WAR AND JUSTICE

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B.S., Kansas State College, 1976

A MASTER'S REPORT

submitted in partial fulfillment of the

requirements for the degree

MASTER OF ARTS

Department of Political Science

KANSAS STATE UNIVERSITY
Manhattan, Kansas

1985

Approved by:

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INTRODUCTION

Can war be just? Since man has discussed war, they have debated it in terms of right and wrong. Some have called this discussion a charade, and believe that war is not, and should not be called a moral action or a just action. However, the concept of a just war does exist and this concept is a prevalent thought in many contemporary writers. These writers do not deny the necessities of states to act in their interests and their right to use force in the pursuit of those interests. However, they do argue, for reasons which will become clear subsequently, inherent or built-in restraints on the use of force. These restraints are, of course moral and prudential. War, it is argued, should only be rationally undertaken as a means of achieving a political ends and only as a means of distributing justice. These purposes rule out an unrestricted use of force which is imprudent and immoral. The theory at this level claims that if force is used, it should be justified and it should be proportional.

The major problem that exists in the current writings is that force must be justified, but who is the one justifying these actions? The answer is the state. The state has its necessities, but at the same time it must insist that these necessities be limited. States have a way of interpreting the concept of just war in such an elastic way that they have caused any act they deem necessary as compatible with any act of war.

It is the purpose of this report to explore the concept of just war. The first discussion is the origins of just war. Most of the earlier theories of just war were prescientific even though some of them were based upon "empirical evidence" drawn from history. Several of the earlier theories contain perceptive insight that merits our attention as part of our cultural heritage. These early theories aid us in seeing how the problem of war was viewed in other eras, and why it was not always regarded as evil. These theories reflect conscious motivations for and rationalizations of war, which at the level of human decision-making can be "causal." They give philosophical, religious and political discussions for and against war. The early writers analyze the phenomenology of war at a more natural level of human observations. Therefore, their inclusion in any thesis dealing with just war is a necessity and it is important to understand their reasoning.

The second discussion considers the qualifications of a just war. In this section I raised several questions: What events must transpire prior to initiating just war? When is intervention just? And how must the war be conducted once it is initiated?

The third discussion considers international morality and war. One may be initially concerned over the validity of "international morality" but after careful review of existing literature it is evident that such a morality does exist. The morality that is found exists in the traditional international law and the basis of international morality found in those general principles of international law.

The final discussion considers whether nuclear deterrence is moral. Many have argued that in view of the destructive power of

nuclear weapons their use or even their use in deterrence is immoral. However, are these writers correct? Is a nuclear threat morally permissible?

Chapter One

THE ORIGINS OF JUST WAR

Wars have existed since the beginning of recorded time. With these wars came rules defining the circumstances under which war might be initiated (jus ad bellum). It is known that an exchange of letters and demands generally preceded hostilities as early as the fourteenth century B.C. with the Hittites' struggles. Rules of war based on notions of chivalry extend as far back as the fourth century B.C. in ancient China (the beginning of jus in bello). Sun Tzu, in The Art of War, wrote that it was forbidden to injure an enemy previously wounded or to strike elderly men. He demanded that his corps "treat the captives well, and care for them. All the soldiers taken must be cared for with mananimity and sincerity so that they may be used by us."[1]

The Babylonians of the seventh century B.C., also treated both prisoners and captured peoples with restraint in accordance with well established rules. This was demonstrated after the campaign against Jerusalem in 690 B.C., when the victorious Sennacherib handled most of the conquered Jews with the prescribed mercy of the times. Sennacherib killed only the officials and patricians guilty of crimes while he treated the rest as prisoners of war and released those not accused of crimes.

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[1]Sun Tzu, The Art of War, Ed. James Clavell, New York: Delacorte Press, 1983.

The rules governing warfare are expressed in the Bible, in the book of Deuteronomy. Complete annihilation of every man, woman and child was permissible in war when the Jews were fighting other nations.[1] Some believed that God gave the Jews the chance to insure that the attacking nation would be cleansed from the earth.

It was not until the time of the Greeks and the Romans that humanitarian notions or concerns gained favor. It was during this time that values of peace and harmony came to the fore. War now had to be justified to the polis in terms of some higher ideal. The Hellenistic and Roman civilizations had laws which specified that an enemy nation could be attacked only if it violated policies previously set forth. Not only was a just cause required, according to Cicero, but also a formal demand for redress of grievances and a declaration of war was necessary. Only after these qualifications had been achieved could a war (justum bellum) be considered legitimate. The war must also be conducted in accordance with religious sanctions and the expressed or implied commands of the gods.

Cicero's approach was developed from the law of reason. According to him this law of reason contains and sets forth the rules of justice which should regulate the relationships between nations, including that of war. War may not be unjust in itself, but the conditions which should regulate its occurrence and conduct spring from the international or universal reason, identifiable with the principles of justice.

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[1]Ed. Washburn College, "Deuteronomy," The Holy Bible, New York: Oxford University Press, 1979, pp. 261-316.

With the spread of Christianity, war took on new meaning. The early Christian Church refused to accept war as moral in any circumstances and Christians were forbidden to enter into the military.[1] The early Church did not encourage an elaborate theology of war. This period of extreme pacifism lasted for approximately three centuries after Christ. This era was represented by men like Origen (185-254), Lactantius (died 330), Tertullian (160-240) and Justinus (100-165).

During this period no Christian author defended Christian participation in war. In fact there is strong testimony against war and this leads one to believe that the general attitude and the position of the early church was extremely pacifistic.

