, since any incursion by one state into another state's affairs has often proved to be a prelude to full-scale attack. And if one has to wait for the full-scale attack, it is almost always too late to be able to prevent the attack. This is why traditional just war theory and contemporary international law, as manifested in the UN Charter cited earlier, look only to whether territorial integrity or state sovereignty has been breached, not to the further question of whether there is significant harm to individuals that is risked by such a breach. Indeed, it is very hard to predict what else will happen once the firm bulwark against rights abuse normally secured by state sovereignty has been breached.

If the right to self-determination is a human right, it may turn out that most invasions that threaten a people's right to determine how it governs itself could violate my reconceptualized just cause principle. However, it should be noted that merely depriving a people of the right to have lots of unoccupied and unused land would not necessarily constitute a violation of the right to self-determination as a human right. In my view, normally the key consideration is whether the assault on a population is imminent. If there is no such imminent threat to a population, then normally there is not a sufficient threat to warrant a state's claim to have just cause to go to war, merely because borders have been crossed or sovereignty breached.

A second objection is that I have not taken seriously nonconsequentialist wrongs that would justify recourse to war. Violations of state sovereignty are wrongs in at least two senses: they risk harm to members of states, but they also are violations of a moral principle that undergirds sovereignty. The problem, which I have explored elsewhere, is to explain what precisely that moral principle is. I have argued that the best way to think about the moral principle of sovereignty is in terms of protection of security of

the individual members of a state.[9] Of course, this is also ultimately a consequentialist idea as well. It is not at all clear to me what would be a purely deontological consideration in this domain. I suppose one could claim that states simply have duties not to invade other states, but surely the obvious question would be why they have such duties.

A third objection arises when we think of punishment as just cause for war.[10] If a state has indeed committed a wrong, there is a sense in which the state deserves to experience retaliatory punishment. War can be justified as a means of punishment since just cause focuses on wrongs, and punishment is just about the proper response to wrongs committed, whether by individuals or by states. Indeed, if there is no likelihood that a state that commits a wrong will get the punishment it deserves by any other means, war has seemed to be justified as a means to achieve such just deserts, just as is true today in arguments in favor of capital punishment for those who otherwise are likely to escape other forms of punishment.

But in the just war tradition, punishment was normally discussed in terms of deterrence, at least long-run deterrence, rather than pure retribution. And in my view the reason is clear enough. War is not a good instrument to use to engage in retributive punishment because it is too broad a brush. It is too likely that those who deserve to be punished will not be, and those who do not deserve to be punished will be. Those who are thought to be deserving of punishment are often so thought because of characteristics of the individual, namely, whether the person acted in a malicious way or acted from racial animus. These characteristics are largely irrelevant to the causes of many wars such as wars that are waged to stop an invasion or to go to the aid of a state that is about to be invaded. So, while just causes concern wrongs done, wars are not legitimately waged unless the point of the war is to prevent or stop the wrong from being committed, now or in the future, rather than merely to act as retribution. In the next section I will say more about how just causes should be understood in relation to proportionality, a consideration that makes us worry about how much wrong is likely to be caused by the wrongs of a state. Indeed, as I will explain, it makes sense to think of just cause as itself having a rudimentary proportionality condition that guarantees that the cause is sufficiently serious.

9 See my book, *Crimes against Humanity: A Normative Account*, Cambridge: Cambridge University Press, 2005, chap. 1.

10 See Kenneth W. Kemp, "Punishment as Just Cause for War," *Public Affairs Quarterly*, vol. 10, no. 4, October 1996, pp. 335–53.

IV. Proportionality and Just Cause

In my view, proportionality plays two roles in *jus ad bellum* considerations. Not all seemingly just causes are significant enough to justify war, even in a prima facie way. Significance is a kind of proportionality consideration, but it operates at the level of a restriction on the normal threshold considerations. There is also an all things considered way that proportionality in itself factors into the justification of war. This second proportionality consideration is not a part of the just cause principle, but is a separate *jus ad bellum* principle. The war might meet a threshold determination of significance in that the goals of the war were indeed ones that *could* bring about less rather than more suffering in the world, and yet it might be that all things considered the war should not take place because the type of tactics needed to win such a war *would* likely produce suffering that is disproportionate to the aims of the war. In this way, proportionality considerations play two different, although related, roles in the moral assessment of the initiation or waging of war. I make a radical break with the just war tradition in arguing that there is a rudimentary proportionality consideration within the very idea of the principle of just cause.

Proportionality as a part of the just cause principle will be closely linked to proportionality as an all things considered principle of *jus ad bellum*. And proportionality, as an all things considered *jus ad bellum* principle, will be closely linked to proportionality considered as a *jus in bello* principle. As I will explain, wars are not justified unless the likely tactics to be used are themselves justified. And the justification of the tactics will have to be drawn in terms of whether those tactics are indeed proportionate to the particular aims of the tactics used in the war. This is also a departure from just war theory, although not of all its adherents, since Francisco Suarez said "that the method of its conduct must be proper," and this *jus in bello* factor became a *jus ad bellum* principle.[11]

Jeff McMahan has recently argued that just cause does have priority over proportionality in a certain sense, namely, in that the other conditions "cannot be satisfied even in principle, unless just cause is satisfied."[12]

[11] See Francisco Suarez, "On War," in *Selections from Three Works* (Dispation XIII, De Triplici Virtute Theologica: Charitate) (c. 1610), translated by Gwladys L. Williams, Ammi Brown, and John Waldron, Oxford: Clarendon Press, 1944, p. 805; reprinted in *The Morality of War*, edited by Larry May, Eric Rovie, and Steve Viner, Upper Saddle River, NJ: Prentice-Hall, 2006, p. 62.

[12] Jeff McMahan, "Just Cause for War," *Ethics & International Affairs*, vol. 19, no. 3, 2005, p. 5.

But he recognizes, as I have also been arguing, that there is another sense in which proportionality may have a kind of priority over the just cause principle. McMahan holds that just causes must be such that they provide a justification for killing and maiming, for in the end that is what war involves or risks. McMahan says that individuals can make themselves liable to be killed or maimed in various ways, such as if they engage in wrongs of various sorts. He and I might part company on what precisely these wrongs are, but we agree that they must be significant or serious enough, in terms of a rudimentary proportionality consideration, that is, that they are "sufficiently serious and significant to justify killing" that normally results in war.[13] McMahan thus seems to support the view I have also been advocating, namely, that the just cause principle has within it the idea of significance of the cause, which is itself a matter of a rudimentary proportionality assessment. Here, McMahan and I are on the same page, although there are many other ideas for which this cannot be said.[14]

Proportionality is a major moral restraint on the justifiability of most wars. I do not wish to claim that proportionality is a greater restraint than is just cause. But I do want to emphasize how important proportionality is and to reemphasize that this is at least in part because for there to be a just cause for war, given the normal killing that occurs in war, just cause must involve something at least as serious and significant as the horrors of war. The discussion earlier about the legitimate concerns about killing the innocent in war cannot be taken lightly, and proportionality forces us to take those innocent lives quite seriously indeed. In addition, proportionality considerations bridge the divide between *jus ad bellum* and *jus in bello*. And while there are two somewhat distinct proportionality considerations here, they have in common the idea that even when the cause appears to be just, there are severe restrictions on what a state can do to another state. One state cannot seek to annihilate another state, even for major wrongs done, and one state also cannot use weapons that cause extreme suffering.

Most importantly, states normally cannot claim to have just cause for war if they cannot conduct wars in question without aiming at or having as their intended effects large-scale loss of civilian life. Many wars will simply not meet this rudimentary proportionality requirement that is imbedded in the principle of just cause, even some wars of self-defense.

[13] Ibid., p. 11.

[14] See the discussion of some of this debate in my book *War Crimes and Just Wars*, especially chap. 2.

In this way, proportionality is a major restraint even on the use of self-defense as a justification for war as well. Because of these proportionality considerations that span the divide between *jus ad bellum* and *jus in bello*, I am inclined to give slightly more weight to proportionality than to the just cause principle. I realize that this is based on a relatively nonstandard view of issues that I hold. But my mixing of *jus ad bellum* and *jus in bello* principles is not completely anomalous, as we will see in Section IV.

V. Just Cause and the Elements of the Crime of Aggression

Despite my argument that we not recognize as many just causes as were traditionally recognized in just war theory, when we consider prosecutions of individuals for initiating unjust or aggressive war matters become more complicated. When the principle of just cause is used to determine whether individuals should be prosecuted for state aggression, we should be more lenient than if we are considering whether the state itself should be subject to sanctions. The reason for this is well stated in the Ministries Case at Nuremberg.

> Obviously, no man may be condemned for fighting in what he believes is the defense of his native land, even though his belief may be mistaken. Nor can he be expected to undertake an independent investigation to determine whether or not the cause for which he fights is the result of an aggressive act of his own government. One can be guilty only where knowledge of aggression in fact exists, and it is not sufficient that he have suspicions that the war is aggressive.[15]

The American Military Tribunal sitting at Nuremberg said that we should not expect individual defendants to conduct a full-scale investigation to determine whether their states are engaging in aggressive or defensive war. I would follow this sage advice and change the way we think of just cause as a basis for determining whether to prosecute individuals for waging aggressive war.

The tribunal in the Ministries Case urged that we not convict individuals for crimes of aggression if they did not know that their government was waging an aggressive war. And the court said it would be unjust to demand that defendants instigate an independent investigation to establish whether their government was acting illegally or issuing illegal orders to wage war. This raises the question about whether someone who is quite

[15] "The Ministries Case Judgment," *Trials of War Criminals before Nuremberg Military Tribunals under Control Council Law No. 10*, vol. 14, p. 337.

high up in the state hierarchy can say that he or she did not know that the acts in question were contributing to an aggressive war. Yet the knowledge of the leaders of a state normally is much greater than that of those lower down in the hierarchy, and it is much easier, often, for them to get information about the lawfulness of the state's practices. It would seem obvious that if one held a role of leadership, then this would normally block one's ability to claim that one did not know whether what one was being asked to do was illegal. This tribunal sitting at Nuremberg denied that this is the correct view to take, even for very high-ranking leaders.

According to the tribunal, the character of the acts, whether or not those acts met the *actus reus* or guilty mind element of the crime of aggression, was not to be judged merely against an objective standard of just cause or unlawfulness. In my view, this is one of the most important "Nuremberg precedents." Fairness to these defendants dictates just this result so that they are not held guilty merely by associating with leaders who do clearly plan and initiate aggressive war. I disagree with the Ministries Case judgment, though, in that if high-ranking leaders intentionally shielded themselves from knowledge that the war they participated in was aggressive, prosecutors should be able to use a gross negligence standard to convict them. It is not enough for these leaders to say that they did not know, but rather that it was very difficult for them to find out. I agree that leaders should not be expected to undertake what the court calls "an independent investigation," for it certainly could be very dangerous to do so. But if these leaders have suspicions, they should not blind themselves to facts that would confirm their suspicions.

When there are close calls, and when the defendant's personal liberty, not merely sanctions against the state, is on the line, then I believe we should be lenient toward the defendant; indeed, fairness dictates that individual defendants be given the benefit of the doubt. The reason for this, drawn in terms of the rights of defendants, is also a kind of proportionality consideration. When the rights of individual defendants, especially important rights to liberty, are at stake, rather than merely the less important considerations of possible sanctions against a state, then we need to adjust our understanding of just cause and state aggression accordingly. If we fail to take the rights of defendants seriously, we will undermine the very fragile idea of the international rule of law and we might undermine the very legitimacy of international law itself.

In criminal proceedings I would widen the understanding of just cause to include most instances of defense of self or others, whereas I would restrict the idea in its use outside international criminal law only to

individual or collective self-defense, not to consideration of defense of others. My proposal is that "just cause" be easier to prove, and aggression be correspondingly harder to prove, in international criminal proceedings than in discussion of possible sanctions against states for aggression. The main reason for a bifurcated just cause test is that that test can be used for such different goals.

Throughout most of modern history, just cause has been used to determine whether a state has engaged in immoral or illegal use of force in armed conflicts. When international law was solely focused on states, the principle of just cause was a major factor in aiding states to determine whether they should or should not use force against other states. One could say that the just cause principle was the main element in the regulation of state conduct, ensuring that states by and large did not transgress against one another's sovereignty. Just cause played a role in a regulatory regime that aimed at minimizing interferences with a state's sovereign prerogatives. The main idea was to minimize wars and all of their attendant horrors.

When we move into the twentieth century and begin to focus on individual criminal liability for aggressive war, the just cause principle begins to play a different role than it had traditionally played. Here the main focus is not on the regulation of states but on the assignment of individual responsibility. Criminal trials at the international level are primarily aimed at inducing those who control states to change their behavior and to try harder to avoid war. But the consequence of such trials is that individuals are put in prison not merely that states are encouraged to act more peacefully. And this added consequence of international criminal trials puts an added burden on the just cause principle, in my view. To be fair to the person in the dock, we should make it easier to prove that one had a just cause for war, in determining whether these individual state leaders committed the crime of aggression.

VI. Rethinking the Separation of *Jus ad Bellum* and *Jus in Bello*

Finally, I wish to discuss one of the implications of the view I have outlined here. I hold that the separation between *jus ad bellum* and *jus in bello* should be bridged in that one of the *jus ad bellum* conditions is that it must be likely that war will be fought with just means in order to be justifiable. Today, it is far more likely that theorists will argue that *jus in bello* restraints will depend on whether *jus ad bellum* conditions have been met, so that if the war is initiated as a just war, there will be fewer tactical restraints

on how the war should be fought than if the war is unjust. I have argued strongly against such a position.[16] Instead, following Suarez, I wish to support a view, also defended more recently by William V. O'Brien, that "just conduct in war is a *jus ad bellum* requirement."[17]

Why should we think that a war that cannot, or is unlikely to, be waged with just tactics should ever be considered a just war from the outset? If it turned out that no wars could be waged with just tactics, because for instance tactics could not guarantee that innocent civilians would not be targeted to be killed in war, it hardly makes sense to say that some of these wars were nonetheless justified at the outset and others were not. What is supposed to turn on this determination about how to regard wars at the outset needs to be couched in such a way so that it would not be misleading to states and their leaders as they tried to determine whether they had just cause to start a war. We must be careful not to make it seem that it is appropriate to plan to go to war merely on the basis of what other states might be planning.

My proposal is that we focus as much on the likely consequences of war as on the impetus for war in thinking about just cause. To some people, this proposal no doubt sounds counterintuitive. After all, the very term "just *cause*" implies that we are looking only at the reasons that *caused* war, not at what *is caused* by that war. But of course there is a second term in this pair, namely, "*just* cause." It is true that normally the justice considerations are all applied to the reasons to go to war, but as I have indicated, some, including Suarez and O'Brien, have seen "just" as implying that we need to think about the kind of war to be waged and ask whether it is indeed likely to be waged as a just war. Terminology aside, I do not think it is counterintuitive to introduce some considerations of how the war is likely to be waged into the discussion of whether the war has a just cause in being waged at all.

We should ask whether "just cause" itself needs to be reconceptualized so as to take into account, or to be linked with, at least some forward looking considerations, and hence that a reconceptualized "just cause" could begin to bridge the divide between *jus ad bellum* and *jus in bello*. While in some cases it might be hard to discern what tactics will have to be employed to win an otherwise just war, often it can be discerned

[16] Larry May, *War Crimes and Just War*, Cambridge: Cambridge University Press, 2007.

[17] William V. O'Brien, *The Conduct of Just and Limited War*, New York: Praeger, 1981, p. 35, quoted in Paul Christopher, *The Ethics of War and Peace*, 3rd edition (Englewood Cliffs, NJ: Prentice-Hall, 2004), p. 101.

and such a consideration should be part of the just cause principle. One of the main reasons for this is that some have argued that once a war can be justified by just cause considerations, then it matters less what moral considerations there might otherwise be concerning tactics and how the war is waged. Indeed, some politicians have recently suggested that if there is just cause to go to war, say, because an enemy is unjustly attacking, it would be odd indeed to restrict the tactics that could be employed in self-defense.

Yet, when the only tactics that will be successful in self-defense cause the annihilation of many combatants and noncombatants alike, it seems to me that likelihood of success and the moral weightiness of success are indeed important. Let us say that an unoccupied section of one's state, say, a very small island, has been invaded. In order to stop and reverse the invading troops, given their vastly superior traditional armed forces, nuclear weapons will have to be used. Surely it makes sense to wonder whether a nuclear war initiated to retain a small, unoccupied island within one's territory is worth the war. And raising this question is indeed, in my view, to raise the question of whether some forward looking considerations should be written into the just cause principle in *jus ad bellum* considerations.

In this essay I have tried to indicate just how problematic just cause can be, and why there may be good reasons to restrict what counts as just cause for determining when to criticize or sanction a state for acts of aggression. But I have also given reasons for why we might want to have a broader sense of what counts as just cause in determining whether or not the state aggression element of the crime of aggression has been satisfied. Where the sanctions are punishments of individual persons, I have argued that the restricted construal of just cause is not appropriate. In any event, we should see just cause as seriously limited by proportionality considerations, and we should break down part of the barrier that has traditionally separated *jus ad bellum* from *jus in bello*.[18]

[18] This chapter is exerpted from Chapters 5 and 6 of my book *Aggression and Crimes against Peace*, Cambridge: Cambridge University Press, 2008.

4

Aggression and Punishment

Jeff McMahan

I. Two Paradigms of Just War

The themes of this essay are, as the title indicates, aggression and punishment. Contemporary ways of thinking about war might suggest that a more appropriate pair of topics would have been aggression and defense, since a war of defense against aggression is currently thought to be the paradigm of a just war, or indeed the *only* kind of just war. Yet when Michael Walzer set out the framework for his now classic account of the just war, which articulated what has come to be the consensus view, he advanced six propositions that he claimed constitute "our baseline, our model, the fundamental structure for the moral comprehension of war," and in these propositions the notions of defense and punishment are tightly yoked. The last four of these six propositions, which together constitute what Walzer calls the "legalist paradigm," are as follows.

- Any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act.
- Aggression justifies two kinds of violent response: a war of self-defense by the victim and a war of law enforcement by the victim and any other member of international society.
- Nothing but aggression can justify war.
- Once the aggressor state has been militarily repulsed, it can also be punished.[1]

These propositions do not express the final form of Walzer's account of the just war. Before stating them, he acknowledges that "our judgments

[1] Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), pp. 61–62.

about the justice and injustice of particular wars are not entirely determined by the paradigm. The complex realities of international society drive us toward a revisionist perspective, and the revisions will be significant ones."[2] The most significant revision is Walzer's concession that there are several possible justifications for the resort to war other than defense against and punishment of aggression. "States can be invaded and wars justly begun," he writes, "to assist secessionist movements (once they have demonstrated their representative character), to balance prior interventions of other powers, and to rescue peoples threatened with massacre."[3]

Walzer's understanding of just war as defense against and punishment of aggression is collectivist in nature. His conception of states is informed by what he calls the "domestic analogy," according to which states are sovereign individuals that have a distinct reality over and above the individuals who compose them and "possess rights more or less as individuals do." Once we embrace the domestic analogy, "the world of states takes on the shape of a political society the character of which is entirely accessible through such notions as crime and punishment, self-defense, law enforcement, and so on."[4] It is, however, only states that are the agents and victims of aggression and punishment in war, for Walzer follows Rousseau in claiming that war "isn't a relation between persons but between political entities and their human instruments."[5] Individual combatants, on this view, are not guilty of aggression even if they participate in it and are not liable to punishment unless they violate the rules governing the conduct of war. Where individuals are concerned, Walzer holds that it is a mistake to regard war as a matter of "crime and punishment, [or] evil conspiracies and military law enforcement."[6] Aggression is a crime that only states – and perhaps a small number of individual decision makers who determine how their state acts – can commit, and for which only they may be punished.

Despite the prominence that punishment has in the propositions that constitute the legalist paradigm, Walzer scarcely mentions it further in his account of the just war. He does not go on to explain, for example, in what ways war might be continued beyond the military defeat of the adversary as a means of inflicting punishment. Punishment as an aim of

[2] Ibid., p. 61.
[3] Ibid., p. 108.
[4] Ibid., p. 58.
[5] Ibid., p. 36.
[6] Ibid., p. 41.

war appears in Walzer's book mainly in his references to older theories of the just war. Virtually all he says about it is this:

> The conception of just war as an act of punishment is very old, though neither the procedures nor the forms of punishment have ever been firmly established in customary or positive international law. Nor are its purposes entirely clear: to exact retribution, to deter other states, to restrain or reform this one? All three figure largely in the literature, though it is probably fair to say that deterrence and restraint are most commonly accepted.[7]

In general, Walzer identifies unjust war with aggression and just war with defense against aggression. In this respect his view is similar to that expressed in the United Nations Charter, which prohibits the use of military force by one state against another in the absence of authorization by the Security Council, except in "individual or collective self-defense if an armed attack occurs."[8] Walzer is in fact unusual among contemporary just war theorists in mentioning punishment at all. To most contemporary just war theorists, and indeed to the great majority of philosophical and juridical writers on war throughout the nineteenth and twentieth centuries, the idea that war could be justified as a form of punishment has seemed an anachronism, a moralistic relic of an earlier period when war was a less indiscriminately destructive affair than it has subsequently become. Throughout most of the twentieth century, the prevailing view among moral and legal theorists was that the only just cause for war is defense against aggression. That consensus is now beginning to break down, for reasons I will mention shortly. But even those who have begun to doubt the paradigm of just war as defense against aggression (to which I will refer as the "aggression-defense paradigm") have not been tempted to revert to the much older paradigm of just war as punishment of wrongdoing (the "wrongdoing-punishment paradigm").

Before analyzing and evaluating these two contrasting paradigms of just war, I will offer a very brief account of the history of the displacement of the wrongdoing-punishment paradigm by the aggression-defense paradigm, as well as an account of recent events that have begun to erode support for the latter.[9]

[7] Ibid., p. 62.

[8] See Articles 2(4) and 51.

[9] For a splendid survey of the evolution of moral and juridical thought about war, see Stephen C. Neff, *War and the Law of Nations* (Cambridge: Cambridge University Press, 2005). A briefer but also excellent discussion of the broad contrast between the classical understanding of just war and the later, more pragmatic or "realist" view, can be found in Gregory Reichberg, "Just War and Regular War: Competing Paradigms," in David

II. A Brief Historical Interlude

The challenge faced by the classical just war theorists was to reconcile the idea that war could be just with the teachings of Christianity. Jesus's Sermon on the Mount and the tendency of some rulers to set themselves up as gods, or to demand a degree of allegiance incompatible with the Christian's duty to serve only the Christian god, made this a formidable challenge. During the medieval period, when war was relatively modest in scale and fighting still involved individual combat rather than combat mediated by long-distance weaponry, it was natural to assume that if it could be justifiable to harm or kill people in war, the justification would have to be the same as that which applied to the harming or killing of people in more familiar domestic contexts. And that justification was that a person could permissibly be attacked or killed only if he had engaged in wrongdoing that was sufficiently grave to make him *deserve* to be attacked or killed. Harming or killing that was considered to be deserved was called punishment, though then, as now, it was not held that the only function of punishment was retribution, or the infliction of deserved suffering on the guilty. Rather, as Walzer notes, deserved punishment could be inflicted as a means of defense of self or others, or as a means of deterring either the wrongdoer or others from engaging in wrongdoing in the future.

Still, it was accepted that for punishment to be deserved, the person punished must be guilty of wrongdoing. "There can be no vengeance," Vitoria noted, "where there has not first been a culpable offence."[10] This meant that the occasion for attacking and killing people in war had to be an instance of wrongdoing in which those people were implicated, so that, as Aquinas claimed, "those who are to be warred upon should deserve to be warred upon."[11] The use of force in pursuit of an unjust cause is one kind of wrong that these theorists claimed could make a person deserve to be attacked in war.

As political power began to be consolidated in large and powerful states, the way that war was understood began to change. War was

Rodin and Henry Shue, eds., *Just and Unjust Warriors: The Legal and Moral Status of Soldiers* (Oxford: Clarendon Press, 2008).

[10] Francisco de Vitoria, "On the Law of War," in Anthony Pagden and Jeremy Lawrance, eds., *Political Writings* (Cambridge: Cambridge University Press, 1991), p. 303.

[11] *Summa Theologiae*, IIaIIae, q. 40, art. 1, resp. Quoted in Jonathan Barnes, "The Just War," in Norman Kretzmann, Anthony Kenny, and Jan Pinborg, eds., *The Cambridge History of Later Medieval Philosophy* (Cambridge: Cambridge University Press, 1982), p. 777. Since the only citation is to the Latin text, I assume that the translation is Barnes's own.

increasingly conceived as it is in Walzer's account, as a condition of conflict among states. States supplanted individual persons as the agents whose conduct was the primary focus of evaluation in moral thinking about war. The principles governing the practice of war might still be similar or identical to those governing relations among individuals outside the context of war, but the agents to whom the principles applied in war were not individual persons but states. Individuals began to be regarded as the instruments of states and as such were absolved of responsibility for their action in war, which lay instead with their sovereign.

According to Hobbes, the principles governing relations among states are not those that govern relations among individuals under the authority of a sovereign within a state. They are instead the natural law principles that had once governed relations among individuals in the state of nature, for states exist in a state of nature vis-à-vis one another. Natural law, as understood by Hobbes, is utterly different from the natural law of the classical just war theorists. It demands the unconstrained pursuit of self-interest – and thus, in war, of the interests of the state.

Hobbes was of course only one figure in the development of moral and legal thought about war, and his view deviated more radically from the classical conception of the just war than perhaps any of the other views in the evolving spectrum of rival theories. But it was representative of the general direction of divergence, which was away from the focus on individual action and responsibility toward a more collectivist and pragmatic understanding of the principles governing the practice of war. Philosophical and juridical theorists began to concentrate less on debating the validity of abstract and universal principles of morality and more on the formulation of principles by which the conduct of war might be regulated and constrained. They sought, in particular, to identify principles that it could be in the interests of all states, including the more powerful, to agree to follow.

Over the course of the seventeenth, eighteenth, and nineteenth centuries, concern with the morality of war was gradually overshadowed by a determination to develop a body of law that could actually be effective in controlling the practice of war. Yet the significance of the legal notion of state sovereignty grew so inflated that during the nineteenth century the view that a just cause is necessary for the resort to war to be legal was largely replaced by the Hobbesian view that the resort to war in pursuit of the national interest is a sovereign prerogative of states. Legal doctrines of *jus ad bellum* were almost entirely eclipsed by a concern with the regulation and constraint of the conduct of war.

Yet all the while state territories were becoming more densely populated, armies were growing larger, and weapons were becoming increasingly destructive. If proof were needed, the two world wars of the twentieth century demonstrated that it was intolerable to grant to states an unconstrained legal right to go to war. It had become essential to repudiate what had seemed acceptable in the nineteenth century: that war was a legitimate instrument of state policy, "politics by other means," in Clausewitz's chilling phrase. Moral and legal theory therefore began to develop in tandem in response to the necessity of constraining the resort to war. The conception of states as internally unified and sovereign individual agents was preserved, but the Hobbesian vision of international relations as a state of nature was replaced by the view that relations among states are morally governed, and must be legally constrained, by the same liberal egalitarian principles that govern relations among individuals. Foremost among these principles is the "harm principle" of J. S. Mill's *On Liberty*, which is

> that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant.[12]

This principle is the "domestic analogue" of the principle that came to dominate both moral and legal doctrines of *jus ad bellum* – namely, the principle that a state must never attack another except in response to an aggressive attack either against itself or against another sovereign state. At this point we have arrived at the aggression-defense paradigm of the just war.

It is a corollary of this view that the internal or domestic affairs of a state are entirely the prerogative of the state itself. It is a violation of state sovereignty, and of the moral right of national self-determination that the legal doctrine of state sovereignty is supposed to protect, to intervene forcibly in the internal affairs of another state. If states are to be seen as relevantly analogous to individual persons, then a case in which a government persecutes some group of its own citizens must be regarded as analogous to a person's harming himself. To intervene would be objectionably paternalistic. As Walzer puts it: "As with individuals, so

[12] John Stuart Mill, *On Liberty*, in Marshall Cohen, ed., *The Philosophy of John Stuart Mill: Ethical, Political, and Religious* (New York: Modern Library, 1961), p. 197.

with sovereign states: there are things we cannot do to them, even for their own ostensible good."[13]

Since the publication of *Just and Unjust Wars*, the world has changed in ways that have begun to undermine the domestic analogy as a heuristic device for thinking about moral relations among states. During the period of the Cold War from the end of the Second World War to the early 1990s, the United States and the Union of Soviet Socialist Republics (USSR) were continuously jockeying for effective control of various countries and regions around the world. The USSR operated partly through covert interventions to stimulate domestic communist insurgencies in other states (though it also conducted direct military interventions in such states as Hungary, Czechoslovakia, and Afghanistan), while the United States used its superiority in nuclear weaponry as a means of deterring Soviet challenges to its numerous military interventions in countries throughout the world. It is unsurprising that, in these conditions, those working in international ethics and international law would argue for the necessity of respect for state sovereignty and the wrongfulness of aggression. With the end of the Cold War, which had also enabled a host of vile and repressive dictatorships to remain in power as puppets of the two major powers, nationalist movements that had been held in check by these dictatorships (usually with the encouragement and support of their superpower ally in the interest of "stability") inaugurated violent campaigns for secession or for the suppression of secessionist movements, the expulsion or massacre of national or ethnic minorities, and so on. Conflicts *between* states – conflicts of aggression and defense – were replaced by conflicts *within* states as the principal threat to the lives and well-being of individuals. Although nationalist violence and genocide were hardly unknown either before or during the Cold War (witness the Armenian genocide in Turkey, the Holocaust, and the genocide in what was then called Kampuchea), fear and hatred inspired by nationalist sentiment led to a series of slaughters (of Tutsi by Hutu in Rwanda, of Bosnian Muslims by Serbs in former Yugoslavia, of Albanian Kosovars by Serbs in Serbia, of black Sudanese Muslims by Arab Sudanese Muslims in Darfur) that seemed to many to require humanitarian intervention on behalf of the victims.

In these altered conditions, moral and legal thought has begun to shift away from the strict aggression-defense paradigm of just war. In general, moral and legal theorists continue to regard defense as the principal or

[13] Walzer, p. 89.

even the only aim of a just war – again, Walzer's reference to punishment is anomalous – but the state is no longer universally regarded as the only appropriate object of defense in war. Many people have come to regard the defense of individuals – in particular the defense of individuals against violations of their basic human rights – as a just cause for war, even if this may require intervention in, or invasion of, a sovereign state that has not committed any act of aggression. The state-centered, collectivist conception of international relations has begun to yield to a more individualist view, and the rights of state sovereignty are thought by many to be overridable when a state engages in the systematic violation of the human rights of some sector of its citizenry.

III. Can Aggressive War Be Permissible?

Are the reformists right or is aggression the sole occasion for just war? That is, can a war be just that is not a response to aggression? Can aggression be just? To answer these questions, we must determine what exactly aggression is. Walzer, one may recall, claims that "any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression." *Just and Unjust Wars*, from which this definition is quoted, was published in 1977 and shows the influence of the definition of aggression adopted by the UN General Assembly in 1974. According to Article 1 of that definition, "aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State."[14] The problem with these ways of understanding aggression, however, is that they imply that any war that is a defensive response to the unjust first use of military force by another state, but that threatens the sovereignty of the initial attacker, counts as aggression. Some wars of defense may not threaten the sovereignty of the state against which they are directed, but some do. Both the Allied war against Nazi Germany and the war against imperial Japan threatened the sovereignty of the state against which they were directed. The Nazi government was overthrown and the German state divided, while Japan was occupied and its government restructured in accordance with a new constitution. Yet the Allies in the Second World War were not guilty of aggression.

[14] Report of the Special Committee on the Question of Defining Aggression, 11 March–12 April 1974. Quoted in Yehuda Melzer, *Concepts of Just War* (Leiden: A. W. Sijthoff, 1975), p. 29.

What is missing from these definitions is, of course, any reference to the first use of force, or "priority," as it is called in legal discussions of the UN definition. The "first use" condition does appear in Article 2 of the UN definition, which says that "the first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances including the fact that the acts concerned or their consequences are not of sufficient gravity."[15] Yet this reference to first use is so heavily qualified that it has little determinate content at all. First use is only *evidence* of aggression, and then only prima facie evidence. This element of the definition leaves it open that the first use of military force by one state against another might not be aggression. One way it might not constitute aggression would be for the Security Council to judge that it is not – perhaps on the ground that the use of force is not sufficiently serious, perhaps on other grounds unspecified by the definition. So the first use of military force is explicitly not sufficient for aggression, and there is no indication anywhere in the definition that it is necessary either.

But as the notion is commonly used, the first use of significant military force by one state against another seems to be a necessary condition of aggression and is in general sufficient. I say "in general sufficient" because there is one type of case in which the actual first use of force may not be aggression – namely, cases in which one state initiates the use of force in response to an imminent threat of attack, or perhaps a nonimminent but nevertheless highly probable threat of attack, by another state. The preemptive or perhaps even preventive use of force that is a response to a genuine and serious threat of attack seems to count as defense rather than aggression. So I suggest that we understand aggression as any use of significant military force by one state against another that is not defensive – that is, military action that is not a response to a prior first use of force, or to a high probability of an initial use of force, by the target state against another state.

With this as background, we can now return to the substantive question whether a just war must be a response to aggression or whether there can be a just cause for war in the absence of prior aggression. Writing in 1961, Elizabeth Anscombe, who understands aggression in the way that I have suggested, gives what I think is the right answer: "The present-day

[15] Ibid., p. 30.

conception of 'aggression,' like so many strongly influential conceptions, is a bad one. Why *must* it be wrong to strike the first blow in a struggle? The only question is, who is in the right, if anyone is."[16]

When put this way, Anscombe's claim may seem so obviously right that one may wonder how people could, for so long, have thought otherwise. There have, I think, been several obstacles to the appreciation of the truth of her claim, some theoretical, some practical. One theoretical obstacle is the pervasive influence of the domestic analogy in the way that people have thought about international relations. If we think about the possibility of justified aggression by exploring parallel cases in which the agent and the victim are individual persons rather than states, our thinking will be distorted by the fact that there simply is no "domestic analogue" of a state's persecuting some sector of its citizenry. As I noted earlier, the closest analogy is a person's harming himself, but that is utterly disanalogous, in moral terms, to a state's harming or killing some of its own citizens. Suppose we thought that in relations among individuals, it is always wrong to strike the first blow – that is, always wrong to be the first to use physical violence against another individual. With Anscombe, I think this is implausible, but it is less implausible than the analogous view at the level of states that it is always wrong for one state to strike the first blow against another, for one state may strike another, not because the other has struck the first blow against another state, but because it is in the process of striking unjust blows against its own citizens.

Another theoretical obstacle has been the view that coercive external intervention in the affairs of a state necessarily violates the right to collective self-determination of the people of that state. Again the classic statement of this view is by John Stuart Mill, this time in his "A Few Words on Non-Intervention," which is quoted and discussed with approval by Walzer.[17] But the flaw in this view, which became painfully apparent in the nationalist civil wars of the 1990s, is that states often contain two or more national groups that have so little in common that there is no single collective "self" whose self-determination would be violated by military intervention. Intervention that might thwart the self-determination of one group might advance the self-determination of another. In a case in which the institutions of the state are controlled by one group and are being exploited for the wrongful oppression or persecution of another,

[16] Elizabeth Anscombe, "War and Murder," in *Ethics, Religion, and Politics, Collected Philosophical Papers*, vol. 3 (Minneapolis: University of Minnesota Press, 1981), p. 52.

[17] See Walzer, pp. 87–91, and accompanying quotations from and citation of Mill's essay.

intervention against the state at the request of the victims might not violate any right of collective self-determination at all. The rights of the beneficiaries would not be violated because they would have requested and welcomed the intervention, and the rights of the group that controls the institutions of the state would not be violated either, since their right to collective self-determination does not include a right of noninterference with their violations of the rights of others.[18]

A practical obstacle to appreciating the force of Anscombe's claim is that, as I noted in the previous section, the prime imperative throughout most of the twentieth century was to constrain the resort to war. To acknowledge the permissibility of the unilateral initiation of war, even in defense of people's human rights against violation by their own government, is dangerous because it offers a rationale, or cover, for the initiation of war for reasons of national self-interest. And states tend to seize any pretext that is available. Throughout the Cold War, for example, the United States sought to justify its various aggressive interventions by claiming that it was defending people from insidious communist subversion and aggression.

This practical concern, while extremely important, is irrelevant to whether there can, in principle, be a just war that is aggressive in the ordinary sense that it involves the first use of significant military force by one state against another. The practical need to constrain the resort to war at most requires that if aggressive war can be morally justified, it would be best not to publicize that fact, and a mistake to grant states any permission under international law to initiate war against another state without authorization by the UN Security Council or, perhaps, some other, more impartial judicial body that might be established under international law.

It may also no longer be true that the most important practical imperative is the prevention of war between states. It may now be equally urgent, or perhaps even more urgent, to prevent systematic violations of human rights when conflicts arise within states.

The most important questions that are relevant to the permissibility of aggressive war are these. Are people who wrongfully and culpably imprison, torture, and kill their fellow citizens morally liable to potentially lethal attack if that is the only, or even just the most effective, means of stopping them? And are those who use force to shield the wrongdoers from interference in these activities also liable? If the answer to both

[18] For a more detailed discussion, see Jeff McMahan, "Intervention and Collective Self-Determination," *Ethics and International Affairs* 10 (1996): 1–24.

these questions is yes, and I think it clearly is, then in principle aggressive humanitarian intervention can be morally justified, for we are granting that there is a moral justification, grounded in familiar moral principles of self- and other-defense, for attacking these people. And there is no reason to alter this conclusion if the agent that acts in defense of the victims is a state, or a group of individuals acting under the authority of a state, or if those who are committing the wrongs against their fellow citizens are agents or officials of a different state. It is, of course, not irrelevant if those who are the agents of a defensive attack are representatives of one state while those who are the victims of the attack are representatives of a different state, but there is no reason to suppose that the permissibility of third-party defense of the innocent is invariably canceled when both these conditions obtain.

According to the definition I have given, unilateral humanitarian intervention counts as aggression. If I am right that unilateral humanitarian intervention can be morally permissible, it follows that aggression can be permissible. Indeed, in cases in which humanitarian aggression is permissible, it is also generally true that defense is impermissible. Insofar as the aim of the aggression is only to stop the violation of human rights, those responsible for the violations have no right to attack the rescuers in self-defense; their only permissible option is to stop the wrongful action that has provided their attackers with a just cause for war. In short, in cases of justified humanitarian intervention, the traditionally accepted claims are reversed: aggression is permissible, while defense is wrong.

IV. Punishment as a Just Cause for War

Even if aggression can be permissible, it may still be true that the sole just cause for war is defense. Defense against unjust aggression might be one just cause, while defense of human rights, which might involve aggression, could be another. The first of these could be either national self-defense by one state against another or third-party defense of one state by another. The second could involve third-party defense of individuals.

But is it true that just war must be purely defensive? Or can there be just causes for war other than defense? Many people believe that deterrence of unjust aggression can be a just cause for war. But many of these same people also believe that the status of deterrence as a just cause is conditional – that is, they believe that it can become a just cause only in conjunction with defense. On this view, deterrence, either of the country attacked or of other countries generally, cannot constitute a just cause for war on its

own. It can never be just to go to war solely to deter unjust aggression or some other serious wrong. Rather, there must be some offense, such as unjust aggression, that justifies a defensive response. Then, once war is in progress for the purpose of defense, it can become permissible to take further action in the war that is not justified entirely by considerations of defense, or to prolong the war after the defensive goals have been attained, in order to deter the aggressor or others from engaging in similar action in the future. My view is that deterrence can be an independent just cause for war and thus may in principle be permissibly pursued even in the absence of defensive aims, though cases in which this might be true are so rare that in practice it is safe to assume that it is permissible to pursue deterrence only as a corollary of the pursuit of defense.[19] I will not, however, discuss this issue further here. Our question in this essay is whether punishment can be a just cause for war.

As before, to answer this question we must first address a prior question: namely, is there a sharp distinction between defense and punishment, and if so what exactly is it? The prevailing view, as George Fletcher puts it in one of a pair of essays that discuss this question, is "that self-defense is one sort of thing and punishment, quite another."[20] That they are entirely distinct is also presupposed by the common view that while defense can be a just cause for war, punishment cannot.

According to most accounts, the main difference between defense and punishment is that defense is ex ante, punishment ex post – that is, defense aims to stop or to prevent an offense, whereas punishment responds to an offense that has already occurred. In criminal law, for example, self-defense is understood as action that occurs once an attack has begun, or is just about to begin, but has not been completed. Punishment, by contrast, occurs only after an offense, such as an attack, has been completed, and indeed only after trial (even if the completed act was an uncompleted crime, as in the case of criminal attempts). Another commonly noted contrast is that while self- and other-defense are permitted to individual agents and require no authorization from others,

[19] For an argument that deterrence can be an independent just cause, see Jeff McMahan, "Just Cause for War," *Ethics and International Affairs* 19, no. 3 (2005): 1–21. For criticism and a defense of the more common view that deterrence is only a conditional just cause, see Thomas Hurka, "Liability and Just Cause," *Ethics and International Affairs* 21, no. 2 (2007): 199–218.

[20] George P. Fletcher, "Punishment and Self-Defense," *Law and Philosophy* 8 (1989): 201–15, p. 201. Also see his "Self-Defense as a Justification for Punishment," *Cardozo Law Review* 12 (1990–1991): 859–66.

punishment is exclusively the prerogative of the state. Some argue that a further difference is that defense seeks to avert one harm through the infliction of another, while punishment adds to the net sum of harm. It inflicts an additional harm after the unavoidable harms have occurred.[21] Finally, most people assume that desert is a necessary condition of justified punishment but not of justified defense – that is, that while a person must deserve to be harmed in order to be a legitimate subject of punishment, this need not be true in order for a person to be a legitimate target of defensive action.

Despite these contrasts, defense and punishment are not so different as to be mutually exclusive. Although in the end Fletcher defends the received view that defense and punishment are "radically different," his two essays are nonetheless devoted to considering "whether harm inflicted in legitimate self-defense constitute[s] punishment."[22] This way of putting the question is, however, misleading. It would be better to ask whether harm inflicted as legitimate punishment can also constitute defense. Phrasing the question this way makes it clear that the categories of defense and punishment are overlapping, for defense is among the accepted aims of punishment.

In most people's minds, the notion of punishment is associated with guilt, desert, and retribution. Yet retribution – the infliction on wrongdoers of whatever penalties they deserve – is only one of the aims of punishment. Punishment is widely recognized as legitimately serving various other aims, such as defending or protecting innocent people from further harm at the hands of the criminal, deterring both the criminal himself and other potential offenders from committing similar crimes in the future, reforming the criminal's morals, and expressing society's disapproval of the criminal's action.

Of these aims of punishment, only retribution requires desert on the part of the criminal. Yet we might altogether reject the ideas of desert and retribution and still retain a practice that would be clearly recognizable as punishment. Suppose, for example, that philosophers were to persuade us that there is no such thing as desert. We would then have to abandon the idea that punishment can be justified as retribution. But we could still have laws and impose penalties on those who violated them in order to protect ourselves from the offenders and to deter both them and other potential offenders from violating the laws in the future. And it would

[21] See Jules Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992), p. 223.

[22] Fletcher, "Punishment and Self-Defense," pp. 214 and 202.

be uncontroversial that in enforcing the laws we would be punishing the violators.

We could still insist, moreover, that only those who had violated the laws could legitimately be punished. Even if we rejected the idea that violators could deserve to be punished, we could still insist that only those who had violated the law could legitimately be punished because only they would be morally *liable* to punishment. The notions of desert and liability are importantly different. If a person deserves to be harmed, there is a reason for harming him that is independent of the further consequences of harming him. Giving him what he deserves – retribution – is an end in itself. But a person is liable to be harmed only if harming him will serve some further purpose – for example, if it will prevent him from unjustly harming someone, deter him from further wrongdoing, or compensate a victim of his prior wrongdoing.

This shows, I think, that we could have a practice of punishment that would have as its sole aim the defense of innocent people against those who, by violating the laws, had shown themselves to be presumptively dangerous and simultaneously made themselves liable to preventive action.[23] But if punishment and defense are so obviously overlapping, why have they been thought to be "radically different" and wholly distinct? I suspect the explanation is that people tend to focus on paradigmatic cases, associating defense with stopping an attack or offense that is in progress, and punishment with retribution inflicted after an attack or offense has been completed. Because justified defense against an attack in progress does not require that the aggressor *deserve* to be harmed, and because retribution is inflicted only for offenses that have already occurred and cannot be prevented, it has seemed natural to suppose that defense and punishment are distinct and not overlapping.

But there is a large area of overlap between "pure defense" (violent action intended only to stop an attack in progress) and "pure retribution" (the infliction of harm on a person for the sole purpose of causing him to suffer what he deserves to suffer as a result of having committed a completed offense). The area of overlap between these pure forms of defense and punishment is occupied by certain cases of "preventive defense," or defense against attacks or other offenses that have not yet begun.

[23] For efforts to develop a justification for punishment on the basis of principles governing individual self-defense, see Thomas Hurka, "Rights and Capital Punishment," *Dialogue* 21 (1982): 647–60; Daniel Farrell, "The Justification of Deterrent Violence," *Ethics* 100 (1990): 301–17; Philip Montague, *Punishment as Societal Defense* (Lanham, MD: Rowman & Littlefield, 1995).

There are two forms of preventive defense that would not normally be considered punitive – that is, would not normally count as punishment. One is preventive action taken to avert a future threat in the absence of any present attack or offense. The other is preemptive action taken in the absence of an actual attack but when planning and preparation have made an attack either imminent or otherwise highly probable. In both these cases, preventive action is likely to be regarded as defensive, whether legitimate or not, rather than punitive.

But there are two other types of case that are simultaneously defensive and punitive. In one, an offense has been completed but the offender is subjected ex post to action intended to prevent him from repeating the offense or committing another offense of a different sort. This is the kind of case to which I referred earlier when I suggested that we might cease to believe in desert and retribution but still have a practice of punishment intended only for social defense. The imposition of restraints on an offender in such a case would clearly count as punishment since the act that would have established liability would lie in the past, but the aim of the punitive action would nevertheless be wholly defensive. In the other kind of case in which action is simultaneously defensive and punitive, an attack or offense is in progress and action is taken both to stop the ongoing action and to prevent further attacks or offenses in the future. The ongoing offense justifies purely defensive action and also provides the basis of liability to preventive action that is punitive in nature, whatever form it may take. In domestic contexts preventive action typically takes the form of detention. In war, it generally takes the form of forcible disarmament. This is in fact a familiar course for war to take: aggression by one side prompts an initially purely defensive response by the victim that is then followed by further action to disarm the aggressor as a means of preventing further aggression in the future. In these cases there are two just causes: (1) defense and (2) punishment that has no retributive element but is instead entirely preventive.

The claim that punishment can be a just cause for war when the aim is preventive leaves open the question that many people have in mind when they ask whether punishment can be a just cause – namely, can *retribution* be a just cause for war? Can it be a just cause for war to inflict on wrongdoers what they deserve to suffer? There are several reasons why in practice it cannot, each of which is individually contingent. To say that a reason is contingent is to say that circumstances could in principle be such that it would not apply. This means that *in principle* retribution could be a just cause for war. But the probability in practice that any one

of the various reasons could be overcome is exceedingly remote; thus the probability that they could all be overcome in a single instance is negligible.

The first question to ask here is who or what is the proper object of retributive punishment in war. One answer – perhaps the one that would be most commonly given – is that it is *the state* that has acted wrongly, for example by engaging in unjust aggression, that deserves to be punished. This presupposes that states can be the nonderivative subjects of belief, desire, intention, action, responsibility, guilt, liability, and so on.[24] I believe that they cannot be, though I cannot argue for that here. States are compound entities composed of individuals, territory, institutions, and so on. Even if such entities could be subjects of guilt that is not reducible to the guilt of individual citizens, it is not possible to punish a state without harming at least some of its citizens. Unless the guilt of a state is necessarily transmitted or distributed to *all* of its citizens simply by virtue of their citizenship – a morally grotesque assumption – punishment of a state is virtually certain to be indiscriminate, and therefore unjust, in that it would be directed against some individuals who bore no responsibility for the wrongs attributed to the state.

It seems, therefore, that if retributive punishment is to be a just cause for war, the punishment must be only of those individuals who are themselves responsible for, or guilty of, wrongs that are derivatively attributable to the state (perhaps because the relevant individuals acted wrongly in their capacity as authorized agents of the state). But there are three objections to the idea that war could be a just means of inflicting on these individuals whatever harms they might deserve.

Two of these objections derive from the fact that retributive punishment presupposes guilt and has to be proportionate to the degree of the wrongdoer's guilt. The determination of guilt and the apportionment of punishment to desert are matters that in general require epistemically reliable procedures such as a fair trial. The first objection to war as an instrument of punishment is that in war the necessary information about what individuals have done and why – matters pertaining to the *actus reus* and *mens rea* – is in general entirely unavailable. As an instrument of retribution, war is the worst sort of vigilante action. Second, even if we could be certain in advance of going to war exactly what the guilty people on the other side were guilty of and how much punishment they deserved, the

[24] For a recent and powerful defense of the notion of irreducible collective responsibility, see Philip Pettit, "Responsibility Incorporated," *Ethics* 117, no. 2 (2007): 171–201.

harms inflicted by war could not possibly be calibrated to give each person no more and no less than what he or she deserves. War is too blunt an instrument for the administration of retributive punishment. (It is worth noting that determination of liability and satisfaction of the proportionality constraint are also necessary conditions of just defense, but the standards of evidence are necessarily lower in the conditions in which people must engage in defense than they are for carrying out retribution.)

The third reason why retribution cannot in practice be a just cause for war is that it is an aim that cannot be pursued by means of war within the bounds of proportionality. War in the contemporary world inevitably causes harm to the innocent, even if unintentionally, that is vastly disproportionate to the importance of inflicting on wrongdoers whatever harms they deserve. This is, strictly speaking, not a reason why retribution cannot be a just cause, but it is a reason why it is not an aim that can ever be legitimately pursued by means of war.

It is, perhaps, tempting to suppose that once war is in progress, it may be permissible to prolong it beyond the point at which the defensive aims have been achieved in order to capture individuals believed to be guilty of the wrongs that have been stopped or prevented and make them available for trial. I think this is true, but it does not show that the continuation of the war would be justified as a means of facilitating retribution. I doubt that the aim of exacting retribution can justify the risks to which just combatants would be exposed in continuing to fight. What could justify the continuation of the war, however, is the enhancement of deterrence that might be achieved by capturing suspected war criminals, especially those charged with *ad bellum* offenses, in order to bring them to trial. Those found guilty could certainly be punished for retributive as well as deterrent purposes, but it would be the deterrent aims that would justify the continuation of the war.

The conclusions I have reached in this essay are unorthodox by the standards of contemporary just war theory. They are that aggressive war can be just and that punishment can be a just cause for war. But the divergence between these claims and the familiar claims of orthodox just war theory is not as great as it may seem, for aggressive war is just only when its aims are defensive – for example, the defense of individual human rights against violation by the victims' own government. And just war can be punitive only when the aim of punishment is defense or deterrence. Just war is never retributive.

5

Responding to Humanitarian Crises

Cindy Holder

I. Introduction

Everyone agrees that the international community must develop better mechanisms for responding to humanitarian crises. The best mechanism for responding is simply to intervene to prevent a crisis from developing in the first place. However, because the principle of sovereignty imposes strict constraints on action across state borders, international actors are often unwilling or unable to interpose themselves until after conditions have escalated into a full-blown crisis, by which time it has usually become a matter of managing human misery rather than ending or averting it.

Respect for sovereignty is an organizing principle of the existing international legal system, and so abandoning it would fundamentally change how the units of international politics are constituted and relate to one another. The strongest argument against abandoning sovereignty is the potential for unintended consequences with respect to peace, political stability, and the effective protection and promotion of human rights. Sovereignty as we now know it is one of the few bulwarks in the international system against naked imperialism, and it plays an important role in regulating competition for influence among powerful states. There is a real worry that in developing principles that allow us to prevent massive suffering and need in one part of the world, we will produce equal or greater suffering elsewhere by facilitating imperial projects and destabilizing relations between competitors.

One way to defuse this worry is to frame interventions across borders as principle-based exceptions to a general rule of state sovereignty. If we assume that protecting and promoting individual human rights are the primary goals of the international system, and that both state sovereignty and peace and security are important to us primarily as vehicles for

achieving this, then (it is argued) we may use the standards of international human rights to identify, and limit, cases in which the presumption of sovereignty may legitimately be set aside. However, the relationship between sovereignty and humanitarian crises is more complex than this picture allows. Theorizing about humanitarian crises inevitably includes recommendations about states and this aspect makes it a species of non-ideal theory. All actual states are rife with injustice, both in their internal structures and in the relationships these structures establish with those outside a state's borders. This fact must be reflected in our reasoning about humanitarian responses.

II. Sovereignty and Humanitarian Crises

Typically when we think of a humanitarian crisis we think of the aftermath of a natural disaster. However, the majority of humanitarian crises are caused by intrastate conflicts. Such conflicts destroy the physical and economic infrastructures on which people depend, prevent them from sowing and harvesting crops, devastate the landscapes and ecosystems they inhabit, separate them from communities and family members, and often require long-term relocation under conditions of compromised physical security. The predominant causes of intrastate conflicts are intense and systematic neglect and abuse of human rights, often coinciding with ethnic, linguistic, racial, or religious differentiation.

Even in cases where the precipitating cause is a natural disaster, it is often not the disaster itself but rather that event in combination with a preexisting pattern of neglect or abuse that produces a humanitarian crisis. Intense disempowerment and deprivation compromise individuals' ability to sustain their lives in the face of extreme climatic or geologic events. The problems the international community confronts in cases of humanitarian crises are thus very closely bound up with the problems of intrastate conflict and systematic neglect and abuse of human rights, especially the rights of national minorities and indigenous peoples.

When thinking about possible strategies for addressing these problems, state sovereignty often appears as the villain of the piece. The principle that states must be respected as sovereign within their borders imposes strict constraints on action across borders and outside interference in a country's governing structures. Such constraints seem arbitrarily to empower those who happen to control a state's apparatus to use that control in any way they see fit, regardless of how this impacts the rest of the population. Some argue on these grounds that a strong principle of

sovereignty is incompatible with basic principles of equal moral concern and respect for human dignity.[1]

Yet although sovereignty has been put to many villainous purposes, it is not true that it is inherently at odds with the principles of equal moral concern and respect for human dignity. Respect for sovereignty is closely connected to the principle that all peoples have a right to self-determination, and this last has been argued by many theorists, especially advocates for the rights of indigenous peoples, to be a basic element of human dignity.[2] Traditionally, self-determination has two dimensions in international law: internal, in which a state's entire population determines the form and operation of its government, and external, in which a population determines its state's relationship to other states.[3] Both dimensions speak to the importance for a population of being able to limit participation in their joint decision making and being able to insist that whether their decisions are binding not depend on what would please other populations. Sovereignty has been an important legal vehicle for making these aspects of self-determination effective for populations who have been subject to imperialism and colonization, and in this it has been important for resisting exploitation and repression and not just for aiding it.[4]

Three different theoretical arguments have been offered to justify a strong principle of sovereignty: valuable relationship arguments, which point out that in some contexts, respect for individuals' capacities to develop and live out personally salient conceptions of what is important and valuable establishes a general prohibition on interfering with the structure and operations of another polity; individual rights arguments, which point to sovereignty's value as an effective means for securing individuals' human rights; and international peace arguments, which emphasize the value of sovereignty as a means for securing relations between

[1] See for example Christopher Morris, *An Essay on the Modern State* (Cambridge: Cambridge University Press, 1998), and Carol Gould, "Self-Determination beyond Sovereignty: Relating Transnational Democracy to Local Autonomy," *Journal of Social Philosophy* 37, no. 1 (Spring 2006), 44–60.

[2] See S. James Anaya, "The Contemporary Definition of the International Norm of Self-determination," *Transnational Law and Contemporary Problems* 3, no. 1 (1993), 131–164; Erica-Irene Daes, "Striving for Self-Determination for Indigenous Peoples" in *The Right to Self-Determination*, Y. N. Kly and D. Kly, eds. (Atlanta: Clarity Press, 2001), pp. 50–62; Cindy Holder, "Self-Determination as a Universal Human Right," *Human Rights Review* 7, no. 4 (2006), 5–18.

[3] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), pp. 71–89, 126–40.

[4] On this see Benedict Kingsbury, "Sovereignty and Inequality," *European Journal of International Law* 9 (1998), 599–625; Antonio Cassese, *Self-Determination*, pp 108–18, 320–26.

states that minimize incentives to engage in violent conflict.[5] In addition to these theoretical arguments there are two important practical considerations. First, the operation of international law as a system of intelligible norms presupposes the ideal of sovereignty. This is true not only for the laws that govern war, conflict, commerce, and the sea, but also for humanitarian law and international human rights law. International human rights law uses domestic civil rights standards and legal institutions as a framework on which to hang its own jurisprudence and legal authority, so that the content of international human rights at the very least relies upon and in some instances derives from the content of each member state's domestic legal regimes. Because of this, it is not obvious that we could keep the international human rights structures that now exist and simply pull the assumption of sovereignty out from under them.[6]

Second, the fact that the principle of sovereignty is an important norm of the international system forces international actors to explain intrusive behavior, both to their own citizens and to those abroad, and to attempt to justify themselves against the background of the theoretical arguments for sovereignty described earlier. This has a limiting effect, however incomplete, on the extent to which states are free to intervene opportunistically in other jurisdictions. Benedict Kingsbury argues that in this, the inhibitions associated with the principle of sovereignty at least slightly moderate inequalities of power and provide a shield for weak states and institutions and have operated as one of the few bulwarks against imperial projects in the post–World War II period.[7] Moreover, many of the arguments against a strong presupposition of sovereignty use language and forms of argument that echo nineteenth-century imperialists' assertion of a developmental divide between the civilized and uncivilized world as a

[5] For a valuable relationship argument see Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd edition (New York: Basic Books, 1993), and "The Moral Standing of States: A Response to Four Critics," *Philosophy and Public Affairs* 9, no. 3 (1980), 209–22. For individual rights arguments see Charles Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1979), pp. 92–123; Allen Buchanan, "Recognitional Legitimacy and the State System," *Philosophy and Public Affairs* 28 (1999), 46–78. For international peace arguments see Hedley Bull, *The Anarchical Society*, 3rd edition (New York: Columbia University Press, 2002); Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2002).

[6] On the general problem of attempting to theorize toward just institutions without accepting some principle of state sovereignty see Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 2004), pp. 322–27.

[7] Benedict Kingsbury, "Sovereignty and Inequality," pp. 617–618.

justification for invasion and exploitation of non-European territories.[8] The possibility of opening the door to imperialism and the extent to which the language of moral concern has facilitated and provided cover for racist exploitation in the recent past ought to give us pause in the face of calls to abandon sovereignty completely.

