

ETIKA, VÁLKA A LIDSKÁ PRÁVA

ETHICS, WAR AND HUMAN RIGHTS

David WHETHAM*

Abstrakt

Válka představuje situaci, při níž dochází k selhání běžných pravidel civilizovaného chování. Myšlenka na zachování lidských práv v tomto kontextu je mnohými považována za ne zcela adekvátní. Vedení války však vždy patřilo mezi činnosti lidstva, které podléhaly pravidlům v nejvyšší míře. Příspěvek je věnován úvahám o tomto zjevném paradoxu s využitím teorie spravedlivé války jakožto rámce pro výzkum vztahů mezi etikou, válkou a lidskými právy a jejich vzájemné interakce v současném vojenském prostředí.

Abstract

War is a situation in which the normal rules of civilised behaviour have broken down. The idea of upholding human rights within such a context is considered by many to be a little strange. However, warfare has always been one of the most rule-bound activities that mankind conducts. This paper explores some of the reasoning behind this apparent paradox, using the Just War Theory as a framework within which to explore the relationship between ethics, war and human rights and the way they interact in the contemporary military environment.

Klíčová slova

Spravedlivá válka, etika, strategie, právo, válka, lidská práva, legitimita.

Keywords

Just War, ethics, strategy, law, war, human rights, legitimacy.

INTRODUCTION

War is a situation in which the normal rules of international society have broken down. The idea of upholding human rights in such a situation is a little odd to many people. Within a society, the worst crime that one can commit is to deliberately take the life of another human being, yet most societies keep a military organisation of varying size to carry out precisely this function if the circumstances so dictate. Even so, those military organisations are only allowed to carry out this function in certain ways, adhering to all sorts of legal, social and ethical constraints. Why should this be so? This paper will begin by looking at the moral and ethical issues surrounding the use of force before exploring the key elements of the Just War Tradition and its relationship with the idea of human rights.

The current, broadly accepted criteria that form Just War Theory (JWT), and the long tradition from which it has developed, are the results of attempts to look at conflict through an ethical framework.¹ Nowhere else are the stakes so high. JWT provides a common language for debating the rights and wrongs of conflict and an ethical framework for thinking about human rights and also responsibilities and duties, even in wartime. It can help explain the difference between justifiable (and therefore legitimate) military action, and something wholly different:

* E-mail: dwhetham@mac.com

Without ethical and legal constraints on both the decision to wage it (jus ad bellum) and its conduct (jus in bello), war is nothing more than the application of brute force, logically indistinguishable from mass murder.²

JWT contains considerations that lie at the heart of sound strategic thinking and a recognition of the importance of human rights is fundamental to this in the contemporary strategic environment.

WHERE DOES THE JUST WAR TRADITION COME FROM?

The type of thinking that leads to JWT fits in between two very different attitudes towards war: Pacifism and Realism. Pacifism is a presumption against war. It argues that while evil must be opposed in the world, resorting to war and violence is always wrong. Pacifism sees a straightforward contradiction between acting morally, and the conscious, systematic and deliberate taking of life that war requires. Put simply, war is unjust and one cannot do something that is unjust whatever the reason - one cannot do evil even to prevent evil. The Pacifist makes a sincere and credible argument until one is faced with something like a decision to intervene and save lives by using force to prevent a genocide, or to stand by and watch mass human rights violations when you could have prevented them (see Ambrose below).

On the other side of the argument, the realist wonders why one would need justification at all? In this context, realism is the view that moral or ethical thinking, or concepts such as 'justice', do not belong in the sphere of international relations.³ The Realist does not have to go as far as to say that such values mean absolutely nothing, just that they are alien to the world between states: the state is what makes such values possible for those who live under its protection. As there is no 'Leviathan' in the international arena, it makes no sense to talk about values, morality or ethics here either. Thucydides captured it in the Melian Dialogue when the Athenians argue:

The standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept.⁴

Cicero summed this view up with 'in war the law is silent'.⁵ Taken seriously, this approach argues that seeking to bound war within rules is simply ridiculous or, at least, unworkable. If war is such a terrible thing, then the best thing that can be done is to get it over as quickly as possible. Adhering to any kind of misguided ethical or legal limitations will simply prolong the agony.

