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Just War and Human Rights

Doctrines of just war have been formulated mainly by theologians and jurists in order to provide a canon applicable to a variety of practical situations. No doubt these doctrines originate in a moral understanding of violent conflict. The danger exists, however, that when the concepts of the theory are adopted into the usage of politics and diplomacy their moral content is replaced by definitions which are merely convenient. If that is so, the concepts of the traditional theory of just war could be exactly the wrong starting point for an attempt to come to grips with the relevant moral issues.

This is the case, I wish to argue, with the moral assessment of the justice of war (*jus ad bellum*).[1] My argument is in four parts. First I show that the dominant definition in international law is insensitive to one morally crucial dimension of politics. Secondly, I connect this argument with classical social contract theory. Thirdly, I propose an alternative definition which attempts to base itself more firmly on the moral theory of human rights. And finally, I apply this definition to two hard cases.

I

Unjust War as Aggression

International law does not speak of just or unjust war as such, but rather of legal or illegal war. For the purpose of the present discussion

1. I follow the traditional distinction between the justice of war, that is, which side is in the right with respect to the issues over which they are fighting, and justice in war (*jus in bello*), which pertains to the way the war is fought.

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I shall assume that the latter distinction expresses a theory of just war and treat the two distinctions as equivalent. The alternative would be to claim that international law is simply irrelevant to the theory of just war, a claim which is both implausible and question-begging.

Several characterizations of illegal war exist in international law. The Kellogg-Briand Pact of 1928, for example, condemns any use of war as an instrument of national policy except in the case of self-defense; and Brierly maintained that it did not lapse among it signers.[2] It is a very wide criterion for unjust war—wider, it may at first appear, than the United Nations Charter, which reads:

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.[3]

Presumably an act of war could exist which violated neither the political independence nor the territorial integrity of any state—say, a limited sea war. Or, to take another example, two states could agree to settle an issue by fighting a series of prearranged battles with prior agreements protecting their political independence and territorial integrity. Such acts would be barred by the Kellogg-Briand Pact; whether they are prohibited by Article 2(4) depends on how one reads the phrase "inconsistent with the purposes of the United Nations." I believe that on the most plausible reading, they would be prohibited.[4] Moreover, they would most likely constitute violations of the *jus cogens*, the overriding principles of general international law.[5] Thus, Article 2(4) is in fact roughly equivalent to the Kellogg-Briand Pact.

In any case, the provisions of Article 2(4) are subsumed under the definition of aggression adopted by the UN General Assembly in 1974. It includes the clause:

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another

2. J. L. Brierly, *The Law of Nations*, 6th ed., ed. Humphrey Waldock (Oxford: Oxford University Press, 1963), p. 409.
3. Article 2(4), quoted in Brierly, p. 415.
4. This is Brierly's claim, p. 409. The relevant Article of the Charter is 1(1).
5. This point was suggested to me by Professor Boleslaw Boczek.

> State, or in any other manner inconsistent with the Charter of the United Nations.[6]

That this is a characterization of unjust war may be seen from the fact that it terms aggression "the most serious and dangerous form of the illegal use of force."[7] The definition of aggression differs from Article 2(4) in that it includes a reference to sovereignty not present in the latter. This does not, however, mean that it is a wider characterization of unjust war than Article 2(4), for an armed attack on a state's sovereignty would be barred by the latter's catchall phrase "inconsistent with the purposes of the United Nations." Thus, the definition of aggression is not really an emendation of Article 2(4). Rather, it should be viewed as an attempt to conceptualize and label the offense at issue in Article 2(4). It attempts to give a sharp statement of principle.

Matters are further complicated by the fact that the General Assembly in 1946 adopted the Charter of the Nuremberg Tribunal as UN policy. Article 6 of this Charter includes among the crimes against peace "waging of a war of aggression or a war in violation of international treaties, agreements, or assurances. . . ."[8] This appears to be wider in scope than the definition of aggression, in that a war of aggression is only one type of criminal war. However, an argument similar to the one just given can be made here. Wars in violation of international treaties, agreements, or assurances are without question "inconsistent with the Charter of the United Nations," and hence fall under the definition of aggression; the Nuremberg Charter and the definition of aggression are thus extensionally equivalent.

It appears, then, that the definition of aggression captures what is essential in the Kellogg-Briand Pact, Article 2(4) of the UN Charter, and the relevant clause in the Nuremberg Charter. Thus, we may say that the UN position boils down to this:

(1) A war is unjust if and only if it is aggressive.

6. Quoted in Yehuda Melzer, *Concepts of Just War* (Leyden: A. W. Sijthoff, 1975), pp. 28-29.
7. Ibid.
8. Quoted in Ian Brownlie, *Principles of Public International Law*, 2nd ed. (Oxford: Clarendon Press, 1973), p. 545.

This gives us a characterization of unjust war, which is half of what we want. The other half emerges from Article 51 of the UN Charter:

> 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. . . .[9]

This tells us, at least in part, what a just war is. Thus, we have

(2) A war is just if it is a war of self-defense (against aggression).