III. Sovereignty and Human Rights

In fact, the nature of the current international system is such that it often appears that the only thing worse than a practice of respect for the principle of sovereignty is the absence of such a practice. This has led some to propose a principle of "contingent sovereignty": sovereignty that is contingent on a state's discharging certain responsibilities.[9]

Contingent sovereignty differs from traditional understandings of the concept in the relationship that is posited between sovereignty and statehood. Traditionally in international law, sovereignty has been thought of as a corollary of statehood. In the same way that individual human beings are treated as being physically inviolable simply in virtue of their being persons, states have been treated as having sovereignty simply in virtue of their being states. States officially count as states under international law through their being recognized as such by other states. There are two theories of how this recognition works: constitutive and declaratory. On constitutive theories, to be a state just is to have been declared to be a state by the relevant international actors (i.e., already existing states). Recognizing a state is thus analogous to christening a ship. On declaratory theories, states do not become states by being recognized; recognition is rather the means by which participants in the international legal order signal to one another and to their institutions that there is good reason to think that the criteria for statehood have been met. Here, recognizing a state is analogous to issuing a passport: international actors treat passports as authoritative declarations of citizenship not because the issuing of a passport makes the person who holds it a citizen but because the

[8] Mohammed Ayoob, "Humanitarian Intervention and State Sovereignty," *International Journal of Human Rights* 6, no. 1 (Spring 2002), 81–102. For a general discussion of the connection between imperialism and standards of civilization in the history of international law see Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law," *Harvard International Law Journal* 40, no. 1 (Winter 1999), 1–80.

[9] See for example Stuart Elden, "Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders," *SAIS Review* 26, no. 1 (2006), 11–24; Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (New York: Transnational, 1997).

mechanisms by which passports are issued are reliable ones for judging the truth of a citizenship claim.

Constitutive theories have proved difficult to maintain consistently and seem not to capture actual international legal practice. Because of this, most theorists of international law subscribe to some form of declaratory theory. Declaratory theories usually include being treated as a state by other states as one of the criteria necessary for statehood and then introduce other criteria according to the view of what properties are necessary for an actor to exercise the functions of statehood in the international legal system. These considerations of function are part of what has made it possible in recent years to talk not just about the rights but also the responsibilities of states, and to develop theoretical arguments for making recognition contingent on certain standards of legitimacy. However, once a state has been recognized, the right to sovereignty has been thought to follow as part of the functional architecture that allows a state to continue to operate as such within the international system.

In contrast, the concept of contingent sovereignty allows that statehood and sovereignty may in some instances come apart. Within contingent conceptions of sovereignty, failure to meet the conditions of having rights to sovereignty is not grounds for thinking that we are no longer confronted with an example of a state. Rather, it is grounds for thinking that the case at hand is an example in which statehood obtains without establishing rights of sovereignty. Allen Buchanan has proposed that we make sense of this possibility by distinguishing between states and governments.[10] Stuart Elden suggests rather an increased fluidity in the concept of sovereignty, so that governance, exclusion, and territoriality are no longer assumed necessarily to coincide.[11] The United Nations International Commission on Intervention and State Sovereignty argues that states have rights of sovereignty only in virtue of their participation in a community that is committed to upholding them.[12] These proposals require us to rethink not just sovereignty and territoriality, but the very practice of international recognition.

As described previously, international recognition is about the presence or absence of *statehood*. Sovereignty plays an important evidentiary

[10] Allen Buchanan, *Justice, Legitimacy and Self-Determination*, pp. 281–84.

[11] Stuart Elden, "Contingent Sovereignty."

[12] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001), pp. 12–13, electronic version available at http://www.iciss.ca/report-en.asp.

role in this judgment, insofar as unwillingness to extend rights of sovereignty is taken to weigh against the presence of a state. In contrast, the concept of contingent sovereignty proposes either that the practice of recognition has two dimensions, one related to statehood, the other to sovereignty, or that unwillingness to extend rights of sovereignty ought not in fact be relevant to practices of recognition. Buchanan argues for the former, two-dimensional, view of recognition; the International Commission's model proposes the latter: that although recognition is a precondition for acquiring rights of sovereignty, having such rights and being recognized as a member of the international community need not coincide.

These puzzles about how sovereignty relates to statehood are avoided by those who argue that sovereignty per se is not something to which states can have rights, either moral or political, at all. For example, Michael Smith has argued that respect for sovereignty ought properly to constrain the sorts of activities that may be undertaken across borders not in virtue of a moral or political right to sovereignty that certain activities would contravene, but in virtue of basic principles of political ethics, such as that the obligations of individuals to conform to the demands of a government depend on the extent to which it respects and protects their rights, and that resorts to forceful coercion must be undertaken in a way that limits the potential for distortions based on self-interest and takes into account the potential for unintended harm.[13] In contrast, Mark Stein has outlined how, within a utilitarian theory, considerations for and against interventions across borders might be addressed under basic principles of interpersonal ethics.[14] In both these approaches, decisions about whether to respect existing borders rest not on a consideration of rights to or against intervention, but on considerations of how such respect realizes or contravenes political and moral obligations in general.[15]

IV. Human Rights and Intervention

In arguing that sovereignty is contingent because the rights of states depend on participation in a collective agreement, the International

[13] Michael Smith, "Humanitarian Intervention: An Overview of the Ethical Issues," *Ethics and International Affairs* 12 (1998), 63–79.

[14] Mark S. Stein, "Unauthorized Humanitarian Intervention," *Social Philosophy and Policy* 21, no. 1 (Winter 2004), 14–38.

[15] Allen Buchanan has criticized this kind of approach to international law and institutions as naïve. See Allen Buchanan, *Justice, Legitimacy and Self-Determination*, pp. 22–29.

Commission's position remains state-centered (developed out of and for the perspective of those who control a state). In contrast, Fernando Teson argues that sovereignty is contingent because the rights of a state are derivative of the rights of the individuals who constitute them. In Teson's words,

> because the ultimate justification of the existence of states is the protection and enforcement of the natural rights of the citizens, a government that engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy but its international legitimacy as well.[16]

Most philosophical arguments for contingent sovereignty resemble Teson's human rights–centered argument.

One important consequence of this emphasis of human rights is that the peace to which respect for a state's sovereignty is supposed to contribute has come to include not only the absence of armed conflict but also the presence of adequate living conditions. This shift both expands the range of humanitarian crises that are potentially legitimate grounds for intervention and shifts the burden of argument to those who would deny that intervention is permitted in cases where the existence of a humanitarian crisis has been established. Such a shift in the burden of argument places front and centre questions about action to prevent humanitarian crises and whether we may have not just permission but a duty to intervene. These questions are difficult even to ask within the traditional framework for treating questions about intervention across borders, just war theory.

Just war theory takes the paradigm of intervention to be the threat or use of coercive force and emphasizes motivations, rules of conduct, and standards of fit between these and the ultimate goal, assumed to be restoration of peace.[17] This focus on coercion and violence frames considerations of proportionality, externalities, and possible triggering conditions in a way that makes it difficult to justify preventive action. The emphasis in just war theory on the duties attached to social and political roles such as head of state, military commander, or field officer also limits the possibilities of justifying the costs of intervention unless the harms

[16] Fernando Teson, *Humanitarian Intervention*, p 15.

[17] See for example Paul Christopher, "Humanitarian Interventions and the Limits of Sovereignty," *Public Affairs Quarterly* 10, no. 2 (April 1996), 103–19; Mona Fixdal and Dan Smith, "Humanitarian Intervention and Just War," *Mershon International Studies Review* 42 (1998), 283–312.

involved are egregious. The legacy of just war theory can still be seen in the emphasis on justifying intervention from the perspective of the international community, and the emphasis on choice of means.

Preventive action is also difficult to justify if our duties to those in other countries are duties of beneficence or charity rather than duties of justice. To argue that we do not have obligations of justice to those with whom we do not share state institutions is to argue that we do not have principled duties to ensure that people outside our borders benefit from our social and political organization. What we owe to people outside our borders are moral duties not to do them harm, and to rescue or assist them should we find them in a situation of imminent danger, but we do not have a duty to ensure that they are as well off as those with whom we share institutions. It is not that people with whom we do not share state institutions do not matter. Rather, in the absence of shared state institutions we may treat differences between our situation and that of another as a matter of luck or someone else's wrongdoing. In cases where another is badly off, this means that there is no principled reason for us to bear the costs of remedying that person's circumstances rather than for her to do so, or for the person who put her in those circumstances. This permission for indifference breaks down when the circumstances are not merely unhappy, but life-threatening or so miserable as to be intolerable. In such an extreme case, we would have a duty to rescue of some sort, contingent on our being well situated to pull the rescue off, and our not having to bear overwhelming costs in order to do so. This view of the duties we have to those outside our borders implies that the level of misery or abuse has to be obvious and extreme, and the likelihood of success has to be high to establish that we must (as opposed to may) incur the costs associated with intervention.[18] The typical case for prevention will not meet this threshold, and so there are very limited prospects within this type of view for establishing a duty to intervene.

There are better prospects for a duty to intervene within views that accept that people outside our borders have claims of justice and not just charity to contributions to the protection and promotion of their human rights. Among those who accept that duties of justice extend beyond those with whom we share state institutions, some argue that these duties are

[18] See for example Jerome Slater and Terry Nardin, "Nonintervention and Human Rights," *Journal of Politics* 48 (1986), 86–95; Howard Adelman, "The Ethics of Humanitarian Intervention: The Case of the Kurdish Refugees," *Public Affairs Quarterly* 6, no. 1 (January 1992), 61–87.

grounded in our duties to human beings as such, some argue that these duties are grounded in our being connected by a shared set of institutions, and some argue that these duties are grounded in our common membership of a world community. For example, Allen Buchanan argues that we have a natural duty of justice to ensure that all human beings, as moral agents with a primary claim to equal moral respect, have access to institutions that protect their basic human rights.[19] In contrast, Thomas Pogge argues that we have duties to ensure the existence of institutions that protect the human rights of those outside our borders in virtue of the existence of a global basic structure, or a set of institutions that establishes causal links between our everyday participation in economic, social, and political activity and the life prospects and possibilities for action of those who live far away.[20] Nancy Sherman grounds our duties to ensure human rights protections for those outside our borders in our common membership in a "global moral commonwealth," the existence of which makes possible the kind of empathic engagement necessary to act for the benefit of others.[21] Buchanan points out that although duties to those with whom we share institutions do not exclude duties to those outside our borders, duties to fellow citizens may impose constraints on how we may act to discharge those duties.[22]

Some have suggested that our duties to intervene originate in a right of abused and at-risk people to intervention on their behalf. For example, Gillian Brock and Véronique Zanetti have argued in separate contexts that people whose human rights are neglected or abused have a right to intervention on their behalf by any international actor situated to contribute to their relief without excessive self-sacrifice.[23] We should be extremely cautious about arguments for a right to intervention. One of the distinctive features of rights language is not just that it makes individuals the locus of moral concern, but that it does so in a way that normatively empowers them, at least in principle. To be a right holder is to be the

[19] Allen Buchanan, *Justice, Legitimacy and Self-Determination*, pp. 95–97.

[20] Thomas Pogge, *World Poverty and Human Rights* (Cambridge, England: Polity Press, 2002), pp. 52–70.

[21] Nancy Sherman, "Empathy, Respect, and Humanitarian Intervention," *Ethics and International Affairs* 12 (1998), 103–19.

[22] Allen Buchanan "The Internal Legitimacy of Humanitarian Intervention," *Journal of Political Philosophy* 7, no. 1 (1999), 71–87.

[23] Gillian Brock, "Humanitarian Intervention: Closing the Gap between Theory and Practice," *Journal of Applied Philosophy* 23, no. 3 (2006), 277–91; Véronique Zanetti, "Global Justice: Is Interventionism Desirable?" *Metaphilosophy* 32, no. 1 and 2 (January 2001), 196–211.

potential subject of a wrong, and not just an object with respect to which wrong may be done. Right holders may claim goods and performances from others in virtue of their rights, or they may decide to forgo claims that they are entitled to make. Part of what it is to be a right holder is to have the power to make others answer for their actions as regards that with respect to which there is a right. In the case of potential beneficiaries of a duty of intervention, none of these elements of right holding seem to be present. The very situation that makes potential beneficiaries of a duty to intervene candidates for a right to intervention limits their capacity to exert control over the circumstances or manner in which the duties that the right establishes are discharged, or to demand an account when the duty is not discharged satisfactorily.

The problem is not that those judged to have rights to intervention will in most cases not be able to exercise them on their own behalf. Rather, the problem is that the purported right holders have very little control over whether and under what circumstances the duties that their right establishes are discharged, and little to no capacity to demand accountability for nonperformance. In this, the holders of a right to intervention appear not as subjects who originate claims but as objects with respect to which right must be done. This worry is exacerbated by the practical observations that in most cases those exercising a right of intervention on the right holder's behalf will also be a subject of duties following from it, and that it would be difficult to imagine circumstances under which people on whose behalf a right of intervention is exercised successfully secure restitution from those who acted as proxies in the face of a mismanaged or negligent intervention.

In fact, it is not the right holders that a right to intervention empowers but their proxies. For example, Saba Gul Khattak and Mariella Pandolfi have pointed out in the context of the Afghanistan and Kosovo interventions, respectively, that there is an inherent limit on the extent to which those on whose behalf interventions purport to be undertaken can contribute directly, and in their own voices, to debates about the form that such intervention takes.[24] Moreover, as noted, to describe the responses we advocate in terms of human rights is already to benefit from a rhetorical shift in the burden of persuasion; this effect is intensified by

[24] Saba Gul Khattak, "Afghan Woman: Bombed to Be Liberated?" *Middle East Report* 222 (2002), 18–23; Mariella Pandolfi, "Contract of Mutual (In)difference: Governance and the Humanitarian Apparatus in Contemporary Albania and Kosovo," *Indiana Journal of Global Legal Studies*, 10 (2003), 369–81.

describing such responses as called for by a human right to humanitarian intervention. Given the limited possibilities for those on whose behalf such action is advocated to appear directly in discussions about how such rights ought to be interpreted and discharged, this rhetorical positioning of opponents to intervention is worrying, in that parties to the debate who purport to speak on behalf of those with a right to humanitarian intervention enjoy all the rhetorical advantages of the right holders' moral position without any mechanisms of accountability for the uses to which those advantages are put.

Both Buchanan and Pogge emphasize duties to establish institutional arrangements that are conducive to the protection and promotion of human rights, and in particular our duties to establish institutions that prevent crises from arising in the first place. In fact, the importance of recognizing obligations to prevent as well as redress humanitarian crises is one of the reasons cited by the International Commission on Intervention and State Sovereignty for thinking about intervention across borders in the context of a responsibility to protect rather than a right to intervene.[25] In general, duties to undertake preventive action have been most clearly and persuasively articulated by theorists who focus on the construction of morally defensible institutions. Pogge argues that it is only from an institutional approach that we can adequately capture the nature of our obligations to address global human rights abuses.[26]

V. Intervention and the State

Whether they emphasize permission to ignore sovereignty, duties to redress abuse and neglect, or responsibilities to prevent escalation, most contemporary treatments of interventions across borders focus on the balance of harms and benefits that can be expected from various forms of intervention, and on what Tom Farer calls "the threshold condition": the threshold at which harms to those inside a state tips the balance against nonintervention.[27] In this regard, it is important to be clear about what counts as intervention. The term "intervention," even "preventive intervention," usually calls to mind military deployment and the use of

[25] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2.28–2.33.

[26] Thomas Pogge, "An Institutional Approach to Humanitarian Intervention," *Public Affairs Quarterly* 6, no. 1 (January 1992), 89–103.

[27] Tom Farer, "The Ethics of Intervening in Self-Determination Struggles," *Human Rights Quarterly* 25 (2003), 388.

force. However, there are a wide range of activities well short of military action through which a state may intervene in the operations of another state. For example, to extend refugee status to another state's citizens or allow them entry despite their own government's having refused to grant them travel papers is not only to criticize another state's political system, but to deny in a very profound way the right of its government to decide how open its borders will be. Actively to aid people fleeing a country (as the Swedish coast guard aided Jewish refugees fleeing occupied Denmark in World War II) is to go even further and infringe territorial integrity. Permitting the broadcast of messages hostile to a neighboring country's government, imposing punitive tariffs, attaching conditions to compliance with extradition, prosecuting individuals for activities that are legal in the state in which they were undertaken, and attaching strings to offers of aid or to the restructuring of loans are other ways that officials of one state may undermine the capacity of those in another state to execute a policy effectively. States may also influence the internal relations and stability of another state through diplomacy and what James Nickel calls "jawboning" (criticism of another state that is not accompanied by threats). Nickel argues that in general, jawboning, education, and other noninvasive forms of enforcement are more effective mechanisms for ensuring respect for human rights than are threats or applications of force.[28]

In much of the literature on intervention sovereignty is treated as a prima facie barrier to helping people and state structures are treated as a potential resource. In this, there is often a presupposition that the problem with sovereignty is that it allows governments to use their states to pursue bad courses with respect to a population as well as good. Solving the problem of sovereignty is thus a matter of figuring out how we can ensure that governments use their states only for good and never for evil. This view of the problem of sovereignty accepts a set of claims about states that ought to be controversial: that states first develop as local entities and then appear internationally; that it is appropriate to value territory as states value it; that the monopolization of authority associated with states is an inevitable feature of political organization; and that the fundamental units of political analysis for purposes of understanding the international system are states and individuals.

[28] James W. Nickel, "Are Human Rights Mainly Implemented by Intervention?" in *Rawls's Law of Peoples: A Realistic Utopia?*, Rex Martin and David Reidy, eds. (New York: Blackwell, 2006), pp. 263–77.

However, one of the primary causes of human rights abuse and indifference is the perceived imperative of building and maintaining a state. For example, Guatemalan military elites in the 1980s targeted indigenous communities as obstacles to political stability on the grounds that the persistence of such communities interfered with the development of a modern state by offering alternative and parallel mechanisms for governance. Peruvian Maoists similarly focused on the elimination of alternative forms of social and political organization as a crucial element of political modernization. In both these cases the perceived need to eliminate indigenous communities was premised not on the belief that such communities undermined the state's claims to sovereignty, but on the belief that such communities undermine the possibility of maintaining a state at all. This view of substate groups is closely bound up with a view of what states have to offer the population within a territory that emphasizes stability of expectations, efficiencies of scale, and the monopolization of coercive enforcement. Such considerations make the capacity to dominate and exclude alternative forms of political organization within a sphere of influence a core part of what is valuable about states.

This understanding of what makes a state worth having is troubling, both for the idealization of domination and control and for the oversimplification of states as vehicles of action. A state is a complex web of bureaucratic organizations, each operating according to its own logic and priorities, and most structure the incentives and scope for advancing personal priorities of those who populate them in a way that encourages strategic behavior with respect both to other aspects of the state and to the population that the state is supposed to serve. Given these features it is implausible to think of states as tools that political representatives may pick up and put down at will as they work away in service of a population. Moreover, the perceived importance of building and maintaining states is deeply implicated in the history of abuse of indigenous peoples and national minorities. Many scholars have suggested that this is not a coincidence, as it is inevitable that the intersection of competition for control and disposition of a state's apparatus, racism, personal ambition, and the tendency of bureaucratic projects to take on a life of their own that characterizes state politics will have very bad consequences for large numbers of people.[29] This suggests that the central problem confronting

[29] See for example James Scott, *Seeing Like a State* (New Haven, CT: Yale University Press, 1998); Richard Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (Routledge: New York, 2000).

the international community in humanitarian crises is not the problem of sovereignty but the problem of the state.

VI. Humanitarianism and Nonideal Theory

Richard Falk has argued that states are inherently hostile to the persistence of unassimilated groups in general and the persistence of indigenous peoples in particular.[30] Even if Falk is mistaken and this hostility is not inherent to statehood, it is nonetheless true that all actual states are deeply unjust both in their internal structure and operations and in the relationships they establish between individuals and groups across state borders. Because of this, to theorize about the permissions, duties, and prohibitions on intervening across borders is necessarily to engage in nonideal theory. John Rawls describes ideal theory as "realistic utopianism": given basic facts about human psychology, and the world we inhabit, ideal theorizing identifies the principles that would characterize just institutions under conditions of "strict compliance" (the conditions in which most people act justly most of the time.)[31] He contrasts this with theorizing about the conditions of "partial compliance" that obtain in everyday life, where our lives are structured in ways that discourage many people from acting as justice requires and we are often forced to weigh one institutional injustice against another. Even if we think of our theorizing about humanitarian crises as intended to develop a view of what international institutions might look like, given our existing circumstances, to the extent that the potential participants in those institutions will inevitably include representatives of states, we must assume that many of those participating will not be motivated to act in accordance with the demands of justice.

The problem here is not that having to theorize about states places an in-principle limit on how close our solutions will approach the ideal; that would be the problem of having to settle for remedies and preventive measures that are less effective or less complete than we would ideally like. The problem is rather that any institution we set up or action we take is likely either to create a new injustice or to leave intact an existing one. The problem arises because to include representatives of states in

[30] Falk, "The Rights of Peoples (In Particular Indigenous Peoples)" in *The Rights of Peoples*, James Crawford, ed. (Oxford: Clarendon Press, 1988), pp. 17–38.

[31] John Rawls, *Justice as Fairness: A Restatement*, Erin Kelly, ed. (Cambridge, MA: Belknap Press, 2001), p. 13.

our theorizing is to take a set of institutions and asymmetries in political power that we know to be deeply unjust as the departure point out of which we develop our view of how humanitarian crises should be handled. The injustice of actual states, especially with respect to their internal populations, is significant for two reasons. First, the fact of injustice in states' structures implies that participants in international institutions cannot be counted on to act as justice requires, partly because of the structure of their incentives and partly because of the distorting effect that their home institutions are likely to have on their capacity to perceive injustice accurately. The second problem is that even if we can trust the perception of what is wrong, the injustice of existing states will limit the range of possible responses.

Recognizing that the kind of action under consideration in theorizing about humanitarian crises is necessarily nonideal does not rule out the possibility of developing a principled basis for advocating some responses to humanitarian crises and rejecting others. However, we must explicitly incorporate considerations arising from the injustice of the institutions that compose actual states into our theorizing. Doing so has several important consequences. First, we should adopt a general presupposition against military intervention. Second, we should be very cautious about nonmilitary interventions. Third, we should consider our duties to monitor and intervene in the operations of our own states as part and parcel of our duties to address and prevent human rights abuse and neglect in other states. Finally, we should encourage and opt for facilitative mediation as the most promising avenue of state-based intervention. I will take these in turn.

First, we should adopt a general presupposition against military intervention. Sober consideration of the structure and operation of actual states leads to the conclusion that military intervention will usually fail to improve a situation of humanitarian crisis and often make conditions worse for the individuals it is intended to assist. This is so not because military intervention involves the use of violence, but because it involves the use of one state's armed forces as a means to achieving objectives whose primary beneficiaries are supposed to be the residents of another state. This fact structures decision making regarding deployment, including the identification and articulation of objectives, the determination of rules of engagement, and the level of resources committed, so as to make it extremely unlikely that intervention will produce either short-term or long-term transformation that unambiguously benefits those in whose name the intervention is undertaken. Such transformation is unlikely in

part because the structure of state-based decision making is such that both democratic and authoritarian regimes are unlikely to intervene in ways that promote human rights and democracy in another country, and in part because as a form of crisis intervention, military deployment is the one least likely to produce positive and long-lasting transformation.

For example in a study of third-party interventions in civil wars and other inter- and intrastate conflicts, Bruce Bueno de Mesquita and George Downs found that such interventions tend to lead to little, if any, improvement in democratic development and often lead to the erosion of democracy.[32] They found this to be the case for both democratic and autocratic interveners. These results were explained by the imperative of a state's leadership to maintain the support of their "domestic selectors": the domestic constituency that can depose them. The type of domestic constituency to which leaders must respond varies between democratic and authoritarian states, but what does not vary is the priority of that domestic constituency's interests and priorities over those of the population of the target of intervention. De Mesquita and Downs argue that ensuring outcomes of an intervention that accord with this priority is inherently at odds with democratization. This argument with respect to democratization may also be expected to hold with respect to the choice of tactics, the rules of engagement, and the type and level of resources committed to an intervention and may explain the preference for high-level bombing in the recent history of humanitarian deployments.

Steven Roach has argued that some of these worries can be mitigated by using the International Criminal Court (ICC) as a legitimating body for responses to humanitarian emergencies.[33] However, even if the ICC can be developed to defuse concerns about decisions to deploy forces, worries about the form of deployment and the resources committed would remain. In addition, armed forces have inherent drawbacks as a tool of humanitarian assistance. For example, the simple reality of military deployment militates against its effectiveness for humanitarian purposes. In a typical military deployment hundreds of heavily armed people who are unfamiliar with the geography and do not speak the local language are sent into a fragile social, political, and physical landscape, often preceded or accompanied by several tons of explosives dropped from the air. In

[32] Bruno Bueno de Mesquita and George W. Downs, "Intervention and Democracy." *International Organization* 60 (2006), 627–49.

[33] Steven C. Roach, "Humanitarian Emergencies and the International Criminal Court (ICC): Toward a Cooperative Arrangement between the ICC and UN Security Council," *International Studies Perspectives* 6 (2005), 431–46.

addition, recent experience suggests that the mixed role of military contingents as police as well as deliverers of aid jeopardizes the principle that assistance should be provided to anyone who needs it, blurs distinctions between aid workers and military personnel, creates tensions within target communities, and increases pressure on a finite pool of resources.[34] Given these considerations it is reasonable to expect that in the typical case deploying armed forces will exacerbate the existing conflict, intensify pressure on local people, and undermine other forms of assistance without significantly benefiting local populations.

Even when the form of intervention contemplated does not involve the deployment of military forces, there is reason to be pessimistic about the prospects for unambiguous improvements in the lives of local people. Nonmilitary interventions are subject neither to the worry that important distinctions between assistance and policing will be lost, nor to concerns that the forms of action with the worst externalities for civilians are precisely those most likely to be chosen by an intervening state. However, they are subject to worries about intensifying competition for finite humanitarian resources, and about the ways in which injustices in the structures of the originating state may distort interventions undertaken by its officials and citizenry. Some have also argued that such interventions disrupt or displace local organizations and institutions for addressing problems, and so compromise the long-term prospects of transformation.[35]

A third consequence of our theorizing about responses to humanitarian crises being nonideal is that our duties to remedy injustice at home are part and parcel of our international duties. If injustice in the states under which we reside is an important contributing factor to the injustice of international institutions more generally, then remedying that injustice will be one of the responsibilities that fall on us as part of our duty to create institutions that prevent and address humanitarian crises. For example, if the hostility of state institutions to the persistence of indigenous peoples puts indigenous people at risk of human rights abuse, then

[34] Randolph C. Kent, "International Humanitarian Crises: Two Decades Before and Two Decades Beyond," *International Affairs* 80, no. 5 (2004), 851–69.

[35] See for example Marina Ottaway and Bethany Lacina, "International Interventions and Imperialism: Lessons from the 1990s," *SAIS Review* 23, no. 2 (Summer–Fall 2003), 71–92; Mariella Pandolfi, "Contract of Mutual (In)difference," 369–81; Eric Belgrad and Nitza Nachmías, eds., *The Politics of Humanitarian Aid Operations* (Westport, CT: Praegar, 1997). For a general discussion of perverse effects in connection with international organizations see Michael N. Barnett and Martha Finnemore, "The Politics, Power and Pathologies of International Organizations," *International Organization* 53, no. 4 (Autumn 1999), 699–732.

our duties to create institutions that prevent and address such abuses will include duties to prevent and address that hostility. To discharge our duties in this regard will require us to identify and eliminate such hostility in our own state as well as in the states of others. Justice at home is a prior condition of our being able to trust our diagnoses of what changes are required, both in the international system and in other states, to remedy propensities to abuse and neglect. It is also a condition of our being confident that our leaders' need to maintain support does not encourage them to precipitate conflict and violate human rights elsewhere.

Finally, honest reflection on the nature of both states and the international system suggests that our best option for preventing humanitarian crises is mediation, and in particular facilitative mediation. Earlier I noted that most humanitarian crises are precipitated by intrastate conflicts, and those that are not are often exacerbated by state-based hostility to the persistence of a substate group. Both these circumstances could plausibly be mitigated by some form of mediation, especially when state-group tensions first emerge (or reemerge after a period of dormancy). In a recent study of the effect of differences in mediation style on the outcomes of international crises, a group of political scientists found that although forms of mediation that attempt to enlarge the range of alternatives open to parties by altering their perceptions of the costs of conflict (manipulation) appear to be more effective than other forms in securing immediate crisis abatement, they are relatively ineffective at reducing tension and conflict over the long term.[36] In contrast, facilitation, in which the mediator seeks only to act as a conduit of information and avoids to the greatest extent possible making substantive contributions to the negotiation, is much less likely to produce a formal agreement, but is much more likely to reduce tension and conflict over the long term.

Facilitation achieves results within the existing context and relationships, and so to the extent that these relationships are characterized by unjust distributions of power, the outcome of such mediation will not be just. However, other forms of intervention, including manipulation, face the same problem and so this is not a reason to reject facilitation. The relevant question is whether we have reason to believe that unjust actors engaged in mediation will produce less morally repugnant institutions and decisions than those engaged in other forms of intervention,

[36] Kyle C. Beardsley, David Quinn, Bidisha Biswas, and Jonathan Wilkenfeld, "Mediation Styles and Crisis Outcomes," *Journal of Conflict Resolution* 50, no. 1 (February 2006), p. 81.

and whether between facilitation and manipulation, the former is less repugnant.

There is reason to think that mediation generally, and facilitation in particular, is better given the nature of states and of the international system. Facilitative mediation involves relatively limited resources and is not open-ended, and so is easier to advocate within state structures, and in the early stages of conflict, abuse or neglect. Also, facilitation is less confrontational and less public than military intervention or jawboning and so is more likely to be accepted, especially in the early stages of conflict, abuse, or neglect. Finally, facilitative mediation specifically includes a commitment to limit the mediator's own input into the possible solutions identified and pursued, and so there are relatively fewer opportunities for injustices in the structure of an intervening state to carry over.

VII. Conclusion

The problem the international community confronts in humanitarian crises is closely bound up with the problems of intrastate conflict and the abuse and neglect of human rights, and these problems are best understood as a problem grounded not in sovereignty as such but rather in the ideal of the state. Because theorizing about the appropriate way to respond to humanitarian crises, both as institutions and as individuals, necessarily involves arguing about how to use and respond to states, such theorizing is necessarily nonideal. All actual examples of states have deeply unjust structures and operations, both internally with respect to the populations that fall within their jurisdictions, and externally with respect to populations outside their borders. We ought to expect these injustices to be reflected in state-based actions and decision making. This implies that whatever we decide with respect to humanitarian crises we will be at best weighing injustices, but it does not imply that we cannot develop principled reasons for choosing some responses and avoiding others. Recognizing the problems with states as vehicles of action does suggest, however, that mediation, and in particular, facilitative mediation, is the best route of intervention. It also suggests that we should be cautious about the circumstances and form that even nonmilitary intervention may take, that eliminating injustice from our own states is an important part of addressing neglect and abuse of human rights elsewhere, and above all that we ought to adopt a presupposition against military intervention.

6

War and Democracy

James Bohman

There are many justifications for democracy. Democracy has intrinsic value to the extent that it realizes the freedom and equality for all individual persons demanded by universal human rights, respects the moral worth of each individual human person, and fairly distributes the opportunities for leading a good human life.[1] But these arguments do not exhaust the possible justifications for democracy. It could also be thought to be instrumentally valuable to the extent that democracy is a necessary means to achieve particular valuable ends or to avoid terrible evils. Strong evidence suggests that democracy is instrumentally valuable in preventing great evils, such as war, famine, and human deprivation generally. It also may be the means to attain important moral ends, most importantly peace, both inside and outside its borders. Indeed, social scientists and philosophers have argued on empirical grounds that democracies are inherently more peaceful than nondemocracies, so peace is one of the benefits of a democratic order. The so-called democratic peace hypothesis has often been used by moral cosmopolitans and by liberal nationalists to justify the policy of fostering democracy within states as the best means to create a peaceful international order of autonomous political communities.[2] Recently, democracy has been seen as so valuable that its promotion provides the basis for a just war, or at least a justification for military intervention by democratic states into nondemocratic ones for the sake of establishing more democracies as a means for peace and

[1] On the distinction between moral and social cosmopolitanism as the difference between the focus on the moral worth of individuals and on institutional order, see Charles Beitz, "Social and Cosmopolitan Liberalism," *International Affairs* 75 (1999), 515–29. Political cosmopolitanism is a subspecies of social cosmopolitanism.

[2] For his version of the idea of a democratic peace see John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 44ff.

security. Even if democracy is both intrinsically and instrumentally valuable, is its promotion really a just cause for war? Is the achievement of a universal democratic order the proper means toward peace?

There are many competing conceptions of the basis for a peaceful world order. Kant doubted that war could ever be an appropriate means to peace, but instead leads to inevitable cycles of war, the preparation for war, and more war. Instead, he proposed a distinctly cosmopolitan solution: the reorganization of political power in an international system through the constraints of cosmopolitan law. In one form or another, this realistic utopia of peace has informed the formation of the international system, culminating in the emergence of international law and a zone of peaceful relations among democracies since 1945. This conception does not see the emergence of democratic or republican states as sufficient for peace, and certainly war is not a plausible means to achieve it. Indeed, at this juncture the instrumental use of democracy as a cause of preventive war has served to undermine the democratic peace and even the democratic quality of the states that engage in such wars. In this situation a different means is required: the formation of institutions by which democratic states and the international system may become more democratic in a mutually reinforcing way.

My argument concerning the proper relations among war, peace, and democracy has three steps. First, I consider whether or not establishing democracy is a just cause for war between a democracy and a nondemocracy. I argue that war is not a plausible means to establish democracy under most conditions. Second, I turn to the issues behind the democratic peace hypothesis and argue that current internal and external conditions have heightened the warlike tendencies of democracies against nondemocracies for the sake of security. These conditions undermine not only the democratic peace hypothesis, but also democracy at home and abroad. In order to show why, I consider the instrumental role of democracy in helping citizens to avoid other great evils, such as famines. The very conditions that help them avoid famine, including a free press and the capacity to exercise deliberative influence over democratic practice, are undermined by wars for the sake of democracy. Such wars of security lead to the weakening of the normative powers of citizens in liberal democracies, in which new forms of domination are now particularly manifest (even in democracies that claim to be committed to universal principles and human rights). Third, I argue that democratization often occurs in the interaction among multiple and overlapping institutions, as can be shown by the democratizing effects of the European Union upon

its member states. Under current conditions, these forms of democratization are more likely to promote peace than either the spread of democracy to more states or international juridical institutions, especially when those outside the zone of peace are dominated internationally. War undermines both established democracies and the emergence of democracy. The task of democratic peace now is to promote the interactive effects of more and different types of democracy, the most important of which is to provide new means for the inclusion and empowerment of noncitizens to make demands of justice on the citizens of democracies.

I. Democracy as Just Cause of War

The idea that democracy may be a just cause for war starts with some plausible premises. The first is that democracy has now become a genuinely universal value, capable of being realized anywhere in the world. While certainly plausible, this premise ignores the vast social scientific literature concerning the background conditions for establishing democracy, which in previous discussions of "development" were made sufficiently demanding so as realistically to make democracy a long- rather than a short-term prospect. If overthrowing a tyrannical and nondemocratic government could alone create democracy, then there seems to be no moral objection to doing so. Second, democratic states have an interest in making this come about: once tyrannics become democracies, these states no longer belong to the list of potential enemies. Finally, promoting democracy by force is also made possible by the overwhelming hegemonic power of the United States, as an effective agent for such change. An additional justification of this policy of war on nondemocracies as a means to promote security is the obvious benefit that such an outcome would give to the citizens of new democracies. Daniele Archibugi has called this idea of the democratic peace "universal democracy" (as opposed to a cosmopolitan democracy), in which the goal is for "the whole world to become democratic," to use Larry Diamond's apt phrase.[3] Perhaps, as some have thought, it might be argued that on these grounds it would

[3] See Daniele Archibugi, "Universal and Cosmopolitan Democracy," presented at the American Political Science Association Annual Meeting, 2005; Larry Diamond, *Can the Whole World Become Democratic? Democracy, Development, and International Policies* (Irvine, CA: Center for the Study of Democracy, 2003). On the dismal historical evidence for democratization by force, see Michael Cox, John Ikenberry, and Takashi Inoguchi, *American Democracy Promotion: Impulses, Strategies, and Impacts* (Oxford: Oxford University Press, 2000); also Minxin Pei and Sara Kasper, *Lessons from the Past: The American Record on Nation Building* (Washington D.C.: Carnegie Endowment for International Peace, 2003).

be enough to justify a preemptive war simply in light of the fact that some state is not a democracy or some democratic state has a conflict with some nondemocratic state. This hardly seems sufficient, however, since the nondemocratic state attacked may have been a decent hierarchical society (in Rawls's sense) and uninterested in conquest or an aggressive foreign policy. In this case, then, it would be justified in one of two ways: either that turning any nondemocratic state into a democracy contributes to the overall peace in the international system or that democracy is an intrinsic good for the people of any such states. There is no empirical evidence to support either possibility when it is the aim of military intervention. The prior and more fundamental question concerns the relationship between means and ends: is war the proper means to the end of establishing a democracy?

Whether or not a nondemocracy could become democratic by force is something for which there is a great deal of historical evidence. In general, the answer is clearly no, given failure in every case after World War II except for small and very brief wars with Grenada and Panama. In the case of larger states closer in size to Iraq and Afghanistan there is a resounding history of failure. War is not an effective means to achieving democracy, except in two specific cases: first, when the war does not establish a democracy but rather reestablishes an already existing democratic status quo; and, second, the defeated nondemocracy and not the victorious democracy started the war in the first place. Without these conditions, democratization is likely to be resisted in the name of self-rule, itself a democratic value. It would seem then that democracy cannot be achieved by means of war, even if an endogenous process of democratization can be aided by outside support. Indeed, except in such narrow circumstances, the lack of normative fit between violent means and the democratic end make it an inappropriate and self-defeating strategy for promoting democracy, much less peace. It would seem then that this claim is wrong in the same way as Mill's endorsement of despotism as a legitimate mode of government for "dealing with barbarians, provided the end be their improvement." By using force to interfere with a nonthreatening state, the intervening democracy violates standards of just war, regardless of whether that state possesses international legitimacy for intervening or not. Once nondemocracies see this policy used against others like them, they will likely attempt to raise the costs of military action. At that point, the democracy claims to intervene plausibly, since the nondemocratic state has become a threat. But this is a threat that the policy

of promoting democracy through war has produced and hardly counts as a justification for a just war.

Neither preemptive war nor war in general then can be used as a means to promote either democracy or the democratic peace. Even if democracy is the goal, a much more legitimate and effective means toward realizing democracy is to promote its preconditions, as well as ties of civil society and the public sphere across borders. But in order to show this, we need a better understanding of the internal workings of democracy and how it might actually promote peace. In the next section, I turn to this issue first by examining another generalization about the instrumental value of democracy: the absence of famine. My purpose here is to examine the mechanisms that are supposed to make it possible to prevent these great ills that still beset much of humanity.

In this regard democracy has two different effects that ought to be distinguished: its capacity to protect the rights of those who are subjects under its laws and its capacity to empower those who are its citizens actively to change their social and political circumstances. This latter effect, I shall argue, is crucial to having the capability to avoid great social evils and represents the core of human political rights. I then argue that such political rights explain the instrumental value of democracy, precisely because of their capacity to improve democratic practice. However, warlike democracies are precisely those democracies that have sacrificed certain civil rights (such as habeas corpus and other constitutional rights that are granted to noncitizens, as well as citizens' ability to challenge executive branch policies in the courts) for the sake of security and thus have lost the political basis for a democratic peace. In the absence of effective means for citizens to protect their political rights and to protect constitutional rights against unlawful detention, warlike democratic states also undermine the connection between democracy and peace internally and externally by reintroducing new hierarchies that apply security measures against their own citizens, including secrecy, preventative detention, torture, and eavesdropping. Without robust rights to challenge executive and military power, security becomes a justification for human violations and for undermining constitutional democracy itself. The protective reach of democracy lies in the hands of citizens and not officials, and in the absence of the effective exercise of that power democracy does not promote peace. It undermines peace externally because such policies detach democratic states from the international institutions based on human rights.

What else is missing in the argument for establishing democracy as a just cause for war? Besides the fact that it is a disproportionate and ineffective means to achieve this end, the claim that well-intentioned hegemonic nations can establish peace through the creation of political order is overly restrictive in its analysis of the causes of war and political violence. Proponents of war as a means to peace see anarchy as the source of such violence and thus legal and political order as the solution. Too much hierarchy, however, is just as much a structural cause of violence and insecurity as anarchy. Just as in the European empires of the nineteenth century, it is just the technological and military superiority of democracies that makes them more likely to go to war against nondemocracies and to impose their political and economic order upon them. There is a long tradition of republican thought that argues that domination and empire abroad undermine the basis for democracy at home, by creating too much hierarchical and executive power. Furthermore, once the hierarchy becomes translated into a distinction between those inside the zone of democratic peace and those still in anarchy outside it, then the zone of peace will cease to expand across this frontier without the use of force. One of the great innovations of eighteenth-century republican theories of security was "to refer to Europe as a whole as a republic" and to see it as "a complex system for restraining both anarchy and hierarchy."[4] The very idea of a nontyrannical and benevolent hierarchy, whether domestic or international, is thus unrealistically utopian, especially as we move from relatively independent states to a globally interconnected world.

II. Hierarchy, War, and Famine

There are two main social scientific generalizations about the beneficial effects of democracy, both of which concern what might be thought of as negative facts: the first is that there has (almost) never been a famine in a democracy; the second is that democracies have (almost) never gone to war with each other. These facts show that the relative absence of two great causes of human suffering – war and famine – can be tied to

[4] On the republican tradition of understanding international insecurity as based upon the dangers of hierarchy, see Michael Deudney, *Bounding Power* (Princeton, NJ: Princeton University Press, 2007), 16, 28–30. Deudney also shows that federalist institutions aim primarily at restricting hierarchy through promoting mixtures of forms of power. On the political cosmopolitanism typical of eighteenth-century Enlightenment republicanism, see my "The Republic of Humanity: The Cosmopolitan Imperative of Democratic Non-Domination" in *Republicanism and Political Theory*, Cécile Laborde and J. Maynor, eds. (London: Basil Blackwell, 2007).

the operation of distinctive features of democracy.[5] Without some fine-grained explanation of the mechanisms behind them, there is no reason to believe that these generalizations have always held or will always hold in the future, especially if the causes of famine and war are always changing and sometimes are brought about by democratic institutions themselves. The protective role of democratic institutions can be seen as primarily negative. In contrast to all other exercises of political power, democracy is fundamentally nonhierarchical, and indeed antihierarchical insofar as most democratic constitutions attempt to bind the exercise of political power. Nonetheless, it would be useful to say more, particularly since democracies do go to war against nondemocracies and thus antihierarchy does not lead to the general prevention of war. Given the limited scope of the generalization, the protections that democracy offers with respect to famines may be a better place to start. Amartya Sen offered the better, finer-grained analysis of the specific conditions associated with democratic practices and institutions that explain the absence of famines in democracies in terms of the antihierarchical consequences that the rights and powers of citizens have for avoiding some of the worst forms of domination. But it does not stop them from dominating noncitizens unless these same powers are distributed more widely, as, for example, when they are considered human rights.

Sen's analysis of the relation between famines and democracy begins with two striking facts. The first is that famines "can occur even without any decline in food production or availability."[6] When this is the case, Sen argues that more equitably sharing the available domestic supply is nearly always an effective remedy to move beyond the crisis. Indeed, famines usually affect only a minority of the population of any political entity, and Sen's hypothesis is that their vulnerability to starvation is explained by the loss of certain powers and entitlements that they had before the crisis. The second striking fact is that not all food shortages have the same disastrous consequences. Together these facts yield the robust generalization that "there has never been a famine in a functioning multiparty democracy," so that we may conclude that "famines are but one example of the protective reach of democracy."[7] It would be

[5] I have explored the methodological and explanatory issues of these generalizations about the instrumental value of democracy in my "Beyond the Democratic Peace: An Instrumental Argument for Transnational Democracy," *Journal of Social Philosophy* 37, no. 1 (2006), 127–38.

[6] Amartya Sen, *Development as Freedom* (New York: Knopf, 1999), chap. 5.

[7] Sen, *Development as Freedom*, 184.

tempting to associate this sort of security with the achievement of various instrumental freedoms or with one's status as a subject or client of a state or similar institution with an effective and well-funded administration. But an adequate explanation of the protective effects of democracy, rather than simply a modern state, requires understanding how democratic institutions are able to create (and to sustain in a crisis) conditions of entitlement and accountability across locations of political power, as well as confer on citizens the reflexive capacity to change the normative framework. Once the explanation is put in the normative domain, so too is the practical understanding of remedies and solutions.

The practical effects of democracy are not directly tied to more effective administrative institutions or even to the consistent application of the rule of law, both of which democracy may achieve. As Sen notes, there are limits to legality: "Other relevant factors, for example market forces, can be seen as operating *through* a system of legal relations (ownership rights, contractual obligations, legal exchanges, etc.). In many cases, the law stands between food availability and food entitlement. Starvation deaths can reflect legality with a vengeance."[8] In this sense, the presence of famine must also be explained via the operation of social norms conjoined with the lack of effective social freedom of citizens with regard to their content. It is most often due to an unresponsive hierarchy that does not need to take into account the claims of those whose policies it directly affects. The deplorable treatment of native populations in famines caused by colonial administrators is often due to domination, manifested in their lack of substantive freedoms such as free expression or political participation. Thus, famine prevention can be gained through fairly simple democratic mechanisms of accountability such as competitive elections and a free press that distribute effective agency more widely than in their absence.

Sen clearly goes further and sees democracy as more than a protective mechanism, which can empower certain agents to act and thus enable them to defend the entitlements of citizens. It is also more active and dynamic, offering genuine opportunities to exercise substantial freedoms, including the capability not to live in severe deprivation or to avoid the consequences of gender norms for overall freedom. It is clear that such substantive freedoms depend on normative powers and the emergence of practices of deliberation in which citizens exercise them. For example, India's success in eradicating famines is not matched in policy

[8] Amartya Sen, *Poverty and Famine* (Oxford: Oxford University Press 1986), 165–66.

domains that require solving persistent problems such as gender inequality, in which the normative powers necessary for effective agency are differentially and unequally distributed. There is certainly no robust empirical correlation between democracy and the absence of these problems; they exist in affluent market-oriented democracies such as the United States. The solution for these ills of democracy is not to discover new and more effective protective mechanisms or robust entitlements, since it is hard for some democracies to produce them. Rather, the solution is, as Sen puts it, "better democratic practice," in which citizens are participants in a common deliberative practice and sufficiently protected and empowered to change the distribution of normative powers and take advantage of improved practices. Asymmetries of this sort lead to domination and are responsible for the unjust distribution of food within families.

To put it somewhat differently, the issue is not merely to construct a more protective democracy, but to create conditions under which an active citizenry is capable of initiating *democratization*, that is, using their powers to extend the scope of democratic entitlements and to establish new possibilities of creative and empowered participation. Democracy is on this view the project in which citizens (and not just the agents for whom they are principals) exercise those normative and communicative powers that would make for better and more just democratic practice. This kind of enabling condition is essential to the explanation of the role of phenomena produced by democracy that serve as Sen's explanans: citizens' powers and entitlements.

The "democratic peace hypothesis" is similar to Sen's generalization about famines in that fairly minimal democratic conditions figure in the explanation of the absence of certain types of wars. The generalization is, however, more restricted in the case of war than of famine. Democracies do go to war against nondemocracies, although "almost never" against other democracies. Many explanations have been offered for why this is the case, and many of these do not depend on any transformative effects of democratic institutions other than that they provide channels for influence and the expression of citizens' rational interests and presume amity among democracies across borders as the basis for trust. Seen in light of the explanation of the absence of famines, democracy might reasonably be given a similar, more dynamic and transformative role than is usually offered: by being embedded in democratic institutions, agents acquire the normative role of citizens and the freedoms and powers that provide means by which to avoid the ills of war. The political ills of war, however, are revealed even in wars with nondemocracies, measured not just in

terms of the human suffering and domination of noncitizens, but also in the costs to citizens' powers and freedoms. In peace, these powers are more likely to flourish and entrench more robustly democratic practice.

If this is the explanation of peace, it is important to make clear why war and the preparation for war often have the opposite effects. The institutional capability to wage war increases along with the heightening of executive and administrative powers within the state on matters of security, which often bypass democratic mechanisms of deliberation and accountability and thus work against democratization (where this is understood precisely as the widening and deepening of the institutional powers of citizens to initiate deliberation and participate effectively in it). At the same time, participating in national self-defense has often been accompanied by the emergence of new rights or their broader attribution to more of the population. Charles Tilly has argued that warfare may have historically been an important mechanism for the introduction of social rights, as the state became more and more dependent on the willingness of citizens to accept the obligations of military service.[9] As modern warfare has become increasingly lethal and professionalized, however, the institutional powers of the state have outstripped this and other democratic mechanisms. The institutionally embedded normative powers of citizens are no longer sufficient to check the institutional powers of states to initiate wars, and these arrangements have left citizens vulnerable to expanding militarization that has correspondingly weakened these same entitlements. A new dialectic between the capacities of citizens and the instrumental powers of states has not yet reached any equilibrium, so that there has now emerged a strong negative influence on democratic practices and human rights generally because of the use of state force for the sake of security. Liberal democracies have not only restricted some civil rights, but have become human rights violators, with the use of extralegal detention centers and torture in order to achieve security. As such, they might be said to have become less democratic, certainly in the active sense of creating enabling conditions for the exercise of normative powers.

These remarks indicate that the democratic peace generalization depends on a set of historically specific institutional and normative presuppositions having to do with states as the primary sources of organized political violence. When war is no longer the sole form of political violence, then the significance of the internal democracy of states as a means

[9] Charles Tilly, *Coercion, Capital and European States* (London: Blackwell, 1990).

toward peace is greatly diminished. This is particularly true of the Kantian normative inference that the mere presence of constitutional democracies would somehow assure that the political federation of peaceful states is ever expanding. But once the institutional mechanisms of war shift power from representative bodies toward much less accountable administrative and executive functions and thus undermine the balance of institutional powers within a democracy, the expansive effect created by democratically organized institutions of domestic politics is less likely. This occurs when administrative and executive powers assert that security requires limitations on the freedoms and entitlements of their own citizens.

Beyond these internal effects, security brings to a halt the expansion of the zone of peace among liberal democracies. This means that the borders of the zone of peace will become a source of political conflict with those who are outside it. By this I mean that various transnational publics are now increasingly aware of the "problematic fact" of the zone of liberal peace and prosperity and regard it as having inherent and systematic asymmetries. The increased potential for violence from those who are outside the zone of peace requires that democratic states adapt to these new threats to their security, often by restricting the liberties of their citizens and their own commitments to human rights, and thus leads to a tendency for democracies to restrict their own democracy and political inclusion within their own states as a result of threats to their security. In this way, the conditions and institutions that promoted a democratic peace among states now act as part of a new negative feedback mechanism, affecting particularly the liberties and rights that have permitted an active citizenry to possess enormous influence over the use of violence. Instead of democracies' making international relations among states more peaceable, the new constellation of political violence is potentially making democratic states less democratic and less open to applying their internal standards of human rights and legal due process to those whom they deem to be threats to security. Recent events show then that democratic peace depends on a positive feedback relation between the internal structure of states and the international political system, where democracy is internally promoted by external peace and external peace is promoted by wider powers of citizenship, including transnational citizenship.

When citizenship is in part transnational, citizens can appeal directly to external institutions and associations in order to make states accountable, as is already the case with human rights violations. This mechanism has not been able to counteract the new negative feedback from

the international system on democracy, and the negative and interactive effects of the emergence of the actual zone of peace indicate that its continued existence no longer depends solely upon the increased democratization of states. The fact that democracies do not wage wars against other democracies now means that the borders of conflict are externalized, by means that exact costs to their internal democratic character. The republican linkage between an empowered citizenry and international peace is in fact systematically severed.

If the practical import of these new feedback relationships undermines the prospect of expanding peace through a political union of existing democracies, peace and security are no longer reducible to the absence of war. Here we need to modify some deep assumptions about the proper location for democracy and the exercise of the powers of citizenship, in order to determine what would help democratic states to avoid the problem of the weakening of internal democracy as a means to maintain security. One possibility is that some supranational institutions could exist that would make democratic states more rather than less democratic. In a word, peace requires not just democracies, but democratization at positively interacting levels.

III. Extending the Democratic Peace: Beyond Anarchy and Hierarchy

In his analysis of the reasons why famines almost never occur in democracies, it is readily apparent that Sen emphasizes not merely the protective functions of democratic state institutions, but also the various powers of individuals, to challenge officials by demanding an account of their policies and actions, to engage in public debate and deliberation, and so on. These powers and entitlements are distinctly normative, in the sense that they are powers to interpret and create norms. By normative power I mean the capacity to modify and change the rights and duties of others, as is the case with the powers associated with various statuses and roles, such as that of being a citizen. This takes the account of normative powers one step further than in Sen's account, by showing how democracy entails a particular understanding of the public exercise of such normative powers (for example, in deliberation). Such a process is free not because it issues in consensus or voluntary agreement, but because it produces obligations as the result of the joint exercise of normative powers in deliberation. Security is not increased by the voluntary surrender of such active powers, since this undermines democratic practice itself.

When someone is a citizen in a democracy, however, she has the power to participate in the ongoing interpretation and shaping of norms that are the source of other obligations and entitlements. What is distinctive about democracy and similar distinctively modern institutions is that the rule creation and implementation process is made explicit and subject to rational and popular control; this reflexivity makes it possible for the rules to be tested and interpreted and thus for such a process to promote the flourishing and creativity of human powers.

This support for the active aspects of democracy is inherently cosmopolitan, since it emphasizes the entitlement of all who possess such powers to be able to exercise them. This broadens considerably the cosmopolitan conception beyond the Kantian emphasis on law as the fundamental mechanism for the protection of individuals as bearers of human rights. In order for democracy to promote justice and human rights, it must recognize the claims made in deliberations initiated by those who each have the same rights and obligations. An active democracy regards rights as normative powers and in this way promotes peace through nondomination. The guiding principle here is not just that democracy promotes such active powers of citizens, but also that such rights and powers are best protected and promoted when there are differentiated and overlapping institutional locations and sites for their exercise. Security-minded states do not function well democratically, precisely because they are missing the checks on executive power that the dispersal of the powers of citizenship across various institutions and levels would provide.

If democracy is conceived of in antihierarchical terms, as in terms of the joint exercise of normative powers and rights among equals, a different analysis of the presuppositions of a reconstructed democratic peace must be provided. According to this view, democracies would be more likely to promote human rights if they had both a high degree of internal institutional differentiation *and* substantial external interconnectedness with other democratic polities, such as would be provided by a high level of participation in multilateral and international institutions. While this would be a good start, it is still not sufficient for democratization. Increasing the capability of citizens to exercise such normative powers in these contexts requires new and better transnational democratic practices with many more institutionally differentiated and distributed processes of deliberation than are currently available in democratic states or in current multilateral institutions. From the standpoint of those who lie outside the zone of democratic peace, existing institutions are not sufficient to solve the problem of domination inherent in most international institutions,

including many multilateral ones. Rather what those outside the zone of peace need is an expansion of the kind of distributed and differentiated deliberation that is already apparent in emerging global public spheres. For those who lack democratic citizenship, participation in these transnational public spheres establishes social ties that may become the basis of democratization through communicative interchange and mutual claim making through which relations of mutual respect can be established and deepened. Thus, it would seem that for most democratic purposes, it is a mistake of the democratic peace debate to require that the framework for interaction already depends on a "presumption of amity" among liberal states (in Doyle's phrase), since it institutionalizes distrust with those outside the zone of peace.

The European Union (EU) provides a more appropriate model than liberal multilateralism for such a conception of a transnational democracy. No longer simply operating with treaty agreements among independent liberal states, the institutions of the European Union have come to regard the citizens of its member states also as citizens of the EU and thus as having claims upon other EU states. The EU polity is not understood in terms of the self-governance of citizens as members of a single *demos*, but rather in terms of multiple and overlapping *demoi*; the regime is then not such that all must participate in the same set of institutions or suffer the consequences of a uniform policy. It is difficult to square the nature of the Europolity, as a unit among other units, with democracy as it is standardly conceived, except by seeing all member states as collectively constituting the *demos* of a common regime, which is then split into various levels of increasing scale. More than simply adding a new layer of authority, the EU provides a way to redefine the interactive relationships among the local, the national, and the supranational levels of scale. If this reconstruction of the process of European political integration is correct, it also follows that a more unitary democratic structure would no longer be either intrinsically or instrumentally desirable. How does this occur in the European Union?

One clear instance of the effect of new transnational democratization in the EU is implicit in the institutionalization of human rights in the European Convention for the Protection of Human Rights and the recent Charter of Rights. What is the purpose of this new layer of human rights enforcement beyond that already provided by the constitutions of member states? With the accompanying supranational European Court of Human Rights that grants rights of individual petition, there are (at least at the juridical level) multiple new institutions and memberships that can

be invoked in making claims about human rights. Such an overlapping differentiated and polyarchical structure permits greater realization of these rights and their claims against domination, as the citizens of *demoi* exercise their overlapping memberships. Even without any police powers, such highly differentiated institutions best realize rights by embedding them in multiple memberships and entitlements rather than in a single form of citizenship that uniquely constitutes the *demos*. In addition, one could argue that the EU's human rights practices serve to make its member states more democratic. It is here that the EU shows itself to be more than a mere regional confederation of states, but rather a transnational order.

By the explicit recognition of the rights of various rightless persons within the boundaries of the EU, residents have the powers of citizenship without being citizens of any of its member states. It is the legal achievement of the EU, and not of its member states considered separately, to recognize the rights of hundreds of thousands of foreign economic immigrants, including rights to political participation and to economic benefits. These rights are made possible by the way in which EU-level judicial and legal institutions have regularized the capacity of such people (whom Kant called "auxiliaries of the republic") to initiate claims to justice and deliberation about them. Precisely as a democracy of *demoi* with a plural political subject, the EU has begun to address what Walzer has called "the oldest form of tyranny," the tyranny of citizens over noncitizens practiced by European states with their "guest worker" policies and the tyranny of cultural minorities. It is clear that with respect to these gaps in human rights between citizens and noncitizens, the EU has been a catalyst for democratization, thereby fulfilling the democratic minimum for the first time for many residents of Europe.

