

Two Theories of Just War

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Abstract As it is traditionally conceived, Just War Theory is not well suited for dealing with nation vs non-nation wars. It thus makes sense to create a second Just War Theory to deal with these wars. This article explores the differences and similarities between the two theories.

Keywords Just War Theory · just cause principle · likelihood of success principle · legitimate authority principle · last resort principle · humanitarian intervention

Universal Ethical Principles and Rules, and Exceptions to Them

Certain ethical rules are universal. They are found in all, or almost all, societies. Examples of such rules are “Don’t kill,” “Don’t harm others” and “Don’t take what is not yours.” Also here are found such rules as “Don’t tell lies” and its positive correlate “Tell the truth.” “Keep your promises” may belong to this universal list as well. Some people would add other rules to the list such as “Be kind,” “Be thoughtful” and possibly also the principle “Treat others with respect.”

These rules and principles are universal in another sense. They are the ones that get generated by just about every ethical theory found on the ethical landscape. Every theory seems to tell us that killing is wrong, lying is not nice and we ought to treat others with respect. Utilitarians, Kantians, intuitionists, natural law theorists, rights-based theorists, contractarians and even theories based on some religion or other all agree here. Only some virtue theorists get left out since they, generally, play down the role of rules and principles in our ethical thinking. They prefer to talk about character and character development.¹ But even with them, their virtue talk about kindness, honesty and the rest mimic the rules that others profess.

But whatever belongs on the list, those who employ these rules and principles face a problem. Actually they face many problems but I want to focus on just one. It has to do with exceptions. Although these rules and principles are universal, both in the intercultural

¹ Rosalind Hursthouse, *On Virtue Ethics*, Oxford: Oxford University Press. See especially Chapters 2 and 3.

and the inter-theoretic sense, they are not absolute. Absolute rules have no exceptions. For a pacifist or a non-violentist “Don’t kill” has no exceptions. Under no circumstances, no matter how pressing, would strict followers of these positions intentionally kill anyone or engage in violent activity. But for most others these rules and principles, with the possible exception of “Treat others with respect,” have exceptions. We say, for instance, “Don’t kill except in self defense” and “Don’t kill except in defense of others.”

These examples show us one way to take account of exceptions. We can talk about them by sticking the exception into the body of the rule. We do so after we have gone through a process of critical thinking that can vary depending upon the theoretical preferences of the thinker. But, at best, this expedient of inserting the exception into the rule is akin to band-aid treatment. There are many situations that can’t easily be accommodated by adding an exceptions clause to the basic rule. Adding this and then that exception to a rule also makes it clumsy and thus difficult to employ. Besides, adding exceptions in this way gives us no clue as to why these conditions represent exceptions to our universal rules, and those do not.

Another expedient for dealing with exceptions is to develop a theory that helps us decide when to, and when not to, make an exception. In part the theory helps us by answering the why-question. It justifies or explains the exception. To be sure, developing a theory is also a clumsy and difficult process so we don’t normally want to get into the business of theory construction unless there is some profit to it. If, for example, we are dealing with some ethical situation that occurs rarely and has, in any case, no great effect on our lives, going to the trouble of developing a theory is not worth it. But there are situations where the investment of time theorizing is well worth the effort. This is especially so when we are dealing with institutional ethical problems. In medicine, for example, life and death decisions are an everyday affair. As the default position, health-care providers will follow rules such as “Do no harm” and “Do what you can to alleviate pain and suffering.” But, famously, these two principles (or rules) come into conflict. Old Uncle Ben is in persistent pain, and suffers as well from a severe depression because he knows that it is almost over with him. He wants to die quickly and painlessly. But his doctors suppose that if they accommodate his request to end his pain by killing him, they would violate the “Do no harm” principle.”

