F I V E

CAN WAR BE MORALLY JUSTIFIED? THE JUST WAR THEORY

> [There are] men who assert that the contradiction between the striving and love for peace and the necessity of war is terrible, but that such is the fate of men. These for the most part sensitive, gifted men see and comprehend the whole terror and the whole madness and cruelty of war, but by some strange turn of mind do not see and do not look for any issue from this condition. —Leo Tolstoy

Augustine makes a powerful case for the justifiability of war. Grant just a few of his premises, and all the rest follows, enveloped in a theological-metaphysical-eschatalogical wrapping that renders it impervious to countervailing evidence and argument. Virtually every major just war theorist in the Western tradition, as I have said, builds upon his work.

This is not to say there is not other important work on morality and war outside of the Western tradition. Both Judaism and Islam give attention to the issue, particularly to the question of how war should be conducted, as does some Eastern thought. It is clear, for example, from the Old Testament that wars commanded by God are considered righteous and that definite rules have been laid down for the conduct of war. These two considerations—the conditions under which one may have recourse to war and the manner in which war may be conducted—are components of any complete just war doctrine. And Islam, in the concept of *jihād*, has a clearly developed just war doctrine that represents the war of Islam against the non-Moslem world as a permanent condition (at least until the establishment of a Moslem world). The war need not be, or at least need not be exclusively, military, and Moslems may participate in the *jihād* "by the heart, the tongue, or the hands, as well as by the sword."[1] But it is seen as enjoined by

[1] Ali Raza Naqvi, "Laws of War in Islam," *Islamic Studies* 13, no. 1 (Mar. 1974): 25.

Allah, giving it much the same justification that Augustine saw in wars commanded by God, and it has as its mission the establishment of a universal Islamic state.

My concern, however, is with the just war doctrine in the Western tradition, where it has been heavily influenced by Christianity, and in particular with some of its more recent formulations. I shall not present a history of the evolution of the tradition; that has been done by others and would be beside the point of our present concerns. My aim, rather, is to examine those aspects of the tradition that bear most directly upon my central argument concerning the morality of war and to assess the just war theory as an approach to the morality of war.

Two principal objections have been brought against the just war approach to war, neither of which, in my judgment, is successful, but one of which helps to focus a third objection that I think is decisive.

The first concerns alleged consequences of the prevalence of just war theorizing in certain historical periods. It is sometimes said that the most terrible wars in history occurred during the ascendancy of the just war theory and that the longest periods of relative tranquillity occurred when the theory was in eclipse. This is sometimes taken, without further argument, to constitute a refutation of the theory. It is true that the sixteenth and seventeenth centuries, when the just war theory was extensively discussed among theologians and jurists, was a time of some of the most vicious wars in history, a fact that provided much of the impetus to try to humanize the conduct of war. It is also true that but for the Napoleonic wars and the American Civil War, both of which caused widespread devastation but were for the most part professionally conducted, much of the period from that time to the twentieth century (a time during which, contrary to the just war theory, it was generally held that nations could justifiably go to war for virtually any reason) was relatively free of the worst excesses of war.

But as tempting as it may be to dismiss the just war approach on these grounds, claims of the preceding sort are difficult to substantiate. We have seen this to be true with the related claim by political realists in their critique of U.S. policy during World War I. They argued that to allow morality to govern foreign policy leads in time of war to a crusading mentality that stands in the way of the cool, dispassionate assessment of self-interest that can limit war's excesses. They were not talking about the just war theory specifically, but in the sense in which that approach embraces any attempt to provide a moral justification of war, their arguments

apply to it. Such claims require disentangling complex religious and moral elements in the thinking about war from other cultural, technological, and military developments that shape its character. This is a difficult task at best. Even if it could be accomplished, it would be hard to be certain that any resultant correlation between the acceptance of the just war theory in a given period and the documentable horrors of war in that same period represented a causal connection. To my knowledge, this has never been convincingly shown.

The second objection bears upon the changing character of war in the nuclear age. It holds that the nuclear age, with the threat of annihilation in the case of an all-out war between the superpowers, has rendered the just war theory obsolete. Michael Walzer, for example, speaks of the "monstrous immorality that our policy contemplates, an immorality we can never hope to square with our understanding of justice in war," adding that "nuclear weapons explode the theory of just war."[2] Various just war theorists, including James Turner Johnson, William V. O'Brien, and Robert L. Phillips,[3] defend the theory and argue that it is relevant to the contemporary age and, indeed, represents the only defensible way of thinking about the problem of morality and war.

I want to examine this second objection in greater detail. Before that, however, it is important to consider certain aspects of the evolution of the just war doctrine, since there are developments there that are important to understanding the newer forms of the theory as well as to understanding my own argument concerning the morality of war.

I

The second main stage in the development of the just war theory following Augustine comes with St. Thomas Aquinas in the thirteenth century, who takes over Augustine's requirements that a war be declared by a legitimate authority and be for a just cause but adds to them a third requirement his own.

What this is can best be appreciated by recalling Augustine's subjectivistic understanding of the morality of warfare. The real

[2] *Just and Unjust Wars* (New York: Basic Books, 1977), p. 282.

[3] See James Turner Johnson, *Can Modern War Be Just?* (New Haven, Conn.: Yale University Press, 1984); William V. O'Brien, *The Conduct of a Just and Limited War* (New York: Praeger, 1981); William V. O'Brien and John Langan, eds., *The Nuclear Dilemma and the Just War Tradition* (Lexington, Mass.: Lexington Books, 1986); and Robert L. Phillips, *War and Justice* (Norman: University of Oklahoma Press, 1984).

evils of war, he said, are "love of violence, revengeful cruelty, fierce and implacable enmity and the like." This, as we have seen, was part of the interiorization of Christian ethics, emphasizing purity of soul and motivation, and it is taken over by Aquinas. But he emphasizes something that is only implicit in Augustine, which is that any action may have bad consequences, whatever the intentions of the agent performing it. And this seems correct. Most actions have *some* bad consequences, particularly in the area of social and political affairs; the best of policies impose demands upon some persons or ask sacrifices of them. The relevant question is not whether those policies would benefit some individual or group but rather whether their benefits outweigh their costs—whether the good produced would outweigh the bad. In more general terms, from the perspective of morality discussed in Chapter One, the question for conduct is: How can one lead a fully moral life if he cannot help doing some bad in the ordinary course of things?

Aquinas proposes a solution in the third condition he adds to Augustine's requirements, which occurs in the context of an argument to show that one may sometimes justifiably kill another person in self-defense.

> Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. . . . Accordingly the act of self-defence may have two effects, one is the saving of one's life, the other is the slaying of the aggressor. Therefore this act, since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in *being*, as far as possible.[4]

In the preceding chapter, we saw the importance of the distinction between intentions and motives. Here, more explicitly than Augustine, Aquinas calls attention to the further distinction between our intention—that which it is our purpose to bring about through an action—and what we merely foresee or expect as the outcome, and maintains that we may sometimes justifiably kill another person provided the killing is "beside the intention"—that is, merely foreseen and not intended (he also requires that one

[4] *The Summa Theologica of Saint Thomas Aquinas*, Dominican trans. (London: Burns Oates & Washbourne, Ltd., 1929), II-II, q. 64, art. 7. See also q. 40, art. 1. Aquinas is sometimes thought to have added a fourth condition, that there be a right use of means as well. See Austin Fagothey, *Right and Reason: Ethics in Theory and Practice* (St. Louis: The C.V. Mosby Company, 1953), p. 516.

have public authority for the act, use no more violence than necessary, and act for the common good).

In the case of the resort to war, it is expressly required that one have a right intention. This means that one must intend to promote the good and avoid evil; merely having a just cause and legitimate authority is insufficient. What constitutes a right intention during the conduct of war is less clear. It has been taken by subsequent writers to require that one not "directly" intend the killing of persons as persons but only intend the killing of them as combatants, or that one pursue peace and avoid unnecessary destruction, or that one protect rights.[5] In any event, the emphasis is subjectivistic, dependent upon inner purity. (There is a similar emphasis in Islam in the requirement that the *jihadist* fight with a good intention, specifically to promote Islam rather than, say, to achieve personal gain.)

II

The troublesome question of whether both sides can be just in a war arises here, however. For the first and third of the preceding conditions—legitimate authority and right intention—could easily be met by both sides. Even Hitler, as we saw in the preceding chapter, arguably had the legitimate authority to declare war in World War II. And it might just as easily be the case that both sides have a right intention in the required sense; good Christians and good Moslems will have no less, as the crusades attest. The crucial question concerns whether both sides could have a just cause, and this issue engaged just war theorists for years and led to some of the most significant developments in the evolution of the theory, particularly in its relationship to international law.

