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## What's A Just War Theorist?

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**Abstract.** The article provides an account of the unlikely revival of the medieval Just War Theory, due in large part to the efforts of Michael Walzer. Its purpose is to address the question: What is a just war theorist? By exploring contrasts between scholarly activity and forms of international activism, the paper argues that just war theorists appear to be just war criminals, both on the count of aiding and abetting aggression and on the count of inciting troops to commit war crimes.

**Keywords:** aggression; war crimes; just war theory; activism; Immanuel Kant; Judith N. Shklar; hypocrisy

### Introduction

The just war theory made its unlikely comeback in large part due to Michael Walzer's popularizing efforts. One of its most remarkable achievements was its application in the form of "humanitarian intervention" to absolve the US-led NATO aggression against Yugoslavia in 1999. Yet on June 17, 2010 Walzer was decorated with an honorary doctorate from Belgrade University; the ceremony took place not far from the remains of buildings destroyed by NATO in the centre of the city. One may, then, rightly contemplate the meaning of gestures of this sort: What could tempt people, particularly the intellectual elites, to even consider honoring those who advocated aggression against their country? Why honor someone hailing from a hegemonic power in a weak state that had witnessed and directly felt the fury of that power, which left behind thousands dead and the whole country in physical, psychological, and economic devastation? These are complicated questions to answer,<sup>i</sup> but in this paper I shall consider a more basic issue: What is a just war theorist? However, let us first consider a bit of history.

### A Brief History of the Just War Doctrine

The doctrine of just war theory has a long history and its invocations have gone through a series of shifting context of applications. Initially developed in the context

of Catholic theology, the theory was also taken to have moral implications, thus transitioning into the secular domain, which at least by the 19<sup>th</sup> century and certainly by mid-20th century also accommodated a legal interpretation. This prolonged transition from the theological context with moral implications into a purely secular domain with legal interpretation (within positive international law) took up most of the history of the just war theory. Eventually, however, with the effort of Michael Walzer, the doctrine reintegrated the moral domain in political theory, and later moral philosophy. Taken as a contemporary legal theory it consists of two components: the *jus ad bellum* is that part of international law governing resort to international armed conflicts. The *jus in bello* is the law of war properly so formulated, namely, the body of rules governing the conduct of parties engaged in international armed conflict. These are also the main constituents of this doctrine as it originated in the theological context and transferred to the moral domain or normative order.

The founder of the Christian doctrine of just war is St. Augustine who gave it its first formulation in *Contra Faustum*. Therein St. Augustine asked the critical question: "Is it necessarily sinful for a Christian to wage war?" His negative and exceptive answer—that wars are just if waged to avenge injustice or to coerce the enemies of the Church—is generally considered as the first appearance of the specifically Christian doctrine of just war. As he so often did, St. Thomas Aquinas, in his *Summa Theologica*, repeated and elaborated St. Augustine's view. The Thomist formula embodies the medieval and scholastic thinking about the just war, and it remains applicable in the doctrine of the Catholic Church to this day. Aquinas answered the question posed by St. Augustine in the negative, provided: (i) the Prince had authorized the war; (ii) there was a "just cause" against the adversary on account of some guilt on his part; and (iii) the belligerent had a "right intention," i.e., to promote good or to avoid evil. The main emphasis was upon the requirement of a just cause, which was considered to be a matter of moral theology. Thus the Thomist view made the question of the "justness" of all wars one that fell within the jurisdiction of the Church.

From 1618 to 1648, the Thirty Years War ravaged Europe. This period of bitter struggle between Catholicism and Protestantism generated its own ideological contribution to the just war doctrine, adding a purely theological component of *jus ad bellum*: war for the cause of religion. The violent clashes were deplorably without restraints. The trouble was that the just war doctrine had relatively little to say about conduct in warfare (*jus in bello*) beyond condemning perfidy (breach of promises) and the slaughter of women and children because war against them was "unjust." The lack of restraint was compounded by 14th and 15th-century ideas that the victorious Prince was waging a just war and, as the agent of God, punishing the defeated, as the devils in hell would punish them in the next world. The victory was the judgment of God as to the justness of the cause of the victor. The war could not be considered just on both sides because God's will was not divisible. These were the components that made up the content of the classic just war doctrine of the late medieval period.