This pacifism was not, however, absolute or unvaried. The reasons for this varied attitude were the impressions gained from the Old Testament that warfare could be divinely sanctioned. It was the belief of some that God revealed his purposes in the midst of and by means of certain wars. One example of this was the Jewish War of 67-71 A.D., regarded by many as a divinely ordained punishment of the Jews. Therefore, many Christians had the conception of the Messiah warring victoriously.[2]

One began to get the feeling after reading many of the writers of the time that denunciation is at some times an expression of fine feeling which at other times cannot meet the practical situations as if some of the writers are thinking of defensive war when they give their

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[1] John C. Cadoux, The Early Christian Attitude to War, New York: Seabury Press, 1982, p. 96.

[2] Ibid., pp. 246-47.

assent and of aggressive war when they condemn. This uncertainty is greatly increased in the light of the political thought of the period.

It was the Pauline justification of civil government, which was an institution ordained by God,[1] that implied that not only judicial penalties but war was also right. This theme was accepted by early writers such as: Clement of Rome, Athenagoras, the Apocryphal Acts of John, Origen, Lactantius and Eusebius. At the time most Christians believed that the State was divinely ordained in order to repress crime and violence with force and at the same time that they, as Christians, must never harm or inflict suffering on their fellows, but must love and forgive.

The ambiguous writings of the times are prevalent in the works of Origen. He claimed that while it is against the Christian faith for Christians to fight for the community and to kill men, Christians also should be fighting as priests and worshippers of God, keeping their right hand pure and by their prayers to God striving for those who fight in a righteous cause and for the emperor who reigns righteously in order that everything which is opposed and hostile to those who act rightly may be destroyed. This may be interpreted as since they cannot fight themselves, they can, however, help others with their prayers. However, Origen clouds the issue in a reply from a challenge issued by Celsus. In the reply he states that Christians should help the emperor with all their power and

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[1] Ed. Washburn College, "Romans, 13 Chapter," The Holy Bible, New York: Oxford University Press, 1979, pp. 1563-64.

> . . . fight for him and be fellow soldiers if he presses for this and fellow generals with him.[1]

His ambiguous attitude is reinforced when he wrote that if wars "are ever necessary they should be just and ordered." In his later works, however, he wrote: "No longer do we learn war any more, since we have become sons of peace through Jesus who is author. . . ."[2]

In spite of these contradictory remarks it is still believed by many that the Church and the early writers objected to all war and any killing. Athansius was the first writer of the Church that ventured to say that war is not only permissible but is also praiseworthy. Not long after this the Church began to withdraw their extreme position against war.

As the toleration of war increased there developed a moral laxity within the Church which encouraged compromise with secular practices. The conversion of Constantine is accredited with reducing the Church's pacific tendencies. The Church bowed to his vision of the cross which Constantine believed had helped him to military victory.

Since the Church was divided and intellectually immature, it was in no position to denounce that military power which God himself had apparently blessed. Therefore, the Church lessened its hatred of warfare and carried the cross into battle as the imperial military emblem.

With this summary of the Church's early attitude toward war, two questions need to be answered. The first, what does the Christian doctrine consider a just war and by what criterion can it be determined,

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[1] Joan D. Tooke, The Just War in Aquainas and Groutis, London: S.P.C.K., 1965, p. 10.

[2] Ibid.

that a war is just? Second, who decides that there is a just cause to begin a war and who has the authority to make that decision?

St. Augustine answers the first question by stating that:

> A just war is wont to be described as one that avenges wrongs, when a nation or a state to be punished, for refusing to make amends for the inflicted by its subjects, or to restore what it has seized unjustly.[1]

Therefore, in order to have jus ad bellum, a wrong must be received or an injury suffered.

As regards to the second question Augustine states:

> The natural order, best adapted to secure the peace of mankind, requires that the authority to make war and the advisability of it should be in the hands of the sovereign prince.[2]

Therefore, each State had to determine from within; that is, the prince would decide after consultation with his counsellors.

St. Augustine also mentions that it is essential for the just war to be necessary and that it should be carried out with mercy. He insisted on war as a means of restoring order and of achieving peace.[3] By stating this he was insisting that war was to be fought with a right intention in mind.

It was not until the 12th century that anyone developed new ideas in the area. At this time, however, St. Isidore stepped to the fore. His remarks were similar to those of St. Augustine, though his authorities were different. He looked to Cicero's Republic and Roman

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[1] J. B. Scott, The Spanish Origin of International Law, London, 1934, pp. 181-82.

[2] Ahmed M. Rifaat, International Aggression, Stockholm: Humanities Press, 1979, p. 4.

[3] Whitney J. Oates, Basic Writings of Saint Augustine, New York: Random House, 1948, p. 481.

law. "Just War" he wrote "must be waged on valid authority, either to regain things lost or to drive out invaders. Unjust war is that which results from passion, not from lawful reason; as Cicero explains in his Republic, unjust wars are those on which men enter without good reason."[1]

After St. Isidore the next major writer was St. Thomas Aquinas. He continued to teach St. Augustine's teachings on just war. Aquinas wrote that "for a war to be just," the following conditions were to be met: "First, the authority of the sovereign by whose command the war is to be waged. For it is not business of the private individual to declare war. . . . Secondly, a just cause is required, namely that those who are attacked should be attacked because they deserve it on account of some fault. Thirdly, it is necessary that the belligerents should have a rightful intention so that they intend the advancement of good, or the avoidance of evil."[2] The views expressed by Aquinas on war are very similar to those of Augustine and the lack of originality is evident, however, these ideas were reinforcing and needed at the time.[3]

The opinions set forth by Augustine were later extended into a full scale theory of the just war. Raymond of Pennaforte,[4] was the first canonist to develop just such a theory. Raymond developed five prerequisites for a just war. War must be just with regard to whom are

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[1]Maurice H. Keen, The Laws of War in the Late Middle Ages, London: Routledge, 1965, 291 p.

[2]Ian Brownlie, International Law and the Use of Force by States, Oxford: The Clarendon Press, 1963, p. 6.

