

# Just and Unjust Wars, Chapters 4, 5, and 6 (excerpts)

## Michael Walzer

### Ch. 4, Law and Order in International Society

#### Aggression

Aggression is the name we give to the crime of war. We know the crime 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. The wrong the aggressor commits is to force men and women to risk their lives for the sake of their rights. It is to confront them with the choice: your rights or (some of) your lives! Groups of citizens respond in different ways to that choice, sometimes surrendering, sometimes fighting, depending on the moral and material condition of their state and army. But they are always justified in fighting; and in most cases, given that harsh choice, fighting is the morally preferred response. The justification and the preference are very important: they account for the most remarkable features of the concept of aggression and for the special place it has in the theory of war.

Aggression is remarkable because it is the only crime that states can commit against other states: everything else is, as it were, a misdemeanor. There is a strange poverty in the language of international law. The equivalents of domestic assault, armed robbery, extortion, assault with intent to kill, murder in all its degrees, have but one name. Every violation of the territorial integrity or political sovereignty of an independent state is called aggression. It is as if we were to brand as murder all attacks on a man's person, all attempts to coerce him, all invasions of his home. This refusal of differentiation makes it difficult to mark off the relative seriousness of aggressive acts--to distinguish, for example, the seizure of a piece of land or the imposition of a satellite regime from conquest itself, the destruction of a state's independence (a crime for which Abba Eban, Israel's foreign minister in 1967, suggested the name "policide"), But there is a reason for the refusal. All aggressive acts have one thing in common: they justify forceful resistance, and force cannot be used between nations, as it often can between persons, without putting life itself at risk. Whatever limits we place on the means and range of warfare, fighting a limited war is not like hitting somebody. Aggression opens the gates of hell. Shakespeare's *Henry V* makes the point exactly: 1

For never two such kingdoms did contend  
Without much fall of blood, whose guiltless drops  
Are every one a woe, a sore complaint  
'Gainst him whose wrongs gives edge unto the swords  
That makes such waste in brief mortality.

At the same time, aggression unresisted is aggression still, though there is no "fall of blood" at all. In domestic society, a robber who gets what he wants without killing anyone is obviously less guilty, that is, guilty of a lesser crime, than if he commits murder. Assuming that the robber is prepared to kill, we allow the behavior of his victim to determine his guilt. We don't do this in the case of aggression. Consider, for example, the German seizure of Czechoslovakia and Poland in 1939. The Czechs did not resist; they lost their independence through extortion rather than war; no Czech citizens died fighting the German invaders. The Poles chose to fight, and many were killed in the war that followed. But if the conquest of Czechoslovakia was a lesser crime, we have no name for it. At Nuremberg, the Nazi leadership was charged with aggression in both cases and found guilty in both.<sup>2</sup> Once again, there is a

reason for this identity of treatment. We judge the Germans guilty of aggression in Czechoslovakia, I think, because of our profound conviction that they ought to have been resisted--though not necessarily by their abandoned victim, standing alone.

The state that does resist, whose soldiers risk their lives and die, does so because its leaders and people think that they should or that they have to fight back. Aggression is morally as well as physically coercive, and that is one of the most important things about it. "A conqueror," writes Clausewitz, "is always a lover of peace (as Bonaparte always asserted of himself); he would like to make his entry into our state unopposed; in order to prevent this, we must choose war. . ."<sup>3</sup> If ordinary men and women did not ordinarily accept that imperative, aggression would not seem to us so serious a crime. If they accepted it in certain sorts of cases, but not in others, the single concept would begin to break down, and we would eventually have a list of crimes more or less like the domestic list. The challenge of the streets, "Your money or your life!" is easy to answer: I surrender my money and so I save myself from being murdered and the thief from being a murderer. But we apparently don't want the challenge of aggression answered in the same way; even when it is, we don't diminish the guilt of the aggressor. He has violated rights to which we attach enormous importance. Indeed, we are inclined to think that the failure to defend those rights is never due to a sense of their unimportance, nor even to a belief (as in the street-challenge case) that they are, after all, worth less than life itself, but only to a stark conviction that the defense is hopeless. Aggression is a singular and undifferentiated crime because, in all its forms, it challenges rights that are worth dying for.

### **The Rights of Political Communities**

The rights in question are summed up in the lawbooks as territorial integrity and political sovereignty. The two belong to states, but they derive ultimately from the rights of individuals, and from them they take their force. "The duties and rights of states are nothing more than the duties and rights of the men who compose them."<sup>4</sup> That is the view of a conventional British lawyer, for whom states are neither organic wholes nor mystical unions. And it is the correct view. When states are attacked, it is their members who are challenged, not only in their lives, but also in the sum of things they value most, including the political association they have de. We recognize and explain this challenge by \_referring to their rights. If they were not morally entitled to choose their form of government and shape the policies that shape their lives, external coercion would not be a crime; nor could it so easily be said that they had been forced to resist in self-defense. Individual rights (to life and liberty) underlie the most important judgments that we make about war. How these rights are themselves founded I cannot try to explain here. It is enough to say that they are somehow entailed by our sense of what it means to be a human being. If they are not natural, then we have invented them, but natural or invented, they are a palpable feature of our moral world. States' rights are simply their collective form. The process of collectivization is a complex one. No doubt, some of the immediate force of individuality is lost in its course; it is best understood, nevertheless, as it has commonly been understood since the seventeenth century, in terms of social contract theory. Hence it is a moral process, which justifies some claims to territory and sovereignty and invalidates others.

