



Case Western Reserve Journal of International Law

Volume 41 | Issue 2

2009

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Recommended Citation

Larry May, *Aggression, Humanitarian Intervention, and Terrorism*, 41 Case W. Res. J. Int'l L. 341 (2009)

Available at: <https://scholarlycommons.law.case.edu/jil/vol41/iss2/5>

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AGGRESSION, HUMANITARIAN INTERVENTION, AND TERRORISM*

Larry May[†]

I. JUS AD BELLUM PRINCIPLES: HISTORICAL ROOTS OF THE IDEA OF STATE AGGRESSION

If there are going to be trials for those who initiate or perpetrate an aggressive war, what constitutes an aggressive war, or an act of State aggression, needs to be defined. Indeed, if individuals are going to be prosecuted, and their liberty put in serious jeopardy, for allegedly committing this crime, it is incumbent on the international community to have a very clear understanding of what State aggression is. Philosophers, diplomats, and lawyers have debated this topic for hundreds of years and have not all agreed. This article discusses several ideas about the definition of aggression in which there might be broad consensus, even if much of the terrain of aggression remains mired in political and ideological squabbles.

A quite useful starting point for understanding State aggression is the relatively modern-sounding translation of Thomas More's work. Here is part of More's discussion of Just Wars in Book II, "Military Affairs," of his famous work, *Utopia*:

Utopians 'go to war only for good reasons: [1] to protect their own land, [2] to drive invading armies from the territories of their friends, or [3] to liberate an oppressed people in the name of humanity, from tyranny and servitude.'¹

One can begin to understand what aggressive war is by first thinking about what it is not. And I would think that today many would agree that wars waged for the three reasons given by More would not be consi-

* This article is adapted and revised from the author's book, *AGGRESSION AND CRIMES AGAINST PEACE* (2008).

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¹ THOMAS MORE, *UTOPIA* 85 (George M. Logan & Robert M. Adams eds., Cambridge Univ. Press 2002) (1516). See also RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE* 42 (Oxford Univ. Press 1999) (discussing this passage). The standard translation of *Utopia* is the one edited by Edward Surtz, S.J. See ST. THOMAS MORE, *UTOPIA*, in 4 *THE COMPLETE WORKS OF ST. THOMAS MORE* (Edward Surtz, S.J. & J.H. Hexter eds., Yale Univ. Press 1964) (1516). The Yale edition translates the passage as follows: "Yet they do not lightly go to war. They do so only to protect their own territory or to drive an invading enemy out of their friends' lands or, in pity, for a people oppressed by tyranny, to deliver them by force of arms from the yoke and slavery of the tyrant, a course prompted by human sympathy." *Id.* at 118.

dered aggressive wars. Indeed, it is interesting that, as far back as Augustine, theorists held that war was most surely justified when undertaken on behalf of those who were innocently attacked, which included wars waged in defense of others as well as self-defensive wars.²

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

It is possible to countenance a wider scope for what counts as State aggression when one eliminates State aggression as one of the elements of the crime of aggression.³ In deciding whether to condemn a State, rather than prosecute one of its leaders, one might allow for a simple "violation of territorial integrity" criterion to suffice, especially since there is a long history of using this criterion in international law.⁴ But, more than this should be needed for demonstrating State aggression as the first hurdle in establishing the elements of the crime of aggression. And this is because when we put an individual's liberty in jeopardy for a trial for such a crime, we need to make sure that the individual has indeed done something of commensurate harm to the loss of liberty he or she is now forced to risk in the trial.⁵

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

² AUGUSTINE, *THE CITY OF GOD* 861–62, 866–67 (David Knowles ed., Henry Bettenson trans., Penguin Books 1984).

³ See Elizabeth Wilmshurst, *Definition of the Crime of Aggression: State Responsibility or Individual Criminal Responsibility?*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION* 94 (Mauro Politi & Giuseppe Nesi eds., 2004).

⁴ I thank Simon Cabulea May for helping me clarify this point.

⁵ See LARRY MAY, *CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT* 139–56 (2005).

aggression that could trigger an international criminal trial. But there is a significant disanalogy. If a physical attack occurs on a person's body there are serious repercussions for the rest of the body—any attack will cause bruising or bleeding that will adversely affect the functions or stability of the rest of the body. But as indicated above, States can have as part of their territories land that is not contiguous with the mainland, or in any event land that when attacked will not necessarily affect the rest of the State's territory or 'body.'

One could object to this proposal that a State is more than a mere population within a territory. A State is also a territorial jurisdiction in which it has a monopoly of enforcement power. Insofar as a State's enforcement jurisdiction is limited by an occupation of part of its territory, the State becomes less of a State than it was before. Indeed, the traditional way of understanding aggression was to see it as merely involving a violation of territorial integrity or political sovereignty, and this characterization survived in the drafting of the United Nations Charter.⁶ This "Statist" way to understand aggression has been dominant for a very long time, but it is wrong-headed.

One could accept the traditional way of understanding aggression if one were interested in a merely stipulative legal meaning of the term. But if one is interested in a definition of aggression that was normatively persuasive, more is needed than merely a reference to violating territorial integrity or political sovereignty. At very least, a normative defense of territory or sovereignty would be needed. And in addition, one would have to give some normative rationale for thinking that continuing as a State is indeed always worthwhile. Defining "aggression" this way cannot be done in general, but only by reference to a State's protection of human rights.⁷

Another objection could be made on similar grounds—namely, to the idea that aggression can involve the repelling of a State that has invaded the territory of a friendly State. Again, since the friendly State's territory is not analogous to a human person's body, it is not clear why invasion per se should count as aggression that warrants retaliation and that is not itself considered aggression. There are also serious objections to the third rationale for aggression—adapted from Thomas More—namely, that it is not aggression to liberate an oppressed people in the name of humanity. Humanitarian wars pose an especially difficult problem for an account like More's. The general presumption in favor of State's not being attacked if

⁶ U.N. Charter art. 2, para. 4.