However, Realism, whether descriptive or prescriptive can itself be decidedly unrealistic when it claims that effective strategy is best served by ignoring the normative dimension in one's conduct. Military success and political success are not the same thing and successful strategy must provide a linkage between the two. For example, the intelligence gained by the French use of torture in Algeria in the late 1950s may have helped win the Battle of Algiers (although this is certainly not clear), but it certainly undermined French support, contributing to the loss of the overall war.⁶ Realism can allow a conflict to escalate beyond control, and for war to become the master rather than the servant of policy. As such, it is actually decidedly unrealistic.

JWT fits in between these two positions as a pragmatic compromise. It agrees with the Pacifist that war is a terrible thing and that it should be avoided, just not at any cost. Rather than accepting the Pacifist's presumption against war, JWT states a presumption against injustice, arguing that it is sometimes morally acceptable (or even morally necessary) to fight. In this respect, JWT agrees with the Realist that it is sometimes necessary to do terrible things. However, that does not mean that war should be something that is easily resorted to - not all reasons justify going to war and, even if a war can be justified, it must still be fought in a way that accepts certain limits. Those limits include the recognition that individuals, both combatants and non-combatants, have certain rights, even in times of war. This is because the purpose of war is to gain a better peace. This is

a principle that has been accepted in the rules that governed warfare between the city-states of Ancient Greece, through to the codification of customary international law in the nineteenth and twentieth centuries. Although often identified as a Western tradition, there is nothing incompatible with ideas, cultures and religious principles found all over the world. Every culture, every civilisation and every religion, including Hinduism, Judaism, Sikhism and Islam accept that war must be restrained in some way.⁷ But why? Precisely because military victory makes no sense unless it can be transformed into political success. Violating the basic principles of JWT makes winning harder or even impossible. The laws of war and JWT from which they come make the return to peace easier and therefore allow a political victory to be achieved.

CONTEMPORARY JUST WAR THEORY

JWT has developed around two related but distinct ideas: *Jus ad bellum* – what is required to justify going to war, and; *Jus in bello* – the limited on the use of force within war.

Jus ad Bellum

- Just Cause
- Legitimate Authority
- Right Intention
- The Goal of the War is Proportional to the Offence
- Reasonable Chance of Success
- Last Resort

Jus in Bello

- Proportionality
- Discrimination (also referred to as Distinction)

Why would one want to make a distinction between the two levels of war? It allows us to draw a line between the decision to go to war and the actual conduct of that war. Soldiers are not responsible for the decision to go to war, but they are responsible for its conduct. Very senior military officers may straddle the line, but, as Walzer points out, this means that we know pretty well where that line should be drawn.⁸ Shakespeare gets to the heart of the matter with succinct elegance:

BATES: *If [the King's] cause be wrong, our obedience to the king wipes the crime of it out of us.*

WILLIAMS: *But if the cause be not good, the King himself hath a heavy reckoning to make when all those legs and arms and heads, chopp'd off in a battle.*⁹

This distinction between the levels of responsibility is an important one, and can have implications for the long-term defence of the state. Vitoria, writing in the mid sixteenth century, makes clear that:

*if subjects can not serve in war except they are first satisfied of its justice, the State would fall into grave peril and the door would be opened to wrongdoing...if subjects in a case of doubt do not follow their prince to the war, they expose themselves to the risk of betraying their State to the enemy, and this is a much more serious thing than fighting against the enemy despite a doubt.*¹⁰

In the absence of clear evidence to the contrary, the soldiers on each side need to give their own leaders the benefit of the doubt or the state itself could be put at risk. However, even while giving this warning, Vitoria still makes it clear that there are limits to how far a soldier can wash their hands of their moral responsibilities. If one was provided with clear evidence of the injustice of a war, there can be no excuse for partaking in it. Effectively, a soldier has a moral duty to disobey any order that is clearly unjust.¹¹ While Vitoria was writing nearly 500 years ago, this is a theme that finds clear relevance today as every soldier has a moral and legal duty to disobey an illegal order, and cannot claim the defence of superior orders (which can, at best, only be accepted as a mitigating circumstance rather than as a defence) if he or she knowingly carries out an illegal act.