The rights of states rest on the consent of their members. But this is consent of a special sort. State rights are not constituted through a series of transfers from individual men and women to the sovereign or through a series of exchanges among individuals. What actually happens is harder to describe. 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, the ongoing character of which the state claims to protect against external encroachment. The protection extends not only to the lives and liberties of individuals but also to their shared life and liberty, the independent community they have made, for which individuals are sometimes sacrificed. The moral standing of any particular state depends upon the reality of the common life it protects and the extent to which the sacrifices required by that protection are willingly accepted and thought worthwhile. If no common life exists, or if

the state doesn't defend the common life that does exist, its own defense may have no moral justification. But most states do stand guard over the community of their citizens, at least to some degree: that is why we assume the justice of their defensive wars. And given a genuine "contract," it makes sense to say that territorial integrity and political sovereignty can be defended in exactly the same way as individual life and liberty. \*

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\*The question of when liberty and sovereignty can rightly be defended is closely connected to the question of when individual citizens have an obligation to join the defense. Both turn on issues in social contract theory. I have discussed the second question at length in my book *Obligations: Essays on Disobedience, War, and Citizenship* (Cambridge, Mass., 1970). See especially "The Obligation to Die for the State" and "Political Alienation and Military Service." But neither in that book nor in this one do I deal in any detail with the problem of national minorities--groups of people who do not fully join (or do not join at all) in the contract that constitutes the nation. The radical mistreatment of such people may justify military intervention (see chapter 6). Short of that, however, the presence of national minorities within the borders of a nation-state does not affect the argument about aggression and self-defense.

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It might also be said that a people can defend its country in the same way as men and women can defend their homes, for the country is collectively as the homes are privately owned. The right to territory might be derived, that is, from the individual right to property. But the ownership of vast reaches of land is highly problematic, I think, unless it can be tied in some plausible way to the requirements of national survival and political independence. And these two seem by themselves to generate territorial rights that have little to do with ownership in the strict sense. The case is probably the same with the smaller properties of domestic society. A man has certain rights in his home, for example, even if he does not own it, because neither his life nor his liberty is secure unless there exists some physical space within which he is safe from intrusion. Similarly again, the right of a nation or people not to be invaded derives from the common life its members have made on this piece of land--it had to be made somewhere--and not from the legal title they hold or don't hold. But these matters will become clearer if we look at an example of disputed territory.

#### *The Case of Alsace-Lorraine*

In 1870, both France and the new Germany claimed these two provinces. Both claims were, as such things go, well founded. The Germans based themselves on ancient precedents (the lands had been part of the Holy Roman Empire before their conquest by Louis XIV) and on cultural and linguistic kinship; the French on two centuries of possession and effective government. 5 How does one establish ownership in such a case? There is, I think, a prior question having to do with political allegiance, not with legal titles at all. What do the inhabitants want? The land follows the people. The decision as to whose sovereignty was legitimate (and therefore as to whose military presence constituted aggression) belonged by right to the men and women who lived on the land in dispute. Not simply to those who owned the land: the decision belonged to the landless, to town dwellers and factory workers as well, by virtue of the common life they had made. The great majority of these people were apparently loyal to France, and that should have settled the matter. Even if we imagine all the inhabitants of Alsace-Lorraine to be tenants of the Prussian king, the king's seizure of his own land would still have been a violation of their territorial integrity and, through the mediation of their loyalty, of France's too. For tenantry determines only where rents should go; the people themselves must decide where their taxes and conscripts should go,

But the issue was not settled in this way. After the Franco-Prussian war, the two provinces (actually, all of Alsace and a portion of Lorraine) were annexed by Germany, the French conceding German rights in

the peace treaty of 1871. During the next several decades, the question was frequently asked, whether a French attack aimed at regaining the lost lands would be justified. One of the issues here is that of the moral standing of a peace treaty signed, as most peace treaties are signed, under duress, but I shall not focus on that. The more important issue relates to the endurance of rights over time. Here the appropriate argument was put forward by the English philosopher Henry Sidgwick in 1891. Sidgwick's sympathies were with the French, and he was inclined to regard the peace as a "temporary suspension of hostilities, terminable at any time by the wronged state. . ." But he added a crucial qualification:<sup>6</sup>

We must. . . recognize that by this temporary submission of the vanquished, . . . a new political order is initiated, which, though originally without a moral basis, may in time acquire such a basis, from a change in the sentiments of the inhabitants of the territory transferred; since it is always possible that through the effects of time and habit and mild government--and perhaps through the voluntary exile of those who feel the old patriotism most keenly--the majority of the transferred population may . . . cease to desire reunion. . . . When this change has taken place, the moral effect of the unjust transfer must be regarded as obliterated; so that any attempt to recover the transferred territory- becomes itself an aggression. . . .

Legal titles may endure forever, periodically revived and reasserted as in the dynastic politics of the Middle Ages. But moral rights are subject to the vicissitudes of the common life.

Territorial integrity, then, does not derive from property; it is simply something different. The two are joined, perhaps, in socialist states where the land is nationalized and the people are said to own it. Then if their country is attacked, it is not merely their homeland that is in danger but their collective property--though I suspect that the first danger is more deeply felt than the second. Nationalization is a secondary process; it assumes the prior existence of a nation. And territorial integrity is a function of national existence, not of nationalization (any more than of private ownership). It is the coming together of a people that establishes the integrity of a territory. Only then can a boundary be drawn the crossing of which is plausibly called aggression. It hardly matters if the territory belongs to someone else, unless that ownership is expressed in residence and common use.