In the 16<sup>th</sup> and first half of the 17<sup>th</sup> century, three notable Englishmen: William Ames, a Puritan theologian, William Fulbecke, a lawyer, and Matthew Sutcliffe, clergyman, academic and lawyer, excluded religion as a basis for the just war doctrine. Francisco de Victoria and Francisco Suarez contributed to further integrating the classic just war doctrine into the overtly secular and legalist doctrine of the modern international law of war. Thus, from the mid-seventeenth century until the mid-twentieth, the idea of just war largely disappeared as a conscious source of *moral* reflection about war and its restraint. Hugo Grotius, John Locke, and Emerich deVattel removed the last lingering traces of the medieval just war doctrine which led to the modern doctrine entirely based in nature and agreements among persons, with no backwards glances seeking divine approval.

The central weakness of the medieval classic doctrine was that it oscillated between aggravating cruelties in war, because the victorious Prince as the agent of God was punishing the unjust defeated, and a high level of artificiality that left

it without an impact upon the content of the *jus in bello*. In particular, it failed to promote the idea that the *jus in bello* applied regardless of the justness of the cause. This idea has in fact been hindered by the long history of the just war doctrine and has taken centuries to become established. The indivisibility of God's will was too serious an impediment to the notion that a war might be just for both sides engaged in it.

Civilians (who did not enjoy the advantage of carrying arms) suffered some of the most appalling atrocities of medieval warfare at the hands of the military (who were the only ones privileged to bear arms). Yet this law of arms yielded ideas not without value for the subsequent development of the modern international law of war. First, it contributed the idea of a body of rules governing the military class regardless of frontiers or allegiance, and independently of the justice or injustice of the initial resort to war. Second, it affirmed the idea that only sovereigns could wage war, properly understood. Thus, the medieval legacy of the just war did yield something of value to posterity. Mainly under the force of Church disapproval, expressed by anathema, it gave no place to private war or indiscriminate incursion, which were the main source of violence inflicting medieval society. To such private wars the law of arms gave no acceptable status. Claims to ransoms and spoils would not be upheld. It made some attempt to bring to book professional freebooters whose behavior was synonymous with terror, brutality, and looting. The requirement that the war be public and open evolved from the Thomist formulation of the just war doctrine, which excluded the "private war" of the feudal lord. The Thomist formula insisted that for a war to be "just" it had to be "public."

Once the modern territorial states had been established, their resort to arms became open by necessity, and soon no form of fighting could properly be a war other than that waged by a sovereign state. In the second half of the 19th century, under the impact of a collection of ideals that might be termed secular humanitarianism, the laws and customs of war were subjected to a major

codifying redaction at the First and Second Hague Peace Conferences of 1899 and 1907. This was the era of positivism, when state sovereignty enjoyed utmost importance, which meant the virtual expulsion of the just war doctrine from all considerations. States might, in accepted international law of the day, resort to war as a legitimate instrument of national policy.

With the gradual decline of that claim, through the progressive stages of the Covenant of the League of Nations, the Pact of Paris, and the United Nations Charter, a new (legal) doctrine of the just and lawful war—limited to individual or collective self-defense—and of collective peace enforcement, appeared as the new *jus ad bellum*. Necessarily, the old question reappears: Does the *jus in bello* bind the aggressor and the self-defender alike? Some would argue that waging an aggressive war is the supreme international criminal act and that those who take part in such a war are participants in this criminality and are not entitled to the protection of *jus in bello*. On the other side of the same coin there are those—most prominently Michael Walzer—who claim that those who are fighting a just war ("the good guys") ought not to be held to the demands of *jus in bello*. Such arguments (moral, legal, political, or religious, whatever they might be), however, would bring us back to the evils of the medieval classic just war doctrine and all the miseries that accompanied it. The humanitarian law theory and its associate, the human rights theory, reject discrimination among participants in war whether on the side of the aggressor or of the defender. But, Walzer's revivalism of the classic just war doctrine, as we shall see, appears bent on bringing back the worst of this medieval doctrine.

### **Walzer, Hypocrisy, and Just War Theory**

Michael Walzer finds moral reassurance in hypocrisy. Others would disagree. The public spectacle of mutual accusations of hypocrisy by irreconcilable ideological opponents, especially when war breaks out, reveal, according to Walzer, *shared moral knowledge*. Walzer, in his book *Just and Unjust Wars*, begins his revival of

the medieval, Catholic just war doctrine with the claim that exposure of hypocrisy may be "the most important form of moral criticism" (1992: xxix). For "wherever we find hypocrisy," states Walzer, "we also find moral knowledge" (1992: 230): hypocrites presume "the moral understanding of the rest of us" (1992: 29). Uncovering the *moral reality* of war is to be accomplished, according to Walzer, through unmasking the hypocrisy of politicians and generals by putting their words to the test of the emerging ethical facts.

