4 Sovereignty and human rights

> War … is so horrible, that nothing but mere Necessity, or true Charity, can make it lawful.
>
> Hugo Grotius[1]

> The law of nations may be deduced, first, from the general principles of right and justice applied to the concerns of individuals, and thence to the relations and duties of nations.
>
> Justice Story[2]

In the last chapter, we discussed *jus ad bellum* under the national defense paradigm, according to which only defensive war is justified. Given the priority principle, which is part of this idea of just cause, the first use of force is never justified.[3] This understanding of just cause is different from that during much of the history of the just war tradition. In particular, the just war paradigm, which characterized the tradition through the seventeenth century, did not accept the priority principle, and aggression was not the only wrong that could justify war. In this chapter, we continue our discussion of *jus ad bellum* by examining whether there is a need to revise our account of just cause in ways more consonant with the just war paradigm.

In recent decades, a number of wars have been justified on humanitarian grounds. A *humanitarian intervention* is a war launched to rescue persons in another state suffering under a grave humanitarian crisis, such as genocide, mass enslavement, starvation, or ethnic cleansing, usually at the hands of their own government. Among the recent interventions

[1] Hugo Grotius, *The Rights of War and Peace*, trans. Jean Barbayrac (London: W. Innys, 1738), p. 507.

[2] Supreme Court Justice Story, *United States* v. *Le Jeune Eugenie*, 26 Federal Cases 832 (1822), pp. 846–848.

[3] Recall that preemptive war may fit this formula if the attack that is preempted is understood as already in progress.

widely viewed as justified on humanitarian grounds are India's invasion of East Pakistan (1971), which established the state of Bangladesh, the Vietnamese invasion of Cambodia (1978), which ended the genocidal Khmer Rouge regime, the Tanzanian invasion of Uganda (1979), which overthrew the murderous regime of Ida Amin, the Somalia intervention by the United States and others (1992), which made possible the delivery of needed humanitarian relief, the United States invasion of Haiti (1994) to reestablish a democratically elected president, and the Kosovo War (1999), an attack on Serbia by the United States and several European states, seeking to end the ethnic cleansing by Serbia of ethnic Albanians in Kosovo.

While humanitarian intervention has been controversial, both as a general concept and in its particular instances, it is commonly accepted that such a use of force is justified on some occasions. Yet this flies in the face of the national defense paradigm. It is a violation of the priority principle. To defenders of the national defense paradigm, it is simply aggression; a strict understanding of the paradigm leaves no room for a first use of force that is not aggression. Humanitarian intervention violates the sovereignty of the state that is attacked, which has committed no wrong against another state. It creates an exception to the national defense paradigm, which I will call the *humanitarian intervention exception*. I shall assume that this exception is morally acceptable and that humanitarian intervention is sometimes justified. There are critics of the humanitarian intervention exception, but much of the criticism is pragmatic or consequentialist rather than based on an in-principle defense of absolute sovereignty.[4] In this chapter, I take up the question of how *jus ad bellum* should be understood in order to accommodate the humanitarian intervention exception. To begin the discussion, consider the Kosovo War.

4.1 The Kosovo War

Following the dissolution of the Soviet Union and the achievement of independence by its former client states in Eastern Europe around 1990, one of

[4] For some criticisms, see Adam Roberts, "The Road to Hell: A Critique of Humanitarian Intervention," *Harvard International Review* 16, no. 1 (Fall 1993), pp. 10–13, and Jennifer Welsh, "Taking Consequences Seriously: Objections to Humanitarian Intervention," in Jennifer Welsh (ed.), *Humanitarian Intervention and International Relations* (Oxford University Press, 2004), pp. 52–68.

them, Yugoslavia, underwent dramatic political turmoil. The Yugoslavian state had encompassed several distinct ethnic groups, including Serbs, Croats, Bosniaks, Slovenes, and Albanians, and in the 1990s, as the political force of the central government weakened, the centrifugal force of their strong group identities came to the fore. Yugoslavia broke into several ethnically based states, and ethnic tensions were severe in some ethnically mixed areas that sought independence from the central government, controlled by the Serbs. A murderous civil war was fought in Bosnia between 1992 and 1995, including genocide and ethnic cleansing[5] on the part of the Serbs (and others) seeking to establish their own ethnic state within Bosnia. The war, which included an extended, murderous siege of the city of Sarajevo, dragged on for a number of months before the United States and Western Europe (under NATO, the North Atlantic Treaty Organization) got involved militarily, leading to an end to the conflict.

Another area of turmoil was Kosovo, a largely (80 percent) ethnic Albanian area which also sought independence, but which was still firmly under the control of the Serbian rulers of the rump state of Yugoslavia. In 1989, the president of this state, Slobodan Milošević, stripped Kosovo of the autonomous status it had been granted in 1974 by a former ruler of Yugoslavia. Milošević, playing to Serbian nationalism, but also responding to concern about the Albanian treatment of the minority Serbian population, stripped Kosovo of its autonomy and instituted a growing political repression, including efforts to force ethnic Albanians out of the country. In the early 1990s, the Kosovar Albanians responded to the repression nonviolently, staging peaceful protests and setting up alternative governmental and social institutions parallel to the official ones controlled by the Serbs.[6] Later in the decade, armed conflict between the Serb military and the Kosovo Liberation Army grew in intensity, and NATO began with increasing urgency to warn Serbia off of its militant, ethnically driven course. A Serb military offensive in 1998 killed 1,500 Kosovar Albanians

[5] Ethnic cleansing is forcing members of an ethnic group out of a given geographical area. It usually involves large-scale killing (and so may also be considered a form of genocide) in order to create the fear that will drive other members of the group out of the area as refugees.

[6] The nonviolent struggle was led by Ibrahim Rugova (1944–2006), known as the "Gandhi of the Balkans." In support of his movement's efforts, he asserted: "The Slaughterhouse is not the only form of struggle."

and drove thousands from the country. In the fall of 1998, the UN Security Council, in two resolutions, demanded that Serbia stop its assault against the civilian population of Kosovo, and NATO threatened air strikes. A brokered deal collapsed, and NATO began air strikes against Serbia on March 24, 1999 to force the Serbs to stop their ethnic repression. No NATO ground troops were used. The air assault included over 14,000 strike missions and lasted for eleven weeks, before Serbia agreed to withdraw from Kosovo. By the beginning of NATO's attacks, it is estimated that Serbia had forced about 200,000 ethnic Albanians out of Kosovo, but once the air attacks began, Serbia picked up the pace and viciousness of its ethnic cleansing. By the end of the war, roughly 750,000 Kosovars were international refugees.[7]

The Kosovo War was controversial for the way in which it was conducted, especially NATO's exclusive reliance on air power, which did great damage to the infrastructure of Serbia, seriously harming the civilian population. NATO justified deliberate attacks on infrastructure targets on the grounds that they were "dual use," meaning that they served military as well as civilian purposes. The reliance on air power allowed the Serbian forces within Kosovo, who could not be effectively attacked by high-flying aircraft, free rein to continue the ethnic cleansing while the war lasted. In addition, the war itself was fought without the backing of the UN Security Council, raising the criticism that it violated international law. (NATO did not put the war to a Council vote because it faced certain veto by China and Russia.) But fewer criticized the war *because* it was a humanitarian intervention. Many critics of the war accepted the moral principles on which it was fought. The war led to the first indictment of a serving head of state, Milošević, for crimes against humanity by the International War Crimes Tribunal in The Hague. He was eventually turned over to the Court by Serbia, but after engaging in extensive stalling tactics, he died in custody before the completion of his trial.

The humanitarian intervention exception seems firmly established in our contemporary understanding of the morality of war. But the exception appears to be inconsistent with the just cause criterion of the national defense paradigm. How is this to be explained? There are at least three lines of response.

[7] For this discussion, I drew in part from Adam Roberts, "NATO's 'Humanitarian War' over Kosovo," *Survival* 41, no. 3 (Autumn 1999), pp. 102–123.

(R1) The inconsistency is merely apparent; the humanitarian intervention exception can be accounted for through the national defense paradigm.

(R2) The inconsistency is real, and so the humanitarian intervention exception requires a new understanding of just cause and a new paradigm for *jus ad bellum*.

(R3) The inconsistency is real, but it is representative of a larger inconsistency that calls into question *jus ad bellum* as a whole.

We will examine each of these responses below, beginning with (R1).

4.2 The domestic analogy and state sovereignty

The moral foundation of the national defense paradigm is the *domestic analogy*. As one individual M is justified in attacking another, N, only if M is under attack by N (or is aiding someone who is under attack by N), a state S is justified in attacking another state T, only if S is under attack by T (or is aiding another state which is under attack by T). The analogy is between individual autonomy and state sovereignty.

State sovereignty is the moral value to which the domestic analogy refers.[8] But does sovereignty have the value thus attributed to it? The notion of state sovereignty is the problematic heart of the national defense paradigm. Sovereignty is related to the *non-intervention principle*, the rule that no state should intervene militarily in the affairs of other states, except in self-defense. Sovereignty is the discretionary power of a state to control what goes on within its borders. The idea is related to the well-known claim of the German sociologist Max Weber (1864–1920) that "the state is the form of human community that (successfully) lays claim to the *monopoly of the legitimate physical violence* within a particular territory." The state's ability to exercise sovereign discretion arises from the effective monopoly it has on violence. But the content of sovereignty goes beyond this. Weber continues: "The state is regarded as the sole source of the 'right' to use violence."[9] There is an ambiguity on the term *right*, suggested by Weber's

[8] Charles Beitz, *Political Theory and International Relations*, new edn. (Princeton University Press, 1999), p. 122.

[9] Max Weber, "Politics as a Vocation," reprinted in Michael Morgan (ed.), *Classics of Moral and Political Theory*, 4th edn. (Indianapolis, IN: Hackett Publishing, 2005), pp. 1213–1249, at pp. 1213–1214.

scare quotes. Is the state's discretionary right to use violence domestically merely a function of its power and its claims to legitimacy (might makes right), or is it a moral right?

There are two related aspects of state sovereignty. *Internal sovereignty* is a state's control of what goes on within its borders; it assumes *external sovereignty*, which is a state's freedom from external interference. The non-intervention principle is how external sovereignty is understood under the national defense paradigm. A sovereign state has territorial integrity and political independence. Absent its aggression, it is free to conduct its own internal affairs, free of forceful interference by other states. But under the regular war paradigm, as we saw in Chapter 2, external sovereignty represents a different form of discretion, a state's discretion to use its force abroad as it sees fit. Under this conception, the external sovereignty of one state is at odds with the internal sovereignty of another. Yoram Dinstein notes that: "State sovereignty has a variable content … The contemporary right to employ inter-state force in self-defense is no more 'inherent' in sovereignty than the discredited right to resort to force at all times."[10] External sovereignty can mean either *freedom from* external interference, as it does under the national defense paradigm, or *freedom to* interfere in the affairs of others, as it does under the regular war paradigm. The content of the idea of sovereignty is not constant, but changes with the historical context.