We note that "just" and "unjust" do not, logically speaking, exhaust the possibilities, since it is (just barely) possible that a war which is not fought in self-defense also does not threaten the sovereignty, territorial integrity, or political independence of any state, nor violate international treaties, agreements, or assurances. Now the expression "just war" suggests "permissible war" rather than "righteous war"; if so, then any war which is not specifically proscribed should be just. It is perhaps better, then, to make the two characterizations exhaustive of the possibilities. This can be done in two ways. Either (1) can be expanded to

(1′) A war is unjust if and only if it is not just,

used in conjunction with (2), or (2) can be relaxed to

(2′) A war is just if and only if it is not unjust,

used in conjunction with (1). Overall, it appears that the conjunction of (1′) and (2), which makes every war except a war of self-defense unjust, is more in the spirit of the UN Charter than the more permissive conjunction of (1) and (2′).

Thus, (1′) and (2) capture pretty much what we want, namely the extant conception of *jus ad bellum*. In what follows I will refer to the conjunction of (1′) and (2) as "the UN definition," although it must be emphasized that it is not formulated in these words in any United Nations document.

9. Quoted in Melzer, *Concepts of Just War*, p. 18. I have omitted a clause which does not bear on the present argument.

The UN Definition and the Doctrine of Sovereignty: A Critique

As it is formulated in the UN definition, the crime of aggressive war is a crime of state against state. Each state, according to international law, has a duty of non-intervention into the affairs of other states: indeed, this includes not just military intervention, but, in Lauterpacht's widely accepted definition, any "dictatorial interference in the sense of action amounting to the denial of the independence of the State."[10] At the basis of this duty lies the concept of state sovereignty, of which in fact the duty of non-intervention is considered a "corollary."[11] Now the concept of sovereignty has been interpreted in a multitude of ways, and has at different times covered a multitude of sins (in such forms as the notorious doctrine that sovereign states are above the law and entitled to do anything); but in its original use by Bodin, it meant that there can be only one ultimate source of law in a nation, namely the sovereign.[12] This doctrine suffices to explain why intervention is a crime, for "dictatorial interference" of one state in another's affairs in effect establishes a second legislator.

The doctrine does not, however, explain why the duty of non-intervention is a moral duty. For the recognition of a state as sovereign means in international law only that it in fact exercises sovereign power,[13] and it is hard to see how that fact could confer moral rights on it. Might, or so we are told, does not make right. Rather, one should distinguish mere *de facto* exercise of sovereign power from legitimate exercise of it. The natural argument would then be that the duty of non-intervention exists only toward states which are legitimate (in the sense of the term employed in normative political theory).

Before accepting this argument, however, we must consider another possibility, namely that the duty of non-intervention in a state's affairs is not a duty owed to that state, but to the community of nations as a whole. This, in fact, seems to be one idea behind the United Nations Charter. The experience of World War II showed the disas-

10. Hersch Lauterpacht, *International Law and Human Rights* (London: Stevens, 1950), p. 167.

11. The term is used in Brownlie, *Public International Law*, p. 280.

12. Brierly, *Law of Nations*, pp. 7-16. See Bodin, *République* (n.p.: Scientia Aalen, 1961), Book One, Chap. 8.

13. This is discussed in Brownlie, chap. 5, pp. 89-108.

trous nature of escalating international violence, and an absolute ban on the initiation of warfare is justified on what we would now call rule-utilitarian grounds: regardless of the moral stature of a state, or the empirical likelihood of escalation in a given case, military intervention in the state's affairs is forbidden for the sake of international security.

I want to reject this argument as the basis for a theory of just war, however. For by giving absolute primacy to the world community's interest in peace, it does not really answer the question of when a war is or can be just; rather, it simply refuses to consider it. Obviously, the dangers posed by a war in the volatile political configuration of the nuclear era must weigh heavily into the question of *jus ad bellum*. But to make this the only factor is to refuse a priori to consider the merits of particular issues, and this is simply to beg the question of *jus ad bellum*.

Thus, I return to the claim that a state must be legitimate in order for a moral duty of non-intervention in its affairs to exist. If this is so, it pulls the rug out from under the UN definition, which is simply indifferent to the question of legitimacy, and thus to the whole moral dimension of the issue. We may put this in more graphic terms. When State *A* recognizes State *B*'s sovereignty it accepts a duty of non-intervention in *B*'s internal affairs. In other words, it commits itself to pass over what *B* actually does to its own people unless *B* has entered into international agreements regulating its domestic behavior; and even in this case *A* cannot intervene militarily to enforce these agreements.[14]