However, as should be well known, Walzer's colleague and friend, Judith Shklar, argued compellingly against his claim about the alleged revelatory power of hypocrisy to present us with shared moral knowledge and particularly its application to the project of constructing a "just war theory". Shklar makes four important points: first, she reminds us that charges of hypocrisy quickly bring about counter-accusations of the same, and, second, that these imputations do not "imply shared knowledge, but mutual inaccessibility" (1984: 81); thirdly, she teaches us a lesson that "the very notion of wars as either just or unjust is by no means universally accepted among the citizens of liberal democracies" (1984: 79-80); and fourth, most importantly, she insists that it is wrong (both in the sense of "morally impermissible" and an error) "to put hypocrisy first" (in her sense of ranking any vice above cruelty) because it "entangles us [...] in too much moral cruelty, exposes us too easily to misanthropy, and unbalances our politics" (1984: 86). There is no evidence that Walzer has neglected all four of these lessons, but he most certainly decided to dismiss Shklar's second and third insight. Hence, it stands to reason that a just war theory erected on the erroneously attributed epistemic status of hypocrisy as revealing alleged moral facts ("shared moral knowledge") will exhibit all three of the undesirable outcomes Shklar urges caution about: *moral cruelty, misanthropy, and unbalanced politics*.<sup>ii</sup> That this is indeed the legacy of Walzer's just war theory must be fully argued elsewhere, but I expect at least a glimpse of it to become evident even in this article.

However, before turning to our main concern—the study about the fundamental nature of a just war theorist—it is worth exploring the importance of the lesson that extreme caution is in order regarding Walzer's revivalism<sup>iii</sup> of the medieval ideas about "just" war. In its early applications the idea of just war served the purpose of justifying the bloody crusades all the way to the desecration of Hagia Sophia and the Latin occupation of Constantinople in April 1204. The looting and devastation of the greatest Christian city of the medieval world by other (Western) Christians, precisely when the Byzantium was under pressure from Islam, is a reminder of what can happen when one is ideologically armed with a just war theory: not much room for compassion regarding even your Christian co-religionists appears available, but only "moral cruelty, misanthropy, and unbalanced politics". Before the final fall to the Ottomans in 1453, for almost two centuries Byzantium was forced to consider the option of the union of the churches in response to the desperate need for military help from the West to combat the Seljuk Turks. But Western spiritual leaders had made a precondition of any assistance the reunion of the churches with Constantinople subordinated to Rome. This humiliating conditioning of military aid with acceptance of papal primacy together with the enduring and vivid memory of the "just war" sacrilege of 1204 lead to the Byzantine proverbial saying: "Better the Turkish turban than the papal tiara" (Herrin, 2008).<sup>iv</sup>

Walzer's initiative to revive the Catholic medieval just war doctrine three quarters into the 20<sup>th</sup> century may appear additionally peculiar as it skips backwards over the singularly important historical contributions of the Enlightenment, and neglects the greatest results in the history of moral philosophy in general and on the question of morality of war in particular by the most important Enlightenment thinker, Immanuel Kant, who so brilliantly systematized the ideas of freedom and rationality. And as Walzer's colleague, Judith Shklar, again reminds us, Kant sees war as beyond the rules of good and evil; hence not a practice that can be just or unjust.<sup>v</sup> It belongs to the domain of



necessity, and the only imperative regarding war is to end it as soon as possible. Kantians cannot approve of the travail by the just war theorist as they view him as "encouraging people to enter upon wars recklessly and then baptizing his own side with the holy water of justice. Every enemy can easily be made to look the aggressor" (Shklar, 1984: 80).<sup>vi</sup>

It must be made clear that Kant is neither a radical pacifist nor a Schmittian realist. His point—so well rendered by Shklar—is that no (moral) rules are possible that would confer moral-theoretic imprimatur on some wars characterized by specific attributes. Any violent conflict could be claimed to satisfy such descriptions whether it did or not. Hence, the entire project should be rejected. Kant is opposed to the idea of constructing "theories" that would render specific wars "just" or "unjust," for an endeavor of this sort could easily be used to rhetorically turn even an obvious aggression into a "good war". The fate of Yugoslavia in 1999 arguably involves precisely such an example where an aggression, by nineteen most powerful countries against a small state that attacked none of them, through capricious manipulation of just war "rules," became baptized a just war. Walzer was chief among many Western publicists who first urged then cheered the aggression, but was practically unique in also demanding a ground offensive.