⁷ See DAVID RODIN, *WAR AND SELF-DEFENSE* 109–10 (2002) (extending an argument in support of the view that something other than State self-defense is necessary for understanding the wrongness of aggression).

they have not attacked other States is in need of a normative rationale, which is generally lacking in the literature on aggression.

There is an initial way to get out of some of these traditional problems and still save the main idea behind More's account. My initial proposal is that defense of self or others that aims to protect the core of the State, that is its human population and essential economic and political institutions that protect this population, should not count as aggression. In addition, military action that involves self-defense of a State's core population and the institutions that support that population should also not constitute aggression.⁸ Whenever another State acts in a way that threatens a given population or its supporting institutions, then rising to defend that State from such assaults is not itself a form of aggression. And the main rationale here is drawn in terms of the value of, and need for protection of, the human rights of members of a population. But defense of a population is not the same as defense of a territory.

II. AGGRESSION AND FIRST STRIKE

It is seemingly even harder to say what constitutes aggressive war than what does not. Sixteenth Century philosophers provide some inspiration. For example, Francisco Vitoria said, "assuming that a prince has authority to make war, he should first of all not go seeking occasions and causes of war."⁹ In Vitoria's view, in most situations sovereigns act aggressively when they initiate war.¹⁰ War is *prima facie* aggressive if the first State to use violent force does so for reasons other than the three mentioned above, namely for self-defense, defense of an ally, or to liberate an oppressed people, insofar as those are linked to human rights protection.¹¹ The first strike element of aggression is not alone sufficient but it does seem to be necessary for a *prima facie* showing of aggression.

The first strike element is meant to separate those who initiate violence and those who merely respond or retaliate.¹² Again the idea is intuitively related to the case of human persons. In a barroom brawl, one of the first questions on the table is who threw the first punch. Of course, this can sometimes be countered by the claim that the first person to act was not the

⁸ My idea of defining legitimate State self-defense in terms of protection of the core population of a State is similar to Michael Walzer's discussion of "the survival and freedom of political communities." See MICHAEL WALZER, *JUST AND UNJUST WARS* *passim* (1977).

⁹ FRANCISCO VITORIA, *DE INDIS ET DE JURE BELLI REFLECTIONES* (Ernest Nys ed., John Pawley Bates trans., 1917) (1557), reprinted in *THE CLASSICS OF INTERNATIONAL LAW* 187 (James Brown Scott ed., 1983).

¹⁰ See *id.* at 163–87.

¹¹ *Id.* at 170–71.

¹² See *id.* (describing just causes for war and differentiating between offensive and defensive).

one who threw the punch but the one who provoked the first punch, perhaps by the use of insults. So the first strike element should not be understood literally as the first State to use violence. The first strike element is an attempt to get people to try to see which State wrongly started a causal chain that resulted in a war, and hence which State is normatively *prima facie* the aggressor.

My amendment to, or clarification of, the traditional Just War way of understanding aggression is that “first strike” should be seen as shorthand for “first wronging” rather than about which State literally engaged in physical assault first. It may seem odd to say that the State that provokes is an aggressor, rather than the State that launches an attack. But history has shown many examples of States that try to start wars stealthily by provoking another State to use violence that can then be countered by supposedly self-defensive violence. Think of a state that menacingly moves its troops to the border of another State thereby provoking that other State to attack first. For this idea not to be quite so odd, think of “strike” as a metaphor for the one first to act in a seriously wrongful way in a chain of events that leads to war. The State that “strikes” first then has a kind of burden since it is on the face of it (*prima facie*) the aggressor unless it can prove that the first strike should not be regarded as wrongful. On the view taken over from More and Vitoria, only certain wrongs can warrant initiation of war. This would help make things much clearer than they often were in the Just War tradition, especially in the writings of those like Augustine who said that war is unjust unless initiated to right a wrong or avenge an injustice.¹³

Engaging in acts that start a war also should not count as aggression when we are under something like “compulsion.” The wrongs that should compel us to wage war are only those that concern the defense of human rights of one’s own or another people.¹⁴ A State may be compelled to go to the aid of another State or group within another State, as well as to act in self-defense. And as the Seventeenth Century founder of international law, Hugo Grotius, says, war is justified only if it is done to ward off a clear danger to life, not just to property, that is “immediate and imminent in point of time.”¹⁵ Grotius makes this point to counter those, like Alberico Gentili, who contended that mere fear of any sort was sufficient to justify what Grotius called “anticipatory slaying.”¹⁶ Grotius argued that the danger must not be merely assumed, but must be shown to require immediate action because

¹³ AUGUSTINE, *supra* note 2, at 862.

¹⁴ See VITORIA, *supra* note 9, at 187.

¹⁵ 2 HUGO GROTIUS, DE JURE BELLI AC PACIS 173 (Francis W. Kelsey trans., Clarendon Press 1925) (1625).

