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The Recourse to War as Punishment: A Historical Theme in Just War Theory

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Ideas, principles, and theories about justified wars take seriously morality's applicability to a perennial and ancient social practice oft extraordinary in magnitude among human endeavors. In war a society organizes its resources and engages myriad, complex activities to resolve conflicts through armed combat, with all the attending death and destruction for people, property, cultures, and the environment. Thinking about justifying wars takes seriously the notion of morally regulating such complex and violent human endeavors. Though the ideas vary over time and place, the notion of moral constraints on war is ancient and global, from ancient Hindu and Chinese texts, to pagan, Christian, and Jewish texts of the ancient West. Ideas about justifying wars all discriminate between morally acceptable and unacceptable wars. Such ideas, then, implicitly deny the pacifists' claims that no war, is, has been, or can be morally justifiable; such ideas reject the political realists' perspective that all wars are amoral, subject either to no norms at all or only to non-moral norms such as states' self-interest; and such ideas disregard the romantic cult of the warrior and many facets of militarism as moral ideal. Ideas about justifying war, then, assume a moral point of view as regulative of a complex, organized, and violent social practice for settling disputes and differences among human beings.[1]

Among ancient western civilizations there are implicit in texts and practices many ideas about regulating the recourse to, conduct of, and sequel to war. These implicit ideas are among the roots of a just war tradition that continues amidst change in content, contexts, and challenges in the West.[2] But only with the fifth century demise of the Roman Empire did writings specifically about morally regulating war begin developing explicit, articulated principles about justifying war, a just war theory.[3] Emerging from these writings is a now familiar dualism of just war theory, whereby *jus bellum* principles express responses to two distinct, logically independent questions:[4]

1. Under what conditions is recourse or going to war morally justified?
2. How ought a war be conducted or waged (whether going to war is justified or not)?

Principles proposed in response to the second question constitute *jus in bello* and attend to moral requirements of proportionality and of discriminating among people or property affected by the use of force in actions constitutive of waging a war. Principles proposed in response to the first question constitute *jus ad bellum* and attend to moral requirements of cause, purpose, authority, and balancing consequences in order to justify going to war at all.[5]

In the history of just war theory, substantive responses to *ad bellum* and *in bello* questions have varied considerably, and many histories have surveyed practices, traditions, and past thinkers' principles for morally regulating war. This essay focuses on some key historical figures' contributions to *ad bellum* principles, especially principles about those causes that morally justify the recourse to war. The following selective survey reveals a thematic pulse of

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seeing morally justified war as punishment. A penal approach to justifying war is implicit in ancient texts, announced by Augustine, carried forth more systematically by Aquinas, adapted to European conquests of the Americas and developed significantly by Grotius, before being recast by the English utilitarians, James Mill and Jeremy Bentham. With respect to *ad bellum* questions of just cause, authority, purposes, and consequences of going to war, thinking of the recourse to war as punishment has a long lineage in the West that extends at least as far as nineteenth century British utilitarianism.

Historical discussion of just war theory sometimes present classic, medieval thinkers like Augustine as invoking the idea of war as punishment. But as a sustained theme in the history of just war thinking, the long lineage of a penal approach to *ad bellum* questions is much neglected. And the classic utilitarians' ideas about war are seldom even acknowledged in histories of principles about morally regulating war. The historical survey in this essay addresses both these common omissions. Histories' neglect of a penal approach to just war principles may reflect our contemporary legal and moral focus on wars of self defense, liberation, and defense of human rights. Though thinking of the recourse to war as punishment is at odds with these common foci, this essay concludes with some brief suggestions about the current relevance of a penal approach to war. With regard to just war theory itself, seeing war as punishment suggests reliance on philosophical work on punishment for ways of reconciling deontological and consequentialist ways of thinking that develop alongside one another in this essay's historical survey of *ad bellum* principles. Also, attention to the historical theme of war as punishment brings to the fore the importance of right authority in *ad bellum* thinking, and it reveals retributive justice as among the morally regulative ideas for the recourse to war. The historical theme also offers a rich vein

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of ideas about war as punishment. relevant to recent developments and challenges regarding justified uses of military force in the 21st century.

I

Ideas in the West about justifications for going to war are ancient, often implicit in the stories and texts that have survived the centuries.[6] In the Hebrew Bible and Christian Old Testament there are, for example, implicit recognitions of divine will, punishment, defense, and conquest as just causes for recourse to war, as well as some elaborate rules restraining the conduct of war.[7] Ancient Greek stories of combative gods and the Homeric accounts of the *Iliad* are contexts for Plato's and Aristotle's political theories and their scattered attentions to justifying war. In the *Republic* wars of expansion play a prominent role in Plato's account of the origins of the city, and the *kallipolis* conducts war against Greeks in order to compel just compensation from those guilty of causing the quarrel.[8] Aristotle's *Politics* acknowledges war and peace as important aspects of a *polis*, and includes scattered remarks acknowledging that hunting is a part of war and that conquest or enslavement of others justify the recourse to war.[9] Roman law articulates a concept of just cause understood juridically as requiring an offense and an offending party to occasion a justified recourse to war. At least under the republic, Roman law and military practice also developed elaborate procedures requisite to establish war as a last resort, as well as some familiar recognitions regarding right conduct of the war.[10] And Cicero, in *On Duties* and *On the Commonwealth* identifies as just causes for war the recovery of lost goods, self-defense of territory or citizens, and punishment of enemy's misdeeds.[11]

The Christian New Testament of the first century explicitly says very little about war, while early Christian thinking about war tended towards forms of pacifism.[12] Thus, Origen and

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Tertullian, among others, struggle with biblical texts and the role of Christians in the militaristic Roman world.[13] An impetus for theory and articulating *ad bellum* principles came with Christianity's formal and official role in relation to the Roman Empire, the conversion of the Emperor Constantine, Rome's adoption of Christianity as its state religion, and the crises for Church and Christianity when Rome was sacked and the western Empire collapsed in the 5th century. For Church and Christianity the pressing questions became those of distinguishing acceptable from unacceptable wars, of developing principles of just and unjust wars, including principles for justifying the recourse to war. In this context Augustine, the Bishop of Hippo, rejects the pacifism of early Christianity and articulates influential rudiments of just war theory in order to distinguish just and unjust wars.

