Just War and Human Rights

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Published by State University of New York Press

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The nonideal conditions we face often involve conditions or circumstances of unjust international attacks and/or unjust domestic institutions that might seem to call for war as a just response. While war might be permissible as a response to severe injustice, there are limits on the conduct of war even when it is permissible (or even required) as such. A state pursuing a just war must do so with “right intention.” The idea of right intention is the overarching constraint on war; a right intention aims at a just and lasting peace. A lasting peace is not possible unless certain standards of basic justice are secure. Although this concept has been around since at least St. Augustine’s work in the fourth century AD, it has lost momentum over the years, but has resurfaced over the last century.

The aim of this book is to explore certain key elements of the claim that a just war is one fought with the right intention of not only vindicating a just cause and doing so in a just manner but also reliably serving as a means to a just and lasting peace. Fighting with right intention and establishing conditions for a just and lasting peace demand certain reforms to just war theory. Establishing a lasting peace is predicated on safeguarding basic human rights, fidelity to the principle of noncombatant immunity, political self-determination and international toleration, and the recognition of the international responsibilities to protect. I argue further that these norms governing right intention should be realized as international legal norms.

Just war theory has been a part of Western political philosophy for the past two thousand years. Theologians such as St. Ambrose, St. Augustine of Hippo, St. Thomas Aquinas, and Francisco de Vitoria as well as the jurist Hugo Grotius and the philosopher Emmerich de Vattel have been the frontrunners in advancing moral arguments (regarding
obligations, restrictions, and proscriptions) that states and their armies should abide by in the three phases of war: before, during, and after. More specifically, just war theory establishes a moral framework regarding when the use of force is not only morally justified (such as in self-defense) but also sets limits to the destructive acts of war by appealing to standards of conduct that incorporate discrimination, proportionality, and necessity. Just war theory also frames what is morally required of the victor and vanquished regarding rebuilding, reparations, and reconciliation during the postwar period.

Contemporary just war philosophers such as Michael Walzer, Brian Orend, Jeff McMahan, and Larry May have made considerable contributions to the just war tradition. Contemporary human rights philosophers such as Henry Shue, Allen Buchanan, Charles Beitz, and David Reidy have made considerable contributions to political philosophy. This book is an amalgamation of their work. More than any other philosopher, John Rawls has significantly influenced my view. Rawls’s perspective in *The Laws of Peoples* relating to human rights and just war is the template for my work, and I believe that in order to improve upon the just war tradition, honoring basic human rights has to be a central theme, because human rights are a class of rights that play a special role in foreign policy: “They restrict the justifying reasons for war and its conduct, and they specify limits to a regime’s internal autonomy.” I take Rawls’s articulation of traditional principles of justice (in particular the right to self-defense and observing certain restrictions in war and the honoring of human rights) that can reasonably be accepted by states that are neither internally aggressive toward their own citizens nor externally aggressive toward other states as my guide.

The human rights movement has marked the latter half of the last century and shows little sign of losing its history-shaping force. Political control of a territory and population no longer guarantees the moral right to nonintervention. Although this was thought sufficient to underwrite political sovereignty and so a right to nonintervention, it is now thought merely necessary. The additional requirement of meeting basic human rights is also necessary. The idea of sovereignty is still tied to the right to nonintervention. However, we have come to recognize/accept that sovereignty is something that depends on certain moral conditions being met, to include basic human rights being reasonably safeguarded. In addition, resorting to war for reasons of self-defense does not just entail fighting until a state’s rights have been vindicated.
Rather, “the aim of a just war waged by a just well-ordered people is a just and lasting peace.”

Aligning the just war tradition with the norm of right intention is essential in order to set conditions for a just and lasting peace. There can be no lasting peace without justice, and justice is predicated on the fulfillment of human rights, which constitute the core of international justice. Unjust war, oppression, and genocide arise from unjust state institutions. Hopefully, by engaging in discourse about right intention we can determine what “policies and courses of action are morally permissible and politically possible as well as likely to be effective” in our long-term goal of reaching a stable and peaceful international global order. A just war tradition that places significant emphasis on human rights can be squarely made part of a state’s foreign policy.