Vitoria in the sixteenth century came close to making explicit a distinction that has its origins in Augustine. He denied that war could be just on both sides, saying that "if the right and justice of each side be certain, it is unlawful to fight against it, either in offence or defence." But he qualified this by adding: "Assuming a demonstrable ignorance either of fact or of law, it may be that on the side where true justice is the war is just of itself, while on the

[5] See, for example, The Pastoral Letter on War and Peace of the National Conference of Catholic Bishops, *The Challenge of Peace: God's Promise and Our Response* (Washington, D.C.: United States Catholic Conference, 1983), p. 30; Phillips, *War and Justice*, chap. 2; Paul Ramsey, "Vietnam and Just War," *Dialog* 6 (Winter 1967): 19-29, reprinted in *The Just War: Force and Political Responsibility* (New York: Charles Scribner & Sons, 1986), pp. 497-512.

other side the war is just in the sense of being excused from sin by reason of good faith, because invincible ignorance is a complete excuse."[6] He said further, in the spirit of Augustine, that although a prince may knowingly carry on an unjust war, his subjects may not know that the war is unjust and "in this way the subjects on both sides may be doing what is lawful when they fight."

Two senses of justice emerge here: an objective sense designating the actual moral status of a war, which is unaffected by whether people *think* the war is just; and a subjective sense, according to which a war is just if it is believed through invincible ignorance to be just, even if in fact it is objectively unjust. In this way a war might be subjectively just on both sides but it could never be objectively just on both sides.[7]

This is a useful and important distinction, and it is elaborated by more recent ethical theorists. But an even more sophisticated handling of this problem is found in the eighteenth century in the writings of E. Vattel, whose influential analysis becomes the prevailing view into the twentieth century. Central to it is the distinction between legality and morality. While Hugo Grotius had clearly recognized the distinction in the seventeenth century, and

[6] *The Spanish Origins of International Law: Francisco De Vitoria and His Law of Nations*, pt. 1, app. B, *De Iure Belli*, in *The Classics of International Law*, ed. James Brown Scott (Oxford: Clarendon Press, 1934), pp. lx-lxi.

[7] A war that is truly just in the Augustinian sense would be objectively just in this sense, and vice versa. But a war that is subjectively just in this sense, that is, which is merely *believed* to be just, might or might not be temporally just in the Augustinian sense. The sixteenth-century writer A. Gentili is sometimes thought to have maintained that justice can reside with both sides in war. But despite some misleading statements, his position is not far from Vitoria's. He maintains, for example, that the Israelites, led by the voice of God, justly made war against the Canaanites and that the latter nonetheless justly resisted in self-defense, through ignorance of divine law. But even he distinguishes between "that purest and truest form of justice, which cannot conceive of both parties to a dispute being in the right" and justice as it appears from man's standpoint, and asserts that "therefore we aim at justice as it appears from man's standpoint." As undeveloped as the point is, he has tacitly invoked a similar—though not identical—distinction to that made by Vitoria. He hedges still further by adverting to his normative definition of war as "a just and public contest of arms" and claims that if one side is contending "without any adequate reason, that party is surely practicing brigandage and not waging war"; and thus he says that "if it is doubtful on which side justice is, and if each side aims at justice, neither can be called unjust." For quoted material see Alberico Gentili, *De Iure Belli: Libri Tres*, in *The Classics of International Law*, ed. James Brown Scott, trans. John C. Rolfe (Oxford: Clarendon Press, 1933), pp. 31-32. Hugo Grotius, sometimes thought of as the father of international law, clearly recognizes different senses of justice in his treatment of this topic in the seventeenth century. See Hugo Grotius, *De Iure Belli ac Pacis Libri Tres*, in *The Classics of International Law*, ed. James Brown Scott, trans. Francis W. Kelsey (Oxford: Clarendon Press, 1925), pp. 565-566.

some awareness of it can be found in Vitoria and possibly even in Augustine, Vattel brings it to bear upon international problems in a way that sheds important light on the interrelationships between law and morality in connection with war.

Let us consider first the nature of international law, after which we will be in a better position to appreciate Vattel's argument.

III

Philosophers and jurists are not fully agreed as to precisely what international law is, but they largely agree that its modern origins lie in the rise of the nation-state in the sixteenth and seventeenth centuries. It was at that time that diverse and often tenuous loyalties to monarchs, princes, and feudal lords began to congeal around larger, politically and territorially definable units having a monopoly of force. The command of such a monopoly came to be a defining characteristic of the state in later writers like Weber. Not only did this process establish nation-states as the principal actors in the interrelationships among peoples but it also added new fuel to the furnace of war. For by the time of the Napoleonic wars between 1792 and 1815 patriotism became an added ingredient in the mixture of emotion, fear, hope, and courage that was to impel peoples to fight and die for the state, a factor that, combined with the advance in weaponry brought by the industrial revolution, made possible the unprecedented capacity for warfare possessed by the industrial nations of the twentieth century.

Both the emergence of states and the increased destructiveness of war contributed to the development of modern international law, but they did so in different ways. The emergence of states altered the character of the entities, or "juristic persons," who are subject to that law. In antiquity the subjects of such rudimentary international law as there was were peoples: the Athenians, the Corinthians, the Romans, the Vandals, and so forth. Today they are states, and it is their conduct that international law seeks to regulate. It is also their rights and obligations that are largely at issue in disputes over international law. I say largely because the Nuremberg trials challenged that view and attempted to extend international law to the conduct of individual persons as well as to states. This raises questions about what sorts of entities states are, what it is for a state to "act," how they can have rights and obligations, and what those rights and obligations are—questions that

underlie many of the problems of contemporary international law as it bears upon the problem of war.

The destructiveness of war, on the other hand, contributed to the development of international law by creating a perceived need to mitigate war's horrors. We saw in the preceding chapter the warlike footing Christianity was put on by Augustine. By the seventeenth century the militarization of Christianity had progressed to the point where Grotius, in explaining his reasons for writing his major study on the laws of war and peace, lamented:

> Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.[5]

The concern for the most part was not to do away with war; it was rather to civilize it and bring it into line with humanitarian ideals. This led to efforts to formulate so-called "laws of war."

Early discussions of the laws of war had two concerns. One, dealing with *jus in bello*, was to establish rules for the conduct of war once it had begun. It dealt with such issues as the legitimacy of killing noncombatants, the treatment of prisoners, the use of poisons, appropriation of property, and the use of especially terrible weapons. The other, dealing with *jus ad bellum*, which in its moral dimension was the primary concern of Augustine, was to establish rules governing the resort to war in the first place and to lay down conditions under which war could justifiably be waged at all. On this view war, no matter how scrupulously waged, could be unjust depending upon how and why it began. The distinction between these concerns is central to Vattel's analysis.

I have been speaking of international law as though there were a clearly specified body of rules comprising such law. But there is not. There is an International Court of Justice (World Court) but no world legislature that enacts legislation and sets penalties for its violation. Nor has there ever been. International law has other origins. What these are is a matter of disagreement among scholars, but three alleged sources stand out: natural law, custom, and convention.

[5] Prolegomena, *De Jure Belli ac Pacis Libri Tres*, p. 20.

Natural law dates back at least as far as the Stoics, and perhaps to Anaximander. The Stoics conceived of nature as a rational manifestation of God and took rightness and duty to be determined by what accords with it. "This, then, . . . has been the decision of the wisest philosophers," Cicero wrote in one of the clearest classical statements of this idea, "that law was neither a thing contrived by the genius of man, nor established by any decree of the people, but a certain eternal principle, which governs the entire universe, wisely commanding what is right and prohibiting what is wrong."[9] Natural law so conceived contains the criteria for judging moral rightness and wrongness. It is unchangeable and transcends man-made laws. It provides a natural standard by which to judge human, or "positive," law as well as the conduct of peoples of different countries who may not be bound together by positive laws. Sometimes such law is represented as taking the form of precepts impressed by common sense upon the minds of all persons, sometimes as taking the form of natural inclinations that are a part of human nature. Aquinas, who Christianized the concept, represents it in both ways. In his view natural law is part of eternal law, God's plan for the governance of the whole of creation, and as such it perfects man unto well-being and happiness in his relation to the natural world and his fellow men.

This sets natural law theory in a metaphysical or theological framework concerning the nature of man and his relationship to the cosmos. The theory varies according to the underlying philosophies of those giving accounts of it. In a more general sense, however, natural law theory is simply the view that moral considerations are or should be the governing considerations behind positive law. In this sense it need not have the implications associated with the formulations of Cicero and Aquinas, and may simply represent an appeal to morality in the formulation and assessment of laws.

Custom, or customary law, on the other hand, designates practices that develop of their own accord without benefit of design or legislation. It represents a kind of international common law, which in turn represents legal norms for the conduct of states. Needless to say it is always an open question whether the practices of people and states are right from a moral standpoint, which means that what is prescribed by natural law and what is dictated

[9] *The Treatises of M.T. Cicero*, trans. C. D. Yonge (London: George Bell and Sons, York Street, Covent Garden, 1876), p. 431.

by customary law may diverge. Grotius in effect recognized both sorts. Natural law provided the foundation of his account, but the better part of his discussion concerns the practices and customs surrounding warfare. In fact, he takes the law of nations, which along with municipal law is part of human law, to be rooted in "unbroken custom and the testimony of those who are skilled in it."[10]

Conventional law, finally, refers to enactments by treaty and convention. Although binding only upon states that are a party to the particular treaty or convention, they play a role in the establishment and acceptance of the rules that states recognize and must take account of in their dealings with one another.

