

# The Rules of War

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***War Crimes and Just War***, Larry May (Cambridge: Cambridge University Press, 2007), 357 pp., \$80 cloth, \$29.99 paper.

***The Price of Peace: Just War in the Twenty-First Century***, Charles Reed and David Ryall, eds. (Cambridge: Cambridge University Press, 2007), 358 pp., \$85 cloth, \$29.99 paper.

***Rethinking the Just War Tradition***, Michael Brough, John Lango, and Harry van der Linden, eds. (Albany: SUNY Press, 2007), 265 pp., \$89.50 cloth, \$29.95 paper.

The ongoing “war on terror,” the difficult postwar experiences in Afghanistan and Iraq, and the clamoring for intervention in Darfur all highlight the ethics of war and peace. An especially prominent and useful tradition of thought about this subject is just war theory, the basic tenet of which is that warfare is sometimes morally permissible. This sets the theory apart from pacifism, which denies this principle, as well as from realism, which stipulates that war and morality have nothing to do with each other and that war ought to be considered solely as a selfish calculus of national interests regarding such things as power, security, natural resources, and economic growth.

Just war theory frames basic moral rules to aid decision-makers facing the monumental challenges of war and peace. These rules fall into three categories, still referred to in their original Latin: *jus ad bellum* (“justice of war,” regarding political rules for starting wars); *jus in bello* (“justice in war,” regarding rules for soldierly conduct during war); and *jus post bellum* (“justice after war,” regarding rules to guide the transition from conflict back to peace).

Three books have recently been released that contribute to this body of theory. The most impressive book of the trio is Larry May’s *War Crimes and Just War*, a detailed, theoretically rich, and clearly written monograph, penned by an expert both in just war theory and domestic and international criminal law. The book has already won the American Philosophical Association’s prestigious Frank Chapman Sharp Memorial Prize.

May’s work is exclusively about *jus in bello*, and is multidisciplinary in method, combining the positive laws of armed conflict with the very old natural law theories of such just war theorists as Alberico Gentili, Samuel Pufendorf, and Hugo Grotius. May is a particular fan of Grotius, the hugely influential seventeenth-century Dutch thinker who himself straddled the gap between law and morality. May starts the book by discussing Seneca, the ancient Roman philosopher, and ends the book with a section on the very latest war crimes trials at The Hague, passionately and persuasively arguing against the use of torture in the case of suspected or even known terrorists. This shows great historical breadth

and stretch, as well as the interdisciplinary application of his theory to *legal* cases, *military* tactics, and overall *political* strategies in the war on terror.

May's aim is nothing less than to provide "a new understanding of the central principles that govern the rules of war" (p. 2). Perhaps he achieves this (more below), but I am not sure he is correct to maintain that the newness comes from this synthesis of positive law and what he calls "minimal" natural law. Grotius, after all, seems to have done much the same thing.

May argues that humaneness is the central concept behind *jus in bello*. His view is that the principle of treating the other side, whether soldier or civilian, in a merciful and humane fashion (to the extent one can amidst war) is what unites the many rules and laws of war, such as discrimination, necessity, and proportionality. Observance of these rules and laws—that is, acting humanely—is what constitutes a warrior's honor. This is suggestive and insightful—but is it new? In many ways it amounts to what philosophers would call a "virtue ethics" reading of just war theory and the international laws of armed conflict. I think May would not object to this interpretation, given that such concepts as honor and mercy are the cornerstone of his approach.

Virtue ethicists, such as Aristotle, believe that human beings must live their lives trying to develop their faculties to the fullest extent. Of course, we have many faculties to develop: intellectual, physical, social, moral, and so on. What does it mean to develop one's *moral* capacity to the fullest? It is to pursue ethical excellence, which is displayed by the virtues (hence "virtue ethics"). What are the virtues? They are the freely chosen character traits that we praise in others. We praise them because: (1) they

are difficult to develop; (2) they are corrective of natural deficiencies (for example, industriousness is corrective of our tendency to be lazy); and (3) they are beneficial both to self and society.

There are many virtues, and a moral person is one who develops them and consistently displays them over time. The ancient Greeks listed four "cardinal virtues"—namely, wisdom, courage, moderation, and justice—and Christian teaching is well known for its recommendation of faith, hope, charity, and love. The main point in connection with May is that the central concern of the ethics of war and peace is for wartime decision-makers—leaders, officers, and soldiers—to devote themselves to the development of virtues within themselves, and to particularly develop the wartime virtues associated with what he calls "humanity": grace, mercy, forgiveness, honor, restraint, reasonableness, and a kind of solidarity even as between enemies.

Now, someone—a pacifist, for instance—might find the attempt to square warfare with humaneness unconvincing, challenging May to think more deeply as to how such a hard, brutal practice can be seen as consistent with such soft-sounding virtues as humanity, mercy, and charity. In the war/peace dichotomy, after all, it is usually the latter that is cited as a virtue, and the former as a vice. One weakness of the book, in my view, is May's failure to account for, and answer in a satisfying way, this pacifist challenge.

