

Tensions in a Certain Conception of Just War as Law Enforcement

(pre-publication draft)

Both current Just War theory and international law recognize that a state has a right to national defense (call this defensive right purportedly held by states ND).¹ If a state is invaded by an aggressive army, that victim state is justified in employing deadly military force to ward off the attack.² Put in terms of international law, a state is a sovereign entity that has the right to territorial integrity and political independence. If a state's territorial integrity or political independence is violated by an armed invasion, then they are justified in taking up arms to defend themselves.³

Furthermore, many (certainly not all) who ascribe to current Just War theory and international law see ND as analogous to and grounded in the right of personal self-defense. In the domestic arena, it's commonly held that persons have the right to wield deadly force to defend their own lives from an unjustified lethal attack.⁴ If someone tackles me from behind, for example, and starts stabbing me, I would be justified in killing my attacker in order to protect my own life. In this case, I would be at liberty to

¹ In this paper I will sometimes use the terms 'state' and 'nation' interchangeably. These terms are of course not synonymous. Roughly speaking a nation is a community of people that share a language, a common way of life, and a common lot of land. A state is roughly defined as the apparatus of government that represents the people of a nation and maintains order and enforces the law. For my purposes, I can ignore the otherwise important differences between nations and states.

² I should note that I'm not distinguishing between a state (or nation) and the soldiers (armies) of that state (or nation). So, to be attacked by (or to attack) a state just is to be attacked by (or to attack) the soldiers (army) of that state.

³ Article 2(4) in the UN Charter states that "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." Article 51, which outlines an exception to this general prohibition against using military force, claims that "Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations..."

⁴ It should be noted that the commonly held notion of self-defense also permits one to kill an attacker in order to protect oneself from either being enslaved or gravely injured (e.g. losing an eye or a limb) by that attacker.

do what is normally held to be both immoral and illegal: commit homicide. My act of homicide was both necessary to save my life and proportionate to the attack leveled against me. It was necessary in that it was an act of last resort. I would have been obligated to try and escape before killing him, but there was no way for me to escape his clutches. My act was proportionate in that the value of my life was sufficiently high to warrant me in taking my attacker's life (who arguably forfeited his own right to life by trying to take mine). It's not as though I killed him after he merely tried, without using any weapons, to wrestle my watch away. If that was the case then my killing him would be unjustified; the harm I would cause (the killing of my attacker) outweighs or is disproportionate to the good I'm trying to protect (the value of my watch). So, according to many proponents of Just War theory and international law, just as I would have the liberty to employ lethal force on my knife wielding attacker, so a state has the liberty to employ lethal force on any aggressive army that attacks them.

David Rodin has pointed out two possible ways of understanding the claim that ND is justified on the basis of personal self-defense. First, we can understand ND as "simply the application, en masse, of the familiar right of individuals to protect themselves and others from unjust lethal attack".⁵ A military invasion of a nation threatens the lives of the people of that nation. ND is just the organized implementation of every body's right to self defense at one time. The citizens of a victim nation, whomever they are (whether they're soldiers or not) are not actually protecting a 'nation' per se, rather, they're protecting their own lives. Since we explain ND in terms of

⁵ David Rodin, "War and Self Defense", (New York: Oxford University Press, 2002), p. 127.

individual self-defense, and since individual self defense is morally justified, thus so is ND.⁶

The second understanding is slightly different. Here ND is seen as a defensive right literally held by the state. It's the state's obligation to protect its citizens, just like a parent is obligated to protect her kids from harm.⁷ A defensive war waged by a victim state is morally justified because it is waged to defend the lives of its citizens. Just like a person is justified in killing the attacker of an innocent victim (assuming of course the attacker was about to kill the victim), so a victim state is justified in warring against an aggressive invading army in order to protect their own innocent civilians.^{8 9} I will refer to those who accept either one of these two conceptions of ND as 'traditionalists'.

The Argument Against Grounding ND in Personal Self-Defense:

Rodin is skeptical about both of these conceptions of ND. This is because most aggressive military attacks are not genocidal in nature. For Rodin, most likely an aggressive state that invades a victim state will only exhibit what can be called conditional aggression. That is, an aggressive state will kill and seriously harm the citizens of the victim state if and only if they do not submit to the invasion, the purpose of which is to seize land (resources), or take away collective self-determination (Rodin calls this conditionally threatening the lives of the citizens of the victim state).¹⁰ While invading another nation and conditionally threatening them is immoral and against

⁶ Ibid, p. 127

⁷ Ibid, p. 131. The idea here is the right of self-defense is extended to include the protection of other people.