This argument suggests a way of thinking about the great difficulties posed by forcible settlement and colonization. When barbarian tribes crossed the borders of the Roman Empire, driven by conquerors from the east or north, they asked for land to settle on and threatened war if they didn't get it. Was this aggression? Given the character of the Roman Empire, the question may sound foolish, but it has arisen many times since, and often in imperial settings. When land is in fact empty and available, the answer must be that it is not aggression. But what if the land is not actually empty but, as Thomas Hobbes says in *Leviathan*, "not sufficiently inhabited"? Hobbes goes on to argue that in such a case, the would-be settlers must "not exterminate those they find there but constrain them to inhabit closer together."<sup>7</sup> That constraint is not aggression, so long as the lives of the original settlers are not threatened. For the settlers are doing what they must do to preserve their own lives, and "he that shall oppose himself against (that), for things superfluous, is guilty of the war that thereupon is to follow."<sup>8</sup> It is not the settlers who are guilty of aggression, according to Hobbes, but those natives who won't move over and make room. There are clearly serious problems here. But I would suggest that Hobbes is right to set aside any consideration of territorial integrity-as-ownership and to focus instead on life. It must be added, however, that what is at stake is not only the lives of individuals but also the common life that they have made. It is for the sake of this common life that we assign a certain presumptive value to the boundaries that mark off a people's territory and to the state that defends it.

Now, the boundaries that exist at any moment in time are likely to be arbitrary, poorly drawn, the products of ancient wars. The mapmakers are likely to have been ignorant, drunken, or corrupt. Nevertheless, these lines establish a habitable world. Within that world, men and women (let us assume) are safe from attack; once the lines are crossed, safety is gone. I don't want to suggest that every boundary dispute is a reason for war. Sometimes adjustments should be accepted and territories shaped so far as possible to the actual needs of nations. Good borders make good neighbors. But once an invasion has been threatened or has actually begun, it may be necessary to defend a bad border simply because there is no other. We shall see this reason at work in the minds of the leaders of Finland in 1939: they might have accepted Russian demands had they felt certain that there would be an end to them. But there is no certainty this side of the border, any more than there is safety this side of the threshold, once a criminal has entered the house. It is only common sense, then, to attach great importance to boundaries. Rights in the world have value only if they also have dimension.

### **The Legalist Paradigm**

If states actually do possess rights more or less as individuals do, then it is possible to imagine a society among them more or less like the society of individuals. The comparison of international to civil order is crucial to the theory of aggression. I have already been making it regularly. Every reference to aggression as the international equivalent of armed robbery or murder, and every comparison of home and country or of personal liberty and political independence, relies upon what is called the *domestic analogy*.<sup>9</sup> Our primary perceptions and judgments of aggression are the products of analogical reasoning. When the analogy is made explicit, as it often is among the lawyers, the world of states takes on the shape of a political society the character of which is entirely accessible through such notions as crime and punishment, self-defense, law enforcement, and so on.

These notions, I should stress, are not incompatible with the fact that international society as it exists today is a radically imperfect structure. As we experience it, that society might be likened to a defective building, founded on rights; its superstructure raised, like that of the state itself, through political conflict, cooperative activity, and commercial exchange; the whole thing shaky and unstable because it lacks the rivets of authority. It is like domestic society in that men and women live at peace within it (sometimes determining the conditions of their own existence, negotiating and bargaining with their neighbors. It is unlike domestic society in that every conflict threatens the structure as a whole with collapse. Aggression challenges it directly and is much more dangerous than domestic crime, because there are no policemen. But that only means that the "citizens" of international society must rely on themselves and on one another. Police powers are distributed among all the members. And these members have not done enough in the exercise of their powers if they merely contain the aggression or bring it to a speedy end--as if the police should stop a murderer after he has killed only one or two people and send him on his way. 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.

From this picture, two presumptions follow. The first, which I have already pointed out; is the presumption in favor of military resistance once aggression has begun. Resistance is important so that rights can be maintained and future aggressors deterred. The theory of aggression restates the old doctrine of the just war: it explains when fighting is a crime and when it is permissible, perhaps even morally desirable.<sup>\*\*\*</sup> The victim of aggression fights in self-defense, but he isn't only defending himself,

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<sup>\*\*\*</sup>I shall say nothing here of the argument for nonviolent resistance to aggression, according to which fighting is neither desirable nor necessary. This argument has not figured much in the development of the conventional view. Indeed, it poses a radical challenge to the conventions: if aggression can be resisted, and at least sometimes successfully resisted, without war, it may be a less serious crime than has commonly been supposed. I will take up this possibility and its moral implications in the Afterword.

for aggression is a crime against society as a whole. He fights in its name and not only in his own. Other states can rightfully join the victim's resistance; their war has the same character as his own, which is to say, they are entitled not only to repel the attack but also to punish it. All resistance is also law enforcement. Hence the second presumption: when fighting breaks out, there must always be some state against which the law can and should be enforced. Someone must be responsible, for someone decided to break the peace of the society of states. No war, as medieval theologians explained, can be just on both sides.<sup>10</sup>

There are, however, wars that are just on neither side, because the idea of justice doesn't pertain to them or because the antagonists are both aggressors, fighting for territory or power where they have no right. The first case I have already alluded to in discussing the voluntary combat of aristocratic warriors. It is sufficiently rare in human history that nothing more need be said about it here. The second case is illustrated by those wars that Marxists call "imperialist," which are not fought between conquerors and victims but between conquerors and conquerors, each side seeking dominion over the other or the two of them competing to dominate some third party. Thus Lenin's description of the struggles between "have" and "have-not" nations in early twentieth century Europe: ". . . picture to yourselves a slave-owner who owned 100 slaves warring against a slave-owner who owned 200 slaves for a more 'just' distribution of slaves. Clearly, the application of the term 'defensive' war in such a case. . . would be sheer deception. . ." <sup>11</sup> But it is important to stress that we can penetrate the deception only insofar as we can ourselves distinguish justice and injustice: the theory of imperialist war presupposes the theory of aggression. If one insists that all wars on all sides are acts of conquest or attempted conquest, or that all states at all times would conquer if they could, then the argument for justice is defeated before it begins and the moral judgments we actually make are derided as fantasies. Consider the following passage from Edmund Wilson's book *On the American Civil War*:<sup>12</sup>

I think that it is a serious deficiency on the part of historians. . . that they so rarely interest themselves in biological and zoological phenomena. In a recent. . . film showing life at the bottom of the sea, a primitive organism called a sea slug is seen gobbling up small organisms through a large orifice at one end of its body; confronted with another sea slug of an only slightly lesser size, it ingurgitates that, too, Now the wars fought by human beings are stimulated as a rule. . . by the same instincts as the voracity of the sea slug.

