

THE CRIME OF AGGRESSIVE WAR

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The Charter of the Nuremberg Tribunal, the United Nations (U.N.) Charter, and U.N. General Assembly Resolution 3314 (adopted in December, 1974), all define aggression as a crime and give some sense of its nature. But the definitions are sparse, minimalist in fact, and there is not a history thick with illustrative cases. There have been a lot of wars since 1945—which ones have been wars of aggression? Many probably fit the minimalist definition, but I am inclined to think that only some of them can properly be called aggressive.

The only wars that the U.N. has called aggressive are the North Korean invasion of South Korea and the later Chinese intervention. (So far as I can tell, the word was not used, or not officially used, with regard to the Iraqi invasion of Kuwait in 1990, which was described only as “a breach of international peace and security.”)¹ Since Nuremberg, no government officials have actually been taken to court and charged with aggressive war. I cannot attempt a legal analysis of the cases that might have been brought; that is not my business. I think, anyway, that we need a moral analysis first. There are good reasons why the development of just war theory preceded the development of the international laws of war. Legal texts may only imperfectly and incompletely embody our moral ideas, but without moral ideas, we would not be able to write legal texts.

So, what is the specific wrong that constitutes aggression? Years ago, I argued that the wrong was to force people to fight and die in defense of the state that protects their common life and the territory on which that common life is lived (it has to be lived somewhere). It is not just the crossing of the border that constitutes the wrong but the threat—to the community and its members—that the crossing signifies. That is why, as I wrote then, “there is a strange poverty in the language of international law. The equivalents of domestic assault, armed robbery, . . . assault with intent to kill, murder in all its degrees, have but one name. Every violation of the

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1. S.C. Res. 660, pmbl., U.N. Doc. S/RES/0660 (Aug. 2, 1990).

territorial integrity or political sovereignty of an independent state is called aggression.”²

To be sure, the U.N. General Assembly Resolution 3314 holds that aggression is only “the most serious and dangerous form of the illegal use of force,” but no other forms are specified.³ And the list of acts that constitute aggression, though short, seem to include pretty much every imaginable use of force against another state.⁴ In a way, this is a sensible position: all of these “aggressive” acts may well justify forceful resistance (because of the value we attach to the common life), and resistance in these cases necessarily puts individual lives at risk. Shakespeare makes the critical point in *Henry V*:

For never two such kingdoms did contend
 Without much fall of blood, whose guiltless drops
 Are every one a woe, a sore complaint
 ’Gainst him whose wrongs give edge unto the swords
 That make such waste in brief mortality.⁵

But this argument hangs on the existence of a common life that is worth defending (that is really what “gives edge unto the swords”) and of a state that organizes and protects it. If the king’s subjects are unwilling to fight for the kingdom, there will be no “fall of blood,” and if the kingdom is a brutal tyranny, then it may not be the attacker whose wrongs we should worry about.

Legal texts like the U.N. Charter do not, and probably cannot, recognize that the argument about aggression depends on a previous argument about political legitimacy. All independent states, and certainly all states that are members of the U.N., have the same legal value. They do not, however, have the same moral value. And the judgments we make (or should make) when a particular state is attacked or invaded have more to do with the moral value of that state than with the brute fact of attack or invasion. That, at any rate, is what I want to argue in this Paper, and the argument will require that we distinguish aggressive border crossings from other kinds—which can be both just and unjust, legal and illegal. My chief

2. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 51–52 (2d ed. 1992).

3. G.A. Res. 3314(XXIX), annex, U.N. Doc. A/RES/29/3314 (Dec. 14, 1974).

4. *Id.* arts. 2–3.

5. WILLIAM SHAKESPEARE, *HENRY V*, act 1, sc. 2, 24–28 (Andrew Gurr ed., Cambridge University Press 2005) (1623).

interest is in border crossings that are unjust, and perhaps illegal, but that do not amount to the crime of aggression.

I acknowledge that the “we” in question here—in phrases like “the judgments we make”—is of uncertain dimension. Some people insist on the exclusive relevance of the brute fact. For them, any “invasion or attack by the armed forces of a State of the territory of another State” is a criminal act of aggression.⁶ The crucial feature of the quoted words, taken from the U.N. General Assembly’s Resolution 3314, is that the capitalized “State”⁷ is unqualified by any political or moral adjectives. Again, this is probably a necessary feature of the U.N. definition, but it would require us to call invasions and attacks criminal aggression when some of us might want to praise the invaders and attackers or to criticize them in some other way. As a member of that latter group, I will try, first, to distinguish the criminally aggressive from the praiseworthy cases—and then, second and more important, to suggest that there may be a range of cases between the two.