Further, it is debatable whether virtue ethics is the most apt moral method to apply to wartime choices. Consider, for example, consequentialism. As the name indicates, the core focus of consequentialism is on the concrete results of one's actions. This tradition is skeptical of the

value of focusing on personal character traits, as virtue ethics does, or on abstract universal rules. The key, ethically, is whether the world ends up better as a result of one's actions. On this perspective, what one ought to do in wartime is whatever one can to create the best overall consequences, not to concentrate on developing personal traits of character.

A third major tradition of thought about ethics in the Western tradition is deontology. Deontology's core principle is that the concept of duty is at the foundation of morality. Ideas such as duty, obligation, and responsibility are uniquely moral ones—indeed, the most uniquely and clearly moral ones. Doing one's duty is central in deontological ethics. And by "duty" deontologists usually mean that one's behavior is permitted or demanded by a first principle or general rule regarding morality, such as "Thou shall not lie," or "Honor thy father and mother." These rules are often portrayed as being self-evident. The international laws of armed conflict are, to this extent, all laid out as deontological commands.

Would May's resurrection of a virtue ethics approach to war and peace result in wars being more humanely fought? Just war theory is, in my view, best understood as a commonsense blending of—or, at its most refined, a kind of Rawlsian "reflective equilibrium" between—deontology and consequentialism. It is a mixing of rule-based appeals to bedrock first principles—like respect for human rights, and the entitlement to resist any physical aggression that seeks to violate them—with results-based appeals to satisfying outcomes. So, for example, in *jus ad bellum*, you have the "consequentialist" appeals to last resort, probability of success, and proportionality—and these force decision-makers to

consider the consequences of their actions. But you also have the justice-based, first principle appeals to just cause, right intention, and public declaration of war by a proper authority. It is an attempt to mix talk of justice and rights and proper procedure with concern for how one's actions are likely to affect the world, with the overall result being a quite comprehensive, persuasive, and commonsense approach to the ethics of war and peace.

It is often suggested, and I think May would agree, that what is lacking in the Rawlsian understanding is an emphasis on what the Greco-Romans stressed: the importance of the moral character of the decision-makers and actors. What good are abstract rules and rights, or calculations of costs and benefits, if those involved are cruel or stupid? But the questions, and accusations, go the other way, too. A searing criticism of virtue ethics has always been that its core concepts, such as humanness, are emotionally resonant yet quite *vague* regarding what exactly they mean in a given situation. And virtue ethics concepts, such as compassion and mercy, are often *culturally bound* as well. Thus, appealing to the virtues in wartime can, in my view, contrast very poorly and ineffectively with citing rules understandable by all, such as: "You may not do X or Y on the battlefield or while searching homes for terrorist insurgents." The Hague and Geneva conventions are full of Xs and Ys; concrete examples would include prohibitions on the use of chemical weapons on the battlefield, or on holding civilian hostages while searching towns or homes for terrorists in the hopes that the terrorists will surrender when they see their loved ones in harm's way.

Another controversial aspect of May's account concerns his views about war

crimes prosecution. He argues, in my view correctly, that much more effort and focus ought to be placed on prosecuting heads of state for setting unjust wars into motion. But I do not agree with May's further implication: that the number of *jus ad bellum* trials of political leaders should be increased while *jus in bello* trials of individual soldiers ought to be decreased. This is a unique argument, and it seems to come out of May's conviction that soldiers have very little room to move in warfare, and that essentially all of the blame for wars rests with heads of state and other political leaders—and thus, this is where the vast bulk of the postwar prosecution energies should go (as opposed to the case today, when they go in the opposite direction). Here, surely, May's own background as a criminal defense lawyer shows itself. To my mind he is too sympathetic toward the individual soldiers accused of horrible actions, and it leads him to say that humane treatment of the criminally accused "calls for a disregard of what the individual has done" (p. 322).

All this said, *War Crimes and Just War* remains an excellent book—a pleasure to read, and one of the very few to consider searchingly the deepest moral and political roots of just war theory and the international laws of armed conflict. It offers a unique, refreshing, and important contribution to just war theory in its attempt to blend law with morality, and to revive a virtue ethics reading of the relevant principles. Whether one agrees with May's approach or not, this is essential reading for anyone interested in the concepts of just war.

*The Price of Peace* and *Rethinking the Just War Tradition*, two recent edited volumes, are not as significant as contributions to just war theory, yet both

have their merits. *The Price of Peace* is generalist and a bit unprovocative. There are, nonetheless, some bright moments in this volume, such as contributions by the prominent theorists James Turner Johnson, Mary Kaldor, and Jean Bethke Elshtain, and a section on how just war theory can be adapted to analyze such "new" issues as humanitarian intervention, rogue regimes, terrorism, and radical Islam. The real gem of the volume, however, is the section on *jus post bellum*.