⁸ Ibid, p. 131

⁹ It's important to note here that this conception of ND does not view the state as analogous with an individual person; as if the state has the right to defend its own "life" in the same way that an individual has the right to defend her own life. Rodin addresses this view and rejects it. Ibid, p. 141-162. I suspect he's probably right, but his argument doesn't have any bearing on this paper.

¹⁰ Ibid, pp. 132-134

international law, a victim state is simply not justified in meeting, with lethal military force, an aggressive invasion that only poses a conditional threat. Why? Such defensive acts are neither necessary nor proportionate.¹¹ As noted, individual self defense is justified only if the requirements of proportionality and necessity are both met. A state that launches a defensive war against an invading army that only seeks to take away things like collective self determination, land and valuable resources, or a people's 'common way of life', fails to meet the requirement of proportionality because the value of land, self determination, etc. is not high enough to warrant the taking of life.¹² In the same way, I wouldn't be justified in killing a mugger who threatened to shoot me, let's say, if I didn't hand over my watch. Moreover, waging a defensive war is not necessary because there is another live option to be taken, namely, capitulation to the aggression.

So, according to Rodin, if we think of ND in terms of the right of personal self-defense, defensive war against aggression will be more times than not unjustified. To be sure, says Rodin, if a nation was attacked by an aggressor bent on genocide or slavery (e.g. Nazi Germany), that nation could indeed justly exercise a right of national defense, a right conceived of in terms of self-defense. For, the people of that nation would literally be fighting to defend their own lives. But since most defensive wars that are waged are not done so against a genocidal attacker, it's not clear how these wars can be just, given that national defense is conceived of in terms of personal self-defense.¹³

¹¹ Ibid, p. 134

¹² Ibid, p. 134 Also, see David Rodin, "Beyond National Defense", *Ethics and International Affairs*, 18, no. 1, 2004, p. 95. Richard Norman holds essentially this same view. See his "Ethics, Killing and War", (Cambridge: Cambridge University Press, 1995.), pp. 120-156. Just to be clear, for Rodin and Norman, taking away a people's self-determination and common way of life is not to enslave them. Aggressive states seek to take away certain liberties, but not to the extent of making slaves out of those whom they have conquered.

¹³ David Rodin, "War and Self-Defense", pp.138-141

Justified War as Law Enforcement

Despite this argument, Rodin oddly wants to resist endorsing full-fledged pacifism concerning conditional aggression.¹⁴ While a state cannot justifiably wage a defensive war against an aggressive attack, it's still possible to wage a justified war against an aggressive nation. How? Instead of thinking of justified war in terms of national-defense (more precisely in terms of self-defense), we should think of justified war as law enforcement, more specifically, legitimate punishment.^{15 16} The idea here is that if there existed an international, sovereign, impartial, governing body (in essence a highly strengthened United Nations), then they would have the authority to wage a punitive war against an aggressive state.¹⁷ Aggressive state's that invade a nation and conditionally threaten to kill its soldiers (and citizens) commit a moral and legal crime, thus they should face punishment.

For Rodin, individual victim states don't have the authority to punish. In order for punishment to be legitimate, at the very least the one implementing it should be impartial towards the parties who are involved in the dispute. Justice requires that the one administering the punishment not have an invested personal interest in seeing the punishment carried out. So, those who are involved in the relevant dispute (e.g. the party who has been wronged, or those who know the party who has been wronged) ought not be the ones to exact punishment. If impartiality is not held to be a necessary condition of

¹⁴ From here on out I will be assuming that aggression committed by a state will be conditional aggression.

¹⁵ Rodin, "War and Self Defense", pp. 173-175. Rodin is apparently open to hearing arguments for conceiving of national defense in terms of something other than self defense. See Rodin, "Beyond National Defense", p.93. But, for now, his view is that the best way to justify war is in terms of law enforcement.

¹⁶ Punishing criminals is but one aspect of law enforcement. Other important aspects include deterring as well as apprehending criminals either in the act of committing a crime or after they have done so. While Rodin claims that a justified war against aggression is one of law enforcement, his emphasis is on punishment.