EU-level institutions can in some instances require member states (and now even applicant states) to realize human rights more fully and to enhance participation by diverse actors with the overall effect of making member states more democratic.[10] This is precisely because the anomalous and often rightless persons who cross borders into the nation state system now have a location in which to initiate deliberation and acquire normative powers against domination. If applied to human rights policy

[10] On the democratizing role of the EU in recognizing the normative powers entailed by human rights independent of any particular citizenship, Honohan also defends broadening the rights of immigrants to political participation in the EU on the republican grounds of nondomination; see Iseult Honohan, *Civic Republicanism* (London: Routledge, 2002), 238–39.

and monitoring, novel practices such as the Open Method of Coordination (OMC) help by providing multiple pathways for publics to initiate deliberation about the rights of immigrants at various locations and on various issues. Other such practices include the European Human Rights Court and the European Convention on Human Rights, for which foreigners without nationality in any EU member state are already entitled to appeal. The European Court of Justice also provides such a forum for the ongoing juridical recognition of human rights, creating adjudicative institutions that build upon the constitutional traditions of member states even as they are extended to noncitizens.[11]

The extension of human rights deliberation to the collective agents of the EU shows the advantages of transnational institutions as a means to break down certain hierarchies of citizenship that have limited the full recognition of the rights of others. Thus, the extension of human rights in the EU to noncitizens without naturalization shows the advantages of multiply realizing human rights in differentiated institutions. In this way, the EU presents a unique positive feedback relationship of pooled sovereignty that enables democratization to occur, in which it is precisely the transnational-level institutions that enhance democracy at the lower levels. Certainly, even in the EU the interaction can go the other way: democracy exercised at the lower levels, in cities, regions, and states, can enhance the democracy of higher levels, especially as local institutions may suffer from the potentially dominating effects of juridification that often make transnational institutions so distant and alien. With such mutual interaction across levels and locations, a highly differentiated polity works not merely in policy areas, but also in the creation of a regime of human rights that can multiply realize the powers of citizenship and make them more rather than less robust. This suggests that a differentiated structure best promotes peace because democracy alone is able to promote a high degree of robust interaction across its institutional levels and sites.

These sorts of positive interactions across borders are missing in the current democratic peace. Also missing is what Sen emphasizes in his claims about democracy and the absence of famines: that democracy

[11] Joseph Weiler points to the case of *Gayusuz v. Austria*, which went to the European Court of Human Rights and led to the extension of social security benefits to third-country nationals. See Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy," *European Journal of International Law* 9 (1998), 658–723.

is the institutionalization of various normative statuses and substantive freedoms, the most important of which are the freedoms and powers of citizens to assess rules and participate in deliberation about the operative norms of the social world in which they are embedded. As I have argued, there are no (almost) famines in democracies that have realized a minimum of such normative powers. Here a minimal democracy that has institutionalized communicative and normative powers may be sufficient to secure freedom from domination in its various forms. With institutional differentiation and the distribution of rights across traditional state boundaries, the antihierarchical consequences are reinforced in ways that make it more difficult for military and police powers within states to escape from the constitutional limits on their authority.

I have already argued that the recent heightening of executive and police powers in many democratic states has undermined the constructive democratic powers of citizens while enhancing the instrumental powers of the state to employ coercive means over their citizens. This development requires a response that diffuses such power at many different institutional locations and in that way promotes nondomination through political agency and recognized status in place of violence and coercion. The conditions that make this generalization robust are internal to democratic practices and may now be disappearing, as fear and the need for security replace supposedly rational interests in peace. If we are to continue the democratic project at least in part because of its connection to the ideals of peace and the obligation to end pointless human suffering, it is best to see that democracy's capacity to do so is a contingent historical fact and a fragile achievement. The European Union examples show that robust interconnections between democracies at local, national, and transnational levels can create and entrench the conditions for democratization that would begin to address the conflicts among the privileged citizens of the zone of the democratic peace and those who lack such normative powers and are potentially dominated by the protective apparatus of the liberal state. Above all, the European Union shows why it is that political liberty, understood in republican terms as freedom from domination, now requires just this sort of transnational dispersal of hierarchical power and the protection of human rights. Membership in a single political community is insufficient for robust nondomination. In order to be secure, such normative powers need to be distributed across institutional levels and across communities, including transnational institutions and a global political community, or republic of humanity.

IV. Conclusion: The Dialectic between Peace and Democracy

We are indeed "beyond" the democratic peace in two respects. First, the attempt to use war as a means to establish more democracies is ineffective and creates conditions of hierarchy that are themselves causes of war and interstate political violence. Second, the use of war abroad as a means to create security at home is democratically self-defeating to the extent that it creates hierarchies of power that undermine democratic checks on the nondemocratic power of the military, the police, and the executive, and lessens the scope of those rights and liberties that made democracies peaceable. If we take the generalization about the new warlike tendencies of security-minded democracies literally, the current situation of warlike democracies ought to be seen as simply one more manifestation of the willingness of democracies to use war and coercion against nondemocracies, often for the sake of their imperial ambitions. The only, valid justification for war available to democracies is that it is necessary to sustain democracy itself. Even when war is conducted for the sake of realizing supposed democratic ends, this kind of democratic peace is hardly inspiring for cosmopolitans, and not what Kant hoped for in his notion of an ever-expanding pacific federation. In this problematic situation, war and violence establish a negative feedback relation similar to the older rivalry among nations: it is likely to make them less rather than more democratic.

Under current circumstances, alternative mechanisms are needed to reconnect democracy and peace. Transnational political orders such as the European Union have been able to extend the normative powers of citizens and create conditions in which noncitizens can take up such active powers in order to transform their circumstances of domination. Expanding the democratic peace requires creating conditions for active citizenship as a means for democratization at the transnational level, and in this way institutionalizes stronger connections between democratic institutions and nascent global publics. At a more structural level, the European Union represents the project of building a democratic polity necessary for the right sort of positive feedback relations between democracy at the state and transnational levels. It helps avoid the fatal combination typical of modern states of excessive hierarchy at home produced in part as a response to insecurity and anarchy abroad, creating a negative feedback relation between the international system of states and robust internal democracy. But as security policies based on war erode the very democracy they are supposed to protect, a new kind of transnational

democratization is essential to the project of an expanding democratic peace, the only kind of peace and security that is not democratically self-defeating. Democracy not only allows citizens to avoid the evils of war and political violence, whether in the anarchical or hierarchical form. It is also the case that the democracy that can achieve this end must now be transnational, giving a new normative significance to the antihierarchical nature of democracy and the idea of a democratic peace.

THREE

WAGING WAR

7

Proportionality and Necessity

Thomas Hurka

I. Consequence Conditions

Just war theory, the traditional theory of the morality of war, is not a consequentialist theory, since it does not say a war or act in war is permissible whenever it has the best consequences. On the contrary, its *jus ad bellum* component, which concerns the morality of resorting to war, says a war with the best overall outcome can be wrong if it lacks a just cause, that is, will not produce a good of one of the few types, such as resisting aggression or preventing genocide, that alone can justify war. It can likewise forbid a war that is not declared by a competent authority or fought with a right intention. Similarly, the theory's *jus in bello* component, which concerns the morality of waging war, contains a discrimination condition that can forbid military tactics with the best outcome if they target civilians rather than only soldiers. In all these ways the theory is deontological rather than consequentialist.

But just war theory does not ignore the consequences of war and would not be credible if it did: a morally crucial fact about war is that it causes death and destruction. The theory therefore contains several conditions that forbid choices concerning war if their consequences are in some way unacceptable. The *jus ad bellum* insists that a war must have a *reasonable hope of success* in achieving its just cause and other relevant benefits; if it does not, its destructiveness is to no purpose and the war is wrong. A further, *proportionality* condition says that even if a war does achieve relevant benefits, it is wrong if the destruction it causes is excessive, or out of proportion to, those benefits. And a *last resort* condition forbids war if its benefits, though significant, could have been achieved by less destructive means such as diplomacy. The *jus in bello* contains conditions that parallel these last two. An *in bello proportionality* condition says an

act in war is wrong if the harm it causes, especially to civilians, is out of proportion to its military benefits, while a *necessity* condition forbids acts that cause unnecessary harm, because the same benefits could have been achieved by less harmful means.

These *consequence conditions*, as I will call them, have been central to recent moral debates about particular wars. Before the 1991 Gulf War some critics said it would be disproportionate, because it would result in a wider Middle East conflagration. Many objected that the Iraq War of 2003 was not a last resort, because any weapons of mass destruction Saddam Hussein had could just as well be eliminated by United Nations inspections. And a common critique of Israel's antiterrorist operations in the Palestinian territories is that they have caused disproportionate harm to Palestinian civilians.

Just war theory could interpret these conditions in a consequentialist way, so that, for example, a war is proportionate if the total of all its benefits, of whatever type and however caused, is even slightly greater than its total harms, and a last resort if its net benefits minus harms are even slightly better than any alternative's. And indeed some of the theory's proponents have interpreted it this way.[1] Then the theory, while not as a whole consequentialist, because it contains just cause, discrimination, and other nonconsequentialist conditions, mimics consequentialism in the way it assesses a war's results.

But this interpretation is neither most intuitive nor truest to the way the conditions have usually been understood. A more attractive reading departs from consequentialism, first, by distinguishing among types of benefit and harm, saying only some are relevant to the assessment of a war or act in war while others are not. Second, it distinguishes among causal processes, saying benefits and harms with one kind of causal history can count toward the assessment of a war or act while the same benefits or harms with another history cannot. Finally, it does not always weigh benefits and harms equally but gives more weight to harms an act directly causes than to any benefits it produces. In all three respects the resulting theory assesses consequences in a deontological way.

Before elaborating these points, we need to say something about the mutual relations of the conditions. The hope-of-success condition, though often presented as a separate condition in the *jus ad bellum*, can actually be subsumed under the proportionality condition. If a war has

[1] See, e.g., James Turner Johnson, *Morality and Contemporary Warfare* (New Haven, CT: Yale University Press, 1999), pp. 27–28.

little or no chance of achieving relevant goods, then its destructiveness is out of proportion to its expected benefits and the war is wrong. But in each branch of the theory the proportionality and necessity conditions – the last resort condition is really an *ad bellum* necessity condition – are independent. A war can be proportionate, because the destruction it will cause is tolerable compared to its benefits, but not a last resort, because the same benefits could be achieved by less destructive means. Or it can be a last resort, because it is the only way of achieving certain goods, but disproportionate, because it will cause excessive harm compared to those goods.

At the same time, the necessity conditions are derivative from the proportionality conditions, because they are comparative versions of them. To assess the proportionality of a given war we identify its relevant benefits and harms and then subtract the latter from the former to arrive at its net effect: only if that is sufficiently positive is the war permitted. Applying the last resort condition would be easy if there were some alternative that would achieve all the same goods; then the only question would be whether that alternative was less destructive. But often the alternatives to war will not achieve all the same goods, or not all to the same degree, and sometimes they risk additional harms. For example, if we try to reverse an aggression by diplomacy and fail, that process may give the aggressor time to strengthen its military, making the eventual war bloodier. We must therefore do a separate proportionality assessment for each alternative to war, subtracting its relevant harms from benefits, and count the war as a last resort only if its net effect is better than that of any alternative. To put it slightly differently, we must determine whether the additional benefits of war, compared to its alternatives, justify its additional harms, and make a similar assessment for particular acts in war under the *in bello* necessity condition. So in each branch of the theory the proportionality condition considers the relevant benefits and harms of a war or act considered on its own, while the necessity condition compares the result of that calculation with the results of similar calculations for relevant alternatives, allowing a choice only when its balance of benefits to harms is better than that of any alternative.

Though the proportionality conditions are not comparative in the same way as the necessity conditions, they still involve a comparison. They require us to identify the benefits and harms a war will cause, a process that requires comparing the situation that will result from the war with the situation that would have obtained had it not been fought. Imagine that a war to remove a brutal dictator will cause 10,000 deaths

among his country's civilians, but that if he remained in power he would kill 100,000 civilians. The relevant fact about the war is not that it will kill 10,000; it is that it will result in a net saving of 90,000. But what is the baseline situation with which this comparison is made?

The simplest view is that the baseline is whatever a nation would have done had it not fought the war or, better, if the just cause for the war had not arisen. But this view is problematic in at least two points. Imagine that a nation is contemplating a war that has a trivial just cause and will be immensely destructive, but that if it does not fight this war it will fight another even more destructive war with no just cause. The fact that the second war will have an even worse result surely cannot make the first war proportionate, and to exclude this implication we must consider only alternatives that do not involve the nation's doing something morally wrong. Now imagine that two nations are contemplating the same war, with the same just cause and same level of destruction. If the first nation does not fight the war, it will spend the money the war would cost on welfare programs that will significantly benefit its poor. If the second does not fight, it will spend the money on tax breaks for the rich, which while not strictly forbidden will be much less beneficial. If the proportionality assessment considers just what a nation would otherwise do, the first nation's war will be less likely to be proportionate. That seems wrong: why should a nation's doing more good in its activities outside war make its resorting to war less permissible? To avoid this implication, we should compare the net effect of war with that of the least beneficial alternative that is morally permitted: then the two nations in our example will have their option of war compared with the same baseline, which is now not purely factual but at two points moralized.[2]

II. Relevant Benefits

Given this baseline, the first step in assessing the proportionality and then the necessity of a war or act in war is identifying its relevant benefits. Consequentialism counts benefits of all types, but just war theory seems not to, holding that some types of good are as types irrelevant. Imagine that a war will give pleasure to our soldiers, who are bored with training and eager for real combat. Their pleasure is undeniably good but seems here morally irrelevant: the case for war cannot be stronger given this kind

[2] On this issue see David Mellow, "Counterfactuals and the Proportionality Criterion," *Ethics and International Affairs* 20 (2006): 434–54.

of effect. Or imagine that a war will stimulate more profound art than would otherwise be created; that too seems irrelevant to its justification. It may be objected that these benefits are too trivial to count seriously in a proportionality calculation, but others are more significant. Imagine that our nation's and indeed the world's economy is in a recession, and that war would end that recession, as World War II ended the depression of the 1930s. The economic benefits the war will produce here are significant, but they again seem incapable of justifying war. An otherwise disproportionate conflict cannot become proportionate because it will boost gross domestic product (GDP).

Which types of benefit are relevant, then? They clearly include those in a war's just causes. If the war will prevent aggression or major rights violations by a government, the goods thereby achieved count uncontroversially against the harm the war will cause. And some very restrictive versions of just war theory say they are the only goods that count. In determining whether a war is proportionate and a last resort, we weigh the harm it will cause against only those benefits involved in its initial just causes.

But most versions of the theory are less restrictive, because they recognize what have been called "conditional" just causes. Unlike "independent" just causes such as resisting aggression, merely conditional ones cannot on their own supply a just cause; if one has only conditional just causes, one is not permitted to fight. But once some other, independent just cause is present, conditional causes become legitimate goals of war and can contribute to its justification, in particular by helping to make it proportionate and a last resort.[3] Three main such causes have been recognized: forcibly disarming an aggressor, deterring future aggression, and preventing humanitarian wrongs that, though serious, do not mount to the level of an independent just cause.

On most versions of just war theory, the mere fact that a nation has weapons it may or even is likely to use aggressively at some time in the future is no justification for war against it now; *pace* the Bush doctrine, merely preventive war is wrong. But once a nation has committed aggression, forcibly disarming it to prevent it from doing so again becomes on most views a legitimate goal of war and can even justify continuing the war after its initial goals have been achieved. It is widely held that in World

[3] This distinction is introduced (though using different terminology) in Jeff McMahan and Robert McKim, "The Just War and the Gulf War," *Canadian Journal of Philosophy* 23 (1993): 502–6.

War II the Allies were permitted to disarm Germany and Japan forcibly after their aggressions had been reversed. Many likewise hold that in 1991 the UN coalition was permitted to send troops into Iraq after liberating Kuwait, in order to eliminate Iraq's weapons of mass destruction; that is why, when they chose not to, they were also permitted to write conditions about disarmament into the ceasefire agreement that ended the war.

A similar point applies to deterrence. The mere fact that war against a nation will deter future aggressors cannot justify war, but once there is another, independent just cause, deterrence becomes a relevant benefit of war and can play a vital role in its justification. Argentina's invasion of the Falklands in 1982 gave Britain a just cause for war, but given the islands' sparse population and remoteness from Britain, that cause may have been insufficient to outweigh the harms of war in a proportionality calculation. But in justifying her resort to war British Prime Minister Thatcher also cited the need to resist aggression wherever it occurs, which was in effect to appeal to deterrence. And deterrence may have done more to make the war proportionate than its initial just cause did. Something similar applies to the last resort condition. In the lead-up to the Gulf War, some nations sought a negotiated Iraqi withdrawal from Kuwait, but it was evident that any such solution would require concessions to Iraq, for example, about some disputed islands on the Iraq-Kuwait border. The United States and its closest allies vigorously opposed the negotiations, saying there must be "no rewards for aggression." For them the conditional just cause of deterrence made diplomacy unacceptable when it might otherwise have been the morally preferable alternative.

The final type of conditional just cause is illustrated by the 2001 Afghanistan War. While the Taliban government's oppression of the Afghan people, and especially of Afghan women, was serious, I think most would deny that it constituted an independent just cause; a war fought only to liberate Afghan women would have been wrong. But once the Taliban provided an independent just cause by harbouring terrorists, the fact that war against them would end their oppression became for many an additional relevant benefit that counted toward its proportionality.[4]

[4] Given the role of these conditional just causes, an independent just cause must involve not only a good of a relevant type, such as resisting aggression, but also one above a threshold of seriousness. Otherwise goods such as disarmament and deterrence could justify war given only a trivial wrong of a relevant type, such as another nation's improperly imprisoning one of our citizens: that wrong would satisfy the just cause condition, and disarmament or deterrence could then satisfy the proportionality and last resort conditions. But surely if those goods cannot justify war on their own, they cannot do so

A less restrictive view, then, counts as relevant benefits the goods in both a war's independent and its conditional just causes. What weighs against the war's destructiveness is not just its initial justifying goal but also its potential to prevent future wars by disarming and deterring would-be aggressors and to correct lesser humanitarian wrongs. And there may be further relevant benefits. Imagine that in 1990 Saddam Hussein conquered Saudi Arabia as well as Kuwait and used the resulting control of their oil supplies to drive up the world oil price, causing significant harm to the world economy. I think many will say that preventing that economic harm would then have been a relevant benefit, making the case for war against Saddam stronger than if his aggression had not affected the oil price. But how can that be if preventing an economic recession is not a relevant benefit? How can economic goods count in the one case but not the other? The answer may lie in the way the goods are produced.

When war lifts an economy out of recession, the benefit results from a means to the war's just cause: in order to reverse an aggression, say, we invest money in military production, and the resulting increase in industrial activity boosts our economy. But in the Saddam Hussein example the benefit results from the achievement of the war's just cause itself: it is the ending of Hussein's occupations of Kuwait and Saudi Arabia that prevents the increase in the world oil price. So it may be that economic goods count when they are causally downstream from a war's just cause, but not when they result only from a means to that cause. This suggestion may be confirmed by a diplomatic example. In the years immediately after its end, it looked as if the Gulf War might contribute to resolving the Israeli-Palestinian conflict, through the Oslo Accords it helped make possible. But I think most would deny that this was a relevant benefit of the war: one could not fight Iraq in order to create peace in Palestine. And the reason may again be that the benefit resulted from a means to the war's just cause rather than from that cause itself. In order to expel Iraq from Kuwait, the United States assembled an international coalition including both Western and Arab states and with Israel as an unofficial partner, and the contacts that coalition involved helped stimulate the Oslo process. But now imagine that the 2003 Iraq War had, by ending Iraq's payments to the families of Palestinian suicide bombers, reduced the level of suicide bombing and so stimulated an Israeli-Palestinian settlement. Here it

given only a trivial wrong. We avoid that implication by requiring independent just causes to be not only of a relevant type but also above a threshold of seriousness.

seems the settlement would be a relevant benefit, because ending support for terrorism is a legitimate goal of war.

It may therefore be that some goods are relevant benefits when they are causally downstream from a war's just cause but not when they result only from the means to that cause. Not all goods allow this treatment, however. If a nation's citizens get pleasure from its military victory, that seems irrelevant to the war's justification even if the pleasure results from the nation's achieving a just cause. But if it holds for even some goods, the just war conditions depart even further from consequentialism: not only do they exclude some types of good as types, they count others only when they result from one causal process rather than another.

The restrictions on relevant goods we have identified also bear on the last resort condition. Any time a nation fights a war, it could have spent the money the war cost in some other way, which could have had better consequences. For example, rather than fight the Gulf War the United States could have spent the billions of dollars it cost on development aid to Africa, which might well have produced greater benefits. For consequentialism this makes the war morally wrong, but it does not do so for just war theory. The reason is that the benefits of development aid, no matter how great, are of the wrong type to be relevant to assessing the Gulf War. They are not involved in the war's just causes, either independent or conditional; nor are they causally downstream from those causes; and they therefore cannot make development aid a morally mandatory alternative to war. For last resort purposes, the relevant alternatives to a war are only alternative ways of achieving the war's benefits, not policies that produce benefits of some totally different type.

These issues about relevant benefits also bear on the *in bello* proportionality condition. Its legal formulations require only that the damage an act in war will cause not be excessive "in relation to the concrete and direct military advantage anticipated," with no further explanation of how "military advantage" is to be understood.[5] But if an act in war is justified, it surely can only be because it contributes to the war's relevant benefits, which means those in the war's independent and conditional just causes, and perhaps others causally downstream from them. But then any other benefits are irrelevant to *in bello* proportionality: an

[5] 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, Art. 51 (5) (b), in *Documents on the Laws of War*, 3rd ed., ed. Adam Roberts and Richard Guelff (Oxford: Oxford University Press, 2000), p. 449.

otherwise disproportionate tactic cannot become proportionate because it will please soldiers or have economic benefits, for example by testing a technology with civilian applications. Just as these benefits cannot count in assessing a war as a whole, so they cannot count in assessing acts within it.

It also follows that what counts as a proportionate tactic varies with the magnitude of a war's benefits, and in particular with the moral significance of its just causes. A level of harm to civilians that would be permissible in war against a genocidal enemy such as Nazi Germany would not be permissible in the Falklands or Kosovo War. That seems intuitively right and even undeniable, but it contradicts the widespread assumption that the *jus ad bellum* and *jus in bello* are independent. It is commonly held that a nation may be morally wrong in its resort to war but fight the war entirely in accordance with the *in bello* rules. This is possible for the discrimination condition, if that permits both sides to target enemy soldiers, but it is not true of the *in bello* proportionality and necessity conditions. If they permit acts in war only when their relevant benefits outweigh their relevant harms, and an aggressor can produce no relevant benefits because it has no just cause, then no acts by that nation's soldiers can be proportionate or necessary. The *in bello* conditions are not independent of the *jus ad bellum* but depend crucially on the latter's specification of relevant benefits.

III. Relevant Harms

Having identified relevant benefits, the next task in assessing proportionality or necessity is to identify relevant harms. Here again some types may be excluded as types. For example, if an aggressor nation's citizens will be saddened by its defeat, that does not count at all against a war to reverse its aggression. But there seem to be many fewer such exclusions than in the case of benefits. If a war will cause pain to soldiers who do not want to fight, prevent the creation of great art, or harm the world's economy, these evils seem all to count fully against the war's benefits, and to do so whether they result from the war's just cause or not. While many types of benefit are irrelevant to the justification of war, most types of harm are relevant.

The more important exclusions of harms concern their causal histories, and in particular the role of other agents' choices in those histories. Consider first the deaths of enemy soldiers. The *jus in bello* seems to give these deaths very little weight. Its necessity condition forbids killing enemy

soldiers wantonly or to no purpose, and this is not a trivial restriction. It can, for example, justify the ban on explosive bullets: once a soldier has been hit by gunfire he is effectively disabled, making any further harm to him unnecessary. But if killing an enemy soldier will produce even a small benefit, it seems to be permitted. If killing a hundred or even a thousand enemy soldiers is necessary to save one of our soldiers, it is on standard military views not disproportionate. (In the movie *Saving Private Ryan* there is surely no number of German soldiers such that Tom Hanks must be careful not to kill more than that number while saving Ryan.) It is less clear how far this discounting of enemy soldiers' deaths carries over into the *jus ad bellum.* On many views the fact that a war will kill enemy soldiers counts more than trivially against its proportionality, but on most it counts much less than if the war will kill enemy civilians. This is reflected in popular criticisms of the Gulf and Iraq Wars, which focus much more on the number of Iraqi civilians killed than on the number of Iraqi soldiers; the latter are often barely mentioned. So in both branches of just war theory enemy soldiers' deaths have significantly discounted weight as harms, and the same is true to some extent for our soldiers' deaths. Imagine that to prevent terrorist attacks that will predictably kill 10,000 of our civilians we must fight a war that will kill 15,000 of our soldiers. I think most will say this war is permitted, implying that soldiers' deaths in general count less than civilians'.

This discounting of soldiers' deaths again distinguishes just war theory from consequentialism, which ignores the causal histories of harms. It is also connected to the discrimination condition in the *jus in bello,* which permits soldiers on each side to target enemy soldiers but not civilians. Different justifications have been proposed for this permission, but the one I find most plausible is most clearly available given volunteer militaries on the two sides. Then we can say that by voluntarily entering military service, soldiers on each side freely took on the status of soldiers and thereby freely accepted that they may permissibly be killed in the course of war. More specifically, by volunteering they gave up their right not to be killed by particular people in particular circumstances, namely, enemy soldiers in a declared war, and so made their killing in those circumstances not unjust. Their situation is like that of boxers who, in agreeing to a bout, permit each other to do in the ring what would be forbidden as assault outside it. This explains not only why targeting them in war is not wrong, but also why their deaths count less in assessing a war or act for proportionality or necessity: by making their deaths not unjust they themselves gave them less weight. In the case of our soldiers

there are competing moral considerations. Our nation owes them special concern just as citizens, and may also have undertaken when they enlisted to safeguard their lives so far as possible. But even here there is an initial discount resulting from their initial decision to take up the soldier's role.[6]

This justification applies most clearly when soldiers are full volunteers, but often they are not. They may be conscripts or may have enlisted only because of lies told to them by their government or because they had no acceptable career alternatives. Are their deaths still discounted, or discounted as much? A hardline view says they are. Even though not fully voluntary, their enlistment was voluntary to some degree: the conscripts could have fled the country or gone to jail. And being voluntary to that degree is sufficient to give them the same moral status as full volunteers. They are likewise legitimate targets during war, and their deaths likewise have minimal weight against our soldiers' deaths. But a softline view adjusts soldiers' moral standing by the degree of voluntariness of their enlistment. If they are conscripts they may be legitimate targets while actively fighting, but not when sleeping in barracks far behind the front lines, and their deaths have more weight against the benefits of war than the deaths of full volunteers. A war with a comparatively minor just cause, such as the Falklands War, might not be proportionate if fought against conscripts though it would be if fought against volunteers. In the Gulf War the Iraqi troops defending Kuwait were largely teenage conscripts; on the softline view this obliged the UN coalition facing them to accept greater risks to its own troops than if the troops opposing them were Republican Guards.

On the view just described, the moral weight of soldiers' deaths is diminished by choices they made in the past, and the same can be true of nonsoldiers. Imagine that some enemy civilians install themselves as voluntary shields around a military target, hoping to deter attacks on it. Their deaths still have some moral weight. If we can attack either this target or another of equal military value that lacks shields, we should attack the one without shields. But if the civilians placed themselves near the target, that surely discounts their deaths to some extent, so attacking it may be proportionate where it would not be if their proximity were not their choice. Or imagine that if we win a war with a just cause some

[6] This justification is surprisingly rarely given, but for hints of it see Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), p. 145; and Paul Christopher, *The Ethics of War and Peace*, 2nd ed. (Upper Saddle River, NJ: Prentice-Hall, 1994), p. 126, n. 23.

terrorists on the other side will launch suicide attacks on our civilians. Setting aside the civilians' deaths for a moment, can it count against the war's proportionality that it will result in the suicide bombers' deaths? The answer is surely no, and the obvious explanation is that by themselves choosing their deaths the bombers took the responsibility for them on themselves and removed it from us.

In all these cases harm to a person is discounted because of his own wrongful choices, but can it also be discounted because of others' choices? Imagine that, losing on the battlefield, enemy troops retreat into a city where our pursuing them will inevitably cause civilian deaths. In assessing that pursuit for *in bello* proportionality, do we count the resulting civilian deaths fully against our act or can we discount them partly as the enemy's responsibility for putting the civilians in the line of fire? International law seems to say we cannot. It forbids using civilians as involuntary shields, as the enemy troops in effect are doing. But it also says that one side's violating its legal obligations does not release the other side from its obligations, and that suggests that our proportionality assessment should remain unchanged. Not everyone accepts this view, however; for example, the U.S. military seems not to. When a battle in the Iraq War moved into the city of Nasiriyah after Iraqi forces retreated there, the commander of a U.S. artillery battalion firing on the city "placed responsibility for any civilian deaths on the Iraqi soldiers who drew the marines into the populated areas," saying, "'We will engage the enemy wherever he is.'"[7]

The same issue arises in the example of suicide bombers. If they kill civilians after we win an otherwise just war, do the resulting deaths count fully against our resort to war or are they partly discounted as due to the bombers' wrongful acts? And it is a pervasive issue in wars against guerrilla or insurgent forces, whose common tactic is to hide among a civilian population. The Viet Cong used this tactic in the Vietnam War, as do Hamas, Hezbollah, and other opponents of Israel today. One view says their use of this tactic makes no moral difference: the forces fighting them must count any resulting civilian deaths fully against their own acts. But some commentators on the Vietnam War say the main responsibility for civilian deaths lay with the Viet Cong and not the United States;[8] similarly, defenders of Israel say if Hezbollah locates rocket launchers in Lebanese

[7] "Marines Wade into Dreaded Urban Battle," *The Globe and Mail*, March 25, 2003 (New York Times Service).

[8] Paul Ramsey, *The Just War: Force and Political Responsibility* (New York: Scribner's, 1968), p. 437; William V. O'Brien, *The Conduct of a Just and Limited War* (New York: Praeger, 1981), p. 100.

towns, the deaths that result when Israel eliminates the launchers are attributable to Hezbollah.

In thinking about this issue we must not assume that the assignment of responsibility is zero-sum: a harm can be both wholly one agent's fault and wholly another's. The issue is just whether an enemy's having wrongfully contributed to a harm reduces somewhat that harm's weight in our assessments of proportionality and necessity. That said, the issue is a difficult one. It is not one where there are clear or uncontroversial judgements about particular cases; on the contrary, there are sharp disagreements about examples such as the Vietnam War and Israel's attack on Hezbollah. Nor do abstract principles tell decisively in favour of either view. On the one hand, one wants to say that we must take the world as we find it and not ignore features of our choice situation because we disapprove of how they came about. If an act of ours will kill civilians, that is the morally salient fact and far more important than the precise reason why it will do so. On the other hand, one wants to say that agents should not be morally protected by their bad characters: that they have performed or will perform seriously wrong acts should not make tactics against them impermissible that would be permissible if they were less grossly immoral. At the same time, the issue is vitally important for current moral debates about particular wars. At the bottom of these debates is a disagreement about how far, if at all, the harms an act of ours will cause are discounted if they also depend on others' wrongful choices.

IV. Weighing Benefits against Harms

Having identified relevant benefits and harms, just war theory must weigh the two against each other. Consequentialism does so by giving them equal moral weight, so an act can be right even though its benefits are only slightly greater than its harms. But deontological moralities are much more restrictive. If they do not contain absolute prohibitions against acts of direct harming such as killing the innocent, they allow these acts only in extreme cases, where their benefits are not just somewhat but vastly greater. Thus they allow killing an innocent person not to save just two other innocents, as consequentialism would, but only to save a hundred or a thousand, and in so doing they weigh harms much more heavily than benefits. As an instance of deontology, just war theory follows this line, but in two different ways at two different points.

When deontological views forbid acts of direct harming, they understand the directness at issue using either or both of two distinctions. The

first says it is morally worse to cause harm by what one actively does than merely to allow harm to happen by not acting to prevent it; thus it is worse to kill than merely to allow to die. The second says it is worse to cause harm intending it as one's end or as a means to one's end than to do so merely foreseeing that the harm will result; thus aiming at harm is worse. These two distinctions are independent of each other. One can actively cause harm while not intending but only foreseeing it, and one can allow a harm because one wants it as an end or means, for example, allowing someone to die because one wants to inherit her wealth.

Of these two distinctions, the second, between intending and merely foreseeing harm, is the more important in just war theory. When the discrimination condition forbids targeting civilians, it on most readings forbids acts that intend serious harm to civilians as an end or a means, while not in the same way forbidding acts that merely foresee civilian harm, as when bombing a legitimate military target unavoidably kills civilians living nearby. Some versions of the theory are absolutist, forbidding the targeting of civilians in any circumstances whatever. But others allow such targeting when it is necessary to avert an absolute catastrophe, or in conditions of "supreme emergency." Michael Walzer thinks these conditions were present in the early stages of World War II, when the only way available to fight the massive evil of a Nazi victory was to bomb German cities. But he denies that they were present when the United States bombed Hiroshima and Nagasaki, even if doing so saved, as President Truman argued, many thousands of lives.[9] In this case the lives saved were primarily soldiers', which may be discounted if they voluntarily enlisted. But many just war theorists would take a similar view of civilian lives. Imagine that the only way to save 100,000 of our civilians' lives from terrorist attacks is by bombing another country's cities and intentionally killing 10,000 of its citizens. Many just war theorists would say this bombing is wrong, thereby giving the harms an act intentionally causes much more weight than its benefits.

The theory gives rather less weight to the other distinction, between doing and allowing, since it often allows active doings that cause significant harm to civilians. But it still seems to make some use of this distinction, and to count the harms a doing causes somewhat more than its benefits. This is, however, not always easy to see.

Consider a trade-off between different civilian lives, as when a war to prevent our civilians from being killed in terrorist attacks will inevitably

[9] Walzer, *Just and Unjust Wars*, chap. 16.

kill some civilians in an enemy country; this was the case in the Afghanistan War. The simplest versions of consequentialism weigh all lives equally and will forbid this war if it takes just one more life than it saves. But most adherents of just war theory start from a different position. They say a nation is permitted and even required to weigh its own citizens' interests more heavily than noncitizens'. When deciding trade, immigration, and other policies, it should look primarily to the effects on its own people. Does this view transfer to the case of war, so there too a nation may care more about its own citizens' good? I think it does, but only in a significantly weakened form. Whereas a nation may be permitted to save its own citizens from a natural disaster rather than save up to n times as many foreign citizens, it may not be permitted to save its citizens from terrorism if that will involve its killing n times as many foreigners. Even if some national preference is allowed in the second case, the degree allowed is less. But then the doing/allowing distinction is doing some work, making harms that result from a doing count more against its benefits than they would if the harms were merely allowed.

Now consider a trade-off between soldiers' and civilians' lives, as when a tactic that reduces the risk of death for our soldiers increases the risk for enemy civilians. (The intense bombing of Iraq at the start of the Gulf War had this effect, as did the Kosovo War policy of flying NATO planes only above 15,000 feet, where they were safe from antiaircraft fire but from where their bombing was inevitably less accurate.) Here the baseline trade-offs are harder to determine. On the one hand, our soldiers are soldiers and by entering military service have surrendered their right not to be killed in war as enemy civilians have not. On the other hand, our soldiers are *ours*; they are citizens of our nation and deserve extra consideration as such. It is hard to determine exactly how these considerations weigh against each other; perhaps they roughly balance each other, so the baseline weights of the two groups are roughly the same. But then the fact that a tactic will actively kill enemy civilians can boost that harm's moral weight, making the civilian deaths count somewhat more. While our military would be permitted to save $n + 1$ of its soldiers rather than save n enemy civilians, it must be saving rather more than $n + 1$ of its soldiers to be justified in killing n civilians.

These initial trade-offs have all involved lives, which are goods of the same general type, but just war theory must also weigh goods of different types. Consider the commonly accepted just cause of resisting aggression. An aggressor may, if successful, kill or imprison citizens of the victim nation; if so, preventing those wrongs is one justification for military

self-defence. But sometimes the aggressor has no such aim. If not resisted, it will merely absorb the victim nation's territory and replace its government, with no further rights violations to follow. In this case all that is threatened is the political self-determination of the nation's citizens. How much harm is permitted to protect that?

Some philosophers argue that none is, and that war against merely political aggression is always disproportionate and wrong: though political rights are important, they are not nearly as important as the right to life and may not be protected by taking life.[10] This is a radical argument, which would make many widely accepted wars wrong. But there are several responses to it. First, by threatening to kill the victim nation's citizens if they resist, the aggressor brings their right to life into play and so increases the level of force they may use in self-defence. Second, a defensive war will kill mostly soldiers, and if they freely entered military service, that fact greatly reduces the weight their deaths have in a proportionality assessment. Third, even if the war will kill some of the aggressor's civilians, it will presumably do so without intent, and that again reduces those deaths' weights. And even if one person's right of political self-determination does not count much against a death, aggression threatens millions of people's self-determination, and their rights added together may justify substantially more resistance. Finally, aggression threatens not just a political right, but the right to remain secure in a cultural and political home, one to which citizens normally feel deeply attached. In the morality of self-defence an attack inside one's home has special moral status, raising the level of defensive force one may use, and international aggression too invades a home.

These responses show, I think, that war against merely political aggression can be morally permitted, but they do not give a precise algorithm for determining when that is so. More generally, proportionality and necessity judgements can never be made with complete precision. There are, first, daunting empirical demands on these judgements. To know in advance whether a proposed war or tactic will be proportional or necessary, we need to know what consequences it will have, which before the fact we can only estimate roughly. Even after the fact, when its consequences are known, we have to compare them with various hypothetical scenarios: with the baseline situation of acting as we could otherwise permissibly have done, for the proportionality conditions, and with the results of relevant alternatives, for the necessity conditions. As merely hypothetical,

[10] Richard Norman, *Ethics, Killing and War* (Cambridge: Cambridge University Press, 1995), chap. 4; David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002), chap. 6.

these scenarios can again only be roughly estimated. And beyond these empirical challenges is the moral challenge of comparing different types of value. To reach a decisive conclusion about proportionality or necessity we must know how to weigh our soldiers' lives against those of enemy civilians, political self-determination against the lives of soldiers, economic costs against deterrence, and much more. These weightings are very difficult, and different people may make them differently, leading to different moral assessments of particular wars or actions even given an agreed-on set of facts.

That said, proportionality and necessity are not always impossible to judge; sometimes there are clear cases. For example, most believe that, despite the massive destruction that resulted, the Allies were right to fight World War II against an enemy such as Nazi Germany. It would likewise have been undeniably proportionate if a military intervention had prevented the Rwandan genocide of 1994. On the other side, the benefits of the Iraq War – ending Saddam Hussein's dictatorship and removing the threat of his acquiring weapons of mass destruction – seem too meagre to justify the large-scale havoc it has caused, so that war was on balance disproportionate. Nor, at least regarding the weapons issue, was it a last resort, since that benefit could have been achieved by UN inspectors. On the *in bello* side, it is hard to see the bombing inside Iraq at the start of the Gulf War as proportionate: the harm it caused Iraqi civilians seems much greater than its benefits to the coalition forces. And some of Israel's tactics against terrorism, such as bulldozing entire streets in Palestinian towns and bombing as far into Lebanon as Beirut, seem to cause excessive harm.

Moreover, even when there are disputes about proportionality and necessity, we can identify their underlying grounds. They do not involve just conflicts among underivative moral judgements, but reflect deeper disagreements about such issues as the moral status of enemy conscripts and the significance of others' wrongful agency. They are principled disagreements, with a more abstract philosophical basis. This may not make them easier to resolve; the underlying principles may be just as contentious. But it does illuminate them, showing where the disputants most fundamentally differ and what would be needed to draw them together.

V. Conclusion

As it must to be credible, just war theory evaluates wars and acts in war partly in light of their consequences. It does not do so, however, in a consequentialist fashion. It does not include all consequences in its assessments,

holding that some types of harm and especially benefit are irrelevant as types, so they cannot count morally for or against a war or military tactic. Nor does it include consequences regardless of how they came about. It may deem certain benefits relevant if they result in one way from a war but not if they result in another, and may discount harms if their causal history includes certain choices, for example by soldiers to enter military service or by an enemy to draw civilians into the line of fire. Nor, finally, does it weigh benefits and harms equally. If certain harms will result from what we actively do, then even if we do not intend them, they count more heavily against our act than if we merely allowed them to happen. The resulting morality of war is sometimes more restrictive than consequentialism, for example, when acts that will save our soldiers will kill enemy civilians. And it is sometimes more permissive, as when the same acts will kill only enemy soldiers. But it takes a distinctively deontological approach to assessing the consequences of war, as befits its overall character as a version of deontology.

8

Collateral Damage

David Lefkowitz

The phrase "collateral damage" refers to harm done to persons, animals, or things that agents are not morally permitted to target in the conduct of war, as a side effect of attacks on persons, animals, or things that agents are morally permitted to target in the conduct of war. Call the first category – that is, those persons, animals, or things that agents are not morally permitted to target – illegitimate targets of war, and the second category legitimate targets of war. Collateral damage, then, refers to harm done to illegitimate targets of war as a side effect of attacks on legitimate targets of war. As this characterization indicates, a complete response to the question of when, if ever, acts of war that cause collateral damage are morally justifiable must address harm done to private and public property, domestic and wild animals, and the environment. In this essay, however, I will focus solely on harm done to persons who are illegitimate targets of war, as a side effect of attacks on legitimate targets. My reason for doing so is twofold. First, most historical and contemporary discussion focuses on the rightness or wrongness of this particular kind of collateral damage.[1] Second, rightly or wrongly, most people appear to be more concerned with harm done to persons than they are with harm done to animals, the environment, or inanimate objects.[2]

Philosophers disagree over what makes a person a legitimate target of war. Some argue that only those who directly pose an (unjust) threat of harm may be targeted, while others argue that it is merely his or her

[1] For discussion of collateral damage to private property, see Colm McKeogh, *Innocent Civilians: The Morality of Killing in War* (New York: Palgrave, 2002); Whitley Kaufman, "What Is the Scope of Civilian Immunity in Wartime?" *Journal of Military Ethics* 2 (2003): 186–94.

[2] I am grateful to Emily Crookston, Heather Gert, Larry May, Terry McConnell, and Michael Zimmerman for their helpful comments on a previous draft of this chapter.

being morally responsible for an unjust threat of harm that justifies targeting a person, even if that person does not pose the threat.[2] On either view, the category of legitimate targets of war significantly overlaps the category of combatants, while the category of illegitimate targets of war significantly overlaps the category of noncombatants. Therefore, I will sometimes characterize collateral damage as harm done to noncombatants as a side effect of an attack on combatants (or a military target), a description commonly employed in public discussion. Nevertheless, it is important to remember that the categories of legitimate target of war and combatant and the categories of illegitimate target of war and noncombatant do not overlap completely.

We need not resolve the debate over what makes a person morally liable to attack in war in order to make significant progress in establishing the moral status of wartime acts that cause collateral damage. What such a discussion does seem to require, though, is that there be some categorical distinction between legitimate and illegitimate targets of war, since such a distinction appears to be essential to the very concept of collateral damage. As will become clear later, certain types of alleged justification for acts of war that harm noncombatants may find it difficult to justify treating this distinction as fundamental.

One last preliminary point remains before we turn to a moral assessment of collateral damage. Some theorists argue that combatants may justifiably kill only if they fight for a just cause, while others argue that combatants may justifiably kill even if the state they serve is morally unjustified in going to war. To avoid this debate, I will assume throughout that those combatants inflicting collateral damage are members of a state that acts permissibly in going to war.

The discussion of what, if anything, morally justifies collateral damage–causing acts of war proceeds as follows. In Section I, I criticize the most common argumentative strategy employed to defend such acts, namely, appeal to the doctrine of double effect. In Section II, I suggest that one prominent nonconsequentialist approach to moral theorizing, namely, social contract theory broadly construed, will also find it exceedingly difficult to demonstrate that collateral damage–causing acts of war are permissible. Finally, in Section III, I consider consequentialist justifications

[2] Michael Walzer, *Just and Unjust Wars*, 3rd Edition (New York: Basic Books, 2000); Robert Fullinwider, "War and Innocence," in *International Ethics*, ed. Beitz et al. (Princeton, NJ: Princeton University Press, 1985); Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004): 693–733; Richard Norman, *Ethics, Killing, and War* (Cambridge: Cambridge University Press, 1995).

for collateral damage. I argue that while such justifications may be more plausible than some writers in the just war tradition have thought, there are still some reasons to find them unsatisfactory. Thus this chapter points to a skeptical conclusion with respect to the moral justifiability of wartime acts that inflict collateral damage: given the elusiveness of a compelling moral justification for collateral damage, and its practically inevitable occurrence in modern armed conflicts, it appears impossible to wage war without acting immorally.

I. The Doctrine of Double Effect and Collateral Damage

Many contributors to the just war tradition attempt to justify military operations that produce collateral damage by appealing to the doctrine of double effect (henceforth the DDE).[3] Applied specifically to acts of war, the DDE holds that harm done to noncombatants is morally permissible if and only if:

1. The combatant intends to attack a legitimate target of war, and to do so in a manner that conforms to the moral constraints on such acts.
2. The combatant does not intend to cause harm to noncombatants as a means to achieving his intended goal. Rather, the combatant merely foresees that his attack on a legitimate target of war will cause harm to illegitimate targets of war as a side effect.
3. There is a sufficient reason to warrant the combatants' acting in a way that can be reasonably expected to cause harm to noncombatants (or illegitimate targets of war, more broadly).

Conditions 1 and 2 reflect the distinction between legitimate and illegitimate targets of war central to the concept of collateral damage: combatants may not aim to harm noncombatants either as an end (condition 1) or as a means to an end (condition 2). A side effect of an outcome the combatant intends to bring about, however, is by definition one at which he or she does not aim: the combatant may foresee that his

[3] Walzer, *Just and Unjust Wars*, pp. 151–59; Elizabeth Anscombe, "War and Murder," in *Nuclear Weapons and Christian Conscience*, ed. Walter Stein (London: Merlin, 1960); Paul Ramsey, *The Just War: Force and Political Responsibility* (New York: Charles Scribner's Sons, 1968). International law, specifically the Geneva Conventions as understood in the 1977 Protocols, also appears to reflect the DDE; see 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, at http: icrc.org/ihl.nsf/WebCONVFULL?OpenView.

action will result in harm to noncombatants, but he does not intend it. Such a combatant respects the distinction between those things he may and may not target while waging war.

That the combatant does not intend to cause harm to noncombatants does not suffice to justify his conduct, however. As condition 3 indicates, only certain considerations justify causing even unintended harm to noncombatants. Most discussants of the DDE label this requirement the proportionality condition and describe it as requiring that the harm suffered by noncombatants as a result of a given act of war be proportional to the good achieved as a result of the same act.[4] This formulation of the third condition of the DDE can be misleading, however, insofar as it suggests that the condition ought to be understood in consequentialist terms. That is, it appears to imply that a collateral damage–causing act of war is morally justifiable only if that act's good consequences (e.g., the prevention of harm to other noncombatants) outweigh its bad consequences (e.g., the harm done to noncombatants killed in the attack). Yet such consequentialist reasoning seems antithetical to the apparently nonconsequentialist distinction between legitimate and illegitimate targets of war essential to the concept of collateral damage, a point I discuss in greater detail later in this chapter.[5] We do better, I suggest, to use the deliberately vague phrase "sufficient reason" when formulating this condition for the justifiability of acts under the DDE, since it leaves open the question of what counts as a sufficient reason for causing harm to noncombatants, as well as the question of what sort of moral reasoning ought to be used to justify treating a particular consideration as a sufficient reason. The question of how to interpret the third condition of the DDE, which for convenience sake I will continue to refer to as the proportionality condition, is taken up at greater length later. For now, the crucial point to note is that according to the DDE, the fact that the combatant does not intend to harm noncombatants is not enough to show that his conduct is morally permissible.

The attraction of the DDE to many just war theorists lies in the fact that it appears to reconcile a nonconsequentialist approach to the morality of

[4] Walzer, *Just and Unjust Wars*, p. 153; Henry Shue, "War," in *The Oxford Handbook of Practical Ethics* (Oxford: Oxford University Press, 2003): 745–47; Robert L. Holmes, *On War and Morality* (Princeton, NJ: Princeton University Press, 1989): 194.

[5] In anticipation of that discussion, consider the following question: if an act of war that harms people is morally justifiable as long as it is reasonable to expect that it will produce more good than bad, then why should it matter whether those harmed by the act are combatants or noncombatants?

warfare with the fact that modern war almost inevitably results in collateral damage. An essential element of a nonconsequentialist moral theory is the claim that in some cases it is not permissible to bring about the best consequences. People are entitled to be treated (or not treated) in certain ways, and no amount of good consequences, however understood, justifies the failure to treat them in the ways to which they are entitled. The right not to be unjustly killed or injured by others is among the most important and widely recognized of these entitlements, and the infliction of collateral damage in war appears to violate this right. The DDE, and in particular the alleged moral significance of the distinction between what a combatant intends and what he or she merely foresees, explains how combatants can engage in collateral damage–causing activities without violating others' rights. Though agents are never morally permitted intentionally to kill someone who has done nothing to forfeit his right not to be killed, morality does permit them to perform an act they merely foresee will result in the death of such a person, as long as it meets the proportionality condition.

The DDE purports to justify a collateral damage–causing act of war if and only if the harm inflicted on noncombatants is unintended and proportional to the good achieved by that act. But what reason do we have to think that collateral damage–causing acts of war are morally permissible if, but only if, they meet these conditions? To respond to this question, its defenders typically attempt to demonstrate that the DDE's prescriptions – that is, what it instructs moral agents to do – match most people's intuitive judgments regarding the rightness or wrongness of particular acts. Of special relevance here is the claim that the DDE accounts for the moral distinction many people intuitively draw between terror bombing and tactical bombing. Suppose that both bombers carry out attacks that have the same probability of causing the same number of noncombatant deaths. What distinguishes them, it is said, is that the terror bomber intentionally targets noncombatants in order to weaken her enemy's morale, while the tactical bomber merely foresees that his attack on a legitimate target of war will also cause collateral damage. Since the terror bomber intends the deaths of noncombatants, her act is morally impermissible. In contrast, because the tactical bomber merely foresees, but does not aim at, the deaths of noncombatants, his act is morally permissible (assuming that it meets the proportionality condition).

As Jonathan Bennett points out, however, the terror bomber need not intend the deaths of the noncombatants, but only the appearance of their deaths, since this will suffice as a means to her end of weakening

her enemy's morale.[6] That these noncombatants appear dead is what she aims at; that they will in fact die as a result of her action is a foreseen, but unintended, consequence of making them appear dead. Thus neither the terror bomber nor the tactical bomber *intends to harm* the noncombatants her or his actions affect, though both foresee that their actions will result in such harm. It appears, therefore, that the DDE does not distinguish morally between terror and tactical bombings; insofar as it provides a justification for the latter, it also provides a justification for the former.

The reader might object that the terror bomber must intend to kill the noncombatants she does, because their deaths are a necessary part of her plan to weaken enemy morale. There is no way for her to make these noncombatants appear dead except by doing something to them that will in fact cause them to die. In contrast, it might be suggested, the noncombatant deaths caused by the tactical bomber are not a necessary part of his plan to destroy the legitimate target of war. He can still achieve his goal even if, miraculously, his act results in no collateral damage. Yet the same is true of the terror bomber; if by some miracle she achieves her goal without killing any noncombatants, then this is fine with her. It might be objected that no miracle will happen, that the terror bomber knows with near certainty that she will achieve her objective only if she kills noncombatants, and that therefore she must intend their deaths. But similarly, no miracle will happen in the tactical bomber's case. He, too, knows with near certainty that achieving his objective will result in noncombatant deaths. Therefore, insofar as we are willing to say that the tactical bomber need not intend the noncombatant deaths his act will cause, so too we ought to say that the terror bomber need not intend the noncombatant deaths her act will cause.

Insofar as many contributors to the just war tradition rely on the DDE to distinguish terrorism from morally permissible forms of warfare, the foregoing argument already provides a significant challenge for theorists of just war. But, in fact, Bennett's argument threatens to undermine the practical relevance of the DDE entirely, insofar as it seems possible to describe any act in such a way that the bad consequences it produces are merely foreseen, but not intended. In principle, the DDE would still distinguish between morally permissible and impermissible acts. In practice,

[6] Jonathan Bennett, "Morality and Consequences," in *The Tanner Lectures on Human Values II*, ed. Sterling M. McMurrin (Salt Lake City: University of Utah Press, 1981): 110–11. See also Judith Lichtenberg, "War, Innocence, and the Doctrine of Double Effect," *Philosophical Studies* 74 (1994): 347–68.

however, agents would merely need to make sure that they never intended the bad consequences of their acts, and as long as they did so, they would not run afoul of the DDE.

Recognition of this fact may well lead to a deeper concern with the DDE, namely, the implication that an agent's intention can determine the rightness or wrongness of her act. As Judith Jarvis Thomson observes, even if an agent's intention is relevant to the question of whether she ought to be praised, blamed, rewarded, or punished for her act, it seems odd to claim that an agent's intention can determine an act's permissibility or impermissibility.[7] Imagine a case in which a bomber pilot can carry out an attack on a military target that will collaterally kill 10 noncombatants, but that will swiftly bring to an end a long and bloody war. Suppose further, however, that while the bomber pilot knows his attack will have this consequence, he does not aim at it. Rather, he has a long-standing childish feud with one of the noncombatants and so carries out the attack with the sole intention of killing that person. Though the bomber's poor character may repel us, surely we do not think it makes his act, one that ends a long and bloody war, impermissible. Yet the DDE appears to have precisely this implication.[8]

Thus far we have identified two challenges to the use of the DDE to justify certain collateral damage–causing acts of war. First, it is not clear that we can characterize the idea of what an agent intends and the idea of what an agent merely foresees so that the DDE justifies all and only those acts of war we intuitively judge to be permissible. Second, it seems odd to think that an act that would otherwise be wrong can be made right simply because of what an agent intends to achieve by it, and vice versa. The philosopher Warren Quinn offers a response to each of these challenges.

Quinn suggests that a person can be properly described as intending harm to others when the harm comes to the victims "at least in part from the agent's deliberately involving them in something in order to further his purpose precisely by way of their being so involved."[9] In contrast, an

[7] Judith Jarvis Thomson, "Self Defense," *Philosophy and Public Affairs* 20, no. 4 (1991): 283–310; Thomson, "Physician Assisted Suicide: Two Moral Arguments," *Ethics* 109 (1999): 497–518.

[8] In addition to Thomson's discussion of this objection to the DDE, see also T. M. Scanlon, "Intention and Permissibility I," *Aristotelian Society* Supplementary Volume 74 (2000): 304–5; F. M. Kamm, "Failures of Just War Theory: Terror, Harm, and Justice," *Ethics* 114 (2004): 666–69.

[9] Warren S. Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," reprinted in *Ethics: Problems and Principles*, ed. John Martin Fischer and Mark Ravizza (Orlando, FL: Harcourt Brace Jovanovich, 1992): 184.

agent merely foresees that his act will result in harm to others if he does not involve them in something for this reason, or his involving them in something for this reason does not contribute to the harm they suffer. Using Quinn's characterization of intending harm, it is possible to distinguish terror bombing from tactical bombing. The terror bomber involves those noncombatants she kills in the bombing precisely because doing so will further her goal of lowering enemy morale. This is so whether she aims to kill them or aims only to make them appear dead. Thus she can be properly characterized as intending the deaths of the noncombatants she kills. On the other hand, the tactical bomber does not involve those noncombatants he kills because doing so will further his goal; since this is not his reason for involving them, he can be properly characterized as merely foreseeing their deaths. Assuming the proportionality condition is met, the tactical bomber acts justifiably according to the DDE, while the terror bomber does not.

Suppose, for the sake of argument, that Quinn provides a satisfactory account of the difference between intending harm to others and merely foreseeing that one's act will cause harm to others as a side effect. It remains necessary to explain why this distinction makes a difference to the moral permissibility of an agent's act. Holding all else equal, why does the fact that an agent involves others in something precisely in order to further his purpose by doing so render that act morally wrong? Why is it that were this not the reason why the agent involved those others, his act would be morally permissible? Quinn responds to these questions as follows. The terror bomber sees the noncombatants as "material to be strategically shaped or framed by his agency," an opportunity to be exploited in the pursuit of victory in the war.[10] The tactical bomber, on the other hand, does not have this attitude toward the noncombatants he kills; he does not view them "as if they were then and there for his purposes."[11] Quinn claims that taking this attitude to noncombatants – seeing them (and their deaths) as merely then and there for his purposes – constitutes a wrong done to them distinct from any other harm they suffer.[12] He concludes, therefore, that there is a greater moral presumption against

[10] Ibid., 187.

[11] Ibid.

[12] Quinn writes, "This aspect of direct agency [people being involved in something at the cost of something protected by their independent moral rights (such as their life, their bodily integrity, or their freedom)] adds its own negative moral force – a force over and above that provided by the fact of harming or failing to prevent harm" (Quinn, "Actions," 187).

actions like that of the terror bomber than actions like that of the tactical bomber.

But why does adopting a certain attitude toward noncombatants count as a wrong done to them distinct from, and in addition to, any wrong they suffer in virtue of their treatment at the hands of the terror bomber?[13] Unless some sense can be made of the claim that merely by thinking of the noncombatants as "then and there for his purposes," the terror bomber wrongs them, Thomson's point about the evaluative significance of an agent's intention (or attitude) applies. Because the terror bomber views noncombatants as mere strategic opportunities to be exploited, we may judge him to be a worse person than the tactical bomber. Yet on the assumption that both bombers inflict the same harm, in the same way, on the same number of noncombatants, nothing appears to distinguish the actions themselves. In both cases, the noncombatants enjoy a right not to be killed unjustly. Unless they have done something to forfeit that right, or they have voluntarily waived it, their deaths at the hands of a combatant who can (or should) reasonably foresee that his action will have this consequence violates those noncombatants' rights. Indeed, Quinn may recognize this, for he does not use the DDE to show that tactical bombing is permissible, while terror bombing is not, but rather to show that the latter is morally worse than the former. It appears, therefore, that even if we accept Quinn's claim that in adopting the attitude he does, the terror bomber commits a distinct wrong to the noncombatants he involves in his action, we are still no closer to a justification for collateral damage–causing acts of war.

Quinn does characterize people's rights as prima facie, meaning that in some cases they may be overridden or defeated by other (moral) considerations. The proportionality condition of the DDE might then be understood to state when this happens: that is, what sorts of moral reasons defeat the right in question. Perhaps, then, when Quinn states that the terror bombers' attitude makes his action morally worse than the tactical bomber's, he means to claim that the terror bomber must have a weightier or stronger reason to justify his action than is required of the tactical bomber. Such a view has much in common with one interpretation

[13] It may be that the attitude of a person who causes harm to another can affect the amount of harm caused; for instance, the same physical harm done from hatred may inflict a greater psychological harm than if it were done recklessly. But Quinn does not appear to have this sort of thing in mind in his discussion of the moral relevance of an agent's attitude toward the person he harms.

of Aquinas's understanding of the DDE.[14] An agent's intention in carrying out a normally prohibited act does not figure in the justification of that act. Rather, an agent's intention serves as a condition on that act's permissibility. In other words, the agent's intention is not what makes the act right (permissible); the presence of some other factor, call it X, does so. The agent's intention can make the act wrong (impermissible), however, even if X is present. For example, though killing people is normally wrong, Aquinas believes it to be justifiable in self-defense. The justifiability of such a killing does not require that the agent merely foresee, but not intend, the death of her unjust assailant. It does require, however, that in killing her unjust assailant, the agent intend only to protect her life; if she acts with the intention of trying out her new gun, then her act is not permissible. For Aquinas, a bad intention absolutely prohibits certain otherwise justifiable acts, while on the preceding interpretation of Quinn's claim, it merely makes such acts harder (but perhaps not impossible) to justify. In both cases, though, the agent's intention does not justify the action, but instead serves as a condition on its permissibility.