There are no doubt wars to which that image might be fit, though it is not a terribly useful image with which to approach the Civil War. Nor does it account for our ordinary experience of international society. Not all states are sea-slug states, gobbling up their neighbors. There are always groups of men and women who would live if they could in peaceful enjoyment of their rights and who have chosen political leaders who represent that desire. The deepest purpose of the state is not ingestion but defense, and the least that can be said is that many actual states serve that purpose. When their territory is attacked or their sovereignty challenged, it makes sense to look for an aggressor and not merely for a natural predator.

Hence we need a theory of aggression rather than a Zoological account. The theory of aggression first takes shape under the aegis of the domestic analogy. I am going to call that primary form of the theory the legalist paradigm, since it consistently reflects the conventions of law and order. It does not necessarily reflect the arguments of the lawyers, though legal as well as moral debate has its starting point here.<sup>13</sup> Later on, I will suggest that our judgments about the justice and injustice of particular wars are not entirely determined by the paradigm. The complex realities of international society drive us toward a revisionist perspective, and the revisions will be significant ones. But the paradigm must first

be viewed in its unrevised form; it is our baseline, our model, the fundamental structure for the moral comprehension of war. We begin with the familiar world of individuals and rights, of crimes and punishments. The theory of aggression can then be summed up in six propositions.

1. *There exists an international society of independent states.* States are the members of this society, not private men and women. In the absence of an universal state, men and women are protected and their interests represented only by their own governments. Though states are founded for the sake of life and liberty, they cannot be challenged in the name of life and liberty by any other states. Hence the principle of non-intervention, which I will analyze later on. The rights of private persons can be recognized in international society, as in the UN Charter of Human Rights, but they cannot be enforced without calling into question the dominant values of that society: the survival and independence of the separate political communities.

2. *This international society has a law that establishes the rights of its members--above all, the rights of territorial integrity and political sovereignty.* Once again, these two rest ultimately on the right of men and women to build a common life and to risk their individual lives only when they freely choose to do so. But the relevant law refers only to states, and its details are fixed by the intercourse of states, through complex processes of conflict and consent. Since these processes are continuous, international society has no natural shape; nor are rights within it ever finally or exactly determined. At any given moment, however, one can distinguish the territory of one people from that of another and say something about the scope and limits of sovereignty.

3. *Any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act.* As with domestic crime, the argument here focuses narrowly on actual or imminent boundary crossings: invasions and physical assaults. Otherwise, it is feared, the notion of resistance to aggression would have no determinate meaning. A state cannot be said to be forced to fight unless the necessity is both obvious and urgent.

4. *Aggression justifies two kinds of violent response: a war of self-defense by the victim and a war of law enforcement by the victim and any other member of international society.* Anyone can come to the aid of a victim, use necessary force against an aggressor, and even make whatever is the international equivalent of a "citizen's arrest." As in domestic society, the obligations of bystanders are not easy to make out, but it is the tendency of the theory to undermine the right of neutrality and to require widespread participation in the business of law enforcement. In the Korean War, this participation was authorized by the United Nations, but even in such cases the actual decision to join the fighting remains a unilateral one, best understood by analogy to the decision of a private citizen who rushes to help a man or woman attacked on the street.

5. *Nothing but aggression can justify war.* The central purpose of the theory is to limit the occasions for war. "There is a single and only just cause for commencing a war," wrote Vitoria, "namely, a wrong received."<sup>14</sup> There must actually have been a wrong, and it must actually have been received (or its receipt must be, as it were, only minutes away). Nothing else warrants the use of force in international society--above all, not any difference of religion or politics. Domestic heresy and injustice are never actionable in the world of states: hence, again, the principle of nonintervention.

6. *Once the aggressor state has been militarily repulsed, it can also be punished.* The conception of just war as an act of punishment is very old, though neither the procedures nor the forms of punishment have ever been firmly established in customary or positive international law. Nor are its purposes entirely clear: to exact retribution, to deter other states, to restrain or reform this one? All three figure largely in the literature, though it is probably fair to say that deterrence and restraint are most commonly accepted. When people talk of fighting a war against war, this is usually what they have in mind. The domestic maxim is, punish crime to prevent violence; its international analogue is, punish aggression to

prevent war. Whether the state as a whole or only particular persons are the proper objects of punishment is a harder question, for reasons I will consider later on. But the implication of the paradigm is clear: if states are members of international society, the subjects of rights, they must also be (somehow) the objects of punishment.