[3]Tooke, op. cit., Chapter 2.

[4]Brownlie, op. cit., p. 6 ff.

the combatants. It must be just with regard to its purpose. It must have a necessary cause. There must not exist a passion for revenge. The war must be declared by a legal authority. Henceforth there was a standard by which to evaluate the justice of war. However, a question still remained over whether, for a war to be called just, it had to satisfy all the prerequisites, or only some of them.

All those concerned in these debates agree that the right of self defense cannot be denied but, to what extent the defendant proceeds is questionable and debatable. Therefore, the only person who may declare war, according to Augustine, is the prince. This was further developed by Bartolus who states that "only he who has no superior can declare a just war."[1] The theory behind this is that since the prince is above civil laws, and since wars do alter civil laws, he is the only one who can declare war. However, the prince cannot violate natural law because natural law is inchangeable.

When a war was levied on the authority of a prince, there was no superior to whom recourse could be made in order to judge on whose side right lay. Since there was no one to judge the cause, the only practical standard of justice which could be applied to such a war was the fact that a prince had declared it. When presented with this type of scenario, it was presumed that both sides believed that justice lay with them, and until arms had settled the issue, both were entitled to the benefit of the doubt.

At this point whoever declared an unjust war was to be held responsible for all the damage done and must return all booty. Cardinal

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[1]Tooke, op. cit., p. 12.

Cajetanus believed that war was a judicial procedure for punishment of the guilty party. Therefore, he declared a prince waging an unjust war must yield his conquest and make reparation for damages of the opponent.[1]

During the fifteenth and sixteenth centuries dynamic changes were taking place in Medieval Europe. The unitary system of the Church and the Empire was disappearing. The Patrimonial State resolved itself into the Sovereign State as a result of the development of the concept of independent princes acting in conjunction with national states, with political capacity vis-a-vis the Emperor. The belief that war was lawful and moral when it had a just cause no longer corresponded to reality. The substantial criterion of the just war was replaced by a formal criterion.

The constant theme of the time is that of the authority to wage war. Bartolus, had previously recognized the fact that only a prince recognizing no de facto superior had the right to declare war in order to redress wrongs at a time when the Emperor could no longer provide redress. Pierino Belli furthered this doctrine by stipulating that to be just, a war must not only be waged for a just motive but also by one who has the power to declare it.

Bathazar Ayala brought new meaning to the doctrine of just war when he wrote:

> A war may in one sense be styled just and yet not be waged for just cause, for the word "just" has varying meaning . . . and it is in a like manner that the phrase "just war" is employed, meaning thereby a war publicly and lawfully waged by those who have the right of waging war. . . . Now seeing that the right to make war is the prerogative of princes who have no

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[1]Tooke, op. cit.

> superiors, discussion of the equity of the cause is inappropriate.[1]

Thus a war would be considered just not because it had a just cause, but only if it was waged by an authority who had the right of waging it.

In the sixteenth century political philosophy was to suffer, according to Leo Strauss, the first wave of modernity.[2] The cause of this wave of modernity was Machiavelli. Machiavelli brought with him a new philosophy which lowered the goals in life. This lowering of goals precipitated a new viewpoint towards just wars. To him "that war is just which is necessary" and every sovereign entity may decide on the occasion for war.[3]

This belief was first developed by Bodin and was developed into a theory that had one prince believing that his cause was just when objectively justice lay with the other party. This theory was later described as probabilism.

Hugo Grotius (1583-1645) was the first writer of comprehensive and systematic treatise on the law of nations. He uses secular natural law and nationalism for his basis of law. His conclusions are those of the writers prior to the era before probabilism, but he does venture relatively close to probabilism at some points.

The era following the Peace of Westphalia marked the end of violent religious wars and the disappearance of the Papacy and the Holy Roman Empire as effective instruments for regulating the affairs of

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[1]Brownlie, op. cit., p. 9.

[2]Hilail Gildin, Political Philosophy, Six Essays by Leo Strauss, Indianapolis: Pegasus, 1975, pp. 81-88.

[3]Brownlie, op. cit., p. 11.

Europe. The writers and philosophers of the time either adopted a positivist standpoint, discussing the justifications for war only in the context of natural law and morality or gave a traditional and vague exposition of numerous just causes of war, combining this with the probabilist views.

Two writers who expounded the positivists view were Samuel Rachel (1628-1699) and Johann Wolfgang Textor (1638-1701). According to Rachel, war must have a just cause and it must be necessary; no war was allowed if reparation was offered and was satisfactory. Textor offered a slightly different viewpoint when he stated: War is "a condition of lawful hostile offence existing for just cause between royal or quasi-royal powers, declared by public authority."[1]

The two main requisites for a just cause of war were a serious grievance suffered and a refusal of redress on the other side. Recourse to war should be of major grievances not for some minor harm.

Vattel (1714-1767) distinguished between the law which results from applying the natural law of nations and the positive international law whose rules are devoted to the welfare and advancement of the universal society, and they all proceed from the agreement of nations. The former addresses itself to the conscience of sovereigns and is concerned with the justness of war while the latter affects only the practice of sovereigns in their intercourse with each other.[2] Vattel rejected war as a means of settling disputes, but recognized it as a means to the end. The cause of every just war was an injury, threatened

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[1]Tooke, op. cit., Chapter 9.

[2]Rifaat, op. cit., p. 13.

or received. The reasons which determine the sovereign to resort to war were:

1. To obtain what belongs to us, or what is due to us;
2. To provide for our future security by punishing the aggressor or the offender;
3. To defend ourselves, or to protect ourselves from injury, by repelling unjust attacks.