The same consideration that makes many people doubt that an agent's intention can affect the justifiability of an act also serves to undermine the claim that an agent's intention provides a condition on an otherwise permissible act. If an agent kills an unjust assailant because she wants to try out her new gun, most will think her character suspect, but many will also think her act justifiable. (Of course, knowledge of her intention may lead us to examine more carefully her claim that she was under unjust assault.) Perhaps a virtue ethicist such as Aquinas would argue that having the right intention is an essential ingredient of doing the right action (as the notion of a sin seems to combine both acting wrongly and having a bad intention). But it is not clear that virtue ethicists must make such a claim: they might define a right action as one that a virtuous person would do, without requiring that a person have the mental state necessary to count as virtuous. In any case, given our task of examining the conditions under which collateral damage–causing acts of war are morally justifiable, whether an agent's intention serves as a condition on the permissibility of an act is a less pressing issue than determining the grounds of the justification itself. Thus far, however, we have yet to do so.[15]

[14] See Alison McInytre, "Doing Away with Double Effect," *Ethics* 111 (2001): 247–50.

[15] I regret that space does not permit me to discuss F. M. Kamm's multiple objections to the use of the DDE to justify collateral damage, or the various rationales she offers to defend causing (intended or unintended) harm to noncombatants in certain sorts of cases. Those interested in exploring these issues in greater detail are strongly encouraged to

II. Social Contract Arguments and Collateral Damage

The arguments set out in the previous section suggest that the proportionality condition of the DDE does all of the justificatory work, for it is this condition that establishes (or, perhaps better, reflects) the extent to which people are morally required to limit their conduct so as to avoid causing harm to others.[16] The crucial issue, then, does not concern the combatant's state of mind when he carries out a particular collateral damage–causing act, but rather whether in doing that act he exceeds the bounds of what he is morally at liberty to do (or, to use a more contentious phrase, whether he violates the rights of those he collaterally kills).

I suggested in the previous section that the proportionality condition is best formulated as requiring that a combatant have a sufficient reason to warrant doing an act that can be reasonably expected to cause harm to noncombatants. What sorts of considerations can provide such a reason? The usual formulation of the proportionality condition suggests a consequentialist response to this question: the fact that a given act of war inflicts harm on noncombatants proportional to the good achieved as a result of that same act provides a reason sufficient to justify it. Upon closer inspection, though, most of those who employ this formulation of the proportionality condition do not adhere very closely to consequentialism.[17] For example, they tend to assume that the good achieved by an act of war must be *significantly* greater than the evil that same act causes in order for the act to be justifiable. Likewise, only certain sorts of goods or evils ought to figure in the calculation: the economic benefits of a particular act of war that harms noncombatants do not count toward that act's justifiability (except insofar as they contribute to a swifter victory in the war). A purely consequentialist approach would not accept these sorts of constraints on the justifiability of acts of war.[18] The fact that many

read Kamm, "Failures of Just War Theory," as well as Kamm, "Justifications for Killing Noncombatants in War," *Midwest Studies in Philosophy* XXIV (2000): 219–28.

[16] Because of the DDE's focus on the combatant's state of mind when he carries out an attack, its defenders often emphasize that the proportionality condition requires combatants to exercise reasonable or due care to avoid even unintentionally causing harm to noncombatants. But to exercise due care is simply to (make a good faith effort to) conform to certain standards setting out the extent to which people are morally required to limit their conduct so as to avoid causing harm to others.

[17] Walzer, *Just and Unjust Wars*; A. J. Coates, *The Ethics of War* (Manchester, UK: University of Manchester Press, 1997): 245–46.

[18] For those unclear as to why this is so, see the discussion of consequentialism in the following section.

discussants of proportionality in the context of the DDE do assume them provides one reason to think that the proportionality condition is not merely the ad hoc addition of a consequentialist moral principle to an essentially nonconsequentialist moral theory.

Suppose that these philosophers are right to forgo using consequentialist moral reasoning to determine what counts as a sufficient reason for causing collateral damage. What sort of nonconsequentialist argument might a theorist employ to illuminate the idea of a sufficient reason for causing harm to noncombatants? One possibility, recently discussed by David Rodin, involves an appeal to agents' exercise of autonomous choice.[19] Rodin begins his discussion of collateral damage by first considering what generally justifies acts that impose a risk of harm on people other than the actor. He suggests that two conditions must be met to justify them: first, "the party assuming the risk [must also be] the beneficiary of the risk-producing activity," and second, the risk must be "autonomously assumed either individually or collectively by those who bear [it]."[20] Thus a doctor is morally justified in performing a risky operation on a patient if he gives his free and informed consent to it, but not otherwise. Likewise, rules permitting police cars to speed or ambulances to run red lights are morally justifiable when they are the result of collective decisions that produce benefits for the community as a whole, on the condition that the risk of harm is distributed fairly across all members of the community. Thus, in a community with rules regulating the driving of ambulances that meet these conditions, an innocent bystander killed by an ambulance running a red light will not necessarily be wronged.[21] In sum, the fact that the relevant agents exposed to a certain risk of harm from others' activities also benefit from those activities, and the fact that they have autonomously assumed that risk, entails that these agents have no claim not to suffer the harm they do when the risk is realized. That they have no such claim entails that the person who does the risky activity is morally free to act as he does; for example, the ambulance driver enjoys a moral liberty to run

[19] David Rodin, "Terrorism without Intention," *Ethics* 114 (2004): 752–71.

[20] Ibid., 766–67.

[21] I say not necessarily be wronged because there will likely be specific constraints on ambulances running a red light, and an ambulance driver who does not adhere to those constraints will wrong the person he kills. Note, too, that the community may make it a condition for ambulances running red lights that those harmed as a result be compensated by the ambulance company, the hospital, or the community as a whole. But when justified in this manner, such civil liability is not indicative of a moral wrong, and assuming that the ambulance driver obeyed the specific constraints on running a red light, he should not (and likely will not) be convicted of a crime.

red lights. It is this moral liberty, and the value of autonomous choice from which it is derived, that provides a sufficient reason for doing acts that, in some cases, cause harm to innocent parties (i.e., people who have done nothing that makes them liable to being harmed by this actor in this particular manner).

Rodin's general justification for risky activities suffers from a number of shortcomings.[22] For example, it seems implausible to claim that authoritarian political communities such as China, North Korea, and Zimbabwe *collectively* decide that the benefits of allowing ambulances to run red lights warrant the risk of harm to each member created by such a practice. Yet it also seems implausible to claim that the absence of such a collective decision necessarily renders the risk created by ambulances running red lights in those states morally unjustified. This difficulty with Rodin's argument can be met by shifting from a focus on actual consent to, or assumption of, risk, to some sort of hypothetical consent to, or assumption of, risk. It is because suitably specified agents *would* agree to a rule permitting ambulances to run red lights (at least under certain conditions) that these practices are morally justifiable even in states like China or Zimbabwe, despite the fact that the actual rules governing the driving of ambulances in those states are not the product of a collective decision.

Our concern, however, is not with the risk of harm to innocent parties created by ambulances running red lights, but rather with the risk of harm to noncombatants caused by acts of war. Drawing on his general account of what justifies risky activities, Rodin concludes that with the possible exception of humanitarian intervention, collateral damage–causing acts of war are morally unjustifiable. In most military conflicts, Rodin asserts, "there is no sense in which the party who bears the risk of harm benefits from the risky activity. Neither have they autonomously chosen, either individually or collectively, to bear the risks of the bombardment."[23] The conclusion we ought to draw, then, is that collateral damage–causing acts of war are morally unjustifiable.[24] Noncombatants have a claim not to be exposed to the risk of harm that is a practically unavoidable concomitant of combat. It follows that combatants are not morally at liberty to impose the risk of harm on noncombatants that they do impose

[22] I discuss these in greater detail in Lefkowitz, "Collateral Damage and Dirty Hands," unpublished, on file with author.

[23] Rodin, "Terrorism," 767.

[24] Strictly speaking, Rodin claims only that the standards of due care for waging war are much higher than what is required by existing international humanitarian law. However, I believe that his argument actually entails the stronger conclusion set out in the text.

when they wage war. The absence of such a liberty means that combatants do not have a sufficient reason to justify the harm they cause to noncombatants.

It is not clear whether the move to hypothetical consent sketched here enables us to avoid the conclusion Rodin draws with respect to the moral justifiability of collateral damage. Whether it does so depends on how we ought to conceive of the agents negotiating the hypothetical agreement that establishes what sorts of risky activities are justifiable (in what circumstances, with what conditions, etc.), and perhaps also the circumstances in which they negotiate. Though space does not permit me to pursue that investigation here, it is worth noting some of the ways in which the conception of the agents' negotiating this hypothetical agreement will significantly influence the case for or against the justifiability of collateral damage. For instance, the relative importance the hypothetical negotiators assign to (their own) life and liberty will affect their willingness to assume the risks involved in the conduct of war. If, properly conceived, these agents assign life a far greater value than liberty, then they will place very narrow constraints on, and perhaps even absolutely forbid, acts of war that impose a risk of harm to noncombatants when undertaken in order to attain or protect individual liberty or political sovereignty. Consider, too, the claim made by one prominent defender of the hypothetical consent approach to moral justification (broadly construed) that "the justifiability of a moral principle depends only on various *individuals*' reasons for objecting to that principle and alternatives to it."[25] That is, agents are to appeal only to the impact a particular principle and the alternatives to it will have on their own pursuit of a good life. This individualist restriction may well rule out the argument that often seems to be lurking in the background in many discussions of collateral damage, namely, that collaterally killing some noncombatants is permissible if it is necessary to prevent some greater number of noncombatants from being killed. If true, the individualist restriction entails that no individual member of the larger group can point to the fact that more noncombatants will die if the collateral damage–causing act is forgone, since each may only appeal to his or her own death as a reason to reject a principle that forbids collateral killing. It may be, then, that any hypothetical contract moral theorist committed to the individualist restriction will find it extremely difficult to justify collateral damage–causing acts of war.

[25] T. M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998): 229.

At this point, I think it safe to draw the following conclusions. First, the DDE does not provide a compelling justification for collateral damage. Even apart from any difficulties there may be in specifying the concepts of intended harm and merely foreseen harm (or harm as a side effect), it remains unclear why we should view the agent's intention as relevant to the rightness or wrongness of his act. Moreover, we do not yet have a convincing account of the proportionality condition: that is, of what sorts of considerations provide a sufficient reason to justify acts of war that it is reasonable to expect will cause collateral damage. Contrary to what some of their remarks might suggest, most of those who discuss the proportionality condition do not appear to be employing consequentialist moral reasoning. Yet as we have just seen, one of the most common forms of nonconsequentialist reasoning, namely, appeal to actual or hypothetical agreement, may not yield a justification for collateral damage. Importantly, this is so regardless of whether the agent's intentions matter to the moral justifiability of his acts (i.e., whether the DDE is a true moral principle, or not). Barring further argument, therefore, it appears that nonconsequentialist moral theorists ought to conclude that collateral damage–causing acts of war are morally unjustifiable.

III. Consequentialism and Collateral Damage

On the one hand, it appears that consequentialist moral theories can easily justify collateral damage. Despite the fact that they inflict harm on noncombatants, a particular collateral damage–causing act of war is morally justifiable insofar as it produces a net increase in social utility or welfare, for instance, if that act prevents an even greater amount of harm to (an even greater number of) other noncombatants. On the other hand, given a consequentialist account of the just conduct of war, there is no reason to be concerned specifically with the justification of collateral damage (at least as defined at the outset of this chapter), for if we ought to be concerned only with the overall consequences of an act, and in particular with whether that act produces a net increase in total welfare, then it should make no difference whether those harmed by the act are legitimate or illegitimate targets of war, or whether the harm done to noncombatants is intended or merely a foreseen side effect. Indeed, once we adopt a consequentialist approach, it seems that the very distinction between legitimate and illegitimate targets of war disappears. A consequentialist justification for acts of war appears to entail that no person or category of persons is necessarily such that targeting him (i.e., intending

to do him harm) is morally impermissible. While the consequentialist might still distinguish between the harm a combatant aims to cause and that which he merely foresees he will cause, this distinction will not be viewed as having any moral significance in itself.

While consequentialism clearly can provide a moral justification for collateral damage, some readers may find deeply unsettling the implication that, under the right conditions, combatants may intentionally harm noncombatants. That is, a strong conviction that combatants ought not to target noncombatants, even if doing so will produce better overall consequences, may lead some to reject the use of consequentialist moral reasoning to justify acts of war, including those that cause collateral damage. In response, a sophisticated consequentialist will likely adopt one of the following two strategies. Either she will argue that despite the appearances to the contrary, consequentialism does absolutely forbid targeting noncombatants. Or she will argue that consequentialism forbids targeting noncombatants in all those cases where, intuitively, most people believe it would be wrong to do so, but also argue that in a few cases most people will conclude that it is permissible to harm noncombatants intentionally, and that consequentialism justifies these beliefs. I briefly describe each of these strategies in turn.

The claim that consequentialism cannot justify an absolute prohibition on targeting noncombatants assumes that an act's consequences are what make a particular act right or wrong.[26] Specifically, act-consequentialism identifies an act as wrong if and only if it produces less good overall than would have been produced by some alternative act the agent could have done. However, some consequentialists reject this criterion for the rightness or wrongness of an act. Instead, they argue that while consequences alone provide the justification for moral rules or principles, what makes a particular act wrong is that it violates one or more of these moral rules or principles. This account of right action is called rule-consequentialism.[27] Suppose that, of all the possible rules for regulating acts of war that affect non combatants, the following rule produces the best consequences:

[26] Such a claim also assumes that it is not necessarily true that targeting noncombatants will always produce worse consequences than those that will result from only targeting combatants.

[27] A reader familiar with the details of consequentialism will recognize that the descriptions in the text of both act and rule consequentialism are very rough. For example, no effort is made to distinguish between actual and expected versions of either criterion for right action, or between full and partial compliance versions. I set aside these important details in the interest of providing greater accessibility to a wide audience.

combatants may never carry out acts of war that target noncombatants, but they may carry out acts of war that they foresee will result in harm to noncombatants as a side effect, as long as that harm is proportional to the good achieved by those acts of war. According to rule-C, only those acts that conform to this rule are morally permissible, and what makes them permissible is that they conform to this rule. What makes the rule one to which combatants ought to conform is that no other rule produces better consequences. Thus rule-C reconciles many people's conviction that noncombatants ought never to be a target of war with the consequentialist claim that the rightness or wrongness of an act is ultimately a matter of its consequences. Indeed, if rule-C does in fact justify the rule set out previously, then it provides a consequentialist justification for the DDE.[28]

Whether rule-C provides a convincing justification for some collateral damage–causing acts of war depends ultimately on its plausibility as a general account of right and wrong actions.[29] But even if rule-C ultimately proves to be indefensible, a consequentialist may adopt the second strategy noted previously in order to defend the justifiability of killing in war, including in some cases intentionally or unintentionally killing noncombatants.

She will begin by noting that, in general, act-consequentialism does not justify intentionally causing harm to noncombatants. This is so for a number of reasons. First, at least in the near term, noncombatants typically pose much less threat of future harm than do combatants. Therefore, killing the typical noncombatant will do little to prevent future harm, though it will cause substantial harm in the present. Second, the belief that an opposing state's military is trying to harm their compatriot noncombatants appears to strengthen the commitment to continuing the war on the part of both combatant and noncombatant members of the victim state. During World War II, both the British and the German air forces carried out massive attacks against each other's urban noncombatant populations, allegedly from the belief that it would so demoralize the general population that they would press their governments to sue for peace. In fact, these bombing campaigns may well have had exactly

[28] Note that given a rule consequentialist justification for the DDE, whether an agent intends or merely foresees that he will harm noncombatants has no importance in itself. Rather, what justifies adherence to a rule that prohibits intending harm while allowing merely foreseen harm (that is proportional) is that it produces the best consequences.

[29] For one defense of a rule C approach to the just conduct of war, see R. B. Brandt, "Utilitarianism and the Rules of War," *Philosophy and Public Affairs* (1971/72): 145–65.

the opposite effect. Given the view that what justifies particular acts of war is that they produce less harm than would result from alternative acts open to the agent, and given that in most cases intentionally attacking noncombatants tends to prolong the war, and so increases the harm it produces, the act-C will conclude that deliberate attacks on noncombatants are rarely justifiable.[30] Finally, one party's decision to adopt a policy of intentionally targeting or recklessly endangering noncombatants may lead other parties involved in the war to adopt a similar policy. Such a chain of events will almost certainly result in worse consequences than if the parties to the conflict generally make their behavior conform to a rule like the DDE.

The reader will surely have noticed that all of the preceding claims contain qualifiers like "in general," "typically," and "usually." The act-C may endorse something like the DDE as a rule of thumb, a useful heuristic device for determining whether a particular act of war is morally permissible. But since what justifies a particular act are its consequences, and not its conformity to a rule such as the DDE, the act-consequentialist must acknowledge that circumstances may arise in which it is permissible, indeed even obligatory, to act contrary to the rule. Thus while the act-consequentialist's analysis of the DDE as a rule of thumb entails significant constraints on the just conduct of war, it will not satisfy those convinced that morality absolutely forbids intentionally killing noncombatants.

The act-consequentialist may challenge this conviction, however, using the following example. Suppose that a general must choose between strategies A and B for capturing a militarily crucial city. Both of these strategies have the same probability of success, but strategy A will involve the death of 10,000 combatants, but no noncombatants, while strategy B will involve the death of 10 noncombatants, and no combatants. Is it really the case that the general must choose strategy A, and so the death of 10,000 people, over strategy B, and the death of only 10 people? Reflection on this case, or something like it, may lead many people to the conclusion that in rare cases, morality permits or even requires intentional attacks against noncombatants. If so, then the conviction that must be accounted for is not "morality never permits intentionally killing

[30] This same reasoning may figure as well in a consequentialist account of why, in general, even merely foreseen harm to noncombatants is permissible only if the good achieved is significantly greater than the harm done. The perception that an opposing state's military forces care nothing for the harm they cause to noncombatants, though they do not intentionally target them, may also deepen the commitment of members of the victim state to prosecuting the war.

noncombatants" but rather "morality rarely permits intentionally killing noncombatants." Act-consequentialism not only accommodates the latter intuition, it also provides a rationale for it.

Yet awareness of the fact that under certain conditions act-consequentialism permits the targeting of noncombatants may lead combatants to do so even when these conditions are not met. Indeed, given the uncertainties endemic to warfare, and the likely biases of those engaged in them, combatants will almost certainly err when making such judgments. It may be, then, that act-consequentialism will require combatants to adhere strictly to a rule like the DDE, since by doing so they are more likely to act as morality requires – understood here in terms of producing the best overall consequences – than if they try to determine in each particular case whether targeting noncombatants is morally permissible.[31] Thus both act-consequentialism and rule-consequentialism may entail that when deliberating, combatants ought to abide by a rule like the DDE.[32]

Though the preceding discussion suggests various ways in which a consequentialist might justify collateral damage–causing acts of war, several concerns with such an argumentative strategy remain. First, I have simply assumed that consequentialism will justify a rule like the DDE, or at least a rule that corresponds to most people's intuitions regarding which acts of war are, or are not, morally justifiable. Yet this assumption may well be false; consequentialism may condone far more killing of noncombatants, intentionally or unintentionally, than I have suggested here. Second, though the act-consequentialist may concede that instrumental-epistemic considerations entail that combatants ought to adhere strictly to a rule like the DDE, she will regret this fact. That is, she will lament the fact that in some cases, though we know not which ones, combatants

[31] Note that this argument justifies adherence to the DDE even in those cases where the combatant would have produced better consequences in that particular instance had he acted contrary to the rule.

[32] Act consequentialists may not be the only ones who will defend adherence to the DDE on instrumental/epistemic grounds, even though they think that such a rule sometimes fails to reflect what morality truly requires. For example, a nonconsequentialist might argue that only those who bear (a certain degree of) moral responsibility for an unjust war may be targeted. This may well entail that, in many wars, it is not morally permissible to kill certain combatants, while it is permissible to kill certain noncombatants. However, this nonconsequentialist may also argue that in light of various facts about human nature and the circumstances of war, combatants will best approximate what morality truly requires if they adhere to the DDE, rather than seeking to determine in each case the legitimacy or illegitimacy of a potential target.

did not intentionally target noncombatants. Some of those convinced that targeting noncombatants is never morally permissible will find such an attitude troubling, and so find an act-consequentialist justification for the absolute prohibition on intending harm to noncombatants unsatisfactory. The act-consequentialist's regret points to a third concern with consequentialist accounts of just conduct in war, namely, that they do not take the separateness of persons seriously. Many philosophers argue that there are certain things you cannot do to a person, even if it will produce a substantial increase in overall welfare. Given its commitment to social or total welfare as the ultimate criterion for right action, consequentialism cannot provide a principled justification for this claim. Thus, even if consequentialism can provide a contingent justification for never targeting noncombatants, it cannot justify this absolute prohibition on the grounds that noncombatants have a fundamental claim not to be used for the benefit of others (at least without their consent).

IV. Pacifism in Practice?

More might be said in defense of each of the alleged moral justifications for collateral damage that I have discussed. Suppose, however, that even upon further consideration no defense proves to be satisfactory. If so, then it appears that in practice the moral person ought to become a pacifist, for it will be nearly impossible for him or her to wage war without acting immorally. Two responses to this conclusion are worth considering, though I cannot discuss them in detail here. First, one might claim that it is absurd to think that the use of armed force to resist genocide is morally justifiable only as long as it inflicts no collateral damage. We have more confidence in this judgment than in the theoretical argument against the permissibility of collateral damage–causing acts of war. Therefore, though at present we may lack a justification for collateral damage, we ought not to conclude that morality requires us to be pacifists. Second, even if all collateral damage–causing acts are wrong, might it still be a good thing (in some sense) that some of them are done? Making sense of this idea – namely, that collateral damage can be an instance of dirty hands – may prove impossible, but it seems worthy of further exploration.

9

Weapons of Mass Destruction

Are They Morally Special?

Steven P. Lee

Weapons of mass destruction (WMD), traditionally understood to consist of nuclear, biological, and chemical weapons, have been singled out for special moral and legal opprobrium. Their status under international law is distinct from that of other weapons, that is, conventional weapons. Under international treaty, the possession of chemical and biological weapons is prohibited.[1] Nuclear weapons have a somewhat different legal status, in that their possession is not outlawed, at least for the major nuclear powers, but there are important legal restrictions on their use. On the assumption, however, that ethics should inform law, I want to consider WMD from a moral rather than a legal perspective. Is the moral opprobrium with which WMD are regarded justified? Are these weapons morally special, and, if so, in what way?

I. Destructiveness

A good place to begin is with a different question. Is the traditional concept of WMD as consisting of nuclear, biological, and chemical weapons adequate? Is it appropriate to conflate nuclear, biological, and chemical weapons into a single category? Is the use of this single expression to represent all three kinds of weapons coherent and useful; does it make sense? If we can determine that they should be grouped together, and this grouping is due to a distinctive morally relevant property that they share, then we may have an answer to the question whether and how WMD are morally special. Many have raised questions about the propriety of this

[1] For a discussion of these and other matters concerning the legal status of WMD, see Paul Szasz, "The International Law Concerning Weapons of Mass Destruction," in Sohail Hashmi and Steven Lee, eds., *Ethics and Weapons of Mass Destruction* (Cambridge: Cambridge University Press, 2004), pp. 43–70, esp. pp. 51–65.

grouping. Some argue that "WMD" should be "deconflated."[2] The simplest way to state the case for deconflation is to point out that the term "mass destruction" does not apply to all three kinds of weapons, at least, not to anything like the same degree. To understand the case for this claim, consider briefly the nature of the three kinds of weapons.

Nuclear weapons are weapons of *mass destruction* par excellence. Harnessing the tremendous energies that bind the nuclei of atoms, nuclear blasts are measured in the thousands or millions of tons of TNT equivalent. The bombs dropped on Hiroshima and Nagasaki were more than a thousand times more powerful than the largest conventional bomb then available, and the thermonuclear or hydrogen bombs tested several years later were a thousand times again more powerful, raising destructive power by a factor of 1 million. A single nuclear bomb can destroy a city, through blast and fire. In addition, it can create airborne radiation that can do harm at a considerable distance in space and time from the site of the explosion.

In contrast, chemical weapons are much less lethal. Chemical weapons are poisons that cause harm through direct contact. Compared with conventional explosives, they are less lethal, pound for pound, and are more difficult to use.[3] During World War I, only 2 to 3 percent of the military personnel subject to poison gas attacks died, while those wounded by conventional weapons were 10 to 12 times more likely to die, and it took more than a ton of gas, on average, to kill a single soldier.[4] Of course, modern chemical weapons, including nerve agents such as sarin, are more deadly. For example, the U.S. Government Office of Technology Assessment predicted that a ton of sarin delivered perfectly under ideal conditions over a densely inhabited and unprepared area might produce three thousand to eight thousand deaths. But if the conditions were less than ideal (for example, if the sun were shining or there were a light breeze) the death rate would be reduced by 90 percent.[5] Chemical weapons are not only much less destructive than nuclear weapons, but perhaps even less destructive than equivalent measures of conventional explosives.

[2] This expression is due to George Perkovich, "Deconflating 'WMD,'" a 2004 paper by the Weapons of Mass Destruction Commission, available at www.wmdcommission.org, accessed January 16, 2007.

[3] Gregg Easterbrook, "Term Limits," *The New Republic* 227, no. 1 (October 7, 2002), pp. 22–25, at p. 22.

[4] John Mueller and Karl Mueller, "Sanctions of Mass Destruction," *Foreign Affairs* 78, no. 3 (May–June 1999), pp. 43–53, at p. 47.

[5] Cited in Mueller and Mueller, "Sanctions," pp. 46–47.

Biological weapons are living microorganisms, such as anthrax, deployed to cause harm to humans through reproducing in their bodies. They are much more lethal than chemical weapons. For example, pound for pound, anthrax is capable of producing lethal concentrations over an area one thousand times larger than sarin can produce.[6] The Office of Technology Assessment asserts that an attack with less than 100 kilograms of aerosolized anthrax spores could result in 3 million casualties, "rivaling the lethality of a thermonuclear weapon."[7] The potential destructiveness of biological weapons is suggested by the fact that the influenza pandemic of 1918, the sort of event that biological weapons in the future might cause, killed an estimated 20 million people.[8] Indeed, it could not be ruled out that a biological agent unleashed as a weapon could (presumably unintentionally) kill the entire human population, making biological weapons potentially more destructive than nuclear weapons. Because biological agents are alive, they may adapt and mutate into more virulent forms.[9]

At the same time, there remains a major gap between theory and practice in the case of biological weapons. In practice, these weapons are hard to manufacture and hard to use, "for many of the same reasons that medicines are hard to make and don't work unless administered precisely."[10] It may be fairly easy to culture at least some biological agents, such as anthrax, but turning the agents into a usable and effective weapon is another matter. Weaponizing a biological agent requires designing a munition that can effectively release the agent without destroying it, and this is especially difficult.[11] In addition, the weapon must create an aerosol of particles of just the right size to be breathed deeply into the lungs and that, under various environmental conditions, can remain suspended in the atmosphere for a sufficient length of time. All of this creates great uncertainty about how effective a biological weapon would be in actual use.

In judging the destructiveness of a weapon, practical difficulties such as the uncertainties of its effects must be taken into account in the

[6] Susan Martin, "Weapons of Mass Destruction: A Brief Overview," in Hashmi and Lee, eds., *Ethics and WMD*, pp. 16–42, at p. 32.

[7] OTA report cited in Gregory Koblentz, "Pathogens as Weapons," *International Security* 28, no. 3 (winter 2003–2004), p. 88, from which the quotation is taken.

[8] John Steinbruner, "Biological Weapons: A Plague upon All Houses," *Foreign Policy* 109 (Winter 1997–1998), pp. 85–96, p. 85.

[9] Steinbruner, "Biological Weapons," pp. 87–88.

[10] Easterbrook, "Term Limits," p. 24.

[11] Martin, "Weapons of Mass Destruction," p. 32.

estimation. The relevant measure of destructiveness is *expected* destructiveness in actual use, a function of our reasonable expectations about the effects of its application under real-world conditions. The expected destructiveness of biological weapons is significantly less than their ideal or potential destructiveness. In contrast, expected destructiveness of nuclear weapons is close to their ideal or potential destructiveness, given the high reliability of the weapons, once developed, and the lack of any effective defenses against them. So, considering the theoretical (or ideal) potential destructiveness of biological weapons in the light of practical difficulties in their use suggests that their expected destructiveness would be substantially less than that of nuclear weapons. In this sense, biological weapons occupy a middle ground in destructiveness between nuclear and chemical weapons. But this claim should be qualified in two respects. First, the current practical impediments in the manufacture and use of biological weapons may be overcome by future technological developments, and, second, recent developments in biotechnology hold out the prospect for the development of biological agents whose potential destructiveness is much greater.

The destructiveness of a weapon is one measure of its military effectiveness. This implies, given the variability in the expected destructiveness among nuclear, biological, and chemical weapons, that the traditional concept of WMD is not an appropriate category from a military perspective. "WMD" should be deconflated. With all three kinds of weapons included, "WMD" is too broad. Chemical weapons do not cause mass destruction, neither in an absolute sense, since they may be less lethal than conventional explosives, nor in a relative sense, in that they are orders of magnitude less lethal than nuclear and (perhaps) biological weapons. In terms of destructiveness, if chemical weapons were included as WMD, then conventional explosives, given their roughly equal level of destructiveness, would have to be included as well. The contrast "WMD" is meant to represent would then be lost. The category would then have become so general as to be meaningless because the point of the category is to draw a contrast with other, conventional weapons. Chemical weapons should be withdrawn from the category, and perhaps biological weapons as well, though there is dispute about this. Chemical weapons are simply not destructive enough to be considered, along with the others, weapons of *mass* destruction. This argument for deconflation has been made by a number of authors. For example: "Subsuming these three types of weapons under the rubric of 'weapons of mass destruction' approaches

the disingenuous. Biological and chemical weapons are not weapons of mass destruction."[12]

There are also important pragmatic elements in the argument for deconflation. It is not simply that conflating the three kinds of weapons together as agents of mass destruction is inaccurate; rather, it is positively misleading and dangerous. One problem is that "imprecision in analyzing and talking about 'WMD' threats obscures important policy choices." For example, in the run-up to the Iraq War in 2002–03, concern about Iraq's WMD arsenal was used extensively by supporters of the war to promote the idea that the United States should invade, but this argument made it difficult to provide a "rigorous cost/benefit analysis of the war."[13] Whether the alleged WMD capacity was chemical or nuclear would have made a great deal of difference in the strength of the case for the war. The use of "WMD" obscured this difference. More generally, as Wolfgang Panofsky notes:

> Combining nuclear, biological, and chemical weapons under the umbrella of WMD tends to obscure the overriding priority of reducing the nuclear danger when real or perceived crises involving BW [biological weapons] or CW [chemical weapons] gain public and political attention.[14]

To lump the three together takes our eye off the much greater danger residing in one or two of them. We must deconflate "WMD" to clarify our military thinking.

II. Indiscriminateness

But what about our moral thinking? The argument for deconflation from a military perspective does not entail that "WMD" should not be viewed as an appropriate category from a moral perspective. Weapons have a variety of characteristics, and it may be that the three kinds of weapons share characteristics of moral importance in virtue of which they should be conflated, whether or not "weapons of mass destruction" is an appropriate name for the category. Do nuclear, biological, and chemical weapons have something morally relevant in common, justifying their being grouped

[12] Philip Morrison and Kosta Tsipis, "Rightful Names," *Bulletin of the Atomic Scientists* 59, no. 3 (May–June 2003), p. 77.

[13] Perkovich, "Deconflating," pp. 4, 9.

[14] Wolfgang Panofsky, "Dismantling the Concept of 'Weapons of Mass Destruction,'" *Arms Control Today* 28, no. 3 (April 1998), pp. 3–8, at p. 8.

together? Is there a morally relevant difference between the weapons that are part of the traditional concept of WMD and conventional weapons?

The answer to this question, it turns out, depends on the type of moral perspective one takes. If we adopt the position of the international-relations *realist*, who rejects the application of morality to war, the question of whether WMD should be morally distinguished from conventional weapons does not arise because no characteristics of the weapons of war are morally relevant. On another hand, if we take the position of the *pacifist*, who rejects all acts of war on moral grounds, the answer is likely to be that conventional weapons and WMD should not be morally distinguished because the use in war of any weapon, whatever its characteristics, is not permitted. For the pacifist, to distinguish WMD from conventional weapons would likely be to support the claim that, while the use of some weapons (WMD) would not be justified, use of conventional weapons would be. The realist and the pacifist thus may reason to the same conclusion, though from very different assumptions.

But there is a third type of moral perspective on war. This is a *limited war perspective*, represented by *just war theory* (JWT). JWT is the perspective I will take in this chapter. JWT seeks to distinguish morally acceptable from morally unacceptable wars and acts of war, and the distinction between WMD and conventional weapons may be relevant to this task. The distinction may help set the rules about what is permissible in war. One of the ways in which JWT seeks to keep war limited is by keeping it less destructive. So from the JWT perspective, as from a military perspective, the destructiveness of weapons is a relevant feature. JWT seeks to limit destructiveness in war by requiring that a war or an act of war satisfy the criterion of *proportionality*, which stipulates that the expected harm from a war or an act of war not be greater than its expected good. Within JWT, proportionality applies both at the *jus ad bellum* level, where it is a necessary condition for a justified war, and at the *jus in bello* level, where it is a necessary condition for a justified act of war. The perspective of proportionality, like the military perspective, is concerned with a weapon's destructiveness. So, from the perspective of this moral criterion, as from the military perspective, WMD should be deconflated. Proportionality seeks to rule out the most destructive weapons, and this suggests that it is not appropriate to group chemical weapons with nuclear weapons. The use of chemical weapons is much more likely to be proportionate, or to contribute to the overall proportionality of a war, than the use of nuclear weapons.

But JWT has moral concerns aside from the destructiveness of war. It seeks to limit wars in ways other than simply their destructiveness. At the *jus in bello* level, another important criterion is *discrimination*, the requirement that acts of war not intentionally cause destruction to civilians or noncombatants and the infrastructure that supports them. In terms of this criterion, the morally relevant characteristic of a weapon is whether it is discriminate or indiscriminate. Perhaps conflation of the three kinds of weapons under "WMD" is appropriate in relation to this morally relevant feature. Perhaps, nuclear, biological, and chemical weapons are indiscriminate, in contrast with conventional weapons, which are discriminate.

But immediately a problem arises with this line of thinking. It seems that weapons cannot be classified as discriminate or indiscriminate. It is not weapons that are discriminate or indiscriminate, but particular uses of them. A conventional explosive can be dropped on a rural military outpost or on an elementary school, its use being discriminate in the first case and indiscriminate in the second. Whether a conventional explosive is discriminate or indiscriminate is contingent on how it is used; its discriminateness is a function not of the kind of weapon it is, but of the uses to which it is put. Weapons do not kill civilians; combatants kill civilians. A conventional explosive is, we may say, *contingently indiscriminate*. But then, it would seem that all weapons are contingently indiscriminate, so that there would be no basis from the perspective of discrimination to distinguish WMD from conventional weapons. If, on the contrary, the category "WMD" is to be morally relevant in terms of discrimination, the weapons included would have to possess, instead, the characteristic of being *inherently indiscriminate*, indiscriminate in all of their uses. I will now argue that this is the case with the weapons traditionally categorized as WMD.[15]

The best place to begin this argument is to speak of nuclear weapons. Nuclear weapons are so powerful that any use of them will kill large numbers of civilians. This claim requires qualification. The likelihood of massive civilian deaths was most evident in the early years of the nuclear age, when delivery systems were so inaccurate that the warheads had to be aimed at large objects, like cities. But warhead delivery became much more accurate, and, as a consequence, the destructive force of the warheads was reduced. Nuclear weapons came to be regarded as "counterforce" rather than "countervalue" weapons, meaning that they could

[15] Some of the argument in the next few paragraphs is taken from Sohail Hashmi and Steven Lee, "Introduction," in Hashmi and Lee, eds., *Ethics and WMD*, pp. 1–15, at pp. 9–10.

be effectively used against military targets rather than civilian targets like cities. Counterforce nuclear weapons could be used against isolated military targets, such as ships at sea, in which case the loss of civilian life might be nil (there might still be civilian radiation deaths).

But this is not the end of the story. First, it is unlikely that an attack with nuclear weapons by an established nuclear state would involve only a single warhead; if one military target was to be attacked, probably several would be, and this larger number would probably include military targets near to or collocated with cities. Many civilian deaths would then result. Second, if one party uses nuclear weapons, it is likely that others would use them in response, that nuclear retaliation would ensue, whether by the state attacked (if it had a nuclear capability) or by a nuclear ally. One cannot view the use of a single weapon in isolation. One nuclear explosion would very likely lead to others, as part of the same attack or through retaliation and escalation, and then many civilians would surely die. Understood in this extended sense, then, nuclear weapons cannot be used without a high likelihood of massive civilian deaths, and this is what I mean by referring to them as inherently indiscriminate. Nuclear weapons, in most situations in which it is realistic to think they might be used, cannot be used discriminately.

The situation with biological and chemical weapons is somewhat different. These weapons are not generally useful as counterforce weapons. They are not very useful militarily, at least at the tactical level.[16] There are several reasons for this.[17] First, their effects are not very controllable or predictable, being subject, for example, to local environmental conditions, such as wind and sunlight. Second, especially in the case of biological weapons, their deleterious effects on combatants may be delayed, meaning that they may be of little help in an ongoing battle. Third, they are unable to destroy weapons and military infrastructure. Fourth, humans can protect themselves from them with respirators, special clothing, or inoculations. Biological and chemical weapons might be effective at the operational or theater level (that is, at the level of attacks against military infrastructure), but such uses occur not on the battlefield, but in

[16] See Brad Roberts and Michael Moodie, "Biological Weapons: Toward a Threat Reduction Strategy," Defense Horizons, paper #15, Center for Technology and National Security Policy, National Defense University (July 2002), p. 2. See also, Susan Martin, "The Role of Biological Weapons in International Politics: The Real Military Revolution," *Journal of Strategic Studies* 25, no. 1 (March 2002), pp. 63–98, at pp. 71–76.

[17] M. I. Chevrier, "Deliberate Disease: Biological Weapons, Threats, and Policy Responses," *Environment and Planning C – Government and Policy* 11 (1993), pp. 395–417, at p. 409.

rear positions likely to be in populated areas.[18] In such attacks, indeed, civilians are more likely to die than combatants because civilians are less likely than combatants to have special forms of protection, such as inoculations or protective clothing.[19] Biological weapons do have strategic, countervalue uses directly against population centers and economic targets.[20] Thus, chemical and biological weapons, if they are used at all, are likely to be used in ways that involve the deaths of large numbers of civilians. They are unlikely to be used tactically, when massive civilian deaths might be avoided, because they are generally not very militarily effective at that level. In this sense, chemical and biological weapons also are inherently indiscriminate; like nuclear weapons, they are unlikely to be used without large-scale civilian casualties.

So, for similar but distinct reasons, nuclear weapons, on the one hand, and chemical and biological weapons, on the other, are unlikely to be used without causing many civilian deaths, and in this sense they are all inherently indiscriminate. Admittedly, an inherent property is usually thought to be a necessary feature of its object; my sense of "inherent" is looser than this. There is no strict necessity. It is possible that these weapons could be used in ways that would harm combatants without harming many civilians. My point is that this is quite unlikely. This is in contrast with conventional weapons, which can readily be used discriminately and are militarily effective when so used, even if they are often used indiscriminately.

But my admission that inherently indiscriminate weapons are not necessarily indiscriminate seems to undercut the claim that this property is morally relevant. If it is possible, even if only barely, to use nuclear, biological, and chemical weapons in a discriminate way, the distinction with conventional weapons, based on the principle of discrimination, is lost, for the principle would not then rule out the use of WMD, but simply require that, like conventional weapons, they be used in discriminate ways, since in both cases it is possible to do so. But I argue that in fact there is a morally relevant distinction, in terms of discrimination, between weapons that frequently can be used discriminately (conventional weapons) and those that seldom can be (WMD). Given the unpredictable, uncertain, and accidental nature of much that goes on in war,

[18] Koblentz, "Pathogens as Weapons," pp. 99–100.
[19] Szasz, "International Law," p. 43.
[20] For a discussion of the role of biological weapons at the strategic levels see Martin, "Biological Weapons in International Relations," pp. 76–80.

"almost always" indiscriminate should count morally as always indiscriminate. We cannot know enough about the consequences of our acts in war to trust ourselves to use nuclear, biological, or chemical weapons in ways that always avoid great civilian casualties. So the property of inherent indiscriminateness is morally relevant and distinguishes nuclear, biological and chemical weapons from conventional weapons; it justifies their conflation into "WMD." From the perspective of the principle of discrimination, an inherently indiscriminate weapon should never be used in war.

But one further problem remains with my claim that inherent indiscriminateness is a morally relevant property in terms of the principle of discrimination. The issue of *intention* figures prominently in our understanding of discrimination. What this principle prohibits are attacks *directed* at civilian targets, where destruction of those targets is part of what is intended in the attack. The principle does not rule out all attacks that happen to have civilian casualties. This is indicated by the principle's being interpreted under the *doctrine of double effect*, which holds that an attacker is not fully responsible for those effects of the attack that are foreseen but not intended. Merely foreseen civilian deaths are not ruled out by the principle of discrimination. Thus, even a necessarily indiscriminate weapon could be used in a discriminate way, if one's intentions do not focus on the civilians at risk.

This criticism, however, falls victim to an appreciation of the fact that because WMD have few or no effective counterforce uses, they are almost certain to be used, if they are used, in a countervalue way. WMD are good at killing civilians, and this is about the only thing they are good at, at least compared with conventional weapons, so any use of them can be expected to be for this purpose, even if in theory one could attempt to use them for a counterforce purpose. Analogously, although one could use a sledgehammer to kill flies, it is not very good for that purpose and would have serious negative consequences if so used, so one could not expect it to be used for that purpose.

This point is strengthened by considering the role of deterrence in military policy. States acquire weapons, in part at least, to deter their use by others. It is reasonable to believe that it is important for a state to have deterrent weapons of the same kind as those possessed by its opponents. The reason is that different weapons have different kinds and magnitudes of effects, and it is thought to be necessary for effective deterrence for a state to be able to threaten to impose in retaliation the kinds and magnitudes of effects its opponent is able to impose on it. This is especially true in the case of WMD, which have effects that conventional weapons do not. States believe that only the possession of

WMD can effectively deter WMD attacks. This is why, for example, the dynamic behind nuclear proliferation has historically been the felt need of states to acquire nuclear weapons because their opponents had them. So, if one has WMD, one will intend to use them to kill civilians because having this intention is a crucial part of an effective deterrent threat. This is why one has the weapons. This is the policy behind the way they are deployed and the way they are intended to be used (all as part of an adequate deterrence posture). Thus, the threat of retaliation by WMD is a countervalue threat, not a counterforce threat. The implication is that the inherent indiscriminateness of these weapons will ensure that, if used, they will in fact be used with an indiscriminate intention.

Finally then we have an argument for conflation. Whereas chemical weapons, at least, should be removed from the WMD category when viewed from either a military perspective or a moral perspective of proportionality, all three kinds should be grouped together when viewed in terms of discrimination. Chemical weapons are much less destructive than nuclear or biological weapons but share with them the property of being inherently indiscriminate. The three kinds of weapons may be conflated under "WMD" because they share a property in virtue of which they violate a criterion of *jus in bello*. This property provides a good moral reason to prohibit these weapons, a reason that does not apply to conventional weapons. Still, switching the moral perspective from proportionality to discrimination does show that "WMD" is a misnamed category. It is not the destructiveness of these weapons that unites them, but their indiscriminateness. Panofsky observes that "weapons of indiscriminate destruction" would be a more appropriate label for the grouping of nuclear, biological, and chemical weapons:[21] WID, not WMD.

So, we have an answer to the question of whether and why WMD are morally special, and we have arrived at that answer by addressing the question of whether the traditional concept of WMD represents an appropriate grouping. It is an appropriate grouping because nuclear, biological, and chemical weapons share the morally relevant property of being inherently indiscriminate, which shows that they are morally special by indicating what makes them collectable under a single label.

III. Dreadedness and Nonlethality

But there is another answer some offer to the question why nuclear, biological, and chemical weapons are morally special. WMD are often

[21] Panofsky, "Dismantling," p. 4.

referred to as *terror weapons*. In their use, they terrorize. In use, they kill many and so they terrorize those whom they have not (yet) killed. This is how they are supposed to do their countervalue work, sowing chaos in a society and inducing the civilian population to force its government to surrender. Conventional weapons can also terrorize civilian populations, as the conventional bombing of German and Japanese cities in World War II showed, but they are only sometimes terror weapons, as they are only sometimes used indiscriminately. On this view, WMD are inherently terror weapons as a consequence of their being inherently indiscriminate. But WMD are sometimes said to be terror weapons for a different reason, not because they destroy civilians, but because of the special way in which they kill. Some claim that WMD kill in ways that are intrinsically immoral, whomever they kill. Susan Martin suggests that it may be unethical in itself to cause death by poison, disease, or radiation (as with chemical, biological, and nuclear weapons, respectively).[22] The immorality of the weapons lies in the fact that they kill by these means.

Related to the issue of how the weapons kill is the perception people have of different kinds of harms or risks of harm and the fear they differentially generate. Jessica Stern, discussing biological weapons, refers to "dreaded risks," risks where the harmful effects have features people tend to find especially distressing. People are, for example, especially frightened by risks with which they are unfamiliar, risks where the harmful agent is invisible or the mechanism by which the harm is produced is poorly understood, risks where the victim does not know he has been exposed, and risks with delayed or unpredictable effects.[23] These are features that characterize the risks of harm from WMD, risks from poison, disease, and radiation. It could be, then, that the moral claim that WMD are unacceptable because of the means by which they kill (through poison, disease, or radiation) reduces to the claim that these ways of killing are dreaded risks, that they are psychologically perceived as especially horrific. But then the moral claim should not be credited. Moral condemnation of WMD should be based on an objective property, not subjective regard, a feature that may vary across cultures and times. As J. H. Humphrey notes, "It seems illogical to set chemical and biological weapons in a category apart from other modern weapons on grounds of beastliness alone."[24]

[22] Martin, "Weapons of Mass Destruction," p. 18.

[23] Jessica Stern, "Dreaded Risks and the Control of Biological Weapons," *International Security* 27, no. 3 (Winter 2002–2003), pp. 89–123, at p. 102.

[24] J. H. Humphrey, "Preventing CBW," in Steven Rose, ed., *CBW: Chemical and Biological Warfare* (Boston: Beacon Press, 1969), p. 157.

So, we should stick with the objective moral property of inherent indiscriminateness. The special fear people have of WMD may explain why they are grouped, but it does not justify their being so grouped.

There is one other challenge I need to consider to the claim that the traditional concept of WMD represents an appropriate grouping from the perspective of the principle of discrimination. Some forms of chemical weapons are incapacitating but not lethal, and the same may be true for some forms of biological weapons as well. Tear gas, for example, is a chemical weapon. While the use of nonlethal agents in war may, strictly speaking, be indiscriminate, in that it can involve intentional harm to civilians, the fact that the harm, such as being rendered briefly unconscious, is temporary and that it may be little more than an inconvenience for its victims suggests that it is a much less morally problematic form of civilian harm than that imposed by lethal forms of WMD. So, there would be a strong case for excluding nonlethal chemical and biological weapons from the category of WMD understood as a group of weapons that share a common morally relevant property. The traditional concept of WMD would then be too broad from the perspective of discrimination (as it is, for different reasons, from the perspective of proportionality). Rather, the category should be understood to include nuclear weapons and lethal forms (not all forms) of biological and chemical weapons. I have no problem with such a conclusion, since my main purpose has been to determine why WMD are morally special. Having determined that it is their inherent indiscriminateness, I feel free to drop whatever members of the traditional concept of WMD fail to satisfy this criterion.

But there is more to be said on the matter.[25] The distinction between good and bad (nonlethal and lethal) chemical and biological weapons is difficult to draw. The alleged distinction is similar to the distinction between good and bad (counterforce and countervalue) nuclear weapons. Part of the argument against the latter distinction, outlined earlier, is that any counterforce use of nuclear weapons is very likely to be part of, or to escalate to, a nuclear exchange involving large-scale civilian deaths. So, counterforce uses of nuclear weapons should be regarded as inherently indiscriminate because they are likely to be part of an indiscriminate attack or to initiate an indiscriminate exchange. One implication of the problematic nature of this distinction is that it is unlikely that

[25] There is an excellent discussion of these issues in George Quester, "Review: Chemical and Biological Warfare," *American Political Science Review* 68, no. 3 (September 1974), pp. 1285–91.

a *firebreak* could be maintained between counterforce and countervalue uses of nuclear weapons. To avoid indiscriminate destruction, it is much more effective to have a firebreak between conventional and nuclear weapons (since this is a distinction that can be easily drawn) than between two kinds of uses of nuclear weapons. There is an analogous argument against the distinction between good and bad chemical and biological weapons. The use of good (nonlethal) chemical and biological weapons is likely to lead to the use of bad (lethal) forms or other indiscriminate weapons. The time scale for such escalation may be more extended than in the nuclear case, but perhaps as inexorable. Once the barrier between conventional weapons and chemical or biological weapons has been crossed by the use of nonlethal forms of the latter, lethal forms of these weapons will very likely be used when they are seen to be useful from a countervalue perspective.

The problem in line drawing is exacerbated by the difficulty in making the distinction at all. The difference is a matter of degree rather than a difference in kind. All biological and chemical agents will probably kill some and merely sicken others, depending on the conditions of the victim and the environment. In the case of a "lethal" gas, those farther out from the center of the attack and more on the fringes of the attack cloud will not receive a lethal dose and may only be sickened. In the case of a "nonlethal" gas, the strength needed to render unconscious most of those in the attack area will likely guarantee that some of those at the center of the attack cloud will die. The gas will be more concentrated at the center than at the fringes, and the more concentrated it is, the more likely the victims will die instead of merely being rendered unconscious. Couple this with the fact that the ratio of those killed to those only sickened or rendered unconscious will vary widely for any one agent depending on the environment of the target area. So, how does one draw the lethal/nonlethal line? However one draws the line, an additional concern is that civilians are more likely to die whichever agent is used because they are, on average, physically weaker than combatants and have generally less access to protection. Effective prohibitions depend on sharp line drawings or firebreaks, and that is why the goal of prohibiting lethal chemical and biological weapons is much more effective when the rule is to ban all chemical and biological weapons.

Such considerations provide a strong pragmatic argument for regarding all forms of chemical and biological weapons, whatever their degree of lethality, as included within the category of WMD. Given the "firebreak" problem, if our concern, from the perspective of discrimination,

is to prohibit the use of all inherently indiscriminate weapons, a better rule to promote, and for that purpose to embody in our definition, is one that prohibits all forms of those weapons, many of whose forms are inherently indiscriminate. This would yield the following rough definition of WMD.[26]

> Weapons of mass destruction are those weapons that either are themselves inherently indiscriminate or are in classes of weapons many of whose members are inherently indiscriminate. Weapons are inherently indiscriminate when their use is very likely to involve (or lead to) the killing of large numbers of civilians.

This definition implies that all nuclear, biological, and chemical weapons should be included as WMD, from the perspective of discrimination, and this affirms the content of the traditional concept of WMD. It also makes clear that a more descriptively accurate name for WMD is, as mentioned earlier, *weapons of indiscriminate destruction* (WID).

A good definition, however, should provide criteria that are not only necessary but also sufficient for the application of the term. In the discussion so far, I have been focusing on inherent indiscriminateness (or the more complicated form of this condition in the preceding definition) as a necessary condition by asking whether, in terms of this feature, the traditional concept of WMD is too broad. But a focus on this feature as a sufficient condition would lead to the question whether the traditional concept is too narrow. Are there weapons besides nuclear, biological, and chemical weapons that are inherently indiscriminate? If we are concerned about which weapons should be banned from the just-war perspective of discrimination, we must ask whether the traditional concept of WMD should be expanded. A number of suggestions have been made about weapons to add to the WMD category. Consider briefly three weapons that seem to present a strong case for inclusion: antipersonnel land mines, cluster bombs, and radiological weapons. All three of these appear to be inherently indiscriminate. Many civilians have been killed (or maimed) by land mines and cluster bombs left over after a battle or a war, and a significant number of such deaths would seem to be inevitable, given the nature of the weapons, even though there is generally a counterforce military purpose in their use. Radiological weapons ("dirty bombs," conventional explosives designed to disperse radioactive material) seem clearly to be weapons with no apparent counterforce military purpose,

[26] See Hashmi and Lee, "Introduction," p. 10.

but simply designed to terrorize civilians and disrupt civilian and governmental activities. So, there is good reason to expand the traditional category of WMD to include these, which is to say, there is a strong moral argument in terms of the principle of discrimination to prohibit them.

IV. Not WMD (or WID), but WAD

There is another feature of nuclear weapons (and perhaps biological weapons) with special moral relevance. Nuclear weapons are a strategic deterrent: that is, through their countervalue capability, they create deterrence at the strategic, not the tactical (counterforce) level. More specifically, nuclear weapons allow for a capacity known as *assured destruction* (AD), and thus may be referred to as *weapons of assured destruction* (WAD). Nuclear weapons are so powerful that they make it possible for one state to terminate another, to render it inoperative, to destroy its society. For example, a relatively small number of nuclear weapons can destroy the several largest cities of a state, effectively putting an end to it. Given available modes of delivery by ballistic missile, effective defense against such a murderous attack is not possible. Because of the great difficulty of intercepting missile warheads and the ability of the attacker to saturate its targets with more weapons than would be necessary to achieve the destruction, no means of defense available can protect the state. A state with a modest number of nuclear weapons and reliable delivery vehicles is assured of its capacity to destroy another state. More than this, if a state's nuclear warhead delivery vehicles were relatively invulnerable to destruction in a surprise attack, as modern missiles can be made to be, the state would have the capacity to destroy its opponent even after being the victim of a surprise attack. The state then has what is called a "second-strike nuclear force." This is the capacity for AD, a state's ability to destroy an opponent even after receiving a surprise first strike.[27] Any state having a modest number of nuclear weapons and reliable and relatively invulnerable delivery vehicles has an AD capacity in relation to other states. Most, perhaps all, of the existing nuclear states have an AD capacity.

When two opponents both have an AD capacity, they are together in a relationship of *mutual assured destruction* (MAD). This was the relationship of the United States and the Soviet Union during most of the Cold War.

[27] For a discussion of AD in its historical context, see Lawrence Freedman, *The Evolution of Nuclear Strategy* (New York: St. Martin's Press, 1981), pp. 245–56.

Many strategists regard MAD as a very stable condition, greatly lessening the likelihood of war, because under MAD each opponent recognizes clearly that any war between them would likely lead to its own destruction, so that there could be no overall benefit to aggression. There is consequently a great disincentive to initiating a war. The lack of a hot war between the Cold War superpowers has been credited by many to the stability of the MAD relationship between them. The possibility of the MAD relationship came into existence during the Cold War, but it is not historically limited to that period. MAD is a permanent possibility created by our technological capacities. It continues to exist now, for example, in the relationships between the United States and China or between India and Pakistan. If the risk of a large-scale nuclear war is less now than it was during the Cold War, this is because the level of hostility between the United States and China, for instance, is currently less than it was between the United States and the Soviet Union.

Do other WMD make possible an AD capacity and a MAD relationship? Here we may recall the earlier arguments about destructiveness of the traditional WMD. Clearly one feature that a weapon needs to be able to create an AD capacity is great destructiveness. This rules out chemical weapons, which, as we have seen, are not, relatively speaking, very destructive, surely not destructive enough to threaten the existence of a state. What about biological weapons? We saw earlier that biological weapons rival (and perhaps even exceed) nuclear weapons in potential destructiveness, but that, given a variety of practical difficulties, their expected destructiveness is less. We also saw that they have strategic, countervalue uses, but few tactical, counterforce uses. Biological weapons could destroy a society not by flattening its cities, but by killing its people and the agriculture on which human life depends. These features suggest that biological weapons could be a strategic deterrent creating the possibility of an AD capacity and a MAD relationship.

This case for biological weapons as a strategic deterrent is offered by Susan Martin. "Like nuclear weapons, biological weapons are primarily useful as a strategic deterrent."[28] The argument is that biological weapons can create an AD capacity because they have the potential to rival or exceed nuclear weapons in their destructiveness. The response to this argument is put by Gregory Koblentz, who points to some of the differences discussed earlier between biological and nuclear weapons. These differences, he argues, show that biological weapons could not be

[28] Martin, "Biological Weapons in International Politics," p. 63.

an effective strategic deterrent. "Nuclear weapons deliver instantaneous and overwhelming destruction; the effects of biological weapons, on the other hand, are delayed, variable, and difficult to predict."[29] In addition, while there is no defense possible against a nuclear attack, this is not the case with a biological attack. Martin's response to this kind of argument is twofold. First, she argues that such points of difference between biological and nuclear weapons are not as great as claimed, so not as relevant as Koblentz suggests to showing that biological weapons cannot be a strategic deterrent. Second, she argues that despite any remaining relevant differences, biological weapons can be a strategic deterrent, nonetheless.[30]

Martin argues that defenses against biological attack cannot be assured of being successful. For example, vaccines can be effective only against certain strains of certain agents, and which strains of what agents an opponent has weaponized may not be known. Moreover, the opponent may be able to change the strains (a prospect enhanced by recombinant DNA technology) much more quickly and easily than the potential target state can engineer a new vaccine and create millions of doses. She acknowledges that in contrast with those of nuclear weapons, the effects of a biological attack are delayed and not easy to predict or guarantee, but this is where the second stage of her argument comes in. Even though these factors indicate that the overwhelming societal destruction is less clear and certain with biological than with nuclear retaliation, the former can still be a strategic deterrent because "effective deterrence requires only a small possibility of great destruction."[31] This is the view that strategic deterrence, as embodied in AD and MAD, is *rugged*, meaning that it is effective even when the likelihood of the retaliatory societal destruction is less than certain. Societal destruction is such a disastrous, catastrophic outcome that any leader of a state would act cautiously in the face of its prospect, even when that prospect falls short of a certainty. The view that strategic deterrence is rugged contrasts with the view that it is *delicate*, that it is not easily achieved and is easily lost, that states are calculating and risk taking, ready to engage in aggression whenever they see a small advantage, even if a significant likelihood (short of certainty) of their own destruction is part of the equation.

[29] Koblentz, "Pathogens as Weapons," p. 105. See, generally, pp. 104–7.
[30] Martin, "Biological Weapons in International Politics," pp. 76–80.
[31] Martin, "Biological Weapons in International Politics," pp. 76.

Those who believe that strategic deterrence is rugged also believe that it is very stable, that nuclear weapons can produce stability in a military relationship that was previously not stable. For example, some argue that since India and Pakistan acquired nuclear weapons, they have been much more cautious in their behavior vis-à-vis each other and more successful at avoiding war. Some strategists argue that the lack of war between the United States and the Soviet Union is evidence that deterrence is rugged rather than delicate. Kenneth Waltz has famously argued that the proliferation of nuclear weapons could be a good thing, in that it would lessen the likelihood of war in the developing world, as it did between the Cold War superpowers.[32] Susan Martin applies this way of thinking to biological weapons. The proliferation of biological weapons, like the proliferation of nuclear weapons, should lead to a more peaceful world; states in the developing world will be less likely to go to war against each other and also will be able to deter the great powers from military interference in their affairs (something the great powers might not be too happy about). Moreover, the proliferation of biological weapons will be facilitated by the fact that they are cheaper and easier to acquire than nuclear weapons. Biological weapons may be "the poor man's atomic bomb."