How can we go about deciding what to do? Well, one step that we might take is to ask whether we have a good reason for doing our uncle in (Fotion & Tai, 2002). And, indeed, one has been provided already in our account. Uncle Ben is suffering; and his suffering is persistent in part because, let us say, the health care team has run out of medications to make him feel at least tolerably miserable. Putting it this way tells us of the second step concerned with deciding what to do. We wouldn’t normally want to make an exception to the no-killing rule in putting Uncle Ben away, even if we had a good reason, if we had not considered other alternatives. These alternatives are presumably less costly in terms of pain and suffering. If we could medicate him out of his misery, we would do so. But unfortunately this is not possible. The choice to “put him down” is, then, our last resort.

So the process of deciding to make an exception to the no killing rule involves referencing two hurdles: good reasons and last resort. But another hurdle needs to come into play. This is sometimes called the proportionality principle. Before a final decision is made, a calculation is needed to show that more overall good will come from ending Ben’s life than not ending it. Another hurdle or criterion can be called proper authorization principle. According to this principle or criterion the decision to end Uncle Ben’s life can be taken properly only if he has his say in the matter. He needs to give consent. Certain members of the health care team should also have a say.

So now there are four criteria or principles that need to be applied before an exception to a basic moral rule is to be made. Others could, and perhaps, should be added. But I have

said enough already to indicate, roughly, how an exceptions theory in medicine might work.

Within medicine the theory can vary. Instead of dealing with Uncle Ben, let us suppose that we are involved in a clinical experiment that uses human subjects. In this setting the consent conditions are not the same as before. Not only would the subject and the experimenters need to give consent, but so also would the local (and/or national) institutional review board. The theory is also likely to vary when it comes to identifying other conditions. If, for example, the experimental design includes a placebo arm (even though an older drug is available to be tested against the newer model), one needs to ask: “Is there a good reason (a just cause) for conducting this particular experiment?” The proportionality criterion would vary as well. Now the gains and losses involved in conducting the experiment would have to be measured broadly to include all those people who might benefit from the new drug, and all those people who would suffer because the experiment was carried out.

We can develop an exceptions theory for journalism as well as one (or two) for medicine (Black, Steele, & Barney, 1995). Applying the theory we might ask: “Does she have a good reason for breaking the truth-telling rule?” A reporter who pretends that she is a doctor might think she has, if, by telling a lie, she could expose corruption in the health-care field. Her good reason for making an exception to the truth-telling rule would be different from the good reasons usually cited in medicine, but she would still have a good reason. She would also have to face a last resort criterion. She would not make an exception to journalism’s strong truth-telling rule unless she had no other way of uncovering the corruption. For instance, she might have tried to uncover records of the corruption, but failed, because the corrupt doctors “doctored” the records. The proportionality criterion would also have to be faced. She would need to show that more good will come about as the result of her investigation, as against the bad that results from her deception. And she would face as well the legitimate authority criterion. She would resort to her deception only after she cleared what she was about to do with her editor and other officials at her newspaper. Again, as it is in medicine, other criteria might come into play. She would have to face the criterion of public scrutiny once she exposed the corruption. Adopting a “tell all” principle would, we might suppose, help maintain the credibility of the journalistic profession, her newspaper, and her own reputation.

We can imagine, then, that specific theories having to do with exceptions, each very similar to one another but each different in some respects, could develop not only in the health care field and journalism, but also in business, law, education and other domains. As we have seen, we can even imagine how more than one theory might develop, and be found useful, within each of these professional domains depending on the kind of work being done. Indeed, I will argue in the remaining portion of this paper that that is exactly what should happen when we become involved in making exceptions to the traditional rules of ethics as they pertain to military work.