II

Augustine's massive corpus contains scattered clusters of ideas about war. Questions about the morality of war were not central to his interests; the explorations of ideas in his occasional writings lack the careful, systemic presentation of later thinkers, and there are myriad interpretive challenges akin to those found for almost any topic Augustine engages. But in his monumental work, *The City of God*, and in several shorter pieces, one detects a general and influential approach to just war theory at work in Augustine's thinking. Couched in a political theology and its implications for uses of force on earth, a fundamental theme emerges from Augustine's complex thinking and writings: a justified war is analogous to and, indeed, a form of punishment necessary for a fallen world.

Augustine approaches political issues, including uses of military force, in the context of his Pauline theology of sin and the necessity of mitigating its earthly manifestations. Given that

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human sin is a condition redeemable only through divine grace, human conflict and war are inevitable features of earthly life. Thus, Augustine's remarks about war are tempered by his acknowledging the tragic fact that such horror is necessary on earth to address the human condition of sin.[14] Political powers' use of force is essential to addressing inevitable human conflict and to maintaining a minimal order and security constitutive of earthly peace. Furthermore, given the willful wantings of fallen human creatures, Augustine holds that force maintains even temporary order, security, or peace only by punishing wrongdoers.

> Surely, it is not without purposes that we have the institution of the power of the kings, the death penalty of the judges, the barbed hooks of the executioner, the weapons of the soldier, the right of the punishment of the overlord, even the severity of the good father . . . . While these are feared, the wicked are kept within bounds and the good live more peacefully among the wicked. . . . [I]t is not without advantage that human recklessness should be confined by fear . . .[and] freedom of action held in check by fear of punishment.[15]

War is a necessary means to peace, order, security, just as other kinds of force are, even in the family. And like other kinds of force, war works as a means through the fear its existence creates in human beings. Thus, seen as a punishment, war works as a penal deterrent to "human recklessness" in actions.

> It is sufficient to see that . . .punishing . . . employs fear as an instrument of coercion, and bends to its own ends the minds of the unhappy people to whom is it adapted. . . . [W]hat is punished is the wrong done to others when their rights are infringed.[16]

In another key text involving war, Augustine adds a key element to this penal model for war.

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> What is the charge brought against war? . . . The real evils in war are the love of violence, revengeful cruelty, fierce and implacable enmity, wild resistance, and the lust of power, and such like; and it is generally to punish these things, when force is required to inflict the punishment, that, in obedience to God or some lawful authority, good men undertake wars . . . .[17]

For Augustine, then, justified wars are centrally tied to his thinking about authority's punishing: peace is the general justifying aim of war as punishment,[18] the means is fear as deterrent, and a warrant is others' illicit actions. On this last element, Augustine famously writes, "Those wars are called just which avenge injuries."[19] Wars are warranted as earthly penal sanctions in response to wrongdoings and for order, security, and peace in a fallen world.

Augustine sees in punishment many aims and purposes when properly exercised by an authority, which leads to his identifying several requirements for a justified war. First, defensive wars are justifiable wars, with the idea that the aim is to prevent or punish the aggressors' violations of the peace. Augustine also says there is a just cause for war "if some nation or some state which is warred upon has failed to make reparation for an injurious action committed by its citizens or to return what has been wrongfully appropriated."[20] He includes other-regarding justifications for war: defensive and rectificatory wars are not restricted to wars of self-defense nor of rectifying wrongs to self. Furthermore, Augustine interestingly employs a domestic analogy. In the first passage quoted above, Augustine compares the work of the jailer, the warring party, and the hangman to that of a father. Developing the paternal parallel, Augustine elsewhere writes of the stern discipline being done for motives of love and for benefit of the punished son, and not for love of cruelty, for example. The suggestion is that the motive for war

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is relevant to whether the recourse to war is justified, what later becomes a concept of right intention, aim, or purpose in a justified war.

Augustine's scattered remarks about just war raise a number of questions that his brief, unsystematic treatments do not address. But the basic approach to war as punishment consistently guides some general features of his substantive views about causes and motives required for justifying the recourse to war. Fundamental is that just war is a response to another's wrongdoing: even in wars of self-defense the just cause points to another's fault in initiating an end to peace. And Augustine does recognize that justifications for the recourse to war as punishment raise questions of authority. Augustine is explicit that private persons have no authority to war: the head of state, monarch, has the authority to decide whether a just cause exists and to lead the state into war. Writing about the biblical account of Joshua's war on the people of Ai, Augustine says "…that kind of war is undoubtedly just which God himself ordains."[21] Even for wars commanded by God the head of state alone is the authority to judge when a just cause for war exists. Once recourse to war has been decided, soldiers and citizens are obligated to obey, even if the recourse is unwarranted.[22] The ordered slaying of a combatant, then, even in an unjust war, is no crime at all. These last comments gesture towards the contours of what becomes the developed duality of just war theory that logically and conceptually distinguishes *ad bellum* and *in bello* requirements.

III

Centuries later many of Augustine's scatted remarks about war become even more influential through Thomas Aquinas' use of them in his systematic articulation of the classic, definitive trio of *jus ad bellum* requirements. As one small part of his grand synthesis of

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medieval thought, especially of Christian faith and Aristotle's politics and ethics, Thomas Aquinas in *The Summa Theologiae* quite briefly entertains the question, "Is it always sinful to wage war?"[23] Quoting Augustine repeatedly, Aquinas quickly argues, "in order for a war to be just, three things are necessary." These three requirements have come to be known as the *ad bellum* principles of "right authority," "just cause," and "right intention."