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**{Excerpt from the end of chapter 4, Just and Unjust Wars.** Walzer qualifies the thought that a just war is a war against aggression. It turns out that according to Walzer a just war is a war against aggression, or a pre-emptive strike against imminent aggression, or a justified intervention (to counterbalance wrongful interference by other outside forces in a civil war, or in support of the secession movement of a national community, or to defend against enslavement or massacre).} The defense of rights is a reason for fighting. I want now to stress again, and finally, that it is the only reason. The legalist paradigm rules out every other sort of war. Preventive wars, commercial wars, wars of expansion and conquest, religious crusades, revolutionary wars, military interventions--all these are barred and barred absolutely, in much the same way as their domestic equivalents are ruled out in municipal law. Or, to turn the argument around once more, all these constitute aggressive acts on the part of whoever begins them and justify forceful resistance, as their equivalents would in the homes and streets of domestic Society. But this is not yet a complete characterization of the morality of war. Though the domestic analogy is an intellectual tool of critical importance, it doesn't offer an entirely accurate picture of international society. States are not in fact like individuals (because they are collections of individuals) and the relations among states are not like the private dealings of men and women (because they are not framed in the same way by authoritative law). These differences are not unknown or obscure. I have been ignoring them only for the sake of analytical clarity. I have wanted to argue that as an account of our moral judgments, the domestic analogy and the legalist paradigm possess great explanatory power. The account is still incomplete, however, and I must look now at a series of issues and historical cases that suggest the need for revision. I cannot exhaust the range of possible revision, for our moral judgments are enormously subtle and complex. But the major points at which the argument for justice requires the amendment of the paradigm are clear enough; they have long been the focus of legal and moral debate.

#### CHAPTER 4 NOTES

1. *Henry V*, 1: 2, ll. 24-28.
2. The judges distinguished "aggressive acts" from "aggressive wars," but then used the first of these as the generic term: see *Nazi Conspiracy and Aggression: Opinion and Judgment* (Washington, D.C., 1947), p. 16.
3. Quoted in Michael Howard, "War as an Instrument of Policy," in Herbert Butterfield and Martin Wight, eds., *Diplomatic Investigations* (Cambridge, Mass., 1966), p. 199. Cf. *On War*, trans. Howard and Paret, p. 370.
4. John Westlake, *Collected Papers*, ed. L. Oppenheim (Cambridge, England, 1914), p. 78.
5. See Ruth Putnam, *Alsace and Lorraine from Caesar to Kaiser: 58 B.C.~1871 A.D.* (New York, 1915).
6. Henry Sidgwick, *The Elements of Politics* (London, 1891), pp. 268, 287.
7. *Leviathan*, ch. 30.

8. *Leviathan*, ch. 15. 9. For a critique of this analogy, see the two essays by Hedley Bull, "Society and Anarchy in International Relations," and "The Grotian Conception of International Society," in *Diplomatic Investigations*, chs. 2 and 3. 1

0. See Vitoria, *On the Law of War*, p. 177.

11. Lenin, *Socialism and War* (London, 1940), pp. 10-11.

12. Edmund Wilson, *Patriotic Gore* (New York, 1966), p. xi.

13. It is worth noting that the United Nations' recently adopted definition of aggression closely follows the paradigm: see the *Report of the Special Committee On the Question of Defining Aggression* (1974), General Assembly Official Records, 29th session, supplement no. 19 (A/9619), pp. 10-13. The definition is reprinted and analyzed in Yehuda Melzer, *Concepts of Just War* (Leyden, 1975), pp. 26ff.

14. *On the Law of War*, p. 170.

### **Excerpt from Chapter 5, Anticipations** (Preventive war distinguished from pre-emptive strikes)

The first questions asked when states go to war are also the easiest to answer: who started the shooting? who sent troops across the border? These are questions of fact, not of judgment, and if the answers are disputed, it is only because of the lies that governments tell. The lies don't, in any case, detain us long; the truth comes out soon enough. Governments lie so as to absolve themselves from the charge of aggression. But it is not on the answers to questions such as these that our final judgments about aggression depend. There are further arguments to make, justifications to offer, lies to tell, before the moral issue is directly confronted. For aggression often begins without shots being fired or borders crossed.

Both individuals and states can rightfully defend themselves against violence that is imminent but not actual; they can fire the first shots if they know themselves about to be attacked. This is a right recognized in domestic law and also in the legalist paradigm for international society. In most legal accounts, however, it is severely restricted. Indeed, once one has stated the restrictions, it is no longer clear whether the right has any substance at all. Thus the argument of Secretary of State Daniel Webster in the *Caroline* case of 1842 (the details of which need not concern us here): in order to justify pre-emptive violence, Webster wrote, there must be shown "a necessity of self-defense. . . instant, overwhelming, leaving no choice of means, and no moment for deliberation."<sup>1</sup> That would permit us to do little more than respond to an attack once we had seen it coming but before we had felt its impact. Preemption on this view is like a reflex action, a throwing up of one's arms at the very last minute. But it hardly requires much of a "showing" to justify a movement of that sort. Even the most presumptuous aggressor is not likely to insist, as a matter of right, that his victims stand still until he lands the first blow. Webster's formula seems to be the favored one among students of international law, but I don't believe that it addresses itself usefully to the experience of imminent war. There is often plenty of time for deliberation, agonizing hours, days, even weeks of deliberation, when one doubts that war can be avoided and wonders whether or not to strike first. The debate is couched, I suppose, in strategic more than in moral terms. But the decision is judged morally, and the expectation of that judgment, of the effects it will have in allied and neutral states and among one's own people, is itself a strategic factor. So it is important to get the terms of the judgment right, and that requires some revision of the legalist paradigm. For the paradigm is more restrictive than the judgments we actually make. We are disposed to sympathize with potential victims even before they confront an instant and overwhelming necessity.

Imagine a spectrum of anticipation: at one end is Webster's reflex, necessary and determined; at the other end is preventive war, an attack that responds to a distant danger, a matter of foresight and free choice. I want to begin at the far end of the spectrum, where danger is a matter of judgment and political decision is unconstrained, and then edge my way along to the point where we currently draw the line between justified and unjustified attacks. What is involved at that point is something very different from Webster's reflex; it is still possible to make choices, to begin the fighting or to arm oneself and wait. Hence the decision to begin at least resembles the decision to fight a preventive war, and it is important to distinguish the criteria by which it is defended from those that were once thought to justify prevention. Why not draw the line at the far end of the spectrum? The reasons are central to an understanding of the position we now hold.