But whether or not biological weapons are strategic deterrents, what moral implications would follow if they were? What moral implications follow from the fact that nuclear weapons are strategic deterrents? What is morally special about weapons that make possible an AD capacity?[33] With an AD capacity, a state threatens for the sake of deterrence to destroy the society of another state. I argued earlier that all WMD should be prohibited because they are inherently indiscriminate and so cannot be used in a morally acceptable way. But some would respond that while the *actual use* (that is, the firing of them on an opponent) of inherently indiscriminate weapons is morally unacceptable, their possession for the sake of deterrence may not be. Using WID for deterrence does not require their actual use, only the threat of such. So a prohibition of actual use may not entail a prohibition of possession for deterrence. But this response fails. Deterrence through threats of indiscriminate retaliation is ruled

[32] Kenneth Waltz, "The Spread of Nuclear Weapons: More May Be Better," *Adelphi Papers*, no. 171 (London: International Institute for Strategic Studies, 1981).

[33] See Steven P. Lee, *Morality, Prudence, and Nuclear Weapons* (New York: Cambridge University Press, 1993).

out by the principle of discrimination because such a policy involves the deterrer's having an intention to attack with indiscriminate weapons (albeit a conditional intention), because a bluff is unlikely to be effective. The deterrer must have a commitment to actual use of the weapons, if attacked. Because the principle of discrimination requires that one's military intentions be discriminate, and because deterrence with inherently indiscriminate weapons necessarily involves an indiscriminate intention, such a policy, and therefore possession of the weapons for its sake, is morally prohibited.

So far, the argument has simply applied our earlier conclusion that the use of inherently indiscriminate weapons is morally unacceptable to a different kind of use, deterrent use. This applies to chemical as well as nuclear and biological weapons: one can neither use nor threaten to use them. There is nothing morally special about a capacity for AD beyond the fact that it involves a prohibited use (deterrence) of an inherently indiscriminate weapon. An AD capacity is morally prohibited, as is any possession of WID.

It seems that the same moral criticism could be made about being part of a MAD relationship. Since a MAD relationship consists of two opponents who both have an AD capacity against the other, it should be morally unacceptable as well. As it is prohibited to create an AD capacity, it is prohibited to create an AD capacity in order to enter into a MAD relationship. But there are moral complications to a MAD relationship that go beyond the moral status of an AD capacity considered by itself. MAD is a state of mutual deterrence in which each side makes countervalue threats (threats to destroy the other's society) in order to dissuade the other from carrying out its own countervalue threats. But there is a crucial element in the logic of deterrence that comes into play in the case of a MAD relationship.

Earlier I claimed that it is reasonable to believe that one must have WMD to deter an opponent effectively with WMD. This claim is based on the following considerations. The only effective way to deter an opponent is to threaten that opponent with a level of harm that is at least as severe as the opponent itself threatens. Otherwise the opponent could engage in aggression at a lower level of harm, expecting that the state would not retaliate out of fear that the opponent would then impose the more severe harm that the state, by hypothesis, is incapable of inflicting. In the terms in which this idea was expressed during the Cold War, for effective deterrence at any level of the escalation ladder, a state must have

a capability to respond as high on the escalation ladder as its opponent can respond. Otherwise, the state's deterrent threats would lack credibility and so be ineffective. If the opponent has an AD capacity, and so threatens societal destruction (as high as the escalation ladder can go), the state must, to deter that threat, have the capability to make a threat of equal severity: that is, it must have its own AD capacity.

Deterrence is a form of defense, and, according to the conditions of *jus ad bellum*, a state is entitled to defend itself. This implies, given the reasonable belief referred to earlier, that a state must be morally permitted to have an AD capacity, if its opponent does. If one's opponent has an AD capacity, one is allowed to have one as well. Participating in a MAD relationship is morally permissible. This is what is morally special about those WID that make an AD capacity possible: it is permissible to have such weapons when one's opponent does. Otherwise self-defense is prohibited. The result may be construed as a moral dilemma: when one's opponent has an AD capacity, the possession of WID necessary to have an AD capacity of one's own is both morally permissible (in terms of *jus ad bellum*) and morally prohibited (in terms of *jus in bello*, given that the weapons in question are inherently indiscriminate). But prohibition implies impermission, so there is a contradiction. The problem is that in traditional JWT, the restrictions and permissions of *jus ad bellum* are not conditioned on the restrictions or permissions of *jus in bello*, and vice versa. Thus weapons with the capacity for AD throw JWT into inconsistency and thereby challenge our traditional moral understanding of military force.

However this moral difficulty is sorted out, the important point for our purposes is that weapons that create the capacity for AD have a morally relevant feature, namely, that they are impermissible to possess by themselves, but permissible to possess when one's opponent has them. Having an AD capacity alone is impermissible, but being part of a MAD relationship, which requires having an AD capacity, is not. Here we have, then, another argument for WMD deconflation. This morally relevant feature would pick out a subset of traditional WMD or WID. Because chemical (and perhaps biological) weapons do not allow for an AD capacity, they should be disaggregated from nuclear (and perhaps biological) weapons, which do. This new aggregation, WAD, is a subset of traditional WMD or WID. So, from the point of view of the *jus in bello* and its principle of discrimination, weapons of the traditional WMD (or WID) should be

conflated because they possess a morally relevant property, being inherently indiscriminate, in virtue of which they should be prohibited. But from the point of view of *jus ad bellum*, a subset of WID, nuclear (and perhaps biological) weapons should be permitted for deterrence in situations in which one's opponent has an AD capacity with them. The contradiction is in the fact that WID and WAD partly overlap.

10

Justifying Torture as an Act of War

Michael Davis

> Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who [being unlawful combatants] are not entitled to such treatment.
>
> – George W. Bush, February 7, 2002 (declassified June 17, 2004)[1]

For anyone[2] who supposes the United States to have begun as an Enlightenment experiment in institutionalizing "natural [that is, moral] rights," this sentence from a memo of a U.S. president must come as a surprise. It explicitly assumes that human beings can lose the moral right to be treated "humanely" (that is, as human beings are entitled to be treated). Underlying that explicit assumption seems to be another, that certain "unlawful combatants" have somehow forfeited their status as human beings – or, at least, their right to be treated humanely. It is that assumption I want to investigate here. If, as I believe, I can show that even terrorist suspects such as those held at Guantánamo are entitled to humane

[1] "Memo: President Bush on Humane Treatment of al-Qaeda and Taliban Detainees," February 7, 2002, in Mark Danner, *Torture and Truth* (New York: New York Review Books, 2004), p. 106.

[2] Parts of this chapter have been presented at the Humanities Colloquium, IIT, February 17, 2006; the Blue Cross and Blue Shield of Florida Center for Ethics, Public Policy and the Professions, University of North Florida, March 2, 2006; the Association for Practical and Professional Ethics, March 4, 2006; and AMINTAPHIL (American Section of the International Association for Philosophy of Law and Social Philosophy), Washington University, St. Louis, November 6, 2006. I should like to thank those present for comments. Parts of this chapter have also appeared (in some version or other) as "Three Fallacies of Torture," *Free Inquiry* 26 (December 2005/January 2006): 49–50; "The Moral Justifiability of Torture and Other Cruel, Inhuman, or Degrading Treatment," *International Journal of Applied Philosophy* 19 (Fall 2005): 161–78; "Torture and the Inhumane," *Criminal Justice Ethics* 26 (Summer/Fall 2007: 29–43); and "Torturing Profession," *Professional Ethics*, forthcoming.

treatment, especially to be safe from torture, then it is unlikely that war provides any context justifying torture or similar forms of inhumane treatment.

This chapter has four parts. The first part offers an analysis of torture.[2] The second explains why torture so understood is always prima facie morally wrong. Torture is a form of inhumane treatment and all inhumane treatment is always prima facie morally wrong. The third part considers why we might nonetheless be tempted to think torture is sometimes justified (that is, at least morally permitted all things considered). The fourth part, the conclusion, argues that attempts to justify milder forms of inhumane treatment must fail for much the same reason as do attempts to justify torture.

I. What Is Torture?

Exposure to cold weather or water is permissible with appropriate medical monitoring. The use of a wet towel to induce the misperception of suffocation would also be permissible if not done with the specific intent to cause prolonged mental harm, and absent medical evidence that it would.

– Excerpt from "Legal Brief on Proposed Counter-Resistance Strategies," Department of Defense, Joint Task Force 170, Guantánamo Bay, Cuba, APO AE 09880 (11 October 2002)[3]

On December 10, 1984, the United Nations General Assembly adopted the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. For the purposes of that document, the term "torture" was defined (in part) as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The convention excludes from the category of torture "pain or suffering arising only from, inherent in or incidental to lawful sanctions" but

[2] The basic legal documents concerning torture are summarized in Helen Duffy, *The "War on Terror" and the Framework of International Law* (Cambridge: Cambridge University Press, 2005), especially, pp. 274–330.

[3] Danner, pp. 176–77.

does not otherwise define "other cruel, inhuman, or degrading treatment or punishment."

However useful this definition may be for some purposes, it is not a good definition of "torture." It leaves out too much. For example, an illegal organization, such as the mafia, is, without official "consent or acquiescence," as capable of torture as any government. Indeed, even animals can torture and be tortured. Whoever or whatever does it, torture remains fundamentally the same, a relation between sentient beings (torturer and tortured) in which the one makes the other suffer.

The term "torture" had its origin in the idea of "twisting" (as in "torque" and "tortuous"). Torture seems originally to have been a tormenting of the body until it twists uncontrollably. While the modern literature on torture (like the UN convention) distinguishes between "physical" and "mental" torture, all clear examples of torture seem to me physical as well as mental – physical because the body suffers in some way and mental because there is no suffering without a mind to suffer it. So, for example, keeping a prisoner awake until disoriented and incoherent seems to me as much physical torture as beating him with a rubber hose. Sleep privation produces effects normally associated with serious physical injury or illness: exhaustion, jumpiness, extreme depression, and so on. While there is generally little pain, strictly speaking, and no scars or other physical marks, there is still much physical suffering – that is, a state of the body sufficiently unpleasant that a rational person would normally avoid it even at great cost. Even a dog or a rat can be made to suffer in that way – and, it seems to me, what a dog or rat can suffer is not mental in any interesting sense relevant here.

Where a body does not suffer, for example, where an interrogator simulates the torture of the interrogated's child or spouse, or only threatens such torture, the suffering in question generally seems to work much as any scheme of extortion does, that is, by intimidation, duress, or coercion. Even this suffering may not be "purely mental" (that is, suffering to which only humans are subject). We can, for example, imagine a dog suffering when she hears the cries of (what she takes to be) her pups in great pain. Yet, so long as the simulated or threatened suffering of a surrogate works through the reason of the person interrogated, it should not count as torture of the interrogated any more than of the surrogate.

Practical concepts like torture inevitably have vague boundaries, but I do not think such vagueness is sufficient to permit there being a clear case of torture that is altogether or even largely independent of severe bodily suffering. The boundary between extortion and torture, however vague,

is sufficiently precise to rule out cases in which the subject of extortion is (in that respect) also clearly the subject of torture. The relationship between extortionist and victim is a human relationship (one depending on reason) in a way that the relationship between torturer and tortured is not.[4]

Torture is often extremely painful, but turning that statistical fact into a definition (as the UN convention does not) opens the door to the paradoxical notion of "humane torture" or "torture lite," harsh treatment of the body causing extreme suffering but not, strictly speaking, pain, for example, forcing a prisoner to shiver naked in a cold cell for weeks or months, with no place to sleep but a concrete floor. Not only is there nothing humane about such treatment (except the absence of worse), but the suffering so generated, if intended, is torture, strictly speaking, slow torture like the drop-drop-drop of "Chinese water torture," but torture nonetheless. The absence of severe pain is a technicality.

Torture can be undertaken for any of at least six reasons. The UN convention identifies four of these: (1) to obtain a confession ("judicial torture"), (2) to obtain information ("interrogational torture"), (3) to punish ("penal torture"), and (4) to intimidate or coerce the sufferer or others to act in certain ways ("terroristic" or "deterrent" torture). The convention seems to overlook two other reasons to torture: (5) to destroy opponents without killing them (what we may call "disabling torture") and (6) to please the torturer or others ("recreational torture"). Recreational torture is not, of course, something government is likely to engage in, but individuals are, especially if a government declares certain individuals or groups beyond its protection.

While torture is a form of inhumane treatment, it seems to differ from other forms in the suffering it imposes. Torture is (as the UN convention says) severe suffering. But not all severe suffering is torture. Consider, for example, the suffering inflicted during a medical procedure (as when a surgeon pops a dislocated shoulder into place). There is also the suffering produced by caning, amputation, or other punishments that most legal systems now forbid. Though cruel, such punishment is not torture. The executioner is not required to cause suffering, only to carry out a sentence, say, so many hard strokes of a cane upon the bare back. The suffering is (in the words of the convention) "inherent in or incidental to lawful sanctions." The legislator may have chosen the punishment (in part) because it is painful, and the judge may have imposed it for the

[4] Thanks to Kathryn Riley and Mohamed Mehdi for comments suggesting this paragraph.

same reason. But those intentions are independent of the executioner's. In contrast, the torturer actually aims at causing the tortured to suffer (either as an end in itself or as a means). For example, "drawing and quartering," though a punishment, was torture, strictly speaking. The executioner was to carry out its various stages in such a way as to make the condemned suffer as much as possible.

While extreme suffering seems to be one distinguishing feature of torture, it is not the only one. Another is the vast inequality between tortured and torturer. The tortured cannot stop the imposition of physical suffering, while the torturer has the power (in fact and perhaps even in law) to impose physical suffering of ever greater amounts almost indefinitely. So, for example, I do not torture you when, in a street fight or wrestling match, I get you in a half nelson and force your arm upward until you cry out in pain and give up. I would, however, begin to torture you if, after you admitted defeat, I continued to force your arm upward.

The tortured's helplessness is of two kinds. First, there is physical helplessness. The tortured is often physically restrained, for example, tied to a chair or strapped to a table. Even when not physically restrained, the tortured may be weakened by lack of sleep, little or no food, or previous beatings. There are usually several torturers to one tortured. Second, there is generally an intellectual helplessness. The torturers know much about the tortured. The tortured know little or nothing about those who torture them (generally, not even their name or badge number). The torturers have some idea how long the torture will last (even if only "as long as it takes" to get such-and-such). The tortured generally have no idea when the torture will end – or even what the torturers will do next. Torture is (supposed to be) more effective insofar as the tortured's fears run wild.

It is sometimes said that the duration of torture is under the control of the tortured. There is some truth in this – but not much. When the torturer seeks information or a confession and the torture is still in its early stages, the tortured can decide to give in (ending the torture). Indeed, in a well-regulated system of interrogational or judicial torture, the torture should begin, as it often did in early modern Europe, with the torturer showing the prisoner (the candidate for torture) "the instruments of torture," explaining the use of each. If the prisoner does not immediately confess or reveal what the torturer wants to know, the torture should begin, with great ceremony and relatively little suffering. The tortured should then be given another chance to reveal or confess. If he does not reveal or confess, the suffering increases again. And so on. But if these appeals to reason fail, the torture begins in earnest, its aim no longer to

extort the information or confession but to obtain it by "breaking" the tortured. The subject of judicial or interrogational torture is "broken" when, and only when, he has become so distraught, so unable to bear any more suffering, that he can no longer resist any request the torturer might make. The tortured then "pours out his guts" much as someone with dysentery uncontrollably empties his bowels.

In principle, torture is limited only by the tortured's endurance. The natural stopping point of torture is the tortured's death, the point at which he can suffer no more. There is nothing in the concept of torture itself to limit it in any other way. The limit in judicial or interrogational torture arises from the use to which the torture is put, the extraction of a confession or of certain information. And, in practice, even judicial or interrogational torture has no clear limit. A torturer seldom, if ever, knows how much useful information the tortured has or how much the tortured must confess to have confessed "everything." Even someone seemingly broken may be holding a little back. How is the torturer to know unless he puts the tortured to the test? If more torture produces more information, the torturer learns that the tortured was holding back. If more torture produces nothing more, perhaps a little more torture will. The only time the torturer knows that he can force no more from the tortured is when the tortured has died. Until the tortured dies, the point at which the torture should stop is a matter of the torturer's judgment (or that of a superior). Torture is not an exact science.

Both torture and (premature) death are great evils, but, if one is a greater evil than the other, it is torture. Torturers seem to think so. They deprive the tortured of every means of suicide, fearing the tortured will choose death over further torture if given the choice. Traditional Christian teaching also seems to understand torture as worse than death. Hell, the ultimate punishment, is eternal life at the price of eternal torment. The damned forever cry out for death. Death (ceasing to exist) seems the greater evil only if we think of torture as having a short duration, a few hours or days, set in advance and ending with a return to ordinary life without serious injury. Death seems a greater evil than torture only when torture is drastically limited in an arbitrary way, a way it seldom is limited in practice. Torture has two dimensions death does not, duration and severity. So, if forced to choose between immediate (but eternal) death or a minute of relatively mild torture, (almost) everyone would choose torture, but if forced to choose between immediate death and years of daily beatings, electric shock, near drowning, and so on, with little food or rest, almost everyone would choose death. Between these extremes,

reason does not identify torture as worse than death or death as worse than torture. They are simply great but incommensurable evils.

Torture is typically voluntary only on one side. The torturer (or his principal) chooses whom to torture, how to torture, and when to stop the torture. The tortured seldom, if ever, have any such choice. What the tortured may choose is a course of action making torture likely or inevitable. For example, they choose to join the French Resistance in 1943 and, betrayed to the Gestapo, refuse to reveal what they know. But many who are tortured do not choose even in this weak sense. They are tortured because, for example, they were caught in a sweep of "suspicious persons." They are simply "innocent bystanders," lacking even the attenuated power to choose that the guilty told to confess or the well-informed told to reveal have.

Torture is always presumptively illegal. Most torture is aggravated battery of one sort or another, a serious crime, and so, most forms of torture are "violent" (in the sense of either simply applying force or applying force against law or morality). But not all torture is violent (in any of these senses). Some tortures do not seem to be batteries (or, at least, primarily batteries). They resemble crimes of deliberate neglect – yet seem worse. If a prisoner arrives at a detention center naked, failing to provide him with adequate clothing would be neglect. If he arrives clothed and sheds his clothing because a guard orders him to, his subsequent suffering from the cold in an unheated cell is not neglect but part of a positive criminal act including robbery (what right had the guards to take the prisoner's clothing without providing an adequate replacement?), assault (putting the prisoner in reasonable fear of bodily injury to get him to undress), and kidnapping (holding him in prison against his will so that he will suffer severe privation). A legal system must explicitly, or by subterfuge, provide for torture if its agents are to torture with impunity. In even the most repressive state, lawful torture can exist only as an exception to ordinary laws concerning kidnapping, battery, and so on.

Whether aggravated battery or another felony, torture seems substantially worse morally than the typical crime it otherwise resembles. Perhaps part of what explains the difference is the extreme inequality between (helpless) tortured and (powerful) torturer. But more important to any explanation must be the way torture takes advantage of that inequality. Torture would be (conceptually) impossible if the tortured could protect themselves. It would be compromised, and perhaps much less effective, if the tortured were treated as having rights the torturer had to respect (say, on pain of later lawsuit or administrative penalty). Generally, torture

occurs away from family, lawyer, and anyone else who might protect the tortured; those who wish to torture someone first make him "disappear" (that is one reason that international law requires us to protect communication between detainees and the outside world). For the torturer, the tortured must be no more than a living corpse. The torturer imposes on the tortured what no ("real") human being should suffer at the hands of another. Torture is therefore always humiliating. The especially humiliating forms of torture, including rough treatment of genitals and anus, are merely the extremes toward which the logic of torture pushes. To recognize any part of the body as beyond torment would offer the tortured some protection – and perhaps severely reduce the effectiveness of the torture.

Torture resembles punishment in at least four related ways. First, like torture, punishment would be a crime did the law not specifically provide for it. The death penalty resembles murder, imprisonment, kidnapping; and so on. Second, like torture, punishments (or rather the acts that constitute punishment) are all prima facie morally wrong. Third (and in consequence), punishment must have a positive defense, a plausible "theory of punishment," to be morally permissible. And, fourth, like torture, most punishments (branding, imprisonment, and so on) require that the convict be (more or less) helpless. Only reprimands, suspended sentences, and the like do not.

Punishment nonetheless differs from torture in at least four morally significant ways. First, punishment presupposes rationality. The insane, children, and other mental incompetents are (generally) exempt from (legal) punishment (at least while their incompetence lasts). Torture requires only sentience. Second, punishment recognizes the condemned as retaining certain rights (especially, the right to be treated as a human person). The concept of "mistreating the condemned" is not empty in the way "mistreating the tortured" is.[5] Third, punishment has a limit the condemned knows as well as those who execute sentence. For example, even someone condemned to be drawn and quartered knows that he will not be flayed or branded. Fourth, punishment (except punishment that is also torture) does not seek to break the condemned (though it may in fact do so). Unlike torture, punishment does not take full advantage of the condemned's helplessness.

[5] A particular legal system may, of course, provide content to the concept of "mistreatment of the tortured." The point here is that torture as such does not (even though, on almost all theories of punishment, the concept of punishment does).

To summarize: torture is the intentional testing of a sentient, helpless being's ability to bear physical suffering against that being's will and indifferent to its welfare. Nothing in the concept of torture requires the tortured to be human or rational; it is enough if the being can be made to suffer.

II. Why Torture Is Morally Wrong

Torture is a subcategory of what the UN Convention against Torture calls "cruel, inhuman, or degrading treatment," what (for the sake of brevity) I have been calling "inhumane treatment." The convention contains no definition or analysis of inhumane treatment; nor does any other internationally approved document. The philosophical literature is also largely silent. The only developed literature at all relevant concerns the related term of American constitutional law, "cruel and unusual punishment" (and that literature almost entirely concerns the death penalty).[6] Torture seems to have pushed other forms of inhumane treatment into the shadows. Yet understanding what is wrong with inhumane treatment generally makes explaining what is wrong with torture much easier – as I will now show.

I begin with the obvious. What we consider inhumane varies with circumstances even though the suffering in question does not (or, at least, does not seem to). For example, we do not consider a penalty such as branding inhumane simply because of the suffering it causes. Branding must have hurt as much when, only a few hundred years ago, no one considered it inhumane. Nor do we necessarily object to a treatment as inhumane because of what we are unwilling to suffer. We are ourselves sometimes willing to suffer inhumane treatment. For example, most of us would prefer a large *R* branded on the upper arm to 10 years' imprisonment, even though we consider branding, but not imprisonment, inhumane.

We seem to object to treatment as inhumane only when treating anyone that way, especially someone else, shocks us – when, that is, we cannot comfortably bear its general use. We suppress inhumane treatment in part at least because we do not want to be shocked by it. To claim that a certain way of treating people is inhumane is, however, to claim more than that it shocks us. Most of us are shocked by many things beside

[6] For a good summary of case law on torture, see Dannner, pp. 156–60 (Jay S. Bybee, Appendix, "Memorandum for Albert B. Gonzales, August 1, 2002").

inhumane treatment, everything from some popular songs to some religious beliefs. Shock, even general shock, is only a necessary condition for inhumaneness. Also relevant is that the conduct in question be (a) a way of treating another sentient being, (b) against her will, and (c) not for her benefit. Why is conduct meeting all these conditions inhumane? What is the connection between shock and morality?

The connection seems to be this: If, against her will and without benefit to her, we treat someone in a way we generally find shocking, we do not treat her as a person. We force upon her something that does not usually happen to persons we know, something so bad that the sight (or perhaps even the contemplation) of it makes us uncomfortable. To treat a person that way is to treat her as we ourselves do not want to be treated, as we would not treat most other persons, and perhaps as we would be unwilling even to treat animals. To treat her that way we must, in effect, consider her to lack the protection of moral rules protecting the rest of us. We thereby degrade her. If morality requires us to treat each person as a person (and that, it seems to me, is relatively uncontroversial even among non-Kantians), then we do something at least prima facie morally wrong if we inflict on a person, against her will and without benefit to her, treatment we find shocking. The more shocking a certain treatment is, the more morally wrong, all else equal. Because suffering is part, but only part, of what makes inhumane treatment shocking, suffering is one, but only one, consideration in determining whether this or that treatment is inhumane.

Making inhumaneness a function of shock in this way raises a difficult question. Shock at this or that is not a basic evaluation all rational persons must share. Shock is also not the inevitable consequence of what all rational persons share. For example, much treatment that would shock most of us – such as cutting off a gangrened leg – does not shock a surgeon. What shocks us seems to be a consequence of how we live, of what we happen to experience (or not experience). If what is inhumane depends in part upon our agreeing that certain treatment is shocking, how does it happen that there is so much agreement about what is inhumane when we live in so many different ways? How, for example, is it possible to have a UN Convention against Torture most of the world's governments endorse? And why is there no similar convention for branding?

A certain way of life shapes our sensibilities in a certain way. A shared way of life, because it shapes a common sensibility, shapes a standard of inhumaneness too. We are made to agree. Branding does not shock a society in which most people have branded an animal or at least seen

many branded and in which most humans' scars are brandlike burns from accidents at home or work. In such a society, branding is not inhumane. On the other hand, making someone run busy streets naked would shock most people in a society where nudity is otherwise private, and, in such a society, forcing someone to run busy streets naked would be inhumane. Culture in general is a determinant of what counts as inhumane.

Technology in particular is also a determinant. By reducing suffering (for example, by providing drugs to relieve pain), technology can make a particular torture more shocking than it would otherwise be. Technology can also provide an alternative to torture (such as "truth serum"). But technology cannot make torture as such less inhumane. There is no worse way to treat a person than to treat her as (primarily) something to be made to suffer as much as necessary to serve some purpose not her own. Nowhere in the world is such suffering a part of ordinary life (nor is it ever likely to be). Torture is severe suffering by design, against the sufferers' will and interests, the limiting case of inhumane treatment. Nothing could be more universally shocking than that. To debate whether a certain way of treating a person "amounts to torture" is to admit that the treatment in question is well within the domain of the inhumane and therefore prima facie among the most serious of moral wrongs.

III. Exceptions?

The foregoing argument yields the conclusion not only that torture is prima facie morally wrong because it is inhumane but also that, all else equal, it is one of the morally worst forms of inhumane treatment. Why then would anyone defend torture? We may, I think, distinguish two sorts of defenders. One sort, what we may call "the realists," defend torture because (they say) it is in fact often useful in a world as dangerous as this one. They defend it not as a rare act but as a standing practice or institution.[7] They offer torture's equivalent of a consequentialist theory of punishment.

The realist defense depends heavily on certain empirical claims. Yet the realists never show that the claims are true or even probable. The realists may, for example, claim that torture was useful to the French during the Algerian War. They do not, however, show even that the information the French obtained by torture could not have been obtained in a

[7] See, for example, Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, CT: Yale University Press, 2002).

less morally objectionable way. They overlook entirely the possibility that torture might have cost the French more support than the information gained was worth, might thereby have contributed to the French defeat, and might even have set precedents that made the Algerian governments that followed the French much more oppressive than they would have been otherwise. All the other examples of "successful torture" – the British in Northern Ireland in 1968, the Israelis during the 1980s, and so on – never seem to have succeeded in the long run. Realists pay surprisingly little attention to reality.[8] Given that torture is prima facie morally wrong, the absence of proof of effectiveness is a good reason not to act as the realist advises. More than claims of success are necessary to justify an institution as morally suspect as torture. The claims should include a calculation of "trade-offs," a reliable way to assess the costs and benefits traded, and substantial evidence that a promised trade-off will be realized.

This criticism of the realists answers them in their own terms. There is another criticism, however, one that questions those terms. Realists assume that if, on balance, the good consequences of torture outweigh the bad, torture is justified. They are, in this respect at least, ordinary utilitarians. They will therefore not convince anyone who does not share their utilitarian commitment, for example, those who think moral rights (sometimes) trump good consequences. For nonutilitarians, all the realist defense of torture shows (or, rather, would show if its empirical claims could be defended) is that torture can, if morally permissible, be justified, all things considered. The realists in fact beg the question of torture's moral permissibility.

Not so the other defenders of torture. These seem to be philosophers suspicious of absolutes. While I sympathize with their suspicion, I nonetheless want to argue for a sort of moral absoluteness here, what we may call "practical moral absoluteness."[9] Some individual acts of torture may be morally justified in some imaginable circumstances (a metaphysical point), but none actually is (the practical point). In fact, no act of

[8] For some good attempts to think through the costs and benefits of torture, using available evidence, see Jean Maria Arrigo, "A Utilitarian Argument against Torture Interrogation of Terrorists," *Science and Engineering Ethics* 10 (July 2004): 543–72; Matthew K. Wynia, "Consequentialism and Harsh Interrogations," *The American Journal of Bioethics* 5 (January–February 2005): 4–6; and David Luban, "Liberalism, Torture, and the Ticking Bomb," in Karen J. Greenberg, ed., *The Torture Debate in America* (Cambridge: Cambridge University Press, 2005), pp. 35–83.

[9] Philip E. Devine, "A Fallacious Argument against Moral Absolutes," *Argumentation*, November 1995, pp. 611–16.

torture is morally justified (and so no institutionalization of torture can be). For all practical purposes – and so, for moral agents like us – torture is absolutely morally wrong.

The major moral theories are no help in showing that torture can (or cannot) be justified (that is, shown to be morally required or permitted). Different moral theories seem to give different results; some even seem to give different results in different hands.[10] The only way decisively to refute the claim that no torture is morally justified is to present (at least) one clear counterexample, a situation in which torture clearly is justified. Identifying a plausible candidate for that counterexample is not hard. It is (some version or other of) "the ticking bomb": a terrorist has placed an atomic bomb in the heart of Paris set to explode in only a few hours, leaving no time to evacuate the city; we have the terrorist in custody; only torturing him offers a means of learning where the bomb is in time to defuse it and save several million Parisians from a fiery death.[11] What I shall now show is that however plausible this example may seem to be, it in fact proves nothing.

Most often, there is no argument that the ticking bomb case is an exception to the general rule against torture, only an appeal to intuition: would not you say that we should torture the terrorist? If we all answered yes, the example would at least be "clear." But some do not answer yes. Good Kantians object that good consequences cannot justify conduct otherwise wrong (and their intuitions seem to correspond to their theoretical commitments). Some Christians may express the same intuition, paraphrasing Paul's words in Romans 3:8, "We should not do evil that good may come of it." And so on. Such contrary intuitions cannot be dismissed as "corrupted by theory," that is, as not "pure" or "presystematic intuitions." To dismiss an intuition on that ground, two conditions should be met. First, it should be possible for adults to have "pure" intuitions (in the relevant sense). That seems unlikely given that even relatively young children have theories about all sorts of things. Second, even if an adult does have some "pure" intuitions, there would still have to be some way to distinguish them from the corrupted ones. We would have to know enough of the history of the intuition to distinguish cause and effect.

[10] For a valiant (but – I think – unsuccessful) attempt to have all moral theories come out the same way on this question, see Fritz Allhoff, "A Defense of Torture: Separation of Cases, Ticking Time-Bombs, and Moral Justification," *International Journal of Applied Philosophy* 19 (Fall 2005): 243–64.

[11] Henry Shue seems to be the first philosopher to consider this temptation (and, I think, to give in to it – if only in a half-hearted way likely to give little comfort to defenders of torture). See the last few pages of his "Torture," *Philosophy and Public Affairs* 7 (Spring 1978): 124–43. For a good critique of Shue's handling of the Parisian terrorist (different from that I offer here), see Christopher W. Tindale, "The Logic of Torture," *Social Theory and Practice* 22 (Fall 1996): 349–74.

Do I have this intuition because I accept this theory? Or do I accept this theory (in part) because I have this intuition? Are the theory and intuition in reflective equilibrium? My own view is that an intuition is "uncorrupted by theory" (whatever its history) if my acceptance would survive exposure to all the relevant facts. That may be a controversial view of what counts as "pure" or "presystematic" intuition, but it is plausible enough to prevent dismissing the intuitions of those whose intuitions reject the ticking-bomb case. Crying "corrupted by theory" is no substitute for argument.

That, then, is one problem with the ticking bomb example; it convinces some but not all of those whom it must convince if it is to serve as a clear counterexample to the claim that torture is never morally justified. Another problem is being sure that, even if intuitions agreed, the agreement would concern moral justification and not something else. After all, it does not follow even from our all agreeing that we "should" do some act that the act actually is morally justified. There are at least three reasons why the inference does not follow (or, at least, does not follow without much more argument than so far offered).

First, the intuition's "should" may not be the "should" of morality but of prudence or some other nonmoral consideration. How are we to tell? Our intuitions are not neatly labeled. Certainly, their strength is not much of a guide to their nature. (Our strongest intuitions may, or may not, be the moral ones.) The only obvious guide to the nature of the intuition in question is an explanation of how the intuition would arise in accordance with moral principles we accept. Such an explanation cannot rely on consequentialist principles. Relying on such principles would beg the question against Kantians, Christians, and the like.

The second reason why we are not now entitled to move from the intuition of "should" to moral justification is that the intuition seems unreliable (whether or not a moral intuition). Both the strength of an intuition and its wide appeal are evidence for its reliability but not decisive evidence. Fallacies also generate strong intuitions and have wide appeal. Philosophers would not care about fallacies if they did not. The intuition in question does not seem likely to be true a priori. Its warrant seems to be experience, an implicit analogy between the ticking-bomb case and situations (somewhat) like it. We should analyze this implicit analogy as we would any explicit one. The intuition is reliable, insofar as it is, because we have made similar judgments and they have (generally) turned out to be right. Where we lack the requisite experience, our intuitions do not entitle us to conclude anything. The supporting side of the analogy is missing.

One of the strengths of the ticking-bomb case is its "purity," the omission of most of the complications of ordinary life. But that strength is

also a weakness. The purer the example is, the less it draws on the firm judgments on which an argument from analogy should depend. So, for example, we (even the police) have had little experience with fanatic bombers, none with such a bomber armed with nuclear weapons, and (therefore) none with such a bomber in custody and known to have set a bomb soon to explode. Consider what our intuition in the imaginary example might be if, say, our actual experience were that torture was generally useless in similar cases because fanatical terrorists so often gave misleading information, because torture seldom broke the fanatic in time (or at all), or because the "fanatic bomber" often proved to be a "crazy hoaxer" hoping for publicity even at the price of torture. Indeed, consider what our intuition would be if, actually having saved Paris, we nonetheless felt that we had wronged the bomber (that we now had "dirty hands"). Without experience of circumstances much more like the imagined case, we lack reliable intuitions about it.

A third reason why the inference from the intuition's "should" to "morally justified" may not go through is that what we are intuiting (even if universal, reliable, and moral) is a moral excuse (a reason to forgive in part or altogether) rather than a moral justification (a reason to approve). One reason to think we are dealing with an excuse is that ticking-bomb cases are usually introduced with a happy ending included (we "know . . ."). The good outcome seems to excuse conduct that would be inexcusable if it failed to prevent the disaster.

There is, however, another possibility: a public official can (some might say) justifiably torture if, but only if, the torture both meets some test of reasonableness in prospect (minimal torture necessary, no alternative, high probability of success, and so on) and succeeds (the torture saves Paris). The point is not that "the act accuses but the outcome excuses," but that (all else equal) the outcome justifies. The public official has "discretion to disobey" the rule prohibiting torture, but she must act at her own risk.[12] The justification depends on "moral luck" (as well as choosing according to certain standards).

This interpretation, however attractive, has one important disadvantage. It means that the ticking-bomb case cannot itself be an example of morally justified torture. The point of discretion to disobey is to assure that the decision that an act is justified awaits the outcome. If the torturer

[12] I take the term (and the concept) from Mortimer R. Kadish and Sanford H. Kadish, *Discretion to Disobey: A Study of Lawful Departures from Legal Rules* (Stanford, CA: Stanford University Press, 1973). For an extended defense of this approach to torture in ticking-bomb cases, see Oren Gross, "The Prohibition of Torture and the Limits of Law," in Levinson, *Torture*, pp. 229–53 (in which Kadish and Kadish is cited).

knew in advance what the outcome would be, she could not have discretion to disobey. Her decision would be either justified at the time she made it or not justified at all. Moral luck would have nothing to do with it. For our purpose, any appeal to discretion to disobey presupposes an actual case (the outcome of which we know), not a merely possible one (the outcome of which we stipulate), just what we now lack (that is why we are asked to imagine the ticking-bomb case).

That may seem enough reason to abandon the ticking-bomb case as a counterexample to the claim that torture is in practice absolutely morally forbidden. There are, however, at least two other reasons worth mention here.

First, the ticking-bomb case seems to presuppose that we have available someone who knows how to torture effectively. This knowledgeable torturer must be from somewhere. Where? Insofar as we suppose that the torturer in question is likely to succeed, we must presuppose a skilled torturer and therefore an institution of torture to vouch for the torturer before he begins to work over the fanatic bomber. The moral cost of trying to save Paris by torturing one fanatic bomber is therefore much higher than it may at first seem. We must have an institution of torture – with some people tortured without any advantage but sharpening a torturer's skills. Anyone asked to exercise intuition on a ticking-bomb case should, therefore, first be reminded of the background institution necessary to give the torture a good chance of success.

Second, the ticking-bomb case presupposes the absence of any effective alternative to torture. Why presuppose that? Less objectionable methods of interrogation seem to succeed at least as often as torture does. "More inhumane" does not mean "more effective." There are, then, no circumstances in which we could reasonably conclude that torture is our only, or even our best, option.

Conclusion

In such circumstances [as the ticking bomb case] interrogators must apply a "minimum harm" rule by not inflicting more pressure than is necessary to get the desired information. Further, any treatment that causes permanent harm would not be permitted, as this surely constitutes torture.

– Final Report of the Independent Panel to Review DoD Detention Operations (August 2004)[13]

[13] Danner, p. 401. The quote is from "Appendix H (Ethical Issues)."

I have now explained what torture is, why it is in general morally wrong, and not only why we have no clear example of morally justified torture but, more importantly, why we are unlikely ever to have one, even in a moral emergency. While the possibility of such an example remains, it should be of no more comfort to potential torturers than other possibilities we can imagine but do not expect to see realized, for example, that the world will end tomorrow. We are not entitled to act on such bare possibilities. Absent some unlikely event, torture can in practice never be morally justified.

Is there any inhumane treatment less severe than torture that is (practically) morally justified? Nothing in what I have argued so far rules out that possibility. Yet, the argument does at least suggest that any treatment much like torture will be ruled out for much the same reasons that torture is. The less like torture an inhumane way of treating someone is, the less likely it is to be subject to the same objection as torture. But the less like torture it is (the less suffering it causes), the less shocking it is likely to be – that is, the less inhumane. The less inhumane, the less likely it is to be effective in the way torture is supposed to be (the less likely it is to "break" the detainee). The less effective, the less it has of the very feature that is supposed to overcome any objection relying on inhumaneness.

There may be some point at which the advantages of some inhumane treatment overcome objections to it, but, if there is, it should involve suffering much less than torture imposes. In any case, we would have to consider each inhumane treatment on its own merits, beginning perhaps with that wet towel put over the face of a prisoner to induce the "misperception" of suffocation, but eventually progressing to any treatment that falls short of international standards of humane treatment. Utilitarian considerations such as the usefulness of prisoners as "sources of intelligence" do not preempt ordinary human rights. To claim the right to mistreat people simply because that is useful to us is to claim an absolute, arbitrary power over them, a power no rational person would grant another – and certainly not one that we would grant others. To claim that a human person can forfeit the right to be treated as a person requires an argument much different from any yet given.

11

On Terrorism

Definition, Defense, and Women

Marilyn Friedman

This chapter deals with three issues: (1) how best to *define* terrorism, (2) whether terrorism is ever *defensible*, and (3) whether female terrorists should be held to the same standards of moral *responsibility* for their terrorist acts as are male terrorists.

I. Defining Terrorism

The word "terrorism" and its cognates have been defined in a great variety of ways. A famous study published in 1983 found 109 different definitions of terrorism already available, some of them scholarly, some political, and some legal.[1] Commentators continue to disagree about what is the best definition.

How terrorism is to be defined is a question of practical significance and not merely theoretical interest. In the wake of the September 11 terrorist attack on the United States, the United Nations Security Council passed Resolution 1373, which imposes obligations on states to oppose terrorist activity in a variety of ways, including trying to bring it to an end, punish it, and prevent it from happening in the future.[2] These requirements are issued internationally as uniform obligations on states, so the efforts by various states to comply with the requirements should cohere legally. Yet without a shared definition of terrorism, each state would be acting on a unilateral definition. The resulting state efforts against terrorism might not be mutually consistent or coherent. Also,

[1] A. Schmid and A. Jongman, Political Terrorism (Amsterdam: North Holland, 1983), pp. 119–52, cited in Ben Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006), p. 57.

[2] Saul, p. 236. Resolution 1373 was passed on October 1, 2001; Saul, p. 50, n. 295.

in particular cases, disputes might arise as to which persons or groups are terrorists and whether particular actions are genuine incidents of terrorism or merely domestic crimes.[3] In addition, under the rubric of combating an ill-defined terrorism, governments might engage in what really amounts to human rights violations and the suppression of political opposition.[4]

Thus, defining the term "terrorism" serves the legal and political purpose of promoting a single shared meaning in place of the current heterogeneity, and making more precise the nature of the actions involved for which people are going to be judged, convicted, and punished.[5] A good working definition will be relatively complete in covering the features that characterize clear-cut cases while also excluding features that characterize cases of violence or political action that are not terrorist.

The process of forging a shared definition of terrorism calls for a dialogue among both commentators and practitioners in which some participants suggest definitions that others then modify in light of reflection on what they take to be actual instances. There is no reason to expect that this process will be easy, since different commentators may disagree about which examples count as cases of terrorism. Attacks on civilian targets such as subways and marketplaces seem to be clear-cut cases of terrorism but what about attacks on military bases or the Pentagon? The goal is to characterize types of political violence that are similar enough to warrant one label for the legal and political purposes for which the term "terrorist" would be used, while excluding those types of political violence that are dissimilar enough to warrant different treatment.

Loosely speaking, terrorism refers to a type of means that is employed for political ends, in the broadest sense of the term. The type of means in question is the use or threat of violence to produce fear in a population. By this means, terrorists hope to influence the government or leaders of the target population to act in a particular manner. Thus, a good initial working definition of "terrorism" is violence aimed at producing terror or extreme fear in a population and undertaken for political or ideological ends.

There are various challenges to overcome in specifying this idea more precisely. For one thing, terrorist violence has to be defined in a way that distinguishes it from other forms of political violence that are not

[3] Saul, p. 49.
[4] Saul, pp. 50–51.
[5] Saul, pp. 21–22.

terrorist, such as legitimate military action. A second challenge is to incorporate into the definition of terrorism some idea of whose actions may count as terrorist and whose may not. Some commentators think that state actions do not amount to terrorism, that only nonstate groups can commit terrorist acts. If the acts of certain sorts of entities are to be excluded from the category of "terrorist," the definition of terrorism should make this clear.

A third challenge is to formulate the definition of terrorism in a way that leaves open the question whether terrorism itself is ever defensible. This issue should be decided independently of the way terrorism is defined. If terrorism is terrorism largely because of the means it employs (violence aimed at producing terror for a political cause), then the definition of terrorism should not prejudge the end for the sake of which it is carried out. That issue should properly be left open for political debate and not decided by definitional fiat. The definition of terrorism should simply specify the sorts of means that are distinctive of terrorist acts.

Many forms of violence are already criminalized in the laws of most, if not all, states. Many actions that terrorists commit, such as murder and arson, are already criminal offenses. It is an important question, then, why terrorism should be separately identified and criminalized. Terrorism, as noted previously, is distinguished by two characteristics: it is aimed at causing fear in a population, and it is carried out for political ends. As political violence, terrorism differs from violence undertaken for the private ends of individual persons.[6] For the purposes of this discussion, "political" pertains to processes and institutions of governing as well as to the public sphere more generally.[7] Political violence, in that sense, makes terrorism distinctive and seems to warrant separate treatment from violence which is not political. Political motivations can be legitimate as motivations and this should affect the legal and political understanding of terrorism. Also terrorism can spill across national borders and is widely feared as a potential threat to world order, especially to international peace and security, something that is not normally true of personal violence.[8] As well, except for the actions of serial rapists or killers, personally motivated violence does not normally operate by instilling terror in a population.[9]

[6] Saul, p. 38.
[7] Saul, pp. 42–45. "Political" can also be used to refer to dimensions of power in human relationships, in which case it is relevant to the so-called private sphere of human relationships.
[8] Saul, pp. 46–47.
[9] Saul, p. 39.

Ben Saul has outlined the main elements of a definition of terrorism, based on international agreement on the nature and wrongness of the sorts of actions that tend to be classified as terrorist.[10] His definition is as follows:

1. Any serious, violent, criminal act intended to cause death or serious bodily injury, or to endanger life, including by acts against property;
2. where committed outside an armed conflict;
3. for a political, ideological, religious, or ethnic purpose; and
4. where intended to create extreme fear in a person, group, or the general public, and:
   a. seriously intimidate a population or part of a population, or
   b. unduly compel a government or an international organization to do or to abstain from doing any act.[11]

This definition has the merit of not limiting terrorism to the actions of nonstate actors. Acts of political violence committed by states may constitute terrorism according to this definition. Saul also recommends adding a provision that explicitly *rules out* any act of "advocacy, protest, dissent or industrial action which is not intended to cause death, serious bodily harm, or serious risk to public health or safety."[12] Saul's definition would thereby exclude political violence directed solely toward the destruction of property as well as political protests that do not target innocent persons with lethal or serious force.

In contrast to Saul's approach, many commentators define terrorism in terms of the actual or attempted killing of noncombatants or innocent persons. This feature is regarded by many as the essence of terrorism and the core of what is wrong with it.[13] How crucial is this element to the concept of terrorism?

To begin with, there is, of course, a difference between the concept of an innocent person and the concept of a noncombatant. The concept of an innocent person seems to be the more relevant concept in regard to the definition of terrorism. The term "innocent" is not being used here in an absolute moral sense, but rather in reference to someone who does not participate in or support the political or military activities that the terrorist opposes. This is a wider concept than that of noncombatant.

[10] Saul, p. 59.
[11] Saul, pp. 65–66.
[12] Saul, p. 66.
[13] Cf. C. A. J. Coady, "The Morality of Terrorism," *Philosophy* 60 (1985): 58. I myself previously defined terrorism in terms of the intended killing of innocent persons, but have revised my thinking in light of the reasons given in this essay.

Someone who does not engage in combat may nevertheless work at a munitions factory that provides supplies that are being used in a military crackdown on the terrorist's nationalist movement. A munitions worker is not "innocent" with respect to military or political activities that the terrorist is fighting. Also, combatants may be conscripts who in fact oppose the military activities they are ordered to carry out. Yet this does not mean they are "innocent" with respect to those activities. Because they are trained to follow orders, their personal opinions do not matter; they constitute threats to the groups against which they are ordered to carry out military operations. To reiterate, what seems to be important to the definition of terrorism that centers on the killing of the innocent is that terrorism is carried out in a manner that endangers people who are not actively engaged in the political or military operations that the terrorists are fighting. This is the sense in which these victims are "innocent."

Saul's definition certainly includes actions that intentionally target innocent persons and targets them with lethal force, but it is not limited to those actions. The definition is broad enough to encompass both recent usage and earlier usage, or earlier terrorist tactics. A few decades ago, airplane hijackings, hostage takings, and destruction of property that had military significance, such as research laboratories for weapons development, were considered to be terrorist even in cases in which lethal force was not intentionally used against anyone. Rather than altering the definition of "terrorism" every decade or two, it seems more historically stable to define terrorism in a way that encompasses the varied uses of the past few decades, provided those uses are similar enough in other respects. Airplane hijackings and hostage takings by themselves can both certainly fit the predefinitional intuition that terrorism is political violence aimed at producing fear in a population. On Saul's approach, then, the use of lethal force against innocent persons is not essential to terrorism, even if it occurs frequently in terrorist acts.

If terrorist acts were limited, by definition, to acts that aim intentionally at the death of innocent persons, then terrorist acts by definition would violate a principle that is central to just war theory and a cornerstone of international humanitarian law. Calling an act one of terrorism would immediately invoke this wrong and make such acts difficult to defend. A wider definition of terrorism has the advantage of making it easier to defend or justify particular cases of terrorism. If the word "terrorism" is used also to cover acts that do not involve the intentional use of lethal force against innocent persons, then the category of "terrorist acts" would leave open a genuine possibility of some sort of defense. This seems to

be an advantage because it allows for a wide-ranging dialogue and debate over whether political violence is ever "justified," something that might otherwise not be debated and might be decided on narrow ideological grounds.

The political or ideological ends for which terrorism can be undertaken are themselves hotly contested matters. There is substantial political disagreement about whether any of the situations that give rise to terrorist activity involve legitimate grievances and justified political ends, and, if so, whether any form of political violence is ever justified on behalf of those legitimate causes. The next section of this chapter explores those issues more deeply. Suffice it to say here that the definition of terrorism should neither prejudge these issues nor be otherwise biased by any particular political ideology nor formed in a manner that serves the political interests of particular states or political entities. Evaluating the causes that give rise to terrorism should not be prejudged by the prior condemnation of the means used in terrorist acts.

II. Defending Terrorism

Nor should the assessment of terrorist acts be prejudged by prior conclusions about whether their causes are legitimate or not. Even if one judges a political cause to be legitimate, this does not entail the permissibility of any and all political violence undertaken in its name. Thus, it always remains an open question whether terrorism can ever be defended.

Formally speaking, there are at least two sorts of defenses that can be used on behalf of any criminal action: justifications and excuses. A justification for an act is an explanation of the act that involves admitting the actor's responsibility for it but offers reasons to show that the act was, on balance, the right thing to do or, at least, permissible. This sort of approach involves claiming that although the act might seem wrong on the face of it, there are allegedly circumstances or reasons to regard its apparent wrongness as outweighed by factors that make it legitimate. An excuse, on the other hand, is an explanation of why someone acted that involves admitting that the act was wrong but claiming that the agent was not responsible, or had diminished responsibility, for committing the act.[14] This section will focus on the question of whether terrorist acts can ever be *justified.* (The next section will deal with the question of excuses for terrorism in certain particular sorts of cases.)

[14] Saul, p. 95.

Most condemnations of terrorist acts tend to ignore the underlying national or political causes that give rise to terrorist movements. Public figures tend to focus on apprehending and punishing terrorists or those who harbor and support them, or on defending against further terrorist attacks. These responses tend to be infused with a rhetoric that demonizes the terrorists and blocks efforts by members of victimized populations or bystanders to gain understanding of the terrorists' political aims and motivations.

Part of the debate over whether terrorism can ever be defended concerns the extent of the legitimate means that may be used on behalf of legitimate political causes, at least as a last resort. As noted earlier, however, some commentators *define* terrorism in terms of the intentional use of lethal force against innocent persons, and they may regard this sort of violence as absolutely wrong and therefore unjustifiable and inexcusable in any case.[15] I suggested earlier that this definition tends to stop the debate over terrorism prematurely and to block a full consideration of whether the *aims* of terrorism might not be legitimate however impermissible the means.

Terrorist activity is often undertaken by members of a group that is seeking political self-determination or national liberation from occupation or colonization.[16] These aims may sometimes be quite legitimate as political causes. To be sure, a 1970 UN declaration, Principle of Equal Rights and Self-Determination, denies that liberation movements have any legal right to use force in their quest for self-determination. However, the declaration does not deny the legal right of liberation movements to use force in self-defense against the *forcible denial* of their self-determination.[17] This opens up the possibility that terrorist acts for the right sorts of causes and under the relevant sorts of conditions might be justifiable.

However, even if a liberation movement is entitled to use force in its struggle, its fighters are still required by international norms to comply with *jus in bello* rules for the waging of war. These rules include the principles of necessity, proportionality, and discrimination. I shall focus here on the principle of discrimination, which bans the intentional targeting

[15] Saul, pp. 72–73.

[16] Robert A. Pape studied suicide bombers from 1980 to 2003 and concluded that the primary motivation behind those terrorist activities was nationalistic. They were all seeking to "establish or maintain political self-determination by compelling a democratic power to withdraw from the territories they claim." Robert A. Pape, *Dying to Win: The Strategic Logic of Suicide Terrorism* (New York: Random House, 2005), p. 4.

[17] Saul, p. 75.

of innocent persons with lethal force. It seems that those acts of terrorism that involve the intentional killing of innocent persons would be unjustifiable, however legitimate might be their political aims. This issue finds a parallel in the question of whether a state that is the victim of military aggression and has a just cause to go to war against its attacker is nevertheless constrained by the *jus in bello* rules of just war theory to limit its self-defense to means that avoid intentionally killing innocent members of the state that is attacking it.

Using lethal force against innocent persons does happen to be allowed under the principle of discrimination so long as it is merely the unintended side effect of acts that are aimed only at permissible military targets. Recall, also, that under Saul's definition, terrorism is not defined in terms of the intentional use of lethal force against innocent persons. Thus, an act of terrorism could be justifiable under the following sorts of conditions: (1) it is carried out for the sake of a legitimate political end, such as the political self-determination or national liberation of a people; (2) the use of force is justified as part of that struggle, for example, because the legitimate political end is being forcibly denied by the state or group that is targeted by the terrorist act; (3) the act either does not involve *using* lethal force against innocent persons or does not involve directing lethal force against such persons *intentionally.*

Terrorists may argue that the members of their enemy population are not innocent, that they are all in some sense complicit in the enemy's wrongful actions, because they contribute to it, support it, or at least do nothing to stop it. This argument, however, fails to take account of children. Although children have been pressured or forced into combat roles in some conflicts, young children, such as babies and toddlers, are innocent in any context; they cannot sensibly be described as complicit in their nation's political policies in any way. There may also be adult members of the population targeted by the terrorists who are not complicit in their own nation's policies because they either do not support, actively oppose, or are genuinely ignorant about their own government's actions against the terrorists' group. In any case, terrorists do not employ methods of due process when judging their victims, so terrorist attacks kill or wound such individuals without a proper legal finding of guilt.

Terrorists may think they are justified in targeting innocent persons in cases in which, for example, their liberation struggle was opposed by air force bombing runs that inflicted widespread "collateral" deaths of innocent persons or noncombatants on the terrorists' side. States undertake

these sorts of military tactics in order to minimize their own military casualties.[18] It seems clear that terrorist groups are justified in defending their own populations – when these are the victims of major wrongs, including the indiscriminate killing of their own innocent group members. In some of those cases, no legal process punished the wrongdoers, rectified past wrongs, or even brought the violations to an end. Fundamental human rights violations against groups that are forcibly denied national liberation sometimes seem to continue for years without relief. The debated question is how far a group whose self-determination rights and other human rights are being forcibly violated may go in forcibly defending itself against such treatment.

If a people are suffering from oppression, colonization, occupation, or some other forcible violation of their right to self-determination, is it justifiable for them to use terrorism, especially terrorism that intentionally targets innocent persons with lethal force, in order to gain their liberation? As noted earlier, some commentators say no: the intentional use of lethal force against innocent persons is simply inexcusable, indefensible, and unjustifiable, no matter how legitimate the political ends that motivated those acts. However, the quest to liberate a people is the quest to end the violation of certain human rights, in particular the right of those persons to self-determination as a people. Also, circumstances might be such that the suppressed people have exhausted all peaceful means for seeking their liberation but to no avail. In addition, the suppressed people might be poor and lacking in the resources to pose a serious military threat to the combat forces that deny them self-determination. Intentionally targeting innocent persons of the state that forcibly denies their self-determination might be the only option open to them for resisting this political suppression.

This defense of terrorism, however, is still not satisfactory. The problem is that the rights to life and bodily security of the *innocent* members, such as infants and toddlers, of the state that is denying self-determination seem to be morally weightier, as human rights, than the right of self-determination, even when the latter is being forcibly denied. However, suppose that the state that is forcefully denying self-determination to another group is also violating the rights to life and bodily security of members of the denied group. That is, the forceful denial of self-determination to a group may not simply be a matter of denying them political self-determination but may also involve threats to their lives and

[18] Saul, p. 93.

bodily security. In that case, the liberation movement on behalf of that people would be acting not only to gain liberation for its people but also to protect the rights to life and bodily security of their own people. If liberation movements are facing violations of the rights to life and bodily integrity of their members in addition to, or as part of, forceful opposition to their self-determination, then it seems that they should have wide latitude to use lethal force in their own self-defense. If innocent persons are being killed or threatened in the group seeking liberation, then should they not be able to defend themselves, even by means that intentionally violate the same rights of members of the state that is forcibly suppressing them? What if there is no other way for them to end the opponent's violation of their own rights to life and bodily security, not to mention self-determination?

III. The Moral Responsibility of Female Terrorists

Women have carried out violent acts of terrorism as Palestinian fighters against Israel, Liberation Tigers of Tamil Eelam (Sri Lanka), "black widows" of Chechnya, members of the Provisional Irish Republican Army, the Weather Underground (United States), the Baader-Meinhof Group/Red Army Faction (Germany), the Red Brigades (Italy), Shining Path (Peru), the Japanese Red Army, and as part of the nineteenth- and twentieth-century uprising against czarist Russia, among others.

Should female terrorists be held to the same standards of moral responsibility as men who commit similar actions? In general, female terrorists tend to be viewed as being less committed than men to the terrorist causes for which they fight and more motivated by personal relationships than by politics per se. For these and other reasons, commentators, legal systems, and publics at large sometimes regard female terrorists as less responsible for their terrorist acts than they regard male terrorists.[19] Is this assessment of women's diminished responsibility justified?

In particular, what about female terrorists who hail from societies that involve the extensive social subordination of women to men? Of course,

[19] Rhiannon Talbot argues that commentators on female terrorists have trouble grasping the female and the terrorist identities together, that when the female dimension is central, the women's agency as terrorist is downplayed and they are regarded merely as dependent auxiliaries, whereas when their terrorist dimension is central, they tend to be viewed in more masculine terms; see Talbot, "Myths in the Representation of Women Terrorists," Eire-Ireland (Fall 2001), available at http://www.dushkin.com/text-data/articles/31680/body.pdf, pp. 1–10, accessed October 10, 2006.

no society is entirely free of such subordination.[20] Also female subordination exists, and has existed in the past, in many societies that do not produce female terrorists. The subordination of women to men obviously does not, by itself, cause women to become terrorists.[21] However, suppose other conditions also obtain that motivate a people to engage in terrorist violence on behalf of a political cause such as the quest for national liberation. Under those sorts of conditions, terrorist leaders and organizers would seek to recruit support wherever they could find it. If terrorist leaders tended to be men, and social practices of female subordination already made women generally vulnerable to the dictates of men, then terrorist leaders would find the women among their people to be perhaps especially vulnerable to male terrorist recruitment efforts. Some authors or agencies claim that women are sometimes coerced or pressured into terrorist activity by male partners or by men who manipulate the conditions of women's subordination.[22]

Societies with extensive female subordination are usually also societies in which women tend to be barred from various roles in the public sphere. Engaging in political violence of any sort would not be a typical sort of activity in which subordinated women would normally be pressured or coerced to engage. It would therefore be unusual for female-subordinated societies to give rise to large numbers of female terrorists. However, when a people are seeking their own liberation, circumstances are not typical. The urgent political quest for self-determination might lead societal leaders to use whatever means are available to pursue that end. Women have strategic advantages as terrorists. For example, they are less likely to be suspected of terrorist activity because of widespread stereotypes about women's nonviolence. Women may therefore have an easier time than men in gaining access to target sites without being searched for concealed weapons or explosives.[23]

[20] There is no presumption here that Western societies are free of female subordination or that it is more prevalent in non-Western societies than in Western societies.