Although the nonideal conditions that we face present some demanding challenges, I cannot take up all just war issues; but I want to address key issues. These issues are pressing now and can all be argued for from the root idea that if force is to be governed by a right intention oriented toward peace with justice, various reforms are required.

I will focus on six main issues: that just war is governed by an overarching principle of right intention; that having right intention compels states to proactively analyze postwar obligations before they arise; that the residual effects of war continue to kill civilians after the fighting is over, so there are obligations to mitigate these harms; that states are morally required to intervene when a state has failed in its responsibility to protect its own citizens’ physical security, subsistence, and basic liberty rights; that justified drone strikes can be predicated on responsibility to protect norms; and that the Fourth Geneva Convention needs to be updated in order to reflect right intention and the human rights movement.

First, right intention is what unifies ad bellum, in bello, and post bellum (of, in, and after phases of war). A state with right intention establishes conditions for a just and lasting peace by respecting human rights, taking due care to insulate civilians from the harms of war, allowing for political self-determination, and by educating its military and political culture. Furthermore, a state’s public acts are evidence of its intention. There is no way to determine if a state actually fights with right intention without looking at the totality of its conduct.

Second, most refer to the jus ad bellum tenet of a reasonable chance of success as the probability of winning the conflict, but this viewpoint
is too limited and undercuts the significant analysis that should be taken into account. As the victor, it is very possible to resort to war for just reasons and fight the war justly, but then completely fail in the postwar phase to fulfill just expectations to the vanquished. Analyzing the likelihood of successful military operations as the only consideration for the *jus ad bellum* reasonable chance of success tenet is inherently shortsighted and problematic, because a state can win the war but still make a moral mess of the aftermath. The benefit of incorporating *jus post bellum* obligations into a state’s reasonable chance of success calculation is twofold: (1) a state could possibly curtail specific types of military operations thereby lending to that state’s ability to more effectively and efficiently fulfilling is postwar obligations, and (2) a state would engage in preliminary postwar scenario planning at the forefront instead of waiting until the war is over (or nearly over), which is way too late to deal with such a huge undertaking.

Third, we need to address what we owe to the civilians of a state with which we are militarily engaged. The old notion of noncombatant immunity needs to be rethought within the context of both human rights and into the postwar phase. For instance, although the laws of war declare the utmost protection of civilians, in modern war more civilians have died than soldiers. This has been the case in World War II (not even including the Holocaust), the Vietnam conflict, the Persian Gulf War, the Second Iraq War, and in the current conflict in Afghanistan. Over the past century, tens of millions of civilians have been killed in warfare.

Although military technological advances have grown by leaps and bounds in the last thirty years with the development and use of precision strike weapons (smart munitions, laser guided bombs, and unmanned aerial vehicles [drones]), even in the twenty-first century, conservative estimates suggest that civilian deaths in war are at least fivefold to that of soldiers killed. Overwhelmingly, these high death rates (in the wars over the past ten years) are not from civilians being intentionally targeted by military forces but from the residual effects of war, many of which stem from the targeting of dual purpose facilities.

No doubt, civilians will be killed in war. However, much more can be done during and after the fighting to protect civilians’ basic human rights from the ills of war. I argue for making belligerents accountable *ex post* by requiring them to repair destroyed dual purpose facilities that are essential for securing basic human rights of the civilian populace. I argue also that a belligerent’s targeting decisions should be reviewed *ex post* by an impartial commission.
Fourth, the Responsibility to Protect (R2P) is the doctrine that supports intervention into a state that has failed (whether deliberately or not) to reasonably protect a group of its citizens' physical security rights. However, civilians—whatever their religious, national, ethnic, or racial group—have the basic human right to not only physical security but also subsistence and basic liberty. The idea is that rights entail duties, and that the duties must be assigned to determinate parties but that they may be assigned to parties in a kind of order. For example, the duty falls first to X, but if X fails, then the duty falls to Y (as a backup obligor), and so on. States have the initial duty to protect the human rights of persons within their borders and then backup duties to protect the human rights of persons outside of their borders. When there is a systematic and widespread manifest failure to protect citizens from grievous harms, other states are required as backup obligors to protect and aid those people.