In the domestic analogy external sovereignty is understood as freedom from outside interference. In the analogy, the analogue of state sovereignty is individual autonomy. Autonomy represents the dignity of persons; it is what makes individuals morally important. It is their capacity for freedom, their power of choice, their ability to determine their own lives. It is the source of the idea that individuals have inalienable moral rights, which other people and all social and political systems are obligated to respect. Autonomy rights, also called *human rights*, do not depend on the political context in which a person exists or the political consequences of recognizing them. Human rights apply to everyone everywhere. Autonomy has intrinsic moral value; its value is not merely extrinsic or instrumental, not dependent on context. According to the domestic analogy, state sovereignty has analogous characteristics. But does it?

[10] Dinstein, *War – Aggression and Self-Defense*, 4th edn. (Cambridge University Press, 2005), p. 180.

Autonomy is the power of an individual to lead his own life. Defenders of the domestic analogy claim that states have the analogous power of *self-determination*. It is morally important that both individuals and states be able to chart their own destiny, and this is the moral grounding of both the non-intervention principle for states and the right of individuals to non-interference. In each case, a party is wronged when force is used against it (absent its aggression). Indeed, the self-determination of states is often seen as an important value in international affairs, and it is appealed to in opposition to various forms of control some states seek to exercise over others.

But there are problems with the idea of state self-determination.[11] For a state to be capable of self-determination, it must, in some relevant sense, be a *self*. An individual is a self because she has the power of choice, which makes her a responsible moral agent. Is the state a self in this sense? There are theorists who take this view. Emer de Vattel claims that a state "has her affairs and her interests; she deliberates and takes resolutions in common; thus becoming a moral person, who possesses an understanding and a will peculiar to herself, and is susceptible of obligations and rights."[12] Vattel sees the state as functioning like an individual, so being a determining self, and such a perspective seems necessary for the state to be appropriately similar to the individual, as required by the domestic analogy.

One rough way to understand the comparison between state and individual entailed by the analogy is in terms of the metaphysical concept of *holism*. An individual is a self because all of his parts are integrated into a whole, and this is necessary for a self to be a responsible moral agent. A self is a whole, more than the sum of its parts. Vattel sees the state in this way, but such a view is not readily sustainable. According to philosopher Douglas Lackey, states are "aggregates of persons [which] do not possess consciousness and 'make choices' only in a metaphorical sense," and speaking "of the 'right of nations' is like speaking about 'the average American family,' something that doesn't really exist, though rights exist and families exist."[13] If the state is not a whole in

[11] Beitz, *Political Theory*, pp. 92–95.

[12] Emer de Vattel, *The Law of Nations*, ed. Bella Kapossy and Richard Whatmore (Indianapolis, IN: Liberty Fund, 2008), p. 67.

[13] Douglas Lackey, *The Ethics of War and Peace* (Englewood Cliffs, NJ: Prentice-Hall, 1989), p. 38.

this sense, it cannot be self-determining in a way that an individual is self-determining.

If states are not wholes in this sense, then they have no moral status of their own. Their moral status, the respect they are owed by other states, derives from the moral status of their members, individual citizens. (To see the state in this way is to see it in *individualistic* rather than holistic terms.) On this view, states have only extrinsic moral value, not the sort of intrinsic moral value possessed by individuals. The value of state sovereignty and self-determination is extrinsic, and this value is derived from that of its members. The state has no intrinsic moral value. This opens up the idea that the moral status of sovereignty, the respect a state is due, depends on the moral respect it shows its own citizens, which would call into question the status of the non-intervention principle.[14]

But there may be other ways to apply the domestic analogy. Michael Walzer is a supporter of the national defense paradigm who advances this position through appeal to the domestic analogy. In his account, the analogue of the individual is not the state as such, but the community that the state normally represents. Speaking of that community, Walzer claims: "Over a long period of time, shared experiences and cooperative activity of many different kinds shape a common life." If aggression occurs, the protection the state provides to the community through defensive war "extends not only to the lives and liberties of individuals but also to their shared life and liberty, the independent community they have made."[15] Walzer distinguishes between two kinds of lives and liberties: (1) the *common life* of the community with its liberty and (2) individual lives of citizens with their liberty. The state may serve to protect them both. The common life is the product of individual decisions and interactions taken collectively, so that the state's defense of the common life is, Walzer argues, a defense of a special kind of individual right, the right of individuals to non-interference with the common life they have collectively created. Self-determination becomes the liberty of the community, not the state, to chart its own path. I will refer to such rights as *common life rights*. The obligation of a state not to engage in aggression is due to its need to respect the common life rights of the citizens of the would-be

[14] Beitz, *Political Theory*, p. 69.

[15] Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), p. 54.

object of attack, as well as the more familiar kind of individual rights based on their individual lives and liberties. These latter, more familiar rights we will refer to as *liberal rights*. Liberal rights are held by individuals because they are individuals, not because they are participants in a common life. It is important to note that Walzer explicitly disavows any Vattel-like talk of the state as a moral person, and its holistic implications. "States are not in fact like individuals (because they are collections of individuals)."[16]

Walzer endorses the humanitarian intervention exception, but the question is how he does so, given his understanding of the domestic analogy. He argues that if we see the moral basis of the non-intervention principle as the need to respect common-life rights, the domestic analogy sometimes requires that its non-interventionary implications be suspended. Consider the sort of severe humanitarian crisis he argues could justify humanitarian intervention, involving rights violations within a state that "shock the moral conscience of mankind." In such a situation, "when a government turns savagely upon its own people," Walzer says, "we must doubt the very existence of a political community to which the idea of self-determination might apply."[17] It is not completely clear what Walzer means here. That idea seems to be that in a severe humanitarian crisis, the state no longer represents the common life of the community. When that is the case, the non-intervention principle no longer stands in the way of intervening with the actions of the state in order to protect the liberal rights of those under threat in the humanitarian crisis. Presumably, the common life rights remain in effect, but because the state no longer protects those rights (as evidenced by its massive violations of liberal rights), those rights no longer protect the state from interference. But one problem with this interpretation is that a military attack, due to the damage it would do, would probably violate common life rights, which means that they would still stand in the way of the intervention.

Walzer's account of the humanitarian intervention exception makes clear that the moral value of state sovereignty is derivative from the moral value of individuals. The value of state sovereignty is extrinsic, depending on the state's respect for the rights of its citizens, where the intrinsic value lies. The rights of states against intervention are derivative from the

[16] *Ibid*., p. 72. [17] *Ibid*., pp. 101, 107.

individual rights of their citizens; they "derive ultimately from the rights of individuals, and from them they take their force."[18] But this picture is complicated for Walzer because of the different kinds of individual rights he posits, liberal rights and common life rights, which function differently in this regard. For Walzer, the rights of states against intervention derive directly from the common life rights of the community which the state represents. So long as the state represents the common life rights of the community, sovereignty stands inviolate, irrespective of whether the state respects its citizens' liberal rights. It is only when violations of liberal rights become massive, at levels that "shock the moral conscience of mankind," that the community's common life rights are no longer represented by the state and intervention may occur. Only then is there a moral opening for other states to act to protect the citizens' liberal rights. In this sense, respect for common life rights takes precedence over protection of liberal rights; common life rights are lexically prior to liberal rights. So, for Walzer, the state's respect for its citizens' liberal rights affects sovereignty only indirectly and at the margin, only when their massive violation by the state entail that the common life rights no longer protect the state. Only to this extent is the moral content of sovereignty conditional on the state's protecting the liberal rights of its citizens.

Because Walzer accepts some humanitarian intervention, state sovereignty may sometimes be violated, so that his theory is one of *conditional sovereignty*, but the conditions are very weak. In general, sovereignty is conditional when its ability to protect the state from outside interference is conditioned on (or limited by) the state's internal or domestic behavior, specifically. Absent the satisfaction of the condition, outside intervention may be justified. In general, theories of conditional sovereignty condition sovereignty on a state's respect for its citizens' liberal rights. The conditions in Walzer's theory are distinctive, and weaker, due to the priority he gives to common life rights over liberal rights. Among theories of conditional sovereignty, his is among the weakest.

In assessing Walzer's theory, it is helpful to note the distinction between *nations* and *states*. Nations are groups of people strongly connected by a common ancestry, history, and/or culture. The community that possesses common life rights for Walzer is similar to a nation. There is no one-to-

[18] *Ibid*., p. 53.

one correspondence between states and nations because not all nations have states (for example, the Kurdish nation is spread among several states, including Turkey, Iraq, and Iran) and not all states encompass a single nation (for example, Britain includes the English, the Scots, and the Welsh). This lack of correspondence poses a problem for theories of sovereignty that condition the moral protection sovereignty provides on the nation. The American philosopher David Luban notes that "the concept of sovereignty systematically and fallaciously confuses a nation and its state, granting illegitimate states a right to which they are not entitled."[19] This should not count as a criticism of Walzer because he does not identify nation or community with state. But the wide-spread lack of correspondence between nations and states may raise a problem for him, namely, whether his theory of conditional sovereignty can have much relevance to the world given that few states could represent a single unified nation.