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. . . But the point is an important one anyway, for it suggests why people have come to feel uneasy about preventive war. We don't want to fight until we are threatened, because only then can we rightly fight. It is a question of moral security. That is why Vattel's concluding remark about the War of the Spanish Succession, and Burke's general argument about the fruitlessness of such wars, is so worrying. It is inevitable, of course, that political calculations will sometimes go wrong; so will moral choices; there is no such thing as perfect security. But there is a great difference, nonetheless, between killing and being killed by soldiers who can plausibly be described as the present instruments of an aggressive intention, and killing and being killed by soldiers who may or may not represent a distant danger to our country. In the first case, we confront an army recognizably hostile, ready for war, fixed in a posture of attack. In the second, the hostility is prospective and imaginary, and it will always be a charge against us that we have made war upon soldiers who were themselves engaged in entirely legitimate (nonthreatening) activities. Hence the moral necessity of rejecting any attack that is merely preventive in character, that does not wait upon and respond to the willful acts of an adversary.

### **Pre-emptive Strikes**

Now, what acts are to count, what acts do count as threats sufficiently serious to justify war? It is not possible to put together a list, because state action, like human action generally, takes on significance from its context. But there are some negative points worth making. The boastful ranting to which political leaders are often prone isn't in itself threatening; injury must be "offered" in some material sense as well. Nor does the kind of military preparation that is a feature of the classic arms race count as a threat, unless it violates some formally or tacitly agreed-upon limit. What the lawyers call "hostile acts short of war," even if these involve violence, are not too quickly to be taken as signs of an intent to make war; they may represent an essay in restraint, an offer to quarrel within limits. Finally, provocations are not the same as threats. "Injury and provocation" are commonly linked by Scholastic writers as the two causes of just war. But the Schoolmen were too accepting of contemporary notions about the honor of states and, more importantly, of sovereigns.<sup>7</sup> The moral significance of such ideas is dubious at best. Insults are not occasions for wars, any more than they are (these days) occasions for duels.

For the rest, military alliances, mobilizations, troop movements, border incursions, naval blockade--all these, with or without verbal menace, sometimes count and sometimes do not count as sufficient indications of hostile intent. But it is, at least, these sorts of actions with which we are concerned. We move along the anticipation spectrum in search, as it were, of enemies: not possible or potential enemies, not merely present ill-wishers, but states and nations that are already, to use a phrase I shall use again with reference to the distinction of combatants and noncombatants, engaged in harming us (and who have already harmed us, by their threats, even if they have not yet inflicted any physical injury). And this search, though it carries us beyond preventive war, clearly brings us up short of Webster's pre-emption. The line between legitimate and illegitimate first strikes is not going to be drawn

at the point of imminent attack but at the point of sufficient threat. That phrase is necessarily vague. I mean it to cover three things: a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk. The argument may be made more clear if I compare these criteria to Vattel's. Instead of previous signs of rapacity and ambition, current and particular signs are required; instead of an "augmentation of power," actual preparation for war; instead of the refusal of future securities, the intensification of present dangers. Preventive war looks to the past and future, Webster's reflex action to the immediate moment, while the idea of being under a threat focuses on what we had best call simply the present. I cannot specify a time span; it is a span within which one can still make choices, and within which it is possible to feel straitened.<sup>8</sup>

What such a time is like is best revealed concretely. We can study it in the three weeks that preceded the Six Day War of 1967. Here is a case as crucial for an understanding of anticipation in the twentieth century as the War of the Spanish Succession was for the eighteenth, and one suggesting that the shift from dynastic to national politics, the costs of which have so often been stressed, has also brought some moral gains. For nations, especially democratic nations, are less likely to fight preventive wars than dynasties are.

### **Notes to Chapter 5 excerpts**

1. D. W. Bowett, *Self-Defense in International Law* (New York, 1958), p. 59. My own position has been influenced by Julius Stone's critique of the legalist argument: *Aggression and World Order* (Berkeley, 1968).

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7. As late as the eighteenth century, Vattel still argued that a prince "has a right to demand, even by force of arms, the reparation of an insult," *Law of Nations*, Bk. II, ch. IV, para. 48, p. 216.

8. Compare the argument of Hugo Grotius: "The danger. . . must be immediate and imminent in point of time. I admit, to be sure, that if the assailant seizes weapons in such a way that his intent to kill is manifest, the crime can be forestalled; for in morals as in material things a point is not to be found which does not have a certain breadth," *The Law of War and Peace*, trans. Francis W. Kelsey (Indianapolis, n.d.), Bk. II, ch. I, section V, p. 173.

### **Excerpt from Chapter 6, Interventions**

The principle that states should never intervene in the domestic affairs of other states follows readily from the legalist paradigm and, less readily and more ambiguously, from those conceptions of life and liberty that underlie the paradigm and make it plausible. But these same conceptions seem also to require that we sometimes disregard the principle; and what might be called the rules of disregard, rather than the principle itself, have been the focus of moral interest and argument. No state can admit to fighting an aggressive war and then defend its actions. But intervention is differently understood. The word is not defined as a criminal activity, and though the practice of intervening often threatens the territorial integrity and political independence of invaded states, it can sometimes be justified. It is more important to stress at the outset, however, that it always has to be justified. The burden of proof falls on any political leader who tries to shape the domestic arrangements or alter the conditions of life in a foreign country. And when the attempt is made with armed force, the burden is especially heavy--not only because of the coercions and ravages that military intervention inevitably brings, but also because it is thought that the citizens of a sovereign state have a right, insofar as they are to be coerced and ravaged at all, to suffer only at one another's hands.