Yet another reason exists that makes the timing and nature of Walzer's revival of just war theory curious. It occurs in the period of unprecedented progress in international law where, regarding *jus ad bellum*, aggression is marked as the supreme crime per Nuremberg precedent and embedded as such in the U.N. Charter, while a number of elements introduced in the positive international law regulate *jus in bello*, such as the Nuremberg Principles or the four Geneva Conventions, etc. But Walzer has no respect for this paper world of international lawyers, and instead opts for yet another medieval Catholic invention: the casuistic method in determining what is just and unjust with respect to war or what the rules of war should be.<sup>vii</sup> Of course, this opens up the

unpleasant possibility that the legal and just war theoretical (presumably moral) judgments about an instance of war come in the opposition to each other. What to do about a war that is deemed "illegal but good"?<sup>viii</sup> A powerful state, bent on waging war, could in such a case want to emphasize the latter and ignore the former verdict. Such a gift from just war theory to raw power! This was exactly the case with the US-led NATO aggression against Yugoslavia in 1999.

### **Scholarship vs. Activism**

Let us now consider directly the question: What is a just war theorist? War is a very serious and grave matter. Yet discourse about (just and unjust) war is not always as serious as is warranted. "Serious" normative judgment in this context requires keeping in clear view the interdisciplinary matrix of values. In the moral order, the phrase "unjust war" attaches a particularly powerful stigma of wrongful action on the part of the accused alleged perpetrators; in the political order, the use of this phrase is a call to action; and in the legal order its meaning is defined in the existing documents of positive international law via the conceptually linked term "aggression," and the (legal) rules about the conduct in war. Given that the discourse about war may equally occur within moral, political, and legal domains, the *minimum* of seriousness while engaging in the war-discourse requires a precise and explicit "indexing" to the specific normative order of usage.

Elsewhere (Jokic, 2009) I have shown that Walzer does not meet this minimum of seriousness required of proper scholarship:

Despite [the] relevance of morality for the other two normative orders [legal and political], it is very important to keep the three separate at all times. In fact, the effort to avoid conflation of these normative orders is a mark of serious and responsible scholarship, or discourse about normative matters in general. All too often normative discussions fail to satisfy this

basic requirement. Such is the case with Michael Walzer's recent discussion on proportionality (Walzer, 2009).

Already in his first paragraph, Walzer confuses the moral and legal orders and perhaps the political as well. Right after claiming that "disproportionate" is the favorite critical term of the partakers in the discussions on the morality of war, Walzer accuses those same (unidentified) people of not knowing what this term means in international law. Is Walzer claiming that before one can formulate a moral judgment using the term "disproportionate" one must ensure that it is used in the same sense as in international law? Could not a practice be disproportionate in a way that it might justify a moral judgment that the practice in question is wrong without thereby amounting to a legal claim that the practice is forbidden by international law? Contrary to Walzer's apparent claim, this seems quite possible. To make things worse, Walzer slams yet another accusation at his targets claiming that "they don't realize that ["disproportionate"] has been used far more often to justify than to criticize what we might think of as excessive violence." What might Walzer mean here by talking of those who use "disproportionate" to "justify" excessive violence? Is the justification he has in mind moral, legal, or simply political? I am afraid that the only meaning that can be attached to "justify" in this context is political—as what appears to be the subject of justification is a certain policy regarding use of excessive violence—thus completing Walzer's mess of conflating all three normative orders in just the first three sentences.

Returning to our discussion, it is particularly worrisome when the legal and political uses of the word "war" are bifurcated, as we have seen with the example of the phrase "illegal but good". War-discourse is replete with conceptual "mix ups" and bifurcations of this nature which can, and often do, result in serious

harms to those who find themselves on the receiving end of inappropriate uses of this discourse. A significant part of contemporary war-discourse rarely meets even the basic standard for the minimum of seriousness, which suggests that the magnitude of abuse that it may generate is potentially significant. A general deficit of seriousness, in the above technical sense, suggests a practice that may not be entirely compatible with any scholarly work, as the latter always requires a methodology that rules out (ideologically driven) arbitrariness and randomness to the maximum possible degree.