Military Ethics

Exceptions theory has developed in the military field more than in any other. It has come to be known as Just War Theory (Fotion, Coppieters, & Apressyan, 2002). Over the years the most common version of the theory addresses situations where two nations threaten to go to war with one another. Primarily, the theory is a nation-versus-nation construction. It is also a theory that divides into two parts, one having to do with the justice of the war (*jus ad*

bellum) the other with justice in the war (*jus in bello*), that is, with justice involved in going to war and justice involved in actually fighting a war. The reason for this distinction has to do directly with the nature of war. Wars are states rather than actions or events. We speak of being in a state of war, which means that a war does not necessarily, although it can, last a few hours or a day or so. Usually it lasts for weeks, months and even years. So the justice or injustice of a war can manifest itself on the way to war and then, later, after the war starts, in the weeks, months or years the war is fought. Notice how different this is when compared to the rightness (justice) or wrongness (injustice) of surgery. Surgeries take place usually in a matter of hours. What might be right or wrong about what happens in the surgical suite can usually be covered by the theory before the surgery gets started. So there is less of a need in medicine, and in other fields such as journalism, law and police work for a distinction comparable to justice of the war and the justice in war.

As far as the justice of the war portion of the theory, six criteria are usually identified (Fotion et al., 2002). The first is the good reasons (or as it is usually called the just cause) criterion. A nation has to have a good reason for going to war since it is assumed that war makes gross exceptions to the family of rules concerned with forbidding violence. But the theory doesn't leave it at that. It identifies somewhat specific good reasons that permit making an exception to the no killing family of rules (Ceulemans, 2002). It says, for instance, that one good reason is self defense, as when one is in fact under a serious attack now. Another has to do with a recent serious attack. The fact that the enemy attack is over doesn't change the situation. The enemy still can be thought of as having acted aggressively and thus deserving of punishment. A third good reason justifies striking preemptively. Here it is customary to distinguish a preemptive from a preventive strike. The former has to do with a strike in the face of a clear and *present* danger. The enemy is going to strike any moment now. But with a preemptive strike the nation about to be victimized strikes first. In contrast, a preventive strike is concerned with a clear but *future* danger. Just war theory allows the former, that is, the preemptive strike, but not the latter. It will become clear shortly why this is so. In addition, other good reasons for entering a war are that a friendly nation is under attack now, has been attacked recently, and that a humanitarian disaster is in progress or is in the making.

An important point needs to be made concerning all these just cause reasons. This list of reasons is not closed. It is not as if the theory tells us that these are the good reasons for going to war and there are no others. There is no way of knowing that all the good reasons for going to war have been identified. It could be, for instance, that technology, in the form of mass destruction weapons, forces us to keep an open mind about some new reason for going to war that was not present in the traditional list. I'll have more to say about this point shortly when I consider arguments having to do with the justice of the 2003 war in Iraq.

The second criterion is last resort (Coppieters, Apressyan, & Ceulemans, 2002). This is an important criterion in part because it helps explain why preventive wars have traditionally been thought of as unjust while preemptive ones count as just. According to this criterion or standard, a war is not just until other resorts have been tried. A preventive war undercuts this criterion. Because a preventive war is one concerned with a future war (when, for example, the enemy will be stronger), there are resorts, so the argument goes, that should be tried in the meantime. So last resort tells us that the war option should not be tried until negotiations, sanctions and other less costly means than war have been tried. The third criterion is proportionality (Fotion, 2002). If, according to this criterion, a war promises to be more costly than the projected gains, then it is unjust. The fourth is likelihood of success (Fotion & Coppieters, 2002). According to this criterion the serious business of

going to war should be foregone if there is no reasonable chance of achieving some meaningful national goal. The fifth is good intentions (Coppieters & Kashnikov, 2002). This has been a controversial criterion since it is so subjective. It is also controversial since it is difficult to decide what the intention of a nation is. After all, a nation is made up of many people each of whom has different intentions. It is the same for those in the government who must make the decision to go to war. They do not all have the same intention. Still, Just War Theory insists that we try to articulate what the intentions of a nation are and, further, insists that the principle be usually interpreted as meaning that a nation's intention must be in accord with the just cause principle (e.g., to defeat the aggressor) and not in pursuit, for example, of national gain in the form of large quantities of cheap oil. The final *jus ad bellum* criterion is legitimate authority (Coppieters, 2002). To start a just war, so the argument goes, a nation must see to it that the authorities assigned to war matters are the ones who actually get the war started. If generals, private military groups, political parties, religious groups, etc. start a war that war is unjust unless, of course, one of these groups happens to be the legitimate authority for a nation. This criterion, like that of good intentions, has also become controversial. Nowadays many people argue that the legitimate authority for starting some wars, such as humanitarian ones, is the United Nations and not some nation or group of nations.