[21] Perhaps if it did, there would be less subordination of women.

[22] In some cases, terrorist leaders allegedly exploit the threat of adverse consequences for women who are regarded as dishonored in their cultures; cf. Israeli Ministry of Foreign Affairs, "Blackmailing Young Women into Suicide Terrorism," February 12, 2003, available at http://www.mfa.gov.il/MFA/Government/Communiques/2003/Blackmailing%20Young%2, accessed May 3, 2006; and C. J. Chivers, "In Murky War Zone, a Secret Life as Terrorist's Wife," *International Herald Tribune*, August 28, 2006, p. 3.

[23] For a journalistic account of Al Qaeda's turn to female terrorists, see Christopher Dickey, "Women of Al Qaeda," *Newsweek*, December 12, 2005, pp. 27–36.

My question about women's responsibility for terrorism, then, focuses on female terrorism that arises in a social group facing a complex combination of circumstances: (a) its members want political self-determination, which they are being forcibly denied; (b) the group members believe that political violence is needed to attain their end; (c) women's participation in that political violence has strategic value; and (d) in general, women are subordinated in the group to male control. This last condition is the one that prompts the question whether women who engage in terrorism under that complex set of conditions are responsible for their terrorist acts.

Men in societies that are violently seeking political self-determination may also be subjected to pressure or coercion to engage in terrorist activity, particularly men who are not in leadership positions. Nothing in this discussion rules out that possibility. However, in male-dominated societies, men find domains in which they are in control, such as their own families, and in which they can practice and develop full and dominant moral agency. In societies with extensive female subordination, women face restrictions that make it difficult for them to develop their own moral agency in any domain, especially in public political life. This gender difference prompts the thought that women who commit terrorist acts under severely female-subordinated conditions may not be acting with full responsibility.

To consider how to assess the moral responsibility of female terrorists who emerge from conditions involving extensive female subordination, let us explore an analogy for excusing or exempting someone from moral responsibility for her behavior. Consider the military defense of acting under orders issued by a superior officer, a defense that lower-ranking military personnel may use in some jurisdictions against charges that they have committed war crimes. Does this example provide a useful model for attributing diminished *moral* responsibility to female terrorists who live in cultures that subordinate women to men?

Most philosophers agree that for a person to be morally responsible for her actions, she must have at least two basic capacities. First, she must be able to understand moral guidelines and, in light of those guidelines, to recognize how the circumstances she faces and the options available to her are relevant to deciding what to do. A grasp of moral guidelines involves an ability to apply them to a variety of situations and to have some sense of how to adjust their demands in light of what is prescribed by still other moral guidelines. The ability to apply moral guidelines to

actual situations requires in turn such abilities as attention and judgment. Second, a person must be able to act in light of her understanding of moral guidelines, situational factors, and available options.[24] An action for which someone is to be held responsible must have resulted from her choice and the choice must be based on the agent's powers to grasp, apply, and act in light of relevant moral guidelines.

Someone may not be morally responsible for what she does if she has a relevant excuse on that occasion or is generally exempt from moral responsibility.[25] An *excuse* pertains to a particular action; someone is excused from moral responsibility for a particular action she committed if there were circumstances that interfered with her grasp of the moral significance of the situation or that blocked her capacity to act in light of her moral understanding.

Someone is *exempt* from moral responsibility in general if her capacities for either understanding situations in light of moral guidelines or acting in accord with that understanding are generally impaired or undeveloped. The capacity to reflect morally on what one does is a matter of degree. Moral responsibility is diminished to the extent that the agent's past has left her with a reduced capacity to reflect on what she does. Exempting conditions are those that deprive people of the powers of reflective self-control or that prevent those powers from ever emerging in the first place. Most philosophers would consider mental illness, mental incapacity, trauma, violence, abuse, neglect, and indoctrination to be conditions that, to some degree or other, could exempt someone from full moral responsibility for her actions. Many of these conditions amount to coercive forms of developmental socialization.

Could conditions of female subordination, with its enforcement practices and the socialization of women for submission to men, exempt women from moral responsibility for their actions? Does women's social subordination to men undermine women's ability to grasp moral guidelines, attend to the morally significant features of situations, understand

[24] R. Jay Wallace, *Responsibility and the Moral Sentiments* (Cambridge, MA: Harvard University Press, 1994), pp. 157–62. Marina Oshana, "The Misguided Marriage of Responsibility and Autonomy," *The Journal of Ethics*, 6 (2002): pp. 263–64. Michael McKenna, "The Relationship between Autonomous and Morally Responsible Agency," in *Personal Autonomy: New Essays on Personal Autonomy and Its Role in Contemporary Moral Philosophy*, ed. James Stacey Taylor (Cambridge: Cambridge University Press, 2005), pp. 207–8.

[25] Wallace, pp. 118, 143–45. See J. L. Austin, "A Plea for Excuses," in J. L. Austin, *Philosophical Papers*, ed. J. O. Urmson and G. J. Warnock, 3rd ed. (Oxford: Oxford University Press 1979), pp. 175–204.

their available options, decide how to act in light of those guidelines and understandings, and then act accordingly? In particular, does it exempt women from moral responsibility for criminal actions such as terrorism?

Is subordination ever a good excuse or exemption that relieves one of moral responsibility for one's acts? Is it warranted to relieve *anyone* from moral responsibility for wrongful actions he or she has carried out as a subordinate member of a group in which the obedience of subordinates to their "superiors" is a culturally enforced practice? There is at least one context for which many people have thought the answer was yes. Lower-ranking soldiers are systematically subordinated to the orders of their superior officers. In the military jurisdictions that allow for it, the "superior orders defense" excuses a soldier from legal responsibility for a criminal action on the grounds that the soldier performed the action in obedience to orders from a superior officer.[26]

At first glance, superior orders, although perhaps justified as a *legal* defense against criminal charges, seem insufficient to excuse a soldier from *moral* responsibility for criminal acts. It seems that a soldier who has the general capacity to respond to morally relevant reasons for action should be able to continue exercising this capacity even in the face of orders to commit criminal acts. If a soldier is a morally responsible agent to begin with, that means, by definition, that he does have the developed capacity to consider moral reasons and act accordingly. If his action was a crime, then, by definition, there was at least one reason against committing it. If his criminal action also violated proper moral norms, then there are good moral reasons in addition to reasons of law against committing it. According to the standard conception of moral responsibility, as noted previously, someone who can understand moral reasons and act in light of that understanding is morally responsible for her actions.

However, standard philosophical accounts of the conditions that excuse someone from moral responsibility for wrongful actions do not tend to take account of "superior orders." An individual may have role-related responsibilities to abide by the orders of those who are superior to her in a shared social hierarchy. Deference of lower-ranking members of a social hierarchy to higher-ranking members may sometimes be necessary for the effective, coordinated action of a hierarchy. Effective,

[26] It should be noted that legal responsibility differs from moral responsibility and does not settle all questions that might arise regarding the latter. However, legal rules can provide models for ways of thinking about the moral questions.

coordinated hierarchical action may, in turn, sometimes serve a legitimate social purpose.[27]

In the context of military operations, soldier obedience to a superior seems, in general, to be important for the success of military operations. In addition, an effective military is necessary in an organized society for self-defense against aggressive threats to the security and the very existence of the society. Military organizations would lose most of their effectiveness if lower-ranking soldiers were encouraged, or even merely allowed, to decide for themselves whether to obey every order they were given. The self-defense of a society is important enough to override at least some other values with which it might conflict. One of the values that may have to be sacrificed, at least in part, in order for a society to maintain an effective military is the independent moral reasoning of soldiers when they act in their military capacities. This reasoning suggests that soldiers should not be held *legally* responsible for criminal acts taken under orders because their obedience to orders tends in general to serve fundamental – and presumably morally overriding – social interests. Or so the argument goes.

According to Mark Osiel, international law is not uniform or fully settled on the question of whether obedience to superior orders is an acceptable legal defense for soldiers against criminal charges.[28] In addition, different nation states have differing legal policies of their own. Some states allow soldiers to use obedience to superior orders as a complete defense against any criminal charges for ordered actions, even if the solder realized the ordered action was unlawful and even if there was no duress: that is, the superior officer did not threaten punishment for disobedience. The Communist bloc favored this approach and much of the Third World still does so.[29]

[27] It is crucial to note that I am not defending hierarchy or subordination in general. There are numerous abusive and unjustified forms of it throughout various societies and cultures, and it is often based on irrelevant human attributes such as gender and race. In this discussion, I am simply considering the possibility that military force serves a crucial social purpose of self-defense against external military aggression, and the hierarchical organization of military personnel promotes its effectiveness in carrying out this mission.

[28] Mark Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War* (New Brunswick, NJ: Transaction, 1999), pp. 42–43. According to Osiel, the International Military Tribunal at Nuremberg claimed that it did not allow superior orders as a defense, regarding it only as a mitigating factor toward determining punishment. However, the main tribunal and the later tribunals were less clear-cut in practice. The United Nations Security Council has also tried to disallowed the defense of superior orders in its International Tribunals for former Yugoslavia and Rwanda. However, the tribunals have not always complied.

[29] Osiel, pp. 41–44.

However, the superior orders defense has declined in international law and national military law in many nations because of Nazi war crimes, which led many to rethink the value of promoting unqualified obedience by soldiers to their commanding officers.[30] A majority of industrialized democracies now limit the superior orders defense with the "manifest illegality rule." According to this procedure, the law does not excuse a soldier for criminal actions carried out in obedience to superior orders if the ordered acts were "so egregious as to carry their wrongfulness on their face."[31] The manifest illegality doctrine requires soldiers to decide for themselves whether a superior's order calls for the performance of a manifest atrocity. In jurisdictions that recognize this rule, soldiers are held legally responsible for the most extreme crimes that they commit, even when they are simply obeying superior orders. However, the most recent formulation of the superior orders defense, Article 33 of the Rome Statute of the International Criminal Court, appears to restrict "manifestly unlawful" acts to "genocide or crimes against humanity."[32] This restriction leaves open the use of the superior orders defense for all war crimes of lesser severity than those two.

The reasoning so far is relevant to assessing soldiers' *legal* responsibility for war crimes but does not yet suggest that soldiers are not *morally* responsible for criminal actions taken under orders. However, there are also certain features of military culture that are relevant to assessing moral responsibility for actions. First, soldiers are trained intensely for obedience to superior orders. Second, a soldier's obedience may be compelled by the punishment that officers are permitted to inflict on soldiers who refuse to obey orders or who try to go "AWOL" (absent without leave), that is, leave the military before they are permitted to do so. Thus, military culture as a whole intensely socializes soldiers for obedience to superior

[30] Osiel, p. 58. Argentina provides an example of how presumptions may oscillate between two different approaches. The superior who gave an illegal order is considered the "sole responsible person" for the action in accordance with the order unless the soldier carrying out the order acted in an "atrocious and aberrant" manner. If the prosecution can prove that the action was atrocious and aberrant, then the "presumption reverses conclusively in the prosecution's favor" and the soldier is now held to share responsibility for the crime (Osiel, p. 59). It appears that the nature of the act alone is sufficient to reverse the presumptions about legal responsibility.

[31] Osiel, p. 45.

[32] *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), pp. 18–19. This statute went into force on July 1, 2002. For a discussion of these international legal developments and the debate over the issue of the responsibilities of soldiers, see Larry May, *Crimes against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005), esp. chap. 10.

orders and uses coercion combined with restricted exit options to ensure that obedience occurs.

By analogy with military contexts, a "superior orders" defense against a charge of moral responsibility for a criminal act might be justified if (1) it is necessary for the adequate functioning of a social hierarchy that serves a morally overriding social purpose, (2) the orders are enforced by coercion and/or the lack of viable exit options, (3) obedience to superior orders is inculcated into the behavior patterns of subordinates through socialization and/or conditioning and is supported socially by the articulated norms of the subculture in question. In particular, the combined effect of conditions (2) and (3) is to undermine a person's capacities for morally responsible agency and, thereby, to exempt someone from moral responsibility for actions taken under orders.

Are the culture, norms, or ends of systems of female subordination enough like those of a military hierarchy to make the superior orders defense, whether widely or narrowly construed, a useful model for assessing the moral responsibilities of female terrorists from female-subordinated societies? This question has two parts. First, should a woman's particular acts of terrorism be morally excused in case she performed them in obedience to specific orders from particular men? Second, does a pervasive culture of female subordination prevent or impede the emergence of women's general capacities for moral agency? That is, should gender-subordinated female terrorists be exempted *in general* from moral responsibility for their actions, including moral responsibility for their terrorist acts?

I have suggested that a superior orders defense might be justified if it is necessary to the adequate functioning of a social hierarchy that serves a morally overriding purpose. Is either the obedience of female terrorists to terrorist leaders or the general social subordination of women to men justified overall by contributing to a social good? The first question is about the legitimacy of the cause for which a woman's terrorist organization is fighting. The second question is about the value of female subordination as a general form of social organization. I shall assume that female subordination is *never* justified as a general form of social organization and that any social good that might result from it is vastly overridden by the violations of women's human rights that this sort of system involves. This leaves only the first possibility.

Could women's subordination in particular terrorist organizations ever serve a social good? A particular terrorist organization might be fighting for a just cause. I suggested in the preceding section that terrorist groups

might have legitimate political aims, such as self-defense against the forceful denial of self-determination to their people, and terrorist methods in self-defense might be justifiable if these occur under certain conditions and meet certain constraints. If a woman carries out terrorist acts under these circumstances, her actions might be justifiable and serve a social good.

However, note two points about this sort of example. First, this is a case in which a woman is excused from moral responsibility for particular terrorist acts, but not necessarily exempted from moral responsibility for her actions in general. Second, this reasoning for excusing female terrorists from responsibility for their terrorist acts would apply equally to their male comrades. Lower-ranking male terrorists as well as female terrorists who were contributing to a legitimate terrorist cause in a permissible manner when obeying superior orders would be just as warranted in doing so, and just as undeserving of blame, as women acting in the same manner. There would be nothing distinctive about women's roles under those circumstances.

Also, like other individuals, female terrorists might have legitimate excuses or exemptions, *as individuals*, from moral responsibility for their actions. Like men, they could suffer from mental illness or have experienced nongendered violence or indoctrination that diminished their moral capacities in general. The question here is whether the social subordination of women *as women* could have any bearing on the responsibility of female terrorists for their actions.

The military case suggests two other sorts of reasons that might apply selectively to the case of female terrorists from female-subordinated cultures but not to male terrorists, or, at any rate, much less well to male terrorists. First, soldiers experience the coercive enforcement of obedience coupled with the lack of viable exit options. Like soldiers, women in female-subordinated societies may experience the coercive enforcement of their obedience coupled with the lack of viable exit options. Second, soldiers are socialized to obey superiors, and this obedience is upheld by the norms of military culture. Also like soldiers, women in female-subordinated societies are socialized to obey men, and this obedience is upheld by the norms of those cultures, often including religious norms.

Military training diminishes the moral agency of soldiers by inculcating habits of obedience to superior orders, promoting an ethos that celebrates this obedience, and scorning disobedience. It may seem, however, that the military training a soldier undergoes is much more intense than the socialization of females for a status of subordination and therefore

does not help us to understand female subordination. Military culture, as Osiel observes, depends on a rigid and formally recognized hierarchy. In addition, military culture celebrates obedience to orders even under conditions of extreme danger to the obedient soldier, perhaps at the risk of the soldier's life. Furthermore, a soldier is trained intensely and coercively in "boot camp" for the military discipline of unquestioning obedience. A soldier is governed by superior orders backed by force, including the threat of court martial, and sometimes even execution, for disobedience.

However, a woman's social subordination may be even more extreme than that of a soldier. A woman in a strongly female-subordinated culture is like a soldier who is born and raised in boot camp for a lifetime of service and who will *never* be discharged from this position. Her socialization for subservient roles begins, not with boot camp at the age of 18, but in infancy. And women's subordinate status lasts, not for a mere two-, three-, or four-year term, but for life. Cultures of female subordination can be all-embracing, covering every aspect of women's lives. Women's entire personalities and life plans may be shaped in such cultures by their subordinated status. In strongly gender-subordinated societies, the norms of female subordination to men can be pervasive, and many formal and informal measures are taken to preserve this subordination. It may even be regarded as divinely ordained. Thus, whatever excuses from moral responsibility are appropriate for soldiers acting under orders should be even more appropriate for many subordinated women who are similarly acting "under orders."

To be sure, the social treatment of women varies from society to society. My argument pertains only to those cases in which women are intensely socialized and coerced into obedience to men. I leave it to the reader to determine which societies these are. As noted earlier, philosophers typically consider coercive socialization to be a condition that exempts someone from moral responsibility for her actions. The coercive socialization to which women are sometimes subjected is imposed on women merely because of their gender. Because nearly all women retain their gender in all walks of life, they are vulnerable to gender subordination throughout their lives. It may be even more pervasively imposed than philosophers' typical examples of coercion.

In being socialized for, or coerced into, subordination to men, women may be generally denied opportunities for their own exercise of responsible moral agency and may be put into positions that subordinate them publicly and privately to the judgments of particular men. They may have to act according to the values, commitments, or dictates of some

significant man or men throughout their lives. Subordinated women are usually socialized from birth to accept their subordinated status, and their personalities and attitudes may have developed so as to fit these social locations without questioning the underlying norms.

What are the effects on morally responsible agency of living under these sorts of pervasive social constraints? On the face of it, it seems obvious that socialization for a subordinate status and a lifetime of subordination can hinder or prevent altogether the development of capacities for morally responsible agency. Someone who is deprived of opportunities to make morally significant decisions for herself may never learn the relevant moral guidelines, or how to apply them to the morally relevant features of situations, or how to act according to her own understanding of the guidelines. A person who remains subordinated to close others throughout her life may internalize a conception of herself as a being that is unworthy or incapable of making important decisions on her own. Those who dominate her may control the range of choices open to her and may have the power to make her act wrongly. It thus seems plausible that a subordinated woman might well not meet the criteria for being fully morally responsible for her behavior.

So far, I have considered only the reasons for thinking that women in female-subordinated societies are *not* morally responsible for their behavior. Are there reasons on the other side? Are there any societies in which women's agentic prospects are really this bleak? Might women be morally responsible for their actions even if they were socialized for female subordination?

There are, it seems, some good reasons for thinking that even subordinated women should not be exempted from moral responsibility for their criminal actions. First, subordinated women usually have domains of activity that are theirs to control and in which they may have extensive freedom to make decisions according to reasons they can apprehend and appreciate. Child rearing and domestic life frequently offer such options. To be sure, these domains may be limited by what a husband wants or requires. A subordinated woman, however, may have enough leeway in those domains to develop and exercise the capacities to grasp relevant moral requirements, apply them to practical situations, and act in light of that understanding. Second, the domination and coercion to which women are subjected may also vary from woman to woman even in a society in which women are generally subordinated to men. Some women in a female-subordinated society may benefit from class, race, or heterosexual privileges that allow them to resist moderate coercion and carve out

social spaces in which to make their own choices in accord with reasons they themselves can learn to grasp as morally relevant.

Also, in line with the current limitations on the superior orders defense in most Western countries, one reason for thinking that female terrorists from female-subordinated cultures should be held to full standards of moral responsibility for their terrorist actions is the severity of their actions. Many terrorist actions are manifestly illegal atrocities, in particular, those that intentionally target innocent civilians with lethal force. By analogy with the manifest illegality doctrine, even subordinated women should be required to think for themselves about whether the actions they are ordered to perform are manifest atrocities. As noted, some military jurisdictions do excuse lower-ranking soldiers from legal responsibility for committing manifest atrocities under orders. However, while this approach seems plausible for the emergency circumstances of the heat of battle, it is less so for the conditions in which terrorists acts are planned and initiated.

Also note that the superior orders defense requires that a soldier have been given specific orders to commit the particular criminal act with which he is charged. The superior orders defense does not exempt a soldier from legal responsibility for all his actions merely because of his subordinate status alone. A female terrorist who hails from a female-subordinated culture but who does not commit her terrorist actions under specific orders from men in positions of power over her does not seem to fit the pattern required for the superior orders defense. The superior orders defense requires both a background of acculturated and enforced subordination and specific orders to commit the particular act in question. The superior orders defense seems to combine elements of both a general exemption from responsibility, because of military training and culture, and an excuse from responsibility for a particular criminal action because it was taken under particular orders. Terrorist acts by subordinated women might not always meet both of these conditions. When they do not, the superior orders defense does not yet provide a reason for analogously excusing women from moral responsibility for their terrorist acts.

To be sure, even when female terrorists have not acted at the specific behest of male terrorist leaders, the concept of the superior orders defense draws our attention back to the importance of acculturated and enforced subordination as a condition that is generally relevant to determining someone's moral responsibility for her actions. The superior orders defense reminds us that someone's defense against the charge

of terrorism might well be her general *exemption* from *overall* moral responsibility. Women who are raised to follow and defer to male authority all their lives may never be able to develop or exercise sufficient powers of moral judgment or practical agency to respond appropriately to moral norms against committing particular criminal actions.

Osiel writes that totalitarian regimes destroy the common sense and moral understandings of a people. These regimes promote criminal conduct through legal means, thereby removing one important standard by which people in the society normally understand what is right or wrong. Wrongful behavior becomes legally endorsed. In such a context of "pervasively legalized criminality," ordinary soldiers would reasonably tend to make mistakes about whether the orders they were given were legal or not.[33] Their capacities for understanding proper moral reasons for action might be generally impaired.

Women who live in social systems of widespread and entrenched female subordination are, in some respects, like all the citizens of a totalitarian regime. To the extent that female-subordinated societies use coercion backed by law, they clearly violate the inherent dignity of women, thereby sanctioning and promoting immorality in law. This state of affairs can easily affect the judgment of women who live under it, an effect that probably lasts throughout women's lives. We can refer to female-subordinated societies as systems of "gender totalitarianism." Women of female-subordinated societies, like anyone raised under a totalitarian regime, would thus have diminished capacities for morally responsible agency from a combination of conditions: socialization for subordination, coercive enforcement of obedience, few or no options of exit from the system in question, and the social prevalence of gender norms that conflict with genuine morality, thereby confusing the moral judgment of its members, and especially of the women who are the victims of practices of female subordination.[34]

The case is therefore substantial for exempting such women from female-subordinated cultures, to a greater degree than men from the same cultures, from moral responsibility for terrorist actions. However, two final thoughts may weigh against this conclusion and pull us back

[33] Osiel, pp. 147–51.

[34] Lisa Tessman discusses the moral damage that can arise to those who are the victims of oppression; cf. Lisa Tessman, *Burdened Virtues: Virtue Ethics for Liberatory Struggles* (New York: Oxford University Press, 2005). Tessman recognizes that oppressors are morally damaged by oppression as well; however, her aim is to explore the ways in which moral damage is greater to those who are oppressed.

to the other side. First, holding all women to the same full standards of moral responsibility and moral accountability as we hold men seems to show a greater respect for women as persons than does letting them "off the hook."[35] It treats women as full moral agents. This treatment can have value as a means of educating members of the society in question and promoting eventual change in gender norms.

Second, we must beware of possible political motives for denying the full political significance of women's terrorist acts. I have argued elsewhere that women's terrorist acts may have greater ideological force than those by men.[36] If women, who are much less prone to violence than men, engage in terrorist acts on behalf of a political cause, this seems to convey a stronger message of the worth of the cause than similar acts carried out by men, who resort to violence more readily than do women. The states that are targeted by women's terrorist violence have a correspondingly greater stake in discrediting the apparently political motives behind the women's actions. One way to do this is to portray the women as lacking in full moral agency and as being the dupes of their (male) terrorist leaders. We must be careful to prevent the motive of wanting to discredit the women's actions from clouding our judgment about the moral responsibility of female terrorists.

[35] Cf. Barbara Houston, "In Praise of Blame," *Hypatia* 7, no. 4 (Fall 1992): 128–47.

[36] See my "Female Terrorists: What Difference Does Gender Make?," presented to the North American Society for Social Philosophy, University of Victoria, Victoria, Canada, August 4, 2006.

FOUR

ENDING WAR

12

War's Aftermath

The Challenges of Reconciliation

Trudy Govier

Philosophical reflection on war has not, for the most part, paid attention to the aftermath of war. Its themes have been the justifiability of resorting to war and of various means of waging it. Themes of civil disobedience, resistance, and responsibility for crimes of war have also received attention. But these considerations leave the context of aftermath largely untreated, neglecting the fact that wars do somehow end and significant problems remain when they do. In this chapter it is not possible to treat all such problems. Included here are descriptions of the centrality of social trust, the contrast between judicial and truth commission approaches to reconciliation, amnesty, and the roles of victims and perpetrators.

Reconciliation and its dimensions have been a significant topic in philosophy and politics since the well-publicized hearings of the South African Truth and Reconciliation Commission (TRC) in the 1990s. The South African TRC was an institution in an aftermath – the aftermath of a struggle over apartheid. Fascinating questions about guilt, innocence, responsibility, justice, and forgiveness are posed by its work. Many of these questions concern *relationships* between persons and groups who had engaged in the struggle over apartheid. It is debatable whether South Africa's postapartheid circumstances amounted to the aftermath of *war*, although the struggle in the 1980s had been characterized by a high level of violence and was deemed by some to have amounted to a civil war. In any event, in wake of this conflict, former opponents had to coexist nonviolently and cooperate to make their country work. Thus they faced the challenges of political reconciliation.

I. Justice and Reconciliation after War

One philosopher who has considered questions of aftermath is Brian Orend. In several recent discussions of just war theory, Orend considers *jus post bellum*: justice after the war.[1] Perhaps because he begins with a focus on justice rather than on sustainable peace, Orend makes no reference to public apologies, forgiveness, amnesty, acknowledgement, truth commissions, restitution and redress, the reintegration of former combatants into society, or any of the many issues pertaining to the building of nonhostile and cooperative relationships between former enemies. He does not explore reconciliation as a central topic in the aftermath of war. Nevertheless, it is useful to work through the details of his analysis: the conditions he considers clearly indicate why reconciliation is necessary.

Justice and peace are in some contexts contending values, and their competition may pose agonizing dilemmas. Nevertheless there are important ways in which these values are entangled and even inseparable. Penal justice presupposes peace, because the conditions for due process and a fair trial will not exist in times of war. Social justice presupposes peace as well; during war, resources will not be available to assist poorer and more vulnerable members of a society. One can argue the point from the opposite position, too. Peace presupposes some degree of perceived justice and fairness, because in their absence, resentment and grievance will make the cessation of violence hard to sustain.

According to Orend, the following conditions must be met if *jus post bellum* is to be achieved.

1. There should be a peace agreement that is proportional, publicly proclaimed, and not used as an instrument of revenge.
2. Human rights should be vindicated in the sense that the rights to life and liberty should be given a secure basis, and the collectivity should have a right to its territory and sovereignty.
3. Discrimination, as in just war theory, should be observed, with due attention being paid to the distinctions among leaders, soldiers, and civilians. Civilians should not suffer from punitive postwar measures such as sanctions.

[1] Brian Orend, "War," Stanford Internet Encyclopedia of Philosophy, Fall 2007 edition, available at http://plato.stanford.edu/archives/fall2007/entries/war/. See also Brian Orend, "Justice after the War," in *Ethics and International Affairs* 2004, and *War and International Justice: A Kantian Perspective* (Waterloo, ON: Wilfrid Laurier University Press 2000).

4. Punishment (first consideration): If the defeated country has been a human rights violator, proportionate punishment should be given to its leaders, who should face fair and public international trials for war crimes.
5. Punishment (second consideration): Any soldiers who have committed war crimes, on whatever side of the conflict, should be accountable; their actions should be investigated for proper trial.
6. Compensation should be provided, subject to considerations of its proportionality and distinctions among leaders, soldiers, and civilians.
7. Rehabilitation of institutions should be pursued to the extent that it is possible, with respect for human rights incorporated.

If we reflect on what it would mean for Orend's conditions to be satisfied in the aftermath of a war, we can see that their realization would require numerous activities within the society. To put the point bluntly, people will have to do things, and in many cases they will have to work together to do them. People would be promulgating, publicizing, and understanding a peace agreement. They would be treating leaders, soldiers, and civilians differently, on the basis of what they regarded as reliable information about who was who and who was doing what during the war. They would respect each other's basic human rights to life and liberty, having learned to do so. They would identify plausibly culpable leaders and arrange for their trial in working, fair, and perceived-to-be-fair courts of law. They would work to improve their institutions in the direction of democracy and respect for human rights. For all this to go on, we need *human agents* – and these agents are not going to be working alone. They are going to be *working together.* The need for cooperation indicates that people and their relationships matter. Feelings and attitudes are relevant and cannot safely be ignored. Former enemies have to work together with some degree of confidence. In short, the challenges of reconciliation arise.

Orend models his requirements on a particular paradigm of war and its aftermath. The war he considers is presumed to have been an international one, and in its aftermath a benign victorious power is presumed to be occupying the territory of the losing state. This paradigm is highly specific, and it is misleading because it is so atypical. Yet even in this rather rarefied case, the need for reconciliation is apparent; injury, resentment, animosity, and alienation will exist in the aftermath of a war. In a situation in which they were losing a war, people are unlikely to have agreed on its

necessity or on responsibility for the problems they face. Some will have been wounded, assaulted, or killed and are likely to resent the occupying power on that account. Some will be former combatants and may be unemployed. Others will be suspected of having collaborated with perpetrators of abuse and injustice. Then there will be persons regarded as collaborators with the enemy – now an occupying force that sees itself as benign and generous but is unlikely to be so regarded by the occupied people.

Orend's account is designed with a view to the aftermath of one particular kind of international war. His paradigmatic scenario is one in which country A gets into a "just war" with country B; the just cause is human rights violations committed by the governing regime of B. The aftermath of this war is presumed to be of the "one just victorious" type. The country with the just cause has clearly won the war, has defeated the rights-violating regime, and is seeking (without mixed motives) to replace that regime with something better. To this goal, A is occupying B.[2] If all this has a familiar ring to it, that is no accident. Orend includes in his *Stanford Encyclopedia of Philosophy* essay "War," a short discussion of Iraq and Afghanistan, illustrating his basic assumption that in these countries, the United States is a victorious power that has won a just war and is occupying a defeated country, working for its reconstruction.

Orend's presumptions about U.S. policy and intentions in Iraq and Afghanistan are charitable to the point of implausibility.[3] Additionally, and importantly from the point of view of reconciliation in the aftermath, we will have a flawed appreciation of *general* problems of aftermath if we focus on *international war*. Far more common than international wars in which one side has justly defended human rights are situations of civil war. Far more common than situations of clear victory are situations in which hostilities have been brought to an end by negotiated agreements among several parties, none of which were clearly victorious or wholly "just." In defining "war," Orend allows for civil wars, which he understands to be contests between a governing regime and a group aspiring to govern. In Bosnia, Kosovo, Sierra Leone, Peru, Northern Ireland, East Timor, Uganda, Mozambique, and elsewhere, damaged societies and individuals

[2] The flaws of the one just victorious model are discussed in my recent book *Taking Wrongs Seriously: Acknowledgement, Reconciliation, and the Politics of Sustainable Peace* (Amherst, NY: Humanity Books, 2006).

[3] This essay was written in February 2007.

face pressing dilemmas in the aftermath of civil war. The philosophy of *post bellum*, or aftermath, will be distorted if such contexts are ignored. Civil war has led to injury, impoverishment, suffering, and death. Because the people affected need to live and work together in war's aftermath, there is a need to overcome animosity and grievance. To rebuild in any constructive direction, an affected society will require more than a cease-fire, peace treaty, and legal processes.

At the end of his discussion, Orend shifts to consider practicalities and offers a 10-point suggestion for transforming a defeated aggressive regime into one that is at least minimally just. Much of the old regime should be purged, he says, and its war criminals should be prosecuted. The victorious party should work with a cross section of locals on a new, rights-respecting constitution. Civil society should be encouraged to flourish. If necessary, the educational curricula in the country should be altered so as to purge "poisonous propaganda" and cement new and better values. Obviously, building and rebuilding will require the cooperation of former enemies. That in turn will require some degree of social trust and, in effect, political reconciliation.

For an occupying power to work with a cross section of locals, that cross section of locals will have to be willing and able to cooperate with it. For curricula to be altered so as to delete "poisonous propaganda," local educators will need to work together cooperatively to reach a consensus about what constitutes poisonous propaganda and how to eliminate it. These issues arise even for the restricted paradigm Orend considers, and they would be even more serious in post–civil war contexts in which there was a negotiated settlement and no clear victor.

These considerations should inspire reflection on some very human facts about people and their relationships in the aftermath of a war. It is highly misleading to contemplate situations of aftermath in the passive voice, omitting human agency. Just consider, as an example, the case of "purging." For a regime to *be purged* will require that some persons will be engaged in this purging. Those people, the agents of purging, will have to select other people as the ones who need to be purged. The agents will have to employ some procedures when they make that selection. For the purging to be helpful, others in the society must regard those agents as trustworthy and their procedures and standards as reliable. Otherwise they will deem the purging a witch hunt and it will increase resentment and conflict instead of contributing to a sustainable peace. To have a reliable purge or "lustration" requires reliable people and procedures to establish who did what, and under what degree of coercion or

voluntariness.[4] These matters are very difficult in practice, as is shown by problems of lustration in Germany, Poland, the Czech Republic, and several other postcommunist countries.[5] To cite just one of the many problems arising in such contexts, information about who did what may have to be taken from files maintained by the abusive and repressive regime. Furthermore, there are practical limitations. Purging, or lustration as it has been called in some contexts, can only go so far. Any society needs qualified and reliable persons to take on important roles. If those newly in power remove too many of the former civil servants, lawyers, judges, educators, doctors, and military personnel, society will lose needed expertise and talent.

In some respects, wars between nations provide a favored context for reconciliation. The practical and ethical challenges of aftermath are less when those who were enemies need not interact on a daily basis, sharing the resources and institutions of a single state. Residual animosities between individuals and subgroups of the warring nations may be of little import. Since the previously contending people live in separate societies, they can limit or avoid contact. They need not rub shoulders in the street, market, schools, or parliament. Still more significantly, they need not cooperate to sustain institutions of governance, as people do need to do in such places as Northern Ireland, Sierra Leone, Mozambique, East Timor, Peru, and Bosnia.

II. The Centrality of Social Trust

What does "reconciliation" mean in a political context? It seems considerably more complex and obscure than the reconciliation of individuals. A husband and wife might quarrel and move apart and then go back together again, on an occasion featuring apologies, hugs, kisses, and forgiveness. They had a relationship; it was briefly broken; when they reconcile, they are repairing that relationship. They forgive each other and try to regain what they had. But how could such a dynamic apply in politics? Even the prefix *re-* is problematic in contexts in which contending groups had no decent relationship before. Then it is more a matter of building decent relationships than of rebuilding them.

[4] A useful source concerning difficulties of lustration is Gail R. Farley, "Lustration, Decommunization, and European Union Enlargement 2004," http://www.eucenter.scrippscollege.edu/eu_events/papers/paper/panel, accessed September 2005.

[5] As to the situation of Iraq, it is now widely acknowledged that early purging of all Ba-athists was unwise, to say the least. It left some 350,000 former soldiers armed, unemployed, and resentful. And it deprived the civil service of qualified people.

Relationships between people are fundamental: it matters what people believe about each other, how they communicate and cooperate, how they feel, what they value, and how they will respond to actions and events in the new society. War ruptures normal life, and its damages do not disappear with a ceasefire. In a civil war, it is obvious that war tears apart what might have been one society.

Social trust is basic to the operation of a society. Fundamentally, social trust amounts to a confident expectation that other people in the society (even strangers) will act in a decent and unthreatening way most of the time. It is an understatement to say that such confidence cannot be taken for granted in the aftermath of war. Social trust will be seriously diminished: these are people whose life experiences have given them powerful reasons to fear and distrust those they regard as adversaries. They will know from bitter experience that others have the capacity and the will to impose pain, suffering, and harm – and they will fear that some will continue to harm them, given the opportunity. How are such attitudes to be addressed?

There is no magic recipe for achieving reconciliation. Truth commission proceedings, workshops and encounter groups, indigenous ceremonies, dialogue between former participants, mediation, and practical cooperative activity have been designed with the goal of improving attitudes and understanding, making cooperation possible, and lessening the chances of renewed hostility based on suspicion and distrust.

Given the centrality of relationships and attitudes, a reasonable interpretation of postwar reconciliation may be offered in terms of the building, or rebuilding, of *trust* in the aftermath.[6] We need social trust because we must interact with and depend on other people – yet we never have certainty as to what these others will do. We cannot escape the fact that we live in a complex world in which other people's actions affect us considerably; as interdependent people, we are vulnerable. And human vulnerability will be all the greater in the aftermath of a war. To reconcile previously opposed parties, in this context, would be to draw them together in relationships characterized by social trust.

We can appreciate the need for social trust by considering even relatively routine social matters. Holding meetings? People will attend only

[6] Trust has of course been discussed by many authors. I rely here on my own account in *Social Trust and Human Communities* (Montreal and Kingston: McGill – Queen's University Press, 1997) and on the application of this work to the topic of reconciliation as developed in Trudy Govier and Wilhelm Verwoerd, "Trust and the Problem of National Reconciliation," *Philosophy of the Social Sciences* 32, no. 2 (2002), 178–205, and *Taking Wrongs Seriously*, chapter 1.

if they are reasonably confident that their physical security is not at risk. Fact finding? It makes sense only if a reasonable proportion of witnesses can be believed and documents presented deemed genuine. Arriving at a common narrative? Doing so will presume institutions for consultation and dialogue.[7] Courts? Judges and officials have to be regarded, and reasonably regarded, as uncorrupt and competent. Treaties? Signing makes sense only if one is confident that the other signatories will keep their word. Disarming? It will seem reasonable only if it appears safe, and safe only if one has reason to believe that the other side will not revert to violence. Issues of trust and distrust underlie all interpretation. We give actions and events a meaning, and whether we trust or distrust other people affects the meanings we construct. The simple fact that one side has achieved something resembling victory in a war does not mean that it is trusted by its former enemies – and even if it is acting for benign ends, its motivation and actions may be misunderstood by those who distrust it.

In addition to reconciliation between individuals and groups who were on opposed sides during a war, there will often be a need for reconciliation between persons who were *on the same side* in the conflict. There is usually a need for groups and individuals to reconcile within themselves in the sense of acknowledging mistakes and wrongs committed during the conflict. Under the pressure of war, the likelihood of error or abuse is great. If these matters are not acknowledged, tensions and problems are likely, both in self-understanding and in lack of mutuality in relations with others. A common dynamic is for a group to cast off those members who engaged in violence on its behalf, disavowing any connection with their acts and disowning those who committed them as "terrorists" or "bad apples." Casting off in this way amounts to scapegoating and is facilitated by simplistic reasoning about moral and legal responsibility, ignoring the role of leaders and the shared attitudes of groups.[8] Former combatants who are stigmatized and without work, income, or community may resort to crime or reengage in political violence. Thus a failure to acknowledge and reconcile with the realities of their own actions leaves a community vulnerable to crime and war: this failure will increase alienation of

[7] Susan Dwyer proposes an understanding of national reconciliation in terms of working out a common narrative in her essay "Reconciliation for Realists," in Carol A. L. Prager and Trudy Govier, editors, *Dilemmas of Reconciliation: Cases and Concepts* (Waterloo, ON: Wilfrid Laurier University Press, 2003), pp. 91–110. Dwyer notes that this task will not be easy.

[8] I have benefited here from reflections on shared and collective responsibility in Larry May, *The Morality of Groups* (Notre Dame, IN: University of Notre Dame Press, 1987).

former combatants, making their reintegration more difficult and threatening the stability of peace.

III. Law and the Truth Commissions: Conceptions of Justice

In the aftermath of a violent conflict, the first step toward building a sustainable peace is clearly the achievement of a viable ceasefire. When that is achieved, animosities and grievances must be addressed. It is to this end that truth and reconciliation commissions have been established in such places as South Africa, Peru, Morocco, Sierre Leone, East Timor, and (most recently) Liberia. Truth and reconciliation commissions have many goals including investigation, fact finding, acknowledgement, testimony, understanding of causes, and healing. Theirs is a quest to understand what went on and why, to reach some sort of consensus about the historical narrative and values for the future society, and to establish, on the basis of that consensus, values and commitments for a fresh start. A major goal is to hear testimony from persons affected by the conflict – whether as victims or as perpetrators. Truth and reconciliation commissions seek to go further than criminal courts; they typically engage many persons and sectors of the affected society.

Truth and reconciliation commissions vary depending on the context for which they have been designed. In Sierra Leone and East Timor, such commissions functioned alongside criminal courts.[9] As we can see from Orend's discussion, a common framework for reflecting on victims and perpetrators has been that of the *law*: the idea is to provide criminal justice for perpetrators and compensatory awards for victims and to do this through the courts. Scholarly and popular commentators on war's aftermath often comment that peace cannot be achieved without justice. One does not have to probe deeply to find out just what sort of justice they have in mind: it is *justice under the law* and, most fundamentally, *penal justice*. In the latter context, for justice to be realized, the guilty must be punished. Or, more precisely, those regarded as guilty of the most serious offences should be indicted, arrested, and brought to trial and suffer appropriate punishment – provided that, under due legal process, they are found to be guilty. In discussions of peace and justice, justice is generally understood in retributive terms, as involving a punishment

[9] An overview of the administrative details and some of the pitfalls can be found in *Taking Wrongs Seriously*, which provides an appendix summarizing conflicts, approaches to reconciliation, and successes and failures for each of these contexts.

that will deliver to the most serious perpetrators the *hard treatment* that they *deserve*. While within a more normal society the justifiability and rationale for punishment may be understood in terms of deterrence, rehabilitation, moral education, or some combination of these principles, in the aftermath of war, issues tend to be more simplified. *Punishment* is nearly always understood in terms of *retribution*.[10] The basic idea is that those most guilty should be made to pay for what they have done.

In the framework of a truth and reconciliation commission, the focus is somewhat different and punishment is not central. The Truth and Reconciliation Commission of South Africa, which has in many respects been the paradigm TRC and a model for others, incorporated an amnesty program for perpetrators who testified before it. Under this program, perpetrators who fully disclosed their actions before the commission and whose actions were political in nature could apply for and might receive from the TRC immunity from criminal and civil prosecution. Several thousand perpetrators received amnesty on those grounds. This amnesty program in South Africa has been subjected to wide criticism from a number of quarters. Many critics argued that amnesty was deeply objectionable from the point of view of justice. They argued that it amounted to letting people off too easily when they had committed serious wrongs in the struggle over apartheid. Some argued that in offering amnesty, the South African TRC was presuming to forgive people who should only have been forgiven by their (direct) victims and not by a committee of the TRC.[11]

There were, of course, defenders of the amnesty policy.[12] First – and this theme is common for many peace settlements – there was a need for some sort of amnesty in order to reach a political settlement of the struggle over apartheid. If leaders and officials of the apartheid regime had faced prosecution, they would not have signed an accord. For South Africa, peace at this point required some compromise on justice – presuming that

[10] Some qualification is needed here when we speak of "ending impunity." This language seems to combine themes of retribution (these serious offenders are not going to be immune from punishment anymore; they are going to get what they deserve) with themes of deterrence (the expectation being that if people are prosecuted and convicted for certain deeds, there will be fewer people who commit them).

[11] This line of criticism, while quite common, confuses amnesty with forgiveness and may, for this reason, be argued to amount to a mistake. Forgiveness, both political and personal, has been a major theme in discussions of the ethics of reconciliation.

[12] I owe much to Wilhelm J. Verwoerd for my understanding of these matters. His responses to criticisms of the approach to amnesty may be found in *Equity, Mercy, and Forgiveness: Interpreting Amnesty within the South African Truth and Reconciliation Commission* (Leuven: Peeters, 2007).

justice was understood as retributive penal justice. Secondly, it would have been impossible to subject all those who had committed serious violations of human rights to criminal trial, since financial and other resources were simply not adequate to the task. From these claims, one may develop an argument against the contention that justice as retributive punishment should take priority over peace. Although often stated as a fundamental criticism of the South African TRC, this claim cannot withstand scrutiny. It violates the fundamental principle that "ought" implies "can."

Without a functioning society and courts, it is not possible to bring all suspected perpetrators to trial. Without a peace agreement, it is not possible to have a functioning society. Peace is required for penal justice and for any other form of justice. Thus ultimately it does not make sense to give priority to the obligations of penal justice over and above those of seeking the peace.

Amnesty awarded by the South African TRC was individual and not blanket; amnesty was not awarded to whole categories of people such as all military, police, civil servants, or officials of the previous regime. To receive amnesty, a person had to do something. He or she had to testify at the TRC hearings and disclose the relevant details of the acts he or she had committed during the struggle over apartheid. Because of this requirement, it is erroneous to believe – as some critics do – that those who received amnesty were let off "scot-free." These people were accountable in an extralegal framework, insofar as their actions were disclosed and publicized. Some who defended the South African TRC appealed to conceptions of *restorative justice*. The truth commission approach, on this understanding, did not seek to achieve peace without justice. It sought peace with justice – but the justice here was not presumed to be retributive penal justice. It was a broader, extralegal, more healing sort of justice – namely, a healing restorative justice.

The South African TRC has been widely admired, and processes and report have provided models for many other truth and reconciliation commissions. Despite sympathy for the conception and goals of restorative justice, there were still many unconvinced critics of the amnesty program of the South African TRC. This program has remained its most controversial and least emulated aspect. Two later truth commissions – those of Sierra Leone and East Timor – sought to combine the truth and reconciliation commission process with criminal trials for some categories of perpetrators. In these contexts, one might say that both restorative and retributive justice were sought. The truth and reconciliation commission in Peru recommended prosecution of some persons it had deemed to

have committed serious wrongs such as massacres. In East Timor, civil violence in March 2006 required the reentry of Australian military forces into the country, suggesting that East Timorese reconciliation processes were unsuccessful. In Sierra Leone, the combination of the Special Court and a truth commission was awkward. To cite just one of many factors, some perpetrators were reluctant to testify before the Sierre Leone TRC on the grounds that what they said might be used against them in the Special Court.[13]

The International Center for Transitional Justice has used its knowledge and experience to advise a number of countries in the aftermath of civil war. It played an important role in Peru, East Timor, and Sierra Leone and has been closely involved with the Truth and Reconciliation Commission in Liberia.[14] A survey of sources indicates that the Liberian TRC plans to operate similarly to the South African model, without an accompanying war crimes tribunal. Ellen Johnson Sirleaf, the president of Liberia, had to promise to stay away from war crimes tribunals and comply with the Peace Agreement for the country, which warlords had signed only on the understanding that war crimes tribunals would not be held.[15] Official accounts of this TRC say that it will combine retributive and restorative justice.

From a theoretical perspective, there is some awkwardness of fit here. In addition to practical challenges, basic philosophical questions arise. The retributive model presumes that those who have committed serious wrongs deserve to suffer precisely because they have committed those wrongs – and for no other reason. On the assumption of retributivism, criminal justice exists to award appropriate (deserved) punishments after due legal process. Those who commit crimes are regarded as accountable moral agents who bear moral and legal responsibility for what they have done. That responsibility may to some extent be lessened by considerations of their mental state or circumstances, but paradigmatically, wrongdoers are to be held to account and given what they deserve, which is punishment.

Although most attention is given to perpetrators, an account of victims on related principles would indicate that victims deserve restitution or compensation. This aspect receives some attention – but far less than that of trials. In postwar contexts, the retributive model focuses mainly

[13] Details about processes in Peru, East Timor, and Sierra Leone may be found in the relevant appendixes of *Taking Wrongs Seriously*.

[14] At time of writing, February 2007, this truth commission was beginning its operations.

[15] Information available at http://www.theperspective.org/articles/0630200060.html and http://www.analystliberia.com/time_for_truth_june23.html, accessed February 13, 2007.

on leaders committing serious wrongs, to those most harmed by them. It treats victims and perpetrators *separately*. In processes of reconciliation, on the other hand, one seeks to address the relationships between people.

When reconciliation is an important goal, restorative justice seems more appropriate than retributive justice, given that its goals are understanding and healing. The point of restorative justice is to build or restore relationships needed for the functioning of society but destroyed by war. Restorative justice seeks acknowledgement and remorse from perpetrators, acceptance and forgiveness from victims, and restitution, healing, and reconciliation. Circumstances and situations in time of war are considered and there is relatively little emphasis on blame, guilt, accountability, or hard treatment. The goal is to heal those harmed and, through this healing, provide a path to the decent relationships needed to rebuild a damaged society.

IV. Thinking about Victims and Perpetrators

A fascinating aspect of reconciliation lies in relations between victims and perpetrators. During the conflict there were contending sides that were enemies: blacks and whites, Protestants and Catholics, Hutu and Tutsi, government and rebels, and so on. But in the aftermath there is often a shift in conceptual framework and the dynamic of competition. Much framing of reconciliation issues suggests that a new fundamental division has taken over: that between victims and perpetrators. The needs of these persons may conflict so that, in effect, they compete. There are risks of a new polarization. Persons harmed as *victims* and persons who were agents (former combatants, or *perpetrators*) may come to be in competition for resources, although they were on the same side in the conflict itself.

On a simplistic model, victims will be innocent and deserving, meriting healing and redress. Perpetrators, by contrast, will be agents of harm. Some former combatants may be regarded as heroic victors, but, especially in a civil war, many will be suspected as agents of violence and regarded as perpetrators even by the communities they sought to defend. Orend's framework illustrates the power of these presumptions: it includes points about which former combatants might be tried and punished, and under which auspices – and which victims are to be compensated, with what resources.

The victim/perpetrator framework implicit in Orend's model justice is, in fact, virtually ubiquitous in accounts of reconciliation. We can see this by considering the work of truth and reconciliation commissions, which include hearings at which *victims* testify and are heard, and

distinct hearings for the testimony and accountability of *perpetrators*. We can also see the centrality of victim and perpetrator roles by reflecting on concepts that have played a key role in the practice and theory of reconciliation. *Acknowledgement* is of major importance: it is nearly always understood as requiring that perpetrating individuals or groups admit to those harmed (victims) that they have committed the harming actions. *Apology* is another central notion: those responsible for wrongdoing acknowledge to victims and the broader public that they have indeed committed these acts; they accept responsibility for committing them, express their sorrow or moral regret, and commit to reform and the offering of practical amends to the victims. *Forgiveness* has been a major theme in the work of several truth and reconciliation commissions; it is the victim who forgives and in forgiving; he or she overcomes resentment and animosity toward the perpetrator. *Restitution* and *redress* are conceptualized as rights or claims of victims. *Punishment* and *amnesty* are considered with regard to perpetrators.

There is clearly a distinction to be drawn between committing an act of violence and being harmed by one – just as there is a distinction between killing and being killed, between raping and being raped. An agent of harm, due to violence, is not the same thing as a person harmed. And so we distinguish between *perpetrators* – or, more neutrally, former combatants – and *victims*, who have suffered as a result of the violence and destruction of war.[16] Within the categories of victim and perpetrator, further distinctions can usefully be made.

Victims

Primary (or direct) victim (V1): the person or group directly or immediately harmed.

Secondary victim (V2): the family and close friends or associates of V1, harmed by the act because of the effects and implications of what happened to V1;

Tertiary victim (V3): persons in the broader community harmed by the act.[17] These persons are harmed as a result of the harms to V1 and V2.

[16] To accept this distinction is not to accept that a dichotomy should be erected around it.

[17] These distinctions are quite standard in reconciliation literature. See, for instance, David Bloomfield, Teresa Barnes, and Luc Huyse, editors, *Reconciliation after Violent Conflict: A Handbook* (Stockholm: International Institute for Democratic and Electoral Assistance, 2003). They also feature importantly in the Australian government report, *Bringing Them Home*, which is available at http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen.

Generally, the greatest harm is done to the primary victim,V1. However, that is not always the case. We may, for instance, imagine that V1 is a strong young person who is assaulted, fights off his assailant, and has few injuries while V2, his wife, is so upset by the attack against him that she suffers from lasting anxiety and finds it difficult to care for their children. In such a case, harm to a secondary victim would be greater than harm to the primary victim.

Further qualifications need to be made as well. It is at least logically possible that there should be a wrong in which there are no V2 and V3, but only a V1. We might imagine that a hermit living alone is robbed of a needed food supply but has no relatives or friends and is not located within a community. In such a case, this person would be a primary victim, but there would be no secondary or tertiary victims. Such cases would be rare – but they are not ruled out by logic. Another qualification involves victims and communities. Typically the primary victim is considered to be an individual and the secondary and tertiary victims are other individuals harmed in virtue of their relationships with the primary victim. When we speak of the tertiary victim as a community in this context, we are thinking of the community as a group of individuals and considering the harm to them as individuals. However, we can also envision a case in which the community itself (as a collectivity) is the direct victim. There is no need to appeal to hypothetical examples here: the situations are all too real. Consider, for instance, cases of bombing that damage such resources as sewage treatment facilities, hospitals, and heritage sites. In such cases, even if no individual were to be directly harmed in the attack, there is an immediate loss to the community, and further losses may be expected. The model here needs to be adapted to apply to this case. V2 would be those harmed by after-effects of this destruction – for example, persons suffering waterborne diseases or losing valued cultural artifacts. V3 would be the same community as V1 – and possibly associated communities – affected by the further effects of the initial damage.

Distinctions among V1, V2, and V3 are useful in conceptualizing how damage and harm spread from the initial context. They are also legally relevant in contexts of restitution and redress. For example, if all the primary victims of a wrong are dead, their descendants may have claims acknowledged by the courts – as in the case of descendants of Holocaust victims. And their community, represented by a political entity, may be morally or legally acknowledged by the former enemy as meriting compensation – as in the case of the state of Israel, with regard to Germany.

Distinctions among V1, V2, and V3 are of interest because they allow some degree of complexity in our understanding of victimhood and

provide a framework in which we can conceptualize the persisting nature of some harms. These distinctions will also allow us to appreciate that many of those identified as perpetrators are also, in one way or another, victims. This fact, while perhaps unsurprising and even obvious, poses important ethical and conceptual challenges.

Perpetrators

The commission of acts presupposes moral responsibility for them, which requires that what they do contributes causally to the acts committed and that they act voluntarily (are uncoerced).[18] While primary, secondary, and tertiary perpetrators (P1, P2, and P3) are symbolically parallel to V1, V2, and V3, there is not a complete parallel.[19] Secondary and tertiary perpetrators gain their status from causal connections with primary perpetrators – not in virtue of kinship or friendship.

Primary (P1s): those who commit harmful acts of violence or who order, finance, recruit for, or organize such acts. P1s are soldiers or militants who are the immediate agents of violence, or they are those who plan and command soldiers or militants. Insofar as acts of violence wrongly harm victims, it is these persons who bear the most causal and moral responsibility for them.

Secondary (P2s): those who aid and abet primary perpetrators by lending support in the fairly immediate context of an action. The "aid and abet" category can be regarded as established, given that it is legally standard. P2s are, essentially, accessories.

Tertiary (P3): those in the broader community who identify with P1 and P2 and whose interests and support are needed in order to make the cause a political one.[20] While the boundaries of P3 may be unclear, that there must be some supportive community should not be a matter of controversy. If a conflict is not political in nature, it does not qualify as a war at all. And if it is political in nature, it is a conflict between groups, the members of which must have some

[18] I would argue that these conditions mean that child soldiers are not morally responsible, even when they have committed atrocities – as in Sierre Leone, Mozambique, northern Uganda, and the Congo.

[19] This suggestion was made by Karl Tomm and has been developed and defended by Wilhelm Verwoerd and myself.

[20] These distinctions with regard to victims are widely accepted and standard. With perpetrators, that is not the case and there is more controversy, particularly with regard to the P3 category. I have benefited from discussing these matters with classes at Menno Simons College (University of Winnipeg) and the University of Lethbridge.

identification with those who are fighting on their behalf. In her recent book on terrorism, Louise Richardson stresses a related point:

> In a great many instances the broader communities share the aspirations of the terrorist groups even if they don't always approve of their means of achieving these objectives. A terrorist group can survive and thrive in this kind of complicit society. Though the broader population will not themselves engage in terrorism or even openly approve of it, they will not turn the terrorists in. They will look the other way and provide crucial, albeit often passive, support.[21]

The category of tertiary perpetrators is not standard, legally or morally; nor is it featured in many discussions of reconciliation. There, it is more customary to distinguish *perpetrators* from *bystanders* and *beneficiaries*.[22] The category of tertiary perpetrators was recently introduced in a quest to understand broader issues of collective and shared responsibility and the complexity of involvement in political violence and war. Even when tertiary participants are ignorant of the details of particular actions (and particularly those that constitute violations), they play an essential role. Without their explicit or tacit approval, the conflict could not occur. If we consider, for instance, the conflict between Protestants and Catholics in Northern Ireland, literally millions of people were involved in sectarianism without being militants or close supporters of militant groups. They saw themselves as on one side of this basic "divide" in the society, identified with the narrative and goals of "Protestants" or "Catholics," and participated in rhetoric and social organization of a sectarian nature.[23]

Typically, group culture, discourse, and customs support the goals and means of a warring group. People in the broader community may be complicit in many ways: rhetorically, propagandistically and educationally, financially, and even, in some contexts, through their inaction. Consider, for example, the case of a doctor who knows that his colleagues are facilitating the torture of enemy prisoners but makes no attempt to speak out, report to a professional association, or persuade them to stop. His inaction makes him complicit in the activity and thus gives him some shared

[21] Louise Richardson, *What Terrorists Want: Understanding the Enemy, Containing the Threat* (New York: Random House, 2006), p. 14.

[22] See, for example, Bloomfield, Barnes, and Huyse, *Reconciliation after Violent Conflict*. The issue of the responsibility of beneficiaries is a highly important one that cannot be treated here.

[23] This point is very clearly explained in Joseph Liechty and Cecilia Clegg, *Moving beyond Sectarianism: Religion, Conflict, and Reconciliation in Northern Ireland* (Dublin: Columba Press, 2001).

responsibility for the torture. In other cases, persons in these tertiary roles share a kind of background responsibility even for actions whose details they do not know.

V. Avoiding Dichotomization

It is crucial not to erect a *dichotomy* around the distinction between victims and perpetrators. Dichotomies can be false in several ways: they can fail to be exclusive, they can fail to be exhaustive, and they can fail in both these respects at once, being neither exclusive nor exhaustive.[24] If we dichotomize victims and perpetrators, we construct a false dichotomy of the third type – one that is neither exclusive nor exhaustive.

To see why a victim/perpetrator dichotomy is not *exclusive*, we have to consider the fact that people can be both victims and perpetrators at the same time. Illustrations of this possibility are easy to find. In the civil conflict in Peru (1980–2000), for example, young Andean Indians were deceived and manipulated into joining the Shining Path guerrillas and cruelly treated within that group; in these aspects, these young people were *victims*. Yet these same people killed, raped, and abused others; thus they became *perpetrators*. Similar points can be made with regard to child soldiers; often victims of abduction and cruel treatment, they are forced to commit atrocities and become perpetrators.