With this (discursive) context in mind, and specifically the dangers it is fraught with, a "just war theorist" would, broadly speaking, be a kind of scholar or expert. By invoking the ideas of scholarship or expertise I mean to account for the meaning of "theorist" in the phrase "just war theorist". When we look up the word "scholar" in an English dictionary we find that it refers to a learned person who has a great deal of knowledge, especially an academic, someone who is a specialist in a given branch of knowledge. So, for example, a "just war scholar" would, then, be a learned person whose branch of knowledge is (just and unjust) war. To be more precise, we would not consider war a "branch of knowledge," rather scholars from a number of branches of knowledge might choose to focus on war as their subject: international lawyers, political scientists, or philosophers, for example. A scholar from any of those branches of knowledge (or other disciplines) who decides to "specialize" in war might then qualify as a "just war scholar." However, there is another phrase that is sometimes utilized that indicates a somewhat relaxed usage; it is (just war) "expert."

When we look up the word "expert" in a dictionary we find that it refers to a person with a high degree of knowledge of a certain subject. So, a "just war expert" would be someone with a high degree of knowledge about the subject of just and unjust war (not necessarily an academic or someone trained in moral philosophy). When we think about the subject of war, the label "just war expert" reveals an unintended yet suggestive ambiguity. It could mean (i) someone

particularly skilled in perpetrating a just or an unjust war in various ways that this can be done, or (ii) someone (presumed) particularly skilled in determining which historical episodes of violence, including in particular the current events, constitute just or unjust wars. Let us call the skills described in (i) "war-engineering skills" and people who have them "war-engineers," while the skills described in (ii) might be called "just war-pronouncing skills" and the people who have them "just war-pronouncement-makers" or "just war judges". It goes without saying that in the current discourse on war everyone partaking in it, *qua* "expert," wants to *count as* expert of the latter sort, and not many would want to be notorious as experts of the former kind (certainly not as engineers of *unjust* wars as that is tantamount to being a *war criminal*). Everyone would rather be a pronouncement-maker than an engineer in this respect. It is not difficult to see, however, that a good case can be made for maintaining that many partakers in the current just war discourse generate nearly as much harm as if they were in fact war-engineers. This would have to be argued in greater detail elsewhere though the already invoked example of the "humanitarian intervention" against Yugoslavia in 1999 may be sufficient to clearly *show* it.

The dominant desire of just war discourse partakers to be just war pronouncement makers, or just war judges, is nicely explained by the shift in terminology from "scholar" to "expert" in this area. It is characteristic of the current Western discourse that many who are not associated with any institution of higher learning or research (or those who are, might be untutored in moral philosophy) still want to be in the position to authoritatively pronounce on these matters. Often this is done as a call to action (one that inevitably involves dropping bombs on countries with unwanted regimes). The non-scholarly experts who desire to authoritatively pronounce on the occurrence of events that would make war just include journalists, NGO operatives, think-tankers, or even government officials serving on various presidential task forces or are intelligence operatives. The danger hidden in this idiosyncratic practice of social epistemology

is clear: once pronouncements about just war are made, by "experts," they become virtually irreversible since credibility in the political sphere usually depends precisely on firm positions and opinions, viz., the refusal to revise calls one has made or reverse oneself. Of course, these characteristics are virtually contrary to the epistemological virtues associated with real experts, i.e., proper scholarship. This makes the already weakened methodological rigor embedded in the very nature of the just war theory, as we have seen, relaxed even further, to the point that what passes for "scholarship" in this domain resembles more closely ideology, advocacy, and lobbying than anything approaching science or philosophy.

The question about the occurrence of a just (or unjust) war is a question about the existence of facts that can in principle be discovered and identified (assuming one would—in a non-Kantian spirit—even want to engage in "practicing" just war theory). A war does not become just (or unjust) as a result of a pronouncement by persons (somehow) vested with the authority to do so. An occurrence of just war is not something governed by institutional rules as is the case with, for example, marriage: the right person under the right circumstances, where "right" in both cases is institutionally defined, can create a new institutional fact by simply uttering something, say, "(by the powers vested in me) I pronounce you legally married." It results from the discovery of the relevant evidence left in "nature" and our records of it rather than institutional procedures and political decisions. One who would want to claim such "institutional power" for oneself to make pronouncements on the justness or unjustness of wars, no matter what his actual expertise may be, is not a true scholar, but an activist (or lobbyist) engaged in promoting, advancing, or recommending policies having to do with war. However, activism on this matter must clearly be delineated from any kind of scholarship as in this context it in fact brings about the third degree of separation from scholarly inquiry, and how vividly this brings out the Kantian concern so well formulated, as we have already

seen, by Walzer's colleague, Judith Shklar: "encouraging people to enter upon wars recklessly and then baptizing his own side with the holy water of justice. Every enemy can easily be made to look the aggressor". Hence, this sort of activism is thrice removed from any kind of scholarship; instead it is only parasitizing on a notion of sound inquiry (as it exists in science or philosophy), which gives the activist the aura of undeserved importance.