Any one of these might be claimed to be the prime source of international law. The philosophy underlying international law has undergone change depending upon which has been emphasized. Natural law gradually gave way after Grotius and his followers to customary law, which is widely regarded today as the major source of international law, as it is in this statement by Hans Kelsen:

> [T]he general norm which obligates states to behave in conformity with the treaties they have concluded . . . is a norm of general international law, and general international law is created by custom constituted by acts of states. The basic norm of international law, therefore, must be a norm which countenances custom as a norm-creating fact, and might be formulated as follows: The states ought to behave as they have customarily behaved.[11]

This view takes customary law to be more basic than conventional law, since it represents the latter as merely codifying what is contained in the former. It leaves natural law out of the picture altogether. It also conflates the "is" and the "ought" of international conduct by taking custom to be prescriptive.

Despite the preeminence of customary law, natural law can be seen to underlie the Nuremberg Charter and the Human Rights Declaration of the United Nations. In connection with warfare natural law was implicit in a statement by the prosecution at Nuremberg: "The law of war is to be found not only in treaties, but in the

[10] Grotius, *De Jure Belli ac Pacis Libri Tres*, p. 44.

[11] *Principles of International Law* (Berkeley: University of California Press, 1952), p. 417, as cited in William W. Bishop, Jr., ed., *International Law: Cases and Materials*, 3d ed. (Boston: Little, Brown and Company, 1962), p. 9.

customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world."[12] If "principles of justice" is taken to refer to moral principles rather than merely to the conceptions of justice held by jurists and military courts, this formulation blends all three of the preceding sources. Along with explicit references to natural law by the prosecution during the trials, this suggests a reemergence of natural law in the thinking about international affairs. Crimes against peace were taken by the tribunal to pertain to the initation of war, hence to belong to that aspect of international law dealing with recourse to war. Crimes of war, or simply war crimes, were taken to pertain to the conduct of war. Crimes against humanity were defined as consisting of various inhumane acts against "any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal." (In its judgment the tribunal issued guilty verdicts on this score only in connection with inhumane acts committed after the outbreak of the war, and insofar as those acts were not also war crimes, issued them on the ground that they were committed in connection with an aggressive war. The implication is, though the tribunal did not draw it, that virtually all mistreatment of civilians in the course of an aggressive war is a crime against humanity.)

Lest it be thought that the foregoing distinctions and the question of what priority to assign to the various sources of international law are of merely theoretical interest, it should be noted that men have been put to death as a result of differences over the nature, scope, and authority of international law. The defendants at Nuremberg were charged with crimes against humanity as well as with war crimes and crimes against peace. In addition they were charged with conspiracy to commit such crimes. The principal basis for the charges was the London Charter, officially known as the Agreement for the Establishment of an International Military Tribunal, concluded at London, August 8, 1945, which specifically identified the aforementioned as crimes. This fact gave rise to one of the central issues in the trial, namely, whether the London Charter constituted retroactive law, inasmuch as the acts for which

[12] *International Military Tribunal, Trial of Major War Criminals, Proceedings* (Nuremberg, Germany, 1948), 22: 464.

the defendants were indicted occurred before that charter existed. The prosecution seemed at times to concede that new law had been created, or at least that existing law had been supplemented, but for the most part it argued that all the charter did was to codify existing law. Here it appealed to the League of Nations Covenant, the Kellogg-Briand Pact, and the Hague Conventions. Germany, of course, had withdrawn from the League of Nations in 1930 and had renounced the Kellogg-Briand Pact.

The defense argued that even if the relevant laws had been in effect, they would not apply to individuals but only to states. They called attention to the fact that only states had customarily been considered the subjects of international law. The reasoning was that, even though it was true, as the prosecution pointed out, that acts of states are acts of men, nonetheless individuals are not personally responsible for such acts and should not be punished for them. They pointed out that at the conclusion of World War I the United States had argued against punishing the Kaiser on the ground that such punishment would imply a limitation upon the sovereignty of the state to punish its citizens for acts performed by them in their capacity as its agents.

The defendants argued that they had been under orders with regard to at least certain of the alleged crimes. The orders were embodied in the *Führerprinzip*, according to which Hitler's orders were binding upon the citizens of Germany. These defenses were repudiated by the prosecution. While the tribunal did not accept the plea of having acted under superior orders as exculpatory, it did allow that it might mitigate punishment in some cases. Nearly all of the major figures among the accused were found guilty, and most were executed.

IV

Vattel recognizes each of the preceding sources of international law. In addition, following Christian Wolff, he recognizes voluntary law, which along with conventional and customary law makes up what he calls positive law. According to natural law, a war cannot be just on both sides. In this he agrees with Vitoria. But he holds that natural law dictates a number of more specific rules to govern the conduct of nations in light of their nature and the circumstances in which they act. The particularly relevant circumstance is that they are free, independent, and sovereign moral persons, and in a state of nature such as exists among nations none

can dictate morally to others. These rules make up what he calls the voluntary law of nations. And thus it is that "the necessary [or natural] law prescribes what is of absolute necessity for Nations and what tends naturally to their advancement and their common happiness; the voluntary law tolerates what it is impossible to forbid without causing greater evils."[13] Nations are presumed to consent to voluntary law whether they do so in fact or not because otherwise they would be violating the liberties of all.

One of the rules of voluntary law holds *"that regular war, as regards its effects, must be accounted just on both sides."*[14] A regular war is one that is authorized on both sides by the sovereigns and is accompanied by appropriate formalities. This does not mean that from the standpoint of natural law both sides *are* in the right; only that from the standpoint of legality they should both be accounted in the right. It is the consequences of failing to do this that concern Vattel: "If an unjust war can give rise to no legal rights, no certain possession can be obtained of any property captured in war until a recognized judge, and there is none such between Nations, shall have passed definitely upon the justice of the war; and such property will always be subject to a claim for recovery, as in the case of goods stolen by robbers."[15] This suggests that territorial acquisitions through war, even if the war is unjust, should be regarded as legitimate lest there be continuing claims for recovery. Because such acquisitions cannot effectively be prohibited, tolerating them will have better consequences than denying their legitmacy.

This would seem to give carte blanche to nations to take what they want whenever they can get away with it. But this, in fact, is the way most nations have conducted themselves throughout history, including the period of European colonialism and the appropriation of North America from the Indians. They have done so to such an extent that if existing territorial boundaries, not to mention the ownership of various kinds of national treasure, were to be subjected to review from the standpoint of historical justice, few claims to legitimacy would survive. Except perhaps in the Middle East, where memories are longer than elsewhere, time generally legitimizes the results of war—at least from the standpoint of legality—if the acquiring nation consolidates its position and is able to achieve stability. For better or worse, this tends to be the accepted principle of international affairs.

[13] E. de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, in *The Classics of International Law*, ed. James Brown Scott, trans. Charles G. Fenwick (Washington: The Carnegie Institute of Washington, 1916), 3: 306.

[14] Ibid., p. 305. Cf. Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, p. 644.

[15] E. de Vattel, *The Law of Nations*, p. 304.

Thus, paradoxically, in Vattel's view the very law of nature according to which at least one side in a war must be acting unjustly dictates that for the good of all peoples it is best from a legal standpoint that both sides be considered just. This marks a clear separation of the conditions for a morally just war from those for a legally just war. It establishes that nations may wage war for any reason without violating international law. This view prevailed into the twentieth century when, following World War I, with the League of Nations Covenant and the Kellogg-Briand Pact, international law was taken once again to govern recourse to war as well as the conduct of war, a conception reaffirmed at Nuremberg and built into the United Nations Charter.

V

Renewed attention to *jus ad bellum*, the justice of going to war, has, however, brought some changes in the thinking about war.

Classical just war theorists, as we saw in the case of Augustine, believed it was sometimes just to initiate war. The question of who initiates a war was not in itself of particular concern to them. However, in the League of Nations Covenant, the Kellogg-Briand Pact, and the London Charter (Charter of the International Military Tribunal), the emphasis is upon aggression. The crimes against peace for which the defendants at Nuremberg were tried covered "planning, preparation, initiation or waging of a war of aggression." And it is the notions of aggressive and defensive wars that have come to dominate the discussions of war throughout much of the twentieth century. Whenever hostilities break out, each side accuses the other of aggression and proclaims that it, on the other hand, acts only in self-defense. Aggression is commonly regarded as a criterion of the illegality of war as well as the immorality of war.

This means there have emerged two sets of distinctions: one between just and unjust war, the other between defensive and aggressive war. Their interrelations are complex in light of the fact that both are subject to different interpretations.