One criticism of Walzer is that common life rights are not really individual rights at all, so that his theory would not escape the criticisms of a holistic approach to sovereignty discussed earlier. There are different ways this is argued. One is to claim that these rights cannot be individual rights because individual rights serve to protect individuals in certain ways from the conduct of other individuals. For example, a person's right to life is her right that no other individual take her life. But common life rights lack this characteristic. They protect nothing of mine from other members of my society, but rather protect something which is partly mine (the common life) from external interference. Common life rights cannot protect me from other members of my society because it is my interactions with them that define what the common life is, what is to be protected. For Walzer, my common life rights stand in the way of efforts by outsiders to protect my liberal rights from encroachment by my state. Walzer seems to want to include common life rights as individual rights, along with standard liberal rights, in order to avoid commitment to a holistic perspective. But, on his view, an oppressive state can appeal to its citizens' common life rights to immunize itself from outside efforts to protect their liberal rights. Walzer's set of individual rights, including common life rights, is, in a sense, self-confounding, in that there is built-in opposition between

[19] David Luban, "Just War and Human Rights," *Philosophy & Public Affairs* 9, no. 2 (Winter 1980), pp. 160–181, at p. 169.

liberal rights and common life rights. While liberal rights may occasionally conflict with one another, they are not in systemic opposition as liberal rights and common life rights seem to be, given the prevalence of oppressive governments. Walzer endorses the apparent paradox that individuals "have a right to a state within which their rights are violated."[20]

A related criticism is a comment on Walzer's claim that, in the case of most authoritarian governments, we should recognize "a morally necessary assumption: that there exists a certain 'fit' between the community and its government and that the state is 'legitimate'."[21] The point is that oppressive governments may represent the common life of their communities because their stance toward liberal rights fits the traditions of the community. Charles Beitz argues that this assumption is often quite implausible, especially in the developing world, where it "appears quite clearly false that authoritarian regimes arose from indigenous political processes, reflecting widely shared, traditional values, and without significant external influences."[22] Adopting a different tack, Walzer at points presents his argument in epistemological terms, basing his general injunction against intervention on our *ignorance* of the internal workings of other societies. On this weaker version of his argument, the claim is not that most illiberal states are in fact legitimate, but rather that, given our ignorance, we should presume that they are unless their illegitimacy becomes "radically apparent," as in cases of genocide. But Beitz's point is that a basic understanding of political forces at work in the developing world makes illegitimacy radically apparent in a much broader range of cases than Walzer would allow.[23] It seems, in any case, that Walzer's shift to an epistemological argument is at odds with his basic idea of common life rights, according to which such rights hold, not simply that they should be *assumed* to hold, short of genocide.

These criticisms reveal the theoretical price that Walzer pays for attempting to defend, on grounds of individual rights, a position usually

[20] Michael Walzer, "The Moral Standing of States: A Response to Four Critics," *Philosophy & Public Affairs* 9, no. 3 (1980), pp. 209–229, at p. 226.

[21] *Ibid*., p. 212.

[22] Charles Beitz, "Nonintervention and Communal Integrity," *Philosophy & Public Affairs* 9, no. 4 (1980), pp. 385–391, at p. 386, note 2.

[23] See also David Luban, "The Romance of the Nation-State," *Philosophy & Public Affairs* 9, no. 4 (summer 1980), pp. 392–397.

defended on the grounds of non-derivative state sovereign rights. By moving to a theory of conditional sovereignty, Walzer opens himself up to criticisms from proponents of other theories of conditional sovereignty. These theories typically place much stronger conditions on sovereignty because they do not have a category like that of common life rights, respect for which take precedence over defense of liberal rights. Walzer's attempt to explain the humanitarian intervention exception is theoretically problematic.

A shift from Walzer's theory to a theory that conditions sovereignty exclusively on a state's respect for liberal rights represents a shift from an (R1) response to an (R2) response. An (R2) response recognizes the need to move beyond the national defense paradigm in order to explain the humanitarian intervention exception. Charles Beitz characterizes this shift as a move from a *morality of states* to a *cosmopolitan morality*.[24] The national defense paradigm, following the domestic analogy, is a morality of states because it treats states as its basic moral units. An approach that conditions sovereignty on a state's respect for liberal rights, is, in contrast, a cosmopolitan approach, in that it would base justification on rights that are universal among individuals. Under such an approach, the wrongs that provide a just cause for war are wrongs to individuals, not directly to states. The effort to reconstruct *jus ad bellum* in terms of individual rights (without common life rights) requires a switch to what I will call the *human rights paradigm*.

4.3 Humanitarian intervention and the human rights paradigm

Consider the most basic liberal right, the right to life. States sometimes do a fair job of protecting this right for most of their citizens most of the time. Individuals have often had a better chance of having their right to life respected and protected by their own state than by trusting to the kindness of international strangers (not to say that their chances were that good in either case). Even those enslaved or oppressed were likely to fare worse at the hands of a foreign invader. The fact that aggression would generally

[24] Charles Beitz, "Bounded Morality: Justice and the State in World Politics," *International Organization* 33, no. 3 (Summer 1979), pp. 405–424, at p. 406. Also Beitz, *Political Theory*.

decrease the life prospects of the citizens of the target state could serve as a justification for defensive war. But in recent decades, this assumption has weakened in many parts of the world. In both capability and intention many states have become more oppressive and murderous toward their citizens. This, along with growth in the consciousness of the importance of human rights and an awareness of their violation through the media, has meant that states are now sometimes motivated to intervene to protect citizens of other states from the depredations of their own governments. As Walzer notes: "It isn't too much of an exaggeration to say that the greatest danger most people face in the world today comes from their own states, and the chief dilemma of international politics is whether people in danger should be rescued by military forces from the outside."[25]

The result is an increase in the occasions in which humanitarian intervention may be justified, and the resultant need to seek an understanding of *jus ad bellum* that takes account of this fact. The difficulties with Walzer's account of the humanitarian intervention exception gives us reason to abandon efforts to account for this exception in terms of the national defense paradigm. What we seem to require instead is an account of *jus ad bellum* grounded in individual liberal rights rather than the rights of states or common life rights as Walzer understands them. This is the human rights paradigm.

Here is an analogy that may help to explain the proposed switch in paradigms. Just war theory is now like physics was at the start of the twentieth century, when Einstein's theories of relativity replaced Newton's physics. Einstein recognized that Newton's physics explained the motion of objects in our experience, but Einstein's theory implied that objects behaved very differently at great velocities. Not until later in the century would tests be developed to observe that very fast-moving objects conformed to Einstein's rather than Newton's paradigm. These new experiences showed the need to switch to Einstein's paradigm.[26] This switch in paradigms is similar in some ways to the switch from the national defense paradigm to the human rights paradigm. In the past century we have been aware of situations where military intervention might plausibly be a better way to

[25] Walzer, *Just and Unjust Wars*, 3rd edn. (New York: Basic Books, 2000), p. xi.

[26] Einstein did not base his theory on such experience, but rather on theoretical considerations. The theory could not be tested on such objects until decades later.

protect individual rights than a blanket rule of non-intervention, but the old paradigm, the national defense paradigm, endorsed the blanket rule. Thus the need for a new *ad bellum* paradigm, the human rights paradigm. But as Einstein had to show that his theory could explain what Newton's did, in addition to the new experiences, we must show that the human rights paradigm can justify traditional defensive wars, as well as humanitarian intervention.

To introduce a discussion of the human rights paradigm, consider some further points about military intervention, in general, and humanitarian intervention, in particular.

The priority principle is the rule that a state should not be the first to use force against another state, and aggression is military force that violates that principle. This understanding would make humanitarian intervention, which violates the principle, a form of aggression. But humanitarian intervention, if it is sometimes justified, should not be seen as aggression because aggression is a *moralized concept*, meaning that any war labeled aggression is understood to be unjust.[27] Thus, we need to abandon the priority principle and admit that some wars involving the first use of force are justified. This requires an intermediate concept like *intervention* that lies between aggression and defense. Consider this list of moral categories of war: (a) defense; (b) intervention; and (c) aggression. The national defense paradigm recognizes only defense and aggression. The addition of intervention adds a morally relevant category to the way we think about *jus ad bellum*. Intervention is different from defense because it involves a first use of force, and it is different from aggression because it can sometimes be justified. In this list, (a) is justified, (c) is not, and (b) sometimes is and sometimes is not.

The distinction between intervention and aggression may be cast in terms of motive. Aggression typically exhibits the sort of negative or vicious motives that concerned Augustine, such as greed, lust, or desire to dominate. In contrast, behind intervention, whether justified or not, are generally neutral or virtuous motives, such as benevolence or fear (which is also a motive for defense). In the last chapter, we discussed *preventive intervention*, which we called preventive war, whose motive is fear

[27] On the idea of a moralized concept, see Darrel Mollendorf, *Cosmopolitan Justice* (Boulder, CO: Westview Press, 2002), p. 104.

of future attack. Preventive intervention is unjustified. Now we consider humanitarian intervention, whose motive is generally benevolence, and which is sometimes justified. Other forms of intervention are discussed in Chapter 7.

While the occasional justification of humanitarian intervention has only recently come to be generally accepted, in contrast to the way it is generally viewed under the national defense paradigm, it has a longer pedigree in the just war tradition. Hugo Grotius asks, "Whether we have a just Cause for War with another Prince, in order to relieve his Subjects from their Oppression under him?" He answers yes, because: "If the Injustice be visible … as no good Man living can approve of, the Right of human Society shall not be therefore excluded."[28] Indeed, we can trace the theoretical basis for humanitarian intervention back to Augustine, who argued that force should be used not in defense of oneself, but in defense of others.[29] Augustine and Grotius speak out of the just war paradigm, and this suggests that there may be some overlap between that older paradigm and the human rights paradigm. Each justifies a first use of force.

In a discussion of just war theory, Elizabeth Anscombe offers this criticism of the national defense paradigm: "The present-day conception of 'aggression' … is a bad one. Why *must* it be wrong to strike the first blow in a struggle? The only question is, who is in the right, if anyone is." Striking the first blow is not always wrong, as the priority principle would have it. To provide an example, she compares two military policies of Lord Palmerston (1784–1865), a nineteenth-century British politician and prime minister: the Opium Wars, intended to force China to open up to Western trade, and his efforts at the suppression of the Atlantic slave trade. Both of these policies involved the first use of force, but "there is no doubt that he was a monster in the one thing [the Opium Wars], and a just man in the other [suppressing the slave trade]."[30] His military actions against the slave

[28] Grotius, *Rights of War*, pp. 1159–1161. The phrase "as no good Man living can approve of" echoes the phrase used by Walzer, actions that "shock the moral conscience of mankind." *Just and Unjust Wars*, p. 107.

[29] Gregory Reichberg, "Jus ad Bellum," in Larry May (ed.), *War: Essays in Political Philosophy* (New York: Cambridge University Press, 2008), pp. 11–29, at p. 23.

[30] Elizabeth Anscombe, "War and Murder," in E. Anscombe (ed.), *Ethics, Religion, and Politics* (Oxford: Blackwell, 1981), pp. 51–61, at p. 52. Palmerston was reported to have said: "I will not talk of non-intervention, for it is not an English word."

trade were a form of humanitarian intervention, and morally justified despite being a first use of force.