It is worth summarizing the three degrees of separation between the practices identified above and anything that could properly be considered scholarship or rational inquiry (in particular philosophy). The first degree of separation is the mentioned general failure to consistently index "just war" judgments to appropriate normative orders (moral, legal or political); the second is associated with the practice of allegedly authoritative (non-scholarly yet expert) pronouncement making or judging of wars as just or unjust; and the third is activism in the form of advocating for and promoting certain wars (usually those your side is undertaking, planning, or contemplating). Consequently, in light of these considerations, the phrase "activist scholar" is an oxymoron. Yet, "activist-scholar" is the term used for example by Amnesty International to describe William Schabas and other panelists at its 2002 Annual Assembly.<sup>ix</sup> That this is an incongruous proposition can be shown in two ways. First, activism and scholarship are incompatible activities that cannot simultaneously characterize what one does. To give an analogous example, one cannot be a racecar driver and airplane traveler; although, of course, a racecar driver can travel by plane (say to the site of his next competition) he cannot be racing cars while traveling by plane. Similarly, activism effectively suppresses proper scholarship and at best puts it in the subservient position. Secondly, activism and scholarship don't combine very well because the former quickly consumes the latter the way fire consumes flammable materials such as paper; hence just as paper and fire cannot be in the same place for very long, activism tends to consume scholarship just as comprehensively. This consuming of the other relationship can go further

than activism overwhelming scholarship as in the case of an intelligence operative who takes as cover the role of an activist; in that case, activism is consumed by the intelligence operation. Hence, proper scholarship must be conducted independently of any activism or intelligence scheme. The just war theorists are clearly not well positioned in this regard.

Finally, one may even wonder what should be the proper characterization of a just war theorist and activist, whose pronouncements of justness are applied to wars of aggression (i.e., when he baptizes an aggression his country is engaged in as just)? Would this be a criminal act of incitement to international violence, an act of aiding and abetting aggression—the supreme crime in international law? Would this make a just war theorist into a war criminal?

### **The Dangers of Public Just War Theory**

Normative judgments, be they moral, legal or political, are as good as the facts that support them. Activists can easily be wrong in this regard (no matter the alleged degree of their expertise in presumably relevant fields of knowledge). Bad facts can only lead to bad normative statements, which depending on the context can bring about dire consequences for the innocents. Activism with such consequences, of course, cannot be condoned! It leads to the effects Shklar has poignantly warned us about: *moral cruelty, misanthropy, and unbalanced politics*. It would be useful to see this on an example.

The case I want to consider will contrast the normative results of the globally unreliable "Report by the International Commission of Inquiry on Human Rights Violations in Rwanda since October 1, 1990" (ICI), published in 1993, which gave rise to the allegations against Léon Mugesera, and the exhaustive, meticulous, and rigorous analysis in the September 8, 2003 judgment of *Mugesera v. Canada (Minister of Citizenship and Immigration) (F.C.A.)*.<sup>x</sup>

On November 22, 1992, at Kabaya, Rwanda, Léon Mugesera made a speech (in the Kinyarwanda language) at a partisan political meeting in the context of external war and internal political conflict. It is the ICI that first



brought the news out of Africa about the speech and provided its authoritative ("expert") interpretation. The striking conclusions drawn by the ICI without questioning the persons involved were that Mugesera's speech constituted an incitement to commit murder, hatred, and genocide. The ICI report had a substantial impact in the media and among other NGOs, and its carefully selected passages from the Mugesera speech crystallized quickly into the unshakable construal according to which the speech "incited the people of Kabaya to kill all Tutsi Rwandans and throw them in the Nyabarongo River so they can go back to their country of origin, Ethiopia." This all sounds very bad! Indeed, since the Mugeseras had made Canada their home in 1993, the ICI report's conclusions regarding Mugesera prompted in 1995 the Minister of Citizenship and Immigration to initiate deportation procedures because the speech constituted an incitement to commit murder, an offence against the Criminal Code of Canada; this made him an inadmissible person according to the *Immigration Act*.