If aggression is understood in a neutral sense (let us call it aggression$_1$), as standing simply for the initiation of hostilities without regard for the rights or wrongs of so doing, then it is clear

that a just war in the traditional sense can be either aggressive or defensive. Who initiates a war is irrelevant. What is relevant is whether he has a just cause, is acting from legitimate authority, and so forth. This, however, is at odds with the more recent use of these notions according to which an aggressive war is unjust virtually by definition. In this normative sense (call it aggression$_3$) aggression stands not simply for the initiation of hostilities but for the *unjustified* initiation of hostilities. To call something a war of aggression is not only to classify it; it is to judge it as well.[16]

But even a third use of the notion can be discerned. In Michael

[16] For a somewhat different way of drawing the distinction among kinds of aggression, see Yehuda Melzer, *Concepts of Just War* (Leyden: A. W. Sijthoff, 1975), pp. 86-87. Aggression$_2$, I have suggested, is the sense found most often in discussions. A theoretical basis for a somewhat similar account is provided by David Luban in his essay "Just War and Human Rights," *Philosophy and Public Affairs* 9, no. 2 (Winter 1980): 160-181. He argues that aggression should be regarded as a crime against individuals, not states. States, he reasons, have a right against aggression only insofar as they enjoy legitimacy, where legitimacy must be understood in terms of the honoring of human rights. Thus he believes that unjust war can be defined as a war subversive of human rights. Aggression, though it does not figure explicitly in the characterization of a just war, is then understood in terms of the subversion of human rights. This makes it an evaluative notion, though not one that entails the initiation of hostilities. In any event, his characterization of a just war as "(i) a war in defense of socially basic human rights (subject to proportionality); or (ii) a war of self-defense against an unjust war" (p. 175) enables him to say, in keeping with classical theorists, that aggression is not the sole crime of war.

The Pastoral Letter of the National Conference of Catholic Bishops similarly characterizes just war in terms of human rights. In setting down the requirements for a just cause it says: "War is permissible only to confront 'a real and certain danger,' i.e., to protect innocent life, to preserve conditions necessary for decent human existence, and to secure basic human rights" (*The Challenge of Peace: God's Promise and Our Response*, p. 28). Though the bishops seem not to recognize this, such a characterization leaves open the possibility that a just war could be an aggressive war, that is, one in which the just side initiates hostilities. It is easily conceivable that protection of innocent life and the security of human rights might require initiating hostilities; this, after all, was among the rationales given for the U.S. invasion of Grenada in 1983. "The present-day conception of 'aggression,' " Elizabeth Anscombe says on this issue, referring pretty clearly to aggression$_3$, "like so many strongly influential conceptions, 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." See "War and Murder," in *War and Morality*, ed. Richard Wasserstrom (Belmont, Calif.: Wadsworth Publishing Company, Inc., 1970), pp. 43-44. In a similar vein, Paul Ramsey observes, "There is really no reason to be found in the justice of war itself for forbidding aggressive war and allowing only the right of self-defense or for forbidding the use of certain weapons systems as such." See "Tucker's Bellum Contra Bellum Justum," in *Just War and Vatican II: A Critique*, by Robert W. Tucker, with commentary by Paul Ramsey et al. (New York: The Council on Religion and International Affairs, 1966), p. 100; reprinted in Ramsey, *The Just War*, chap. 17. See also Johnson, *Can Modern War Be Just?* pp. 177-178, and Tucker, *The Just War: A Study in Contemporary American Doctrine*, p. 15.

Walzer's *Just and Unjust Wars*, it is used in a way that does not even require the initiation of hostilities. Walzer contends that

> aggression can be made out not only in the absence of a military attack or invasion but in the (probable) absence of any immediate intention to launch such an attack or invasion. The general formula must go something like this: states may use military force in the face of threats of war, whenever the failure to do so would seriously risk their territorial integrity or political independence. Under such circumstances it can fairly be said that they have been forced to fight and that they are the victims of aggression.[17]

Such an implicit definition as this (let us call it aggression$_3$) enables one to render just and unjust wars virtually coextensive with defensive and aggressive wars. It expands the notion of aggression to cover cases of mere threats, provided the threats are serious enough. If one assumes further that such threats provide a just cause for going to war in self-defense, this would enable one to hold that it is possible to initiate a just war. In this way, the apparent proscription of the initiation of war in the League of Nation's Covenant, the Kellogg-Briand Pact, the London Charter, and the United Nations Charter is overridden in favor of an approach more in keeping with the traditional just war theory.

This is at some cost, however. For as one moves from aggression$_1$ to aggression$_2$ to aggression$_3$, the conceptual content of the notion changes. In aggression$_1$ there is an objective and neutral criterion for deciding when aggression has occurred, namely, when someone fires the first shot. It may not always be easy to apply in practice, but it is simple and clear. In aggression$_2$ the idea of initiating hostilities is retained, but whether aggression has occurred requires showing that the initiation of hostilities was unjustified. Reference to the initiation of hostilities drops out altogether in aggression$_3$ and is replaced by reference to a "threat of war," where this does not even require an immediate intention to attack. Aggression$_1$ has the shortcoming that many people, including heads of state, some just war theorists, and experts in international law, feel there are circumstances in which one is justified in initiating war; in other words, that aggression$_1$ is sometimes justified. Israel's attack upon Egypt initiating the 1967 Arab-Israeli War is a case in point. This means that to incorporate this sense of the

[17] Page 85.

concept in laws defining criminal action in the resort to war is to render illegal some wars widely held to be just. Aggression$_2$ and aggression$_3$, on the other hand, leave discretion to potential initiators of war to determine when hostilities are warranted. Since virtually every nation that starts a war believes it does so justifiably, this enables nations to go to war pretty much when they want and for whatever reasons they want and to call it a response to aggression. Since, furthermore, to respond to aggression by force is understood by all to be self-defense, and to wage war in self-defense is recognized by all except pacifists to be legitimate, this provides a rationale for virtually every war.

Some of these difficulties figured in the protracted effort by the United Nations to define aggression. If to call something an act of aggression is to imply that it is wrong, no nation will settle for a definition according to which its past or future actions are rendered aggressive. This made agreement on a definition by the United Nations difficult to achieve. The one finally adopted affirms that "[a]ggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other way inconsistent with the Charter of the United Nations, as set out in this definition." However, the second of eight Articles following the definition asserts:

> The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances including the fact that the acts concerned or their consequences are not of sufficient gravity.[18]

This qualification so dilutes the definition as to render it of questionable value. But it does make clear that aggression$_1$ is not the sense the U.N. Special Committee proposing the definition had in mind, since the first use of force is taken to represent only prima facie evidence of aggression. Defensive wars, once begun, are often directed against the "sovereignty, territorial integrity or political independence of another State." The situation is less clear

[18] This and the above definition are cited in Meltzer, *Concepts of Just War*, pp. 29-30. Meltzer's book contains an excellent discussion of these and related issues. See further, Julius Stone, *Conflict through Consensus: United Nations Approaches to Aggression* (Baltimore: The Johns Hopkins University Press, 1977).

regarding aggression$_2$. But then Article 4 states that "the acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter." This opens up still further the possibility that acts which do not involve the imminent or actual first use of force might nonetheless constitute aggression, which is the essential idea contained in aggression$_3$. It also suggests that the U.N. attempt to define aggression is hopelessly muddled.

The legality of war is, as we have seen, but one concern of *jus ad bellum*; the main concern is with the morality of war, and parallel problems arise here. Does one, for example, treat the concept of aggression as neutral for purposes of moral judgment, implying nothing one way or the other about the justifiability of the use of force it represents, or does one require as part of the definition that the use of force in question be unjustified? And does one allow that aggression may be committed without the use of force, as allowed by aggression$_3$? In the absence of the resolution of these and related issues, neither the legal nor the moral dimensions of the just war theory can provide adequate criteria for *jus ad bellum*.

VI

Most modern theorists, however, devote little attention to the question of *whether* war is justified; they assume that it is and ask only under what conditions it is justified and how it is to be conducted justly. Their actual prescriptions, in fact, differ little from those of political realists, and apart from the underlying rationales they provide for them it would be difficult to tell them apart. If anything, the just war theorists may be more hardline than political realists, which suggests that adopting a moral perspective does not per se make it less likely that one will be militaristic. They tend to be strongly anticommunist, particularly anti-Soviet, to be pro nuclear deterrence, and to feel that one is sometimes justified in initiating a war. All of them agree, however, that *jus in bello* requires that the conduct of war be limited, and most of them favor a counterforce as opposed to a countervalue (or countercities) policy with respect to the targeting of nuclear weapons.

No single statement of the conditions of just war would do justice to all of the just war theorists, since the number of conditions vary from writer to writer, ranging from about five to ten for both *jus ad bellum* and *jus in bello* combined, and their interpretation

often varies as well. But they all include just cause for *jus ad bellum* and principles of proportion and discrimination for *jus in bello*.

A fairly representative statement is that of the National Conference of Catholic Bishops in their pastoral letter on war and peace. For one to be justified in resorting to war, they say, the following conditions must be met:

> 1. Just Cause: "War is permissible only to confront 'a real and certain danger,' i.e., to protect innocent life, to preserve conditions necessary for decent human existence, and to secure basic human rights."
> 2. Competent Authority: "[W]ar must be declared by those with responsibility for public order, not by private groups or individuals."
> 3. Comparative Justice: In recognition of the fact that there may be some justice on each side, "[e]very party to a conflict should acknowledge the limits of its 'just cause' and the consequent requirement to use *only* limited means in pursuit of its objectives."
> 4. Right Intention: "[W]ar can be legitimately intended only for the reasons set forth above as a just cause."
> 5. Last Resort: "For resort to war to be justified, all peaceful alternatives must have been exhausted."
> 6. Probability of Success: This criterion is not precisely stated, but the bishops affirm that "its purpose is to prevent irrational resort to force or hopeless resistance when the outcome of either will clearly be disproportionate or futile."
> 7. Proportionality: "[T]he damage to be inflicted and the costs incurred by war must be proportionate to the good expected by taking up arms. . . . This principle of proportionality applies throughout the conduct of the war as well as to the decision to begin warfare."

