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Larry May
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PART A

PACIFISM AND JUST WARS

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1

Introduction

Between the Horrors and Necessity of War

This book is about the normative grounding of crimes of aggression, or what are sometimes called crimes against peace. The crime of aggression is the only one of the three crimes charged at Nuremberg (the other two being crimes against humanity and war crimes) that is not currently being prosecuted. The ensuing discussion of the crime of aggression is timely since the International Criminal Court (ICC) has jurisdiction to prosecute such crimes, as they were prosecuted at Nuremberg, but the ICC currently lacks, and is now seeking, a mechanism for international trials for the crime of aggression. I will examine the justifiability of initiating war, as well as who should be held liable for initiating or waging an unjustified war. I will focus on issues in international criminal law, that is, on when and whether individuals should be prosecuted for initiating and waging aggressive war, rather than on the more traditional question of when or whether States are to be criticized or sanctioned for waging aggressive war.

My view is that crimes of aggression are deserving of international prosecution when one State undermines the ability of another State to protect human rights. This thesis runs against the grain of how aggression has been traditionally understood in international law. Previously, it was common to say that aggression involved a State's first strike against another State, where often what that meant was simply that one sovereign State had crossed the borders of another sovereign State. In this book I argue that the mere crossing of borders is not a sufficient normative rationale for prosecuting State leaders for the international crime of aggression. At Nuremberg, charges of crimes against humanity were pursued only if the defendant also engaged in the crime of aggression. I now argue for a reversal of this position, contending that aggression charges should be pursued only if the defendant's acts involved serious human rights

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violations. Indeed, I argue that aggression, as a crime, should be defined as not merely a first strike against another State but a first wrong that violates or undermines human rights.[1]

My strategy is to find a normative grounding for the crime of aggression that is similar to that for crimes against humanity and war crimes. Today, crimes against humanity and war crimes are considered *jus cogens* crimes, that is, crimes that are of such paramount wrongness that States are universally bound not to commit them.[2] If there are to be prosecutions for crimes against peace (or the crime of aggression) that are similar to prosecutions for crimes against humanity and war crimes, then there must be a similarly very serious violation that aggression constitutes. Mere assaulting of sovereignty does not have the same level of seriousness and is not as universally condemned as are the other crimes. For this reason, among others, I argue that aggression, as a crime, needs to be linked to serious human rights violations, not merely to violations of territorial integrity.

A decade ago, I first conceived the idea of writing a book on the normative and conceptual issues in international criminal law. That project has grown into a series of volumes, of which this is the third. The first two volumes were on crimes against humanity and war crimes, respectively.[3] In the current volume, I focus on the normative principles and conceptual assumptions of prosecuting individuals for crimes against peace. The concept of humanity plays an important role in each of these volumes. In the first volume, a particular kind of crime is identified, crimes against humanity, that harms humanity, as opposed to individual States or persons. In the second, a type of crime is identified, war crimes, that assaults humaneness, as opposed to more traditional assaults on justice. And in this third volume on the crime of aggression, I argue that aggressive wars are best understood as wars that undermine the ability of States, and hence of the human community, to protect human rights. In all three books, as is increasingly seen in debates about international law, the focus is on the "laws of humanity": a set of rules meant to govern the international community, that is, the obligations and rights of humanity, although in each type of crime humanity is harmed differently.

[1] In a different context, David Rodin has also argued for a similar view of aggression. See his book, *War and Self-Defense*, Oxford: Oxford University Press, 2002.

[2] See Alexander Orakhelshvili, *Peremptory Norms in International Law*, Oxford: Oxford University Press, 2006.

[3] *Crimes against Humanity: A Normative Account*, New York: Cambridge University Press, 2005; and *War Crimes and Just War*, New York: Cambridge University Press, 2007.

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Crimes against peace assault humanity by undermining human rights protections that States normally can provide, but crimes against peace do not harm humanity the way that crimes against humanity, such as ethnic cleansing campaigns, do. Crimes against peace also are not like war crimes in assaulting humaneness, since all wars, not merely aggressive wars, are inhumane, and aggressive wars are not necessarily more inhumane than defensive wars. For this reason, I will speak of the harm of crimes against peace as involving the abrogation of human rights, rather than as directly harming humanity or humaneness.[4] Of course, there are States that have been massive violators of human rights, and wars waged to stop such States are not generally aggressive in my view.