¹⁷ Rodin, "War and Self Defense", p. 179-180.

punishment, then states that employ force in the name of punishment risk their actions being both unfair and taking on the nature of revenge.¹⁸ A punitive war, then, waged by a victim state would not be justified; the victim state would not be administering legitimate punishment.¹⁹

Call Rodin's overall view, 'war as law enforcement' (WLE). WLE, to recap, basically states that traditionalists who think that national defense can be thought of in terms of self-defense are unable to justify most wars. But, war can in principle be justifiably waged against aggression by a legitimate international law enforcing authority.²⁰ It seems to me though that there's a tension in WLE that can be exploited by the traditionalist, rendering it not at all compelling. Let me try and explain.

Problems for the proponents of WLE:

Proponents of the WLE claim that aggressive states that invade and conditionally threaten victim states *deserve* to be warred against, it's just that the individual victim states in question aren't authorized to do it. If there existed a strengthened, authoritative UN, then the actions of such aggressive states would warrant a lethal military response by the UN. But if the soldiers of an aggressive state deserve to be warred against (i.e. maimed and killed)²¹, it's hard to see why the lives of the aggressive soldiers are more valuable than the enjoyment of self-determination and the 'common life', etc. Recall the discussion that said the act of invading a victim state and conditionally threatening them

¹⁸ It's of course controversial whether or not states in a state of nature (and for that matter, individuals who are in a state of nature) have the authority to punish. I think Rodin could offer more by way of argument for why states don't have this authority. For my purposes in this paper I will be assuming that Rodin is correct on this count.

¹⁹ For Rodin's discussion of impartiality and the authority to punish, see *ibid*, pp. 173-179.

²⁰ I take Rodin to be saying that a war waged by a legitimate international law enforcing body against aggression is to be called (conceived of as) a punitive war rather than a defensive war.

²¹ Rodin uses the terms maiming and killing to describe the act of war.

was not grave enough to warrant a lethal military response. The harm inflicted by the victim state was disproportionate to the harm threatened by the aggressive state. The value of self-determination and the like is not of sufficient magnitude to justify the snuffing out lives in order to protect it. It would be like me killing the mugger who only wanted my watch. The mugger's crime is not serious enough to justify such a response. But, and here's the point I want to make, his crime is not serious enough to justify the police in killing him either. The police, in an effort to stop the crime, couldn't kill him;²² nor could an appropriate authority punish the mugger by death. The mugger by mugging hasn't done anything to warrant his death, whether by me, or a legitimate law enforcement agency. In the same way though, if a state committing mitigated aggression hasn't done anything to forfeit its immunity to war, then nobody -- neither the victim state nor an authoritative international body -- has the right to inflict that on it. It's not clear why legitimate punishment in the form of killing is proportionate to the offense of aggression; but defensive force wielded by a victim nation in the form of killing is not proportionate to the same offense.

The main point I want to make is that proponents of WLE are seemingly in a dilemma. If the claim is that defensive military force is a disproportionate response to mitigated aggression, then it would seem that punitive military force in the name of law enforcement would be disproportionate as well. Go back to the mugger example. Justice doesn't require that the mugger lose his life for stealing my watch. And if an officer of the law happened to witness the mugger stealing my watch, it wouldn't suddenly become

²² Though, the police in an effort to apprehend the mugger could draw their weapons and order him to stand down. And perhaps, *if (and only if)* the mugger were to try and escape after such an order, they could open fire on him. But if this were to happen, and assuming it was justified, the shooting would be a means to maintain order; it would not be a means to punish him.

the case that justice did require that the officer kill the mugger. In the same way, since justice doesn't require that the soldiers of an aggressive state lose their lives for invading a victim state, then it wouldn't seem that justice would require that they lose their lives at the hands of a strengthened UN. A strengthened UN would perhaps have the sole authority to punish the soldiers of an aggressive state with death, but only if the soldiers of that state have done something worthy of such a punishment. Hence, a punitive war waged by a strengthened UN against an aggressive state is unjustified, and pacifism would seemingly be the only way to go.

However, if it's claimed that punitive war is a proportionate response to mitigated aggression (such aggression is grave enough to warrant lethal punishment), then the argument against the traditionalist loses its force. For no longer can that argument claim that self determination and the like are not of sufficient value to defend by means of war.