Thomas Aquinas follows Augustine's basic approach to *ad bellum* thinking by seeing the recourse to war in terms of punishment. Thus, the first requirement of a just war is "the authority of the ruler, by whose command the war is to be waged." This *ad bellum* principle is then defended *via* analogy with the ruler's domestic penal authority: As only the ruler rightly has recourse to the sword in punishing evil-doers to counter internal disturbances, so it is only the ruler who has "recourse to the sword in defending the common weal against external enemies."[24] Aquinas severely restricts the authority to war: no justified war can be waged by private individuals or *loci* of power other than the ruler of the community. The second requirement, a "just cause," adopts Augustine's notion of avenging wrongs: "those who are attacked, should be attacked because they deserve it on account of some fault."[25] Aquinas's idea is that, even in a war of self-defense, war is deserved by those belligerents as punishment for their offense of initiating hostilities, for an assault that, in the law, would ground a cause of action. And third, Aquinas's "right intention" requirement also relies on Augustine's exclusion of certain motives and passions behind the recourse to war as punishment of wrongs: "…belligerents should … intend the advancement of good or the avoidance of evil."[26] This allusion to Aquinas's first precept of natural law[27] bespeaks the broad degrees of generality covered by this requirement, "from the overarching intention to promote peace …, right down to the exclusion of cruelty, fraud, and, by implication, intent to kill or harm innocents."[28]

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Aquinas's discussion of war is brief, but hugely influential on aspects of the recourse to war. He clearly distinguishes three basic topics – authority, cause, purpose – that becomes the traditional trio of *jus ad bellum* considerations. The substance of his *ad bellum* principles also relies much on Augustine's ideas of the recourse to war as punishment. Thus, just cause, for example, points to an event that is a wrong and to which recourse to war is justified because the wrongdoer deserves to be attacked: ". . . when a nation or state has to be punished for refusing to make amends for the wrongs inflicted by its subjects or to restore what it has seized unjustly."[29] Note that Aquinas allows a just cause whether the wrong is committed against one's own state or against others. For Aquinas self-defense is a just cause to punish the wrong of initiating hostilities, but defense of others can also justify war as punishment for wrongdoing. The penal conception of justifying war leads easily to war as a means whereby states punish wrongs committed against others, not just themselves. It also explains Aquinas's exclusion of religious conversion as a just cause for war.[30] Second, the penal approach to just war theory makes Aquinas's *ad bellum* trio fit nicely with an adoptive Aristotelian causal analysis. A just cause, then, denotes an immediately antecedent event which prompts, as an efficient cause would, the recourse to war; a just cause is, then, not some cause that people take up, like the "cause of Christ," for example, that can easily lead to crusades and holy wars. Similarly, if right intention is more like the teleological or functional orientation of Aristotelian thinking, then mental states and other subjective considerations about rulers are not so relevant to whether a war is justified. Finally, these construals of Aquinas's principles avoid conflating them, whereas in positive international law, right intention is identified with aiming to accomplish the just cause.[31]

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IV

Within a few centuries of Thomas Aquinas's codification of *jus ad bellum* principles, the world and wars had very much changed. Western Europe was organized around sovereign nation states, Christendom was fragmented by the Reformations and bloody religious wars, European voyages of discovery brought brutal conquests and dominations of native peoples. These and other considerations affected thinking about war and its justification as just war theory accommodated new questions about conquest, the status of the seas, the authority over discovered worlds, and states' reasons for waging war.[32] Furthermore, there slowly emerged an alternative understanding of a moral perspective on war, as just war theory came to be framed in terms of moral and legal rights. A cluster of thinkers engaged in just war thinking, with Hugo Grotius's monumentally important work at the center of developing *ad bellum* principles for a changing, modern world of states, rights, and the law of nations.

Justifying war as punishment figures prominently in just war theory as it responds to challenges emerging from the European discoveries, conquests, and occupations of the Americas. In 1548 the Spanish Dominican missionary to the Americas, Bartholome de Las Casas, wrote *In Defense of the Indians*, which criticized his own nation's wars of conquest against native peoples.[33] Others struggled to show that only states, not Emperor or Pope, are the right authority for waging war, that the Americas are not unoccupied lands, that native peoples qualify as states, and that therefore European powers' treatments of them are subject to the moral requirements for the recourse to war.[34] Thus, for example, the Spanish theologian, Francisco de Vitoria, set foundations for two generations of scholars and jurists by explicitly invoking the Thomistic appraoch to just war and arguing that converting the infidel or pagan is not a just cause for war and that war against the native peoples requires a ground for punishing them.[35]

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Whether wrongs done to conquerors or to innocents, or, in some cases, perhaps wrongs committed in violation of moral principles governing all humans' conduct (e.g. proscriptions of sodomy, murder, theft),[36] recourse to war is warranted only if there is a just cause constituted by a wrong worthy of being punished. In his "seventh proposition" Vitoria even invokes a penal proportionality principle:

> . . .if the barbarian nevertheless persist in their wickedness and strive to destroy the Spaniards, they [i.e., the Spaniards] may then treat them no longer as innocent . . ., but as foes against whom all rights of war can be exercised, including plunder, enslavement, deposition of their former masters, and the institution of new ones. All this must be done with moderation, in proportion to the actual offense.[37]

Sovereign states' armed actions for glory, self-interest, or pre-emption engaged out of fear are not the requisite intentions for justifiable recourse to war. Though war on native peoples of the Americas was not always condemned, the sixteenth century engagement of the issues invoked features of a penal approach to *ad bellum* principles for justifying the recourse to war.