Two principles, finally, govern the conduct of war, even when justifiably resorted to:

> 8. Proportionality: as above.
> 9. Discrimination: "[T]he lives of innocent persons may never be taken directly, regardless of the purpose alleged for doing so. . . . Just response to aggression must be . . . directed against unjust aggressors, not against innocent people caught up in a war not of their making.[19]

[19] See the Pastoral Letter of the National Conference of Catholic Bishops, *The Challenge of Peace: God's Promise and Our Response*, pp. 28-34.

We find here an elaboration of the conditions set forth by Augustine, with explicit recognition that justification must be given both for the resort to war as well as for the manner of conducting it. There is also recognition here of the problem of whether there can be justice on both sides during a war. The bishops imply there may at least be degrees of justice, that these must be compared, and that war must be kept limited in light of this possibility. Finally, it is notable that the notion of innocent life plays an important role in both areas of *justum bellum*, its protection being a central element in the constitution of a just cause and the prohibition against taking it being a central condition of the just conduct of war. In this, modern just war theorists depart from Augustine, for whom the importance of protecting innocent life is at best implied in the notion of a just cause and virtually absent in the few things he says about the conduct of war. In fact, the idea of protecting innocent life has today become one of the chief justifications for resorting to violence in general. By extension it has come to play an imporatnt role in most accounts of *jus ad bellum*. What it is for innocent lives to be "directly" taken, however, is crucial to understanding *jus in bello*, for in most accounts it is only the direct taking of innocent life (and of the lives of noncombatants, as it is about equally as often put) that is prohibited. I shall examine this question in the next chapter.

Although just war theorizing has been closely identified with the Catholic tradition, there has been wide interest in it among Protestant and secular writers as well in more recent thought, with Paul Ramsey leading the way among Protestants.[20] He is one of the relatively few to devote much attention to the origins of the just war tradition, and we have considered in the preceding chapter his analysis of Augustine on the matter of noncombatant immunity. We may add here that he breaks with tradition on the issue just considered and reads Augustine as allowing that there may be justice on both sides in war. However, he seems to regard the sense of justice involved in this claim as a subjective one, representing the good will and intentions of a people bound together by agreement on common aims, this constituting a form of political justice. In this he is more in the tradition of Vitoria and Gentili. But he is skeptical about the possibility of discerning true or "universal" justice in war, and in this his orientation is strongly Augustinian, as the distinction between true and temporal justice was

[20] See his *War and the Christian Conscience: How Shall Modern War Be Conducted Justly?* (Durham, N.C.: Duke University Press, 1961) and *The Just War*.

central for Augustine. This leads Ramsey to give limited attention to *jus ad bellum* and to concentrate almost exclusively upon *jus in bello*. His thought also marks a return to another important feature of the classical just war theory in that he allows that sometimes an aggressive (or offensive) war can be just or, at the very least, that a fast adherence to the distinction between aggressive and defensive war is unreasonable. Finally, he virtually identifies just war in the modern age with counterforce war (that is, war targeting only military forces and installations) as opposed to countercities or countervalue war. But although he attaches great importance to noncombatant immunity, he does not see this as precluding the use of nuclear weapons or the destruction of homes that may be used as sanctuaries by the enemy. We shall in the next chapter examine the principle of double effect to which he subscribes, which allows such acts so long as the intention is not to kill innocent persons.

James Turner Johnson likewise focusses almost exclusively on the question of the conduct of war, saying that his concern is with "the *jus in bello* of the just war tradition, the broad cultural consensus on the appropriate limits to force that has developed over Western history."[21] The problem as he sees it is how to limit the violence of war. The assumption is that certain values are so important that their defense sometimes requires going to war; as he says, "[I]t is sometimes necessary to oppose evil by force unless evil is to triumph."[22] The just war tradition, he contends, has full relevance to the contemporary situation, and he examines the applicability of *jus in bello* criteria both to nuclear deterrence and to such conventional conflicts as the Falklands War and the Israeli invasion of Lebanon. Indeed, he claims that the ideas contained in the just war tradition represent the "only way actually open for persons in our culture to think about morality and war."[23] Although he thinks an all-out nuclear war between the superpowers would strain the limits of a just war conception of proportionality, he believes there are sufficient restraints operating in the international situation to make such an outcome unlikely.[24] Nonetheless, he favors the strengthening of conventional forces and the development of weapons that can be used effectively with minimum risk to noncombatants. "In this regard," he says, "the continued

[21] *Can Modern War Be Just?* p. 3.
[22] Ibid., pp. 31, 84.
[23] Ibid., p. 29.
[24] Ibid., p. 186.

existence and enhancement of nuclear deterrent forces, including the progressive development of less massively destructive means of deterrence and alongside the provision of effective means of defense and warfighting capability, is the lesser evil not only politically and militarily, but also morally."[25]

VII

This issue is important for the just war theory. For however justifiable war is taken to be, one cannot help but wonder whether waging it all-out with nuclear weapons can ever be justified. And if it cannot, can the just war theory remain relevant in the nuclear age?

William V. O'Brien, like Johnson, believes it can, arguing that limited nuclear war need not necessarily escalate into all-out war. But the deeper issue is whether the conditions that make for justice in the recourse to war, whether it be conventional or nuclear, can justify violations of moral constraints in the conduct of war; that is, whether *jus ad bellum* can override *jus in bello* in circumstances in which they conflict. Michael Walzer maintains there may be such violations in the case of what, following Churchill, he calls supreme emergencies, such as was represented by the Nazi threat in World War II. If this should be correct, it would at least open the way (though Walzer does not argue this) to justifying such violations in the case of nuclear war as well. And that is crucial to showing that the just war theory can demonstrate the permissibility of war in the nuclear age, since it is virtually certain, as I shall argue in the next chapter, that one cannot wage modern war of any sort, much less nuclear war, without killing innocent persons.

Walzer's appeal to supreme emergencies has been taken by O'Brien to represent an alternative to the just war theory, and O'Brien argues that the just war approach is the more defensible of the two.[26] I believe it can be shown, however, that there is no significant difference between the ethics of supreme emergency, as O'Brien characterizes it, and the just war theory as he conceives it. This requires taking a closer look at Walzer's theory.

Walzer devotes rather more attention to *jus ad bellum* than do most recent writers, but he also assumes with little argument that

[25] Ibid., p. 304.
[26] See his "The Future of the Nuclear Debate," in O'Brien and Langan, eds., *The Nuclear Dilemma and the Just War Tradition*, pp. 223-248.

war is justified. Although he sometimes speaks as though aggression only creates a presumption in favor of armed resistance, he usually affirms that aggression suffices to justify the resort to war. He says, for example, that "[a]ll aggressive acts have one thing in common; they justify forceful resistance"; and again that "[a]ggression is a singular and undifferentiated crime because, in all its forms, it challenges rights that are worth dying for."[27] He states unequivocally, however, that *only* the defense of rights can justify war.

His analysis of aggression centers about the legalist paradigm. He analogizes the international order to the civil order, except that the international order "is unlike domestic society in that every conflict threatens the structure as a whole with collapse. Aggression challenges it directly and is much more dangerous than domestic crime, because there are no policemen."[28] Because of the gravity of aggressive violations of the international order, the violation of those rights must be vindicated; the members of international society have not done enough if they "merely contain the aggression or bring it to a speedy end."

The theory of aggression as he construes it consists of six points: (1) that *"[t]here exists an international society of independent states"*; (2) that this society has a law establishing the rights of individual members, above all to territorial integrity and political sovereignty; (3) that *"[a]ny use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act"*; (4) Aggression justifies a war of self-defense by the victim and a "war of law enforcement" by the victim and any other member of society; (5) *"Nothing but aggression can justify war"*; and (6) *"Once the aggressor state has been militarily repulsed, it can also be punished."*[29]

Walzer then proposes revisions to take account of the disanalogies between domestic and international society. I shall mention only the one of these that bears most directly upon our preceding discussion. It is the revision of (3) above, to count as aggression certain acts that fall short of the first use of force or even an immediate intention to initiate hostilities. It is this which commits him to the concept of aggression$_3$. He finds this revision justified by the 1967 Arab-Israeli War. Though the Israelis launched the initial attack, he believes that circumstances justified the attack because of Egypt's threat to Israel's security. This he believes effectively made Israel a victim of aggression.

[27] *Just and Unjust Wars*, pp. 52-53.
[28] Ibid., p. 59.
[29] Ibid., pp. 61-62.

Although his emphasis upon aggression has a modern ring, and his insistence that only aggression justifies resort to war seems to place him in the legalist tradition developed since World War I, in certain respects Walzer's position actually lies closer to that of the traditional just war theorists. With Augustine, he emphasizes that resort to war is justified only to vindicate the violation of rights, and his expanded conception of aggression enables him to justify the initiation of war, as Augustine did. In these respects his position is a restatement in modern dress of a basically traditional theory. But in certain other respects, as I shall point out, particularly in what he says about supreme emergencies, it resembles political realism.