A similar dilemma that seemingly plagues the proponent of the WLE can be put in the following way. Let's assume that an authoritative and strengthened UN exists. At the risk of sounding overly simplistic, proponents of the WLE would presumably characterize the punishment that is exacted by this UN as either essentially retributive or essentially consequentialist in nature.²³ Roughly, for the retributivist, the principle goal of punishment is give the criminal state its just desert for committing a wrong. The proponent of the WLE, then, could claim that the state that commits mitigated aggression fully deserves to be warred against given the nature of their wrongdoing. For the retributivist, the punishment in this case is proportional precisely because the nature of the crime warrants such a punishment. But if all this is true, then in the absence of a

²³ For a discussion on retribution and consequentialism with regards to the law, see Jeffrie Murphy, "Legal Moralism and Retribution Revisited", *Proceedings and Addresses of the American Philosophical Association*, vol. 80, issue 2, Nov. 2006, pp. 46 & 51-52.

strengthened UN, the claim that a victim nation is unjustified in militarily defending itself against aggression given that the lives of the aggressive soldiers are more valuable than experiencing self determination and one's common life, etc. seemingly falls flat.

Now the proponent of WLE could view the nature of punishment as consequentialist in nature. For the consequentialist, the fundamental purpose of exacting punishment is not to give wrong doers what they deserve; for the consequentialist, there really is no concept of just desert. Rather the primary aim of punishment is, roughly, to bring about good consequences, which are to, roughly, maintain order and deter aggressive conduct that is dangerous to the international community. What makes the punishment in this case proportional are the consequences of such punishment. But if the proponent of WLE espouses this sort of consequentialism, the door is wide open for a certain kind of traditionalist – one who holds that the nature of proportionality is such that the consequences of defensive war should factor into the proportionality calculus -- to make his case. One such prominent traditionalist is Jeff McMahan. McMahan argues that defensive war waged by a victim state can be proportionate given that other nations will be dissuaded from committing aggression as a result of waging the defensive war.²⁴ In addition to deterrence, the traditionalist in this case can seemingly claim -- just as a consequentialist proponent of WLE would -- that their act of war is proportionate given that it contributes to international stability.²⁵ The underlying point I want to make here is that the consequentialist proponent of WLE does not have a compelling case against a traditionalist like McMahan; for largely the same factors that contribute to the

²⁴ Jeff McMahan, "War as Self Defense", *Ethics and International Affairs*, 18, no. 1, 2004, p. 79.

²⁵ Roughly speaking, the act of defensive war, if successful, contributes to international stability in that it eliminates a belligerent state from the world scene. This act of war may or may not deter other states from engaging in aggression.

proportionality of a punitive war also seemingly contribute to the proportionality of a defensive war. There's no reason then why a traditionalist like McMahan should be compelled by WLE.

It might be thought at this point that even if it's the case that the traditionalist has not been given a compelling case for why wars waged in national-defense against aggression are not proportional, it still seems that such defensive wars are unnecessary. Thus these wars are not justified. But I'm not so sure that this true. If the traditionalist is still within her rights to hold that defensive wars are proportional, then the fact that these wars are necessary as well seems to follow.²⁶ Consider a nation facing aggressive invasion. The victim nation has only two options, either capitulate or meet the attack with force -- all diplomatic efforts at averting the mitigated aggression have failed. They of course could, if they so desired, capitulate to the aggression, but they certainly wouldn't be morally obligated to. Given that they are still justified in thinking that they are permitted to meet aggression with lethal force, they don't have to give in to it. Now I haven't argued that a defensive war against mitigated aggression is in fact proportionate (although I suspect that it is). I've just argued that the proponent of WLE hasn't argued the traditionalist out of their view that it is. Since the proponent of WLE hasn't shown that a defensive war against mitigated aggression is in fact disproportionate, the traditionalist has no reason to think a defensive war is automatically unnecessary.

²⁶ For clarity's sake I should point out that the traditionalist at this juncture is not within her rights to claim that any defensive war against mitigated aggression automatically meets the proportionality condition for a Just war. The traditionalist, rather, is within her rights to claim that a defensive war is not automatically disproportionate. For example, an aggressive nation, on account of its mitigated aggression, may be liable to defensive lethal military force. However, such a lethal response by the victim nation may wind up killing a tremendous amount of harmless civilians and causing excessive damage. Here is a defensive war against mitigated aggression that is disproportionate, but not for the reasons outlined by Rodin.