The first two points are the object of offensive war, the third is the object of defensive war.[1]

With the coming of the 19th century the European continent was still dominated by an unrestricted right of war of the recognition of conquests. The right of states to go to war and to obtain territory by right of conquest was unlimited although some qualifications to this position had appeared by 1914. Situations resulting from resort to force were regarded as legally valid as in the case of the Prussian annexation of the Danish duchies. Many writers, such as Lawrence, Westlake, Anzilotti, von Liszt, stated the position of the right to resort to war was a question of morality and policy outside the sphere of law. Many writers, such as Holland, Woolsey, Wheaton, Phillimore, described war as a judicial procedure involving punishment. War was seen as the litigation of nations, a means of obtaining redress for wrongs.

Toward the end of the 19th century war was stated to be a means of last resort after recourse to all other available means had failed. In practice, however, this was perceived as a formal qualification of the right to resort to war. The view was reinforced several times

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[1]Ibid., p. 14.

preceding World War I and was increasing in popularity among nations. Prior to the Russo-Japanese War of 1904, the Japanese referred to the failure of peaceful means of settling the matters of redress prior to the outbreak of hostilities.

In this century the state of affairs has come to be regarded as intolerable, not only because of the evident urgency of need to limit war, but also because of the failure of international law to limit war. This failure of international law to limit the initiation of war is now seen as undermining the reality of international law itself. Therefore, after the brief separation from the just war doctrine, World War precipitated a return to thinking along these lines.

Chapter Two

THE QUALIFICATIONS OF A JUST WAR

Following the first World War a peace conference was held in Paris in 1919. From this peace conference a resolution was adopted declaring that "it is essential to the maintenance of the world settlement . . . that a League of Nations be created" and that "this League should be treated as an integral part of the general treaty of peace."[1] On January 10, 1920 the League of Nations was established to accomplish this goal.

The objectives of the Covenant of the League of Nations were to promote international cooperation among nations and to achieve international peace and security. In order to achieve these aims, the Covenant imposed certain obligations upon its signatories. The most important of these was the prohibition of any future war.

The general presumption was that war was still a right of sovereign states although signatories to the Covenant were bound by that instrument to submit to certain procedures of peaceful settlement. Resorting to war in violation of the Paris Peace Covenant was illegal. The Covenant was the source of and inspiration for developments which in sum destroyed the presumption in favor of the lawfulness of war and it signified the beginning of the last resort policy in contemporary times.

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[1] Denys P. Myers, Handbook of the League of Nations, Boston, 1935, p. 3.

Although war may be justified, according to the Covenant, it will only be morally and legally correct after it is clear that: (1) all other means of peaceful redress have failed and (2) time does not permit a less coercive means.[1]

From the Paris Peace conference forward, illegal war or unjust war was generally posited with those wars not fought in self-defense. Use of such force was characterized as aggressive war, war of aggression, act of aggression, or simply aggression. Since agression is the name we give to crime of unjust war,[2] aggression by state organs directed against other states other than in self-defense was illegal. The growth of illegality and the desire to remove ambiguities from nonaggression pacts, and from mutual assistance and security treaties, led states to examine the problem of defining aggression.

The League of Nations defined peace in terms that appeared to introduce criteria for determining the aggressor in article 10. Article 10 essentially stated that any act of force, or threat of using force, against the territorial integrity or the existing political independence of any of the members of the League is an illegal act of aggression.[3] However, this definition was attacked on various grounds. Its terms were vague. What were territorial integrity and political independence? "It was said that this definition of aggression would lead states into

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[1]Brownlie, op. cit., pp. 53-62.

[2]Michael Walzer, Just and Unjust Wars, New York: Basic Books, Inc., 1977, p. 51.

[3]Leon Friedman, The Law of War, New York: Random House, 1972, p. 424.

war in fulfillment of its guarantees . . . that peace was to depend upon possession but not justice."[1]

No agreement on a definition of aggression could be reached by an international committee until 1974. Prior to this time it was argued that a definition would provide "a trap for the innocent and a signpost for the guilty."[2] During the 2,319th plenary meeting on December 14, 1974 a Definition of Aggression, Resolution 3,314 (XXIX), was adopted in the United Nations. This resolution was composed of eight articles. These articles outline the definition of aggression as currently accepted by the United Nations. Therefore, if war is initiated as defined by the United Nations, it is deemed an unjust war. A just war, by implication, is one waged to resist aggression--a war of self defense. This identification of injustice with aggression and justice with self-defense is reflected in the Charter of the United Nations.[3]

As the Charter defines aggression it suggests two classes of war: those that are aggressive, Article 1(1) and those that are defensive, Article 51. However, to identify aggression with the violation of a condition of peace is simply to change the argument to a debate concerning the meaning of aggression to that concerning the meaning of peace. In the United Nations Charter two distinct concepts of aggression as a breach of peace are reflected. According to one conception of

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[1]Brownlie, p. 62; citing Ray p. 346 citing Doherty, A. (1921), P., p. 834 and A. 1921, C.I. pp. 107 seq. Cf. Hunter Miller, The Drafting of the Covenant, pp. 354, 358.

[2]Julius Stone, Legal Controls of International Conflict, London, 1954, p. 851.

[3]Article 2(4) and Article 51 of the United Nations Charter.

Article 1(1), an act of aggression is an armed attack by one state against another, regardless of the circumstances and justifications attending it. The second, taking account of these circumstances and justifications identifies aggression with the use or threat of force by one state against another in a manner that violates another state in violation of international law. Aggression, according to the first definition, is a reality; according to the second, which defines it in relation to standards of conduct, it is a wrong morally and legally. In the first case, the peace that is disrupted by war is a condition defined by the absence of fighting; in the second, it is a condition in which disputes are settled on the basis of common rules, but what is peace?