In Just and Unjust Wars, I made a similar argument by describing a set of exceptions to the “legalist paradigm” (which insists on the brute fact.)⁸ That still seems to me a good way of making the argument, but not the only way. Given the number of exceptions and the differences among them we might think not of a single moral rule and a set of cases to which we do not want to apply the rule, but of a moral continuum extending, say, from something like the German attack on Poland (a clear example of aggression) to something like the NATO defense of Kosovo (a just war, in my view). Kosovo is a useful test case; I will come back to it, and then I will look at the American war in Iraq.

My project is to pluralize the language of condemnation and critique (and perhaps also the language of approval, though that will not be the focus here). It is a common feature of this language that single words, like “communist” in the 1950s or “terrorist” today, come to serve wide rhetorical purposes. Politicians may find it convenient to call their opponents “communists” or “terrorists,” even when many of them do not fit any serious definition of those terms. This is a practice we should resist. The moral/political world is complicated, and it needs a language that reflects its complications. This is also true of the moral/legal world, where “aggression” is the word used to condemn armed attacks—though the U.N. is an exception, since it is very cautious about condemning anything.

6. G.A. Res. 3314(XXIX), art. 3, U.N. Doc. A/RES/29/23314 (Dec. 14, 1974).

7. *Id.*

8. See WALZER, *supra* note 2, at ch. 6.

But the word is commonly used in Security Council and General Assembly debates if not in formal U.N. resolutions. And yet there are acts of war that we should certainly worry about, and perhaps condemn, that are not usefully called “aggressive.” But why would we ever think that an attack “against the sovereignty, territorial integrity, or political independence of another State” is anything less than aggression? One good reason (though this will not help me establish the continuum) is that the attack is pre-emptive, directed against an imminent attack from the other side, one that is known with certainty to be coming and coming soon—so that the state that is preemptively attacked is already a criminal state (or a near-criminal state). In contrast to preventive wars, aimed at more distant and speculative threats, pre-emptive attacks are commonly justified, even though they fit the definition of aggression.

The right of pre-emption seems to be an implicit exception to what appears to be a ban on striking first; or it is taken to derive directly from the right of self-defense, so that pre-emptive strikes sit, so to speak, alongside defensive wars. If this right was not implicit in the original Nuremberg and U.N. statements, then it was subsequently read into them—most clearly after the Israeli pre-emptive strike against Egypt in 1967 (though the persuasiveness of that example may derive from the U.N.’s abysmal failure, despite the presence of its forces in the Sinai, to stop Egypt’s mobilization).

But my primary concern here is with an attack by state A against state B, when B is not already engaged in planning an attack against A—and possibly has no interest in any such attack, now or in the future. Even so, I want to argue that if the attack by A has urgent humanitarian reasons, if it is aimed to stop mass murder or ethnic cleansing in state B, it would be wrong to call it aggression—though, once again, it will fit the U.N. definition. We might think of this scenario as another implicit exception: murderous governments are not protected by the doctrine of sovereignty. Alternatively, wars in defense of others are morally similar to wars of self-defense—they are even more just, I would think, and so, if there is a continuum, they might represent one of the end-points. This is the argument for “humanitarian intervention”; it already appears in nineteenth-century law books, and many students of international law would probably accept it, despite the fact that the U.N. has never ratified it.

NATO’s intervention in Kosovo has been called an aggressive war, but most observers acknowledged its moral legitimacy. I am told that the German philosopher and social theorist, Jürgen Habermas, described it as “illegal but morally necessary.” When those two judgments are paired, the illegality is already fading.

The moral meaning of aggression requires that there is common life being lived on this piece of territory, which this state protects, and which the attacking state puts at risk. We can see immediately how the Kosovo intervention fits the U.N. definition of aggression, but not the moral meaning.

Kosovo was part of the sovereign state of Yugoslavia, ruled from Belgrade, and so the NATO war was both an attack on Yugoslav territory and a challenge to Yugoslav sovereignty. But there was no common life shared by Serbs and Kosovars, nor did the Belgrade regime protect the common life or even the physical lives of the Kosovars: in 1999, it actually posed the greatest threat to both of these. Nor did NATO seek anything more than the end of that threat and the establishment of political arrangements guaranteeing that it would not be renewed. Though NATO certainly violated the territorial integrity of Yugoslavia, it did not put the survival of the Serbian nation in jeopardy. Hence the war was not, from a moral standpoint, an act of aggression. It also was not a wrong of any lesser sort; its “moral necessity” was full justification.