Although a state loses its moral right to nonintervention because it has committed acts that violate its citizens' physical security, subsistence, or basic liberty human rights, only physical security violations (i.e., genocide, war crimes, crimes against humanity, or ethnic cleansing) entail possible military intervention. My view is that to have a right to nonintervention a state must secure basic human rights, but that it does not follow from its lack of a right to nonintervention that any particular intervention is morally permissible or required. It only follows that an intervention would not violate the state’s right to nonintervention since it does not have one. When states violate basic liberty rights and/or subsistence rights but not basic physical security rights other states might permissibly intervene but only through less intrusive measures (public condemnation, economic sanctions, etc.). A state losing its moral right to nonintervention because it committed acts of genocide does not entail that this is a sufficient condition for required military intervention. Rather, military intervention is required and so permissible only if a number of further necessary conditions are fulfilled. The only sufficient condition is the fulfillment of all the necessary conditions.

Fifth, the United States, although not under imminent threat, routinely conducts drone strikes into nonconsenting states. According to just war theory, this constitutes a violation of traditional *jus ad bellum* principles (just cause and last resort). As it currently stands, attempting to use *jus ad bellum* criteria to discern a state’s moral justification for implementing force short of war (drone strikes) is not only unhelpful
but fails to provide a reasonable framework. The use of armed drones is a recent phenomenon that will continue to evolve, and with this comes a need for establishing a set of moral guidelines on a state’s implementation of them. In an attempt to remedy this shortcoming, we need to look at drone strikes not as an act of war but as an act or force short of war. I want to make the case that drone strikes can be morally justified using the Responsibility to Protect norms. That is, the R2P norms should be the guiding norms with regard to *jus ad vim* (the just use of force short of war). Incorporating the R2P norms into a *jus ad vim* account provides a much-needed framework of when states can morally resort to the use of force.

Lastly, the Fourth Geneva Convention (which is the convention that specifically deals with the treatment of civilians during and after war) needs to be updated and revised. It can be argued for from the root idea that if force is to be governed by right intention oriented toward peace with justice, then the Fourth Geneva Convention is currently inadequate, because it does not reflect current human rights practices and standards which are essential if our goal is establishing conditions for a just and lasting peace. Just as human rights should be realized not only as moral but also as (international) legal rights, so too the norms of just war that follow from right intention should be realized. Just war norms should not only be realized as moral norms but as (international) legal norms to point parties more squarely toward justice, because without legal embodiment justice becomes more difficult to secure or maintain.

Additionally, the UN is the appropriate institution not only to facilitate this process but also to play a role in institutionally expressing and adjudicating the relevant treaty. First, the UN is the global structure that specifically deals with fostering the cooperation of states regarding issues of peace and security. Second, the UN should monitor and report compliance failures, much as the UN already does when it comes to grave human rights violations.

To some considerable degree, my just war perspective is inevitably tied to and has been shaped by being a U.S. soldier over the last twenty years. Although I take up some just war issues that might have some reference to the point of view of a U.S. soldier, what I propose is my own view and not representative of all U.S. soldiers or even the U.S. government. I do, though, reference key examples from U.S. history as a way to help substantiate certain claims that I make. These empirical
facts are important because they provide real-world situations that allow us to realize moral obligations that might otherwise go unnoticed.

Although there are plenty of other examples, I lean on mostly U.S.-based examples predominately because those examples are not only applicable but also I am most familiar with U.S. and U.S.-led operations based on my background. In addition, being a member of the U.S. Army I am better qualified to critique, criticize, and commend the organization that I am a part of than a foreign military in which I have never served. However, just because most of my examples are U.S.-based does not suggest that right intention and the philosophical advancements that I propose do not apply to other states and other wars.

I recognize that a complete account of proposing to reorient just war theory around a particular idea of what it means to fight with right intention would need to address examples outside U.S. history and issues (e.g., nuclear weapons, supreme emergency, outlaw regimes at war with one another, etc.) and beyond those that I currently address. For now, I have limited aspirations but hope in the future to pursue these other areas that fighting with right intention would also regulate.

The aim of this book is not that this be the last word about fighting with right intention but rather the starting point from which I hope further discussion will follow; my hope is that the exploration of what fighting with right intention entails leads to improvements in the ethics of war.