Most of the book uses examples from the International Military Tribunal sitting at Nuremberg and the subsequent proceedings by the American Military Tribunal also sitting in Nuremberg under the auspices of Control Council Law Number 10, since these are the most important international trials that have occurred for crimes against peace.[5] In the end I offer some strong cautions for contemporary lawyers about how the Nuremberg model is increasingly being used today. Nonetheless, I argue that prosecutions of State leaders for crimes against peace can be justified and should go forward today where the undiluted elements of State aggression as well as the subjective and objective elements of individual criminality are present.

In this first introductory chapter, I will set the stage for the later chapter-length discussions by trying to indicate the considerations that allowed both the Just War tradition and contemporary international law to come to similar understandings about which wars were clearly aggressive and which were not. I will also explain the methodology of the book: normatively minimalist and also defendant-oriented throughout. In general, I wish to indicate why there is a problem about war over the centuries, namely, that war is strongly condemned but also seen as allowed, or at least excusable, in some few cases. Indeed, in those few cases, such as when a State uses military force in self-defense or defense of others, these wars are not only justified but may even be required. This is because war is

[4] See Lawrence Douglas, *The Memory of Judgment*, New Haven, CT: Yale University Press, 2001, pp. 45–46.

[5] The other main trials for crimes against peace were those held in Tokyo, but the judgments reached there did not provide us with a very rich analysis of this international crime, as well as in Poland (the Greiser trial) and in China (Chinese War Crimes Military Tribunal). See Mark Drumbl's discussion of these latter trials in his paper presented to the 60th Anniversary Conference on Nuremberg held at Washington University in the fall of 2006.

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often paradoxically something that is needed to restore human rights protection and peace in a region of the world. That some wars may be justified or at least excused will have a strong impact on when and whether individuals should be prosecuted for such wars.

I. Condemning War but Fighting for Peace

War is a horrible thing and only in the most extreme cases can it be justified. Given the likelihood that innocent people will be killed in war there remains a strong contingent presumption that all wars are unjustified. In his essay "The Grotian Tradition in International Law," Hersch Lauterpacht described the 17th-century philosopher and founder of international law, Hugo Grotius, as someone whose writings displayed "a disapproval, amounting to a hatred of war."[6] And yet, according to Lauterpacht, Grotius also "does not deny that war is a legal institution . . . war is not inconsistent with the law of nature and with many other kinds of law."[7] I will also explain that war is needed in certain cases since international solidarity seems to require that a State be willing to go to war in order to aid States that are protecting human rights, or to prevent harm to individuals in oppressive States. In this way we confront the problem that all wars seem to be condemnable but that some wars may be justified or at least excused.

One normative difficulty is that if what makes war immoral is the killing of people, then all wars are immoral and there is no relevant moral distinction between aggressive wars and defensive wars. If one wants to maintain a distinction of this sort and punish people for waging aggressive wars but not for waging defensive wars, focusing on killing alone will not work. One strategy is to see that some wars destabilize a sovereign State and other wars do not; indeed, purely defensive wars shore up rather than destabilize. But this turns on the ability to explain why sovereign States matter morally. The difficulty is that today not all sovereign States are worth preserving morally since some States are the worst human rights abusers. Yet in most cases the world is better off with stable rather than destabilized States, as the problem of failed States as a haven for terrorist groups so vividly indicates. My view is that aggression is morally wrong because it destabilizes States that generally protect human rights more than they

[6] Hersch Lauterpacht, "The Grotian Tradition in International Law," *British Year Book of International Law*, vol. 23, 1946, p. 47.
[7] Ibid., p. 46.

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curtail them.[8] If a given State is not generally protecting human rights, it will be less clear that war waged against such a State is indeed best labeled aggressive and unjustified war. Indeed, if States systematically violate the basic human rights of their citizens, then those States have no right to insist that other States respect their sovereignty.[9]

State aggression is a resort to the means of war not justified by reference to self-defense or defense of others. Normally, State aggression is a form of war, that is, the violent use of force by one State (or State-like entity) against another. The most obvious way that State aggression causes harm concerns the loss of life, and risk to loss of much of what is valuable to many other lives, that is a consequence of any war. But this strategy, as I said above, will not allow us to distinguish aggressive from defensive wars. In all wars, many people are either killed or placed in serious jeopardy of being killed, and it does not matter whether the war is aggressive or defensive. Instead, one might try to show that humanity is harmed in aggressive but not in defensive wars. This would mean that it is not the violence per se that is the wrong-making characteristic of State aggression but the effect on humanity.