Emerging from these efforts were understandings of an international order as governed by universal moral principles and as constituted by reciprocally related states, each with rights of sovereignty.[38] State sovereignty rights were codified in the 1648 Treaty of Westphalia that ended the Thirty Years' War. To ground international law of war the notion of universal natural law and rights are invoked by the seventeenth century Dutchman, Hugo Grotius. Conversant in the older scholastic and more recent Spanish thinking about war and law, Grotius faced challenges to just war theory occasioned by Dutch commercial expansion in the Indies and the dubious sovereignty of the States of Holland.[39] In his monumental work, *The Law of War and Peace*, Grotius devotes much attention to these new challenges while adapting previous thinking

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about justified war in terms of punishment and bringing to the fore now familiar considerations neglected by his predecessors.[40]

In addition to the classic *ad bellum* trio of authority, intention, and cause, Grotius prominently includes considerations related to balancing the effects of war. Although concerns about the consequences of the recourse to war had were implicitly acknowledged by some previous thinkers, Grotius explicitly develops proportionality, last resort, and likelihood of success as important additional principles by applying to war general views about reasoning or punishment. Giving a consequentialist model of practical reasoning, Grotius says, "in all deliberations, the ends should be compared with one another, and also the effective power of the means to bring about the ends."[41] Grotius then applies three rules of balancing good and evil to war, explicitly indicating the need for adequate resources to accomplish the aim and, by analogy with inflicting punishment, arguing against ever starting " a war with a power whose strength is equal to" one's own.[42] Grotius develops views on limiting the range of punishment's amount or severity as a matter of proportion and then applies such penal proportionality constraints to war.[43] With respect to the concept of war as a last resort, Grotius acknowledges "war is a matter of supreme importance, since from it flow a multitude of evils." He then discusses methods "by which disputes may be prevented from breaking out into war": holding a conference, arbitration, drawing lots, even, in some cases, single combat.[44] Furthermore, by applying to war his views about punishment, Grotius says

> There are many reasons that urge us not to insist on punishment . . . . [A]fter establishing a right to go to war . . . it is frequently more highminded and noble to relinquish one's right. . . . [W]ar is not to be undertaken for every lawful cause.[45]

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In another place Grotius argues by analogy with domestic arrest and punishment to maintain that a resort to arms is warranted only if a guilty party has opportunity to offer satisfaction to the one injured.[46] This leads to a third kind of consideration Grotius offers that is relevant to last resort: "certain formalities" must accompany any justified recourse to war.[47] In particular, at least for some wars, a justified recourse to force must be accompanied by the sovereign authority's public declaration as "notification of the event by one party to the other . . . ."[48] In these discussions Grotius adds to just war theory by attending to balancing effects as requirements for justifying war, and Grotius's approach to war as punishment permeates his thinking about *ad bellum* proportionality, success, and last resort.

Grotius also devotes attention to Aquinas's traditional *ad bellum* trio, as suggested even by his public declaration requirement's explicit reference to sovereign authority. Grotius clearly maintains that a justified war "must be waged on both sides by the supreme power in the state": the power is sovereign "whose acts are not subject to the legal control of anyone else, and cannot be rescinded at the pleasure of another human will."[49] For Grotius the requisite authority for war, sovereignty, includes the right to make war and "a right to exact punishment," a right derived from an executive right that originally belonged to every individual.[50] In the area of intent or purpose as a requirement for justified war, Grotius offers scattered remarks relevant to this concept, but does not emphasize this traditional *ad bellum* consideration. His *magnum opus* begins with the familiar, tradition claim of right intention, from Augustine and Aquinas: "war is waged for the sake of peace."[51] And given his acknowledgment of the magnitude of power and evil effects of war, Grotius attends often to the qualities of authority in punishment and war. At one point he admits that "often when a lawful reason for war exists, there is evil in the conduct of it, due to the spirit of the person directing it," whether the motive itself is illicit ("such as passion

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for glory, or some advantage, public or private, which he expects to derive from the war, aside from the alleged aim") or he is influenced by some emotion "such as the pleasure of watching another man's calamity, without regard for the good."[52] With respect to war as punishment, Grotius refers to a penal motive for war as one that can be combined with other intentions.[53]

Grotius's considerable attention to traditional *ad bellum* questions of just cause for war both extends and recasts the classic, inherited notion of just war as punishment. His account of authority presupposes that a sovereign authority's right of punishment, the right to use force, arises from individuals' consensual transfer of their own pre-political right to punish and he accepts "a strong version of an international right to punish."[54] Grotius effectively recasts natural law precepts in terms of rights and correlative duties by calling upon the Roman law conception of cause of action and remedy, which leads him to characterize just causes for war in terms of rights.[55] Given the substantive precepts of natural law, then, Grotius identifies as just causes for war the defense of self or property, the recovery of what has been wrongly taken or of reparations for property, and punishment of wrongs committed or injuries actually inflicted by a state.[56] With respect to self and property, Grotius narrowly restricts wars of defense, rectification, or retribution: anticipatory or pre-emptive wars cannot be justified as remedy or punishment, nor can wars of self-interest or wars for religious causes.[57] Furthermore, given the notion of universal natural law according rights and every state's right to punish wrongs, Grotius argues that a just cause for war is protecting individuals' rights, even if they are being violated in and by another state.

> In our discussions above of men who make war, we said and showed that by the law of nature everyone is the maintainer both of his own rights and of those that belong to

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> others. The reasons therefore that are lawful for a man whose own welfare is at stake are lawful for those who come to the aid of others.[58]
>
> We should understand also that kings and those who possess authority equal to theirs have a right to exact punishment not only for wrongs committed against themselves or their subjects, but for those that do not immediately touch them but are brutal violations of the law of nature or of nations, committed against anyone. …It is more noble indeed to avenge others' wrongs than one's own . . . . So we do not doubt that wars are lawful which are . . . waged against those who sin against nature.[59]

Thus, Grotius argues for a broad and powerful right of states to wage war as punishment for other states' violations of anyone's rights, what we now might call humanitarian interventions. Such other-regarding grounds for the recourse to war are evident in Augustine and Aquinas, for example. Grotius's *ad bellum* thinking recasts that ground of punishment in terms of each state's right to punish, and adds consequentialist considerations to justify the recourse to war as punishment.