So that is a quick overview of the *jus ad bellum* portion of Just War Theory. An equally quick overview of the *jus in bello* portion is as follows. Traditionally two principles form this portion of the theory. The first is proportionality (Van Damme & Fotion, 2002). Only now the good as against the bad of engaging in war concerns not the start of war itself but the conduct of the war once it starts. Thus the principle needs to be cited, according to the theory, when a battle or some major operation is about to begin. The second principle is discrimination (Hartle, 2002). During war, the war parties are admonished to distinguish between those who are legitimate targets of attack such as soldiers, sailors, airmen and perhaps munitions workers, from those who are not, such as children, shop keepers, medical care providers, and the clergy. The discrimination principle applies to facilities as well as people. Airports, roads and rail facilities used heavily by the military, factories making military equipment as well as facilities dedicated to military needs are all subject to attack but hospitals, religious institutions, schools and homes of the civilian population are not.

How one justifies each of the principles found in Just War Theory and how one justifies the theory as a whole are questions that need to be answered at another time. But in outline form, that is the theory. It is a theory that demands that each criterion be satisfied. If a nation fails to satisfy one of the criteria, last resort for instance, then the theory says that this nation has entered the war unjustly. So in that sense the theory is very demanding. However, it is less demanding than it seems since the principles themselves are stated in such general, one is tempted to say vague, terms that they invite varied interpretation. Consider the just cause criterion of humanitarian intervention. It could be claimed that the United States, Britain and its other allies intervened in Iraq because of the atrocities committed by the Saddam regime. Yet many of the atrocities were not being committed just before and during the time the 2003 invasion began. It was not as if the atrocities were being committed on a large-scale right then and there, and so action needed to be taken to stop the ugly process. Indeed, historically there is ample evidence to show that the Saddam regime was extremely brutal to the Kurds in the north, the Shiites in the south and to other peoples throughout all of Iraq. The regime was also brutal in its treatment of a large number of individuals and their families. The question, then, is does the intervention in Iraq fall under the just cause criterion as a humanitarian one or not? Just War Theory doesn't clearly help us answer this question. Some just war theorists will say that the war was not justified

because the humanitarian reason did not apply. The major slaughters the Saddam regime perpetrated were largely in the past. Others will argue that this reason applies because these slaughters were extremely serious and that less extensive anti-humanitarian practices continued in Iraq right up to the invasion. They argue, in effect, the Saddam's regime was chronically anti-humanitarian.

A Second Just War Theory

So there are serious problems with Just War Theory. The principles are stated so loosely that there is a great deal of play in them when it comes to their application. As a result two sincere just war theorists could disagree about the justice of this war or that one. But I'd like to move on to discuss another equally serious problem with the theory. This problem has to do with the state-versus-state nature of traditional just war theory. Historically, at least for the past several hundred years since the Peace of Westphalia (1648), the theory has been largely viewed as applying to state-versus-state problems. But, one might ask, does the theory give us as a fairly clear sense of how to act when the threat of war against a state is generated not by another state, but by some non-state rebel, irregular, or guerrilla organization?

It does not. As a result, I will argue the theory needs to be changed. Just as exceptions theory employed in one sub-domain of ethics (e.g., in medicine where a decision has to be made whether to put Uncle Ben "down") is different from the exceptions theory employed in another sub-domain (e.g., in medical experiments), so the theory employed in state-versus-state wars is going to be different from that employed in state-versus-non-state wars. As domains or sub-domains differ, one must accept differences in the exceptions theories that are to be applied to them. The theories have to be, as it were, tailored to the domain or sub-domain.