14. On the relation of international agreements with the duty of non-intervention, particularly in the case of human rights, see Louis Henkin, "Human Rights and 'Domestic Jurisdiction,'" in Thomas Buergenthal, ed., *Human Rights, International Law and the Helsinki Accords* (New York: Universe Books, 1977), pp. 21-40, and Thomas Buergenthal, "Domestic Jurisdiction, Intervention, and Human Rights: The International Law Perspective," in Peter G. Brown and Douglas Maclean, eds., *Human Rights and U.S. Foreign Policy* (Lexington, Mass.: Lexington Books, 1979), pp. 111-120. Both agree that even when the right of domestic jurisdiction over human rights has been "signed away" by a state, military intervention against it is proscribed. This doctrine, a product of the United Nations era, has replaced the nineteenth-century doctrine which permitted humanitarian intervention on behalf of oppressed peoples. The legal issues are discussed in the readings collected in Richard B. Lillich and Frank C. Newman, eds., *International Human Rights: Problems of Law and Policy* (Bos-

No matter if *B* is repulsively tyrannical; no matter if it consists of the most brutal torturers or sinister secret police; no matter if its ruling generals make its primary export bullion shipped to Swiss banks. If *A* recognizes *B*'s sovereignty it recognizes *B*'s right to enjoy its excesses without "dictatorial interference" from outside.

Really, however, the point retains its force no matter what the character of *B*. The concept of sovereignty is morally flaccid, not because it applies to illegitimate regimes, but because it is insensitive to the entire dimension of legitimacy.

Can the UN definition be repaired, then, by restricting the concepts of sovereignty and aggression to legitimate states? This would certainly be a step in the right direction; but the attempt underlines a puzzle about the whole strategy of defining *jus ad bellum* as a crime against states. Wars are not fought by states, but by men and women. There is, therefore, a conceptual lacuna in such a definition. It can be bridged only by explaining how a crime against a state is also a crime against its citizens, that is, by relating men and women to their states in a morally cogent fashion. This, I take it, is what the concept of legitimacy is supposed to do. A legitimate state has a right against aggression because people have a right to their legitimate state. But if so we should be able to define *jus ad bellum* directly in terms of human rights, without the needless detour of talk about states. Nor is this simply a question of which terms are logically more basic. If the rights of states are derived from the rights of humans, and are thus in a sense one kind of human rights, it will be important to consider their possible conflicts with other human rights. Thus, a doctrine of *jus ad bellum* formulated in terms of human rights may turn out not to consider aggression the sole crime of war. Indeed, this is what I shall argue in Section III.

First, however, it will be helpful to consider more closely the connection between a state's rights and those of its citizens. For I have

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ton: Little, Brown and Company, 1979), pp. 484-544. The case analyzed there is India's 1971 intervention into Bangladesh; on this see also Oriana Fallaci's interview with Zulfikar Ali Bhutto, in *Interview With History* (Boston: Houghton Mifflin Co., 1976), pp. 182-209.

criticized the UN definition (and the doctrine of sovereignty) by suggesting that its focus on the former shows indifference to the latter.

II

Contract, Nation and State

This argument may be clarified by examining social contract theory, the canonical modern account of legitimacy. The key feature of contract theory for our present discussion is its conception of the rights of political communities, particularly their right against aggression. According to contract theory, a political community is made legitimate by the consent (tacit or explicit) of its members; it thereby acquires rights which derive from the rights of its members. Thus the rights of political communities are explained by two rather harmless assumptions: that people have rights, and that those rights may be transferred through freely given consent. Contract theory, then, appears to offer a particularly clear account of how aggression against a political community is a crime against its members.

However, it is important to note that the term "political community" has two radically distinct meanings, corresponding to two very different conceptions of the social contract. The seventeenth-century theorists distinguished between a contract by which people bind themselves into a community prior to any state—Locke's version—and a contract by which people set a sovereign over them—Hobbes' version. Let us call the former a "horizontal" and the latter a "vertical" contract.[15]

A horizontal contract may be explicit: Arendt, in introducing the terms, suggests the Mayflower Compact as a paradigm case of a horizontal contract to which consent was explicitly rendered. More often, however, the consent is given tacitly through the process of everyday living itself. In Walzer's words:

15. I adopt this terminology from Hannah Arendt, "Civil Disobedience," in *Crises of the Republic* (New York: Harcourt, Brace, Jovanovich, 1972), pp. 85-87. See also her *On Revolution* (New York: Viking, 1965), pp. 169-171. It appears also in Michael Walzer, "The Problem of Citizenship," *Obligations* (New York: Simon and Schuster, 1970), p. 207.

> Over a long period of time, shared experiences and cooperative activity of many different kinds shape a common life. 'Contract' is a metaphor for a process of association and mutuality. . . .[16]

Such a contract gives rise to a *people* or, as I shall say in order to emphasize the people's existence as a political community, to a *nation*. But only the vertical contract can legitimate a *state*. A state is an ongoing institution of rule over, or government of, its nation. It is a drastic error to confuse the two; for while every government loudly asserts, "Le peuple, c'est moi!" it is clear that this is never literally true and seldom plausible even as a figure of speech. And it is equally obvious what ulterior motives and interests lie behind the assertion.