Humanitarian intervention is a military response to a severe humanitarian crisis within another state, a response designed to ameliorate or end the human rights abuses that constitute that crisis. In addition to genocide and ethnic cleansing, human rights abuses may include deprivation of basic necessities, as in cases of mass famine. Humanitarian intervention is distinct from both *humanitarian assistance*, provision of welcomed aid in the case of natural disasters, and *humanitarian interference*, non-military forms of coercion, such as economic boycotts, meant to end human rights abuses. These three forms are sometimes mixed, for example, intervention and assistance can go together, as in the United States intervention in Somalia in 1992, where military force was used to create the order and stability necessary for the successful distribution of assistance to the starving. While humanitarian assistance is welcomed by the victims, it sometimes requires military force as well either because the situation is politically chaotic (as in Somalia) or because the government seeks to avoid the outside scrutiny that assistance would bring. One example of the latter is resistance to aid by the military government of Myanmar (formerly Burma), which suffered a devastating cyclone in 2008. The target of a humanitarian intervention can be a *normal state* (where the government is fully in control), an *inept state* (where the government is only partly in control), or a *failed state* (where there is little or no functioning central government). In recent years, humanitarian crises have been occurring more often in inept or failed states, where the crisis is usually due, in part, to the depredations of militia forces beyond the government's control.

Humanitarian intervention is a form of *rescue*, its goal being to rescue individuals caught in humanitarian crises. (Indeed, under the human rights paradigm, this is true of all justified wars, including defensive wars.) The purpose of the intervention is to prevent rights violations, not to punish a state for the violations it has already committed. The intervention must be undertaken in the midst of a crisis, when there are still violations to be avoided, not after it is over. Humanitarian intervention may involve either *mere rescue*, *rescue through regime change*, or *rescue through political reconstruction*. In the case of mere rescue, the rights violations may be ended without the need to overthrow the regime. In the case of rescue through regime change, the regime is removed as a necessary step in achieving the

humanitarian ends. In the case of rescue through political reconstruction, sustained efforts at "nation building," beyond simple regime change, are required to end the abuses. If the state itself is the chief rights violator, often the only way to achieve rescue is to overthrow the regime, which is then likely to require subsequent efforts at political reconstruction.[31]

Argentine legal scholar Fernando Tesón offers a cosmopolitan account of humanitarian intervention elaborated in terms of individual rights.[32] According to Tesón, state sovereignty has no intrinsic moral value, only a derivative or instrumental value, dependent on the extent to which the state promotes the protection of individual rights. Morally acceptable humanitarian intervention is "the proportionate international use or threat of military force, undertaken in principle by a liberal government or alliance, aimed at ending tyranny or anarchy, welcomed by the victims, and consistent with the doctrine of double effect."[33] Some of the clauses deserve comment. "Tyranny" and "anarchy" are political conditions that tend to involve systematic violations of individual rights (though it would have been better had he used the idea of individual rights violations directly in the definition). The stipulation that humanitarian intervention must "cause more good than harm" is the requirement that it satisfy the proportionality criterion, which we discuss in the next section.[34]

That the intervention must be "welcomed by the victims" is, presumably, to ensure that the state conduct that justifies intervention is in fact a violation of rights. If the apparent victims would not choose to be spared the conduct that appears to victimize them, there would be no evidence that their rights were being violated. For Tesón, however, the consent in question is not actual consent, but *ideal consent*, meaning that it is determined by the answer to a hypothetical question: would the victims consent to the intervention, assuming that they were rational and aware of the risk that innocent persons, including themselves, could be killed in the war? Lastly, Tesón's stipulation that intervention must be in accord with

[31] Michael Walzer, "Regime Change and Just War," *Dissent* (Summer 2006), pp. 103–111.

[32] Fernando Tesón, "The Liberal Case for Humanitarian Intervention," in J. Holzgrefe and Robert Keohane (eds.), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge University Press, 2003), pp. 93–129.

[33] *Ibid*., p. 94.

[34] *Ibid*., p. 114. Presumably by "good" here, Tesón means the avoidance of evil or harm.

the doctrine of double effect brings *jus in bello* into the discussion.[35] The doctrine permits *some* killing of innocent people, as long as their deaths are merely foreseen, not intended, as we discuss in Chapters 5 and 6.

Tesón's and Walzer's accounts of humanitarian intervention differ substantially in theory, as one represents the national defense paradigm and the other the human rights paradigm. According to Tesón, they also differ substantially in practice, as his theory would, in principle, allow humanitarian intervention in all cases of tyranny or anarchy, while Walzer would see many such cases as ones where the state is protected from intervention by its support for the common life rights of the community.[36] The reason for this difference is that common life rights play no role in Tesón's account. This raises the *scope question*, the question of the scope or range of cases in which humanitarian intervention would be justified. This is the question of where to draw the line between justified and unjustified humanitarian intervention. In answering the scope question, we must consider, as we do shortly, the proportionality criterion under the human rights paradigm.

The cosmopolitan approach provides a justification not only for humanitarian intervention, but for defensive war as well. This is why it represents a new *ad bellum* paradigm. Considered theoretically, humanitarian intervention is not an exception; it only appears so from the perspective of the national defense paradigm. Humanitarian intervention is simply one sort of case where the use of military force may be justified in terms of the general moral principle that a state may act to aid victims of human rights violations. So, the new approach needs to show how defensive war may be justified in these terms as well. The basic idea is that defensive war is justified by a state's protecting the rights of its own citizens. David Luban has advanced the more general position.[37] He argues that sovereignty is conditional on a state's respect for the rights of its citizens. As a result, "we should be able to define *jus ad bellum* directly in terms of human rights, without the needless detour of talk about states." This means that just cause should be formulated in terms of threatened human rights

[35] *Ibid*., pp. 119–121, 115–117.

[36] *Ibid*., p. 104. Tesón also says that intervention would be justified only in cases that are "beyond the pale" (p. 98), seeming to echo Walzer's limiting of intervention to cases that "shock the moral conscience of mankind."

[37] See Luban, "Just War and Human Rights."

violations rather than the sovereign rights of states.[38] With sovereignty being conditional, states drop out of the equation.

Based on these distinctions, Luban offers a definition of just and unjust war. (1) A just war is "(i) a war in defense of socially basic human rights (subject to proportionality); or (ii) a war of self-defense against an unjust war." (2) An unjust war is "(i) a war subversive of human rights, whether socially basic or not, which is also (ii) not a war in defense of socially basic human rights."[39] One problem with this definition is that, in separating the two clauses in (1), Luban does not make clear the unity behind the human rights paradigm, as (i) humanitarian intervention and (ii) defensive war are justified on the same grounds. Also his formulation suggests that proportionality applies to humanitarian interventions but not to defensive wars. In any case, Luban provides an initial sketch of an account of *jus ad bellum* in terms of individual rights, an account that puts the discussion of war in a cosmopolitan context of "universalist politics."[40]

The moral rights referred to in the human rights paradigm are *claim rights*, that is, rights that entail corresponding duties or obligations on the part of others. If a young child has a claim right not to be targeted in war, there is duty or obligation on the part of combatants not to target that child. A claim right is violated when the duty or obligation corresponding to that right has not been fulfilled.[41] When I speak of moral rights, I mean universal, nonconventional rights, rights that apply to everyone and must be respected by everyone, though moral rights may be conventionally recognized as well. (For example a person's moral right not to be killed is nonconventional, but it is also conventionally recognized in laws against murder.) In contrast with claim rights are *liberty rights*, which are permissions and lack any corresponding obligations on the part of others. When a state satisfies the criteria of *jus ad bellum*, it has a liberty right to go to war, which means simply that it is not wrong of the state to do so. (We discuss later whether humanitarian intervention is an exception to this claim.)

Human rights are a species of moral rights. Their grounding is the interest each of us has in our own autonomy, and they embody, in their

[38] Beitz, *Political Theory*, p. 55. [39] Luban, "Just War and Human Rights," p. 175.

[40] Luban, "The Romance of the Nation-State," p. 392.

[41] The idea of a claim right was developed by Wesley Hohfeld (1879–1918). See David Rodin, *War and Self-Defense* (Oxford University Press, 2002), chapter 1.

corresponding obligations, the demand that autonomy be respected.[42] There are, we may say, two sorts of human rights: (1) rights that directly protect activities through which we exercise our autonomy, such as rights of association; (2) rights that protect the basis necessary for the exercise of autonomy, such as rights to basic security. Without security, we cannot exercise autonomy. The second category could be what Luban had in mind when he referred to socially basic rights.[43] Luban borrows the notion of basic rights from American philosopher Henry Shue. Moral rights, says Shue, are basic "only if enjoyment of them is essential to the enjoyment of all other rights."[44] Two important categories of basic rights are rights to physical security and rights to economic security (the latter are called *subsistence rights*). It is clear that without physical and economic security a person is not free to enjoy other rights. We all have duties and obligations to ensure that others have this security.

An important feature of Shue's account of basic rights is his emphasis on *default duties*. Like other claim rights, basic rights have associated duties, but these duties are more complex and far-reaching than might be supposed. "Every effective system of rights needs to include some default, or backup, duties – that is, duties that constitute a second-line of defense requiring someone to step into the breach when those with the primary duty that is the first-line of defense fail to perform it." Everyone not only has duties not to violate the rights of others directly, but also has additional, default duties in regard to the conduct of others who might directly violate those rights. This has important implications regarding our duties to people in other states, as "the rest of us are not free merely to leave human beings to their fate when it is impossible for their basic rights to be protected by national institutions."[45] Beyond the first-level duties corresponding to basic rights, there are two levels of default duties, yielding three levels of basic duties: (BD1) "Duties to *avoid* depriving;" (BD2) "Duties to *protect*

[42] This view of human rights is related to the moral theory of Immanuel Kant (1724–1804). See his *Grounding for the Metaphysics of Morals* (Indianapolis: Hackett Publishing, 1993).

[43] Luban, "Just War and Human Rights," pp. 166, 174.

[44] Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 2nd edn. (Princeton University Press, 1996), p. 19.

[45] Henry Shue, "Limiting Sovereignty," in Welsh (ed.), *Humanitarian Intervention*, pp. 11–28, at pp. 16, 20.

from deprivation;" and (BD3) "Duties to *aid* the deprived."[46] In each case, the deprivation involved is that of basic physical and economic security. A violation of basic rights occurs whenever duties at any of the levels are not fulfilled by the persons or institutions that have those duties.

For example, a state T may violate the subsistence rights of its citizens either by: (1) *depriving* them of their means of livelihood, a failure to fulfill (BD1); (2) *not protecting* them from being deprived by others of their means of livelihood, a failure to fulfill (BD2); or (3) *not aiding* them when they have lost their means of livelihood due to a lack of fulfillment of duties (1) and (2), which is a failure to fulfill (BD3). (BD2) and (BD3) are default duties. But, because human rights are universal, individuals outside of T, acting through their states, may also have these duties toward citizens of T. The duties of citizens of state S, or of S itself, resulting from violation of the subsistence rights of citizens of T, are not mere matters of charity, but moral obligations. Shue's idea of basic rights and their complex of duties provides a theoretical foundation for justifying war, not only in the form of humanitarian intervention, but in the form of national defense as well.