What I am proposing, then, is that the domain of war be divided into two sub-domains and that separate theories should be applied to them. Regular Just War Theory, as I call it, is the traditional theory dealing with state-versus-state conflict. In contrast, Irregular Just War Theory deals with state-versus-non-state conflict.

As a starter, consider how the principle of legitimate authority needs to be modified to take into account the special conditions of a state-versus-non-state conflict. With state-versus-state conflicts, authorities that legitimize war can be identified. For any state about to enter a war the question asked is: was the war properly authorized? But with state-versus-non-state conflict this question, often, cannot even be asked. A rebel group may have a leader, as the Cuban revolutionaries had in the 1960s, but that leader has no legitimacy (Balfour, 1990). Back then Castro was no a leader of a government in being or even a leader of a government about to be in being. He was not a leader of a state but of a guerrilla group. Charisma, cunning, and luck might have gained him this status, but he did not have the status of a legitimate authority.

If, then, many rebel, guerrilla or other irregular groups become involved in a war with a state; it makes no sense to ask these groups to satisfy the principle of legitimate authority. The state involved in the conflict still has to satisfy this principle, but not the non-state group. That is, just because its opposition does not possess a figure or group that can act as a legitimate authority is no reason to exempt that nation that has such a figure or group from its duties to authorize that war legitimately.

Another of the principles, likelihood of success, needs also to be modified to account for the difference between state-versus-state and state-versus-non-state wars. Since their re-

sources are so limited and their organizational achievements minimal, it is next to impossible for many non-state groups to assess what their success chances are. Nations can at least make rough assessments. They can see whether their armies are equal to their potential enemy and so can figure whether they have at least a fighting chance of achieving some success or other. But especially in the beginning, the rebel groups are likely to be a pathetic lot with, seemingly, hardly any chance of success. So it doesn't seem quite fair to the rebels to insist that they must adhere to a principle of Just War Theory that they cannot possibly satisfy.

A trend is beginning to appear within Irregular Just War Theory that deserves attention. An asymmetry has developed with both of the principles identified so far. It is no longer the case that, as with Regular Theory, that the two sides have to play by the same rules. So far, on the nation side, their rules (really principles) are the same as those found in Regular Theory. But those on the non-nation side are not. And, so far, the non-state groups are getting off scot-free.

However, they do not get off scot-free when we reconsider the just cause and last resort principles. Recall that where war threatens between nations, preventive wars are not allowed because a war started in order to deal with some future threat does not satisfy the principle of last resort. So a war started to prevent a future war is unjust. But the situation is quite different when dealing with a threatening non-state entity. Such an entity cannot legitimately declare war on a nation simply because it has no legitimacy. Not only that, it is difficult to tell when this entity is attacking. An explosion occurs in a plant or on a bridge. Is this the first act of the group that, hitherto, has been completely underground? Then there is a long hiatus. Nothing happens until, one day, some national troops are ambushed and killed. It still may not be clear that there is any organized resistance to the nation state.

At this point the question arises: how is the nation state supposed to respond? How long should it wait before it takes counter measures? Suppose that intelligence has informed the national leaders where a large number of the suspected rebels are located. Also, suppose, for the sake of the argument, the information gathered suggests that the rebels cannot mount a new, or a first, attack for some time. Suppose further that the intelligence is time sensitive. The rebels move around a lot. Thus, on the one side, to wait in order to gather more evidence of rebel complicity is to render the information gathered about them useless. On the other, to attack is to do so preventively and therefore, on Regular Just War Theory, to attack unjustly. But what would Irregular Just War Theory say?

It would say that even if a military response against the rebels is largely preventive in nature, it is permitted. But why? First, the rebel plans are most probably non-contingent. The rebels are not planning military action just in case certain things happen. Rather their plans represent the first step in a process that, eventually, will lead to violence. So they are in effect at war already with the nation they are opposing. Thus any military response to the rebels is preventive, but preventive of an attack that is in the process of being implemented.