A state's rights can be established only through a vertical contract, which according to social-contract theory means nothing more or less than that the state is legitimate. This, too, requires consent, and this will be consent over and above that which establishes the horizontal contract. For the nation is prior to the state. Political communities, not sets of atomic individuals, consent to be governed. Of course it is the typical argument of totalitarianism, with its idolatry of the state, to deny this. For example, Giovanni Gentile, the "philosopher of fascism," says:

> For it is not nationality that creates the State, but the State which creates nationality, by setting the seal of actual existence on it. It is through the *conquest* of unity and independence that the nation gives proof of its political will, and establishes its existence as a State.[17]

Gentile had in mind Italy's struggle for unity in the Risorgimento; evidently, he believed that until the Italian state was established the nation as such did not exist. But what, then, gave "proof of its political will"? Gentile calls it the nation, and he is right, although this is inconsistent with his original contention that before the state the nation did not exist. A national liberation movement comes about when a people acts as a political community, that is, as a nation; its state

16. Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), p. 54.

17. Giovanni Gentile, *Genesis and Structure of Society*, trans. H. S. Harris (Urbana: University of Illinois Press, 1966), pp. 121-122.

comes later if it comes at all. The nation is the more-or-less permanent social basis of any state that governs it.

The relevance of these distinctions for just-war theory is this: clearly, aggression violates a state's rights only when the state possesses these rights. According to contract theory this entails that the state has been legitimated by the consent of its citizens. An illegitimate state, that is, one governing without the consent of the governed is, therefore, morally if not legally estopped from asserting a right against aggression. The *nation* possesses such a right, to be sure, but the state does not. Thus we have returned to the argument of the preceding section, which in our present terminology amounts to the claim that the concept of sovereignty systematically and fallaciously confuses a nation and its state, granting illegitimate states a right to which they are not entitled.

Curiously, Walzer himself falls prey to this confusion in his theory of just war. He attempts to give a contractarian justification of the UN definition, grounding the rights of states in a social contract based on tacit consent as characterized above ("shared experiences and cooperative activity of many kinds shape a common life"). This form of consent, however, can only refer to the horizontal contract, and can thus ground only the rights of nations, not of states. As Gerald Doppelt points out, "Walzer's theory seems to operate on two levels: on the *first* level, he implicitly identifies the state with the established government . . .; on the *second* level, he identifies the state with the people, nation, or political community—not its *de facto* government. . . ."[18] This is precisely a confusion of vertical with horizontal contracts. Doppelt goes on to criticize Walzer on grounds quite similar to those suggested by my argument: an illegitimate and tyrannical state cannot derive sovereign rights against aggression from the rights of its own oppressed citizens, when it itself is denying them those same rights.

The question which we are facing is this: what sort of evidence shows that consent to a state has indeed been rendered? I shall not attempt to give a general answer here, since the issue is quite com-

18. Gerald Doppelt, "Walzer's Theory of Morality in International Relations," *Philosophy & Public Affairs* 8, no. 1 (Fall 1978): 9.

plex. Two things, however, are clear. The first is that the mere existence of the nation cannot be sufficient evidence of the required sort: it would then legitimate any pretender. This is why Walzer's contract in no way establishes a state's rights, contrary to his claim. The second is that clear evidence can exist that a state is *not* based on consent and hence *not* legitimate.

An example drawn from the recent Nicaraguan revolution will illustrate this. On 22 August 1978 a band of Sandinista guerrillas took over the National Palace in Nicaragua, holding virtually the entire parliament hostage. They demanded and received the release of political prisoners, a large ransom, and free passage to Panama. Newspapers reported that as the guerrillas drove to the airport the streets were lined with cheering Nicaraguans. Within two days a general strike against the government of Anastasio Somoza Debayle had shut down the country; it was unusual in that it had the support of Nicaragua's largest business association, and thus seemed to voice a virtually unanimous rejection of the Somoza regime. Soon armed insurrection began. In the city of Matagalpa the barricades were manned mainly by high school students and other youths. Somoza responded by ordering the air force to bomb Matagalpa; the Matagalpans sent delegates to the bishopric to ask the church to intervene on their behalf with the government. The rebellion spread; at this point American newspapers were routinely referring to the Nicaraguan events as a struggle between the Nicaraguan people and the National Guard (the army). In a press statement strongly reminiscent of Woody Allen's *Bananas*, Somoza stated that his was the cause of Nicaraguan freedom, since he enjoyed the support of virtually the entire National Guard. By October the uprising was crushed—albeit temporarily—by sheer force of arms.

I do not pretend to possess a detailed understanding of Nicaraguan politics. However, it does not take a detailed understanding to realize that when the populace of a capital city cheers the guerrillas who have taken their own parliament hostage, when labor unions and business associations are able to unite in a general strike, and when a large city's residents must ask for third-party intervention to prevent their own government from bombing them to rubble, the government in

question enjoys neither consent nor legitimacy. The evidence, I submit, is more than sufficient to back this claim.