¹⁶ See *id.* at 173; LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE 78–79 (2008).

of the impending harm that would result to the victim.¹⁷ If an assailant seizes weapons and acts in a menacing manner, this may be enough to justify anticipatory violence, as long as there is a necessity that one strike the first blow to avoid the imminent danger.¹⁸

So first strike will only be a *prima facie*, not an all things considered, determination of which State is the aggressor. The State that defends self or other against an imminent and unjustified attack may be compelled to strike first, but it is not the aggressor. Indeed, another way to characterize this situation is to say that the State that is threatening to attack has already in effect been the one to “strike” first. Of course, if the “threatening” State is only beginning to plan for a possible attack, or if its leaders are merely making bellicose speeches, the attack is not imminent and the State that attacks to prevent the threat from being actualized is still the first to strike and as a result the *prima facie* aggressor.

While still somewhat preliminary, the ideas of the Just War theorists, especially More, Vitoria, and Grotius’ highly plausible ideas, provide useful guidance for proving a State was an aggressor. We could think of the *prima facie* case for proving State aggression as involving the first use of armed force by one State that wrongs another State not justified by self-defense, the defense of an innocent State being attacked, or the liberation of an oppressed people in the name of humanity. For simplicity these three latter reasons may be collapsed into one concept, namely, “self defense or defense of others.” However, this phrase is not meant to include anything more than what Thomas More meant, with the changes indicated above, most importantly the reference to human rights. And in any event some preemptive wars will be justified by this criterion since when one State has menacingly built up its armies on the border of another State, self-defense or defense of others may call for the first use of armed force rather than to wait for a first strike attack by another State.¹⁹ Yet in this case, not all such threats will do, but only those that are serious, immediate, and imminent. The next section will explain how this historically based understanding of State aggression can shed light on contemporary debates in international law.

Traditionally, it was thought that invasion, or threatened invasion, gave the invaded State a just cause for waging war.²⁰ For instance, Thomas More said: “Utopians go to war only for good reasons: [1] to protect their own land, [2] to drive invading armies from the territories of their friends, or [3] to liberate an oppressed people in the name of humanity, from tyran-

¹⁷ 2 GROTIUS, *supra* note 15 at 173–75.

¹⁸ *Id.* at 173–74.

¹⁹ See 2 GROTIUS, *supra* note 15, at 172–73.

²⁰ LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE 47–48 (2008).

ny and servitude.”²¹ The second and third reasons given seem as valid today as they were when More expressed them nearly 500 years ago. But concerning the rationale of invasion, Hugo Grotius’s explanations should be followed rather than More. In 1625 Grotius said: “Right reason . . . do[es] not prohibit all use of force, but only that use of force which is in conflict with society, that is which attempts to take away the rights of another.”²²

States are not justified in going to war against other States merely to protect territory or property, unless that territory was occupied. The reason for this is that war involves the killing of many people and it is not at all clear why it would be a just cause to wage a war that involved such killings merely to preserve territory. Indeed, if the State in question was not protecting the rights of its members, it is also unclear why a State would be justified in going to war to preserve its sovereignty. Following a Grotian principle of just cause provides a framework to figure out a way to connect just cause better with what the principle is ultimately to justify, namely the killing of many people in war.

Any plausible reconceptualizing of the principle of just cause must limit just cause to those circumstances where going to war will provide overriding reasons to counter the presumption that war is nearly always wrong because of the risk of killing the innocent. If a State is going to go to war and risk killing many people, some of whom will surely be innocent, there must be something at stake that is at least as important as what is risked. Lots of killing is always risked when a State resorts to war, and this must be balanced against what is to be gained from the war. Here the most important consideration is that recourse to war not be even *prima facie* permitted unless what war aims at is truly significant, and on the order of preventing the killing of lots of people, thereby restricting what counts as just cause to connect to the minimization of the destruction of human life or at least to the promotion of human rights.

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

²¹ THOMAS MORE, *UTOPIA* 85 (George M. Logan & Robert M. Adams eds., Cambridge Univ. Press, 1989).

²² See 2 GROTIUS, *supra* note 15, at 53.

the human rights of its members and can no longer do so, or where the sovereignty violation jeopardizes human rights in some other significant way.

III. THE MORAL AMBIGUITY OF HUMANITARIAN INTERVENTION

As noted above, Thomas More listed the liberation of an oppressed people in the name of humanity, from tyranny and servitude, as a just cause for war.²³ And as far back as the early middle ages, Augustine, the founder of the Just War tradition, had said that defense of others was a better reason to go to war than defense of self since the former was more selfless. Today, humanitarian intervention has once again replaced self-defensive war and become the favored example of those who think there are clear cases of morally justified wars. Surely if there are morally justified wars, then wars fought to stop a genocide or to curtail crimes against humanity are more likely to be justified, rather than wars fought to gain territory or convert heathens.

But there is an unfortunate part of most wars fought for humanitarian reasons: innocent people will be killed. This is the inevitable result of all wars, and even more likely to occur in humanitarian wars since there is often no clear military target that needs to be destroyed, such as a supply depot. Indeed, recent humanitarian wars have been waged in such a way as to be directed against civilian targets to get the civilian population to put political pressure on a government to stop a genocide. Or as in the recent case of Rwanda, where the civilian population was involved in massive killing, it looked like it would take attacks on that civilian population to stop the genocide.²⁴

In order to win most humanitarian wars, one must try to break the will of a part of a population that is oppressing another part of a population, rather than merely to defeat the enemy army in certain military campaigns.²⁵ And to break a people's will, infrastructure and population centers often must be attacked. Yet, if it is true that a large part of a population is complicit in causing, or allowing, a genocidal campaign, perhaps a war that must target that civilian population is not so difficult to justify after all.²⁶

²³ See *supra* note 1.