If peace be defined as an absence of fighting, then aggression is defined as a cessation of peace. However, is this an acceptable definition of peace? In Hobbes's Leviathan the definition of war identifies it not only with fighting but also with "the known disposition thereto during all the time there is no assurance to the contrary."[1] The rest of the time he says is peace. Peace is not merely the absence of war but a state in which war need not be feared because peace is guaranteed by a pact creating political institutions to define and enforce its terms. Kant's view is similar but yet different. Kant states: "A state of peace among men living together is not the same as a state of nature, which is rather a state of war. For even if it does not involve active hostilities, it involves a constant threat of their

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[1]Thomas Hobbes, Leviathan, Oxford: Basil Blackwell, 1960, Chapter 13.

breaking out. Thus the state of peace must be formally instituted, for a suspension of hostilities is not in itself a guarantee of peace."[1] This is a juridical view as opposed to Hobbes's natural condition and peace can be disrupted only when force is used in violation of common law. This position can be realized and maintained only through clever expedients and on the basis of law.

By conceptualizing peace in such a fashion, it is not the use of armed force that constitutes aggression but rather the use of force in a way that violates the rights established by a juridical or moral order. "We know" aggression "because of our knowledge of the peace it interrupts not the mere absence of fighting, but peace-with-rights, a condition of liberty and security that can exist only in the absence of aggression itself."[2] According to Walzer, "All aggressive acts have one thing in common: they justify forceful resistance. . . . Aggression opens the gates of hell. . . . Aggression is morally as well as physically coercive, and that is one of the most important things about it."[3] Therefore, if a State's peace, political sovereignty or territorial integrity be disrupted by aggression it is not a mere fact but a "crime." If all other modes of redress have failed then the use of force to counter this "crime" is justified.

The notion of the justification of war, insofar as it pertains to war within a society of states, i.e., the international community, is

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[1] Immanuel Kant, Political Writings, Ed. Hans Reiss, Cambridge University Press, 1970, p. 98.

[2] Walzer, op. cit., p. 51.

[3] Ibid., pp. 52-53.

that the states composing this society are related to one another in the same way that citizens are related within the civil order of a state. In the same way that the civil order of the state is founded on the juridical equality, liberty, and personal security of its citizens, international legal and moral order rests on the formal equality, liberty and security of the independent political community composing the society of states.[1] The domestic analogy used by Hobbes now reappears with some validity when considering Hobbes's rationale "Nature had made men so equal in the faculties of body and mind . . . [that] the weakest has strength enough to kill the strongest."[2] In this age of nuclear, biological, and chemical weapons the weakest of nations may bring destruction to the strongest of nations. The quality and liberty of states are embodied in the idea of sovereignty, their security in the idea of territorial integrity. Therefore, states must respect each other's political sovereignty and territorial integrity, unless by its conduct a state forfeit its right to this respect.

"A State," according to Walzer and later Lackey "forfeits its basic rights if and only if: (a) it has already used force in violation of the basic rights of other states; (b) it has threatened to use force in violation of the basic rights of other states and made preparations to carry out this threat; (c) its ability to govern is disrupted by a recessionist movement which is representative in character, or (d) it

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[1]Hedley Bull, "Society and Anarchy in International Relations," Diplomatic Investigations, Cambridge: Harvard University Press, 1965, p. 35.

[2]Hobbes, op. cit., p. 63.

has engaged in massive violations of basic personal rights."[1] This list, however, violates the United Nations Charter Article 51 which essentially states that a just war is one which is in self-defense, but the charter failed to classify its definition of self-defense adequately according to some contemporary moralists such as Michael Walzer, D. Thomas O'Conner, and R. M. Hare.

The above implies that a state may in some circumstances use force to restore the basic rights of other states and their inhabitants. A state may in certain circumstances come to the aid of those who are the victims of aggression, even if their state has not been directly injured. A state which commits atrocities invites the concern and possible intervention of the other members of the society of states, each of whom has a legitimate interest in seeing that the rules upon which that society rest are upheld. Article 2, paragraph 7 of the Charter of The United Nations stipulates that "[N]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any states or shall require the Members to submit such matters to settlement under the present charter; but this principle shall not prejudice the application of enforcement measures under chapter VII."[2]

If the violations of the state be solely domestic ones then intervention by members is not permitted or justified. However, if the dispute is found to be outside of a domestic squabble, then intervention

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[1]Douglas Lackey, "A Modern Theory of Just War," Ethics, April 1982, pp. 533-49.

[2]Peter R. Baehr and Leon Gordenker, The United Nations Reality and Ideal, New York: Praeger Publishers, 1984.

would be justified. The third party to domestic intervention definitely walks on a thin line when considering the U.N. Charter. "A state contemplating intervention or counter-intervention will for prudential reasons weigh the dangers to itself, but it also, and for moral reasons, weigh the dangers its action will impose on the people it is designed to benefit and all other people who may be affected. An intervention is not just if it subjects third parties to terrible risks: the subjection cancels justice."[1]

The mainstream of just war thinking--that running through Victoria, Suarez, Grotius, Locke, and Vattel, each of whom was concerned with the problem of how to reconcile divergent will within a common moral order--recognized that every sovereign has a duty to uphold the law of nations. Walzer summarizes the collective judgment of these thinkers when he suggests, "the rights of the member states must be vindicated, for it is only by virtue of those rights that there is a society at all. If they cannot be upheld (at least sometimes), international society collapses into a state of war or is transformed into a universal tyranny."[2] At this point a state may take matters into its own hands because there is no superior power to rely upon for redress of grievances or self-defense. Since aggression is both an attack against a particular and a crime against society itself, resistance to aggression is an act of law enforcement as well as of self-defense. A state that goes to war in this instance is not merely defending itself. By defending its rights it is upholding the common rules of the society

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[1]Walzer, op. cit., p. 95.