It is in his exploration of the relationship between *jus ad bellum* and *jus in bello* that he appeals to supreme emergencies. He contends that justice in these two domains may sometimes conflict. When it does, rules governing the conduct of war may in some circumstances be violated in the promotion of a just cause. Thus he holds that nazism was such a menace that one could have done anything to defeat it,[30] including violating the rights of the innocent. But he stops short of saying that one is justified in doing this. Rather, he says that the rights violated remain in effect even as one violates them.[31] Johnson, it should be noted, takes this issue to be so important that he says: "The problem of just warfare in the contemporary age is not the problem of warfare in this age as such; rather, it is the problem of how to avoid what Michael Walzer terms 'supreme emergency' situations."[32]

Walzer's last contention is as important as it is puzzling. There are two ways of reading it. According to the first, individual rights sometimes have to be overridden in the interests of a just cause, namely, in circumstances of supreme emergency. The rights remain "in effect" only in the sense that they remain prima facie claims to certain sorts of treatment. According to the second interpretation, the rights remain fully in effect, and their violation is wrong even though it is morally justified by the supreme emergency. This, however, would seem to render some actions both right and wrong at the same time, and as this is incoherent, I shall assume that Walzer intends the first interpretation. The first, in

[30] Ibid., pp. 248-249.
[31] Ibid., p. 231.
[32] *Can Modern War Be Just?* p. 185.

any event, is consistent with the few remarks he makes about the moral theory underlying his position.

That theory is a morality of human rights, with considerations of utility secondary.[33] But when it comes to justifying the violation of the rights of the innocent—apparently to the point of being willing to kill them[34]—the situation is reversed. In a tantalizingly equivocal passage, Walzer says first that the rights of innocent people "cannot simply be set aside, nor can they be balanced, in utilitarian fashion, against this or that desirable outcome," and then:

> And yet the case for breaking the rules and violating those rights is made sufficiently often, and by soldiers and statesmen who cannot always be called wicked, so that we have to assume that it isn't pointless. Anyway, we know its point all too well. We know how high the stakes sometimes are in war and how urgent victory can be. . . . The very existence of a community may be at stake, and then how can we fail to consider possible outcomes in judging the course of the fighting? At this point if at no other, the restraint on utilitarian calculation must be lifted.[35]

As though unable to let stand a decision on the dilemma he has posed between collective security and individual rights, he then adds: "Even if we are inclined to lift it [the restraint on utilitarian calculation], however, we cannot forget that the rights violated for the sake of victory are genuine rights, deeply founded and in principle inviolable."[36]

He seems, in the last analysis, then, to say that utilitarian considerations sometimes override rights. But whatever the justification, the appeal in the above passage is to the survival of the "community," presumably meaning the nation or state; which suggests that national survival, or more basically, national egoism, is the governing norm. He does not always speak this way; sometimes he speaks of opposing "immeasurable evil" and the like. But repeatedly it is the survival and well-being of the state that is his ultimate appeal, which means that reason of state begins to show itself in the guise of the just war theory. The survival of the state becomes the ultimate end (with no clear underlying moral justifi-

[33] Walzer, *Just and Unjust Wars*, p. xvi.
[34] Ibid., pp. 259-260.
[35] Ibid., p. 228.
[36] Ibid.

cation of that end), and one is willing to do anything to promote that end.

O'Brien contends that Walzer's position, though resembling that of the German doctrine of *Kriegsraison* during World War I (basically, an unqualified principle of military necessity), differs from that position in that Walzer allows that measures warranted by supreme emergencies are justified only so long as the emergency lasts.[37] When they are no longer necessary one must conform once again to moral constraints in the conduct of war. The allies during World War II failed to recognize this limitation, O'Brien argues, in their bombing of cities; hence although their policies differed from those of the German proponents of *Kriegsraison* of World War I in that their justification was much more plausible, "they resembled the Germans in their propensity to use exceptional and morally impermissible means beyond the point where they could be justified by even a bona fide argument of necessity."[38]

Whatever the actual practice of the Germans in World War I and the allies in World War II, there is nothing in the notion of military necessity to authorize killing and destruction beyond what is militarily necessary; while it does not preclude going beyond that, military necessity provides no authorization for doing so. And in circumstances of supreme emergency, exceptional measures are called for precisely *because* they are militarily necessary; there would be no warrant in Walzer's view for violating the rights of innocent persons were that not the only way to preserve the community or to combat "immeasurable evils." As circumstances change, those measures may no longer be justified. But that is because they are no longer *necessary*. By the same token, measures that are militarily necessary in one set of circumstances may cease to be so in others. Their justification on grounds of military necessity then likewise ceases. So whatever the end for which one is fighting, and however justified the resort to war in the first place, Walzer's supreme emergency provisions justify the same measures as military necessity. For this reason, *if* Walzer believes that it is the preservation of the state that justifies the resort to war and the resort, when in war, to the extraordinary measures called for by supreme emergencies, his position begins to look indistinguishable in practical import from that of political realism.

O'Brien points out that *Kriegsraison* as advanced by Germany

[37] In "The Future of the Nuclear Debate," in O'Brien and Langan, eds., *The Nuclear Dilemma and the Just War Tradition*, p. 235.
[38] Ibid., p. 233.

during World War I held that "the German state possessed superior worth and had the right to greater latitude in self-preservation and self-advancement than other states."[39] He discounts this claim, saying that "Germany would be eligible for a supreme-emergency claim if its very existence and its fundamental values were at stake, but no more eligible than any other state." This is an important observation. It reflects the fact that if a principle is to have any claim to being moral it must extend equally to all and be equally usable by them in the same sorts of circumstances. But would one be willing to acknowledge the right of Nazi Germany to make such a claim? Few even consider the kind of justification the Nazis gave for their policies; as O'Brien says, "I take it that it is unnecessary to discuss justification for the conduct of the Third Reich in World War II."[40]

But *Mein Kampf* represents the German nation (meaning the German people, not the state) as confronting the very kind of threat to its survival and values that Walzer takes to justify supreme emergencies and that just war theorists almost universally take to constitute a just cause. Hitler saw the German nation as threatened by a Marxist-Jewish conspiracy of diabolical proportions, sapping its life, poisoning its blood, and dragging it down from its prior heights of cultural achievement. Reason of state demanded strong measures. This led to the Nuremberg Laws of 1935, to increasing persecutions of Jews and Communists (and others considered undesirable for other reasons), and eventually to exterminations of both as war broke out. That many more Jews were exterminated than non-Jews should not obscure the fact that in Hitler's mind Jews and Communists were part of the same threat. That he was mistaken in these views is beside the point. One acts necessarily upon what he *believes*. People can only apply principles that seem to them relevant. And this allows for error. So, if one lays down such requirements for a just war as that one have a just cause, what this means in practice is that nations may resort to war when they *believe* they have a just cause. By the same token, to justify the killing of innocent persons when necessitated by a supreme emergency is to say, in effect, that nations may resort to such measures when they *believe* they confront such an emergency. And in Walzer's account, as well as those of just war theorists, it is always the nation proposing to resort to war that is

[39] Ibid., p. 251.
[40] *Ibid.*

the judge of whether it has justice on its side or whether a given emergency is supreme. There is no correcting mechanism by which to detect errors. (Augustine had a better sense of this than some contemporary theorists because he recognized that one can never know when true justice is present.) It also does little to argue that Hitler did not really believe these things. The evidence is that he did. To imply otherwise is to underestimate the seriousness of the threat he posed and the sense of conviction he imparted to followers. And in any event one *could* believe equally vile things and convince himself that equally severe measures were justified for the survival of the state or of a particular people. If claims of supreme emergency, or appeals to military necessity, are to have even a prima facie warrant to being moral, they must be available equally to all to use.

Do Walzer and O'Brien differ sufficiently on these issues to warrant saying that their analyses represent different approaches to the morality of war? I suggest they do not. Their accounts will likely justify precisely the same sorts of acts and in the same sorts of circumstances, with only the rationales differing in certain points of detail.

Walzer contends that in supreme emergencies one may override the rights of innocent persons. And O'Brien says repeatedly that violations of the principles of proportionality and discrimination by the allies during World War II and by the United States in Korea and Vietnam did not prevent those wars from being just.[41] The violations were *wrong;* unlike Walzer, he is unequivocal about this. It is just that they were offset by the overwhelmingly just causes for which the United States was fighting. But to say that a war can be just *overall* despite violations of *jus in bello* criteria differs little from saying that a war can be just even though supreme emergencies justify violating these criteria. It is just that in the one case the rights of the innocent are violated, in the others they are "overridden." The overwhelmingly just cause and the supreme emergency become practically equivalent. Both Walzer and O'Brien think war may be a justifiable response to aggression, and both think that response may necessitate violating the moral constraints upon the conduct of war (with O'Brien holding further that such a war may be just even if such violations occur but are not necessitated). That is, both believe that there may be conflicts between *jus ad bellum*

[41] See his *The Conduct of a Just and Limited War*, chaps. 4 and 5.

and *jus in bello* and that when they occur *jus ad bellum* may override *jus in bello*.