Second, responding to rebel groups is more difficult because they are often, or mostly, in hiding. When nations are at war with one another there is no problem with finding where the enemy is. There is a border separating them from us, and all that territory on the other side belongs to the "other side." Knowing where the enemy is, where its leaders are, and knowing how to contact them in order to negotiate with them are, in a sense, luxuries. They make employing last resort possible. These luxuries are not available to a nation dealing with many types of rebel groups. A nation cannot easily place sanctions on rebel groups, cannot boycott them, cannot threaten them with a blockade, cannot employ deterrent policies on them and, in many cases, cannot negotiate with them because (often) it cannot even find them. All this suggests that last resort is inappropriate in dealing with rebel groups and that a preventive attack on them should be permitted.

The third reason permitting a preventive attack does not necessarily apply to all, and perhaps most, rebel groups. Nonetheless, it applies to many. If these groups are planning to adopt, or have actually adopted, the tactic of attacking soft targets, then they have the potential to harm a nation in a way that is difficult to defend against. Rebel groups can destroy a railway station, a school, any commercial building, a bus and so on almost at will. Any nation victimized by such attacks cannot afford to wait to be attacked. If possible, what it has to do is anticipate such attacks - preventively if necessary.

So Irregular Theory makes two more changes to Regular Theory. It adds preventive attacks to the just cause list, and it argues that the last resort principle need not be honored. As against the first two changes, these two favor the nation rather than the non-nation group. It permits the nation involved in a conflict setting to go to war more easily than if the conflict were between two nations.

At this point it is important to note one thing that hasn't changed in the move from Regular to Irregular Just War Theory. The principle of discrimination remains the same. It could be argued that it should also be changed. The rebels could argue that they have no choice but to ignore this principle. It is military necessity. They are, the argument goes on, helpless in the face of the national military machine they are facing. They have no tanks, helicopters and artillery. To attack the state military machine without such equipment is to commit suicide and destroy what chances they have of bringing off a successful revolution. Not being able to attack the machine directly, they are left with attacking only "soft" targets: old folks, children, mothers, commercial buildings, schools, and the like.

The main reason this argument doesn't work is that non-state groups can attack the state military machine. Of course, what these groups cannot do is fight the state military power in head-to-head battles. If they fight a symmetrical war with the state, they will get blown away. But they can still fight asymmetrically. They can engage in hit-and-run raids, lay mines on roads traveled heavily by military forces, use car bombs at military installations and the like. No doubt it is more difficult to attack military as against non-military targets. This is so both for regulars and irregulars fighters. And, no doubt, both regulars and irregulars could argue (perhaps wrongly) that the war would end more quickly if they systematically attacked non-regular targets. Still, these "truths" have never been thought of as sufficient for cashiering the principle of discrimination.

Criticisms and Some Applications

Some comments on the dual-theory approach are in order. They are in response to a series of closely related critical questions concerning this approach. Why do we need two theories? Why don't we accommodate the changes that you talk about in Irregular Theory into the classic Regular Just War Theory? Further, isn't it true that Irregular Theory isn't all that different from the regular version and, if that is so, isn't it pretty clear that we don't need two separate theories? Further, aren't you going to have trouble knowing when to employ each theory since there is no bright line separating state-versus-state wars from state-versus-non-state wars? Finally, isn't true that by permitting preventive wars, you loosen the reins that constrain war to the point that just about any time a nation wants to go to war it will do so?

I will deal with the bright-line question first. Of course there is no bright line. And that means that it may be difficult on occasion to know which theory to cite. Such difficulty will appear when non-state groups gradually form themselves so as to operate increasingly like

states. But a modified one-theory approach (i.e., one that incorporates the changes of the two-theory approach into one theory) faces the same problem. There will be times when, on that approach, it will be difficult to know which of the criteria (the old or the new ones) should be applied. The only way to avoid the problem is to hold onto the unmodified theory, that is, Regular Theory. On that account, everyone is treated alike so there is no problem knowing whether to use this principle on one group and that one on another. But the costs of operating with an unmodified theory are great. Working with Regular Just War Theory exclusively ignores the many differences cited above between state and non-state participants in war.