[2]Ibid., p. 59.

of states. It protects the international community by acting on those principles that make it a community.

The state that initiates the atrocities is not a victim of aggression when it suffers attack by those it wrongs, provided the response is proportional in nature.[1] Proportional force is "nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it."[2] The use of force becomes unjust when the proportionality principle is violated and just when it is adhered to. The problem with the requirement of proportionality is the lack of an unambiguous guideline to follow. It has never been clear whether the requirement of proportionality limits acts taken in self-defense to repelling the immediate danger or permits action directed to removing the danger. The latter interpretation is not unreasonable response but, given the circumstances attending the exercise of self-defense in international society every consequence should be weighed prior to acting. In the former the proportionality required is both one of effectiveness and of value. In the latter, the proportionality required is little more than what may be termed a proportionality of effectiveness. In the ideal of the just war, it is not enough that the use of force is proportionate, but not in excess, to the effective protection of endangered interest or values. To this proportionality of effectiveness must be added a proportionality of value, requiring that the values preserved through force are comparable

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[1]James Turner Johnson, Can Modern War Be Just, New Haven: Yale University Press, 1984, p. 25.

[2]Brownlie, op. cit., p. 261.

to the values sacrificed through force. Indeed, it is the proportionality of value rather than of effectiveness upon which primary emphasis is placed in the just war idea.

Within the twentieth century international law has gradually reduced the acceptable justifications of war to one: defense. While a form of intervention is permitted through the acceptance of multinational agreements providing for mutual defense it is not consciousnessly reflected in contemporary international law. The current concept of defense is an elastic one reflecting that the state may repel aggressors. For this reason the use of aggressive force has increasingly been held up as the evil and immoral to be avoided above all: it is the fundamental form of aggression, the unforgivable act of hostility among nations.

Chapter Three

INTERNATIONAL MORALITY AND WAR

International morality is embedded in international law. International law is a body of authoritative practices and rules constituting a common standard of conduct for nation-states in their relations with one another. One must exclude as nonmoral those parts of international law that are instrumental to the realization of particular substantive purposes: that is, much of the special law embodied in treaties and in the charters and regulations of international organizations. The moral element in international law is to be found in those general principles of international association that constitute traditional international law, and above all the most fundamental of those principles, such as the ones specifying the rights of independence, legal equality, and self-defense, to refrain from aggression, to conduct hostilities in war in accordance with the laws of war, to respect human rights, and to cooperate in the peaceful settlement of disputes. International law may be referred to as the common morality of international society because it contains the authoritative practices and rules by which society is defined and the conduct of its members directed and judged.

A moral tradition, even though it may be concerned with personal behavior is also concerned with the acts and policies of collectivities such as the state. Much of the just war tradition is concerned with precisely such judgments. When countries invade one another it can be

said by other countries they ought not commit this criminal act. The 'ought' in question is neither prudential nor legal but a moral ought. Therefore, when collectivities are judged, the resources upon which we draw in making such decisions are often those of international law.

The difficulty with the view that traditional international law constitutes an international morality arises not from doubts concerning whether this body of law applies to individual conduct, or whether moral principles apply to states, but from the conviction that principles cannot be regarded as moral unless they respect freedom and rights of the individual. Therefore, it can be debated that the principles of association represented by international law cannot be regarded as moral principles because they do not adequately recognize and protect what are perceived as human rights. The principles of international association embodied in international law are not moral, according to this perception, because on the one hand they permit governments too much liberty to violate the rights of their own citizens, and on the other, restrict governments too much from intervening to redress the violation of human rights abroad.

International law gives weight to individual liberty by recognizing the existence of independent liberty by recognizing the existence of states and by restricting intervention by one state in the domestic affairs of another. In this manner international law tries to protect the liberty of a sovereign. The principles of state sovereignty and nonintervention are based on the assumption that a state is a community united through common laws and institutions reflecting its

culture and history.[1] Foreign intervention constitutes an interference with the liberty of the citizens of a state to live according to their own traditions and to govern themselves.

Another argument for a connection of states and individual liberty is that the two of them are contingently related. The principles of state sovereignty and nonintervention reflect the consideration that in a world organized as a society of states, individuals have rights largely as members of a political community. This membership does not guarantee them to be treated in a manner that respects their personal autonomy or dignity, it is clearly related to such treatment.

Since traditional international law reflects a concern for individual liberty, shaped by the society of states, it has a moral significance even on a fairly stringent definition of morality. However, traditional international law and international morality are not synonymous. International law embodies the morality of states conduct and this conduct may express what may plausibly be represented as a moral point of view in regard to the relations of states. Morality is an authoritative practice governing the conduct of the community. In morality, as opposed to law, we are all judges. In the course of this history, researchers have found that the everyday moral life has formed a vocabulary and an arsenal of arguments upon which to base international morality.

Morality is found in the judgments people make. Moral principles are found in what people say in their expectations or complaints to which they give expression when they criticize, persuade, justify, blame

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[1]Walzer, op. cit., Chapter 6.

or excuse themselves or others. Their judgments enter the realm of public discourse only by being expressed. Morality is a common vocabulary; a language within which the rights and wrongs of conduct may be debated among people whose judgments are not necessarily in agreement. By using this common vocabulary the communities of society are able to express themselves and give meaning to what they perceive is moral conduct in war.