V

Grotius's ideas of war as punishment and their foundation in natural law were developed and discussed in subsequent centuries, by Hobbes, Locke, Pufendorf, Vattel, Rousseau, Kant, and others.[60] Grotius's foundation of just war theory in rights and natural law framed the discussions, even for those who, like Hobbes and Locke, so significantly differed in their views about the substance of natural law, rights and principles of just war. Then in the nineteenth century, in England, there emerged a mode of moral thinking about war as punishment that is

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markedly different from the deontological theories of Grotius and other key historical figures already mentioned. The classic English utilitarians continue the traditional theme of war as punishment, but they do so by invoking consequentialist reasoning to support principles about the conditions under which states' recourse to war is morally justified as punishment.

James Mill, in an essay titled, "Law of Nations," sees wars between nations as analogous to ways that penal deterrence functions among men living in a lawless state of nature:

> As men, in a situation where law, and the protection derived from them, do not exist, are left to their own protection, and have no means of deterring other men from injuring them, but making them dread injury in return, so nations, which, with respect to one another, have . . . little protection from the legal sanction, are left to supply its place by this dread of injury in return, which . . . may be called the retributive sanction, and of which …. war is the principal organ. [61]

Thus, according to Mill, war is punishment – "the retributive sanction" that operates as a deterrent against injuries committed by other states. Mill says it follows from "this view of the essence and end of war . . . one pretty extensive proposition" regarding "the condition necessary to render it just":

> The retributive sanction of nations, which is war, ought to operate only where some right of the nation, or something which ought to be treated as a right, has been violated, and where the violation has been such as to require that desperate remedy.[62]

So, James Mill implicitly accepts that justified recourse to war is the act of a nation or state that is such a "desperate remedy" that its costs are warranted only as punishment for other states' violations of "some right of the nation."

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Though never clearly indicating whether a just cause includes one state waging war to punish violations of another state's rights, Mill does develop his penal approach to war by addressing the idea of injury as just cause. Needed is a way to distinguish those injuries and rights violations sufficiently great to justify the great evils war produces. Mill addresses this need by invoking ideas of proportionality. He illustrates the point with a case of self-defense as just cause: a nation's sense of security is so important that "preparations for a threatened attack," at some point, justify the threatened nation's "striking the first blow."[63] Thus, James Mill explicitly expands the cause of self-defense to allow pre-emptive strikes as justifiable war, while more generally acknowledging that much remains to be done "on the important subject of defining those violations of the rights of nations which ought to be regarded as justificatory causes of war," including "what state of preparation shall, or shall not be considered as justifying the threatened nation in striking the first blow."[64] James Mill's brief discussion of *ad bellum* ideas concludes with consideration of last resort, a "doctrine of compensation" whereby "whatever injury may have been sustained, if compensation is made for it, the justificatory cause of war is removed," and no war, except in cases fit for exception, should be regarded as just, which [the demand for compensation] had not preceded" and had not been made through "a constituted organ, and in a predetermined mode" that yet needs to be established.[65] James Mill argues for an international code and tribunal as warranted extension of the idea of war as punishment and a last resort.[66]

Jeremy Bentham's remarks about war closely parallel James Mill's thinking in terms of punishment and injuries to states.[67] In an early and brief work of Bentham's, *Principles of International Law*, the constitutive four essays include one devoted to war, followed by "A Plan for an Universal and Perpetual Peace."[68] Like James Mill, Bentham took right authority for war

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to reside in rulers or states, and he understood relations among states as the focus in thinking about the recourse to war. Each state is bound to protect subjects' injury by other states; each state is bound to do no injury and to do the greatest good for other nations that is consistent with the "regard which is proper to its own well-being."[69] In general, then, war, is an evil sometimes warranted as a means whereby states settle disputes, respond to rights violations, and discourage more injuries or injustices.[70] Whether recourse to war is warranted in a particular situation is a matter of a state weighing the consequences for that state and other states.

> In order to regulate his proceedings with regard to other nations, a given sovereign has no other means more adapted . . . . than the setting before his eyes the general end.[71]

In his work, *Constitutional Code*, Bentham develops his state utilitarianism about the recourse to war as excluding wars waged out of enmity, crude, capricious or excessive state self-interest, monarchs' personal animosity or national prejudice.[72] In effect, Bentham articulates ideas about the traditional *ad bellum* requirement of right intention: the recourse to war is justified only if engaged by a state out of rational considerations of consequences for states and injuries, and not out of emotions and motives such as conquest, power, self-aggrandizement, etc.

As his utilitarian mode of thinking would readily lead, Bentham's discussion of the recourse to war implicitly acknowledges consequentialist *ad bellum* considerations such as the cost-benefit balancing of proportionality and the likelihood of success.[73] Also, since "war is mischief upon the largest scale," Bentham implicitly acknowledges considerations of last resort by listing causes of war and "some of the means of prevention."[74] It is about the traditional concept of just cause, and particularly the discussion of injuries to states, that Bentham's approach to war as punishment is most evident. At one point Bentham says war is a "procedure" for resolving disputes among states.[75] And he explicitly acknowledges justifications such as

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wars aimed at collecting compensation for damages suffered or protecting states' rights.[76] In his exhaustive list of causes for recourse to war, he distinguishes just causes from *mala fides*, thereby excluding ambition, insolence, and malevolence.[77] Then, in taking a bit further the traditional view of war as punishment, Bentham makes relevant in justifying war the state of mind of the state committing the injury, as if war, as a punishment, cannot be merited without the requisite *mens rea* accompanying a rights violation.

> …the utility with regard to the state which looks upon itself as aggrieved – the reasonableness, in a word, of going to war with the aggressor depends partly upon his relative force and partly upon what appears to have been the state of mind with relation to the injury. . . . [I]f the aggression, how unjust soever it may appear, . . . does not appear accompanied with *mala fides* on the part of the aggressor, nothing can be more incontestable than the prudence of submitting to it, rather than encountering the calamities of war.[78]

Bentham even suggests that war against a superior power (which reduces likelihood of success) can be justified in consideration of the mental state behind the injury committed by a state.[79] Like James Mill, Bentham then proposes establishing "a Common court of Judicature" as means to and partially constitutive of peace and extension of the approach to war as punishment for injuries committed by states.[80] Though ripe with questions that plague utilitarian justifications for punishment, both James Mill and Jeremy Bentham apply their consequentialist mode of moral reasoning to war in ways that at least implicitly address traditional *ad bellum* questions, including the old idea of thinking about the recourse to war as punishment.