The fact that the very same people may be both victims and perpetrators poses a challenge to the conceptualization of reconciliation in terms of the criminal accountability of perpetrators and the rehabilitation and compensation of victims. Strictly speaking, "victim" and "perpetrator" are *roles*, not people. The same person can occupy a number of roles, as is common in ordinary life. A man can at the same time be a father, activist, teacher, husband, and citizen. Victim and perpetrator are not roles that exclude each other. In a conflict such as a civil war, a person can, in some actions and phases, be a victim and in other actions and phases be a perpetrator.[25] The plain fact is that in many conflicts, many

[24] The assumption here is that a true dichotomy is an exclusive disjunction: there is a true dichotomy between V and P if and only if no V are P and everyone categorizable in the context is either V or P. Actually, I would argue that there are three further ways in which dichotomies can be flawed. These are fundamental nonclarity, the failure of an item to be even "on the spectrum" dealt with by the constituent terms of the dichotomy, and indeterminacy. However, this is not a topic to be pursued here.

[25] In the South African context, Winnie Mandela provides a powerful and important example of a person who was both a victim (banned under apartheid law, raising children alone

people will have occupied both roles, even if we restrict our analysis to primary victims and perpetrators. One may, for certain persons, wish to define one role as more prominent and more significant than the other, believing that a person's actions as a perpetrator should outweigh the importance of any victimization she may have suffered. Or one may take the opposite stance; especially in the case of minors, one may judge that coercion in circumstances of vulnerability and immaturity has occurred to the point where there is no moral or legal accountability and the victim role dominates.

If we apply the Socratic idea that a wrongdoer harms himself, claims about victimized perpetrators can be supported in another way. It can be argued that those who have engaged in brutality against others have harmed themselves in the process – becoming desensitized, brutalized, or traumatized by their experiences. Applying this analysis, it can be argued that a person can be both victim and perpetrator with regard to the very same act. Given the victimization of many perpetrators by others or by themselves, it is clear that the distinction between victims and perpetrators does not establish an exclusive dichotomy.

Nor does the distinction between victims and perpetrators provide the basis for an *exhaustive* dichotomy. Adopting the framework providing for secondary and tertiary victims and perpetrators extends perpetrator and victim categories from the immediate context of harming and harm. One might suspect that, given this extension, everyone in the aftermath of conflict will fall into at least one category. But that need not be the case. Even in a civil war, there may be regions that are largely unaffected and uninvolved. There may be persons within civil society who have identified with none of the contending sides and have sought to mediate and resolve the conflict. Though the victim/perpetrator framework introduced here implies that a great many people are in some way victims, perpetrators, or both, it does not entail that everyone falls into one or another of these categories.[26]

because of the long imprisonment of her husband) and a perpetrator (in her role with the Mandela Football Club and its coercive, even deadly, practices in the late eighties).

[26] This point is important since some have objected to the P3 category on the grounds that it will undermine the combatant/noncombatant distinction in just war theory, or rationalize terrorist ideology, according to which everyone in a society is fair game for attack since everyone (in some sense) supports those they regard as enemies. To say that certain persons are tertiary participants or tertiary perpetrators in the sense defined here is *not* to say that they merit death (whether in war or by capital punishment) in virtue of that status.

We can see, then, that while there is a distinction to be made between victims and perpetrators, this distinction should not be understood so as to imply dichotomization or polarization. If we do construct the distinction that way, we will oversimplify and may create new oppositions – even polarizations – in the aftermath. It is important not to construct a new conflict around mistakenly dichotomized roles of victims and perpetrators. The needs of victims and perpetrators may be in conflict because there are insufficient resources to provide for both. Both sufferers and agents of violence may require assistance to reconstruct their lives. This assistance will somehow have to allow for the facts of overlapping roles, since the very same people may have been harmed both as individuals and as perpetrators.

VI. Concluding Comments

Only some of the many dilemmas of reconciliation have been explained here. Clearly, basic theoretical issues about trust, responsibility, and social and penal justice are central in understanding the challenges in this area. Attitudes are central, especially those relating to social trust. Peace is in jeopardy if the challenges of reconciliation are ignored. Courts may be important and necessary but are not sufficient. Polarization needs to be overcome, not cultivated. And victims and perpetrators are better understood as roles than as people.

13

Amnesties and International Law

Christopher Heath Wellman

An amnesty is granted when an individual or group of individuals is given immunity, typically before being put on trial or convicted.[1] It is important to think systematically about when amnesties should be granted (and respected by the international community) because a country's use of amnesties can dramatically affect its capacity to pursue justice, reconciliation, peace, and stability.

There are at least three distinct questions regarding amnesties: (1) Under what conditions is it *rational* to grant amnesties? (2) Under what conditions is it *morally permissible* to grant an amnesty? and (3) Under what conditions must the international community respect amnesties granted by individual domestic governments? I will address each of these questions here, commenting most extensively on the last.

I. When Is It Rational to Offer Amnesty?

Ideally, one would like a policy on amnesties that both maximizes justice and establishes the appropriate incentive structure for all the relevant parties, especially military and political leaders. It is not clear that such a policy exists, however, because often we must choose between securing retributive justice or paving the way toward future peace and stability. Consider the case of a country ruled by a dictator, for instance. What should this country do if its tyrant agrees to relinquish power on the condition that she and her associates are granted complete immunity

[1] It is standard to distinguish amnesties from pardons, which tend to be more particularized and to imply forgiveness. Because they raise so many of the same practical and moral issues, however, I will draw no distinction between amnesties and pardons for the purposes of this essay.

for any crimes committed while in power? If the citizens want retributive justice, presumably they should not pardon the ruler. If they are to liberate themselves from this oppressive regime, on the other hand, they may have no choice but to extend the amnesty. In cases such as these, it seems that a country must choose between justice and a more prosperous future; it cannot have both. And because there is room for reasonable people to disagree about the relative importance of the various values involved, it is not clear how specific one can be about the circumstances under which it is rational to grant amnesties. Still, some more general conclusions can be reached.

To begin, it is important to appreciate that a judicial system is able to supply the extremely important benefits it does (securing justice, deterring crime, morally educating both the criminal and society at large, allowing society to express its core moral values, helping to restore victims, and providing a peaceful outlet for society's – and especially the victim's – thirst for justice and revenge) only within a legal climate in which criminals are systematically pursued, prosecuted, and punished. And since extending immunity to presumed criminals will render one's system of criminal law less able to secure these crucial aims, there is clearly a presumption against granting amnesties. Given this prima facie case against impunity, it seems reasonable to conclude that amnesties should be granted only in exceptional circumstances. In particular, amnesties are tempting when they appear to be the most promising path to (1) establishing peace or (2) overcoming daunting practical challenges. If a country faces a substantial threat to peace (during a precarious transition between regimes, for instance), or if a country would experience enormous logistical difficulties prosecuting criminals (if there were an inordinate number of defendants, for example), then granting an amnesty might appear the best way to ensure that the entire system does not collapse. South Africa's Truth and Reconciliation Commission (TRC) is often held up as a crowning example of a successful amnesty. Perhaps because holding all perpetrators accountable would have both (1) jeopardized the country's chances of peace during a time of turbulent transition and (2) been prohibitively difficult (and costly) to administer effectively, most regard the TRC as a paradigm example of a rational amnesty.

We must be careful about inferring too much from this example, though, because not everyone is convinced that the TRC was an unalloyed success, and many who do regard it favorably consider it to be the exception rather than the rule. Though in the minority, critics have expressed concerns that the commission produced arbitrary results, was

systematically biased, lacked investigative capacity, failed to supply reconciliation at the more local levels, and perpetuated a dangerous culture of impunity in South Africa.[2] And among those who regard the TRC favorably, many caution that it would be recklessly naïve to assume that the results in South Africa are representative since the TRC was distinctive in being democratically pursued, offering immunity only under certain conditions (including public confessions of guilt), and conjoining some cases of immunity with other criminal prosecutions and, perhaps most importantly, the entire venture was endorsed and overseen by Nelson Mandela, a figure virtually universally admired for his impeccable moral credentials.

My own view is that the TRC was a remarkable achievement, but it would be wildly optimistic to presume that its formula for success could be easily replicated. While we should not entirely rule out the future use of amnesties, it would be wise to begin with a very weighty presumption against them, and to forgo this extreme measure unless one both is in exceptional circumstances and has particularly clear and compelling evidence that an amnesty stands to work markedly better than any other feasible option. This conclusion is admittedly vague, but in view of the various incommensurate values involved, it seems futile to seek a fully codifiable algorithm that can be universally applied.

II. When Is It Morally Permissible to Grant an Amnesty?

Given the zeal with which human rights groups lobby for the prosecution of human rights perpetrators, one might conclude that amnesties are never morally permissible. There are three salient justifications for this response: one focuses on the rights of the international community, a second revolves around the rights of those within the criminal's political community, and a third focuses upon the rights of the victim.

According to the first justification, individual countries may not issue amnesties because the international community has a right to a global climate of accountability, and amnesties undermine efforts to create this climate. The core idea that motivates this argument is that a culture of accountability is a global public good, a good that can be established only if enough countries do their part to contribute to it. Because potential

[2] Dwight G. Newman, "The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem," American University International Law Review, 20, no. 2, 293–357.

violators of human rights (especially military and political leaders) take their cues at least in part from the way criminals in other countries are treated, when one country allows its criminals impunity it makes it that much harder for the rest of the world to establish the desired global climate. Put bluntly, any country that issues an amnesty is not doing its fair share; it free-rides upon the sacrifices of others, unfairly making an exception for itself.

There are two reasons to question this intriguing argument. First, even if we can speak sensibly about both "an international community" and a "global culture of accountability" (a point that is not altogether clear), it is not obvious that this community has a genuine right to such a culture. The international community may have a *legitimate interest* that there be a culture of accountability, but one can acknowledge this without committing oneself to the claim that the community of states has a *valid claim* to this type of climate. Second, even if such a right exists, and each country therefore has a duty to do its fair share to promote a global culture of accountability, this admission is not sufficient entirely to rule out the permissibility of amnesties. It might well explain why countries should not grant immunity for frivolous reasons, but a country that genuinely feels the need to issue an amnesty is typically in dire straits, desperately looking for a means to handle a monumental crisis. Given this, it seems plausible for an imperiled state to object that it would be unreasonably costly for it to forgo the option of amnesties and, as a consequence, its reluctant use of an amnesty during especially trying times does not violate its duty to do its fair share.

A second possible explanation of a state's duty to punish all criminals invokes the rights of the criminal's compatriots. The motivation behind this approach is the idea that each citizen has an obligation to obey the criminal law as her fair share of the communal project of creating a peaceful environment. If someone breaks the law, then it is appropriate to punish this criminal for not doing her fair share. Thus, if the government gives immunity to someone who has broken the law, it thereby allows that criminal to free-ride upon the sacrifices of others; the unpunished criminal is a free-rider because she is able to enjoy all of the benefits of the peaceful society without having to incur the usual costs of obeying the law. Such free-riding is patently unfair to those who have borne the relevant costs, of course, and thus the rest of us have a right that the state punish those duly convicted of breaking the criminal law.

I am sympathetic to conceiving of the duty to obey the law as a citizen's fair share of the communal job of securing peace and justice, and

I even agree that those who break the law unfairly take advantage of the sacrifices of their compatriots. Still, I resist this second type of argument because I am not convinced that obedient citizens necessarily have a right that all convicted criminals be punished. In my view, citizens have a duty to obey the just laws of a legitimate government, but if the government is legitimate, it enjoys a certain degree of discretion over its exercise of the criminal law, discretion that entitles it to grant immunity as it sees fit. As I see it, a citizen has the duty to obey the just laws of a legitimate regime, where a regime's legitimacy depends upon its satisfactorily performing the requisite function of securing basic human rights. And because a state can perform this function consistently with its granting some immunity, it is within its rights to do so. Of course, if the state were to grant an excessive number of sweeping amnesties, then a culture of impunity would likely result, and crime would become rampant. Under these circumstances, though, the state would not be performing its requisite functions because it would not be satisfactorily protecting the basic moral rights of its constituents. And thus the state would not be legitimate, and citizens would have no duty to obey the law. To recapitulate: There is a correlation between a citizen's duty to obey the law and her state's performing requisite functions, but the latter should not be cashed out in terms of a duty to hold all suspected criminals accountable. Instead, a citizen's duty to obey the law depends upon her state's adequately protecting human rights. And because a state can satisfactorily protect these rights without necessarily punishing every last criminal, it does not violate the rights of all those who faithfully obey the law if it occasionally extends immunity to those who have taken advantage of the system.

The third justification for the contention that states have a duty to punish all criminals features the claims of victims. Specifically, one might assert that each victim has a right that the state zealously pursue, prosecute, and punish those who have wronged her. After all, it is often thought that individuals in the state of nature have a right to punish those who violate their moral rights, and if they are entitled to this in the absence of political society, how does the imposition of a legitimate state extinguish this executive right? Even if we assume that this right is extinguished, it seems natural to infer that states thereby acquire a correlative duty to punish criminals, a duty that renders amnesties impermissible.

Because the Lockean view that individuals in the state of nature enjoy an executive right to punish wrongdoers is attractive to many, this third justification for the impermissibility of amnesties is perhaps the most promising. This line of argument ultimately fails, however, if citizens of

legitimate states can *lose* the right that those who wrong them be criminally punished, and most accept that an important component of what one loses by living in a legitimate state is moral dominion over the prosecution and punishment of criminals. Virtually everyone acknowledges that the state is at liberty to criminally prosecute a criminal even when the criminal's victim would prefer *not* to press charges, for instance, so there is no reason to be suspicious of the opposite conclusion – that the state may elect not to prosecute or punish a criminal, even when the victim emphatically wants to press charges. And if government officials are well within their rights when they elect not to press charges against a potential defendant (if they decide that it would not be possible to build a sufficiently compelling case against the criminal, for instance), then a state's decision to grant amnesty to a large group of rights violators (because its legal system could not feasibly manage such a massive load of cases, for example) appears to be just a larger example of what is commonly understood to be squarely within a state's legitimate sphere of sovereignty over its exercise of the criminal law.

Because invoking the rights of the victims proves no more helpful than appealing to the claims of the international community, it appears as though the blanket impermissibility of amnesties cannot be derived from a state's duty to prosecute and punish all suspected criminals. But while the foregoing arguments do not show that governments may *never* issue an amnesty, they might point toward weighty moral reasons to resist the use of amnesties in anything like normal circumstances. In particular, the rights (or at least the legitimate interests) of the international community, of the criminal's compatriots, and of the victims themselves might explain why criminals must be prosecuted and punished unless there is a weighty reason against doing so. One might even cash this out in terms of a conditional duty: states have an obligation to refrain from granting amnesties in all but the most extenuating circumstances.

I have no objection to this more modest conclusion, as long as it is understood that a government's use of amnesties need not be ideal or fully rational in order to be morally permissible. Think, for instance, of President Ford's decision to pardon Richard Nixon for any involvement he might have had in the Watergate scandal. Ford appealed to the distraction it would cause lawmakers if they were to pursue this prosecution and thus justified the pardon as in the country's best interest. Suppose that Ford was wrong: that is, suppose that the benefits of prosecuting and punishing Nixon would have more than outweighed the costs of doing so.

In my view, this would not have made Ford's decision to pardon Nixon impermissible. If Ford had pardoned Nixon merely because they were friends, on the other hand, then I think the victims in particular and the public at large would have had a legitimate complaint. Thus, even if we are ultimately unable to say with any degree of precision which amnesties are rational and which are not, this inability will not preclude us from making moral judgments on the topic, because the permissibility of any given amnesty does not depend upon its having been perfectly rational. Instead, amnesties can be permissible just as long as they are issued for the right types of reasons, that is, if they are granted in the genuine pursuit of important goods. And this may be enough for us to conclude that Ford's pardon of Nixon was morally justifiable, but not the amnesty Pinochet extended to his associates and himself, if the former was based upon a genuine concern about the country's welfare, whereas the latter was not.

III. When Should the International Community Respect an Amnesty?

Suppose that, in a desperate attempt to coax its dictator out of office, a country offers immunity to this despot and her staff. Should the international community respect this agreement? On the one hand, there clearly are reasons why, despite the explicit agreement, international actors should take it upon themselves to criminally prosecute and punish the dictator. First and most obviously, the fact that the dictator's country was willing to pardon the tyrant does not make her any less guilty of the crimes she committed while in power, so the importance of securing retributive justice continues to provide the international community with reasons to punish the dictator. What is more, given the circumstances under which the country offered the immunity, it is not clear that the dictator has a right against being punished. In particular, because the country agreed to pardon her only because this was its only hope of escaping her tyrannical rule, the country's promise appears no more morally binding than a slave's promise not to run away from her slave owner. Thus, when one considers the merits of the individual case, there appear to be good reasons for the international community to criminally prosecute the dictator despite the explicit guarantee of immunity.

On the other hand, if the international community disrespects agreements like this one, other leaders will have no incentive to broker similar

deals in the future. Think of it this way: The dictator in question agreed to relinquish power only because she expected to be able to live out her years in peace, free from the threat of prosecution. But if the international community routinely prosecutes former leaders who had been granted immunity, then dictators would have no incentive to give up their power in return for amnesty. And if this is right, the international community's criminal prosecution of those previously granted immunity imposes a huge price upon those currently oppressed by dictators who otherwise might have agreed to leave office under the protective cover of an amnesty. Thus, the international community is confronted with a choice similar to that which the domestic country initially faced: it can pursue retributive justice or it can seek future peace and prosperity, but it cannot do both. (In fact, it is messier still, because the international community's decision to honor the amnesty will have negative consequences insofar as it fails to deter future leaders from violating the rights of their constituents.)

To make matters more complicated, there are at least two additional issues that the international community must consider before deciding a case like this one: (1) double jeopardy and (2) state sovereignty. Regarding double jeopardy, notice that it is widely agreed that the international community should not criminally prosecute someone who has already been prosecuted by her domestic system of criminal law; doing so is just as problematic (and for the same reasons) as multiply prosecuting someone within a single jurisdiction. Similarly, it may be wrong for the international community to criminally prosecute an individual after she has been pardoned within her domestic jurisdiction (just as it presumably would be problematic if a country criminally prosecuted and punished someone for a crime for which the country had earlier granted amnesty). And regarding state sovereignty, notice that an international actor that criminally prosecutes someone after she has been pardoned by her country is taking it upon itself to preside over a matter that is normally thought to be within the exclusive jurisdiction of the state. Indeed, if it is objectionably meddlesome for international actors to intervene forcibly to ensure that an individual *not* receive the criminal punishment to which her country had sentenced her, why is it not equally disrespectful of state sovereignty for an international party forcibly to impose a punishment when the country has previously decided that none is in order?

In light of the complexity of the various issues involved, perhaps the best way to begin this inquiry is by examining existing international law. Interpreting international law is notoriously difficult and controversial, but I

am convinced by Leila Nadya Sadat's analysis of this issue.[3] Sadat argues that while domestic amnesties are not illegal, the international community is not bound to respect any immunity given for *jus cogens* crimes. To appreciate this interpretation fully, one must grasp two distinctions: (1) that between an amnesty's being *illegal* versus its being *binding* upon others and (2) that between crimes that are *jus cogens* versus those that are not.

First, saying that international law does not make amnesties illegal is to insist only that countries do not currently have a legal duty to prosecute and punish their criminals. But whereas international law does not forbid countries to grant amnesties, it does deny that these amnesties necessarily bind the international community. In other words, while individual countries are at liberty to grant amnesties, this immunity does not obligate international parties to refrain from prosecuting and punishing those covered by the amnesty. Second, *jus cogens* crimes are those covered by peremptory, nonderogable norms of international law. It is a matter of controversy which crimes are actually *jus cogens* (it is unclear whether terrorism would be included, for instance), but genocide, crimes against humanity, torture, and slavery would certainly qualify, whereas offenses like tax evasion and embezzlement clearly would not. Perhaps the simplest way to put the point is to say that gross violations of human rights are *jus cogens* crimes because these are offenses that international law insists are illegal anywhere in the world, irrespective of the wishes or official pronouncements of any domestic government. Combining these two points, we might say that international law allows states to grant amnesties to criminals of all stripes (even those guilty of *jus cogens* crimes), but it reserves the right of international parties to prosecute and punish the perpetrators of human rights atrocities even if they have been granted immunity by their municipal governments.

Assuming that this is an accurate description of the current state of international law, the global community might appear to have staked out a sensible compromise position. It is important to recognize, however, that this stance is supported not by a principled understanding of when the right of self-determination gives legitimate states the moral authority to issue binding amnesties, but by the erroneous presumption that the international community is itself harmed by all and only *jus cogens* crimes. As United Nations High Commissioner for Human Rights Mary

[3] Leila Nadya Sadat, "Exile, Amnesty and International Law," *Notre Dame Law Review*, 81, no. 3 (Spring 2006), 935–1036.

Robinson stated, "The principle of universal jurisdiction is based on the notion that certain crimes are so harmful to international interests that states are entitled – and even obliged – to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or the victim."[4]

To see the error of this way of thinking, consider the rationale behind a paradigmatic *jus cogens* offense, crimes against humanity. The category of crimes against humanity is regarded as necessary to explain an international party's jurisdiction into what would otherwise be the exclusive business of a sovereign state, because international lawyers typically approach these matters from the Westphalian perspective, which presumes that each state enjoys a privileged position of moral dominion over its self-regarding affairs. And if each state is sovereign over its own matters, then presumably external parties have a duty to respect a state's exercise of criminal law. In other words, it is up to each state to decide whether and how to prosecute its own criminals, even those responsible for human rights atrocities. To overcome this presumption in favor of national sovereignty, then, the international community must explain why certain forms of criminal activity do not merely affect members of a given state: they harm humanity as a whole. As its name implies, the category of crimes against humanity is thought to fulfill this function because it is said to single out those crimes that (even if perpetrated exclusively by and against members of a single country) harm all of humanity.

Accounts of what constitutes a crime against humanity take a variety of shapes and sizes, of course, but in my estimation they all fail because none shows that every member of humanity is actually harmed (in the morally relevant sense) by any given crime, no matter how horribly it violates its victims' human rights. Even if we concede that the genocide of Jews violates the humanity of those Jews attacked (or perhaps of all Jews), or even if we grant that using chemical weapons against Kurds shocks the conscience of humankind, neither conclusion is sufficient because neither account shows why an average citizen in Australia, say, is necessarily harmed by even the most horrific crime perpetrated against either a Jew in Germany or a Kurd in Iraq.

But notice, even if I am right that no account of crimes against humanity can explain why the international community can have an actionable interest in the internal affairs of a state's criminal legal system, it does not

[4] Mary Robinson, "Foreward," in Stephen Macedo's *Princeton Principles on Universal Jurisdiction* (Princeton, NJ: Program in Law and Public Affairs, 2001), p. 16.

necessarily follow that international criminal law is therefore unjustified. The category of crimes against humanity is important only if one accepts the Westphalian assumption that all states are entitled to dominion over their self-regarding affairs, but since I reject this Westphalian orientation, I am not worried by the failure of accounts of crimes against humanity. Put simply, unless one begins with the presumption that all states have a moral right to sovereignty over their self-regarding affairs, one does not need a special category of crimes that purportedly harm all of humanity.

An exhaustive analysis of the Westphalian orientation would be complicated, of course, but the most basic reason I deny that all states are entitled to sovereignty is that I think that illegitimate states have no right to self-determination. Very briefly, I believe that states are legitimate just in case they satisfactorily protect the human rights of their constituents and respect the rights of others. If a state adequately performs these functions, then it enjoys a morally privileged position of dominion over its self-regarding affairs. But if a state is either unable or unwilling to protect its constituents' basic human rights, or if it violates the human rights of foreigners, then it is illegitimate, and it has no claim to sovereignty. Thus, on my view, neither Milosevic's Yugoslavia nor Somalia since the early 1990s would qualify as legitimate because the former was *unwilling* and the latter has been *unable* to protect the basic rights of its citizens. As a result, it would be permissible unilaterally to impose international criminal law on either of these states. Most importantly for our purposes here, we would not have to show that criminals in Yugoslavia or Somalia were harming anyone outside either state in order to justify this intervention. Instead, because neither of these states is legitimate, neither has a presumptive claim to self-determination that must be defeated by an account of how (some subset of) the crimes committed within these countries putatively harm all of humanity.

Although this discussion of legitimacy and its implications has been quick, it is enough to show that there is an important difference between those amnesties that have been issued by legitimate states and those that been granted by illegitimate regimes. There is also an important distinction to be drawn, I think, between amnesties for crimes exclusively against citizens of the state that has granted the amnesty, and amnesties for violations of the human rights of foreigners. Taking these two distinctions into account, an adequate analysis of when the international community should respect a domestically issued amnesty must distinguish among four different types of cases: (1) a legitimate state's amnesty for crimes committed exclusively by and against its own citizens, (2) a legitimate

state's amnesty for crimes committed either by or against foreigners, (3) an illegitimate state's amnesty for crimes committed exclusively by and against its own citizens, and (4) an illegitimate state's amnesty for crimes committed either by or against foreigners.

Right off the bat, the first and fourth cases seem considerably easier to negotiate. Specifically, while it is wise to avoid speaking in terms of absolutes, it seems clear that the international community should virtually always respect a legitimate state's amnesty for crimes committed exclusively by and against its own citizens, because legitimate states enjoy dominion over their own self-regarding affairs, and the prosecution and punishment of entirely domestic crimes seem a paradigmatically self-regarding matter. Indeed, these amnesties should be respected even if they are patently irrational or even immoral. Even if Ford's pardon of Nixon had been not only unwise but immoral, for instance (as it would have been if it Ford had given the immunity only because the two were friends), it would still not be appropriate for some international party to take it upon itself to prosecute and punish Nixon. The basic idea here is that just as an autonomous individual has a right to live her life free from outside interference even when she acts in an irrational or suberogatory fashion, legitimate states have the right to order their own affairs even when they do so in a suboptimal manner. Even if capital punishment is immoral, for instance, a country would not necessarily lose its legitimacy merely because it utilized the death penalty. (Of course, the international community might be justified in interfering if the domestic crimes were either widespread or systematic, but in that case the state would not qualify as legitimate, because any state that permitted either widespread or systematic crimes would not be satisfactorily protecting the rights of its citizens.)

At the opposite end of the spectrum, the international community would seem to have very little reason to respect a domestically issued amnesty granted by an illegitimate regime for crimes committed either by or against foreigners. Very briefly, since the state is illegitimate, it has no claim such that the international community must treat its judicial pronouncements as binding. And even if it did, presumably this claim would not apply to cases involving foreigners. Imagine that Saddam Hussein had given amnesty to all Iraqi soldiers who committed atrocities against civilians in Kuwait, for instance. It is hard to see why the international community is obligated to respect this immunity.

The second and third types of cases, on the other hand, appear considerably more difficult. Regarding a legitimate state's amnesty for crimes

committed either by or against foreigners, I am inclined to think that *territory*, rather than *citizenship*, is the crucial variable. More specifically, legitimate states are entitled to grant amnesties for crimes within their territory (even if they were committed by or against foreigners), but they do not have the right to give immunity for crimes in foreign lands (even if they were committed by or against citizens).

I suspect that many people will find this position curious. After all, how could the Danish government have the right to grant immunity for a crime committed either by or against a Swedish citizen? If a Danish citizen violated the rights of a Swedish citizen in Copenhagen, for instance, would not the Swedish government have a right to complain if the Danish government pardoned the Danish criminal? And may not the Swedish government take it upon itself to punish its own citizen for violating the rights of Danes in Copenhagen? I would answer both of these questions negatively: The Swedish government is not wronged if the Danish government pardons a Danish criminal for violating the rights of a Swede in Copenhagen, and the Swedish government cannot rightfully punish its own citizen for crimes committed in Copenhagen if the Danish government has granted the Swede immunity for these crimes.

These conclusions seem awkward because we typically assume that legitimate political states enjoy an exclusive, privileged position over all and only their citizens. But while this position is close to the truth, I believe it misses the mark. It is more accurate, I think, to claim that legitimate states enjoy exclusive sovereignty over their *territory*. For the most part, this means that each country is entitled to preside over its own citizens, but because citizens travel internationally, this relationship holds only "for the most part." And since states are defined territorially, it makes sense that the Danish rather than the Swedish government should preside over any Swedes who travel to Denmark. Indeed, in support of this conclusion, consider a banal example. Imagine that Sweden has a federal law prohibiting the sale of alcohol on Sundays, but Denmark allows duly licensed stores to sell alcohol seven days a week. Does the Swedish government have a right to punish Swedish citizens living in Denmark for selling alcohol on Sunday? Presumably not. And it seems just as wrong to think that the Danish government could rightfully object if the Swedish government punished a Dane living in Sweden if she were duly convicted of selling alcohol on Sundays. As these examples indicate, it is quite straightforward and sensible to presume that the Danish criminal law extends to all and only those physically in Denmark, not to all and only Danish citizens. And if so, then what is wrong with the position that Denmark has

the exclusive authority to grant immunity to those who commit crimes in Denmark, but it does not have the authority to extend amnesties for all crimes committed either by or against Danish citizens?

Here one might object that my example of selling alcohol on Sundays is misleading because this is not a crime that involves the violation of basic moral rights. In particular, one might wonder about a case in which Denmark changed its criminal laws so that it was no longer a crime to violate the rights of foreigners. Under these circumstances, Swedes would be quite vulnerable, and it no longer seems clearly wrong to suppose that the Swedish government might have the authority to prosecute and punish Danes for rights violations they perpetrated against Swedes in Denmark.

I am inclined to agree with this conclusion, but doing so poses no problems for the position I am defending here, because my view concerns only *legitimate* states, not all states. More specifically, if the Danish government passed laws that granted amnesties for violating basic moral rights of foreigners, and if the result were an environment in which foreigners were extremely vulnerable, then this government would not be legitimate, since the central condition for legitimacy is that one satisfactorily protect the basic moral rights of one's constituents. And notice: it is important that the last word of the previous sentence is "constituents" rather than "citizens." In keeping with my contention just previously that a legitimate state enjoys dominion over all and only those people within its territory (rather than all and only its citizens), I believe that, in order to be legitimate, states must adequately protect the basic moral rights of all and only those people within their territory, not all and only their citizens. Thus, Denmark would not lose its legitimacy if it were not adequately protecting the rights of its citizens who reside abroad, but it might lose its legitimacy if it did not satisfactorily protect the rights of foreigners living in Denmark. And if this is so, then I can accept the conclusion of this potential objection without its counting against the view I am defending here.

Finally, consider whether the international community should respect an illegitimate state's amnesty for crimes committed exclusively by and against its own citizens. Although illegitimate states may not have a *right* that others respect their self-determination, there remain pragmatic (and perhaps moral) reasons to defer to the wishes of a state's constituents, even if their government is not yet able to perform the requisite political functions. With this in mind, I believe it would be best for the international community to honor all *valid* amnesties (where validity is a function

of a country's people genuinely and freely granting immunity) and to disrespect invalid or "sham" amnesties (where an agreement is invalid if it is coerced or for some other reason is not a genuine expression of the group's will – because the party granting the pardon is not a legitimate representative of the people, for instance). Of course, this raises difficult questions about how to assess the validity of an amnesty. Here I would recommend that the international community establish an authoritative body (within the UN or the Hague, for instance) charged with certifying – in advance, wherever possible – the validity of amnesties.

I should emphasize, however, that these amnesties are to be negotiated domestically; only after the agreement is brokered within the confines of the country in question should it be taken before this review board to determine whether the international community is willing to certify it as a valid agreement. The crucial point is that it is up to a country's own people to make the difficult choices about how to pursue the various (and often mutually exclusive) goals of retributive justice, reconciliation, peace, and stability. The international community can also play a key role, but it is better if outsiders do not tell a country which course it must choose. International actors can perform the restricted but important function of ensuring that a country's amnesties are respected if and only if they accurately reflect the people's free and genuine preferences. Perhaps the best comparison of the role I envision the global community's playing is to that of an international body that monitors a domestic election. Only the citizens of the state in question should have a vote (it is not the place of the international community to tell a people who their ruler should be), but the international community may or may not certify the election results depending upon the extent to which the election was free and fair. If the country elects a candidate through an appropriate democratic procedure, then the international community should respect that person's political standing, whether or not the international community thinks she is the best person for the job. If there are substantial problems with the way in which the election is managed, on the other hand, then the international community has good reasons to deny that the newly appointed leader has the legitimate authority that other rulers enjoy. Similarly, the decision of whether or not to grant amnesties raises difficult questions concerning a number of competing values, and while it is typically best if a country's constituents make these decisions, the international community can and should play an important role in seeing to it that all and only valid agreements are respected.

IV. Conclusion

In closing, let me punctuate some of my main conclusions in terms of a concrete example. In particular, consider the situation of Iraq's transitional government as it attempts to build a stable, secure future. Both because it has a violent history, and because its path to lasting peace and democratic rule is a difficult one, it might be tempting to grant amnesties to various parties in the clashing groups. Would the Iraqis be wise to go this route? Perhaps, but we must bear in mind several points. First, the standard concern about the Iraqi judicial system's simply collapsing under the weight of such a large number of potential defendants is much less pressing given the emergence of the international legal system. Because various international parties would be prepared to aid Iraq in its pursuit of retributive justice, we should not simply assume that this daunting task is utterly beyond the capacity of the fledgling government. Second, because Iraq's prospects for a peaceful future depend as much as anything else upon their overcoming their current climate of impunity, they should be extremely wary of the extent to which granting amnesties now will undermine their hopes of establishing a culture of accountability. Third, even if it turns out that there is a very clear and compelling case in favor of amnesties, the Iraqis should (1) avoid making them any more sweeping than necessary, (2) tie the immunity to certain conditions, and (3) offer the amnesties alongside a parallel track of prosecutions, as the TRC did.

Would it be morally permissible for the Iraqis to grant amnesties? The short answer is yes. Because no party has a right that criminals be punished, Iraq does not have a duty to refrain from granting immunity. And because an amnesty need not be rational in order to be morally permissible, Iraq need not prove that any given plans for granting immunity will be beneficial before instituting them. That said, there are weighty moral reasons for the Iraqis to refrain from issuing any amnesties. Because of the legitimate interests that people all over the world have in securing a global climate of accountability, because of the legitimate interests all law-abiding Iraqis have in ensuring that others are not able to free-ride on their sacrifices, and because of the legitimate interests victims (among others) have in seeing that retributive justice is meted out upon those who have violated their basic rights, Iraq should not grant any amnesty unless it has clear and compelling evidence that doing so is the only way to secure a vitally important aim.

Finally, must the international community respect any amnesty granted by Iraq's transitional government? As we have seen, it depends upon

a number of factors, the two main ones being the legitimacy of Iraq's government and the location of the crimes. If the transitional government was illegitimate at the time the amnesty is granted, and if the amnesty is for crimes committed against foreigners (such as foreign soldiers and contractors, for instance), then the international community has virtually no reason to respect the immunity. If the transitional government was legitimate and granted amnesties for crimes committed exclusively by and against Iraqis (within Iraqi territory), on the other hand, then Iraq's right to self-determination implies a correlative duty upon others to respect its sovereign judgment over this matter. If Iraq grants amnesties for crimes committed either by or against foreigners, then others must respect these amnesties just in case they are for crimes committed within Iraqi territory during a time when Iraq's government was legitimate. And finally, if Iraq's transitional government is not yet legitimate when it issues the amnesty, then it has no right to self-determination and international actors have no duty to respect its judgments on these matters. Still, I believe that the best course would be to respect any "valid" amnesties, where validity is a function of the free and informed preferences of the Iraqis as a whole.

14

War Crimes

The Law of Hell

David Luban

I. Is Law Silent When Arms Are Raised?

This is a chapter about war crimes and war crimes trials. In it, I sketch the history, structure, and justification of laws of war backed by criminal punishments; in the concluding section I briefly compare war crimes trials to other ways of coming to grips with war's horrors after it ends. Yet before turning to these topics, it is worth pausing to reflect on how extraordinary the entire idea of war crimes is. To conduct war crimes trials supposes that war is governed by laws, and that is by no means obvious. In Cicero's famous words, "Laws are silent when arms are raised" (*silent enim leges inter arma*).[1] Even in peaceable civil society, according to Hobbes, "A man cannot lay down the right of resisting them, that assault him by force, to take away his life."[2] As for war, "The notions of right and wrong, justice and injustice have there no place. Where there is no common power, there is no law: where no law, no injustice. Force, and fraud, are in war the two cardinal virtues."[3] General Patton wrote, "War is not a contest with gloves. It is resorted to only when laws (which are rules) have failed."[4] Today, this "all's fair in war" idea resurfaces in a T-shirt slogan: "In war, you can be right – or you can be left."

One might object to Cicero's self-defense-versus-law dichotomy that individual self-defense is part of the law, not a limit to law: all legal systems permit lethal force in response to dangerous attacks. However, soldiers'

[1] Marcus Tullius Cicero, Pro Milone 11.

[2] Thomas Hobbes, *Leviathan*, Thomas Oakeshott ed. (Oxford: Basil Blackwell 1957), p. 86, chap. 14.

[3] Ibid., p. 83, chap. 13.

[4] George S. Patton, "The Effect of Weapons on War," *Cavalry Journal* (November 1930), available at http://www.pattonhq.com/textfiles/effect.html.

violence in war vastly exceeds the contours of civilian self-defense, in several ways. First, once a state of war exists, soldiers can engage in offensive violence. Second, a soldier can kill the enemy even when he poses no immediate threat. Indeed, the soldier can attack uniformed cooks, drivers, mechanics, and bookkeepers. More generally, individual self-defense cannot accommodate any situation in which I shoot Enemy Soldier A in battle because Enemy Soldier B has shot at me.[5] The fact is that very little of war's violence counts as individual self-defense in any sense domestic law recognizes or should recognize.

Furthermore, we all understand that war harms the innocent to a degree that would be intolerable in times of peace, and that knowledge makes attempts to draw up a legal regime for war seem farcical. Even if warriors conscientiously target only active combatants, "collateral damage" – a euphemism for dead and maimed civilians – will inevitably result, in large numbers. Indeed, as war has evolved away from set-piece battles on discrete battlefields, collateral damage overwhelms military deaths in scale (so much so that today the very term "collateral damage" should be rejected as propaganda aiming to downplay civilian casualties). In World War I, fewer than 10 percent of the casualties were civilians; in World War II, 50 percent. In contemporary African conflicts, civilians represent 90 percent of the casualties.[6] The current U.S. war in Iraq has produced, by a low-end estimate, close to 60,000 civilian deaths; the high-end estimate is 10 times that.[7] U.S. military casualties, even including private military contractors, number in the low thousands, a small fraction of the "collateral" deaths.

The preponderance of civilian deaths holds under a worldwide legal regime that insists on the impermissibility of targeting civilians. But that regime itself is a historical anomaly, and the wrongfulness of targeting civilians is by no means universally acknowledged. The point of war is to cause the enemy's surrender. It may be that the best method is attacking civilian homes, fields, and workplaces. Total war simultaneously

[5] For a devastating criticism of efforts to assimilate war fighting to personal self-defense, see David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002), p. 128.

[6] P. W. Singer, *Children at War* (New York: Pantheon, 2005), pp. 4–5.

[7] The low-end estimate is from Iraq Body Count, available at http://www.iraqbodycount.org/. The high-end estimate is from Gilbert Burnham et al., "Mortality after the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey," *The Lancet*, Oct. 6, 2006, available at http://www.thelancet.com/webfiles/images/journals/lancet/s0140673606694919.pdf. However, this high-end count estimates excess mortality over the preinvasion rate, whatever the causes.

undermines the material infrastructure of enemy troops and breaks the will of its people. That was the goal in Sherman's brutal march to the sea in the U.S. Civil War, bringing to perfection the strategy formulated by Grant, who understood that the southern armies could not be beaten on the battlefield alone.[8]

Bluntly, Sherman said, "War is hell." His aphorism can be understood in two ways, one realist and one moralist. First, if the aim of war is to force the enemy's surrender, then the "logic" of war (as strategists like to call it) rejects restraint in favor of escalation.[9] War is hell because, as in hell, the horrors know no bounds. Second, on moral grounds, escalation leading to a quick surrender may be more desirable than restraints that prolong the war. War can be foreshortened by making it as hellish as possible. So, at any rate, Sherman argued in his memoirs.

Sherman understood strategy better than theology. Hell is for the guilty, but Sherman's strategy was to plunge the innocent into hell fire, side by side with the guilty, to bring the enemy to its knees sooner rather than later. However, even if his celebrated metaphor is imperfect, his argument that hellish violence shortens wars cannot simply be dismissed. Defenders of the atomic bombing of Hiroshima and Nagasaki offered exactly the same argument. So did Churchill and Sir Arthur "Bomber" Harris when they continued carpet bombing German cities even in the endgame of the war.[10] Sherman, Churchill, and Truman all followed Clausewitz in assuming that the logic of military necessity is impervious to moral or legal restraint other than, in Clausewitz's words, "self-imposed restrictions, almost imperceptible and hardly worth mentioning, termed usages of International Law."[11]

All these points – the impossibility of treating war along the lines of legal self-defense, the destruction of the innocent inherent in war, and the terrible cogency of escalation arguments – suggest that in an activity consisting, as Chris Hedges puts it, of "organized murder,"[12] crime talk is fatuous. Paul Fussell makes this point again and again in his famous defense of dropping the A-bomb on Japan: the strictures of the moralist

[8] John Keegan, *The Mask of Command* (New York: Viking, 1987), pp. 219–20.

[9] Carl von Clausewitz, *On War*, Anatol Rapaport ed. (Harmondsworth, England: Penguin, 1968), chap. 1.

[10] Paul Fussell, "Thank God for the Atom Bomb," in *Thank God for the Atom Bomb and Other Essays* (New York: Summit Books, 1988), pp. 13–37, available at http://www.ux1.eiu.edu/~cfib/courses/Fussell.pdf. On Churchill's terror bombing, see Michael Walzer, *Just and Unjust Wars*, 3rd ed. (New York: Basic Books, 1977), pp. 261–62.

[11] Clausewitz, p. 101. Quoted in Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (New York: Henry Holt, 1997), p. 116.

[12] Chris Hedges, *War Is a Force That Gives Us Meaning* (New York: Anchor Books, 2002), p. 21.

simply have nothing to do with the lived experience of combat. Fussell heaps sarcasms on the "sensitive humanitarian" who "was not socially so unfortunate as to find himself down there with the ground forces, where he might have had to compromise the purity and clarity of his moral system by the experience of weighing his own life against someone else's."[13] Marines "sliding under fire down a shell-pocked ridge slimy with mud and liquid dysentery shit into the maggoty Japanese and USMC corpses at the bottom, vomiting as the maggots burrowed into their own foul clothing" simply cannot take seriously the notion of war as a realm governed by rules and restraints.[14] That is why combat-hardened U.S. troops preparing to invade mainland Japan "broke down and cried with relief and joy" at the news of the atomic bombs. "We were going to live. We were going to grow to adulthood after all."[15]

Fussell focuses on the soldier's elemental self-interest in living and the absurdity of expecting high-minded self-sacrifice from the soldier in hell. But more than self-interest is at work. Soldiers also emphasize that they are "assets" whose mission needs them, so saving their skins is their duty as well as their desire – military necessity as well as personal necessity.

Beneath his anger at armchair moralists, it is unclear whether Fussell means that in war everything is justified – that no violence is wrong if it contributes to victory – or that war fighters' crimes are excused because wartime puts troops under stress and duress that make moral restraint impossible. Probably the analytic distinction between justification and excuse holds no interest for Fussell. But the distinction is crucial, because *Kriegsraison* – the doctrine that all's fair in war if it contributes to victory – fundamentally threatens the coherence of declaring some deeds war crimes. "Wartime drives us mad," on the other hand, concedes that war's violence can be wrongful (though excusable).

The doctrine of *Kriegsraison* should be rejected, because victory is hardly ever an ultimate, all-justifying, necessity. To be sure, in ancient wars, being conquered sometimes meant the murder, rape, and enslavement of the entire population. Faced with a genuine existential threat of this sort, warriors could plead military necessity. Michael Walzer calls it "supreme emergency," and he believes Great Britain faced a supreme emergency in 1940 when Churchill ordered the terror bombing of German cities. But supreme emergencies are few and far between, and Walzer takes pains to "set radical limits to the notion of necessity"; in his view, the need for

[13] Fussell, pp. 34–35.
[14] Ibid., pp. 30, 35–36.
[15] Ibid., p. 28.

terror bombing had already passed by 1942.[16] The United States never faced an existential threat in its war with Japan, whose war aim was merely control of the western Pacific. It faces no existential threat in its current conflict with Al Qaeda.[17] In the grips of war fever or war panic, the costs of defeat are easily inflated into supreme emergencies, and only this gives the doctrine of *Kriegsraison* whatever plausibility it seems to have.

Fussell writes from the standpoint of the front-line rifleman, and his argument is that nobody who has not experienced the front line can understand the absurdity of moral restraint in mortal combat. But why privilege the rifleman's outlook over that of the child he shoots or the prisoner he beats to death? The fact, if it is one, that there are no moralists in foxholes no more proves the absurdity of morals than the fact that there are no atheists in foxholes proves (or disproves) the existence of God. The closest we might come to actually *justifying* unrestrained war is Sherman's moralized version of "war is hell": abandoning restraint saves lives by shortening wars. The trouble is that we have no reason for thinking this true beyond the say-so of apologists. Even Fussell never claims that the numbers add up on the atomic bombings. (It depends how quickly Japan would have surrendered without the A-bombs – and some historians believe it would have been very quickly, and that U.S. leaders knew this.)

II. The Law of War as Practical Humanitarianism

An even more fatal objection can be raised to Sherman's argument, for there is a far better way to save lives than upping the level of devastation in war fighting: You can refuse to fight. If the argument is purely a consequentialism of casualties, the correct conclusion is not *inter arma*

[16] Walzer, *Just and Unjust Wars*, pp. 255–61.

[17] As Lord Hoffman wrote in a British security detention case, chiding the Blair government for declaring an emergency that threatens the life of the nation in order to derogate from the European Convention on Human Rights,

> I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.

A and others v. Sec'y of State for the Home Department, [2004] UKHL 56, para. 95. See also Michael Walzer, "Emergency Ethics," in *Arguing about War* (New Haven, CT: Yale University Press, 2004), pp. 33–50, arguing that supreme emergency must be restricted to the rare cases when the life of the community is at stake.

leges silent. The correct conclusion is pacifism – or, at most, the near-pacifist view that lethal force is justified only when the exacting conditions for individual self-defense in peacetime civilian law are met.[18] "Nothing is justified" seems far closer to the truth of war than "everything is justified."

This should not surprise us: "war is hell" sounds like an argument for pacifism more than for total war, and Fussell's aim in much of his writing is not to debunk the theory of *jus in bello*, but to debunk those who romanticize war. Thinking that war can be a rule-governed, restrained enterprise is, in Fussell's view, a version of romanticism about war.

In this, however, he is mistaken. Henri Dunant founded the Red Cross movement in response to the horror scenes he witnessed after the 1859 battle of Solferino.[19] Francis Lieber, who drafted the first modern regulatory code for war, was a combat veteran who fought at Waterloo and was wounded at Namur. These were not armchair romantics but pragmatic reformers who saw war firsthand and aimed to mitigate its horrors through law. Call their view *practical humanitarianism*. Both historically and conceptually, I believe it lies at the basis of the laws of war.

Practical humanitarianism is compatible with many philosophical views, including both pacifism and Hobbesian amoralism. By itself, therefore, it provides no basis for deriving any particular laws of war from moral principles other than the principle of reducing war's horrors to whatever extent possible, given that wars will continue to be fought. In this sense, laws of war are largely a matter of convention: they consist of whatever restrictions practical humanitarians can induce war fighters to accept.[20]

The contemporary philosopher Jeff McMahan has done perhaps the best job of defending the claim that practical humanitarianism has no principled connection with what he calls the "deep morality" of war.[21] As a matter of deep morality McMahan criticizes and rejects many defining features of the laws of war, for example, the view that combatants on all sides of a war are morally equivalent if they fight by the rules. McMahan argues that fighters on the unjust side of a war (let us say a war of naked aggression) do wrong when they kill the enemy. After all, the aggressor

[18] I take it that this is close to the position defended by David Rodin – see *War and Self-Defense*, pp. 196–97 and also Rodin, "Problems with Preventive War," in Henry Shue, ed., *Preemption: Military Action and Moral Justification* (Oxford: Oxford University Press, 2007).

[19] On the origin and activity of the Red Cross, see the title essay in Michael Ignatieff, *The Warrior's Honor*, pp. 109–63.

[20] See George I. Mavrodes, "Conventions and the Morality of War," *Philosophy & Public Affairs* 4 (1975): 117–31.

[21] Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004): 693–733. See especially pp. 729–33.

has no moral right to be in the defender's homeland in the first place, and killing the righteous defender is no less murder because the killing follows conventional rules of combat. A burglar cannot plead self-defense if he kills the homeowner, even if the homeowner attacks him. Nevertheless (McMahan continues), telling combatants that if they kill on behalf of the unjust side they can be punished for murder might deter them from surrendering and thus "establish incentives to protract wars rather than to terminate them."[22] That is because soldiers on all sides would fear that if they lose, the victor will declare their cause unjust and punish them. So, even if the deep morality of war establishes asymmetrical responsibilities between the just and unjust sides, the laws of war should remain symmetrical.

Where do these arguments leave us? First, with the conclusion that "everything is justified" is false. Second, with the conditional conclusion that if laws of war can scale back war's horrors, they should be embraced and enforced. And third, with the conclusion that we should not expect the laws of war to track morality closely. Some moral wrongs done in war – even grievous moral wrongs, as when an aggressor kills a just defender – should not be declared war crimes.

Suppose, then, that we abandon "everything is justified." What about the alternative exoneration, that war subjects fighters to such hellish horrors that everything is excused? As I have already observed, this claim concedes that there are legal or moral war crimes – otherwise, no excuses are necessary. To be sure, those of us who have never experienced combat should take seriously Fussell's warning that we have no idea how insane combat situations are, and therefore what effect they might have on fighters' control over their own actions. At the same time, it is simply untrue that many, let alone most, soldiers shoot prisoners or helpless civilians, rape 14-year-olds, blow up religious shrines, or torture captives in prison camps. Legal excuses (mental incompetence, duress, self-defense, necessity, mistake), like their moral counterparts, are specific, fact-bound releases from rules that most warriors find possible to obey. Without a showing that most warriors commit outrages, blanket exonerations like "War makes us crazy" or "You can't know what it was like" or "When people are shooting at you you can't expect decent behavior" must be rejected.

Fussell's challenge does suggest that combat stress should mitigate punishments for some war criminals – and perhaps that the primary focus of war crimes trials should not be on the combat soldiers but on higher-ups

[22] Ibid., p. 731.

who order, condone, or enable war crimes, without the excuse that they have seen too many of their buddies eviscerated by roadside bombs to control themselves.

It seems, then, that the basic project of establishing a code of *jus in bello*, and enforcing it through legal processes, survives the fundamental Hobbesian challenge that in war right and wrong, justice and injustice, have no place.

III. A Quick Tour of the Law of War

Systematic thinking about just war is ancient, and codes of behavior for warriors date back at least to the Middle Ages. Shakespeare's *Henry V* contains a remarkable scene in which Henry and his soldiers argue fine points of the law of war, and in fact some of Henry's troops at Agincourt (1415) refused to obey his order to kill the prisoners.[23] War crimes trials date back at least to the 1474 trial of Peter von Hagenbach, the brutal governor of Breisach under Charles the Bold.

There was, however, no codified *jus in bello* until Francis Lieber drew up a code for the U.S. Army in the mid-nineteenth century, and the enterprise of regulating warfare through treaties began in earnest only with the Hague Conventions of 1899 and 1907. These agreements established rules of combat (for example, they forbid the bombardment of undefended cities) and banned certain weapons (for example, poison). Subsequent treaties establish further restrictions on modes and means of warfare, banning (for example) blinding laser weapons, bullets undetectable by X-rays, and attacks against cultural property and the environment.[24] In 1929, and again in 1949, states negotiated Geneva Conventions dealing with the treatment of sick, wounded, or captured soldiers. Two Additional Protocols of 1977 added other rules about war fighting, and today, the Geneva regime forms the core of the law of armed conflict (LOAC; sometimes called "international humanitarian law" [IHL]).[25]

[23] See Theodore Meron, *Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages* (New York: Oxford University Press, 1993); Maurice H. Keen, *The Laws of War in the Late Middle Ages* (London: Routledge, 1965); John Keegan, *The Faces of Battle: A Study of Agincourt, Waterloo and the Somme* (New York: Vintage, 1976), pp. 107–12.

[24] For a list of treaties, see the ICRC's Web site, http://www.icrc.org/ihl.

[25] All 194 states in the world are parties to the Geneva Conventions, and more than 160 states are parties to the Additional Protocols. I shall follow standard practice and refer to the Geneva Conventions as GCs, and the Additional Protocols as AP I and AP II. The Third Geneva Convention, pertaining to POWs, is GC III or GC-PW; the Fourth, pertaining to civilians, is GC IV or GC-C.

The Geneva Conventions (GCs) establish a category of "grave breaches" and require states to punish grave breaches through their domestic criminal law. These are the war crimes. Theoretically, states may exert "universal jurisdiction" over grave breaches, meaning that any state can try offenders from any other state; in practice, it seldom happens that uninvolved third parties prosecute war crimes.

More recently, the International Criminal Court (ICC), which as of 2007 had more than one hundred states-parties, includes an extensive list of war crimes in its statute, combining elements from both Geneva law and other treaties. In some cases it criminalizes Geneva violations that the GCs themselves do not count as grave breaches and do not criminalize. Arguably, the Rome Statute of the ICC offers the definitive catalog of war crimes at the present moment.

The ICC, however, has jurisdiction only over "the most serious crimes of concern to the international community as a whole" (Article 5), and its statute limits its war-crimes jurisdiction to those "committed as part of a plan or policy or as part of a large-scale commission of such crimes" (Article 8). Under this arrangement, isolated or small-scale war crimes will continue to be prosecuted by the soldier's own state, and only major war crimes, systematically perpetrated, will fall to the ICC. In any event, the ICC has limited capacity to process cases; that, together with the difficulty of collecting evidence from war zones, virtually guarantees that low-level perpetrators will not face ICC trial.[26]

Alongside treaty provisions, LOAC includes the customary international law of war. Like all customary international law, customary LOAC consists of widespread state practices undertaken out of a sense of legal obligation (*opinio juris*), and, as in all customary international law, there is no authoritative code of what its rules are. These can be contentious, as an example illustrates. In 2005, the International Committee on the Red Cross (ICRC) – the most influential nongovernmental authority on LOAC – published a 4,500-page manual on the customary law of war. One volume articulates the rules, while two lengthier volumes exhaustively

[26] The experience of the Yugoslav tribunal indicates that there could be exceptions, however, because of the accidents of how defendants are captured. The first ICTY conviction involved a low-level perpetrator, Erdemovic, who turned himself in and pled guilty as a matter of conscience; the first contested case, that of Dusko Tadic, arose because Tadic made the mistake of vacationing in Germany. He was arrested and tried before the ICTY even though he was not a high-level perpetrator, largely because at the time he was the only defendant in custody and the evidence of his brutality was powerful.

canvass state practice and *opinio juris*. In 2007, however, the U.S. government denounced the study, claiming that ICRC used sources that really do not amount to state practice or *opinio juris*. More contentiously, the United States argued that it is illegitimate to rely on enactments by states that do not fight many wars (hinting thereby that the main source for determining the customary international law of war ought to be the United States, which fights more wars than any other state).[27]

This example illustrates one unpleasant fact about the laws of war: what they are, whose interpretation of them is authoritative, and who gets to establish them are all deeply politicized issues.[28] Sometimes, the political tug of war is between humanitarians like the ICRC and war fighting states. Even the two names for the law of war – IHL and LOAC – reflect this struggle. As a U.S. Army lawyer once explained to me, "People who talk about 'humanitarian law' are always people in the business of saving lives. We're in the business of killing."

But the politics can also run along other fault lines. In 1977, Additional Protocol I to the Geneva Conventions extended POW protections to nonuniformed guerrilla fighters, so long as they display their arms openly during combat (Article 44). The United States, with the memory of Vietnam still fresh, rejected this proposal on the basis that legitimizing nonuniformed fighters who melt back into the surrounding population would lead to more civilian casualties. Without going into the merits of this argument, the politics seem transparent: Third World countries galvanized by Vietnam preferred laws of war that legitimize guerrilla struggle, while the United States prefers laws that protect only traditional combatants. Each side desires laws that favor the kind of warfare in which it is most confident of prevailing.

Despite these political disagreements, the basics of the law of war are not controversial. They rest on three bedrock principles: necessity, discrimination, and proportionality. The principle of necessity forbids

[27] Jean-Marie Henckaerts et al., *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005). For the U.S. critique, see Letter from John B. Bellinger, III (Legal Adviser, U.S. Dep't. of State) and William J. Haynes, II (General Counsel, U.S. Dep't. of Defense) to Jakob Kellenberger (ICRC President), Nov. 3, 2006), available at http://www.defenselink.mil/home/pdf/Customary_International_Humanitarian_Law.pdf; Jim Garamone, "DoD, State Department Criticize Red Cross Law of War Study, Armed Forces Press Service, March 8, 2007, available at http://www.defenselink.mil/news/newsarticle.aspx?id=3308.

[28] See Kenneth Anderson, "Who Owns the Rules of War?," *New York Times Magazine*, April 13, 2003, pp. 38–43.

unnecessary suffering and gratuitous violence, that is, violence not required for overpowering the enemy. (This principle must not be confused with the doctrine of *Kriegsraison*, according to which military necessity trumps the law. Instead of providing an escape hatch from legal obligation, the principle of necessity within the law of war represents an outer limit, a prohibition rather than a permission: no violence is permitted unless it is militarily necessary. That remains a very wide permission, because it includes any lawful action that confers military advantage; but the word "lawful" is crucial. Unlawful acts cannot be justified by the plea of military necessity.)[29] "Discrimination" means that "at all times a distinction shall be made between (a) combatants and civilian persons; (b) military objectives and civilian objects."[30] Noncombatants may never be targeted, and "constant care shall be taken to spare the civilian population, civilian persons and civilian objects."[31] Finally, proportionality requires that military action not cause civilian death or injury, or destruction of civilian objects, disproportionate to the value of the military objective.

IV. Demarcating War

Next consider a fundamental and uncontroversial point: that the laws of war permit violence and the destruction of innocents at a level that would be intolerable in any peacetime legal regime. They are, in lawyers' jargon, *lex specialis* – "special law."[32] Contrast, for example, the world's major human rights treaty, which requires legal protection of "the inherent right to life" and forbids arbitrary deprivation of life, with the *lex specialis* doctrine of proportionality, which permits "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life . . . to civilians" unless the civilian casualties "would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."[33] The *lex specialis* is plainly more permissive than the

[29] William Gerald Downey Jr., "The Law of War and Military Necessity," *American Journal of International Law* 47 (1953): 251–62.

[30] Frederic de Mulinen, *Handbook on the Law of War for Armed Forces* (ICRC, 1987), Conduct Principle 387, p. 92.

[31] Ibid., Conduct Principle 388, p. 92.

[32] International law acknowledges that the *lex specialis* in wartime offers lower levels of protection than human rights law in peacetime. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, at para. 25.