*Jus post bellum* is a nascent aspect of just war theory that addresses such concerns as military disarmament, apologies, war crimes trials, compensation and punishment, publicly declared peace treaties, and aid and rehabilitation, both political and economic. In general, one can witness tension between those preferring more limited postwar ideals, stressing punishment and trials (a revenge paradigm), and those supporting more bold experimentation in institutional change (a rehabilitation paradigm). How can, and should, a victor transform the loser's regime and society in the wake of conflict? What does history say about best practices in this regard, and are similar conditions in place in the current situations in Afghanistan and Iraq? Gwin Prins's piece on the reconstruction of Iraq and Afghanistan, Kaldor's on the concept of human security as an alternative to just war theory, and John Langan's on postconflict arrangements and how they affect the terms of the peace offer interesting thoughts along these lines, both theoretical and as applied to these latest of case studies.

A part of the State University of New York's new "Ethics and the Military Profession" series, with George Lucas of the U.S. Naval Academy as its overall editor, *Rethinking the Just War Tradition* is a

much stronger collection. This is mainly a specialist collection, but there is an attempt to reach out to a more generalist audience by summarizing at the end the various just war rules (although unfortunately omitting those of *jus post bellum*), and by offering a decent and recent summary bibliography. Although the logic of its division into three parts is unclear, the essays are themselves very strong. Specifically, they deal with *jus post bellum*, U.S. hegemony, child soldiers, the moral equality of soldiers, assassination, and the rule of proper authority. This last issue is often overlooked despite the fact that it is the very essence of many security problems: *Who has the authority to govern a territory?* When authority is disputed, what procedures should prevail? What should be the proper role of the international community in helping domestic or national communities solve their disputes over political authority?

Mark Woods contributes a very creative piece connecting just war theory with environmentalism. This new direction of just war theorizing is not completely without precedent: For example, the 1977 Additional Protocol to the Geneva Conventions bans means and methods of warfare that alter the natural environment, and many experts have argued that Saddam Hussein violated the principles laid out in the protocol in the 1991 Persian Gulf War by igniting Kuwaiti oil wells. Woods argues for systematically incorporating environmental ethics throughout just war theory.

Eric Patterson sets out a three-step requirement for *jus post bellum*: reestablish *order* in the wake of war; pursue *justice* (particularly through war crimes trials); and then promote *reconciliation* between the former enemies. These are good

suggestions, but too limited and conservative, as they ignore reconstruction projects involving institutional reform and social transformation. In my judgment, these tasks can often be of more value in the short-to-medium term than the pursuit of reconciliation.

Reuben Brigety and Rachel Stohl contribute a condensed but substantial essay dealing with the disturbing phenomenon of child soldiers. This tragic and too-common practice—especially in Africa—presents war fighters with many problems, which are insightfully analyzed in this piece. Some of these problems include: What is the cutoff age for a “child”? How does one use such an age on the battlefield—for example, how does one know the age of someone who is shooting at you? How does one (indeed, *can* one) respond justly to a child soldier? At the very least, Bridgety and Stohl argue, the international community ought to be vigilant and crystal clear about making the use of child soldiers its own category of war crime, and then prosecuting such leaders and officers who make use of them to the very fullest extent of the law.

Another strong *jus in bello* chapter, by Michael Brough, deals with the moral equality of soldiers—which brings us, full circle, to May’s concerns with the humane treatment of combatants. Michael Walzer has strongly defended this concept, and it is clearly part of the international laws of armed conflict, as contained for instance in the Hague and Geneva conventions. Moral equality stands for the idea that soldiers are not to blame for the wars they fight; they are only to blame for how they behave on the battlefield. It entails a kind of battlefield ethos—even between enemies bent on killing each other—to treat fellow soldiers in arms with a certain degree of

honor and respect. Recently, however, such talented philosophers as David Rodin and Jeff McMahan have expressed searching doubts about the moral equality of soldiers. Why, for example, should we treat as equals those soldiers fighting on behalf of a horrible cause, such as Nazism? Soldiers are the executors of the will of the political leadership—the leaders can not fight without them—and so, when soldiers choose to fight, do they not also assume *some* kind of liability for trying to realize an unjust war aim? Would not holding them *partially* liable actually constitute yet another deterrent against aggressive war leaders? I agree with Rodin and McMahan here, and note that it sets us at odds with Walzer, Brough, and May. The tradition simply lacks consensus on this developing point.

Though I agree with the recent thinkers and this attempt to forge a link between *jus ad bellum* and *jus in bello*, Brough does a formidable job defending the traditional concept, pointing out the atrocities soldiers become willing to commit when they are encouraged to dehumanize the other side and view them as having lesser war entitlements.

These three books, especially the first and third, are resonant contributions to the ever-developing just war tradition of thought about the ethics of war and peace. They show how its enduring principles can be applied insightfully and fruitfully to even the latest kinds of conflict, weaponry, and tactics; and they show how just war theory raises significant issues of the background political context, out of which all wars develop.