Obviously the two levels of responsibility remain connected in some way. While one cannot make an unjust cause morally acceptable by fighting it well,¹² one can certainly undermine a just cause by conducting it badly.

JUS AD BELLUM

A Just War must have a just cause. The clearest example of a just cause in the 21st Century is self defence due to the invasion of one's territory. This is accepted in Article 51 of the UN Charter, which affirms the inherent right of self defence possessed by every state.¹³ Just Causes could also be the defence of a neighbour or ally (for example the liberation of Kuwait in 1991) or, increasingly, it is becoming argued in legal terms that defence of the innocent is also a just cause. This takes contemporary legal arguments back to those ethical arguments put forward by Ambrose (ca. 339-397) and later Augustine (354-430) that sacrifice on behalf of the innocent and the common good are to be praised: 'Anyone who does not prevent an injury to a companion, if he can do so, is as much at fault as he who inflicts it'.¹⁴ One can see such thinking shaping the development of the Responsibility to Protect in contemporary international affairs, where if a particular state proves itself to be unwilling or unable to carry out its responsibilities to prevent human rights abuses, that responsibility must be transferred to the international community so that it can act instead, using peaceful means where possible and military force only as a last resort.¹⁵

Is pre-emption a legitimate act of self defence? Context is everything when answering this question. Morally, the problem with pre-empting a threat is that it can all too easily turn the defender into the attacker. However, if one is about to be ambushed, one can fire the first shot and it still be considered self defence. It appears common sense that this reasoning extends to states as well as individuals.¹⁶ Sometimes a threat must be anticipated if it is to be successfully defended against, but how far can this be taken? Clearly in today's strategic environment, one can't wait until the mushroom cloud to act. However, if you just decide that somebody, at some unspecified time in the future, just might become a threat to you even though they are not at this moment, attacking them cannot be considered self defence, either legally or morally. The key to legitimacy is getting the balance right.

Unless one is acting purely in self defence (in which case no further authority is required), the use of armed force requires legitimate authority. In contemporary legal terms, this authority can only come from the UN Security Council. Article 2(4) of the UN Charter declares: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Everything other than actions taken in immediate self defence requires this authority. However, in practice, if not theory, the actual power to do this still rests with individual states or regional alliances rather than exclusively with the UN.¹⁷ States still have established procedures for legally declaring war or committing their armed forces into a conflict and these must be followed if such a deployment is to be considered just. For example, in the UK, the Royal Prerogative under which the Prime Minister could commit UK troops without

Parliamentary approval is very likely to be a thing of the past now as it is no longer seen as legitimate when it is Parliament itself that is supposed to be sovereign.¹⁸

Most people accept that motives are relevant to the moral quality of an action. Therefore, a Just War must have right intention.¹⁹ While the just cause establishes that one is doing the right thing, right intention asks if you are doing it for the right reasons. These could include creating, restoring or keeping a just peace, righting a wrong or assisting the innocent. Wrong intentions are those that seek to expand lands, enslave or convert people to your religion or ideas, hatred or revenge. If a war is motivated by these last two emotions in particular, it becomes easy for the enemy to be regarded as less than an equal which makes it far more likely that atrocities and war crimes will get committed. Of course, good intentions are often mixed up with more dubious ones. Does it really matter what the motivation for an action is? JWT recognises that states will rarely have only one reason for what they do. However, this criteria is still important as it recognises that wars fought primarily for bad motives often lead to an unjust peace, which in itself will simply sow the seeds for further conflict in the long run.