At the same time, as critics of the NATO war have pointed out, mass murder was not actually in progress in Kosovo in 1999; there were killings and rapes designed to terrorize the population, but there was nothing comparable, say, to the massacres that took place in Rwanda in 1994 (where no one intervened); in fact, things were probably not as bad as they had been in Bosnia a few years earlier. But the chief agent of mass murder and rape in Bosnia was also the chief military actor in Kosovo, and that has to be a large part of the war’s justification. Even if we insist, as I would, that military interventions are only justified in extreme cases, the extremity of Bosnia made extremity seem imminent in Kosovo. And the shame that many people in the West felt for having stood by and watched what happened in Bosnia led them to make sure that it did not happen again—as it seemed about to do.⁹ Here, once more, is the argument for pre-emption, which has the form that I have already described: if self-defense is justifiable, then so is its pre-emptive version. If humanitarian intervention is justifiable, then so is its pre-emptive version. We are still at the far end of the continuum.

We start to move along the continuum (from just to unjust) when we consider wars that cannot conclusively be called “morally necessary.” What about attacks on governments that have begun a program of

9. *See generally* JUST INTERVENTION (Anthony Lang, Jr. ed., 2003); ETHICS AND FOREIGN INTERVENTION (Deen K. Chatterjee & Don E. Scheid eds., 2003).

persecution and terror that might one day end in mass murder but is not there yet? What about governments that have committed mass murder in the past and might (or might not) do so again? What about governments whose ordinary brutality stops well short of mass murder? And what should we make of wars that overthrow brutal and murderous regimes but result in even more brutality and murder? Is it possible to describe a series of wars and military interventions that are not “aggressive”—they fit the legal definition but not the moral meaning of the work—even though some of them might be unjust?

We might think of military action in these latter cases as preventive intervention. And does it not follow, since preventive war, aimed at a threat that may or may not materialize, cannot be justified, that preventive intervention, aimed at massacres that may or may not happen, also cannot be justified? There is a difference here that is worth noting: shifts in the balance of power that strengthen state A vis-à-vis state B may point to a distant danger of coercion or invasion—that is the classic argument for preventive war. But there is no immediate experience of injury. By contrast, the kinds of regimes that might or might not commit mass murder are already brutal and cruel, already injurious to many of their subjects. It seems to me that prevention is still wrong; ordinary brutality is not a just occasion for military attack. If it were, there would be far more occasions than it is safe to have—and far too much “waste in brief mortality.” States cannot impose the risks of war on other states, except in cases of humanitarian urgency.

That is the general rule. Should it be qualified by additional information—for example, when the argument for prevention begins with the fact that this regime has already committed mass murder, in the very recent past, and so can plausibly be said to pose a threat in the near future? This case would fall somewhere between prevention and pre-emption. Perhaps we need some discussion here of what might be called “optional” war—the justice or injustice of which would depend on quite precise, and therefore very difficult, calculations of likely “collateral damage” and of political consequences down the road. I am inclined to insist on “extremity in real time,” or situations requiring an immediate response, as the only instances in which military action is justified. The list of past crimes and the likelihood of future crimes may provide occasions for the use of force short of war—the embargo and no-fly zones imposed on Iraq after the first Gulf War and after the massacre of Shi’ites in the south are illustrative examples. But that is not my subject here, even though (again) the military actions necessary to enforce such sanctions probably fit the legal definition of aggression (but are not in fact aggressive). I want to focus for

now only on armies marching across borders and bombers flying over cities.

Imagine an attack of this latter kind, called preventive, against a tyrannical and brutal (but not at that moment murderous) regime. Let us stipulate that attacks like this are unjust, but do they constitute the crime of aggression? One way to address this question is to consider the intentions of the attackers. Of course, intentions are hard to figure out even with regards to other individuals; they are harder with regard to states and governments. In the classic cases of aggression—Germany invades Poland, Italy invades Ethiopia—the crucial intention is conquest and subordination, which, with great clarity, puts the common life of the victim nation at risk. In classic cases of humanitarian intervention—Vietnam invades Cambodia, or India invades East Pakistan—the crucial intention is to stop the killing. But these are never the only intentions. Does it matter in either of these sets of cases if other intentions are present, if motives are mixed, as they commonly are in political life? Suppose, in the aggression cases, that the invaders believe they are acting at God's command, or fulfilling their historical mission, or bringing civilization to barbarian peoples. Suppose, in the humanitarian intervention cases, that the invaders hope to win some strategic advantage or establish a "friendly" (satellite) government. Would this make a difference? Not, it seems to me, if what I have called the "crucial" intention is actually present. Additional motives might lead us to qualify our judgments; they will not significantly alter them.