One clear way that humanity might be harmed by some, but not all, wars concerns the significant violation of human rights that sometimes occurs when one State destabilizes another State. Of course, not every destabilizing of a State does cause significant violation of human rights since some States are major abusers of human rights and destabilizing them would seemingly have a positive effect on the protection of human rights in the world. But in at least some of these cases, having a failed State may make for much broader human rights abuses than was true when there was, for instance, an authoritarian State that significantly abused human rights. In many cases, though, destabilizing a State not related to self-defense or defense of others seems to be a harm to humanity in that significant human rights are abused, or made much more likely to be abused.

Traditional Just War theory argues that some wars can be justified, even required, out of respect for the protection of innocent life. Self-defense and defense of others are the key bases for the justification of war. This position was historically articulated in opposition to strict pacifism, although it ended up calling only for a kind of limitation on certain

[8] See Allen Buchanan, *Justice, Legitimacy, and Self-Determination*, Oxford: Oxford University Press, 2004.
[9] See my discussion of this issue in chapter 1 of my book *Crimes against Humanity*, 2005.

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versions of pacifism. If pacifism is itself grounded in respect for life, especially innocent life, then it appears that some wars may be justified, from the standpoint of certain versions of pacifism, if those wars will prevent massive loss of innocent life without risking a corresponding loss of life that occurs as a result of waging the war itself. Indeed, the early Church Fathers saw themselves as sympathetic to pacifism and yet also thought that some wars could be justified on just the grounds we have been discussing, namely, concern or respect for the lives of fellow humans. Of course, we may want to question whether the early Church Fathers really were pacifists, but my point is only that war can sometimes be justified on the same grounds on which certain forms of pacifism are themselves grounded.

Strict pacifists will not support any war since war involves the intentional taking of human life. But few would follow these strict pacifists in saying that one should not use violent force to defend an innocent person's or one's own life from mortal attack. As an analogy, think of the abortion debates. Strict adherents to a pro-life position will argue that all abortions are unjustified. But they do not gain many adherents to their position when the focus is on those cases of abortion that are necessary to save the life of the pregnant woman. And the reason regarding abortion is similar to the case of war. It seems odd to think that abortion or war should be condemned in all cases on grounds of protecting life and yet not recognize the conflicting intuitions that many people have about the cases in which abortion or war is necessary to protect innocent life as well. Except in the most extreme view of it, the principle of respect for life does not seem clearly to require that all wars or all abortions be prohibited.

As we will see in later chapters, another strategy in these debates is to maintain a strong condemnation of all wars, and yet allow that some individuals who initiated war can be excused if the reason that war was initiated had to do with the protection of innocent life. Once again, strong pro-life adherents in the abortion debates sometimes take the view that abortion is morally impermissible even to save the life of the pregnant woman. Yet some allow that the woman or her doctor may be excusable for what they have done. This recognizes the distinction, which is very important in legal theory, between a justification and an excuse.[10]

To say that war is justified is to say that the moral or legal reasons in support of waging war in a given context outweigh the moral or legal reasons against waging war in that context. To say that waging war might

[10] See Thomas Franck, *Recourse to Force*, Cambridge: Cambridge University Press, 2002, ch. 10.

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be excused is to say that even though the balance of reasons weigh against waging war, special considerations might warrant that waging war in this case not be blamed or punished. Think of the example of murder. One can say that a person is guilty of murder even though he or she had some reason to engage in this act. But one can also say that a person is guilty of murder and yet his act can be justified or excused, such as in the case of killing in self-defense. One can be guilty of murder and yet excused from punishment.

One strong strain of the Just War tradition has taken off from the above position, namely, that some wars can be allowed or at least excused even if one is generally sympathetic to pacifism. This is the position of Augustine and of Thomas More, as well as some of the followers of Thomas Aquinas, who specifically discuss abortion as well as war in just these terms – that some wars may be justified out of respect for life. The extreme pacifist early Church Fathers began to lose adherents throughout the Roman era, and it seems likely that the Just War doctrine came into being as a way to save much of the sentiment behind the pacifist position, especially the strong support for life, by admitting that some, but only very few, wars could be justified or excused. Contrary to what is often thought today, I read the Just War tradition as continuing a tradition of generally condemning war. And in this respect, Just War theory and contemporary international legal theory are quite similar to each other. Indeed, there are very similar debates today in legal circles about how to regard recourse to force, and whether and when war can be justified or at least excused if it seems necessary to use even lethal force to restore or maintain the peace.[11]