But are the differences between state-versus-state and state-versus-non-state wars large enough to warrant developing dual theories? Sure they are. These differences are significant with respect to how the two sides dress for war, the kind of military equipment they use, what they identify as targets, how they engage enemy forces, the fighting groups they employ, their overall organizational structure, and where they tend to be located. It is no wonder that it is tempting to employ a different theory for those wars fought between regular and non-regular forces as against war fought between two regular forces.

But in the end one could still argue for keeping Just War Theory monistic, albeit in modified form. Such a single theory can take account of the differences between regular and non-regular forces in war. So why, finally, do I argue for two just war theories? I do so purely for a pragmatic reason - a reason that, in truth, is not overwhelmingly persuasive. It has to do, primarily, with ease of employment. Applying the monistic theory can be confusing. By listing the modified principles along with the unmodified ones, it becomes less clear which version of each principle needs to be applied. In most cases, it is easier to be clear about what one is judging when the judgments concerning two kinds of wars are separated into Regular and Irregular Theory.

But just how easy is to apply the two just war theories? Well, it is not all that easy, but the application is manageable. Consider the following examples. The Cuban revolution. There is no vagueness here since Castro's forces, before they took over Cuba, were a rag-tag group of rebels (Balfour, 1990). They naturally are to be assessed under Irregular Just War Theory. By the way, one reason no vagueness appeared in this case has to do with the sudden collapse of the Batista regime that Castro was opposing. One day Castro was a rebel, the next, or almost the next, he was the leader of a state. So, one day Irregular Theory applied to Castro and his people, the next Regular Theory applied.

What about the American Civil War, the so-called War of Secession? That was purely a Regular Theory affair. The Confederacy formed a government quickly so it, quickly, became a war between two states. The Confederacy went to war as a state. So again there is no problem in knowing which theory to apply.

What about the Communist Revolution in China? No doubt Irregular Theory was applicable in the early stages of the revolution. And no doubt there was a period of time when the Communists began to sound and act like they had formed a nation even before they had finally defeated their opposition (Chesneaux, Le Barbier, & Bergere, 1977).² So, with this case, it appears that we are facing the vagueness problem directly. Actually, we are not. The reason is that the justice of the war portion of the theory is moot once the war starts. As a result, it makes no difference that the Maoists began to act increasingly as if they were running a state. They were irregulars when the war started and so are to be judged by Irregular Theory.

What of the Afghanistan war in 2002 where coalition forces, led by the Americans, attacked both Al Quada and the Taliban? It would seem that if we focus on Al Quada,

² See especially chapters 5,6,8,9, and 11.

Irregular Theory needs to be applied but if, in contrast, we focus on the Taliban, Regular Theory should be. Does that pose a problem? Not really, since both theories need to be invoked. It is not a question of “either/or,” but of “and.” Irregular Just War Theory should be invoked in responding to Al Quada *and* Regular Just War Theory for the Taliban. There are two wars here, so two theories need to be invoked.

What now of the conflict between Israel and Palestine? Is this a state-versus-state war or one between a state and a non-state? This appears to be a difficult case for the two-theory theory of just war for two reasons. First, the Palestinian Authority has some legitimacy, has territory of its own, has an official leader, has other officials in position to help run the society, has a police force, etc. In short, it has most of the institutions in place to allow it to be counted as a state. Yet the Palestinians also have organizations like HAMAS that at least give the appearance of acting independently of the Palestinian Authority. So as far as the Israelis are concerned, it is difficult to tell against whom they are fighting a war. Are they fighting against a state or some non-state groups, or are they fighting against both? Second, the war is really a war in one sense; but not a war in another. It is a war since the fighting is chronic. It has been going on for a long time. Yet it is not a war since the fighting has an on-and-off character to it. There is fighting and then agreements to stop fighting, only to be followed by more fighting.