We may refer to (BD1) as duties requiring *respect* for rights, and (BD2) and (BD3) as duties requiring *protection* of rights. Humanitarian intervention is an effort to *protect* against the violation of rights in another state when those rights are not being *respected*, usually by the government of that state. It is appropriate that one of the key UN documents setting out the case for humanitarian intervention is called "Responsibility to Protect."[47]

Here is the proposed formulation of the just cause criterion under the human rights paradigm.

> Just Cause (Human Rights Paradigm): a war waged by S against T must be a response to an ongoing policy of T that results in a substantial violation of basic rights of either: (1) citizens of S (or some third state), when T's use of force is unjustified (covering the national defense case); *or* (2) against T's own citizens (covering the humanitarian intervention case).[48]

[46] Shue, *Basic Rights*, p. 52.

[47] "Responsibility to Protect," The International Commission on Intervention and State Sovereignty, http://responsibilitytoprotect.org/ICISS%20Report.pdf, accessed January 4, 2011.

[48] In a more thorough elaboration, the formulation would include, as our earlier one did, reference to measures short of war, which might be justified in response to lesser humanitarian crises. See Walzer, "Regime Change and Just War."

This formulation seeks to cover both traditional defensive war and humanitarian intervention by understanding the justification of each to be a matter of avoiding the substantial violation of basic rights resulting from a failure to respect basic rights on the part of the state that is the object of attack. Both defensive war and humanitarian intervention are the fulfillment of duties to protect against such violations. (Whether the human rights paradigm makes war obligatory rather than merely permissible will be considered later.) The criterion may be understood in two ways: either it assimilates defensive war to humanitarian intervention by understanding each as a response to wrongs by a state against individuals (rather than against states); or it assimilates humanitarian intervention to defensive war by understanding each as a response to aggression by another state, whether the aggression is inter-state or intra-state. In either case, aggression is against individuals. The criterion abandons the priority principle, which views the justification for war as a threat against a state, not against individuals.

One way to see defensive war and humanitarian intervention as part of the "same underlying moral structure" is proposed by David Rodin. The traditional idea of national defense includes third-party defense, allowing S to go to war against T in order to aid citizens of R whose rights are being violated by T. Humanitarian intervention fits the same structure except that the rights of the citizens of R are not being violated by another state T, but by R itself.[49]

One important implication of this criterion is that a state under attack is not justified in a military response if the attack itself is justified. Under the state-centric national defense paradigm such a case could not arise because justified intervention is ruled out. But, under humanitarian intervention, a first use of force can be justified, and, when it is, a "defensive" response is not. This preserves the principle that only one side in an armed conflict can be just. According to Vattel, if an opponent waging war against us "has justice on his side, we have no right to make forcible opposition; and the defensive war then becomes unjust."[50] As a matter of fact, of course, the state that is the object of a justified humanitarian intervention may well respond with military force as if it were the victim of aggression, but it is not justified in doing so.

[49] Rodin, *War and Self-Defense*, pp. 130–131. [50] Vattel, *Law of Nations*, p. 487.

The requirement that basic rights violations be *substantial* represents the idea that war should not be undertaken for minor reasons. This is largely implicit in the formulation of just cause under the national defense paradigm, since aggression against a state is almost certain to involve substantial individual rights violations, but it should be made explicit in the formulation covering humanitarian intervention because all states violate basic rights of their citizens to some extent. Without the qualification "substantial," any state would in theory have a just cause at any time for intervention in any other state. Of course, we have yet to consider the proportionality criterion for the human rights paradigm, which presumably imposes further restrictions of this sort on justification. Note that the appeal to basic rights in the formulation shows that the answer to the frequently raised question of whether humanitarian intervention may be undertaken to impose democracy is no. The rights that are violated by the fact that a government is not democratic are not basic rights; the citizens of a non-democracy may have all their security and subsistence rights respected and protected by their state.

To understand the wrong of inter-state aggression in terms of the violations of basic rights, we need simply to appreciate how a military attack violates those rights. First, citizens of the state attacked are deprived of their physical and economic security; they are killed and maimed and have the resources they need to survive taken from them. This violates their basic rights by the attacker's failure to fulfill its duties not to deprive those citizens of their basic rights. Second, the attacking state also fails to protect the basic rights of those citizens because it damages the capacity of the state attacked to protect those rights. The attacking state fails to observe its default duties to protect those rights. As Larry May observes, when a state that generally protects its citizens' basic rights is attacked, it is destabilized, undermining its ability to protect those rights.[51] It is this violation of basic rights of individuals, not an attack on the state as an entity, that constitutes the moral wrong of aggression. But we may note for future reference that any war, even a justified war, also entails such rights violations.

Earlier, we raised the scope question: what is the proper range of cases of humanitarian crisis where humanitarian intervention would be

[51] May, Larry, *Aggression and Crimes against Peace* (Cambridge University Press, 2008), p. 6.

justified? Part of the test for an adequate theory of *jus ad bellum* is that it gives a proper answer to the scope question. We may think in terms of the *threshold* of basic rights violations that would, other things being equal, trigger justified intervention. A good theory should be neither too permissive nor too restrictive in this regard; it should set the threshold at the proper point, neither too high nor too low. Consider two theories of humanitarian intervention we have considered so far: the theory of the national defense paradigm under Walzer's revised interpretation and the theory of human rights paradigm under Tesón's interpretation. Walzer's theory of the humanitarian intervention exception permits humanitarian intervention only in cases that "shock the moral conscience of mankind." This is fairly restrictive, setting the threshold for intervention quite high. Tesón criticizes Walzer for setting the threshold too high, but his own theory, which allows intervention to end anarchy or tyranny, may put the threshold too low. Under the human rights paradigm, it seems that the number of cases of justified border crossings under the banner of humanitarian intervention is potentially large, given that many states, at different times, are guilty of substantial violations of their citizens' rights. But Tesón does specify that any intervention must satisfy the criterion of proportionality, so perhaps if we had a clearer understanding of how this criterion should be understood under the human rights paradigm, we would have a theory that adequately addresses the scope question.

But before revisiting proportionality, we may briefly consider how the other *ad bellum* criteria should be understood under the human rights paradigm.

4.4 Other *ad bellum* criteria

The criterion of rightful intention is roughly the same under the new paradigm. The intervener must have the intention defined by the just cause, namely, to avoid the threatened rights violations. It may have other intentions, but only those that require no greater use of force than that needed to avoid those violations are acceptable. This addresses the frequently posed question of whether humanitarian intervention can be justified when the intervener's motives are not purely benevolent. Admittedly, pure benevolence is unlikely; a state will generally aid victims abroad only if it also foresees some resulting benefit to its national interest. But, as we

saw earlier, singleness of motive is largely irrelevant. The criterion is in terms of *intentions*, which are in our control, not *motives*, which often are not. While intentions can also be multiple, this is handled by the provision that none can require greater use of force than that needed to avoid the rights violations.

Legitimate authority, as outlined in the last chapter, requires simply that a war be initiated by some person or group with legal or *de facto* authority within a large organization, apart from whether it or its organization has moral legitimacy. Many would argue that conditions on authority should be more restrictive in the case of humanitarian intervention, for example, that the only legitimate authority is the UN Security Council. We saw this controversy earlier in our discussion of the Kosovo War. The UN Charter itself makes no explicit provision for humanitarian intervention, though it allows the Security Council to authorize the use of force for the sake of "international peace and security," and this concept has been stretched to encompass humanitarian intervention.[52] But morality is not the same as law, despite their close relationship. Michael Walzer asserts that a UN authorized intervention may not be "any more just or timely" than that of a single state.[53] The Security Council may not be able to agree on an intervention when one is clearly morally warranted (as in the case of Kosovo) and, if approval does come, it may come too late.

There is another reason to think that stronger conditions on the legitimate authority may be needed, a reason that is more evident in the case of humanitarian intervention, but which applies also in the case of defensive wars. The concern is of war being initiated by private groups rather than states. Earlier, I said that individuals outside of a state, "by themselves or through their states," may have duties toward citizens of that state. A state can discharge such obligations through humanitarian intervention, but can individuals do so directly? Approaching this problem from a different angle, Cheyney Ryan has referred to it as the "sovereign symmetry problem."[54] The problem is that sub-state organizations may

[52] A stretch because a humanitarian crisis, if completely contained within a state's borders, may not pose a challenge to international peace and security.

[53] Walzer, *Just and Unjust Wars*, 3rd edn., p. xiii.

[54] Cheyney Ryan, "Moral Equality, Victimhood, and the Sovereign Symmetry Problem," in D. Rodin and H. Shue (eds.), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford University Press, 2008), pp. 131–152.

seek to engage in humanitarian intervention (or defensive wars, for that matter), and the legitimate authority criterion, as formulated, would not stand in their way. Ryan speaks of a group of Irish immigrants at the end of the American Civil War who, in what might be considered an unusual form of humanitarian intervention, formed a private army to seize territory in Canada to broker for Irish independence from England.[55] But this may be a problem we are stuck with, for, as discussed in Chapter 7, making moral sense of intra-state wars requires giving legitimate authority to sub-state groups, which are often groups of private individuals. It seems likely, however, that other *ad bellum* criteria would rule much of this sort of privateering that would be morally objectionable.

Regarding reasonable chance of success, the formulation of this given earlier applies here as well, but an extra caution is in order. In the case of humanitarian intervention, success is ending the rights violations, and, as we mentioned, this may require, beyond mere rescue, regime change and political reconstruction. A successful military action may end the violations for the time being, but they may be reasonably expected to return immediately upon military withdrawal in the absence of regime change or political reconstruction.[56] The more ambitious agenda may make success much harder to attain, in terms of the difficulty of the task and the great patience it may require. Part of a judgment of reasonable chance of success should include reasonable expectations about the political staying power of the intervener in regard to the difficult reconstruction process that may be necessary.

The likely need for regime change deserves some comment. In wars of national defense, regime change is seldom necessary to achieve the defensive ends. Moreover it is, for that reason, generally not justified, as it would be a use of force beyond what is necessary to achieve the rightful intention. This point is emphasized by Michael Walzer, who argues that regime change is not justified in defensive wars, with Nazi Germany being an exception to this rule.[57] But in the case of humanitarian intervention, as we mentioned, removing the threat to the victims of a murderous regime often requires removing that regime. Otherwise, the regime is likely to

[55] *Ibid*., p. 148.

[56] C. A. J. Coady, *Morality and Political Violence* (Cambridge University Press, 2008), p. 76.

[57] Walzer, *Just and Unjust Wars*, pp. 111–117.

resume the rights violations of its vulnerable victims as soon as the intervener leaves; the political dynamics that originally lead to the oppression remain in place.