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VI

This selective survey of key historical figures reveals a lengthy, complex, changing theme of seeing war as punishment in developing *ad bellum* principles for morally justifying the recourse to war. Of course, there are other strong streams in the long history of just war theory. John Stuart Mill's brand of utilitarianism departs significantly from his father and godfather's, and he accords prominence to peoples' self-determination in briefly discussing states' justifications for the recourse to war.[81] Also in the nineteenth century, Marx, Engels, and later Lenin, adopt "the language, if not the spirit of the just war tradition" by assessing the recourse to war not as punishment, but as revolution and liberation from oppression on the way to international socialism and eventual peace in a world devoid of class conflict and its effects.[82] Immanuel Kant, too, eschews thinking of war as punishment. Embedded in his international theory of justice and "revolutionary ideas of a revised international law," and generated by successive applications of his Categorical Imperative and a domestic analogy for international society, Kant holds that recourse to war is justified in order to "preserve, protect, and enhance each and every instance of rational agency," with the ultimate purpose being perpetual peace and the systemic structures that peace requires.[83] These emphases on collective self-determination are a stream of *ad bellum* theory that cannot so plausibly be construed as justifying war in terms of punishment.

Even as only one prominent line in just war thinking, there is contemporary relevance in the long lineage of thinking about the recourse to war as punishment. At least since Augustine, *ad bellum* theory is a mix of consequentialist and deontological considerations. Though the classic medieval thinkers emphasize deontological principles of just cause and right authority, consequentialist considerations of last resort and proportionality are mentioned. In Grotius's

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thinking, consequentialist considerations are elevated to independent *ad bellum* principle alongside deontological principles about just cause and each state's right to punish wrongs. It is only with the utiltarians, as expected, that deontological notions about the recourse to war are entirely subsumed and justified on consequentialist grounds. In the development of a penal approach to just war theory, then, thinkers differ in the relative importance of deontological and consequentialist thinking, leaving questions about the coherence of a mixed moral theory for the recourse to war. The substance of *ad bellum* principles illustrates the tension. Many, like Grotius, for example, maintain the aim of war is peace and justify the recourse to war as punishment. Considerations of peace and punishment readily pull in opposite directions when applied to particular instances, for a penal war not only ends peace, but may not promote peace, either. But if war is approached as punishment, then philosophical work on punishment may help clarify mixed moral theories about the recourse to war. For example, H.L.A. Hart has famously suggested a structure for understanding mixed theories of punishment.[84] Applied to a theory of just war, one might see peace as a general justifying aim for the practice of war existing, while notions of retributive justice establish liability to punishment and, thus, necessary conditions for pursuing a particular war against a specific belligerent. Consequentialist considerations of proportionality, then, would address analogues to questions about amounts of punishment, including whether exacting the penalty through war is worth the cost in comparison to alternative means of redressing the situation. Attention to the historical theme of war as punishment can in this way perhaps prompt philosophical developments of a moral theory of just war today.

Seeing war as punishment may be an old, recurring, and prominent approach to *ad bellum* principles, but such an approach today exists uneasily alongside a contemporary climate of

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severely limiting the recourse to war. Current international law and many just war discussions focus almost exclusively on self-defense as just cause. In his work on the history of the just war tradition, James Turner Johnson notes this tension, arguing that just war theory long has been centrally about justice, not primarily about restricting uses of force:

> [T]he concept of just war does not begin with a 'presumption against war' focused on the harm which war may do, but with a presumption against *injustice* focused on the need for responsible use of force in response to wrongdoing.[85]

Specifically with respect to just cause, Johnson maintains that the tradition includes "the right to use force if necessary for such purposes as combating … systematic and sustained violations of universally recognized human rights."[86] What this essay reveals is that a kind of justice long central to just war theory is the justice of punishment, retributive justice as distinguishable from distributive justice. The historical theme invokes principles for addressing wrongs intentionally committed, not for unintended, systemic patterns or processes of maldistributions of economic or other goods.

In this era of ethnic cleansings, genocides, and crimes against humanity the history of just war theory may illuminate lost ways of thinking helpful to contemporary questions about the recourse to war. Humanitarian interventions, for example, are uses of military force in defense of others' human rights.[87] Such interventions are sometimes by recourse to war, just war theory is then applicable, and the idea of war as punishment is not irrelevant to justifying such armed conflicts. When other states systematically violate others' fundamental human rights, the ancient question of "avenging wrongs" becomes relevant as a cause for war. Such a way of thinking in contemporary terms may bear implications for *post bellum* principles as well, just as Grotius and Bentham, for example, indicated links between the sequel to war and seeing wars as

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punishment.[88] Today individuals' and states' heightened liabilities for committing crimes against humanity are developments suggesting that practices and institutions now implicitly acknowledge a penal aspect to the recourse to war, even if international law also denies that defense of others or punishment are licit causes for using military force without United Nations authorization.[89]

The historical theme of justifying the recourse to war as punishment is rich in its details and variations, highlighting the questions that penal aspects of war bring to the fore. Much important theory and practice might be fruitfully enriched by pursuing the rich variations on the historical theme of justified recourse to war as punishment for wrongs committed against others or self. As is evident in the variations of the historical theme, approaching war as punishment brings to the fore the importance of right authority in justifying the recourse to war. If just war is about retributive justice, then right authority is a prominent and important question. Though modern variants of the historic theme uncritically presume *de facto* states are the right authority, the classic roots of war as punishment rightly struggle with principles for identifying legitimate authority for the waging of war to avenge wrongs. To see the recourse to war as punishment is to acknowledge the importance of right authority as a question for just war theory and practice. The history of just war theory suggests a need to re-examine principles of right authority for justifying the recourse to war today.[90]

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NOTES

[1] That justifying war takes a moral point of view on war as a structured, social enterprise is an approach taken in the contemporary classic by Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977, 2001).