[33] The first is Article 6(1) of the International Covenant on Civil and Political Rights; the second is Article 8(2)(b)(iv) of the Rome Statute of the ICC (borrowing language from AP1, Article 51(5)(b)).

peacetime human rights law. There is a gap between them, and I shall refer to violence permitted under the laws of war but forbidden under peacetime law as "gap violence."

Although we most naturally think of the law of war as imposing restrictions on military violence, the flip side is that the law of war implicitly immunizes acts of gap violence – acts such as shooting a sleeping enemy or bombing a military target knowing that a large (but not disproportionate) number of civilians will be killed. Those are precisely the kind of violent acts that lawful belligerents can permissibly perform, and I shall use the phrase "belligerent immunity" as shorthand to refer to the implicit immunity that the law of war creates for gap violence.

The gap between the laws of peace and of war places, front and center, the threshold question of how to tell when a war is going on. Unless we can tell, we will not know whether the high standard of human rights protections we are entitled to expect in civilian life applies, or the lower standard in wartime. How do we distinguish the violence of crime or vendetta from genuine war, especially since organized crime and vendetta can sometimes mobilize forces as powerful as armies? Call this question of how to distinguish war from peace the *demarcation problem.*

The natural place to begin is with the theory implicit in the Geneva Conventions – or rather, the theories implicit in the GCs, because Additional Protocol I significantly modifies the original theory. As we shall see, both theories have deep deficiencies.

The most striking feature of the Third Geneva Convention (GC III) is its insistence that POWs are the moral equals of the captors' own troops: both are privileged belligerents. POWs must be "quartered under conditions as favorable as those for the forces of the Detaining Power" (Article 25), be treated with respect and honor, and indeed have their salaries paid by their captors (to be repaid by the POW's home state at war's end). GC III even specifies which enemy officers POWs must salute. POWs are clearly not treated as criminals merely because they have fought; indeed, the only war crimes they can be punished for are those that their captors would punish if their own troops committed them (Articles 87, 102). We can see from these articles that their gap violence enjoys the belligerent immunity – otherwise, POWs could be tried for murder or assault because they fought their captors.

Crucially, however, these provisions apply only in "international armed conflicts," that is, wars between states. To be sure, the GCs also contain a provision guaranteeing minimal human rights to captives in "armed

conflicts not of an international character" such as civil wars.[34] But those rights conspicuously do *not* include immunity from prosecution for gap violence. The GCs, in other words, reserve belligerent immunity for states and their armies. Medieval just war theory made legitimate authority (*auctoritas principis*) one of the criteria of permissible war, and Geneva likewise assumes that only states may fight wars in which gap violence is immunized by LOAC.

This theory obviously favors the armies of existing states, even horribly unjust ones, over rebels and insurgents; it is a *statist* theory. When the Additional Protocols were negotiated in the 1970s, former colonies and states sympathetic to them objected to a theory so deeply wedded to the international status quo. Additional Protocol I (AP I) expanded the concept of international armed conflicts to include "armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" (Article 1(4)). (Recall that AP I also declares that guerrilla fighters are legitimate combatants.)

However, even the Additional Protocols do not offer belligerent immunity to insurgents in civil wars, except civil wars against colonial, alien, or racist regimes. In all other cases, the AP theory is no less statist than the theory it replaces. In the U.S. Civil War, this theory would have made all the Confederate troops criminals, while granting belligerent immunity to their adversaries.

To be sure, in civil wars AP II does require states to "endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict" (Article 6(5)). But this is a much weaker protection of rebel fighters than belligerent immunity: endeavoring to grant amnesty is not the same as granting amnesty, and the broadest possible amnesty for rebels may in the state's opinion be quite narrow. In any event, the very use of the word "amnesty" implies that under AP II rebel fighters enjoy no belligerent immunity, else they would need no amnesty.

One unfortunate consequence of reserving belligerent immunity in civil wars for soldiers fighting on behalf of states is the one McMahan identified: stripping belligerent immunity from rebels may deter surrender and protract civil wars. The theory also implies the bizarre result that if the rebels win, they will have to punish or amnesty their own fighters for gap violence, while soldiers of the defeated government enjoy belligerent immunity. Moreover, if the law of war does not apply in civil wars,

[34] This is "common Article 3," so called because it is common to all four GCs.

all its humanitarian restrictions disappear except the minimalist rules of common Article 3 and AP II.

Most important, the theory makes no exception for a rightful rebellion against despotism. It seems unreasonable to deny belligerent immunity to freedom fighters while granting it to a tyrant's troops. Even when both sides are bad guys, it is hard to see why only one receives belligerent immunity. The better argument was offered by Vattel in 1758:

> Civil war breaks the bonds of society and of government, or at least suspends the force and effect of them; it gives rise, within the Nation, to two independent parties, who regard each other as enemies and acknowledge no common judge. . . . They are therefore in the situation of two Nations which enter into a dispute and, being unable to agree, have recourse to arms. That being so, it is perfectly clear that the common laws of war . . . should be observed by both sides in a civil war.[35]

Suppose then, following Vattel, that we broaden the Geneva theory so that rebels in civil wars receive belligerent immunity, just as states' armies and antiracist, antiimperialist, and anticolonial forces do. Though I think Vattel's is a better theory, there is no denying that it has one unfortunate consequence: it greatly complicates the question of how to demarcate war from other violence.

The problem lies in the netherworld of failed states, private armies, and mixed motives. Most armed conflict today is "ragged war" involving warlords, adventurers battling for mineral riches against collapsing kleptocracies, ethnic and clan militias, freedom fighters who also smuggle narcotics and traffic prostitutes, and terrorists.[36] Should "rebels" like these be dignified with belligerent immunity? To restrict belligerent immunity to state armies in international armed conflicts, or even to state armies and antiracist or anticolonialist forces, can make criminals out of freedom fighters. But to grant belligerent immunity to nonstate forces can make honorable warriors out of gangsters and terrorists.

One approach would simply deny that ragged warriors deserve belligerent immunity. Warlords and narcoinsurgents are hardly what medieval theorists meant by princely authority (though they powerfully resemble medieval princes); nor are they idealistic freedom fighters. Why not treat them as mere criminals?

[35] Emer de Vattel, "The Law of Nations," Chapter XVIII, in Gregory M. Reichberg et al., eds., *The Ethics of War: Classical and Contemporary Readings* (Malden, MA, and Oxford: Blackwell, 2006), paras. 293–94, p. 516.

[36] The term "ragged war" is from the counterinsurgency specialist Leroy Thompson, quoted in Ignatieff, p. 126.

The trouble with this approach is that in weak, corrupt states warlords are sometimes the closest thing in their neighborhoods to public authority, and nationalist gangsters may actually have a valid revolutionary or irredentist political program. Their local political legitimacy, grounded in protection and patronage, may be no worse than that of the kleptocrats they replace. To deny their soldiers belligerent immunity may carry all the bad consequences of denying it in "purer" civil wars.

V. Athena's Disciples

It seems, then, that the separate sphere occupied by the law of war cannot be demarcated by either a difference in kind among the location of wars (foreign versus internal) or the authorizing authorities (state versus nonstate). How else, then, can we demarcate the domain of war from that of crime?

I believe the best answer is to look not at the nature of the fight but at the nature of the fighters, or, more precisely, of the fighting organizations. For thousands of years, warriors have considered themselves a breed apart, governed by a code of honor. In practice, this may have been laughable – Wellington famously described his own troops as "the mere scum of the earth," and why doubt him? – but the idea that warriors can be trained and disciplined away from cruelty, rape, and pillage is both definitive of war and a necessary condition for the very possibility of a law of war. The historian Steven Neff notes that ancient Greek myths distinguished between Ares, the god of mere violence, and Athena, the goddess of warfare "as an organized, disciplined, rationally conducted collective activity."[37] Other cultures registered the same distinction in their languages and religions. Warriors as the disciples of Athena fight in disciplined, rule-governed units, whose rules are the external form of a code of honor that warriors are supposed to internalize. In Michael Ignatieff's words, "Such codes may have been honored as often in the breach as in the observance, but without them war is not war – it is no more than slaughter."[38]

We have seen that the Geneva Conventions distinguish wars on the basis of whether or not they are international. But they also distinguish them

[37] Steven C. Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005), p. 16.

[38] Ignatieff, "The Warrior's Honor," p. 117. I have borrowed many ideas from Ignatieff's brilliant essay. See also Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline and the Law of War* (New Brunswick, NJ: Transaction Books, 1999), p. 23.

on the basis of what kind of organizations fight them. GC III reserves privileged status to fighters who belong to regular armies, or whose organizations satisfy four criteria that make them the moral equivalent of regular armies:

> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.[39]

Additional Protocol I states: "The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates.... Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict."[40]

The salient feature in both these definitions is that military forces are disciplined bodies, responsibly commanded, so that they are capable of compliance with the law of war. They belong to the sphere of Athena, not Ares. Even AP II, governing noninternational armed conflicts, applies only when the dissident forces are "under responsible command" and able "to implement this Protocol" (Article 1(1)).

Three features mark out the sphere of Athena. First, armies must maintain strict and near-absolute discipline, with clear-cut lines of authority and adequate training to ensure that fighters do not run amok. Second, armies must respect the principle of discrimination: warriors fight only warriors. Civilians, along with fighters rendered hors de combat by injury, illness, or surrender, are off limits. Third, in order to underwrite the first two requirements, combatants must distinguish themselves from noncombatants, by wearing a uniform or, in the case of guerrilla fighters, by bearing their arms openly during engagements.

The overarching idea of all these requirements is straightforward: to distinguish warriors from murderers. Only if that is possible does it make sense to think of a *lex specialis.* We would not want a *lex specialis* for murderers. Warriors are supposed to be different: they use violence in a disciplined manner, and only against those who might do them harm. Their existential position is one of mutual jeopardy, and only those who share

[39] GC III, Article 4(2).
[40] AP I, Article 43(1).

that position – other warriors – are legitimate targets. The requirement of self-identification through a uniform or other means fits in with this understanding of the warrior's vocation. Not only do warriors exist in mutual jeopardy, they show it openly.

VI. The Legal Consequences of Discipline

Two important consequences follow from the all-important ideal of military discipline, one concerning commanders and the other concerning subordinates. The first is a heightened conception of command responsibility. The need for discipline makes military organizations strictly hierarchical, and precisely because military organizations are strictly hierarchical, commanders can be held responsible if they fail to prevent or punish their forces' war crimes.

Command responsibility can be implemented in three ways. First, commanders' failure to prevent or punish can be regarded as complicity in their forces' war crimes – being an accessory to the crime either before or after the fact. That is the usual method civilian law uses for criminalizing Person A's involvement in a crime physically perpetrated by Person B. Second, the commander's failure to prevent or punish war crimes can be regarded as a self-standing crime – call it "dereliction of duty" – wholly independent of B's crime. Third, and most radically, Commander A can be held *vicariously liable* for Soldier B's war crimes.[41] This alternative is the most radical because it convicts the commander for the soldier's crimes, as though the soldier were a mere extension of the commander rather than an independent intervening decision maker.

Strikingly, military law adopted the third, radical, approach for centuries. It already appears in the American Articles of War of 1775, which held officers vicariously liable for outrages committed by their troops if they failed to punish them and make reparations.[42] Partly, no doubt, military law adopted this standard because its harshness would give officers more incentive to take it seriously. That by itself would not make vicarious

[41] These are well summarized in the ICTY decision Prosecutor v. Halilovic, ICTY Trial Chamber, Judgement of 16 November 2005, paras. 42–54, available at http://www.un.org/icty/halilovic/trialc/judgement/index.htm.

[42] American Articles of War of 1775, Article 12, reprinted in William Winthrop, *Military Law and Precedents*, vol. 2, 2nd ed. (1896), p. 1480. Indeed, a version of this principle appears in a 1439 order of France's Charles VII: Leslie Green, "Command Responsibility in International Humanitarian Law," *Transnational Law and Contemporary Problems* 5 (1995): 321.

liability fair, of course, and recently the Yugoslav Tribunal has partially abandoned it in favor of the dereliction-of-duty approach.[43] The basis for declaring vicarious liability fair lies in the demand for strict military discipline: hierarchical control in a sharply defined chain of command means that, in an important sense, the soldier is an extension of the commander's will.

The burden on commanders to control their soldiers is heavy. The ICC's statute holds commanders responsible for their forces' war crimes on a negligence standard: even if they did not know about the war crimes, they can be convicted if they "should have known that the forces were committing or about to commit such crimes" (Article 28(a)(i)).[44] Even more harshly, after World War II the United States executed the Japanese general Yamashita for his troops' atrocities even though American bombers had partly cut Yamashita off from them. Yamashita's conviction has been criticized as an injustice,[45] but it can perhaps be justified on the basis of his failure to train and discipline his troops properly when he had the chance: the wide scope of the atrocities is evidence of prior command failure, not individual soldiers run amok.

Admittedly, these are hard cases. The principle pertains most clearly in the easier cases where commanders have clearly condoned or incited war crimes. They bear responsibility for those crimes. Equally important is the nature of their duty: before the fact, commanders must prevent or repress war crimes; after the fact, they must investigate and punish them. Cover-ups and whitewashes are not merely obstruction of justice or "conduct unbecoming of an officer": under the literal legal standard, commanders become vicariously liable for subordinates' crimes if they cover them up.[46] This is an unforgiving standard (criminalizing as it does a commander's usually benign desire to protect his troops), and in real life superiors who cover up their subordinates' crimes are never convicted for those crimes, although they may be convicted of obstruction offenses. Worse, when

[43] *Halilovic*, para. 54. However, in paragraph 95, the same court suggests that commanders remain vicariously liable for their subordinates' war crimes if they fail to punish them.

[44] For criticism of the negligence standard, see Larry May, *War Crimes and Just War* (Cambridge: Cambridge University Press, 2007), pp. 264–78.

[45] See the blistering dissent of Justice Murphy in In re Yamashita, 327 U.S. 1, 26–41 (1946), who wrote, "Nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force. To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality." *Yamashita*, at 35. See also Walzer, *Just and Unjust Wars*, pp. 319–22.

[46] Halilovic, para. 95.

crimes become known, self-protective military organizations sometimes stop their investigations at the lowest levels, jailing the corporals and shielding the officers. Abu Ghraib is a notorious recent example. But I believe the unforgiving standard is justifiable. A military commander wields an instrument with the power of life and death. Covering up his troops' murders, rapes, or tortures fuzzies up rules that should be the brightest of bright lines. The troops quickly know when a cover-up has happened, and that knowledge "undeters" violent young men, and risks turning an army into a gang of murderers, rapists, and torturers – in which case they deserve no belligerent's privilege or immunity. Vicarious liability for the commander is, in a sense, the army's price of admission to the sphere of Athena.[47]

Although for purposes of assigning command responsibility the law treats troops as instruments of their commanders' will, doing so is a legal fiction. In reality, soldiers are never mere instruments with no judgment of their own, and subordinates who commit war crimes can be held accountable for them. However, subordinate responsibility is complicated.

In part, this is for reasons Fussell makes clear: soldiers on the front line exist under incomprehensible levels of stress. Fear, rage, and vengefulness may be their constant companions, and days without sleep sap their judgment. What makes law compliance possible under such circumstances are the same discipline and drill they rely on to keep themselves alive.

What if the soldier gets an illegal order? Here, the problem is that the same deeply drilled discipline that makes compliance with the law of war possible drives the soldier to obey criminal orders. Drill is designed to make actions as mindless and automatic as possible, "to avert the onset of fear or, worse, of panic and to perceive a face of battle which, if not familiar, and certainly not friendly, need not, in the event, prove wholly petrifying."[48] A system designed to produce unthinking compliance cannot simultaneously produce freedom of conscience.

The more freedom of conscience the soldier exercises, the less effective drilled discipline will be, and loss of discipline may lead to more war crimes rather than fewer. But the less freedom of conscience the soldier exercises, the more deadly and effective criminal orders become. In such

[47] A sophisticated argument for unforgiving command responsibility is Mark Osiel, "The Banality of Good: Aligning Incentives against Mass Atrocity," *Columbia Law Review* 105 (2005): 1773–83, 1830–37.

[48] John Keegan, *The Faces of Battle*, p. 22.

circumstances, a compromise of values seems inevitable.[49] Contemporary LOAC in effect divides orders into three categories: lawful, unlawful but not obviously so, and "manifestly" unlawful. Soldiers *must* obey lawful orders and *must* disobey manifestly unlawful orders – orders that, in the language of a famous Israeli judicial decision, fly the black flag of illegality over them. If an order is illegal but not obviously so, the soldier *may* disobey without suffering punishment. But what if the soldier obeys and is charged with a war crime? Here, different legal systems strike different balances between discipline and conscience. Some reject the defense of superior orders in all cases; others reject it but permit superior orders to mitigate the punishment; others permit the defense, but only if the soldier believed the order was lawful; a few permit the defense even if the soldier did not believe the order was lawful.[50]

There may be no single right approach across societies. A country whose military has been plagued by mutinies, coup attempts, corruption, and criminality may conclude that the need for discipline is so great that obedience to orders is the paramount value. However, international tribunals from Nuremberg to Yugoslavia and Rwanda take the opposite approach. Aiming to deter fighters at all levels from organized atrocities – and, I believe, to project a liberal vision of human beings as individuals with consciences that transcend collective aims – they disallow the defense of superior orders in all cases, except as mitigations. The ICC takes an in-between position: it allows no superior orders defense for genocide or crimes against humanity but permits the defense for war crimes if the order was not manifestly unlawful and the defendant did not know it was unlawful (Article 33).

VII. Modern War Crimes Trials

When wars end, should the victors, or the international community, respond to its horrors by staging war crimes trials?

At the end of World War I, the victorious Allies proposed to try hundreds of German military and political officials for war crimes and violations of international law. The Germans, perhaps rightly, saw this as vindictiveness, nothing more, and bargained hard so that they would conduct the trials themselves. However, the Leipzig trials ended in farce as all but

[49] The best treatment of this subject I know is Osiel, *Obeying Orders.*

[50] Gary D. Solis, "Obedience of Orders and the Law of War: Judicial Application in American Forums," *American University International Law Review* 15 (2000): 481–526.

six defendants were acquitted, and the guilty received short sentences.[51] After World War II, the Allies – remembering Leipzig – tried the German military and political elite before an international military tribunal at Nuremberg. This, too, was in part vindictive, because the Nuremberg Tribunal had jurisdiction only over Axis defendants, not Allied war criminals, even though there was no doubt that the Allies too had committed major war crimes. "International," furthermore, meant only that the trial was conducted by the four leading Allied powers, and nominally supported by the remaining dozen allies.

Despite these infirmities, the Nuremberg trials managed to transcend the taint of "victor's justice," partly because the Nazi crimes were so enormous, but in no small part because of the fairness of the tribunal and the transparency of its procedures. Throughout the trial the prosecutors were terrified that acquittals would delegitimize the tribunal. Their uncertainty about the outcome underlines that these were not show trials. In the end, three defendants were acquitted of all charges, and others of some charges; and, far from delegitimizing the tribunal, the acquittals were the best possible warrant of its fairness. Today, we think of the tribunal and subsequent Nuremberg trials as the paradigm of what a civilized legal response to war's atrocities should be.

What, after all, were the alternatives to trying the top Nazis? Great Britain, concerned that Nuremberg would provide the top Nazis with a forum to rally pro-Nazi sentiment, opposed the American idea of trials, and instead wanted simply to round them up and shoot them; Stalin raised a toast to the execution of fifty thousand German officers.[52] The Nuremberg defense lawyers, on the other hand, argued that because the law under which defendants were charged did not exist at the time of their conduct, they should simply be released, notwithstanding the blood of 50 million people directly or indirectly on their hands. Both responses – liquidation and impunity – would have been backhanded admissions that "reasons of state" and *Kriegsraison* lie beyond law. Trials, in which rational debates about evidence and degrees of blameworthiness would replace summary execution and impunity, were the only device available to reject the dangerous proposition that politics and war lie beyond law. Trials, therefore, performed an overwhelmingly important expressive function. In famous words of the U.S. prosecutor Robert Jackson, "That four great

[51] Telford Taylor, *The Anatomy of the Nuremberg Trials* (New York: Alfred A. Knopf, 1992), pp. 16–18.
[52] Ibid., p. 30.

nations, flushed with victory and stung with injury, stay the hands of vengeance and voluntarily submit their captive enemies to the judgment of the law, is one of the most significant tributes that Power ever has paid to Reason."[53]

Jackson's idea stuck. In the 1990s, the United Nations Security Council created a postconflict tribunal in former Yugoslavia, and another in Rwanda. These have been followed by the Special Court for Sierra Leone, a tribunal for East Timor, and another for Cambodia. With the activation of the ICC in 2002, the proposal that wars and civil wars should end with war crimes trials seems firmly rooted in our expectations. On this view, staging war crimes trials is an expressive act planting law's flag in contested moral terrain, and nothing other than transparently fair trials can do so. This expressive justification – let us call it *norm projection* – is, in my view, the fundamental argument for international war crimes trials.[54]

Other reasons have been offered by commentators and theorists: that trials provide justice and closure for victims, that they promote social healing and reconciliation, and that they create a historical record as a hedge against future revisionists. The trouble is that none of these alternative rationales is very convincing. Social healing might be better accomplished through amnesties or truth and reconciliation commissions. Truth commissions also create a historical record, and, far from offering victims closure, the rigors of cross-examination in an adversarial trial may simply renew victims' traumas.[55] Among the standard rationales for criminal punishment, the deterrent and rehabilitative power of international trials remains unproven. Only the retributive motive for trials and punishments seems clear – and retribution is very close to norm projection. Both of them use trials for expressive or communicative purposes: to broadcast international condemnation of the crime and to dramatize the seriousness and importance of the legal norms that the criminal transgressed. For this reason, the center of attention in international tribunals has always been the trial itself more than the punishment. The trial is the

[53] Nuremberg Judgment, vol. 2, p. 98, available at http://www.yale.edu/lawweb/avalon/imt/proc/11–21-45.htm.

[54] For further defense of this view, see David Luban, "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law," in Samantha Besson and John Tasioulas, eds., *Philosophy in International Law* (Oxford University Press, forthcoming).

[55] See Martti Koskenniemi, "Between Impunity and Show Trials," *Max Planck Yearbook of International Law* 6 (2002): 1–35.

dramatic embodiment of the all-important proposition that when arms are raised law is *not* silent.

Transforming the basic meaning of war is a long-term and perhaps utopian goal; it may take decades for humanitarian norms to take root in violence-ravaged parts of our exceedingly violent world. In the shorter run, amnesties or truth commissions may in some cases serve more pressing peacekeeping needs. Or, as in Sierra Leone, trials can be reserved for those who bear the greatest responsibility, while the soldiers (many of them children) who perpetrated atrocities on the ground suffer no punishment. There is no one-size-fits-all answer to the question of how compatible doing justice and making peace are in any given case. I believe that projecting humanitarian norms through trials is vitally important. But we must not forget that the law of war itself exists for practical humanitarian reasons, and practical humanitarians should settle for whatever mix of legal and nonlegal methods can best save lives. The point is not law for its own sake, but law as life's servant when hell is loose in the world.[56]

[56] I wish to thank Emily Crookston, Larry May, and Gary Solis for helpful comments on an earlier draft.

15

Revenge and Demonization

Nancy Sherman

Vengeance is . . . the wildest, sweetest kind of drunkenness, both for those who must wreak vengeance and for those who wish to be avenged.

– Milovan Djilas as quoted in Jon Elster, "Norms of Revenge," *Ethics* 100 (July 1990): 871

I. Introduction

The thirst for revenge seems to many one of the more primitive and noxious sentiments in war. It brings to mind personal vendettas and lawless punishment, feuds where blood and not money becomes the coinage for exchange. It conjures up the grievances that militias, gangs, and armed kin stand ready to carry out and pass on from generation to generation. It reminds us of the blind passion that fuels war crimes. It speaks to the sectarian violence and reprisal killings that, as I write, compete with the insurgency and counterinsurgency for number of lives taken each day in the war in Iraq.

But as negative as many of our associations of revenge are, the desire for vengeance is known intimately by most of us, and sometimes savored, whether or not we heed its impulse. It is a close cousin to other sentiments of anger we are less quick to find fault with, such as a retributive sense of justice, righteous indignation, moral protest, and moral outrage. It can mingle deeply with patriotism, as it did in the wake of 9/11. Soldiers who mobilized shortly after 9/11 did not always use the word "revenge," but many spoke unflinchingly of their anger. As one philosopher provocatively said, years earlier, revenge may be part of a "package deal," both "conceptually inseparable" from love of country and solidarity

with countrymen and "psychologically inseparable for people anything like ourselves."[1]

This is a strong claim, which I am not here prepared to endorse. But I do believe that we need to reconsider revenge with greater equanimity. Given our natural propensities as well as the close conceptual links between feelings of revenge and other emotions we find less overtly offensive, it seems too heavy-handed, to proceed, in the way, say, of Seneca in *On Anger* and ban wrath outright from the moral psyche of the good person. Even if we ultimately arrive at this point, we should first try to understand wrath on its own terms, as part of the general task of understanding ourselves.[2] Military leaders especially need to understand the emotion, for their soldiers are likely to feel it when their closest buddies are killed. And they themselves may feel it welling up, when losses mount and their own grief mingles with frustration and anger. This is especially so as commanders continue to face an enemy that flouts the laws of war and uses terrorism and insurgency to exploit the morality of its opponents. For these sorts of reasons, revenge in war merits a fresh look.

The plan of the paper is as follows: In Section II, I review Seneca's response to Aristotle's claim that anger is a morally permissible response to wrongful injury. This follows up some themes I discuss at greater length in *Stoic Warriors*. In Section III, I explore the moral psychology of revenge culture in contemporary warfare. In Section IV, I discuss revenge feelings themselves, and in Section V I consider how grief and its expression might temper those feelings. I conclude by asking whether the idea of self-assertion, implicit in revenge, can be preserved, absent some of the more offensive concomitants of revenge. An undercurrent that runs throughout the paper is the dialectic between Stoic and Aristotelian images of the good warrior.

[1] See David Lewis, "Devil's Bargains and the Real World," in Douglas MacLean, ed., *The Security Gamble: Deterrence Dilemmas in the Nuclear Age* (Totowa, NJ: Rowman & Allanheld, 1984).

[2] Revenge is the subject of a number of recent works. For lively discussions, see William Miller, *An Eye for an Eye* (Cambridge: Cambridge University Press, 2006); Laura Blumenfeld, *Revenge* (New York: Washington Square Press, 2002); Nico Fridja, "The Lex Talionis: On Vengeance," in S. H. M. Van Goozen, N. E. van de Poll, and J. A. Sergeant, eds., *Emotions: Essays on Emotion Theory* (Hillsdale, NJ: Lawrence Erlbaum, 1994), pp. 263–90; Jon Elster, "Norms of Revenge," *Ethics* 100 (July 1990): 862–85; Jeffrie Murphy, *Getting Even: Forgiveness and Its Limits* (New York: Oxford University Press, 2003). For further discussion and references, see my *Stoic Warriors*, (New York: Oxford University Press), 2005, chap. 4.

II. The Stoics and Aristotle

For a Stoic, like Seneca, reliance on revenge, in war or elsewhere, is nothing short of moral corruption, for it puts reason, the Stoic foundation of moral character, at risk. The Stoics insist that the bite-back defense, even if proportionate,[3] is both likely to outstrip rational deliberation and to keep us fixed on a harm or indignity that makes us more victim than rational agent.

The very sight of angry faces, exhorts Seneca in *On Anger*, is evidence itself that wrath makes us more possessed than possessor:

> Eyes ablaze and glittering, a deep flush over all the face as blood boils up from the vitals, quivering lips, teeth pressed together, bristling hair standing on end, breath drawn in and hissing, the crackle of writhing limbs, groans and bellowing, speech broken off with the words barely uttered, hands struck together too often, feet stamping the ground, the whole body in violent motion . . . the hideous horrifying face of swollen self-degradation.[4]

The corruption Seneca paints is physical. But what is reflected in the face and body is only "a tiny fraction of its true ugliness." A soul consumed by wrath is itself degraded and knows neither peace nor rational self-mastery. It is ineffectual and self-imploding. It is a runaway emotion that damages all it touches: "No plague has cost the human race more."[5]

Seneca, in the tradition of the Stoics, takes himself to be rejecting Aristotle's Homeric-based view of anger. Anger, says Aristotle in the *Rhetoric*, with Homer in mind, typically includes desire for revenge at the pain of perceiving oneself (or those dear to one) the victim of an unwarranted offense or indignity. Injury and offense may be painful, but the desire for revenge rewards the victim with the pleasure of anticipation and fantasy: "It is also attended by a certain pleasure because the thoughts dwell upon the act of vengeance, and the images then called up cause pleasure, like the images called up in dreams."[6] And so Aristotle gives the warrior tradition of the *Iliad*, the tradition of Achilles, for whom wrath is "sweeter . . . than the honeycomb dripping with sweetness," a philosophical gloss and deferential nod.

[3] After all, the Hebrew Bible's *lex talionis* of an eye for an eye, and for a tooth no more than a tooth, is meant to be precisely a restraint on wild revenge. See, for example, Exodus 21:24, among other places.

[4] *On Anger* 1.1.3–4 using the translation in *Seneca: Moral and Political Essays*, John, M. Cooper and J. F. Procopé, trans. (New York: Cambridge University Press, 1995).

[5] *On Anger* l.2.1–3.

[6] Aristotle, *Rhetoric* 2.1, 1378a35–b10.

To be sure, Aristotle is not singing praise to the hot-headed warrior. Nor is Homer, for that matter. Homer passes decisive judgment on Achilles' frenzy at the moment of his desecration of Hector's body: "that man without a shred of decency in his heart." He outrages "even the senseless clay in all his fury."[7] Aristotle, himself, insists that we must distinguish between different kinds of wrath.[8] The "hot-tempered" person is too quick to retaliate and too indiscriminate in his venting. The "sulky" person "retains his anger for long" and is better off retaliating a bit rather than brooding, "for revenge relieves them of their anger, producing in them pleasure instead of pain." To sulk and "digest one's anger in oneself" is a slow process that takes an outward toll on friends and family. Better to vent a bit, Aristotle suggests, though not to the excesses of the hot-tempered or choleric sorts. To feel no anger at all at serious offense, he teaches, is to be either insensate or servile. Anger, he famously says, is virtuous if it hits the mean. This is correctly glossed not as *moderate* anger, but *appropriate* anger – anger felt and expressed at the right time, in the right way, to the right degree, and toward the right objects. This is praiseworthy and fine anger, however difficult it is to discern that mean in the messy circumstances of life.[9]

Although Aristotle links anger and revenge, he does not seem to insist that the desire for revenge must itself be part of the recognition of serious offense, though it may be part of a more complex angry reaction. Certainly, for there to be anger, that recognition must itself be affective – a judgment infused with pain – but the desire for vengeance and the anticipation of pleasure in carrying it out are something distinct, a separate conceptual and possibly temporal moment. The Stoics, in their analysis of emotions, more decisively sever the conceptual moment of judging the evil of an offense and the judgment of how to react appropriately. It is just that cleavage, argues Cicero, that allows one to be Stoic on the outside without necessarily being Stoic within. That is, one may hold onto the judgment that one has good reason to be angry or sorrowful because of a genuine evil suffered, though one judges one can and should show equanimity in one's outward decorum.[10]

[7] *Iliad*, 9.857–61;65, using Fagles trans. (New York: Penguin, 1999).
[8] *Nicomachean Ethics* (NE) 1126a4–30, using the Revised Oxford Translation, Jonathan Barnes, ed., *The Complete Works of Aristotle* (Princeton, NJ: Princeton University Press, 1984).
[9] NE 1125b32ff; 1126b1–3.
[10] See Cicero's exposition of the two-tiered judgment in emotions in Margaret R. Graver's trans., *Cicero on the Emotions: Tusculan Disputations 3 and 4* (Chicago: University of

Others have argued recently for a tighter link between recording injury and the impulse toward revenge. So Robert Solomon has claimed that "the desire for vengeance seems to be an integral aspect of our recognition of evil," and Peter French has argued that "a disposition to administer a hostile response" is "conceptually inseparable" from the judgment of an unwarranted offense, constitutive of anger.[11] Of course, even these claims might be thought of as fairly limited – a *disposition* to act or even a *desire* to act is not on its own an action that steps foot in the world (though this is not to deny that the mental world involves its own kind of actions and fantasy enactment).

We are fairly good at inhibiting our desires for revenge precisely because we know vengeance is not always self-protective. It can ratchet up risks, subject us to more threat than deterrence, turn excessive and disproportionate. Within the military, rules of engagement, laws of armed conflict, notions of just conduct, in short, the norms of professional soldiering, are all rules designed, in no small part, to curb the unmeasure of revenge.

And yet revenge feelings brew and are unleashed in war. Bonds of loyalty and a sense of strong identification with those one trains with, lives with, and depends upon for survival heighten feelings of vulnerability when there is loss. The denuding of the recruit the moment he or she steps off a bus and enters boot camp – that first shorn head and issued uniform, the replacement of "I" with formal third-person self-address, the loss of all privacy and abrupt separation from family and love objects, all that goes into being cut down and built up into a new self – breeds loyalty and the kind of conventional shame and honor that tend to heighten revenge feelings. The Marines' *Semper Fidelis* speaks volumes.[12]

We might argue that in thinking about revenge and military moral psychology we would do well not to confuse vengeful feelings with revenge cultures. Vigilantism and vendettas, for example, are *practices* of revenge, and not necessary parts of wrath itself. Similar sorts of things could be said of shame and honor. The phenomena are not restricted to specific

Chicago Press, 2002), 3.62. See my discussion in *Stoic Warriors: The Ancient Philosophy behind the Military Mind* (New York: Oxford University Press, 2005), pp. 143–49.

[11] Robert Solomon, *In Defense of Sentimentality* (New York: Oxford University Press, 2004), chap. 2. Peter French, *The Virtues of Vengeance* (Lawrence: The University Press of Kansas, 2001), p. 225.

[12] On the making of a Marine, see PBS's documentary *The Marines*, aired February 21, 2007.

practices and norms.[13] Some of this is uncontroversial. Shame, revenge feelings, and honor are all a part of ordinary and depth psychology in a way perhaps obscured by emphasis on cultural groups and practices. Yet military institutions are cultural and breed a kind of loyalty and brand of shame and honor that are not entirely foreign to the kind of honor cultures that anthropologists study.[14] Indeed, we can see elements of a kind of honor culture within the military that exacerbate feelings of revenge. I turn to that now.

III. Revenge through the Lens of Honor

Honor, in revenge cultures, is typically a public matter. It is conspicuous, to be upheld before others, to be shown to others, lost in shame before others. Bonds of loyalty cement and nurture it. When it is threatened or damaged, revenge aims to recuperate it. The damage and the revenge fall on group lines, with groups readily mobilized in the offense and defense. "Getting back" may satisfy justice, but it does so through satisfying honor, in the sense of regaining position and status. So recall Agamemnon's revenge in the opening scenes of the *Iliad*.[15] His *honor*, his *timê*, more specifically, his prize and war bride, Chriseis, has been snatched in a moment of public shame. He takes his revenge by robbing Achilles of *his* bride and thus recuperating lost honor and reestablishing his status as *agathos*, chief warlord. Revenge is here conceived as part of a zero-sum game. Agamemnon's loss is Achilles' gain. Vindication requires recovering loss, in the currency of booty or often, blood.

Our own military, or at least its ethics education programs, struggle mightily to dismantle this Homeric notion of warrior honor and inculcate, instead, a notion of honor rooted in inner virtue – in conscience, in integrity, and in doing what is right. Great efforts are made at the Naval Academy, for example, to gloss the Navy creed, "Honor, courage, commitment," in terms of the highest standards of individual, moral conscience

[13] On shame and shame cultures, see Bernard Williams, *Shame and Necessity* (Berkeley: University of California Press, 1993). On revenge and revenge cultures, see Jon Elster, "Norms of Revenge," *Ethics* 100 (July 1990): 862–85.

[14] For helpful studies, see Napoleon A. Chagnon "Life Histories, Blood Revenge and Warfare in a Tribal Population," Science 239, no. 16 (February 1988): 985–92. Also, Jacob Black-Michaud, *Cohesive Force: Feud in the Mediterranean and the Middle East* (New York: St. Martin's Press, 1975), pp. 83–84. For an important psychoanalytic study, see Vamik Volkan, *Killing in the Name of Identity* (Charlottesville, VA: Pitchstone, 2006).

[15] *Iliad*, 1.217–21.

in the line of duty.[16] But loyalty tends to breed archaic notions of honor, as does the military hunger for an honor that is conspicuous, marked in decorations, metals, and status. Indeed, it is easy to misplace loyalty and skew honor in a system that emphasizes careerism and rewards advancement up a chain of command.

In primitive tribal warfare, affronts to sexual honor are often what incite revenge.[17] For our own troops, what incites revenge are more likely death and grievous injuries, the known costs of war, but for all that, no less easy to accept and tolerate. The common deferral of grief in war, whether because of manly decorum or lack of leisure for private or collective mourning, can fuel revenge.[18] Demonization of the enemy by individual soldiers as well as by a command climate, including a commander-in-chief who inculcates a sense of righteousness against the forces of evil, undoubtedly further feeds the revenge.

In this regard, consider the Marine killings of 24 civilians in Haditha, Iraq, November 19, 2005. The rampage by the Kilo Company, of the Third Battalion, First Marines (known as the "3/1" or "Thundering Third") followed a roadside bomb attack of a company humvee that killed Lance Corporal Miguel (T. J.) Terrazas. The deaths were first reported as collateral damage involved in return fire, but they were later determined to be direct assaults of civilians, 10 of whom were women and children. Four Marines were eventually charged with murder and another four with dereliction of duty in covering up the facts as they sent them up the chain of command.

We might speculate about what went wrong at Haditha: young Marines typically sign up to fight war battles and not counterinsurgency police operations; they are not trained adequately for the latter nor have a clear enough sense of how to use minimal force in the protection of civilian lives, as police models of force require.[19] The Third battalion was itself involved in fierce fighting earlier in the year in Fallujah, where there were

[16] I served as the Distinguished Chair in Ethics at the United States Naval Academy, 1997–99 in the wake of a massive cheating scandal where issues of honor and loyalty came under close scrutiny.

[17] See Napoleon A. Chagnon, "Life Histories," pp. 986–87 and Black-Michaud, *Cohesive Force*, pp. 43, 79, 142.

[18] See Chagnon, op. cit. p. 986, on the volatile blend of grief and persecutory anger common among the Yanamamös.

[19] For an excellent discussion of these different models of the use of force, see Tony Pfaff, "The Ethics of Complex Contingencies," in *The Future of the Army Profession*, 2nd edition, ed. Don Snider and Lloyd Matthews (New York: McGraw Hill, 2005).

liberal rules of engagement (in one account about how to prevent detonation of improvised explosive devices [IEDs] by remote mechanisms, one of the commanders was reported to have said half-jokingly, "If you see someone with a cell phone," "put a bullet in their f-ing head").[20] On top of all this are the sheer fatigue and frustration of a thinned out military, on repeat deployments, fighting a war that has become unpopular at home.

But equally, there are the feelings of revenge and its familiar expression in revenge cultures. Of significance is that the Haditha rampage took the shape of a tribal-type raid much like that anthropologists describe – to seek out the enemy, to look for the killer, but then to take vengeance on the most ready-to-hand targets.[21] Group identity becomes the salient marker, not combatant/noncombatant status, even in the all too easy case of discrimination, where there are infants.

Second, the manifest and immediate reaction to loss here is rage, not grief, and a rage experienced as persecution in search of a persecutor. Perhaps grief that bleeds into anger is a ubiquitous part of war. Anger mixed with hatred can become an even more volatile mix. But the role of a good commander is to know this in advance and to act aggressively to prevent troops from both feeding those desires and acting on them in indiscriminate reprisals.

Finally, a notion of male, warrior honor may have played a role in a tragedy like Haditha.[22] War, for many men, remains the ultimate test of manhood. The test is to fight rather than retreat or remain impassive in the face of extreme danger. But IEDs of the sort that incited the response in Haditha leave no palpable target for the fight. Soldiers take losses without knowing who and where the enemy is. They cannot easily fight back or protect themselves or each other. (The same was true in Vietnam, in a different kind of war theatre, fought in the jungles, not streets, thick with mines, not IEDs.)[23] The frustration is obvious, but, too, the sense

[20] See Newsweek, "Probing Bloodbath," June 12, 2006, pp. 22ff. See also "One Morning in Haditha," *Time*, March 27, 2006, pp. 34–36; and "Haditha," *Time*, June 12, 2006, pp. 26–42.

[21] See Chagnon, "Life Histories," p. 987.

[22] Note, women Marines are not allowed in *mana a mano* combat, though they may, of course, face combat, given that there is no real front line in the wars we currently fight.

[23] Recall here the antecedent moments of the Charlie Company's experience in the My Lai massacre of Vietnam – losses mounting from mines without visible enemies and commanders, Lieutenant Calley and Captain Medina, ready to exploit that rage. For an account, see Michael Bilton and Kevin Sim, *Four Hours in My Lai* (New York: Penguin, 1992).

that one fails specifically as a warrior and protector; one fails to do what war tests one to do and what conventional images of manhood require.

Unedited public comments from the commander of the First Division, Lt. Gen. James Mattis, some months before the Haditha incident, advert to a further aspect of machismo in war. Of fighting in Iraq, he said: "It's a hell of a hoot I like brawling." With respect to Afghanistan, he said, men who slap women around for years because they do not wear a veil have "no manhood left anyway. So it's a hell of a lot of fun to shoot them."[24] The remarks reveal a conception of manhood that killing in war can expose. Mattis sees killing, in part, as a way to shame those men who are not real men. It is a display of male domination and the pleasure of that power in the moment of revenge.

IV. Revenge Feelings in the Raw

Mattis's remarks are patently offensive, all the more so because they are made by a person in a visible, leadership role. But I want to linger on them in this section as an occasion to reconsider Aristotle's position and Seneca's response. When Aristotle famously claims that anger that hits the mean is virtuous, he does not make clear whether the virtuous angry response includes vengeful desires as well as their pleasures. To be sure, part of what Aristotle is keen to point to in his general account of virtue is the requirement of moral sensitivity. In the face of unjust injury, we must register the injury as moral sentients. That is the force of his point that we cannot be insensate or servile; we must be ready to protest the injury in virtue of its hurt and the indignity suffered. What is less clear is whether that vulnerability extends to vengeful *feelings*. But for the moment, let us assume it does, or at least, assume that vengeful feelings, and their satisfactions, are part of a typical Aristotelian complex, angry response. In what sense are those satisfactions virtuous? We might turn for guidance to Aristotle's own account of pleasure.

It is part of Aristotle's general view that activities, mental as well as physical, have their distinctive pleasures and that our performance of activities is enhanced by those pleasures. To clip the pleasure off the activity is to impede the activity. Pleasure "completes the activity," Aristotle says.[25] It is evidence of the activity at its finest. But does this entail that the pleasure of revenge in anger is part of the overall goodness of the

[24] From *Newsweek*, "Probing Bloodbath."
[25] NE 10.4–5, esp. 1174b30–75a20.

angry response? Put differently, is that pleasure what we expect of and praise in virtuous people?

The view seems counterintuitive, and at least on the face of it, not what we associate with virtue, even the virtue of anger that records and responds to wrongful injury, for consider what the distinctive pleasure of vengefulness is like. It can have that feeling of exultancy and power Mattis describes, of humiliation and domination; metaphorically, it can feel like a swelling up, as the Stoics say more generally of pleasure, and perhaps more specifically, in the case of the pleasure of revenge, a bloated swelling, a gloating, a crowing, a feeling, as William Miller puts it in his study of revenge, of being "ecstatic, glorying, pumped up, all hepped up."[26] It is often a satisfaction not just of getting even, but also of putting fear in the air. The protest of my wrongful injury spreads to a need not just to vindicate that wrong, but to spoil and persecute another in virtue of the wrong. Moreover, in the case of violent payback in killing, there is the assumption that revenge in blood, that is, taking life, is an ultimate kind of potency over another that includes a sense of finality and closure.[27]

But of course that promise is often left unfulfilled. Achilles drags Hector's corpse around not once but seven times. If one corpse is all there is, then it must submit to multiple desecrations – multiple rekillings and humiliations. Haditha and My Lai are not just reprisals, but rampages and massacres. They are unbounded moments of punishment, fed by "a sheer brute force that rushes," as Seneca puts it.[28] Thus, the distinctive pleasure of revenge does not seem to *complete* the activity, except in the sense of *intensifying* the original desire. Satisfaction may result less from completion or fulfillment than from exhaustion, depletion, and discharge, to use a sexual model not uncommon in war.[29]

Seneca's critique of vengeful feelings does not address the proportionality requirement of just conduct in war (*jus in bello*). That specific criterion – of not causing more mischief than good ultimately

[26] William Miller, *An Eye for an Eye*, p. 141.

[27] See William Miller, p. 26.

[28] *On Anger*, 3.3.

[29] On the sexual model of revenge in war, consider here an anecdote a Vietnam vet, Bob Steck, shared with me. In Vietnam, Steck's job was to keep the radio networks open so that the helicopter teams could be in communication with each other. One of the helicopters, nicknamed a white "loach," looked like "an Easter egg with a hard-on." Another was a thin Cobra, "thin and phallic looking," shooting red tracer rounds out of its front. Steck recalled one night hearing a Cobra pilot report back on the radio: "He was almost panting as he said, 'coming hot,' 'coming hot.' I thought, whoa, I think I just looked under the curtain."

achieved – as well as the criterion of discriminating combatants from noncombatants originate later in the history of ideas. Seneca's own concern is less specific: to show that anger, in general, is a runaway emotion that brings down victim and perpetrator as well: "It is doomed to sink what cannot be drowned unless he himself drowns with it." Nonetheless, he alludes to what we would conceptualize as the consequences of revenge – that wrath, uncurbed in a military, can lead to both indiscriminate and disproportionate violence. So he says with prescience, vengeance cuts down "cities of the greatest renown"; it turns them into "deserts, mile after mile without inhabitant." Through anger, a "military" will "butcher the populace on masse"; "whole peoples [can be] condemned to death in an indiscriminate devastation."[30] Vengeance's impulse to violate proportionality and discrimination is clear.

The nonproportionality and indiscriminateness of revenge's discharge, the feelings of domination and humiliation that can be part of revenge, the carnal and physical sense of absolute potency that can accompany thirsting for the kill, the craving for relief of pent-up feelings and then not being satisfied by the discharge – all these not surprisingly lead some military leaders to put a lid on feelings of revenge in their troops.

But what then do we say about Robert, a 21-year-old veteran, whom I interviewed at Walter Reed, where he had had been in residence for 19 months, convalescing and trying to retire from the military with benefits.[31] Since the age of five, he wanted to be in the army and carry a gun. His dream came true at 18 when he enlisted and ultimately became a sniper in Afghanistan. His last mission was a fierce firefight on June 10, 2005, a seek-and-destroy campaign that lasted about 15 hours. His unit of eight was overrun by a military group of at least 100, which seemed like "a beehive swarming" out of the hills. Several friends were killed. He tells me, "After a sniper killed one of my friends, I put a couple of bullets in his head." It was "the best feeling in the fucking world because of knowing that he killed a friend of mine and almost killed me." He himself suffered injuries in the head and back. He lost a leg below the knee, now replaced with a prosthetic, and has a right arm that is half filled with titanium.

He narrates the story of the battle several times in different sequences, backing up and going forward as he tries to reconstruct how he was injured. His voice and body language take him back to Afghanistan. The actual events are unclear. But what seems to have happened is that as he

[30] *On Anger*, 1.2.1–3.
[31] Based on an interview conducted on February 14, 2007.

is raising his arm to kill a target ahead, he is hit from behind, in the arm, head, and back. He then tries to stand up and his ankle is taken out. After he is shot and sees that he is the last man in the formation, he puts his weapon "on burst" and starts spraying a 30-round magazine of bullets. It is only at Walter Reed, after a debriefing by a senior military medic who had been in the battle, that he has confirmation that he, in fact, "got the guy" who shot at him and who killed his friend, who had been running to his aid. The senior man says, "That's more satisfaction than I could have." I wanted you to know, he said, "so you could sleep better at night."

Robert's story is psychologically complex, and I have only touched on a small part of it. But what is salient for our discussion is that at the moment of a life and death battle, and in the reliving of it, Robert is exuberant about the revenge. He got the guy (or guys) who took his buddies' lives, and he got the guy who tried to kill him. That part of the story feels good – indeed, it is "the best fucking feeling in the world." His survival and performance as a sniper in battle depend on the very desire to get back, though not necessarily on feelings of satisfaction in executing that desire. Yet it seems unreasonable to deny him the pleasure of that desire, the pleasure not just of anticipatory revenge and actual revenge, but of reliving, revisiting, and reimagining his revenge. We can say this even if his revenge is a mixed pleasure, one that involves taking life at the instant of seeing life taken. Still, Robert does not revel in killing. "It's a job, that's what it comes down to." "It's a life style," he says to me, but one, he acknowledges, that needs barrier walls that he does not yet know how to build.

Robert thinks of revenge in terms of pleasure and satisfaction. He does not crave the satisfaction, though the act of payback yields it. There are other accounts, though, where revenge produces no pleasure. Here I have in mind a vignette from *Naples 44* – an eye-opening memoir of Naples in the last year of World War II. The author, Norman Lewis (a British Field Security officer), reports the comments of a prison lifer from the rural countryside outside Naples, who is engaged in gang violence during the war years. The prisoner tells Lewis that he has wiped out a "whole family with a hatchet. It took five minutes. It was a quick, clean job. Nobody suffered. I did it for honor. . . . Don't imagine anybody enjoys having to do a thing like this. The fact is it was a mistake to get ourselves born."[32]

[32] Norman Lewis, *Naples 44* (New York: Pantheon, 1978), p. 89.

Revenge, for some actors, may be less a matter of a pleasure than a duty – an obligation passed on transgenerationally and never completely fulfilled by each generation. If the injury is not adequately grieved, or grief is prolonged and stoked with a renewed sense of persecution, it may remain fresh, "unmetabolized," part of the next generation's inheritance. The "mistake," as this man says profoundly, "is to get ourselves born."[33] Revenge, for this man, is not about pleasure, in anticipation or in deed. It is simply about honor-bound duty.

V. Grief That Tempers Revenge

The preceding remarks suggest that we can conceive of a desire for revenge without pleasure, wild or otherwise. To be sure, there is a craving for satisfaction, but the satisfaction has to do with stemming loss, or, at least, calling in one's credit in a cycle of credit and debt. It is a matter of finding a temporary stasis. The wrath need not be, as it was for Achilles, "sweeter . . . than the honeycomb dripping with sweetness."

But while we might sever the conventional notion of honor from the *pleasure* of revenge, we are unlikely to sever such honor from revenge itself. We might speculate that many traditional notions of honor cannot easily accommodate grief or leave room to process or "work through" loss. Perhaps even revenge keeps grief at bay, and, with it, mechanisms for absorbing and acknowledging loss.

Interestingly, one of the most honor-bound revenge cultures leaves room for grief and not just private grief, but public, ritual grief. I have in mind the Homeric warrior, and in particular, Achilles. Achilles is committed to avenge Patroclus's death and even to savor its sweetness. But he is expected to mark his bereavement by crying openly and profusely. He grieves with the women keeners and, too, with his warriors, in collective grief rituals in the lull of battle:[34]

> A black cloud of grief came shrouding over Achilles.
> Both hands clawing the ground for soot and filth,
> he poured it over his head, fouled his handsome face
> and black ashes settled onto his fresh clean war-shirt.
> Overpowered in all his power, sprawled in the dust,
> Achilles lay there fallen
> tearing his hair, defiling it with his own hands.

[33] Ibid., p. 87.

[34] See Jonathan Shay on the importance of collective grief in *Achilles in Vietnam* (New York: Touchstone, 1994).

> And the women he and Patroclus carried off as captives
> caught the grief in their hearts and keened and wailed,
> out of the tents they ran to ring the great Achilles,
> all of them beat their breasts with clenched fists,
> sank to the ground, each woman's knees gave way . . .
> Antilochus kneeling near, weeping uncontrollably,
> clutched Achilles' hands as he wept his proud heart out –
> for fear he would slash his throat with an iron blade.
> Achilles suddenly loosed a terrible, wrenching cry . . .
> and his noble mother heard him . . .
> and she cried out in turn.[35]

At the end of the *Iliad*, Priam and Achilles, Trojan and Greek together, reunite and weep – Priam for his beloved son, Achilles for his beloved friend, slain by Priam's son.

> Priam wept freely
> for man-killing Hector, throbbing, crouching
> before Achilles' feet as Achilles wept himself,
> now for his father, now for Patroclus once again,
> and their sobbing rose and fell throughout the house.[36]

Thus archaic warriors are permitted to grieve openly and even in the bosom of their enemy.[37] They maintain honor by revenge, but they assuage some of the pain of loss and some of the fury of revenge by owning their injury, internally in grief and externally in the collective practices of mourning. For Achilles, it may even be that grief is a kind of revenge on self, directed inward as well as outward, for in customary ritual, he "tears his hair, defiling it with his own hands." His cries are violent and terrible. His grief seems to mix with guilt, that he survived his beloved Patroclus's death: "My spirit rebels – I've lost the will to live."[38] Achilles's guilt and grief are perhaps self-accusatory, ways of experiencing and tolerating the anger as his own, and as no longer in need of displacement.

This is an archaic notion of a warrior's honor, and part of the more complete Homeric picture of honor, revenge, and grief. The ancient *Stoic* picture of the warrior rejects it. And significantly, *that* Stoic military model, in popularized form, as I have detailed in *Stoic Warriors*, informs our own contemporary military ethos. Grieving is difficult for the soldier

[35] *Iliad*, 18.23–42.
[36] Ibid., 24.595–600.
[37] See my fuller discussion of this in *Stoic Warriors*, 134ff.
[38] *Iliad*, 18.105;94–96.

who is taught to view himself as stoic, girded for battle by learning to keep separate the fighting self from the vulnerable self. Stoicism, we might say, is a form of dissociation (or compartmentalization), so appealing to soldiers, precisely because it gives the illusion of being bulletproof, of providing armor that can keep loss and hurt at bay. Visible grief, for both the ancient and the modern stoic warrior, becomes glossed as womanish, a deficit in self-mastery, a breakdown in decorum. For such soldiers, the words of Coriolanus, the mythical Stoic warrior in Shakespeare's play by that name, are all too apt: "It is no little thing to make mine eyes to sweat compassion."[39]

I introduced grief, recall, as something that might temper feelings of revenge in the cycle of injury and violence. As we said at the beginning of this essay, Stoicism repudiates wrath and the bite-back feelings that sustain it. But we have now seen that it repudiates grief as well. Both, on the Stoic view, compromise self-sufficiency. Both are chinks in the armor, defects in ideal invulnerability. More specifically, they are misdiagnoses of evil, mistaken beliefs that things outside one's reason (where reason, for the Stoics, just *is* one's virtue) are genuine bads. Thus, the Stoics hold that what happens to one's buddies or loved ones (and so often arouses anger or grief) are not real evils, for only inner virtue or reason is a genuine good and only *its* loss, a genuine evil. Cicero tries hard to embrace the view as a way of recovering from his grief for his daughter, Tullia, who dies in childbirth. But the price of the consolation is too high: "It is not within our power to forget or gloss over circumstances which we believe to be evil at the very moment they are piercing us. They tear at us, buffet us, goad us, scorch us, stifle us – and you tell us to forget about them?"[40]

VI. Conclusion

I have suggested that grief might soften or appease desires for revenge. But this might still deflect us from our initial gambit – that contrary to Stoicism, there are ways of being angry, ways even of showing revenge feelings or, at least, their close cousins (shorn of wild pleasure and perhaps undigested loss), that are worth preserving. As we conclude, let us be clear about just what is problematic about revenge. For the Stoics, and to

[39] Shakespeare, *Coriolanus*, act 5, scene 3.
[40] *Tusculan Disputations*, 3.35.

some degree, for us, part of revenge's problem is its lawlessness, both in terms of taking justice into one's own hands and its tendency to be wild – to exceed bounds, to be indiscriminate in whom it targets, to prolong through generations the cycle of violence. And then there is its pleasure, its "hunger for wild satisfaction," where that pleasure can motivate further disproportionate and indiscriminate violence.

But these negative associations leave out the positive notion of empowerment that we have been eager to stress and that the Stoics fail to see. In revenge, I envision myself as not an impotent victim, helpless in the face of loss and injury, but as someone who is self-assertive. I take steps to recuperate my self-esteem, my honor.

But the Stoics have a reply. For although they are amongst the strongest advocates of the healing power of a sense of agency, they critique the agency, in revenge, as flawed, for, among other reasons, it fails to take into account the agency of others. What matters, they argue (in a move that prefigures Kantian ethics), is agency that can coexist in a world of other agents. That agency is *rational* agency, agency that partakes of shared and, as they see it, divine reason. They propose a cosmopolitan ideal in which agents celebrate their own agency, bounded always by a respect and reverence for the agency of others. Thus, following Diogenes the Cynic's lead, the Stoics believe we are all cosmopolitans, literally, world citizens, worthy of respect and dignity.[41] In war, it is precisely cosmopolitan values that become the constraints that make war a regulated activity, with enemies worthy of respect, and not just objects of blind revenge. Respect is operationalized in the way one may prosecute war justly (i.e., with *jus in bello*).

This is no time to explore that concept further. The point for now is that once constraints are introduced on warfare, revenge may become tamed but not neutered. The idea of assertion remains. The idea of biting back, of defending oneself against attack, still has place. In war, especially, forgiveness must occur late in the game, not at the moment of armed aggression, when the war still rages. The warrior spirit, the *thumos*, as Plato would put it, must be available to serve courage and the rationale of the mission. It needs to be given room to do its job, as we saw in the case of Robert. But still, the fighting spirit of a warrior must respect that very spirit in others. This is no small task in fighting an enemy whose methods depend upon exploiting that very morality in their opponents.

[41] On cosmopolitanism, see Diogenes Laertius, 6.63; see also Epictetus's *Discourses*, 2.10.3, 1.9.2–6. For further discussion, see *Stoic Warriors*, pp. 168–72.

Ernst Jünger, a German lieutenant in World War I, writes in his preface to the English edition of his memoirs, *The Storm of Steel*, words worth recalling:

> It is not impossible that among the readers of this book there may be one who in 1915 and 1916 was in one of those trenches that were woven like a web among the ruins of Monchy-au-Bois. In that case, he had opposite him at that time the 73rd Hanoverian Fusiliers, who wear as their distinctive badge a brassard with "Gibraltar" inscribed on it in gold. . . . At the time . . . I was a nineteen-year-old in command of a platoon. . . . Of all the troops who were opposed to the Germans on the great battlefields the English were not only the most formidable but the manliest and the most chivalrous. I rejoice, therefore, to have an opportunity of expressing in time of peace the sincere admiration which I never failed to make clear during the war whenever I came across a wounded man or a prisoner belonging to the British forces.[42]

The remarks, I fear, will seem quaint to soldiers fighting insurgents who have abandoned modern forms of chivalry for leverage against an enemy that outpowers them in traditional force. The special challenge for our soldiers today is to fight in a way that respects an enemy and its civilian population who do not always respect them.

[42] Ernst Jünger, *The Storm of Steel* (New York: Fertig, 1996), pp. ix–xiii.

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