A Just War should have a goal that is proportional to the offence that prompted that war. Of course, this can be a very subjective criteria to fulfil – after all, what price does one put on national honour? It would clearly not be proportional to invade and subjugate an entire population in response to a minor border infringement. The second part of this criteria is that the benefits of the war must outweigh the suffering it causes. How many combatant and civilian deaths are likely to result on both sides and how many can be justified by the Just Cause as a reason to go to war in the first place? This is a particularly difficult calculation to make in advance of military action, however, JWT asks that a credible attempt is made to answer this question before resorting to the use of force.

Going to war for a hopeless cause may be considered noble by some, but most people accept that it is unethical to sacrifice life and cause pain and suffering if it cannot actually change anything. Therefore, JWT asks that there be a reasonable chance of success for military action to be justified. Of course, this means that one must have a clear idea of what one's definition of success is before military action is pursued. This idea is closely related to the need to plan for conflict resolution rather than simply conflict termination as this asks the protagonist to think through to the *Jus Post Bellum* – justice after the war. It is not simply about victory, but the best way to achieve the political goals that prompted the war in the first place, planning for and creating the conditions for a meaningful and lasting peace. In this way, by establishing a clear and realistic objective at the outset, mission creep can be avoided and war remains an instrument of policy rather than becoming the master of it.

The final JWT *ad bellum* criteria is that war should be a last resort. A state should only go to war when it has tried every sensible non-violent alternative first, such as diplomacy, economic sanctions, political pressure, condemnation in the UN etc. Of course, diplomats can always send one more letter so how does one know when the last resort really has been reached? The last resort criteria simply means that there are no more practical alternatives that might achieve success that have not already been attempted.

JUS IN BELLO

No-one (or rather, very few people) would knowingly fight for a cause that they considered unjust. Only a deity could know who is really, objectively, in the right.²⁰ In this sense, The soldiers on both sides are in the same boat, as it were.²¹ This means that there is a moral equality of combatants, no matter what side they are on. This sentiment is beautifully expressed by Ataturk on a memorial to those who fell on both sides in WWI:

*Those heroes that shed their blood and lost their lives... You are now lying in the soil of a friendly country... Therefore rest in peace. There is no difference between the Johnnies and the Mehmets to us where they lie side by side now here in this country of ours.*²²

This moral equality connects the *ad bellum* considerations to the *in bello* ones and leads to the acceptance that war should be conducted within limits. It does not matter who ‘started it’ – both sides will claim justice to be with them anyway – both sides are bound to conduct their conflict justly, recognising that both sides have certain rights and duties to each other (proportionality) and to those who are unconnected with actually pursuing hostilities (discrimination). Such considerations are required to ensure that there can be a return to a just and acceptable peace following the war, thus avoiding perpetual conflict.

Just as the war itself must be a proportional response to the injury suffered, the means employed in the war must be proportionate or appropriate to win and no more. The principle of proportionality requires that the damage, losses or injury resulting from any military action should not be excessive in relation to the expected military advantage. Long before the JWT formula begin to emerge in a more systematised way, Plato recognised that war between the Greek city states should be restrained in certain ways that accepted the rights of the people involved in, and affected by, the hostilities. He argued that while it was legitimate to take food to sustain oneself while passing through hostile territory, destroying the means of producing that food was not.²³ Effectively, such action was considered disproportionate in the same way that today, destroying an entire town to neutralize one enemy sniper is likely to be disproportionate.

In the spirit of adhering to the idea of proportionality, certain weapons have been prohibited throughout history. For example, the Laws of Manu prohibited Hindus from employing poison arrows and both Greeks and Romans prohibited the use of poison and poisoned weapons.²⁴ It is the same rationale that explains the contemporary prohibition on the use of chemical and biological weapons or the poisoning of water and food supplies.²⁵ The parties to the 1868 St Petersburg Declaration prohibited the use of incendiary or explosive projectiles below a certain size and weight for the same reason – the same effect could be achieved with a normal solid round, so why cause additional, unnecessary suffering?²⁶ Certain methods of war and types of weapon are simply considered too inhumane due to the suffering inflicted when compared to the military advantage achieved by their use.