More specifically, the information publicized in the ICI report led the Minister to make the following allegations of law which, in his opinion, justified the deportation of Léon Mugesera (and his family, a wife and five children): (A) The speech made on November 22, 1992 constituted an *incitement to commit murder*; (B) by inciting "MRND members and Hutus to kill Tutsis" and inciting them "to hatred against the Tutsis," the said speech constituted an *incitement to genocide* and an *incitement to hatred*; and (C) the said speech constituted a *crime against humanity*.<sup>xi</sup> These are very serious allegations indeed, and the court had to deal with both the questions of fact—explanation and analysis of the speech—and a question of law—whether the speech is a crime, once the speech is understood and analyzed. With some simplification, it is fair to say that since the case against Mugesera was based on the ICI report, which made the speech a high-profile subject of controversy, it would stand or fall with its credibility regarding the claims about the speech. And the court found that "the ICI report, at least in its conclusions regarding Mr. Mugesera, is absolutely not reliable."<sup>xii</sup>

Since this case would not have existed in the first place without the ICI, which was in the end rejected as unreliable on more than compelling grounds, it is of interest to us, which is the whole point of the example, to see how the *experts who are also activists* fared in court. It is instructive in this regard to quote the judgment *in extenso*:

The Minister's decision to seek deportation and the decisions of the adjudicator, Appeal Division and the Trial Division Judge were all decisively influenced by the ICI report. ICI co-chairperson Alison Des Forges, called by the Minister as an expert witness, admitted that the Commission's report was produced "very quickly, under very great pressure". She also *acknowledged that, as a human rights activist, she could not claim objectivity* although attempting to maintain neutrality as between political factions. She even admitted that some of her accusations "will inevitably [be] shown to be false". She finally conceded that the speech might be regarded by some as "legitimate self-defence". She also admitted that *no witness interviewed by the ICI had been present when the speech was made*. Another admission was that, from the evidence she had been able to obtain, the only impact of Mugesera's speech had been vandalism and theft. She declined to identify the person who had provided the ICI with the transcript from which the translation used by ICI was prepared. When cross-examined as to whether she took out of context passages in the speech which suited her, Ms. Des Forges admitted having done so. She *admitted having selected that evidence which supported the conclusions reached by the Commission*. Finally, she could not deny having said to a reporter for a newspaper, The Gazette, "Throw him out on his ear . . . what are you waiting for?" It was on a deliberately truncated text of Mugesera's speech that the ICI concluded him to be a member of the death squads. *It could only be concluded that Ms. Des Forges testified as*

*an activist with a clear bias against Mugesera and an implacable determination to have his head.*<sup>xiii</sup>

An "expert" witness who admits in court that she cannot be objective due to her activism illustrates very well the degrees of separation between experts and activists on the one hand and scholars on the other. Hanging on to one's activism in court also shows an astonishing confusion about one's role as a court expert that it perhaps raises to the level of contempt of court.<sup>xiv</sup> The by now recognizable but deplorable formulaic invocation that human rights trump law,<sup>xv</sup> and one's self-important alleged devotion to ending violence and impunity in a foreign land leave bitter taste. For, if you the reader put yourself for a moment in the shoes of a black citizen of some African country, would you really want some white human rights warrior fighting for you at the expense of "having a head" of a highly educated black man, your compatriot, based on frivolous and self-serving pretexts? No wonder the judge saw her testimony as completely opposite of "sober, calm, and non-partisan" and added:

Even making the debatable assumption that a member of a commission of inquiry, who is actually its co-chairperson and co-author of the report, can be described as an objective witness concerning the conclusions of that report, Ms. Des Forges testified much more as an activist than as a historian. Her attitude throughout her testimony disclosed a clear bias against Mr. Mugesera and an implacable determination to defend the conclusions arrived at by the ICI and to have Mr. Mugesera's head.<sup>xvi</sup>

The *misguided activism*<sup>xvii</sup> exhibited by Des Forges in the case of one man (and his family) would get hugely multiplied in its bad consequences if adopted by just war theorists calling for ("just") aggressions, surgical strikes, smart bombs, or

ground offensives the way, for example, Michael Walzer did in case of the 1999 aggression against Yugoslavia.