The concept of morally acceptable conduct in the waging of war has always precipitated hesitation and misgivings in the thoughts of men. Philosophers have feared that in accepting the idea of regulated warfare one may in an indirect method be condoning actions that are sinister. Warfare, even when it is confined within limits prescribed by the rules of war, is always "hell." Therefore, it is not surprising that the question of whether it is really possible to fight wars morally arises with each new conflict and each new generation based on the increased killing ability. Nations do war, and there are a number of formal agreements, conventions, and treaties that prescribe how countries will fight in war. In coexistence with the former are the generally acknowledged and accepted common law traditions which also tend to regulate behavior in warfare. Combined, these compose the substantive laws of war, jus in bello. The question, that will be considered herein, is whether those rules of war that are in existence, which have been developed within legal and moral traditions, are morally sound. Moral reflection and philosophical criticisms of the laws of war often lead to demands for stricter limits of the military's conduct in war. These demands tend to precipitate laws which are unrealistically stringent and utopian in nature. Laws which very few, if any, could

obey in war and live to tell. Laws of this nature would require debate on the battlefield and checking with your superior each time before initiating fire or returning fire, these types of rules would simply be untenable. These types of rules are suggestive of a regulated warfare. It is feared that the laws are not permissive enough because they prohibit certain kinds of military conduct, such as direct attacks on noncombatants, even to avoid worse evils. If we accept the position that the noncombatants will not be made the object of attack regardless of consequences from adhering to such a constraint, then we must have an answer for the next question: What if the consequences are deleterious? Is it not unreasonable to obey a law when the consequences of doing so will be disastrous?

These are the points where defenders of a morality of common rules and those who would disregard are most apt to fail. To defend such a morality as a guide to conduct in extreme situations, situations of impending doom, is to adopt a position that seems to be rendered untenable by its own inflexibility. It is the doctrine of moral absolutism which is implied by this apparent attitude of rigidity and irrationality.[1] The problem is one that is hardly confined to the morality of war. This problem is one of the most fundamental sources of perplexity in moral reflections. The question of whether the moral constraints on military action should always be observed, raises the problem in a particularly compelling form, for war is an activity in which one's ultimate values, as well as core values are at stake.

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[1]Thomas Nagel, "War and Massacre," Philosophy and Public Affairs, Volume 1, Number 2, Winter 1972, pp. 123-44.

However, to adopt activities such as killing the innocent to defend those values attacks one of the most basic of moral principles. For Many people the most accepted position seems to be one in which a morality of law is supplemented by a qualifying corollary to the effect that an act which ordinarily is impermissible may be performed if failing to do so would have truly catastrophic results. The results is a morality of rules with a utilitarian escape clause, a hybrid morality that relies on authoritative rules for ordinary situations, but allows instrumental or utilitarian calculations in certain extreme situations.

The arguments for extreme utilitarianism, like those for utilitarianism in general, commonly find their beginnings in cases observing a moral law that leads to unacceptable results. These cases are often hypothetical in nature in which it is often assumed that terrible consequences will follow unless the normally unacceptable actions are placed in effect. Many of these situations are familiar in ethical discussions of "what if?" The discussions of the "what if?" nature are helpful in exploring the theoretical limits of moral principles, but their pertinence for moral judgment and conduct is limited at best. These discussions are not the situations in which actual moral decisions are developed. This is because most people are rarely, if ever, faced with such decisions. It is not a serious shortcoming in a morality that its maxims might lead one astray in an artificially constructed environment that one is unlikely to encounter. This common morality is for conduct in the real, not an imaginary world.

When do moral laws cease to exist? Only one possible time exists: when the state is truly in danger of collapse, both militarily and politically, then its conduct should be judged by a lower standard,

one that tolerates the violation of rights, though it should never violate the principle of proportionality. According to Walzer "Utilitarian calculation can force the state to violate the rules of war only when it is face to face not merely with defeat but with a defeat likely to bring disaster to a political community."[1]

In this situation the state is justified in violating moral law for the good of the whole. Moral rules could be overridden only for the preservation, and not for the aggrandizement, of the state. The political leaders, in this situation, cannot be bound by moral laws. Political leaders have a responsibility to their people, but the prospect of being conquered does not justify measures of defense that make opposing forces the victims of injustice.

Moral rules exist to guide and to ease the burden of making rational decisions. A danger that exists with these rules is not that people in situations of crisis will act irrationally by allowing their judgment to be guided by moral rules but rather the likelihood that in such situations they will regularly confuse the consequences of acting morally with defeat and annihilation. These moral rules are suitable for ordinary moments but they may be abandoned in favor of a more direct reliance on reason in extreme situations, which are by definition situations of crisis in which imperfect knowledge and errors of reasoning are more likely than in calmer moments.

Every war precipitates new situations and temptations to violate the traditional restraints. Although these situations are novel it is far more likely that actions based on history embodies more wisdom than

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[1]Walzer, op. cit., p. 253.

the judgments of moment, but how can a government or its representatives base their actions on history in the case of nuclear war? There is no history to guide them, only speculation. Where do these individuals turn to?

Chapter Four

IS NUCLEAR DETERRENCE MORAL?

The future war precipitates many questions. The first that comes to mind are: What actions will be the catalysts to the next war?, Who will initiate the war and will this war be a just war?, and Will nuclear weapons be used and if so will their actions be justified? It is the latter question that the greatest energy is spent when analyzing the possibility of nuclear war.

Since 1945 American foreign policy has fluctuated between conciliation and confrontations, but American strategic military policy has remained firmly fixed to the concept of nuclear deterrence. After Nagasaki and Hiroshima, it became evident that the effects of nuclear weapons are so immoral and demoniac that their continued use in war should not be allowed or condoned. But the threat to use nuclear weapons need not require their use, and such threats, in themselves, might prevent great evils. From this thought there now exists a theory about nuclear deterrence which goes far beyond the consideration of mere military means. This theory of nuclear deterrence is thought to structure, through a "balance of terror,"[1] both peace and war. This theory is seen as leaving the heavier burden of enabling the participants within the international community to exist in relative peace.

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[1]Paul Ramsey, War and the Christian Conscience, Durham, N.C.: Duke University Press, 1961, p. 231.