Closely related to proportionality is the principle of discrimination. This relates to who it is legitimate to conduct hostilities against. Plato put forward the idea that only those who are actually responsible for the dispute are to be treated as enemies.²⁷ Echoing Plato’s point, contemporary law makes a clear separation between two types of people:

*Only combatants are permitted to take a direct part in hostilities. It follows that they may be attacked. Civilians may not take a direct part in hostilities and, for so long as they refrain from doing so, are protected from attack.*²⁸

There is an implicit ‘deal’ here. Civilians get the right not to be intentionally targeted by military forces, and in return, they have a duty not to take up arms in hostilities.²⁹

So who is a legitimate object of attack in the contemporary environment? Those who can be targeted include: members of the military forces; members of an organised guerrilla force, whether or not they are in uniform, and; anyone who takes up arms in a conflict other than in direct self defence. However, once a soldier is no longer capable of posing a threat because they are *hors de combat* – wounded or surrendered and therefore no longer capable of taking a direct part in hostilities – they too cease to be a legitimate target. In case of doubt, people are to be considered to be civilians and therefore to be considered immune from attack.³⁰

DOUBLE EFFECT

While non-combatants can never be legitimately targeted themselves, JWT would have become irrelevant centuries or even millennia ago if it did not recognise that innocent people get killed in wars. But how can the foreseeable deaths of civilians be compatible with the idea of respecting their human rights? JWT accepts that sometimes the achievement of a specific aim or objective can only be satisfied by accepting a degree of 'collateral damage' – the euphemism for dead women and babies. Therefore, the requirements set out in the *in bello* criteria above to avoid the infliction of unnecessary suffering or destruction on both combatants and non-combatants, are balanced in JWT against the principle of military necessity - 'those measures which are indispensable for securing the ends of the war, and which are lawful'.³¹ While it would never be ethical or lawful to deliberately target a civilian population, JWT recognises that the same population may still, under certain circumstances, still be affected in a negative way by military operations. Aquinas grappled with this question and articulated what later became known as the Doctrine of Double Effect to explain it.³² It is the idea that individuals are not morally responsible for a foreseeable, yet unintended side-effect of an otherwise legitimate action. However, the foreseeable side effects of a military action, even while not intended, must still be proportionate to the expected military utility of the target and civilian casualties are still to be avoided as far as is possible. The Doctrine of Double Effect cannot be used to defend the use of weapons of mass destruction against an area with a civilian population as these weapons are so indiscriminate that the resulting civilian casualties cannot be regarded as a secondary result. This is underlined by the notion of proportionality.

Clearly the character of the conflict has an impact on the way the Doctrine is applied. For example, if one is engaged in a humanitarian operation motivated by a desire to protect and help the civilian population and uphold their human rights, it would be inappropriate to push the burden of risk over to that same population and accept the same degree of collateral damage for them that might be acceptable in an existential war fought for the very survival of one's own state.

CONCLUSION

Justice and war must be considered together rather than separately. This is truer now than ever before in the age of the 'Strategic Corporal'.³³ Recent events at places such as Abu Ghraib have demonstrated that the actions of even private soldiers can be beamed around the world very quickly, causing massive political impact, perhaps undermining the whole cause for the war in the first place.³⁴ There is nothing intrinsically new in this recognition of the importance of public opinion. General Keightley acknowledged it in his post-mortem of the Suez operation in 1956, stating that 'world opinion is now an absolute principle of war and must be treated as such'.³⁵ Western military forces represent democracies. Their primary centre of gravity is always going to be the support of their own people. World public opinion is increasingly linked to this and in the case of a counter-insurgency operation, the consent of the people in the host nation is absolutely vital to success. If this support is lost, the conflict will also be lost. Acknowledging the importance of, upholding, and being seen to uphold human rights within this context is vital.

People die in wars. That is regrettable but also inescapable. The Just War Theory provides a framework for distinguishing between justifiable military action within a legal and ethical framework, and murder. As Plato recognised in the Fourth Century BC, a successful statesman must keep in mind that war should be a means to a better peace, rather than an end in itself.³⁶ Fighting a war without recognising the importance of limits and thus ignoring human rights is counterproductive and bad strategy as it makes winner harder rather than easier by undermining victory at the level that counts – the political level.