Finally, the earlier formulation again seems appropriate in the case of last resort. The emphasis would be on the moral cost of delaying the intervention while peaceful resorts were tried. In the case of a humanitarian crisis, the cost of delay is likely to be great.

4.5 Proportionality revisited

Many of the wrongs typical of aggression are not limited to aggression, but characterize any attack by one state on another, justified or not. Any attack violates basic rights. As we saw in the last chapter, the created evil of a war cannot in practice be zero. Now, we need to investigate more precisely the components of the created evil, which must be assessed as part of the application of the proportionality criterion. This will help to determine whether the human rights paradigm can provide an adequate answer to the scope question.

Under the human rights paradigm, the criterion may be formulated as it was under the national defense paradigm:

> Proportionality criterion (human rights paradigm): a war must be such that the significance of the created evil does not exceed the significance of the resisted evil.

The created evil, as before, refers to wrongs to individuals, but under the human rights paradigm, the resisted evil does as well. We need to address anew the three questions addressed in the previous discussion of the criterion: (a) What is the resisted evil? (b) What is the created evil? (c) How are the two compared to determine whether war would be disproportionate?

Considering (a), the resisted evil under the human rights paradigm is the threatened violation of individual rights, which provides a just cause for war. In the case of defensive war, the aggressor violates the rights of citizens of the state attacked.[58] In the case of humanitarian intervention, a state violates the rights of its own citizens. These are evils that another

[58] And perhaps those of its combatants as well, an issue raised in the next two chapters.

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state may be justified in using military force to resist. Under the human rights paradigm, states themselves have no rights and cannot be wronged. Talk of the rights of states or of wrongs done to them is simply convenient shorthand for the rights of individuals or wrongs done to them. "Persons, rather than states," Beitz observes, are "the ultimate subjects of international morality."[59]

Turning to (b), the created evil consists of wrongs, specifically, the violation of individual rights, that the warring state with a just cause does to individuals in the state that it attacks. In practical terms the created evil cannot be zero. While not everyone who is harmed by military action is wronged, some who are harmed will be wronged because they are not liable to be harmed. To say that the created evil cannot be zero is to say that, in practical terms, a war cannot be fought without basic rights being violated, without serious harm being done to those not liable to be harmed. As we see in the later discussion of *jus in bello*, civilians in general are not liable to be harmed. When civilians are harmed, as many will predictably be, often they are wronged, their basic rights violated. Some civilians may be harmed intentionally, in violation of the *in bello* principle of discrimination, but even if this principle is adhered to scrupulously, some will be harmed unintentionally but foreseeably (some such harm being permitted under the *in bello* principle of proportionality). When civilians are harmed in either of these ways, they are wronged, and such wrongs will often be a violation of their basic rights. War inevitably produces much such harm.

The harm to civilians in violation of their basic rights may be to their person or to their important possessions. In IHL, such possessions are referred to as *civilian objects*. Civilian objects are "objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations …"[60] Recall that the policy of the United States and its allies in both the Gulf War and the Kosovo War was morally controversial because it involved intentional attacks on civilian infrastructure, an important form of civilian object. The justification for these attacks was often that such infrastructure served a "dual use," that it had military as

[59] Beitz, "Bounded Morality," p. 409.

[60] 1977 Geneva Protocol I, in Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War*, 3rd edn. (Oxford University Press, 2000), p. 451.

well as civilian uses. But, because of their important civilian uses, destroying these objects was a violation of the basic duties states have to avoid depriving individuals of their security. Note that such civilian objects are best understood as a form of *collective or public property* of all individuals in a society, whatever their legal status.

While the usual examples given of civilian objects are of "material and tangible things,"[61] there is no reason that something intangible, such as an *institution*, if it played the same sort of indispensable role for civilians as tangible objects, could not count morally as a "civilian object." Indeed, tangible civilian objects are often valuable only in conjunction with institutions that exist to create and foster them and to distribute their product among the citizens; so respect for tangible objects entails respect for the affiliated institutions. Many social institutions are of basic value to individuals not only in this sort of extrinsic way, but intrinsically as well. They help to provide the members with cultural as well as physical sustenance. Moreover, social institutions, like tangible objects, can be damaged or destroyed in war, through disruption of normal social activities. Basic social institutions, like their tangible counterparts, are created over time by many members of the community, and, like them, can be said to be public property, the property of all individuals in the society.

The destruction of civilian objects, tangible or intangible, may be counted as a violation of individuals' basic rights, even though the objects are collective or public products. This makes individual rights against the damage or destruction of basic social institutions something like Walzer's common life rights. The common life of a society is composed in large part of its social institutions. This suggests that Walzer could have arrived at his account of common life rights through the idea of a civilian object. But if Walzer had taken this approach, he would have recognized that common life rights are different from those portrayed in his account and play a different and broader moral role.

The moral content of common life rights is captured in the moral force behind the claim, "it's none of your business." This complaint, understood morally, is a claim that outsiders should not intervene in the affairs of a group. It can be true or false, but when it is true, the outsiders have

[61] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2004), p. 84.

a strong moral reason not to intervene. Consider a mugger who tries to warn you away from interfering to protect her victim with the claim that it is none of your business. Here the claim would be patently false; it is your business. This is because mugger and victim, assuming them to be strangers, are not a group in a morally relevant sense. There would be no moral bar to your intervention on behalf of the victim, and, indeed, it may be your default duty (BD2) to intervene. Consider another case. One of the participants in a fist fight makes the moral claim that it is none of your business to warn you away from intervention to break up the fight. There are three possibilities here. The first is that, like the mugging, the fighters do not know each other and one is simply seeking to victimize the other, in which case the moral claim is false, at least when the one warning you away is the victimizer. In the second and third cases, the fighters are members of a fight club, so they form a social group in a morally relevant sense. Then the moral claim may be either true or false. In the second case, one of them is clearly taking unfair advantage of the other, in which case the claim may be false, and it may be appropriate for you to intervene, despite their being members of a group. In the third case, it is clear that the fight is a fair one which both participants agreed to participate in by being members of the club. In that case, the claim "it's none of your business" may be true, and you should not intervene.

When the claim "it's none of your business" is true, the members of the group or association have a common life right against intervention. Thus, common life rights, the rights individuals have against intervention in the activities of their groups, apply to individuals in all social groups, not just to those in states or nations. Their application in war, for example, in the right of individuals not to have their basic social institutions damaged or destroyed, is just a species of the larger genus. This is because the moral grounding of the rights, the moral content of the claim "it's none of your business," applies to all social groups. Any social group creates a common life, from which common life rights flow. By limiting common life rights to states or nations, Walzer fails to recognize their breadth. When individuals create groups, they construct a common life with their fellow members through the institutions that constitute the group, and the individuals have rights against those who would damage or destroy those institutions or, more generally, interfere in activities within the group. As individuals in states have common life rights against intervention by

other states, individuals in associations in civil society have common life rights against legal intervention in their groups. In either case, the claims resulting from the common life rights can be overridden by other rights claims. This means that, despite such rights, it may be permissible for a state to engage in humanitarian intervention, as it is for it to force private clubs not to discriminate based on race. Like other rights, common life rights are *prima facie*, subject to being overridden in particular circumstances by considerations of competing rights. To justify the humanitarian intervention exception, one need not appeal to the ad hoc claim that the common life rights cease to exist if the state is engaged in massive rights violations against some of its own people.

So our conception of common life rights differs from Walzer's in two main respects. Common life rights apply to any social group or association, not only national communities, and they can be overridden by other rights claims. In fact, common life rights may be regarded as a form of liberal rights. Common life rights may be seen as flowing from *freedom of association*. In civil society, individuals have the freedom to gather into associations, which means that the state has a *prima facie* duty not to interfere in those associations. But, notes American philosopher Amy Gutmann: "Freedom of association may be limited for the same kind of reason that freedom of speech may be: it can conflict with other vital claims." She also notes: "Because freedom of association is neither morally nor constitutionally absolute, we cannot conclude that an intrusion into the internal structure is unjustified before we evaluate the purposes of the intrusion and compare the merits of intrusion with those of nonintrusion into an association's internal structure or affairs."[62] When other duties conflict with the duty not to interfere with freedom of association, as they often do, sometimes the other duties are weightier. As John Rawls notes, churches may be allowed to excommunicate heretics, but not to burn them at the stake.[63]

In any war, the social institutions of the state attacked will be damaged, and this counts as a violation of the common rights of the citizens of the state, whose association the state is. This is an important part of the created evil of a war, whether defensive or humanitarian. But the special

[62] Amy Gutmann, "Freedom of Association: An Introductory Essay," in Gutmann (ed.), *Freedom of Association* (Princeton University Press, 1998), pp. 3–32, at pp. 17, 11.

[63] John Rawls, *Justice as Fairness* (Cambridge, MA: Harvard University Press, 2001), p. 11.

relevance of this to humanitarian intervention lies in the frequency with which these wars require regime change and political reconstruction, processes which, however necessary to ending the murderous rights violations, involve the destruction, not simply the damaging, of major social institutions, amounting to serious violations of the basic rights of the entire population, which is dependent on those institutions. Major social institutions may be part of the war effort, but they are also of great importance to the population. They are *dual use* entities, a species of dual use infrastructure. They may be a mechanism through which humanitarian crises are perpetrated by states, but they are also the basis of the associational life of the population. If they are destroyed in the process of ending the humanitarian crisis, the resulting rights violations should be counted in the created evil of the war.

To consider the nature and extent of appropriate governmental intervention in associations in civil society, take family law. The family is generally treated in law as an intimate or primary association, rather than a secondary association, which means that intervention in the family faces higher legal hurdles than intervention in, say, the Junior Chamber of Commerce. But state intervention in the family is still legally permitted, more so now than in the past. Formerly, family law in the United States was governed by the doctrine of *oneness*, according to which the family was in some respects impervious to legal intervention. Oneness of the family is normatively analogous to the unconditional sovereignty of the state in the national defense paradigm. The family was treated as a unit, and its members, to that extent, were not treated as individuals. For example, one legal commentator notes: "Originally, the doctrine of 'oneness' of husband and wife precluded any lawsuit between spouses." Though this doctrine has now been largely abandoned, even today: "Taking into account the special nature of family relationships, the law of torts applies special immunities to disputes within the family."[64] Family members do not have the full protection from each other that they would have were they outside such an association. The rationale is that, were family members treated as individuals in their legal dealing with each other, this would "disturb family

[64] Harry D. Krause, *Family Law in a Nutshell*, 2nd edn. (St. Paul, MN: West Publishing, 1986), p. 116. Relations between parents and children raise additional complications not considered here.

harmony," and the family would not be able to function as the kind of group that its members want it to be.