[2] That there is a just war tradition in the West follows James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740* (Princeton: Princeton University Press, 1975); *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton: Princeton University Press, 1981); *Morality and Contemporary Warfare* (New Haven: Yale University Press, 1999).

[3] Throughout this essay 'just war' refers to war being morally justified, not necessarily that war is justified on grounds of justice. A further ambiguity of 'just war' relates to the deontic character of a morally justified war, whether a justified war is morally permissible, morally obligatory, or a matter of moral right, for example.

[4] Walzer, p. 21.

[5] At least since Immanuel Kant, principles morally regulating the sequel to war, *jus post bellum*, have been acknowledged as a third basic division in just war theory, and increased attention to these principles is evident in recent discussions. See W. B. Gallie's analysis of *Perpetual Peace* in *Philosophers of Peace and War* (Cambridge: Cambridge U P, 1978), pp. 8-36; Brian Orend, "Kant's Just War Theory" *Journal of the History of Philosophy* 37 (1999): 323-353; Michael Walzer, *Arguing About War* (New Haven: Yale University Press, 2004).

[6] Much of this paragraph about origins follows Frederick Russell, *Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975), pp. 1-15. There are other views about origins of just war thinking in the West. For example, in *Morality and Contemporary Warfare* James Tuner Johnson omits classical Greek ideas as a source of the just war tradition (p. 24). Others maintain that the origins are not biblical, but pagan and Roman: Jonathan Barnes, "The Just War*," The Cambridge History of Later Medieval Philosophy* (Cambridge: Cambridge University Press, 1982), pp. 771-784; G.I.A.D. Draper, "Grotius' Place in the Development of Legal Ideas about War," *Hugo Grotius and International Relations*, ed. Hedley Bull, *et.al*. (Oxford: Clarendon Press, 1990), pp. 177-181.

[7] The latter includes lengthy passages in Deuteronomy 20:1-20, 21:10-14, 23:9-15, 24:5. For extensive discussion of biblical texts and just war ideas, see John A. Wood, *Perspectives on War in the Bible* (Macon, GA: Mercer University Press, 1998), especially pp. 140-151.

[8] *Republic*. Book II. 373e-375e; Book V. 471a-b.

[9] For example: Book I. 7, and Book VII.10-11.

[10] Russell, pp. 4-5; Arthur Nussbaum. *A Concise History of the Law of Nations* (New York: Macmillan, 1947), pp. 16-18.

[11] *On Duties*, Book I. 36; *On the Commonwealth*, Book II. 23, 34, 35.

[12] On some aspects of these issues, see also Paul Christopher, *The Ethics of War & Peace* (Third Edition. Upper Saddle River: Prentice Hall, 2004), pp. 17-21.

[13] Rolan Bainton, *Christian Attitudes Toward War and Peace* (New York: Abingdon Press, 1960); Arthur F. Holmes, ed. *War and Christian Ethics: Classic Readings on the Morality of War* (Grand Rapids: Baker Book House, 1975), pp. 39-50.

[14] Herbert A. Deane, *The Political and Social Ideas of St. Augustine* (New York: Columbia University Press, 1963), pp. 154-171; R. A. Markus, "The Latin Fathers," *The Cambridge*

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History of Medieval Political Thought, ed. J. H. Burns (Cambridge: Cambridge University Press, 1988), p. 115; Paul Ramsey, "The Just War According to St Augustine," *Just War Theory*, ed. Jean Bethke Elshtain (New York: New York University Press, 1992), p. 8; Russell, pp.16, 25.

[15] *Epistula* CLIII, as quoted in Deane, p. 139.

[16] *De Libero Arbitrio.*. Book I. xv.

[17] *Against Faustus,* as translated and quoted in Deane, p. 161.

[18] *De Civitate Dei*. Book XIX.

[19] *Quaestionum in Heptateuchum*. VI. 10.

[20] *Ibid*.

[21] Divinely commanded wars are sometimes ignored by commentators, while others accord much attention to this topic and its implications for an account of right authority as a condition of the recourse to war. See, for example, Russell, pp. 20-23, and Christopher, pp. 37-38.

[22] Deane, pp. 163 ff.

[23] II-II. Q. 40. a. 1. References and quotes are from *On Law, Morality, and Politics*, ed. William Baumgarth and Richard Regan (Indianapolis: Hackett, 1988), pp. 220-222.

[24] *Ibid*.

[25] *Ibid*.

[26] *Ibid*.

[27] *Summa Theologiae* I-II. Q. 94. a. 2., p. 47.

[28] John Finnis, *Aquinas* (Oxford: Oxford University Press, 1998), p. 285.

[29] Quoting Augustine, in *Summa Theologiae* II-II. Q. 40. a.1.

[30] *Summa Theologiae* II-II. Q. 10. a. 8. p. 250.

[31] Johnson, *Morality and Contemporary Warfare*, pp. 30, 34.

[32] Historical background follows Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), pp. 1-77; G.I.A.D. Draper, "Grotius' Place in the Development of Legal Ideas about War," in *Hugo Grotius and International Relations*. Ed. Hedley Bull, *et.al*. Oxford: Clarendon Press, 1990. pp. 177-208, pp. 184-186; Benedict Kingsbury and Adam Roberts, "Introduction: Grotian Thought in International Relations," in the same volume, pp. 1-64.

[33] Trans. and edited by Stafford Poole (DeKalb, Ill.: Northern Illinois University Press, 1974).

[34] Tuck, pp. 68-77.

[35] "On the American Indians," in *Political Writings*, ed. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), pp. 282-3, 289.

[36] *Ibid*. pp. 274, 288.

[37] Ibid., p. 283.

[38] Vitoria, "On Civil Power," *Political Writings*, p. 40.

[39] Tuck, pp. 78-81.