It might be objected that this example shows only that the Somoza regime was illegitimate, not the Nicaraguan state as such. The distinction between regime and state, however, is simply this: the regime is a particular distribution of men and women over the leadership posts which the state institutionalizes. (I shall ignore the complication that replacements can be made in some posts without the regime changing.) If this is so, then the objection amounts to the claim that the Nicaraguan people might consent to an institutional structure involving a leadership position with Somoza's powers—that is, that they might consent to a dictatorial structure which they could change only through armed struggle. It is clear that this claim possesses vanishingly small plausibility; ultimately, I believe it rests on the question-begging assumption that a nation always consents to some state or other.

This example underlines the moral impotence of the concept of sovereignty. For other states continued to recognize the sovereignty of the Somoza regime and thus committed themselves to a policy of non-intervention in the state's war against its nation. No doubt such decisions were discreet; they were certainly not moral.[19]

Other examples are—unfortunately—not hard to find. One thinks of the Organization of African Unity's frosty reception of Tanzania's "aggression" in Uganda, despite the notorious illegitimacy of Idi Amin's regime.[20] The point is graphically illustrated as well by the United States government's response to the conquest of Cambodia by Vietnam in January 1979. The Carter administration had frequently pinpointed the regime of Pol Pot and Ieng Sary as the worst human rights violator in the world, and some reports suggested that the "auto-genocide" in Cambodia was the most awful since the Holocaust.[21] Nevertheless, the State Department denounced Vietnam for aggression and violation of Cambodia's territorial integrity and sovereignty;

19. Walzer would, it seems, agree; see *Just and Unjust Wars*, p. 98.

20. See *Amnesty International Report 1978* (London: Amnesty International Publications, 1979), pp. 89-92, and Amnesty's *Human Rights in Uganda* (London: Amnesty International Publications, 1978).

21. See *Amnesty International Report 1978*, pp. 167-170, for detailed instances.

and this despite the fact that the Vietnamese-installed regime's first announcement concerned the restoration of human rights in Cambodia.[22] I shall discuss this issue more fully in Section IV.

The Modern Moral Reality of War

Modern international law is coeval with the rise of the European nation-state in the seventeenth and eighteenth centuries. As the term suggests, it is within the historical context of nation-states that a theory will work whose tendency is to equate the rights of nations with the rights of states. It is plausible to suggest that an attack on the French state amounts to an attack on the French nation (although even here some doubts are possible: a Paris Communard in 1871 would hardly have agreed). But when nations and states do not characteristically coincide, a theory of *jus ad bellum* which equates unjust war with aggression, and aggression with violations of state sovereignty, removes itself from the historical reality of war.

World politics in our era is marked by two phenomena: a breakup of European hegemony in the Third World which is the heritage of nineteenth-century imperialism; and maneuvering for hegemony by the (neo-imperialist) superpowers, perhaps including China. The result of this process is a political configuration in the Third World in which states and state boundaries are to an unprecedented extent

22. ". . . A profound moral and political issue is at stake. Which is the greater evil: the continuation of a tyrannical and murderous regime, or a flagrant violation of national sovereignty? . . . the Carter Administration . . . decided without hesitation . . . that the violation of Cambodia's sovereignty was a greater enormity than the Cambodian regime's violations of human rights. . . ." Henry Kamm, "The Cambodian Dilemma," *The New York Times Magazine*, 4 February 1979, pp. 54-55. Evidently, this view was shared by the United Nations, which voted recently to seat a delegation from the deposed Pol Pot government rather than the Vietnam-supported Heng Samrin regime, on the grounds that no matter how unappetizing the behavior of the former, it would be wrong to condone aggression by recognizing the latter.

In citing these examples I am not entering any large moral claims on behalf of Vietnam or Tanzania, both of which are accountable for their share of human rights violations. Here I am in agreement with Walzer (*Just and Unjust Wars*, p. 105) that pure motives and clean hands are not necessary to morally justify an intervention. The present essay was written in early 1979, before the current Cambodian famine, in which it appears that the policies of Vietnam may be just as horrifying as those of the Khmer Rouge.

the result of historical accident (how the European colonial powers parceled up their holdings) and political convenience (how the contending superpowers come to terms with each other). In the Third World the nation-state is the exception rather than the rule. Moreover, a large number of governments possess little or no claim to legitimacy. As a result of these phenomena, war in our time seems most often to be revolutionary war, war of liberation, civil war, border war between newly established states, or even tribal war, which is in fact a war of nations provoked largely by the noncongruence of nation and state.

In such circumstances a conception of *jus ad bellum* like the one embodied in the UN definition fails to address the moral reality of war. It reflects a theory that speaks to the realities of a bygone era. The result is predictable. United Nations debates—mostly ineffectual in resolving conflicts—and discussions couched in terms of aggression and defense, have deteriorated into cynical and hypocritical rhetoric and are widely recognized as such. Nor is this simply one more instance of the well-known fact that politicians lie in order to dress up their crimes in sanctimonious language. For frequently these wars are fought for reasons which are recognizably moral. It is just that their morality cannot be assessed in terms of the categories of the UN definition; it must be twisted and distorted to fit a conceptual Procrustes' bed.