Of course, another take on "oneness" is that it served simply to reproduce the patriarchal domination of men over women, and, indeed, much of the impetus for the move away from oneness in family law has been the demand that women be treated as the equals of men *as individuals*. For example, Rawls suggests that "special provisions are needed in family law (and no doubt elsewhere) so that the burden of bearing, raising, and educating children does not fall more heavily on women, thereby undermining their fair equality of opportunity."[65] Despite the attenuation of the idea of oneness, the law still respects common life rights against legal intervention in the family. In some cases, other rights carry the balance, and legal intervention is justified, while in others, common life rights carry the balance and intervention is not justified.

This is not to say that social groups within states are the same as national communities in all relevant respects. Perhaps the principal difference is that membership in a national community or political society is not voluntary, while membership in social groups within a state generally is voluntary.[66] But this difference does not seem to be relevant because individuals build a common life in the groups they are in even when their membership is non-voluntary. Moreover, membership in a national community may not be completely non-voluntary, given possibilities of emigration, and membership in social groups within a state may be significantly less than fully voluntary.[67] In addition, while states generally lack the *legal* authority to intervene in other states that they have to intervene in domestic groups, this is legally but not morally relevant to the question whether national communities and civic associations both generate common life rights that need to be considered.

As a result, the morality of humanitarian intervention must be considered in terms of its effects on institutions of the target state and the common life rights its citizens have that those institutions not be interfered with. Intervention to rescue victims of humanitarian crises, like defensive war, will damage the institutions of the community's common life

[65] Rawls, *Justice as Fairness*, p. 11. [66] See *ibid*., p. 20.

[67] See Michael Walzer, "On Involuntary Association," in Gutmann (ed.), *Freedom of Association*, pp. 64–74.

and violate common life rights. Judging whether an intervention is justified must take into account not only the rights violations the intervention would avoid, but also the common life rights the intervention would itself violate. The justifiability of some cases of humanitarian intervention shows that common life rights do not always take precedence. Moreover, as with family law, the balance between common life rights and other rights is changing over time in the light of our greater appreciation of the force of human rights. Indeed, the recent interest in humanitarian intervention represents a similar shift in the balance from emphasis on common life rights to greater concern for other basic rights.

Note three more points concerning the balance among rights violations in these sorts of situations. First, common life rights apply to all the members of a group, so interfering in the group to protect some members may violate the common life rights of the other members. This must be taken into account in the calculation of created evil. Second, members of a group generally have obligations to other members of the group, for example, based on the moral principle of reciprocity or fair play. Common life rights may, in part, reflect the obligations an outside intervener owes other members of the group not to intervene in ways that would let a member with such obligations off the moral hook, or simply in ways that, in rescuing individuals, would seriously damage the group. Third, consent to group membership is not always as relevant as it might seem to be. One might think that common life rights apply only when the relevant group members continue to consent to being in the group. But consent may be indeterminate, not just epistemologically, but inherently. For example, the victim of fraternity hazing may want both to endure the treatment in order to protect the group and his role in it and to escape it.

4.6 Comparing created evil and resisted evil

This brings us to the question (c): how the created evil and the resisted evil are to be compared. Consider again the question of whether it is possible to compare or weigh the resisted evil and the created evil against each other. Is it possible to justify a state's violating some rights (the created evil) in order to avoid rights violations by others (the resisted evil)? Our understanding of basic duties casts this question in a different light. Rights entail default duties, for example, the duty not to let a third party

violate someone else's rights. We have obligations both to *respect* rights and to *protect* others from rights violations. When a person stops another from violating the rights of a third party, he not only does a morally good thing, but also fulfills a duty. But if he cannot fulfill that duty to protect from rights violations (resisted evil) without violating his duty to respect a right (created evil), his situation should be understood as a conflict of duties. The weighing of resisted and created evil becomes a matter of balancing conflicting obligations. So, we need to acknowledge some version of what we call the *trade-off approach*, according to which it is possible to compare duties regarding prospective rights violations and to determine an overall obligation in some situation based on that comparison.

One way to conceive of the trade-off approach is in terms of what American philosopher Richard Wasserstrom has called *a utilitarianism of rights*, according to which sets of rights violations can be compared to determine which set contains fewer violations. Wasserstrom proposed this idea as the basis of an account of humanitarian intervention alternative to that of Walzer's.[68] As David Koller expresses the position, "an action may be taken if the anticipated enjoyment of human rights by all individuals outweighs the anticipated human rights enjoyment of all alternative courses of action."[69] But it is misleading to refer to the sort of balancing required in weighing the created evil against the resisted evil as simply totting up the number of violations, or the number of unfulfilled duties, on each side of the equation. Some rights violations are more significant than others, and some duties are more stringent than others, so the significance of rights violations or duty non-fulfillments is just as important, if not more so, than the numbers of such.

To see how we should think about the weighing involved in the proportionality calculations, consider a case proposed by American philosopher Joel Feinberg, who offers the following domestic analogy (which I have slightly modified). A person is hiking in the mountains with her young child when an unexpected blizzard arises, threatening their lives, whereupon she stumbles upon a locked cabin with an absent owner. In a clear

[68] Richard Wasserstrom, review of Walzer's *Just and Unjust Wars*, in the *Harvard Law Review* 92, no. 2 (December 1978), pp. 536–545, at p. 544. Walzer rejects this alternative in "The Moral Standing of States."

[69] David S. Koller, "The Moral Imperative: Toward a Human Rights-Based Law of War," *Harvard International Law Review* 46, no. 1 (Winter 2005), pp. 231–264, at p. 255.

violation of the owner's property rights, she breaks in, uses the owner's food, and burns his furniture to keep them both alive.[70] When we compare the conflicting rights violations, it seems clear that the hiker is overall morally justified in destroying the property because her duty not to destroy the property is outweighed or overridden by her duty to save her child's life (and perhaps her own too). If she had to kill the owner, who refused to let her in, to save their lives, the weighing of the relevant duties might go in the other direction. Judging whether the resisted evil justifies imposing the created evil is a matter of weighing the conflicting duties that are involved.

This is what we do in applying proportionality. Consider a prospective war by S against T which has a just cause, but may or may not satisfy proportionality. The resisted evil is composed of the basic rights violations, including common life rights violations, that are threatened by T and would be avoided by the military efforts of S, whether the violations are against citizens of S (in the case of defensive war) or of T (in the case of humanitarian intervention). The created evil is composed of the basic rights violations, including common life rights violations, that S's military efforts would impose on those citizens of T not liable to be harmed. (In both cases we consider reasonable expectations of the violations occurring.) We then weigh the conflicting duties corresponding to avoiding these prospective rights violations.

We normally think of not fulfilling a duty (thereby violating the corresponding right) as wrongful behavior. But in a conflict of duties, not fulfilling those that come out on the short side of the balancing is not wrongful. The hiker does not do wrong in not fulfilling her duty to respect the owner's property rights because that duty is outweighed by the conflicting duty to save her child's life. American philosopher Judith Jarvis Thomson, using examples of the sort that Feinberg introduced, provides a helpful way of speaking about these cases. Switching from a discussion of duties to a discussion of the corresponding rights, she suggests that we recognize a contrast between *infringing a right* and *violating a right*.

> Suppose that someone has a right that such and such shall not be the case. I shall say that we infringe a right of his if and only if we bring about that

[70] Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," *Philosophy & Public Affairs* 7 (Winter 1978), pp. 93–123, at p. 102.

> it is the case. I shall say that we violate a right of his if and only if *both* we bring about that it is the case *and* we act wrongly in so doing.[71]

This distinction between violating and infringing a right makes clear that it is misleading to say, when respect for rights has been overridden, that the rights have been violated. The hiker infringes the cabin owner's property rights, but does not violate them. According to Thomson, only some infringements are violations, so not all infringements are wrongful. Thomson rejects "the view that every infringing of a right is a violation of a right."[72] A violation is a wrongful infringement, and an infringement that is not wrongful is permissible.

The distinction between rights infringements and rights violations provides a way of making clear that rightful action in many cases, especially in choosing war, is a matter of weighing conflicting rights and duties. It is inevitable that some rights will be infringed and some duties unfulfilled. The distinction makes clear the response to the pacifist who argues, with the rights absolutist, that war is impermissible because it cannot be conducted without rights violations. As Daniel Montaldi asserts, "the possibility of just wars depends upon the possibility of there being permissible infringements of basic rights."[73] The proportionality calculation concerns the significance of sets of prospective rights infringements. We do not know which of the rights infringements are also rights violations until we have made the judgment of the side on which the greater significance lies. That judgment tells us which rights infringements would be wrongful. So we must modify the earlier claim that a failure to respect a right, or a failure to fulfill a duty, is always a wrong; when the failure is a mere infringement, it is not wrongful. What may seem in isolation like a rights violation may turn out to be a mere infringement in the context of the comparison of sets of prospective infringements.

Consider, finally, how this discussion of proportionality helps to address the question about whether the human rights paradigm gives a satisfactory answer to the scope question. This question arises primarily in regard to

[71] Judith Jarvis Thomson, *Rights, Restitution, and Risk: Essays in Moral Philosophy* (Cambridge, MA: Harvard University Press, 1986), p. 51.

[72] *Ibid.*, p. 40.

[73] Daniel F. Montaldi, "Toward a Human Rights Based Account of Just War," *Social Theory and Practice* 11, no. 2 (Summer 1985), pp. 123–161, at p. 126.

humanitarian intervention: does the human rights paradigm set the proper threshold for when a humanitarian crisis is sufficiently grave to justify intervention? Our earlier speculation was that Walzer's theory regarding humanitarian intervention may set the threshold too high, while Tesón's version of the human rights paradigm may set it too low. What I have added to our understanding of the human rights paradigm is a recognition of common life rights, and this recognition would raise the threshold implicit in Tesón's account. It adds to the plausibility of a theory of *jus ad bellum*, if it has a threshold for humanitarian intervention between those implicit in Walzer's and Tesón's theories, and a version of the human rights paradigm that recognizes common life rights is such a theory.

A theory that recognizes common life rights has different implications for humanitarian intervention than it does for defensive war. In defensive war, common life rights are generally infringed by both sides; both aggressor and defender fight on the other's soil, infringing common life rights. This means that common life rights infringements would tend to cancel each other out, so to speak, as they would be part of both the resisted evil and the created evil. But in the case of humanitarian intervention, common life rights are normally infringed by one side only, the side that intervenes.