If now we return to the second of the objections considered at the outset of this chapter, concerning the relevance of the just war approach to the nuclear age, we may observe that for all of this O'Brien may nonetheless be correct in saying in response to that objection that a limited use of nuclear weapons would not necessarily escalate into an all-out war. No one can know for certain. If *that* is what is meant by saying that the just war theory is relevant to the nuclear age, the point can be granted and the second objection considered met.

But there is another reply to the objection that is more telling. It is that even if O'Brien and others should be wrong about the possibility of keeping a limited nuclear war limited, all that would follow is that by just war criteria themselves an all-out war would be unjust. The fact that a certain type of war turns out to be unjust does not show that the just war theory is inapplicable to it; it shows only that it yields a certain outcome when applied to that type of war.[42] So if the question is whether the nuclear age has rendered the just war theory obsolete in the sense of showing that its criteria are no longer appropriate for the assessment of war, the answer is that it has not. Whether some, or all, or no nuclear wars turn out to be just by just war criteria is immaterial. That those assessments can be made shows the relevance of the theory to nuclear war in the sense its advocates intend.

The preceding discussion suggests a third and more serious objection to the just war doctrine. We have seen that there are serious problems in reconciling the claims of *jus ad bellum* with those of *jus in bello* with regard to whether a just cause sometimes warrants, or at least excuses, violations of moral constraints in the conduct of war. A more fundamental question is whether even a war that is just according to both *jus ad bellum* and *jus in bello* criteria will still unavoidably involve the violation of moral constraints; whether, that is, there is something in the very nature of war that renders it wrong and that is not dealt with directly by the just war theory. The just war theory says that if certain conditions are met, it is permissible to go to war; and it says further that if certain other conditions are met, one's manner of conducting the war is moral. What it does not do is to ask whether there are things that one unavoidably does even when *all* of these conditions are met

[42] This point is well made by Phillips in *War and Justice*, p. xi.

which cannot be justified morally. If there are, then the just war theory is defective in a far more serious way than suggested by either of the first two objections.

I believe that there are, and that is what I shall argue in the next chapter. But the issue is complex and requires an examination of the relationship between *jus ad bellum* and *jus in bello*.

VIII

A war, once again, is justified if it is characterized by *jus ad bellum*: if, that is, the conditions constituting justice in the resort to war are met. These include but are not limited to a just cause. Traditionally, as we have seen, one had to have legitimate authority and a right intention as well, with various other requirements often added, such as that the war be a last resort, have a likelihood of success, that the use of force be restrained, and that there be proportionality in the resultant good and evil.

A justified war, however, is not necessarily a just war. To be fully just a war must be characterized by both *jus ad bellum* and *jus in bello*. A war obviously cannot be just if one is unjustified in entering upon it in the first place, but neither can it be just, however just the cause and right the intention, if it utilizes indefensible means.[43] Even those like Walzer who think that normally indefensible means may sometimes be used affirm this. Though the earliest just war theorists gave insufficient attention to this issue, there must be rules or principles governing the conduct of war as well as governing the decision to enter into it.

Notice that I am concerned here with what is morally justified in the conduct of war, not with what is legally justified. There exist certain rules, known as the laws of war, generally accepted as governing the conduct of warfare on all sides. These, as we have seen, are part of international law. Individual soldiers, whether fighting for a just cause or not, are not considered accountable for their participation in a war so long as they observe these rules. This, however, is not my concern at the moment. My concern is with what is morally justified in warfare, whether or not it coincides with what is legally permissible. The laws of war, as Grotius recognized,[44] might as a matter of fact allow many things that in the last analysis cannot be justified morally.

[43] On the issue of the relationship between *jus ad bellum* and *jus in bello*, see Walzer, *Concepts of Just War*, esp. chap. 2.

[44] *De Jure Belli ac Pacis Libri Tres*, bk. 3, chap. 10.

In the eighteenth century William Paley proposed a principle to govern the conduct of war in his *Principles of Moral and Political Philosophy*, writing that "if the cause and end of war be justifiable; all the means that appear necessary to the end, are justifiable also."[45] Suárez before him had written even more simply that "if the end is permissible, the necessary means to that end are also permissible."[46] Except that they are intended to apply only to just wars, and that Suárez expressly added a prohibition against the killing of innocents, these formulations resemble the principle of military necessity. If one is justified in going to war, they say, he is justified in doing whatever is necessary to win. Moderation in the prosecution of a just war, in the sense of refraining from doing what is necessary to achieve your objectives, would be no less an absurdity on this reasoning than Clausewitz thought it to be in the prosecution of any war.

Let us call the principle that one may do whatever is necessary to prosecute a just war a principle of just necessity. Though only occasionally expressly formulated, it probably has many adherents. One often hears that it is wrong to send men to fight and be killed unless you are willing to fight to win. If one adds to this the qualification that it applies only to justified wars, as often seems the intent, one has just necessity.

According to this view, then, whatever justifies resorting to war in the first place justifies the means necessary to winning it (or achieving one's objectives, if they fall short of victory). There are no independent moral constraints upon the conduct of war. This represents what may be called an internalist view of the relationship between *jus ad bellum* and *jus in bello*, in the sense that the standards for judging *jus in bello* are already, as it were, contained in the standards for judging *jus ad bellum*.

Distinguished from this, however, is an externalist view, which holds that there are independent standards for judging *jus in bello*—independent, that is, of *jus ad bellum*. Whatever the justice

[45] *The Principles of Moral and Political Philosophy* (London: J. Faulder, 1814), 2: 425.

[46] *Selections from Three Works of Francisco Suarez*, specifically *On the Three Theological Virtues: On Charity* (disputation 13: On War, sec. 7, p. 840), in *The Classics of International Law*, ed. James Brown Scott (Oxford: Clarendon Press, 1944). See also Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, p. 599. In a more recent approximation, Robert W. Tucker says that "the ethics of war may justify the use of almost any weapons and the employment of any methods which realize the ends or purposes of the just war" (*The Just War: A Study in Contemporary American Doctrine*, p. 75). Walzer considers much this same principle in responding to possible criticisms of his own view of combat equality (see *Just and Unjust Wars*, p. 230).

of one's resort to war, there are in this view limits to what one may do in conducting it. The most prominent of these concerns the treatment of innocent persons, with writers like Ramsey, Phillips, and Anscombe maintaining that there is an absolute prohibition against the intentional killing of such persons.[47]

The issue between internalism and externalism in the theory of *jus in bello* is important because whatever undesirable consequences follow from the principle of military necessity also follow from the principle of just necessity in a justified war. Any action that one principle legitimizes the other will also.

It is easily imaginable that the only way to win an otherwise just war (assuming there may be such) would be to demoralize the civilian population by terror bombing. This, indeed, was much the rationale for the saturation bombing of German cities during World War II, except there the bombing was probably thought necessary only to hasten victory, not to achieve it. But if World War II was a just war on the side of the allies, and if such bombing *had been* necessary to win, just necessity no less than military necessity or supreme emergency would have dictated it. If, moreover, Elihu Root was correct that adherence to military necessity would spell the end of international law, then one should expect the same to be true of adherence to just necessity; or at least that it would have a strong tendency to that end (unlike military necessity it will be implementable only by the side acting justly, and hence its bad effects may reasonably be thought to be less than in the case of military necessity). Circumstances can bring military necessity into conflict with international law. These may have nothing to do with the justice of the war and can arise as easily in a just war (meaning for the side that is warring justly) as in an unjust one.

To justify the pursuit of victory in war requires showing that the necessary means to that end are justified. The permissibility of going to war provides no assurance they will be. One may not even know fully what those means are until the war has progressed, perhaps nearly to its conclusion. Yet, according to the usual thinking in just war theory, one may know in advance of going to war whether or not he is justified in so doing. If that is true, then the standards for *jus ad bellum* cannot by themselves, determine the standards for *jus in bello*.

This means that the internalist position, and with it the principle

[47] See Anscombe, "War and Murder," in Wasserstrom ed., *War and Morality*, pp. 42–53; Phillips, *War and Justice*, chap. 2; and Ramsey, *The Just War*, especially chap. 7.

of just necessity, must be rejected. It is not the end that justifies the means but the means (among other things) that justify the end.[48]

This has even more far-reaching implications. Both the internalist and the externalist assume that war may be just; they differ only over the criteria for *jus in bello*. But if the impermissibility of the means necessary to win a war means that one may not justly pursue victory in that war, then the impermissibility of the acts necessary to the very *waging* of war mean that one may not justly wage war, whatever one's objectives. Waging war requires justifying the means of so doing as much as winning a war requires justifying the means to that end.[49]

To justify going to war, then, that is, to establish *jus ad bellum* in the first place, requires showing that what one would be doing by waging it is justified. If a war is justified, then the necessary means to waging it will indeed *be* justified—but not because they are legitimated by the justice of the war assessed independently of those means. They will be justified because to be justified in going to war requires establishing antecedently that those means are permissible. Again, it is not the end that justifies the means but the permissibility of the means (including the killing and destroy-

[48] One is justified in performing an act only if he is justified both in employing the means necessary to its performance *and* in performing any subsidiary acts constitutive of it. I cannot be justified in watering my garden unless I am justified in attaching the hose and turning on the water; or in mowing my lawn unless I am justified in cutting the grass. The justification of the act is not one thing and the justification of the means another. What one justifies in the first place *are* those means; to justify the act is to justify the means (and/or the constitutive acts). This is the truth in the saying that the end does not justify the means.