III

Human Rights and the New Definition

What, then, are the terms according to which the morality of war is to be assessed? In order to answer this question, let me return to my criticism of the contractarian derivation of the rights of states from the rights of individuals. States—patriots and Rousseau to the contrary—are not to be loved, and seldom to be trusted. They are, by and large, composed of men and women enamored of the exercise of power, men and women whose interests are consequently at least slightly at variance with those of the rest of us. When we talk of the rights of a state, we are talking of rights—"privileges" is a more accurate word—which those men and women possess over and above the general rights of man; and this is why they demand a special justification.

I have not, however, questioned the framework of individual rights as an adequate language for moral discourse. It is from this framework that we may hope to discover the answer to our question. Although I accept the vocabulary of individual rights for the purpose of the present discussion, I do not mean to suggest that its propriety cannot be questioned. Nevertheless, talk of individual rights does capture much of the moral reality of contemporary politics, as talk of sovereignty and states' rights does not. This is a powerful pragmatic reason for adopting the framework.

To begin, let me draw a few elementary distinctions. Although rights do not necessarily derive from social relations, we do not have rights apart from them, for rights are always claims on other people. If I catch pneumonia and die, my right to life has not been violated unless other humans were directly or indirectly responsible for my infection or death. To put this point in syntactic terms, a right is not to be thought of as a one-place predicate, but rather a two-place predicate whose arguments range over the class of beneficiaries and the class of obligors. A human right, then, will be a right whose beneficiaries are all humans and whose obligors are all humans in a position to effect the right. (The extension of this latter class will vary depending on the particular beneficiary.)[23] Human rights are the demands of all of humanity on all of humanity. This distinguishes human rights from, for example, civil rights, where the beneficiaries and obligors are specified by law.

By a *socially basic human right* I mean a right whose satisfaction is necessary to the enjoyment of any other rights.[24] Such rights deserve to be called "basic" because, while they are neither intrinsically

23. Other analyses of the concept of "human right" are possible. Walzer, for example, makes the interesting suggestion that the beneficiary of human rights is not a person but humanity itself (*Just and Unjust Wars*, p. 158). Such an analysis has much to recommend it, but it does not concern us here, for humanity will still enjoy its rights through particular men and women.

24. I take this concept from Henry Shue, "Foundations for a Balanced U.S. Policy on Human Rights: The Significance of Subsistence Rights" (College Park, Maryland: Center for Philosophy and Public Policy Working Paper HRFP-1, 1977), pp. 3-4. Shue discusses it in detail in *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, in press), chap. 1.

more valuable nor more enjoyable than other human rights, they are means to the satisfaction of all rights, and thus they must be satisfied even at the expense of socially non-basic human rights if that is necessary. In Shue's words, "Socially basic human rights are everyone's minimum reasonable demands upon the rest of humanity." He goes on to argue that socially basic human rights include security rights—the right not to be subject to killing, torture, assault, and so on—and subsistence rights, which include the rights to healthy air and water, and adequate food, clothing, and shelter.[25]

Such rights are worth fighting for. They are worth fighting for not only by those to whom they are denied but, if we take seriously the obligation which is indicated when we speak of human rights, by the rest of us as well (although how strictly this obligation is binding on "neutrals" is open to dispute). This does not mean that any infringement of socially basic human rights is a *casus belli*: here as elsewhere in the theory of just war the doctrine of proportionality applies. But keeping this reservation in mind we may formulate the following, to be referred to henceforth as the "new definition":

(3) A just war is (i) a war in defense of socially basic human rights (subject to proportionality); or (ii) a war of self-defense against an unjust war.

(4) An unjust war is (i) a war subversive of human rights, whether socially basic or not, which is also (ii) not a war in defense of socially basic human rights.

I shall explain. The intuition here is that any proportional struggle for socially basic human rights is justified, even one which attacks the non-basic rights of others. An attack on human rights is an unjust war *unless* it is such a struggle. This is why clause (4) (ii) is necessary: without it a war could be both just and unjust. Clause (3) (ii) is meant to capture the moral core of the principle of self-defense, formulated above as (2). And it is worth noting that clause (4) (i) is an attempt to reformulate the concept of aggression as a crime against people rather than states; an aggressive war is a war against human rights. Since the rights of nations may be human rights (I

25. Ibid., pp. 3, 6-12.

shall not argue the pros or cons of this here), this notion of aggression may cover ordinary cases of aggression against nations.