Think again about a preventive intervention against a brutal regime where the aim is not to stop the killing, but to prevent it from beginning at some future time. There is, furthermore, no intention to conquer and subordinate the attacked nation, but, the attackers do hope to secure strategic and material advantages like military bases or access to natural resources. The attack is wrong, according to just war theory as I understand it, because of the risks it imposes on the attacked nation, and it is wrong without regard to the intentions that are or are not present. It is wrong because of what commonly happens when the "dogs of war" are let loose. The general rule holds: only real time extremity can justify the imposition of risk, and that is missing in the case as I have described it. Still, "aggression" does not seem the right term for interventions of this sort. And, if this is so, then it should not be the only name we have for wrongful war.

Consider now, the actual case that I have just described abstractly, the American war in Iraq. It cannot be said that the attack of March 2003 forced the people of Iraq to defend the state that protected their common

life. There was no common life under Saddam Hussein. Iraqi Kurds welcomed the attack and wanted the Americans to stay until their own autonomy or independence could be secured. Shi'ites had no reason to defend the Baathist regime but (mostly) wanted the Americans to leave as soon as possible after its overthrow. Large numbers of Sunnis resisted both the invasion and the subsequent occupation, but it was not the common life of the nation that was at issue but rather the old regime and their dominant role within it. Only the Americans, it might be said, really believed that there could be a common life for all Iraqis—and a democratic and secular state to boot. And that belief stemmed as much from ignorance as from idealism, which is a very powerful argument against the invasion. The imposition of risk is already wrong, but the wrongness is greatly intensified if the people imposing the risks have so little understanding of what the risks are. Still, the overthrow of a regime as awful as that of Saddam Hussein does not fit the moral meaning of aggression, for this was not a regime that most Iraqis were prepared to defend. It is only after the overthrow that they, or many of them, were ready to risk their lives in the name of one or another vision of a successor regime.

The German invasion of Poland and the NATO intervention in Yugoslavia might be conceived as polar opposites: the first represents the worst kind of unjust war, a war of aggression; the second represents the best kind of just war, a war fought in defense of others. The American War in Iraq falls somewhere in between—closer in my view to the unjust pole—and so establishes a rough continuum, along which we could mark out other positions, perhaps many others. Consider the Falklands War in 1982 (on either side), the Israeli invasion of Lebanon that same year, and the American attack on Panama in 1989—none of these would get high grades on a moral scale; none of them seems to me an example of aggression. I cannot give a moral description, or a name, to all the possible kinds of wars; that will have to wait for a more creative linguistic craftsman. I have attempted only a rough account of two of them. For now the different positions on the continuum are the product of moral arguments and judgments; they reflect a kind of casuistry, though not yet the kind that judges will recognize. But, the existence of a moral continuum invites practicing lawyers and legal scholars to make parallel arguments and judgments, and so mark out a continuum of their own: a range of “illegal uses of force” and a range of legal uses, too. Surely this is work that must be done before the ICC can think about prosecuting political leaders for the crime of aggression—or for any lesser crimes. There are a lot of people, in Europe mostly, but also in the U.S., who want

to begin the prosecutions, though I am not sure that they have a clear idea of what they are prosecuting (even when they are very clear about whom they want to prosecute).

I have never been sympathetic to what the Chinese call “the rectification of names,” which does not seem to be anything more than a new way for government officials to tell lies. The U.N. once tried to eliminate the word “war” altogether. Every military border crossing unauthorized by the Security Council would be called a crime, and the response would be a “police action.” The first application of this linguistic policy took place in Korea, and it failed dismally: every history book talks about the “Korean War.”¹⁰ But the move I want to argue for, basing myself on the way we actually think and argue, is linguistic revisionism, indeed, but not rectification and not elimination. I am arguing for multiplication. We need a richer moral (legal) language so that we can make more nuanced and differentiated judgments. It is not that we cannot do that now; I have been doing it, or trying to. But we can do it better: a more comprehensive language of condemnation (and approval) will lead to more accurate perceptions and descriptions of the moral world. Or, since accuracy will always be contested, it will lead to better arguments about what we, and everyone else, are doing and should be doing in the moral world (which is the real world).

10. *See, e.g.*, DAVID REES, *KOREA: THE LIMITED WAR* (1964); BRUCE CUMMINGS’ *THE ORIGINS OF THE KOREAN WAR* (Princeton University Press 1990).