²⁴ LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE 47–48, 273–74 (2008).

²⁵ I am thinking primarily of humanitarian wars aimed at ending genocidal campaigns rather than those aimed at ending a civil war. As Brook Sadler has pointed out to me, the latter are easier to justify since the sovereign State may welcome intervention and in addition there are clear-cut military targets. But such wars are not unproblematic since one needs to side with one party over another, whereas in the case of stopping genocide it is easy to see which side has the moral high ground.

²⁶ See generally ETHICS AND FOREIGN INTERVENTION (Deen K. Chatterjee & Don E. Scheid eds., 2003) (containing essays that analyze the theories of just war, humanitarian intervention, and political secession).

The reason why humanitarian intervention has been so controversial is that it is hard to characterize the acts by the State that has caused the humanitarian crisis as having threatened either the State that intervenes or the world community. And for this reason it is hard to see that the offending State has engaged in a first strike or otherwise provoked the attack by the intervening State. And without any provocation, at least based on the traditional elements of what constitutes State aggression, where unprovoked first strikes are paradigmatically cases of State aggression, it looks like the State that has engaged in humanitarian intervention has itself engaged in an act of aggression.

Of course, since the State has gone to war for defense of the rights of others, in my view of what counts as aggression, it is not clearly an example of State aggression. Yet, what is in question is whether this kind of defense of others, where the other in question is not itself a State that is being attacked, can justify intervention. It is odd indeed to call the humanitarian actions of a State by the name aggression since that implies that there is some hostility behind the intervention. If the intervention is truly motivated by humanitarian concerns, then calling it aggression and therefore also hostile seems out of place.

Still, it is difficult to see humanitarian intervention that risks the horrors of war as a paradigmatically good thing to do or as an example of a paradigmatically justified war. Anything that increases the likelihood of major loss of civilian life must at best be a necessary evil, surely not a paradigmatically justified war. The morally ambiguous character of humanitarian intervention is made even more clear when one realizes that humanitarian wars are more likely than other wars to involve massive civilian casualties.²⁷ Such considerations contribute to the continuing debate today about how to regard humanitarian intervention.²⁸

IV. HUMANITARIAN INTERVENTION IN INTERNATIONAL LAW

Consider the state of international law today regarding the case of humanitarian interventions. In the 1986 Nicaragua case,²⁹ the International Court of Justice points to a problem with humanitarian intervention. The case concerned the mining of Nicaragua's harbors by the CIA, and by "contras," who were merely paid operatives of the U.S. The U.S. tried to topple the Nicaraguan government in the early 1980s, as a means to prevent what it

²⁷ George R. Lucas, *From jus ad bellum to jus ad pacem*, in *ETHICS AND FOREIGN INTERVENTION*, *id.* at 78–79.

²⁸ See LARRY MAY, *AGGRESSION AND CRIMES AGAINST PEACE* 274, 291 (2008).

²⁹ See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 56–57 (June 27).

predicted would be massive human rights violations by the communist government of Nicaragua in the region.³⁰ Here is part of the Court's judgment:

In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports ... which is based on the right of collective self-defense.³¹

This ICJ opinion seems to see humanitarian intervention to prevent human rights abuses as just one form of aggression. Yet, there has been a controversy about how to interpret this ICJ opinion, some reading it narrowly as applying only to the unusual factual circumstances of this case and others seeing in it a broad condemnation of humanitarian intervention.

Ian Brownlie, writing in 1963, says this of the doctrine of humanitarian intervention:

The state practice justifies the conclusion that no genuine case of humanitarian intervention has occurred, with the . . . embarrassing exception provided by Germany [by its claim to be going to the aid of oppressed Germans in Czechoslovakia], the institution has disappeared from modern state practice. As a matter of legal and international policy this is a beneficial development. The institution did not conspicuously enhance state relations and was applied only against weak states. It belongs to an era of unequal relations. Many modern authorities either ignore humanitarian intervention or expressly deny that such a right to intervene exists.³²

Brownlie points to the fact that even when discussions "in the Sixth Committee of the General Assembly" in the 1960s considered "whether action taken by a state to prevent genocide against a racially related minority in a neighboring state" would be aggression, many of the delegates said that it would.³³ If stopping genocide was not then considered to be sufficient to justify the initiation war, it is hard to imagine any other humanitarian goal that could have done so.

One reason for the reluctance of the international legal community to accept the legitimacy of humanitarian intervention is that there have been so many cases of mixed motives on the part of governments who have claimed to be engaging solely in humanitarian efforts.³⁴ Brownlie's reference to Nazi Germany is a case in point. Hitler claimed to be engaged in a

³⁰ *Id.* at 134.

³¹ *Id.* at 134–35.

³² IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES*, 340–41 (1963).

³³ *Id.* at 341.

³⁴ *See id.* at 339–40.

humanitarian war to stop atrocities against native German peoples in the Sudetanland portion of Czechoslovakia. Yet it was also clear that Hitler was engaged in a power grab in Eastern Europe that had nothing to do with humanitarian motives.