Deterrence is simply the threat of an immoral response against the threat of an immoral attack. Deterrence works by creating in the minds of men images of Nagasaki and Hiroshima only now on a global level. The threat of such slaughter makes nuclear attack a radically undesirable policy. Either side is terrified of the outcome of such an attack but no further intimidation or subjugation is needed. However, is this sort of threat morally permissible?

This question is complex and has been discussed and rediscussed many times since Hiroshima. Many philosophers and theologians are concerned by the act of terrorizing as well as by the possibility of use of nuclear weapons. They are concerned that the use of nuclear weapons will bring about unacceptable and immoral results.[1] But so far this has not occurred since Hiroshima. With the doctrine of deterrence there is a knowledge that nuclear holocaust can happen and use of nuclear weapons could destroy thousands, yet this knowledge is accepted. Why do we let this continue? The reason is because defense is not killing. It is the same as a man who buys a gun. Most would say that this is not an immoral act. It is the same in the nuclear deterrent theory, only in a much, much larger sense. Even though acquisition of nuclear weapons is not killing, it is very close or else it would not work, it is this nature of closeness that the moral problem exists.

Deterrence depends upon a readiness to use nuclear warheads. With nuclear deterrence we are concerned with our own intentions and the

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[1]However, there is evidence of a moral conviction that the deliberate killing of noncombatants is permissible if enough can be gained by the act. See Thomas Nagel, "War and Massacre," Philosophy and Public Affairs, Vol. 1, Number 2, Winter 1972, pp. 123-44.

potential thousands of victims of those intentions.[1] If it is a wrong to do wrong then is it not a wrong to threaten to do wrong? Even though the actual event is wrong morally, how can one accept the intentions to do wrong? The military stands ready to instantly obey the commander's order to initiate a retaliatory attack if one should materialize; from the perspective of morality, the readiness is all. What many condemn here is the government's commitment to murder.

The government does not want to commit murder but it does want the other side to feel that it will choose that course once they have paved the way. The government seeks only to deter its nuclear adversaries, defense would begin only after the use of nuclear weapons was required. This is what makes deterrence different from war, that it seeks to avoid war. In this way deterrence protects us in two ways. It protects us from nuclear blackmail[2] and second, of nuclear destruction. Deterrence was made attractive by politicians who advocated that this doctrine seemed capable of avoiding both.

The case for nuclear blackmail is an obvious one. A nation which possesses nuclear weapons could influence a lesser nation which has no nuclear forces. This is analogous to the policy of appeasement that Hitler used in 1936. A superior force threatened an inferior force and that smaller force submitted rather than suffer the promised destruction. This action is intolerable, for it involves a loss of values central to our existence. Adherence to our commonly accepted

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[1] Ramsey, op. cit., p. 231.

[2] Jeff McMahan, "Nuclear Blackmail," Dangers of Deterrence, Eds. Nigel Blake and Kay Pole, London: Routledge, 1983, pp. 84-111.

war convention would place us at a disadvantage. Were it not for our possessing equal firepower this would be true today.

In any case if there exist an enemy actually prepared to initiate a nuclear attack there exists no self-defense, for it is impossible at this stage to defend against ICBMs and cruise control missiles. Therefore, it only makes sense that its victims should respond in kind. This kind of reasoning will hopefully keep everyone from using nuclear missiles, for what is not acceptable will not be accepted. This is why that every country who can create the bomb will do so simply to maintain Ramsey's "balance of terror."

The only end to this would be one of mutual disarmament but we do not trust them and they do not trust us. Therefore, deterrence seems the only likely choice. It is our only current way of coping. However, the current star wars program of the Reagan administration might initiate some changes to this, but at this time the future is too sketchy to foretell. Currently, we have no choice but to threaten evil in order not to commit evil.

We strive to give defense credibility, but in essence what we do is immoral and unacceptable. Justice can never be achieved with nuclear weapons. However, in this era a nation cannot maintain parity with their enemy without them.

Nuclear war is and will always remain morally unacceptable. Since it is unacceptable and since nuclear deterrence is also morally unacceptable we must find better alternatives. The international society is currently in condition of what Walzer calls a "supreme emergency" and to him this is never a stable position, and therefore,

a response to this moral dilemma must be found in order to escape the cycle of nuclear deterrence versus nuclear destruction. This can only be achieved when the superpowers remain open to the explorations of alternatives.

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WAR AND JUSTICE

by

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AN ABSTRACT OF A MASTER'S REPORT

submitted in partial fulfillment of the

requirements for the degree

MASTER OF ARTS

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KANSAS STATE UNIVERSITY
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1985

This thesis is an account of the qualifications of a just war, the morality of actions in war, and the morality of nuclear deterrence. I began my thesis by researching wars in general, looking for the reason(s) why statesmen felt that their war was just. This historical research provided the framework for the political and moral reasonings that were finally reached. From antiquity to the present an evolutionary transition has been taking place with regards to the just war. This transformation saw the just war develop from the might makes right view to the present notion of the just war which, as outlined in the United Nations Charter, is self-defense.

The morality in war, whether it be just or unjust, has not made as much progress as in the direction of justness. Instead it has remained utilitarian at best. If one is to judge the actions of nations in combat they would find a more violent war than ever before. This violence may in fact be due to the remoteness of modern war, however, the preception of utilitarian morality is still present.

The final subject discussed in this thesis was the morality of nuclear deterrence. It can be said that if the act is wrong then the intention of the act is also wrong. However, without deterrence we could not prevent nuclear blackmail and nuclear destruction.

It is the aim of this thesis to highlight the utilitarian viewpoint of contemporary times as well as the fact that just wars do exist. Wars, however, are hell and they bring about death and destruction. It is not the aim of this thesis to advocate war, but to discover if there are just wars.

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