[40] Quotations and citations below are by Book, chapter, section, and page number of *The Law of War and Peace*, translated by Louis Loomis (New York: Walter J. Black, 1949).

[41] *The Law of War and Peace*. II.xxiv.5. p. 257.

[42] *Ibid*. II. xxiv. 6, 7, 9. pp. 258-9.

[43] *Ibid*. II. xx. 28-34. pp. 221-224.

[44] *Ibid.* II. xxiii. 6-12. pp. 252-253.

[45] *Ibid.* II. xxiv. 1-2. p. 255. Cf. also: "Not every injury . . . should be taken as excuse for a war." II. xx. 38. p. 225.

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[46] *Ibid*. II.i.18. p. 77.
[47] *Ibid*. I. iii. 4. p. 40.
[48] *Ibid*. III. iii. 5. p. 289.
[49] *Ibid*. I. iii. 4-5. pp. 40-41; and I.iii. 7. p. 43, respectively.
[50] *Ibid.* II. xx. 40. pp. 226-227.
[51] *Ibid.* I. i. 1. p. 17.
[52] *Ibid*. II. xxii. 17. p. 249.
[53] *Ibid*. II. xx. 38. p. p. 225. Grotius does discuss cognitive mental states regarding the recourse to war in a chapter titled, "Doubtful Reasons for War" (II. xxiii. pp. 250-254.).
[54] See note 50. See also, Tuck, pp. 81-93 and 108, who notes the similarity with Locke's "very strange doctrine" in the *Second Treatise* (sections 7-11) as "one of the most striking examples of intellectual convergence."
[55] *Ibid*., pp. 81-108; Draper, pp. 194-197.
[56] *The Law of War and Peace*. II. i. 2. p. 72; II. xx. 1. p. 205; II. xx. 39-40. p. 225-227; II. xxii. 5. p. 245; II. xx. 44-51. pp. 228-234.
[57] *Ibid*. II. i. 1. p. 71; II. i. 17. p. 77.
[58] *Ibid*. II. xxv. 1. p. 260.
[59] *Ibid*. II. xx. 40. p. 226. Grotius develops this idea by appealing to natural law in order to argue for a *post bellum* right of a state to punish the enemy at the conclusion of war undertaken for a punitive reason.
[60] Tuck, pp. 109-225.
[61] "The Law of Nations." *Supplement to the Encyclopedia Britannica*, in *Essays* (London: Innes, 1825). Reprinted in *Essays* (Fairfield, NJ: Augustus M. Kelly, 1986), p. 19.
[62] *Ibid*.
[63] *Ibid*. p. 20.
[64] *Ibid*.
[65] *Ibid*.
[66] *Ibid*. pp. 27-33.
[67] Anthony Ellis, in one of the few discussions of utilitarians' views about war, asserts that though Bentham wrote little about international affairs, his views were well known through James Mill's presentation of Bentham's views. "Utilitarianism and International Ethics." *The Traditions of International Ethics*. Ed. Terry Nardin and David Mapel (Cambridge: Cambridge U P, 1992), pp. 158-179, pp. 163-164.
[68] *The Works of Jeremy Bentham*. 11 Volumes. Ed John Bowring (New York: Russell & Russell, 1962), Volume II, pp. 535-560. Bentham also addresses relevant issues in *Constitutional Code*, Volume IX, pp. 1-662. References to these two works are by volume and page number in the Bowring edition.
[69] *Principles of International Law*, Vol. II, pp. 538, 544.
[70] *Ibid*. pp. 539, 552.
[71] *Ibid*. p. 538.
[72] Volume IX, pp. 129, 538.
[73] *Principles of International Law*. Vol. II, pp. 539, 545.
[74] *Ibid*. Vol. II. p. 539.
[75] *Ibid*. p. 539.

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[76] *Constitutional Code*. Vol. IX, p. 202.
[77] *Principles of International Law*, Vol. II., pp. 539-540.
[78] *Ibid*. Vol. II. p. 545.
[79] *Ibid*. Vol. II. p. 545.
[80] *Ibid*., and note 66 above.
[81] Fundamental to J. S. Mill's utilitarianism are the qualitatively superior pleasures associated with exercising one's distinctive human faculties in determining one's own life, an exercise of individuality that requires liberty as a means. By analogy, then, nations' armed interventions in another state are usually unjustified with because of the paramount value of collective self-determination. In his short essay of 1862, "A Few Words on Non-Intervention," Mill develops an exception alluded to in *On Liberty*, where paternalistic armed intervention is permissible when a civilized nation intervenes in the affairs of an uncivilized nation in order to bring the latter along towards the necessary conditions of self-determination. On the other hand, between civilized nations, Mill argues that states ought not war in support of liberation movements and other forms of civil upheaval that occur within another state. For a brief use of Mill's approach, see Walzer, *Just and Unjust Wars*, pp 87-96, and Ellis, pp. 165-169.
[82] Clark, *Waging War*, pp. 46-47; Gallie, *Philosophers of Peace and War*, pp. 66-99.
[83] W. B. Gallie, *Philosophers of Peace and War*, pp. 8-36; Brian Orend, "Kant's Just War Theory" *Journal of the History of Philosophy* 37 (1999): 323-353. The latter article references the received and revisionist literature on interpreting Kant's views on war.
[84] "Prolegomenon to the Principles of Punishment." *Punishment and Responsibility*. (Oxford: Clarendon Press, 1968).
[85] *Morality and Contemporary Warfare*, p. 35.
[86] *Ibid*, pp. 31-32; see also pp. 28-29.
[87] Jeff Holzgrefe, "The Humanitarian Intervention Debate," in *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, ed. J. L. Holzgrefe and Robert O. Keohane (Cambridge: Cambridge University Press, 2003), p. 18.
[88] See notes 59 and 80 above.
[89] Current international law of force is helpfully explored by Thomas Franck in *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995).
[90] One such investigation is Allen Buchanan's *Justice, Legitimacy, and Self Determination: Foundations for International Law* (Oxford: Oxford University Press, 2004, especially pp. 233-303.

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