From 1960 to the present day, sentiments have changed but it is probably fair to say that the vast majority of international law scholars still find wars waged for humanitarian reasons to be illegal as of this writing in 2009. Indeed, most of the authorities today continue to think of humanitarian intervention as a form of aggression. Nonetheless, wars waged for humanitarian reasons, such as NATO's attempt to stop ethnic cleansing in Kosovo by its brief war against Serbia, are sometimes described as paradigmatically justified wars.³⁵

Two UN Security Council Resolutions, concerning the terrorist attacks against the US on September 11, 2001, seem to open the door to a broader right of self-defense of States than had previously been acknowledged in international law.³⁶ Yet, this is a very recent movement, although one that is often strongly represented in the media and in moral and political theory. And there has been a counter movement, spurred by an International Court of Justice ruling about the US bombing of Iranian oil platforms, which seemed to attempt to close the door of broadening self-defense that the Security Council resolutions had opened.³⁷

Some legal scholars have recently supported the idea that some humanitarian wars can be legally fought. Article 2(4) of the UN Charter declares:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.³⁸

Michael Reisman argues that humanitarian wars are not straightforward violations of Article 2(4) of the UN Charter:

Since a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the State involved and is not only not inconsistent with the purposes of the United Nations but is rather in

³⁵ LARRY MAY, *AGGRESSION AND CRIMES AGAINST PEACE* 276 (2008).

³⁶ See S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

³⁷ See *Oil Platforms (Iran v. U.S.)*, 2003 I.C.H. 90, 203 (Nov. 6).

³⁸ U.N. Charter art. 2, para. 4.

conformity with the most fundamental peremptory norms of the charter, it is a distortion to argue that it is precluded by Article 2(4).³⁹

If the intent is to save a people from annihilation, it is possible that there was no additional intent to change the territorial boundaries or political independence of a State.

Critics of this legal argument respond that any humanitarian war will cross borders and this is surely a violation of the territorial integrity of the State.⁴⁰ Here is one common response, provided by Oscar Schachter:

The idea that wars waged in a good cause such as democracy and human rights would not involve a violation of territorial integrity or political independence demands an Orwellian construction of those terms.⁴¹

And this view seems reasonable if we just look at the wording of the UN Charter.

While a growing number of scholars in moral and political theory argue that some humanitarian wars are justified,⁴² the majority of legal scholars continue to follow Schachter here, and the Nicaragua case continues to be cited as the main precedent in international law, despite the failure of the international community to condemn NATO's humanitarian war against Serbia to stop the persecution of the Kosovar Albanians.⁴³ In general, while international law may be in flux about humanitarian intervention, legal scholars have not followed their colleagues in political and moral philosophy in urging whole-scale changes in what appear to be straightforward applications of *jus ad bellum* concepts.

V. DEFENDING HUMANITARIAN WARS

One can mount a limited defense of humanitarian wars based on some of the ideas of the Eighteenth Century theorist, Emer de Vattel. Perhaps humanitarian wars can be justified by reference to Vattel's principle of

³⁹ W. Michael Reisman & Myres McDougal, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 177 (Richard Lillich ed., 1973).

⁴⁰ Oscar Schachter, *The Legality of Pro-democratic Invasion*, 78 AM. J. INT'L L. 645, 649 (1984); see also J.L. Holzgrefe, *The Humanitarian Intervention Debate*, in HUMANITARIAN INTERVENTION DEBATE 15, 38 (J.L. Holzgrefe & Robert O'Keohane eds., 2003).

⁴¹ Schachter, *supra* note 40, at 649.

⁴² The most prominent scholar to argue in this vein is Allen Buchanan.

⁴³ The Congo case, discussed in Chapter 10, has also raised the question of whether a State that is being attacked for humanitarian reasons can justifiably defend itself. The ICJ has not given a clear answer to this question, although I have given reason to think that a State can provoke humanitarian force by other states and not normally then legitimately claim that it acts in self-defense to repel that force.

humanity, namely, when it is in a State's power to help other States without risking greater harm to itself, it is permissible (perhaps even obligatory) to do so.⁴⁴ Vattel worried about how the application of this principle could disrupt sovereignty. And we have also wondered about the risk of civilian casualties from humanitarian war.⁴⁵ One way to modify the Vattelian principle to respond to such worries is to stipulate that one has a responsibility to act only if one does not risk greater harm to self or others. We should also stipulate that the States must have very good grounds for thinking that the State or people to be rescued are truly in need of, and desire, rescue.

Vattel worried that humanitarian wars would often jeopardize whatever good there is from having stable sovereign States.⁴⁶ But, Vattel also said that the most obvious case where such worries were not clearly overriding, concerned situations where there was a civil war or at least where it was not clear where sovereignty resided.⁴⁷ Expanding on this idea and extrapolating to emergency situations generally, we could say that humanitarian wars should only be allowed where what is to be gained is not overridden by the negative effects on sovereignty that occur due to such intervention. Such considerations would naturally fall under the category of potential harm to others by waging humanitarian wars. Only when the risks from intrusion on sovereignty are less than the gains from such intrusion, can humanitarian wars be justified on this reconstruction of Vattel's position. Proportionality consideration would be key here.

There is a significant worry about the loss of life to civilians in humanitarian wars. But these losses may nonetheless be justified, yet only in very few cases, if the sheer extent of the humanitarian crisis is so large as to outweigh considerations of the lives of the innocent that are risked by the attempt to stop the crisis through military means. If innocent lives are on both sides of the balance sheet, there is no reason to think that greater saving of lives cannot justify lesser loss of lives, assuming that there is no other way to save the greater number of lives than by war.