NOTES

¹ In the same way that the laws of war apply to armed conflicts as a whole rather than simply those that are declared as wars, so Just War Theory applies even when a formal war has not been declared.

² BELLAMY, Alex J, *Just Wars: From Cicero to Iraq*, p. 1.

³ For example, see MACHIAVELLI, Niccolò, *The Discourses*, p. 515.

⁴ THUCYDIDES, *The History of the Peloponnesian War*, p. 402.

⁵ CICERO, *Pro Milone*, p. 11.

⁶ See WHETHAM, David, *Taking the Gloves Off and the Illusion of Victory*.

⁷ See *Just War in Comparative Perspective*, editor Paul Robinson.

⁸ WALZER, Michael, *Just and Unjust Wars*, p. 39.

⁹ SHAKESPEARE, *Henry V Act 4 Scene 1*.

¹⁰ VITORIA, Francisco, *De Indis De Jure Belli*, Part III. 31.

¹¹ *Ibid.* III. 26.

¹² Although those who conduct themselves in this way do not share in the blame for the war itself and can even be commended on their actions – for example Rommel in WWII. See WALZER, Michael, *Just and Unjust Wars*, p. 38.

¹³ “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs.” Thus self defence does not require any additional authority to sanction it.

¹⁴ AMBROSE, *On the Duties of the Clergy*, Book 1, ch. 36.

¹⁵ International Commission on Intervention and State Sovereignty. <http://www.iciss.ca/>

¹⁶ Although the relationship between individual and collective self defence has been challenged. For example, see RODIN, David, *War and Self Defence*.

¹⁷ E.g. the authority for the Kosovo intervention came from the agreement by the countries of NATO and was then retrospectively legitimised by the UN.

¹⁸ It is through just such a process that the declaration of hostilities is made, setting out what the cause of the conflict is and what is required to stop the military reaction to it. This is a procedural concept, but one that is nevertheless an important one.

¹⁹ Right Intention was at the heart of Augustine’s reluctant acceptance of war as a necessary evil, with it being justified in terms of what one was intending to achieve: a better peace. See AUGUSTINE, *City of God*, book XV, chap. 4.

²⁰ Rather than limiting this ability to a deity alone, one can instead try to reason oneself towards a more objective position. See NAGEL, Thomas, *The View From Nowhere*.

²¹ The problem of ascertaining the objective truth of an event is demonstrated by the ongoing debate over the cause of the sinking of the USS Maine in Havana Harbour in 1898, an event that precipitated the ensuing Spanish-American War, although it is still not clear of the blast was caused by a mine or an accident on board.

²² Kemal Atatürk Memorial, ANZAC Parade, Canberra.

²³ Plato, *Republic V*, p. 710.

²⁴ ROBERTS, Adam & GUELFF, Richard (Editors), *Documents of the Laws of War*, p. 29.

²⁵ For example, the Geneva Gas Protocol of 1925 which prohibited ‘the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices’. See *The Manual of the Law of Armed Conflict*, p. 11.

²⁶ *Ibid.* p. 109.

²⁷ Plato, *Republic V*, p. 710.

²⁸ *The Manual of the Law of Armed Conflict*, p. 24. Referring to Additional Protocol I, Art 43 & 51.

²⁹ Except in the case of direct self defence, which can justify the use of arms. As explained above, self defence requires no additional authority to be valid.

³⁰ AP 1, Art 50. See *The Manual of the Law of Armed Conflict*, p. 53.

³¹ This articulation of military necessity was first defined in the 1863 Lieber Code, Art. 14.

³² See Question 64: Article 7, in AQUINAS, Thomas, *Summa Theologica*, pp.1465-6.

³³ See KRULAK, Charles, *The Strategic Corporal: Leadership in the Three Block War*.

³⁴ ‘Lynndie England Convicted in Abu Ghraib Trial’, *USA Today*, 26 September, 2005.

³⁵ Cited in SHAW, T, *Eden, Suez and the Mass Media*, p. 196.

³⁶ PLATO, *Laws I*, p. 1230.

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