## **Self-Determination and Self-Help The Argument of John Stuart Mill**

These citizens are the members, it is presumed, of a single political community, entitled collectively to determine their own affairs. The precise nature of this right is nicely worked out by John Stuart Mill in a short article published in the same year as the treatise *On Liberty* (1859) and especially useful to us because the individual/community analogy was very much in Mill's mind as he wrote.<sup>1</sup> We are to treat states as self-determining communities, he argues, whether or not their internal political arrangements are free, whether or not the citizens choose their government and openly debate the policies carried out in their name. For self-determination and political freedom are not equivalent terms. The first is the more inclusive idea; it describes not only a particular institutional arrangement but also the process by which a community arrives at that arrangement--or does not. A state is self-determining even if its citizens struggle and fail to establish free institutions, but it has been deprived of self-determination if such institutions are established by an intrusive neighbor. The members of a political community must seek their own freedom, just as the individual must cultivate his own virtue. They cannot be set free, as he cannot be made virtuous, by any external force. Indeed, political freedom depends upon the existence of individual virtue, and this the armies of another state are most unlikely to produce--unless, perhaps, they inspire an active resistance and set in motion a self-determining politics. Self-determination is the school in which virtue is learned (or not) and liberty is won (or not). Mill recognizes that a people who have had the "misfortune" to be ruled by a tyrannical government are peculiarly disadvantaged: they have never had a chance to develop "the virtues needful for maintaining freedom." But he insists nevertheless on the stern doctrine of self-help. "It is during an arduous struggle to become free by their own efforts that these virtues have the best chance of springing up."

Though Mill's argument can be cast in utilitarian terms, the harshness of his conclusions suggests that this is not its most appropriate form. The Millian view of self-determination seems to make utilitarian calculation unnecessary, or at least subsidiary to an understanding of communal liberty. He doesn't believe that intervention fails more often than not to serve the purposes of liberty; he believes that, given what liberty is, it necessarily fails. The (internal) freedom of a political community can be won only by the members of that community. The argument is similar to that implied in the well-known Marxist maxim, "The liberation of the working class can come only through the workers themselves."<sup>2</sup> As that maxim, one would think, rules out any substitution of vanguard elitism for working class democracy, so Mill's argument rules out any substitution of foreign intervention for internal struggle.

Self-determination, then, is the right of a people "to become free by their own efforts" if they can, and nonintervention is the principle guaranteeing that their success will not be impeded or their failure prevented by the intrusions of an alien power. It has to be stressed that there is no right to be protected against the consequences of domestic failure, even against a bloody repression. Mill generally writes as if he believes that citizens get the government they deserve, or, at least, the government for which they are "fit." And "the only test. . . of a people's having become fit for popular institutions is that they, or a sufficient portion of them to prevail in the contest, are willing to brave labor and danger for their liberation." No one can, and no one should, do it for them. Mill takes a very cool view of political conflict, and if many rebellious citizens, proud and full of hope in their own efforts, have endorsed that view, many others have not. There is no shortage of revolutionaries who have sought, pleaded for, even demanded outside help. A recent American commentator, eager to be helpful, has argued that Mill's position involves "a kind of Darwinian definition [*The Origin of the Species* was also published in 1859] of self-determination as survival of the fittest within the national boundaries, even if fittest means most adept in the use of force."<sup>3</sup> That last phrase is unfair, for it was precisely Mill's point that force could not prevail, unless it were reinforced from the outside, over a people ready "to brave labor and danger." For the rest, the charge is probably true, but it is difficult to see what conclusions follow from it. It is possible to intervene domestically in the "Darwinian" struggle because the intervention is continuous and sustained over time. But foreign intervention, if it is a brief affair, cannot shift the domestic balance of

power in any decisive way toward the forces of freedom, while if it is prolonged or intermittently resumed, it will itself pose the greatest possible threat to the success of those forces.

The case may be different when what is at issue is not intervention at all but conquest. Military defeat and governmental collapse may so shock a social system as to open the way for a radical renovation of its political arrangements. This seems to be what happened in Germany and Japan after World War II, and these examples are so important that I will have to consider later on how it is that rights of conquest and renovation might arise. But they dearly don't arise in every case of domestic tyranny. It is not true, then, that intervention is justified whenever revolution is; for revolutionary activity is an exercise in self-determination, while foreign interference denies to a people those political capacities that only such exercise can bring.

These are the truths expressed by the legal doctrine of sovereignty, which defines the liberty of states as their independence from foreign control and coercion. In fact, of course, not every independent state is free, but the recognition of sovereignty is the only way we have of establishing an arena within which freedom can be fought for and (sometimes) won. It is this arena and the activities that go on within it that we want to protect, and we protect them, much as we protect individual integrity, by marking out boundaries that cannot be crossed, rights that cannot be violated. As with individuals, so with sovereign states: there are things that we cannot do to them, even for their own ostensible good.

And yet the ban on boundary crossings is not absolute--in part because of the arbitrary and accidental character of state boundaries, in part because of the ambiguous relation of the political community or communities within those boundaries to the government that defends them. Despite Mill's very general account of self-determination, it isn't always clear when a community is in fact self-determining, when it qualifies, so to speak, for nonintervention. No doubt there are similar problems with individual persons, but these are, I think, less severe and, in any case, they are handled within the structures of domestic law. \* \*

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\* \*The domestic analogy suggests that the most obvious way of not qualifying for nonintervention is to be incompetent (childish, imbecilic, and so on). Mill believed that there were incompetent peoples, barbarians, in whose interest it was to be conquered and held in subjection by foreigners. "Barbarians have no rights as a nation [i.e. as a political community] . . ." Hence utilitarian principles apply to them, and imperial bureaucrats legitimately work for their moral improvement. It is interesting to note a similar view among the Marxists, who also justified conquest and imperial rule at certain stages of historical development. (See Shlomo Avineri, ed., *Karl Marx on Colonialism and Modernization*, New York, 1969.) Whatever plausibility such arguments had in the nineteenth century, they have none today. International society can no longer be divided into civilized and barbarian halves; any line drawn on developmental principles leaves barbarians on both sides. I shall therefore assume that the self-help test applies equally to all peoples.