It might be possible to justify even the targeting of civilians if it could be shown that this was necessary to save many more lives than those that were risked by the targeting. It is sometimes said that the intentional targeting of civilians can never be justified.⁴⁸ Vattel's position is more compelling. We could follow Vattel in thinking that there can be emergency

⁴⁴ See EMER DE VATTTEL, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE* (Carnegie Institute 1916) (1758), reprinted in *THE CLASSICS OF INTERNATIONAL LAW* 130 (James Brown Scott ed., 1983).

⁴⁵ *Id.* at 131.

⁴⁶ *See id.*

⁴⁷ *See id.*

⁴⁸ *See id.* at 130.

situations where such a large number of innocent people is threatened by the actions of a State, or where there is so much potential harm to the world community, say by a genocidal campaign, that what is normally banned may sometimes be allowed. Of course, emergency situations do not have much precedent. But that is just to reaffirm what has been thought at least since Augustine, namely, that all war, even humanitarian war, can only be justified, if at all, in the most extreme cases of harm that can be prevented in no other way.

It is also hard to see that humanitarian interventions constitute wrongs at all, let alone the most important of wrongs in the international arena, and hence we have reason to think that crossing State borders is not always wrong. Humanitarian intervention may indeed often be ill advised since anything that contributes to the horrors of war is to be avoided at nearly all costs. But if the motivation for the humanitarian intervention is to stop genocide, then the war may not be ill advised even though there is a serious risk of the kind of major loss of civilian life that occurs in most wars. Here, we need some rudimentary utilitarian calculation in order to see that stopping genocide by means of a war could be justified.

It is next to impossible to justify all humanitarian wars, but at least some humanitarian wars may be justified even strongly so. Many humanitarian wars will violate the proportionality principle in that more harm to the civilian population or to the security of the region will occur from these wars than the good that is done by waging them. But some humanitarian wars will not run afoul of the proportionality principle since they will confront genocides and other mass crimes with less loss of life through the conduct of the war itself. In addition, many humanitarian wars do not meet the last resort principle since war has rarely been able to stop, at least not for very long, mass crimes like genocide from occurring in ways that diplomacy often can. But there surely are some humanitarian wars that seem to satisfy the last resort principle and are likely to have some efficacy. And the justification of such wars will indeed be best grounded in collective responsibility principles.⁴⁹

Think of a war waged to stop the genocide in the Darfur region of the Sudan. The Sudanese government, if the near anarchy in the Sudan is a government, has shown itself unwilling or unable to stop the slaughter.⁵⁰ Diplomatic efforts have been tried and have all failed miserably. The attempts by the United Nations to put peace-keeping troops in place have met with strong resistance and the death of many peace-keepers. Threats of eco-

⁴⁹ See LARRY MAY, *AGGRESSION AND CRIMES AGAINST PEACE* 292 (2008).

⁵⁰ See Steven R. Weisman, *Powell Says Rapes and Killings in Sudan are Genocide*, N.Y. TIMES, Sept. 10, 2004, at A3 (quoting former Secretary of State Colin Powell saying "genocide has been committed in Darfur and that the government of Sudan and the Janjaweed bear the responsibility, and [] genocide may still be occurring").

conomic boycotts and incentives of economic aid have similarly failed to achieve a stop to the carnage in the refugee camps. This is the kind of case where it looks like war might be the last resort to ending the genocide and doing what the international community has a collective responsibility to do.⁵¹

Indeed, it seems that the failure to go to war to end genocides of the sort that are occurring in Darfur would indicate a failure of the international community to enforce its most widely praised multi-lateral treaty, namely the Genocide Convention, and hence a serious failure of international law itself. If law is not enforced then it ceases to have any claim to be called law. In international law, an area of law already thought of as controversially labeled “law” at best, there is an especially pressing reason to demonstrate that there is enforcement of the most widely accepted provisions of international law.⁵² Failure to intervene in places like Darfur, in order to stop the flagrant violation of the Genocide Convention is also a major failure of international law.

Humanitarian wars can at least be *prima facie* defended in such circumstances as the genocide in Darfur. Such wars might be technically aggressive, at least according to traditional doctrine, in that they involve invasion by one State against another State that is resisting rather than consenting to the invasion. Yet, since there is no “hostility” that motivates the invading State, and if the international community in effect consents to allow the invasion to occur, it seems as if the designation of aggression is, at best, the kind of technical characterization that doesn’t bear much normative weight. Aggression, as traditionally understood, is not itself a trigger of normative disapproval, since some aggression, such as that form that stops worse aggression could be a very good thing indeed, as theorists from the Just War tradition and contemporary international law have claimed.⁵³ This is one reason I urged that we abandon the traditional way of understanding aggression.

The major problem with humanitarian intervention wars is that despite their lofty aims they are still wars. And because they are wars often with no clear military targets, there will be innocent civilians who will be killed, perhaps in very large numbers. And the horrors of war do not stop just with the killing of the innocent, no matter how unintended, but extend to massive injuries and infrastructure damage that may take a generation to overcome. Because of the likelihood of the civilian casualties involved, wars of humanitarian intervention remain morally and legally problematical. Yet, when it really does seem like the last hope for saving many lives, saving wide-scale

⁵¹ LARRY MAY, *AGGRESSION AND CRIMES AGAINST PEACE* 276 (2008).

⁵² *Id.*

⁵³ *Id.* at 292–93.

injury, and saving property from mass destruction, then sometimes such wars seem worth it. And those who initiate and wage such wars, have not clearly done wrong when they pursue humanitarian intervention as a strategy for the promotion of international law.