Revisiting Just War as Law Enforcement:

To conclude, I've tried to show that there are problems for the person who wants to both reject a certain traditional view that nations have a right to national-defense that is analogous to personal self-defense and instead embrace WLE. At this point, I want to move away from the notion of a just war as national-defense and instead consider the issue of just war as law enforcement. I think there's perhaps a case to be made that nations, even in the absence of an authoritative UN, can justifiably wage a war of international law enforcement against conditional aggression. Rodin, rightly so, conceives of legitimate law enforcement as more than just punishing crime. Law enforcement also involves the prevention of crime before it happens as well as stopping crime that is in progress.²⁷ It's this notion of stopping crime in progress that can seemingly justify a victim state in militarily attacking its aggressor. There is some intuitive weight to the idea that nations can't legitimately punish one another for doing wrong. For states, with respect to one another, lack the hierarchal authority that is necessary for legitimate punishment.²⁸ However, there doesn't seem to be any substantive case to be made that nations cannot legitimately stop other nations from breaking international law.

Consider an example involving individual persons in the domestic arena. Ordinary citizens --who witness criminals in the process of breaking the law--are permitted to (if the police cannot be summoned) try and thwart the crime. If I, for example, witness someone breaking into my neighbor's house, I am justified in enforcing the law myself (again, if the police cannot do it) by using necessary and proportionate

²⁷ Ibid, p. 174

²⁸ George Fletcher, Basic Concepts of Criminal Law, (Oxford: Oxford University Press, 1998), p. 35.

force to try and stop the crime. Analogously, if an individual nation is witnessing an international crime in progress (e.g. the crime of conditional aggression being committed either on itself or another nation) then they are seemingly justified in employing necessary and proportionate force in order to stop the crime given that there really is no effective and authoritative international police force to be summoned.

Importantly, I am assuming that--given the importance of all that conditional aggression seeks to take away e.g. a nation's common way of life, political independence, and territorial integrity--the employment of military force, conceived of as stopping international crime in progress, is a proportionate reaction to conditional aggression.²⁹ This is seemingly not an unreasonable assumption, given that we are assuming (along with Rodin), that an authoritative UN *punishing* an aggressive nation with lethal force is proportional to the aggressive nation's wrongdoing. Again, it's seemingly odd to say both that punishing an aggressive nation X with lethal force is a proportionate response to X's wrongdoing; but that the danger that stems from X's actions is not sufficiently high to warrant a lethal response in order to avoid (or prevent) it.

To conclude, I should briefly touch on the difference between a nation resisting conditional aggression as a means of upholding international law (i.e. a nation enforcing international law), and a nation *defending* itself against conditional aggression (i.e. a nation exercising its right of ND). A war waged by a victim nation in the name of national defense, and a war waged by the same victim nation in the name of law

²⁹ My claim in this section is that the notion of stopping international crime in progress can justify a victim nation in warring against its conditional aggressor. Given this, it's important to note that what makes a victim nation's military response to conditional aggression proportionate is strictly speaking the fact that the danger to be avoided e.g. the loss of political independence is sufficiently high to warrant the victim nation in employing military force. I am not claiming that what makes a victim nation's military response to conditional aggression proportionate is the egregious wrongdoing of the aggressive nation. This makes it sound like the victim nation is justified in punishing the aggressive nation.

enforcement (stopping international crime in progress) will be similar in how they are fought. Both wars will see the employment of lethal military force. Furthermore, the goals of both wars will not be entirely different. Whether the war by the victim nation is one of law enforcement (stopping international crime in progress) or national defense, a fundamental goal is to protect people and to keep their rights from being violated. Put differently, by waging a war of law enforcement, a victim nation will thereby be defending itself in the same manner as it would if it were waging a war of national-defense. And vice versa. By waging a war of national-defense, a victim nation will thereby be enforcing international law in the same manner as it would if it were waging a war of law enforcement. The difference I am trying to uncover, then, lies in how a victim nation conceives of what they are doing, as well as (importantly) what justifies the victim nation in employing lethal military force. My aim here, then, in this last section has just been to suggest a possible way of *justifying* war against aggression -- in the absence of an authoritative UN -- that is *conceived* of in terms of a type of law enforcement.³⁰

³⁰ I would like to thank all the participants in the University of Sterling Law and Philosophy conference for their valuable discussion regarding this paper.