Let me emphasize that (3) and (4) refer to *jus ad bellum*, not *jus in bello*. When we consider the *manner* in which wars are fought, of course, we shall always find violations of socially basic human rights. One might well wonder, in that case, whether a war can ever be justified. Nor is this wonder misplaced, for it addresses the fundamental horror of war. The answer, if there is to be one, must emerge from the doctrine of proportionality; and here I wish to suggest that the new definition is able to make sense of this doctrine in a way which the UN definition is not.[26] For the UN definition would have us measure the rights of states against socially basic human rights, and this may well be a comparison of incommensurables. Under the new definition, on the other hand, we are asked only to compare the violations of socially basic human rights likely to result from the fighting of a war with those which it intends to rectify. Now this comparison, like the calculus of utilities, might be Benthamite pie-in-the-sky; but if it is nonsense, then proportionality under the UN definition is what Bentham once called the theory of human rights: "nonsense on stilts."

IV

Two Hard Cases

The new definition differs in extension from the UN definition in two ways: on the one hand, an aggressive war may be intended to defend socially basic human rights, and thus be just according to (3); on the other, a war of self-defense may be fought in order to preserve a status quo which subverts human rights, and thus be unjust according to (4). But, I suggest, this is no objection, because (3) and (4) accord more with the moral reality of war in our time than do (1) or (1′) and (2).

26. The new definition also allows us to make sense of an interesting and plausible suggestion by Melzer, namely that a just war (in the sense of *jus ad bellum*) conducted in an unjust way (*jus in bello*) becomes unjust (*jus ad bellum*), in other words, that the *jus ad bellum* is "anchored" in the *jus in bello*. On the new definition this would follow from the fact that a war conducted in a sufficiently unjust way would violate proportionality. See Melzer, pp. 87-93.

There are two situations which are of particular interest for the theory of *jus ad bellum* because they exhibit marked differences between the UN definition and the new definition. The first concerns a type of economic war, the second an armed intervention in a state's internal affairs.

What I have in mind in the first case is a war for subsistence. Consider this example: *A* and *B* are neighboring countries of approximately the same military capability, separated by a mountain range. *A* is bordered by the ocean and receives plentiful rainfall; however, the mountains prevent rain clouds from crossing over to *B*, which is consequently semi-arid. One year the lack of rain causes a famine in *B* which threatens millions of lives. *A*, on the other hand, has a large food surplus; but for a variety of cultural, historical, and economic reasons it makes none of this food available to *B*. Can *B* go to war with *A* to procure food?

According to the UN definition such a war would constitute an aggression, and consequently be unjust; but according to (3), since the war would be an attempt to procure socially basic human rights for *B*'s people, it would be just. Indeed, *A* is morally obligated to give food to *B*, and assuming that *B*'s sole purpose in fighting is to procure food, a defense by *A* would be an unjust war.

This, I suggest, is a position fully in accord with moral decency. Indeed, it is interesting to note that Walzer adopts a similar position, despite the fact that it runs counter to his basic argument concerning the criminality of aggression. Discussing the case of barbarian tribes who, driven west by invaders, demanded land from the Roman Empire on which to settle, Walzer quotes Hobbes with approval: "he that shall oppose himself against [those doing what they must do to preserve their own lives], for things superfluous, is guilty of the war that thereupon is to follow."[27] A fight for life is a just fight.

An important qualification must be made to this argument, however. If *A* itself has a food shortage it cannot be obligated to provide food to *B*, for its own socially basic human rights are in jeopardy.

27. Walzer, *Just and Unjust Wars*, p. 57. See also Charles R. Beitz, *Political Theory in International Relations* (Princeton: Princeton University Press, 1979), pp. 175-176.

Thus *B* loses its claim against *A*. And if a third nation, *C*, can supply food to *A* or *B* but not both, it is unclear who has a right to it. Socially basic human rights can conflict, and in such cases the new definition of just war will not yield clear-cut answers. Nor, however, do we have reason to expect that clear-cut answers might exist.

There are less clear examples. What about a fight against impoverishment? In the 1960s and 1970s Great Britain and Iceland were repeatedly embroiled in a conflict over fishing grounds. This resulted in an act of war on the part of Iceland, namely, a sea attack on British ships. Of course, Iceland's belligerance may have been merely theatrical; moreover, on Iceland's interpretation of the limits of fisheries jurisdiction, she was simply defending her own right, since the British vessels were within the two-hundred mile fisheries zone claimed by Iceland. But the moral issue had to do with the fact that Iceland's economy is built around the fishing industry, and thus a threat to this industry presented a threat of impoverishment. Now no socially basic human rights are at issue here: impoverishment is not starvation. Nevertheless, there is a certain moral plausibility to the Icelanders' position, and it clearly resembles the position of country *B* in our previous example. But if we weaken the definition of unjust war to include struggles against economic collapse, the door is opened to allowing any economic war. For example, do industrialized countries have a right to go to war for OPEC oil?

One way to handle this would be to claim that while nations have no socially basic right to any given economic level beyond subsistence, they do possess a socially basic right not to have their economic position worsened at a catastrophic rate. There is a certain plausibility to this suggestion, inasmuch as a collapsing economy will undoubtedly cause social disruption sufficient to prevent the enjoyment of other rights. The point is nevertheless debatable. Without pretending to settle it, I would, however, claim that we are now on the right moral ground for carrying out the debate, whereas a discussion couched in terms of aggression and sovereignty would miss the point completely.