VI. TERRORIST AGGRESSION AND THE TREATMENT OF TERRORISTS

Like humanitarian intervention, terrorist aggression pushes the limit of the conceptual and normative categories that this article has discussed. In particular, the idea of terrorist aggression calls into question the idea that the world is composed largely of State actors and that the *ad bellum* rules of war are primarily a matter of regulating State behavior. When non-State actors are added into the mix, the central categories are disrupted.

There is no reason to think that only States can wage aggressive wars. In contemporary times, we have seen non-State actors, including terrorist groups, wage war against States and against other non-State actors. Amending a definition offered by Andrew Valls, terrorism is violence committed by State or non-State actors directed against civilians or their property for political purposes.⁵⁴ In the Just War tradition, wars by non-State actors were not generally contemplated because the legitimate authority to wage war resided only in States. There is an interesting exception, which is explored below, concerning piracy as a form of aggression by non-State actors. This section argues that the *jus ad bellum* principles discussed above apply to some terrorist groups, and that when the leaders of such groups wage aggressive war they should be confronted by international legal institutions. This section also argues that when terrorists are confronted and prosecuted they should be afforded the same rights as when State leaders are similarly confronted and prosecuted.

The strategy I adopt, of allowing that some terrorist groups can wage war and that terrorist leaders can be prosecuted for waging aggressive war, as long as such prosecutions are subject to the rule of law, recognizes the reality of the contemporary situation where there are multiple types of actors on the world stage. Non-State actors have increasingly become dominant players especially in a world where many States are quite weak, and where groups that have not been elected can operate in a State's territory unhindered by even the authorities that have been designated to serve all of the people of that State. My strategy does not maintain the fiction that only State leaders can operate in State territories and wage war against other States or peoples.

⁵⁴ Andrew Valls, *Can Terrorism be Justified?*, in ETHICS AND INTERNATIONAL AFFAIRS 68 (Andrew Valls ed., 2000), reprinted in LARRY MAY, ERIC ROVIE & STEVE VINER, THE MORALITY OF WAR 318 (2006).

There is an interesting initial question of whether some terrorist groups can ever resemble sovereign States in the world. For if the answer is no, then it seems that it makes little sense to talk of terrorist groups waging aggressive war, or any kind of war. This is an especially hard case for a theory of aggression and a consideration of *jus ad bellum* principles. In general my strategy is to treat non-State actors like States when non-State actors behave in similar ways to that of States. This section addresses the idea of terrorist aggression initially through several levels. It revisits the Seventeenth Century debates about how to treat pirates, especially concerning the ability of pirates to wage naval battles and seize State ships. In the end it discusses what are the special human rights concerns that prosecuting terrorists entails, and how best to maintain the rule of law even in the face of terrorist aggression.

Alberico Gentili, writing at the end of the Sixteenth Century, provides a good place to begin. He argues that the laws of war do not apply to pirates since they stand outside the system of rules that governs States during times of war.

There is another reason why such men do not come under the law of war, namely, because that law is derived from the law of nations, and malefactors do not enjoy the privileges of a law to which they are foes. How can the law, which is nothing but an agreement and a compact, extend to those who have withdrawn from the agreement and broken the treaty of the human race as Florus puts it? Pirates are the common enemies of all mankind [*hostes humani generis*].⁵⁵

This is representative of Sixteenth and Seventeenth Century thinkers on the topic, but not of thinkers who wrote in earlier centuries of the Just War tradition.

The early Just War theorists were not as committed to the idea that only States can justly wage war. At least part of the explanation is that until the Sixteenth Century there was not as clear a divide between States and other political entities and similarly it was not clear that non-State actors were always illegitimate. Unincorporated non-State actors were much more plentiful in these early eras, and it was not out of the question that they could wage just wars in self-defense. There is also an old tradition of thinking that everyone is entitled to humane treatment, even those who are our worst enemies. Indeed, there was somewhat of a debate in the early Seventeenth Century about whether even pirates should be treated humanely, although it should be clear that thinkers like Gentili were on the side of the majority of theorists that denied this thesis.

⁵⁵ Alberico Gentili, *DE JURE BELLII* [The Law of War] at 22 (John Rolfe, trans., Clarendon Press 1933) (1598).

Before leaving Gentili, here is a comment on the idea of *hostes humani generis*, common enemies of humanity, a term which today is sometimes also applied to terrorists. This term, or an equivalent, was probably first used by Cicero in his *De Officiis*.⁵⁶ But while the term appears to be used in both more ancient sources as well as in Seventeenth Century debates, it is not at all clear that the term has always had the same meaning.⁵⁷ Indeed, it seems that there are several distinct meanings of *hostes humani generis* that are not necessarily related to each other.

- (1) One of the earliest examples of the idea behind this term relates simply to people who had rejected the rules of how States are to be formed, and lived without a centralized authority.
- (2) The term also seems sometimes to have been applied to those political associations, even States, which failed to follow the rules that other States had established concerning property or preservation of life.
- (3) The term seems to have been used most often for those bands of robbers who operated on the high seas and recognized no rules of property or preservation of life.

It is interesting to speculate why these very different examples came to be captured with the same term and what it was that made people think that each case is truly a threat to humanity, not merely to those States in the region where they operated.

The rationale for seeing the groups in the first category as enemies of humanity is merely that they reject the model of State formation as the way to organize political society. One can think of examples today of unincorporated groups that manage to function well and not to threaten their neighbors unduly. Not organizing as States is only the loosest of threats to humanity, and is really only a threat if one thinks that States are the best form of political organization. Indeed, one could see the proliferation of forms of political organization as a healthy, indeed perhaps necessary, means to promote the development of humanity.