Some, of course, would argue that if the end is justified, then so must be the means. And this is true, if properly understood. But it does not follow from it that the end justifies the means. For there is an asymmetry here. One must justify the necessary means before one can justify pursuing the end, whereas the reverse is not the case. I do not need to justify watering my garden before I justify hooking up the hose and turning on the water; I may do these things as a means to a different end, such as washing the car. If the end is justified, the means will in fact *be* justified. But that is because one must justify them in the course of justifying the end, not because the justification of the end in isolation somehow justifies them.

[49] I am, for the sake of simplicity, speaking here as though what one must do in order to wage war constitutes the means to waging war. In actuality, those acts are constitutive of waging war. There are two related but distinguishable relationships here. One is that of means to end. It figures in the argument to show that the internalist position is incorrect. It involves showing that the means to victory in war must be justified in their own right; their permissibility does not follow automatically from the fact that the resort to war may be justified. The other is that of constituent to whole; it is central to the present argument regarding the justification of the resort to war, which involves pointing out that to be justified in resorting to war one must be justified in doing all those things that make up the waging of war.

ing that are part of the nature of warfare) that, along with satisfaction of the other requirements of *jus ad bellum*, justifies the end.

The point is that killing and destruction are inherent in warfare, and unless they can be justified, war cannot be justified. It will by its very nature be wrong.

Two conclusions follow from this. First, the issue of a possible conflict between *just ad bellum* and *jus in bello* is more complicated than it first appears. There cannot be a conflict between the two on the internalist view because the standards for the former constitute the standards for the latter. Satisfaction of the conditions of *jus ad bellum* (just cause, right intention, and the like) in the light of the principle of just necessity entails satisfaction of the conditions of *jus in bello* as well—at least so long as one does only what is necessary to achieving one's objectives and does not engage in gratuitous violence. But there can be a conflict on the externalist view if one assumes, as much of the just war tradition does, that it is possible to justify the resort to war independently of consideration of the constraints upon its conduct. For then one might adopt unjustifiable means to the attainment of otherwise justifiable ends. But there are compelling reasons for dropping this latter assumption. One does not just go to war. One goes to war for certain reasons, to achieve certain ends or objectives. The very act of embarking upon war presupposes them, as does the selection of certain means by which to try to achieve them. This means that to justify going to war requires justifying the selection of means from the outset. There are not two separate acts here, the embarking upon war and the implementing of chosen means. To embark upon war *is* to implement chosen means. What one justifies doing, in applying the standards of *jus ad bellum*, is inseparable from the conduct of war. Not that there cannot still be a conflict between *jus ad bellum* and *jus in bello*; as I have said, one may not always know in advance precisely what means the successful prosecution of a war will require. As events unfold, to prevail in a war may require the resort to morally impermissible tactics that could not have been foreseen at its outset. This notwithstanding, one can never justify the resort to war without justifying the means by which one proposes to fight the war.

On the other hand, there is no presumption at all that a war that meets the conditions of *jus in bello*, as these are usually conceived, will meet those of *jus ad bellum*. I am speaking here of the usual conditions that comprise the rules of war (regarding noncombatant immunity, treatment of prisoners, and the like). War is not a

game. Following the rules is not exculpatory if you should not be involved in the enterprise in the first place. Even when the conditions are intended to be moral, like those of proportionality and discrimination, they do not ensure the justifiability of resorting to war. It would be different if they included *all* of the morally relevant considerations pertaining to the treatment of persons. For then, if those conditions were met, a war could hardly fail to be just, since everything one did in the course of fighting it would be permissible. To say one might still be acting wrongly by fighting it would then be vacuous. So, if *jus in bello* were understood in this way (which it is not by just war theorists), the satisfaction of its standards would virtually guarantee the satisfaction of those of *jus ad bellum* as well.

The relevant question, then, is whether all of what one does in the course of fighting a war can be morally justified (by which I mean, all of what one does that is associated with the nature of war; obviously one can do many gratuitously barbarous things that are unessential to the aims of war and that are morally prohibited). This is why I say that in addition to justifying the *means* of conducting war as part of justifying the resort to war, one must also justify those acts which are *constitutive* of the waging of war by whatever means. War by its nature is organized violence, the deliberate, systematic causing of death and destruction. This is true whether the means employed are nuclear bombs or bows and arrows. Often it is the doing of psychological violence as well. And, as we saw in Chapter One, it is presumptively wrong to do violence to persons in these ways. So given that one can know to a virtual certainty that he commits himself to doing these things in going to war, fully to justify going to war requires justifying these acts as well. A necessary condition of the justifiable pursuit of *any objectives* in war, by *any means* whatever (hence a necessary condition of the satisfaction of the criteria of both *jus ad bellum* and *jus in bello*), is that one be justified in engaging in such killing and violence in the first place.

Second, and relatedly, this means that most attempts to justify war from the early just war theorists to the present day are inadequate. For they do not meet this necessary condition.

Discussions of *jus in bello*, if they deal with the conduct of war in moral rather than just legal terms at all, talk mainly about whom one may kill and in what proportions one may cause destruction, not about whether that which they seek to regulate should be taking place at all. That is supposedly the province of *jus ad bellum*.

But discussions of *jus ad bellum* mainly require both certification that an appropriate wrong has been committed, that is, that one has a just cause, and satisfaction of other conditions (like legitimate authority, right intention, probability of success, etc.) which are appropriate if one assumes *in advance* that killing and violence are justifiable responses to wrongdoing but which do not establish that. It is as though the only question were what violence is acceptable and the only issue were to specify when it is acceptable—with little recognition of the fact that, as we saw in Chapter One, to establish that wrongdoing has occurred does not suffice to establish what one's response to it should be, that the response is a separate act and needs justifying in its own right. Most just war theorists proceed, in short, as though they assume that one can justify the resort to war independently of, and antecedently to, justifying both the necessary means to conducting it and the acts constitutive of waging it.[50]

If this is correct, it means that attention in *jus ad bellum* must be shifted away from the almost exclusive concern with the offenses and ancillary conditions commonly thought to justify war to a consideration of the precise nature of what one is doing in the waging of it; not, as in traditional accounts of *jus in bello*, starting from the assumption that war is justified and needs only to be waged humanely, but rather starting with an open mind about whether it is ever justified in the first place. *Unless one can justify the actions necessary to waging war, he cannot justify the conduct of war and the pursuit of its objectives; and if he cannot do this, he cannot justify going to war.*

So what we might call justice in the waging of war (by which I mean the justifiability of the violence and killing and destruction that are part of the nature of warfare) is a necessary condition of both justice in the conduct of war (*jus in bello*) and justice in the resort to war (*jus ad bellum*).[51] This means further that as interesting and important as many of the historical and contemporary issues are in the just war tradition—issues concerning what consti-

[50] This is not, I should say, true of all just war theorists. Among classical theorists, Grotius is notable for trying to specify with some precision the conditions under which an individual person's life may be taken. See *De Jure Belli ac Pacis Libri Tres*, bk. 3, chap. 11. And both he and Augustine, as well as others, deem it important to try to rebut interpretations of the New Testament that would seem to block the way to justifying the violence of war.

[51] The American Catholic bishops show an awareness of this when they acknowledge the presumption against war and ask: ["D]o the rights and values involved justify killing? For whatever the means used, war, by definition, involves violence, destruction, suffering, and death" (*The Challenge of Peace: God's Promise and Our Response*, p. 29).

tutes a just cause, what constitutes aggression, whether nuclear war can ever be justified, and so forth—their satisfactory resolution can never by itself justify the resort to war. In short, the just war theory in its historical and contemporary forms fails to do justice to the central moral problems in war's justification.

SIX

THE KILLING OF INNOCENT PERSONS IN WARTIME

> But of course one can't just say to a million mothers: "I want your sons," and then six months later: "Sorry, they're all dead." If war is to be made tolerable, the romantic tradition must be handed on. "Madam, I took away your son, but I give you back the memory of a hero. Each year we will celebrate together his immortal passing."
> —A. A. Milne

If the means necessary to waging war cannot be justified, then war cannot be justified and no war can be just. Not only must there be moral constraints upon the *conduct* of war even if the war is in all other particulars justified; the possibility must be recognized that there are moral constraints upon the treatment of persons that prohibit the *waging* of war in the first place, that is, even engaging in the limited killing and destruction that otherwise just wars entail.

Although Augustine gave this little attention, most just war theorists impose limitations upon the conduct of war. As we have seen, some recent theorists deal almost exclusively with the conduct of war in their preoccupation with *jus in bello*. The limitations deal with such things as the treatment of prisoners and with the use of certain kinds of weapons, whose violation constitute war crimes in international law; but the most prominent of the concerns is with the killing of noncombatants and innocent persons. My concern shall be with the killing of innocent persons. Nothing is more central to the moral assessment of war, and this issue is at the heart of the question whether the waging of war can be justified, whatever other limitations are imposed upon its conduct. As we saw in Chapter One, there is no stronger moral presumption than that against the doing of violence to innocent persons. And knowingly killing them against their will is to do violence to them.