In the case of defensive war, the issue is what the human rights paradigm implies about border crossings. Ordinary moral judgments about defensive war tend to agree with the priority principle that any border crossing (with significant military force) can justify defensive war. But the human rights paradigm may not have as clear an implication because a border crossing does not necessarily entail a serious infringement of individual rights, including common life rights. Border crossings, however, are usually a prelude to significant rights infringements.[74] As Walzer notes, "we assign a certain *presumptive* value to the boundaries that mark off a people's territory and to the state that defends it."[75] This suggests that any theory of defensive war may need in practice to make use of *presumptive principles*, and there is no reason why the human rights paradigm should not as well. Presumptive principles are rules of thumb, adopted as

[74] Larry May, "The Principle of Just Cause," in May (ed.), *War: Essays in Political Philosophy* (New York: Cambridge University Press, 2008), pp. 49–66, at p. 58.

[75] Walzer, *Just and Unjust Wars*, p. 57, emphasis added.

an expeditious way of approximating correct decisions in real-world, time-sensitive situations in which it is difficult to apply the moral principles that determine the correct decisions. Presumptive principles are *prima facie* and defeasible, which means they can and should be overridden by the correct moral principles in situations in which the latter can be clearly applied. The need to operate under presumptive principles is usually a drawback for a theory, but it seems that any theory that must account for humanitarian intervention as well as defensive war would need, for practical purposes, to make use of the priority principle as a presumptive principle. Use of the priority principle is recognition of the importance of common life rights. It would place the burden of proof on those who advocate not responding to aggression with defensive force and on those advocating engaging in humanitarian intervention.

Before leaving this discussion of the human rights paradigm, we should address the contrast between *permission* and *obligation*. Just war theory is understood as a theory of the permissibility of war; when the *ad bellum* criteria are satisfied, a state is justified or permitted to initiate war. But under the human rights paradigm, war is initiated because of rights violations, and avoiding rights violations, in general, is more a matter of *obligation*, not mere permission. This question is raised especially in regard to humanitarian intervention, with some commentators claiming it may be obligatory, but it applies to defensive war as well. Two points may help to explain this apparent discrepancy. First, there seems to be a difference in stringency between obligations to respect rights and obligations to protect others from rights violations. Protecting others from rights violations is connected with the idea of the "good Samaritan," and the requirement to be a good Samaritan assumes that being one is not too burdensome, for example, personally not too risky. The same may apply to the requirement that a state respond to a humanitarian crisis in another state, given what a state risks in blood and treasure from going to war. Second, a leader has obligations toward her own citizens (as the moralized realist emphasizes) that are outside the realm covered by just war theory, and which may be at odds with her initiating a war, again, especially in the case of humanitarian intervention.[76] These two factors do not logically imply that satisfying

[76] Allen Buchanan, "The Internal Legitimacy of Humanitarian Intervention," *Journal of Political Philosophy* 7 (1999), pp. 71–87.

jus ad bellum yields a mere permission rather than an obligation to go to war, but they may explain why, given the existence of forms of moral obligation impinging on leaders outside of just war theory, it is appropriate to treat going to war as a mere permission.

4.7 Is a moral defense possible?

Earlier in the chapter I suggested that there were three responses to the apparent inconsistency between the national defense paradigm and the humanitarian intervention exception. We have considered two of these. (R1) was represented by Michael Walzer's attempt to explain humanitarian intervention in a way consistent with the national defense paradigm. (R2) was represented by the replacement of the national defense paradigm with the human rights paradigm, explaining both humanitarian intervention and defensive war in terms of duties to respect and protect individual rights. Now we consider the third response. Advocates of (R3) take the position that the apparent inconsistency between the national defense paradigm and the humanitarian intervention exception reveals something deeper about the morality of war, calling into question not simply the national defense paradigm, but any version of *jus ad bellum*. Proponents of (R3) argue that war cannot be justified through either paradigm; the violation of rights, whether of states or of individuals, cannot justify war, or cannot justify it beyond a very limited number of possible cases, so that we may be effectively led to unconditional anti-war pacifism.

Richard Norman offers a version of (R3). Norman argues that the crucial moral fact about a war is that it involves killing, so war can be justified only if what is being defended is worth killing for. The attack of one individual on another may justify killing in self-defense, but it does not follow that the attack of one collectivity on another justifies individual members killing each other. Individual killing would be justified only if the threat was "literally, the lives of people in the victim community," in which case "only something like a defensive war of resistance to genocide could be justified." In the more usual sort of invasion, "if there were no resistance, [the enemy] could invade without having to take any lives."[77] This is a point also suggested by Rousseau, who asserted: "It is

[77] Richard Norman, *Ethics, Killing, and War* (Cambridge University Press, 1995), p. 135.

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sometimes possible to kill the State without killing a single one of its members; and war confers no right that is not necessary to its end."[78] What would be lost in such an invasion, if it were not resisted with force, would be merely the political community, not individual lives. Norman asks: "Why does the life of a political community matter, and does it matter enough to justify killing in its defence?"[79] His answer is that, in general, it does not.

According to this line of argument, once we recognize that talk about defense of states is shorthand for talk about defense of individuals, we are forced to appreciate that most defensive wars are not justified. David Rodin, arguing in a similar vein, suggests that we might understand the relation between war and individual self-defense by viewing the state as having a right to defend its citizens "the way a parent has the right to defend his or her child."[80] In killing in a defensive war, combatants act for the state in carrying out its parent-like responsibility to protect its citizens. Against this approach to justifying war, Rodin raises two lines of arguments: what he calls the argument from humanitarian intervention and the argument from bloodless invasion.

In his argument from humanitarian intervention, Rodin claims that there is a tension between defensive war and humanitarian intervention: "When a state intervenes in another state on humanitarian grounds, one of the moral considerations weighed against this action is the defensive rights of the subject of the intervention." Thus, a right to humanitarian intervention entails that "the moral basis of the right of national defense can in certain circumstances be justly overridden, not [that] the right of humanitarian interventions [is], in some sense, an application of those moral considerations."[81] This is similar to our argument about the inconsistency between the national defense paradigm and the humanitarian intervention exception. But the argument does not have the anti-war implications Rodin assumes it does, partly due to his use of a bad analogy. In line with the social contract tradition, the relation between state and citizen is not like parent to child, but more like agent to client. The

[78] Rousseau, *The Social Contract*, quoted in Roberts, "The Principle of Equal Application of the Laws of War," in Rodin and Shue (eds.), *Just and Unjust Warriors*, p. 233.

[79] Norman, *Ethics, Killing, and War*, p. 137.

[80] Rodin, *War and Self-Defense*, p. 129. [81] *Ibid*., p. 131.

state serves as agent of its citizens in many different respects, including carrying out their moral obligations that require collective action. These obligations may include both defending our fellow citizens against rights violations from foreign aggression and also defense of non-nationals from rights violations by their own government. With the switch in the analogy, the tension Rodin finds between national defense and humanitarian intervention disappears. An obligatory defense of individual rights provides a foundation for both.

Rodin's argument from bloodless invasion is similar to Norman's argument. The argument poses the question of whether defensive war can be justified even when it would not avoid any deaths (because the attackers would kill only if there was armed resistance to their takeover). In such cases, they would claim, the created evil of the wrongs of a defensive war would be disproportionate to the resisted evil of the loss of political community. Canadian philosopher Thomas Hurka, following Norman, claims that defensive war "satisfies proportionality only if it protects rights of citizens that are important enough to justify killing."[82] Norman and Rodin argue that it does not. But their arguments are based on a misunderstanding of how the proportionality criterion applies. A state could never be sure in advance that its attacker, absent resistance, would not kill. This uncertainty must be taken into account in the proportionality calculation, in the reasonable expectations of unjust harms. Thus the resisted evil in the proportionality calculation will always include some killings by the aggressor, along with violations of other rights, because it reflects the range of probabilities concerning the number the unresisted aggressor would kill. That it might be zero in some cases does not allow the calculations to be run as if it were zero.

There are several other reasons why defensive war may be justified, even if an unresisted invasion would turn out to be bloodless. First, even without any killings, the takeover of a state certainly involves other serious rights violations, which might by themselves justify defensive killings. On analogy, in the case of individual self-defense, the victim is morally permitted to kill the attacker if this is the only way to stop him from

[82] Thomas Hurka, "Proportionality in the Morality of War," *Philosophy & Public Affairs* 33, no. 1 (2005), pp. 34–66, at p. 52.

imposing serious rights violations short of killing.[83] Second, the number of people whose lesser rights (lesser than right to life) would be infringed by the attacker is presumably greater than the number in the opponent's society whose right to life would be infringed in a defensive war, and there is no reason that the proportionality calculations should not take this into account, sometimes justifying defensive killing by balancing the greater numbers of less significant infringements against the lesser number of more significant infringements.[84] Third, even if the unresisted invaders kill no one, they would threaten to kill should there be resistance, and threats of death may sometimes justify defensive killing in response.[85] Fourth, Hurka argues that, even with a bloodless invasion, "it is a mistake to see the only rights of citizens threatened by aggression as rights of political self-determination; they also include the right to be secure in a political and cultural home." The analogy is to a person protecting her actual home, where the law, "on the ground that 'a person's home is his castle,' allows more force to be used … than in protecting other forms of property."[86] This is in the spirit of common life rights, and, indeed, when common life rights violations are included in the resisted evil, a further basis is provided for the conclusion that the created evil in a defensive war, even granting the possibility of bloodless invasion, need not be disproportionate to the resisted evil.

Rodin sees two different argument strategies at work in support of the claim that defensive war can be justified: the *analogical strategy* (based on an analogy between individual and state self-defense) and the *reductive strategy* (based on an attempt to reduce the right of a state to defend itself to the rights of individuals). The analogical strategy is a version of the argument from the domestic analogy under the national defense paradigm, and the arguments Rodin and Norman offer against it overlap with the arguments presented earlier against the national defense paradigm.[87]

[83] Jeff McMahan, "War as Self-Defense," *Ethics & International Affairs* 18, no. 1 (2004), pp. 75–80, at p. 78.

[84] This point, as well as the next two, are suggested by Hurka, "Proportionality," pp. 53–56.

[85] In contrast, Rodin and Norman argue that threats of death cannot, in general, justify self-defensive killings.

[86] Hurka, "Proportionality," pp. 55, 56.

[87] David Rodin outlines the two strategies in *War and Self-Defense*, p. 123, and offers his criticism of the analogical strategy in chapter 7 of that work. Richard Norman offers his criticism of the analogical approach in *Ethics, Killing, and War*, chapter 4.

But the arguments against the reductive approach, which, for Rodin, include the humanitarian intervention argument and the bloodless invasion argument, appear not to succeed. They fail to show that the human rights paradigm is not an adequate basis for *jus ad bellum*.

This completes the discussion of *jus ad bellum*. Next we consider *jus in bello*.