The other case I wish to discuss concerns foreign intervention into a country's internal affairs. The point is that if such an intervention is on behalf of socially basic human rights it is justified according to the new definition.

Here again it will be useful to look at Walzer's position. He begins by endorsing an argument of Mill's which is based on the right of national self-determination. Mill's point is that this is a right of nations to set their own house in order *or fail to* without outside interference. If a people struggles against a dictatorship but loses, it is still self-determining; whereas if it wins due to the intervention of an outside power, its right to self-determination has been violated. Walzer admits only three exceptions: (i) a secession, when there are two or more distinct political communities contending within the same national boundary; (ii) a situation in which another foreign power has already intervened; and (iii) a situation in which human rights violations of great magnitude—massacres or enslavements—are occurring. Only in these cases may intervention be justified.[28]

Now Mill's argument employs a somewhat Pickwickian conception of self-determination. A self-determining people, it suggests, fights its own battles, even if it loses them. But then one might infer that a self-determining people fights its own wars as well, even if it loses them. Thus, a nation's conquest by a foreign power would become an instance of its self-determination.[29] Surely the fact that it is a foreign rather than a domestic oppressor is not a morally relevant factor, for that would imply that oppressions can be sorted on moral grounds according to the race or nationality of the oppressor. Yet something is clearly wrong with an argument which leads to this doublethink concept of self-determination.[30]

The problem with Mill's position is that it takes the legitimacy of states too much at face value. "Mill generally writes as if he believes that citizens get the government they deserve. . . ."[31] That is, somehow oppression of domestic vintage carries a prima facie claim to legitimacy which is not there in the case of foreign conquest. It seems that Mill suspects that the state would not be there if the people did not secretly want it. This seems to me to be an absurd, and at times even

28. Walzer, *Just and Unjust Wars*, pp. 87-91.

29. As Walzer expressly denies, p. 94.

30. I take Doppelt to be making a similar point when he suggests that a people can be "aggressed" against by its own state as well as by a foreign state, "Walzer's Theory," p. 8. My argument in this section is quite in sympathy with Doppelt's, pp. 10-13.

31. Walzer, p. 88.

obscene view, uncomfortably reminiscent of the view that women are raped because secretly they want to be. The only argument for Mill's case, I believe, is the improbable claim that the fact that people are not engaged in active struggle against their state shows tacit consent. Even granting this, however, there remains one case in which Mill's position is unacceptable on its own terms. That is when there is overwhelming evidence that the state enjoys no legitimacy—when there is active and virtually universal struggle against it. Such struggles do not always succeed, and after each bloody suppression the possibility of another uprising grows less. Heart and flesh can bear only so much. In such a case an argument against intervention based on the people's right of self-determination is merely perverse. It makes the "self" in "self-determination" mean "other"; it reverses the role of people and state. One thinks of Brecht's poem "Die Lösung," written after the rebellion of East German workers in 1953: "After the rebellion of the seventeenth of June . . . one could read that the people had forfeited the government's confidence and could regain it only by redoubling their work efforts. Would it not be simpler for the government to dissolve the people and elect another one?"[32] I might add that in fact Walzer grants the point: "a state (or government) established against the will of its own people, ruling violently, may well forfeit its right to defend itself even against a foreign invasion."[33] Thus, it would appear that in such a case intervention is morally justified, even in the absence of massacres and slavery.

And, to make a long story short, the new definition will endorse this view. For the kind of evidence which demonstrates a government's illegitimacy must consist of highly visible signs that it does not enjoy consent, for example, open insurrection or plain repression. And this necessitates violations of security rights, which are socially basic human rights. Obedience which is not based on consent is based on coercion; thus the more obvious it is that a government is illegitimate, the more gross and widespread will its violations of security rights be, reaching even those who do not actively oppose it. This is akin to a

32. Quoted by Hannah Arendt, *Men in Dark Times* (New York: Harcourt, Brace and World, 1968), p. 213.

33. Walzer, *Just and Unjust Wars*, p. 82 n.

law of nature. And thus an intervention becomes morally justified, or even morally urgent.

No definition of just war is likely to address all of the difficult cases adequately—and there is no realm of human affairs in which difficult cases are more common. Seat-of-the-pants practical judgment is a necessary supplement to one's principles in such matters: in this respect I fully agree with Walzer that "The proper method of practical morality is casuistic in character."[34] Thus, while I do not doubt that troubling examples may be brought against the new definition, it seems to me that if it corresponds with our moral judgments in a large number of actual cases, and can be casuistically stretched to address others, it serves its purpose. My claim is that, whatever its deficiencies, the new definition of *jus ad bellum* offered in (3) and (4) is superior to the existing one in this respect.

34. Ibid., p. xvi.

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