II. War and Contemporary International Law

International law and the Just War tradition share many things in common, and perhaps the most important is the general condemnation of war and yet the recognition that war may be justified or excused in certain cases. One way to think about wars that might be justified is to think of the use of violence by individuals instead of by the State. Self-defense and defense of others seem to be grounds for the use of violence by individuals; and when violence is used for other reasons it seems prima facie unjustified in the sense that it is aggression. Self-defense has been recognized in domestic laws for hundreds, if not thousands, of years and is now also recognized in international law. The United Nations Charter,

[11] See Franck, *Recourse to Force*, 2002, ch. 2.

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as we will see in this section, seems to recognize a self-defense basis for justified resort to war even as it purports to outlaw the use of force by one State against another State.

After the Second World War, there was an attempt to instill the idea that waging war is against international law. Article 2(4) of the United Nations Charter reads as follows:

> 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 manner inconsistent with the purposes of the United Nations.

The Charter is, at the very least, a multilateral treaty that is binding on all of the States that ratified it, which includes all but a handful of the States in the world at present. Depending on one's view of customary international law, it may be that the Charter is now also customary law and binding on all States, not merely those that ratified it. The prohibition on the use of force, though, is not absolute here, since the Charter only prohibits the use of force against "the territorial integrity" or "political independence" of another State. And while this covers an enormous amount of ground, it certainly falls short of the complete prohibition on war that many hoped for when the United Nations was formed.

Indeed, self-defensive wars and wars fought in defense of others appear not to be subject to the prohibitions of Article 2(4) since arguably they are not *aimed* against the territorial integrity or political independence of another State. Unless all crossing of borders, for whatever reason, is such a violation, there appears to be a kind of loophole in Article 2(4). If force is used to stop aggression, it is not itself aimed against the territorial integrity or political independence of a State. And while the only way to stop aggression may be to violate the political independence of a State, this need not be the primary aim and indeed may not be the aim at all if lesser measures of force may do the trick. In any event, Article 2(4) has not achieved what many hoped, namely, the unambiguous and unqualified outlawing of all wars.

The opening for some legally justifiable or excusable wars is seen most clearly in another part of the United Nations Charter, Article 51, which reads as follows:

> 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, until the Security Council has taken measures necessary to maintain international peace and security.

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More Information

This article appears to allow for self-defensive wars, or at least to indicate that nothing else in the Charter (especially Article 2(4)) will rule them out. The interpretation of this Article, especially in light of Article 2(4), as actually allowing certain wars is controversial to say the least. But it certainly seems that wars waged in self-defense, if the United Nations does not quickly act, are not clearly unjustified or inexcusable in international law, as was also true for the Just War tradition.

The United Nations Charter has been interpreted by customary international law over the last sixty years. But the core consideration regarding war is that the use of force is generally disallowed unless the State using force has itself been attacked and needs to use force to defend itself or to defend one of its allies. In later chapters we will have occasion to wonder about the use of customary international law in international criminal proceedings. Suffice it here to note that, at least outside of the context of international *criminal* law, there has been wide consensus in thinking that a State could go to the defense of another State, especially if these States were in some kind of collective security organization, such as NATO. So defense of self and perhaps defense of others has been the basis for legally waging war, and all other, or nearly all other, recourse to war is considered aggression.

Aggression has thus been mainly defined negatively. It is the use of force by one State against another State neither in self-defense nor defense of others (within a collective security arrangement). But there has not been a formal recognition of this standard. At the moment, the International Criminal Court lists the crime of aggression as one of the four crimes falling under its jurisdiction. Yet, until the elements of this crime can be agreed to, no prosecutions for this crime can be engaged in by the Prosecutor's Office of the ICC. In my view, there is considerable agreement about how to understand the crime of aggression, or at least the State aggression element of this crime. As we will see, though, there is considerable controversy in international law today about how to understand the place of the State aggression element in the crime of aggression, that is, in the crime for which individuals, as opposed to States, may be punished for having waged aggressive war. Indeed, unlike other international crimes, if there will eventually be prosecutions for the crime of aggression, there will only be major State leaders in the dock.

In very recent years an International Criminal Court has evolved that will allow for the prosecution of individuals for international crimes. We can learn quite a bit about the status of aggression in international law today from this source. The debates about the crime of aggression during

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