The second category is also not obviously a group that poses a threat to humanity. At least in part it depends on whether the rules that most States live by are better than the rules that the non-State actors, or "rogue" States, subscribe to. Here there are three distinct possibilities: the rules of the rogue State are worse than, better than, or no worse than those of the other States. Only in the first case is there cause for alarm, as is true today when some terrorist groups seem to have completely different rules of engagement that put civilians at much greater risk than would be true if they

⁵⁶ See ALFRED P. RUBIN, *THE LAW OF PIRACY* 15–17 (2d ed. 1995).

⁵⁷ *Id.* 90–95.

followed the traditional rules of engagement of States and their armies.⁵⁸ Humanity would not be harmed if there were merely different rules that one State, or non-State actor, followed than were followed by other States. There is often some loss in predictability or efficiency when there is no conformity of rule following, but such a situation hardly places humanity in jeopardy.

The third category is the worrisome one, since here the non-State actor simply does not play by the rules at all, and is seemingly unrestrained in its behavior toward all with whom it comes into contact. The pirates who flew the skull and crossbones might have been signaling that anyone was at risk of death who happened to come into contact with these pirates. This category seems most clearly to be an enemy of humanity. But even here, it depends on whether the non-State actor does in fact have much interaction with the rest of the world. If this law-less group kept to itself, such as a White supremacist, separatist group in Montana, it is not at all clear that it poses a threat to humanity merely by its existence. How they conduct their societies may be reprehensible, but if the members are there uncoerced, it may be that interference is unjustified nonetheless.

This third category may also include some contemporary terrorist groups. Indeed, what makes some terrorist groups morally and legally problematic is that they do not recognize the legitimacy of the rules of war, especially the rule against targeting civilians. In this sense many terrorist groups do not play by the rules. But unlike some pirates of old, terrorists normally play by other rules than those rules that would be recognized by States around the world. Indeed, many terrorist groups see themselves not as enemies of humanity but as insurgents fighting repressive regimes.⁵⁹ There is a sense in which some terrorist groups see themselves as acting much as some States see themselves acting in situations of humanitarian intervention. In this sense, some terrorist groups not only mainly play by the rules but also see themselves as the ultimate protector of those for whom the rules are not providing protection.

One could argue that the mere fact that terrorist groups do not play by the same rules as most States makes them a threat to the international rules. If there are two alternative sets of rules that one can adhere to, it may seem that no one is held to any particular rules at all, thereby undermining the continued existence of any rules at all.⁶⁰ The argument that having alternative rules weakens or jeopardizes any rules is not convincing. Think of the alternative ways of computing US taxes, or the alternative ways of doing

⁵⁸ See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 165 (2d ed. 2004).

⁵⁹ See LARRY MAY, *AGGRESSION AND CRIMES AGAINST PEACE* 302 (2008).

⁶⁰ I am grateful to Cindy Holder for suggesting this objection to me, and for generally an excellent set of comments on a paper of mine that was an ancestor to this chapter. See also MARK OSIEL, *THE END OF RECIPROCITY* (2009).

double entry accounting. While cumbersome, and ripe for unfairness, having alternative sets of rules between which one can choose, does not necessarily undermine the rules.

The situation of pirates and their treatment in ancient times may still provide valuable lessons for how to regard some terrorists. As Alfred Rubin points out, in Roman times some pirate groups were treated as no different from small States, where some of these non-State groups were the proper subject of war on the part of Rome, and where others were simply given no moral or legal status since they were enemies of humanity.⁶¹ Today, one could similarly divide “terrorist” groups into those that behaved more in State-like ways than others. Some pirates were treated like brigands and others were given quasi-State status. Today, similarly, terrorist groups like the Bader Meinhoff group are more like criminal gangs and brigands, and groups like Hamas, which in fact won a significant election in Palestine in 2006, are sufficiently State-like to be given a different status.⁶²

Before concluding discussion on this topic, it is worth noting that Grotius generally opposed Gentili’s views in early international legal theory. Grotius claims that pirates are beyond the moral pale in the sense that they are “banded together for wrongdoing,”⁶³ yet he thinks that pirates should be treated in a moral way. According to Grotius, pirates must have their rights protected, not for their own sake, but for the sake of God or other parties.⁶⁴ Failure to take the rights of pirates seriously, in a sense jeopardizes the rights themselves since all humans share a common interest in this protection of rights.⁶⁵ There is a difference between asking whether the life of a pirate is to be condemned and asking how the rights of pirates should be treated, especially in war. Following Grotius here, we can see pirates as *hostes humani generis* and yet still as having rights that need to be protected. Even as they are common enemies of humanity they are also members of humanity.

Terrorists should be viewed similarly to how Grotius viewed pirates. Generally those terrorists who are common enemies of humanity are nonetheless also members of humanity. As members of humanity, terrorists are owed the same human rights considerations as any other member of humanity, since human rights attach merely to membership not to what the person otherwise deserves. I hope these brief remarks illustrate how Just War principles can inform our debates about international law.

⁶¹ OSIEL, *id.*

⁶² LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE 302 (2008).

⁶³ 2 GROTIUS, *supra* note 15, at 631.

⁶⁴ *See id.* at 373, 631.

⁶⁵ *See id.* at 373–374. *See also* LARRY MAY, WAR CRIMES AND JUST WAR 301–23 (2007) (arguing for a similar analysis and conclusion of a Grotian position concerning terrorists).