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In International society, the law provides no authoritative verdicts. Hence, the ban on boundary crossings is subject to unilateral suspension, specifically with reference to three sorts of cases where it does not seem to serve the purposes for which it was established:

--when a particular set of boundaries dearly contains two or more political communities, one of which is already engaged in a large-scale military struggle for independence; that is, when what is at issue is secession or "national liberation;"

-when the boundaries have already been crossed by the armies of a foreign power, even if the crossing has been called for by one of the parties in a civil war, that is, when what is at issue is counterintervention; and

--when the violation of human rights within a set of boundaries is so terrible that it makes talk of community or self-determination or "arduous struggle" seem cynical and irrelevant, that is, in cases of enslavement or massacre.

The arguments that are made on behalf of intervention in each of these cases constitute the second, third, and fourth revisions of the legalist paradigm. They open the way for just wars that are not fought in self-defense or against aggression in the strict sense. But they need to be worked out with great care. Given the readiness of states to invade one another, revisionism is a risky business. Mill discusses only the first two of these cases, secession and counter-intervention, though the last was not unknown even in 1859. It is worth pointing out that he does not regard them as exceptions to the nonintervention principle, but rather as negative demonstrations of its reasons. Where these reasons don't apply, the principle loses its force. It would be more exact, from Mill's standpoint, to formulate the relevant principle in this way: *always act so as to recognize and uphold communal autonomy*. Nonintervention is most often entailed by that recognition, but not always, and then we must prove our commitment to autonomy in some other way, perhaps even by sending troops across an international frontier. But the morally exact principle is also very dangerous, and Mill's account of the argument is not at this point an account of what is actually said in everyday moral discourse. We need to establish a kind of *a priori* respect for state boundaries; they are, as I have argued before, the only boundaries communities ever have. And that is why intervention is always justified as if it were an exception to a general rule, made necessary by the urgency or extremity of a particular case. The second, third, and fourth revisions have something of the form of stereotyped excuses. Interventions are so often undertaken for "reasons of state" that have nothing to do with self-determination that we have become skeptical of every claim to defend the autonomy of alien communities. Hence the special burden of proof with which I began, more onerous than any we impose on individuals or governments pleading self-defense: intervening states must demonstrate that their own case is radically different from what we take to be the general run of cases, where the liberty or prospective liberty of citizens is best served if foreigners offer them only moral support. And that is how I shall characterize Mill's argument (though he characterizes it differently) that Great Britain ought to have intervened in defense of the Hungarian Revolution of 1848 and 1849.

{Here I skip ahead to the end of the same chapter.}

Humanitarian intervention is justified when it is a response (with reasonable expectations of success) to acts "that shock the moral conscience of mankind." The old-fashioned language seems to me exactly right. It is not the conscience of political leaders that one refers to in such cases. They have other things to worry about and may well be required to repress their normal feelings of indignation and outrage. The reference is to the moral convictions of ordinary men and women, acquired in the course of their everyday activities. And given that one can make a persuasive argument in terms of these convictions, I don't think that there is any moral reason to adopt that posture of passivity that might be called waiting for the UN (waiting for the universal state, waiting for the messiah. . .).

Suppose. . . that a great power decided that the only way it could continue to control a satellite state was to wipe out the satellite's population and recolonize the area with "re1iable" people. Suppose the satellite government agreed to this measure and established the necessary mass extermination apparatus. . . Would the rest of the members of the U.N. be compelled to stand by and watch this operation mere1y because [the] requisite decision of U.N. organs was blocked and

the operation did not involve an "armed attack" on any [member state]  
...? 28

The question is rhetorical. Any state capable of stopping the slaughter has a right, at least, to try to do so. The legalist paradigm indeed rules out such efforts, but that only suggests that the paradigm, unrevised, cannot account for the moral realities of military intervention. The second, third, and fourth revisions of the paradigm have this form: states can be invaded and wars justly begun to assist secessionist movements (once they have demonstrated their representative character), to balance the prior interventions of other powers, and to rescue peoples threatened with massacre. In each of these cases we permit or, after the fact, we praise or don't condemn these violations of the formal rules of sovereignty, because they uphold the values of individual life and communal liberty of which sovereignty itself is merely an expression. The formula is, once again, permissive, but I have tried in my discussion of particular cases to indicate that the actual requirements of just interventions are constraining indeed. And the revisions must be understood to include the constraints. Since the constraints are often ignored, it is sometimes argued that it would be best to insist on an absolute rule of nonintervention (as it would be best to insist on an absolute rule of a nonanticipation). But the absolute rule will also be ignored, and we will then have no standards by which to judge what happens next. In fact, we do have standards, which I have tried to map out. They reflect deep and valuable, though in their applications difficult and problematic, commitments to human rights.

#### **NOTES to chapter 6 excerpts**

1. "A Few Words on Non-Intervention" in J. S. Mill, *Dissertations and Discussions* (New York, 1873), III, 238-63.

2. See Irving Howe, ed., *The Basic Writings of Trotsky* (New York, 1963), p. 397.

3. John Norton Moore, "International Law and the United States' Role in Vietnam: A Reply," in R. Falk, ed., *The Vietnam War and International Law* (Princeton, 1968), p. 431. Moore addresses himself specifically to the argument of W. E. Hall, *International Law* (5th ed., Oxford, 1904), p. 289-290. *Journal of Int'l Law* 304 (1973),  
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28. Julius Stone, *Aggression and World Order*, p. 99.