If we focus on the chronic interpretation of what is going on in that part of the world, invoking the justice of the war portion of either Regular or Irregular Theory is moot. On this interpretation, the war started long ago. The only question left is an assessment of each side’s justice-in-the-war behavior. But justice-of-the-war issues are not moot on the on-and-off interpretation. Each time the fighting resumes it makes sense to appeal to the justice-of-the-war criteria. That being so, it makes sense to ask: should Regular or Irregular Just War Theory be invoked? The best answer is Irregular Theory. The attacks on the Israeli society come mainly, or at least directly, from irregulars. Even if these attacks are supported in some way or another by the Palestinian Authority, the irregulars are the attacking groups. As such, Israel is justified in responding preventively in a way that it would not be if it were facing a national enemy. It would be justified, of course, only if it had reason to believe that HAMAS and other like organizations were planning to attack Israel in the future non-contingently.

One could argue, as in the Afghanistan war, that Israel can appeal to Regular Theory in order to attack the Palestinian Authority as well. In part the justification for such an attack would be that the Palestinian Authority is not doing enough to suppress the irregulars and/or that it is actually supporting them. But, of course, before invoking Regular Theory to justify an attack, Israel would have to march through all the resorts before the last one and also satisfy all the other principles of just war theory.

As all these examples show it is not impossible, or even especially difficult, to decide which of the two just war theories to invoke. The problems posed by way of invoking one or the other theory are not so great as it first seemed at least as far as the issue of vagueness is concerned.

I have not yet dealt with the over-permissiveness objection to the dual-theory approach that I am advocating. Is such a theory over-permissive? Certainly it is no more permissive than the modified monistic theory. That theory as well allows for preventive war. But then perhaps both theories should be condemned for being over-permissive of war. But, I think not. Recall that preventive wars are allowed only when dealing with irregular forces. This means that the 2003 invasion of Iraq cannot be justified under the heading of a “preemptive,” really a preventive war. In so far as this criterion is concerned, Regular

Theory tells us that deterrence (one of the resorts before the last one) rather than prevention should have been the policy to adopt in dealing with Iraq.

But even when dealing with irregulars we cannot appreciate just how permissive Irregular Theory is without being clearer as to what prevention means. There are actually two kinds of preventive strikes or wars. Classically there is a preventive strike or war where military force is used on a first-strike basis. Prior to the preventive strike there is no war; after the strike there is. But with war fought with irregulars there is often the situation where the preventive strike prevents the *next* attack by the irregulars. It is easy to confuse the two kinds of prevention in irregular wars since, as noted above, such wars often have an on-and-off character to them. The irregulars strike one day but do not strike again for some time. They may wait for days, weeks or months before mounting new attacks. Should a nation respond during one of these hiatus periods, the response would give the appearance that that nation is starting a war. Indeed, the appearance is so strong that we would naturally cite all the justice-of-the-war criteria to determine whether the response is appropriate or not. And, indeed, citing these criteria may help to constrain the war. But in allowing preventive strikes, Irregular Theory is mostly doing so for preventive strikes of the second kind. That theory permits (only if the other criteria are also satisfied) those strikes that prevent the *next*, not the *first*, strike by the enemy.

So the number of new wars Irregular Theory permits via an appeal to preventive wars is not so great as it might seem. The “new” wars are limited to those between states and non-states. Further they are mostly limited to on-and-off type “wars.” And finally they are limited since, before a new preventive strike is to be actually authorized, the other criteria (e.g., proportionality) still need to be satisfied. This means, in the case of Israel, that even if it had preventive just cause on its side in responding to past attacks on its people, it still might not be justified in actually responding militarily because greater benefit might come by restarting negotiations, invoking sanctions or something of the sort.

In the end, then, the dual-theory approach to Just War Theory seems viable. It helps keep us clear about what kind of war we are engaged in, it doesn’t suffer from so much vagueness as it seemed it did at the outset and, although it perhaps triggers more wars than the classic theory, those additional wars are few in number.

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