### **Decriminalizing U.S. War Crimes**

The pronouncements by the just war theorists do not end with baptizing decisions to go to war by his own side with the holy water of justice. They also pronounce on conduct in war. Here too Walzer took the lead.

On November 8-10, 2010 a conference titled "The Enduring Legacy of *Just and Unjust Wars*—35 Year Later" was held at the New York University celebrating the 35<sup>th</sup> anniversary of this book's publication.<sup>xviii</sup> The conference attendance was by invitation only. What these enthusiasts and aficionados of Walzer's just war theory apparently heard from him on this occasion is the following: "If it is not possible to win just wars fighting justly, then we will have to revise the *jus in bello*."<sup>xix</sup> Who is the "we" that Walzer talks about here? Presumably it is the same "we"<sup>xx</sup> as in the book being celebrated at this conference: the "we" is composed of people who share a moral understanding of concepts as they relate to war. The "we" thus pertains primarily to his compatriots, it seems. And this is even clearer when we look at the full quote:

The worry is that if you fight in accordance with the legal regimes of international law, you can't win. That is a major challenge, and I was very happy that General [Charles] Dunlap denies that and say you can. Still, it is a worry. It must be possible for the good guys to win within the rules, at least as a possibility, but also as a real possibility. That's where *ad bellum* and *in bello* come together: to win a just war fighting justly.

But suppose it isn't possible. That's what moral philosophers partly do—worry. What follows if it is not possible, or not a real possibility? What then? Well, the rules would have to be changed. We would have to reconsider the content of the rules *jus in bello* if we could not live within

*jus in bello* and still have the just side win on the battlefield (Anderson, 2010).

This allows for the second shoe of the just war theory to drop: having already baptized his own side with the holy water of justice when considering *jus ad bellum*, thus effectively decriminalizing aggressions by the United States, Walzer now gives his side another gift—the decriminalization of war crimes committed by American troops and their allies during the US wars of aggression. If with regard to the decriminalization of aggression we wondered whether this might be a criminal act of incitement to international violence, an act of aiding and abetting aggression, the supreme crime in international law, then we must now wonder whether this (announced *ex post facto*) "revision of *jus in bello*" in fact amounts to incitement to commit war crimes by the troops of one's country. Isn't the message to American troops, who are continuously engaged in wars in different places on the globe, that they need not be concerned about "fighting justly" since, if necessary, *in bello* rules will be revised to fit what they do and find convenient in order to win? The rules will be tweaked to fit the American conduct in war rather than the other way around!

Consequently, whether we see just war theorists as some sort of scholars or simply as activists in the end their contributions seem to teeter dangerously towards that of being just war criminals, both on the count of aiding and abetting aggression and on the count of inciting troops to commit war crimes.

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## Endnotes

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<sup>i</sup> A recent work answers precisely these questions, however. The book by Aleksandar Jokic and Milan Brdar (2011) offers a detailed account and analysis of the academic scandal regarding the honorary doctorate awarded to Professor Michael Walzer by Belgrade University and the events that followed.

<sup>ii</sup> For these insights by Shklar and criticism of Walzer I must thank Tiphaine Dickson (2010), where she argues against the conventional view that Hans Morgenthau eschews morality in his construction of a realist theory while Michael Walzer is reclaiming moral argument for political theory, as placing things exactly on the head.

<sup>iii</sup> As with most "isms" this one too is intended to suggest that there is something wrong with the project.

<sup>iv</sup> See particularly chapter 27.

<sup>v</sup> Curiously, some authors characterize this view of Kant's, that no just war is possible, as "the traditional reading" and contend that Kant has a just war theory. See, for example, (Orend, 1999), who claims that there are "three basic perspectives on the ethics of war and piece with realism and pacifism at the extremes and just war theory in the middle" and since he rules out that Kant can be seen as either realist (based on a comically crude rendition of the international relations realism) or pacifist Kant is said to be a just war theorist. This is not the place to argue this, but I strongly reject both the claim that Kant is a just war theorist and that there is anything Kantian in the newly developed so-called "contemporary Kantian just war theory". See (Orend, 2000). Similar misuse of Kant occurs in the contemporary "democratic peace theory" by authors such as Michael Doyle who assert that Kant would condone the spreading of democracy by military means. See (Doyle, 1983). It is well known that Kant was not a good friend of democracy, but even if he were the idea of this post-Cold War doctrine, so comforting for the US hegemonic inclinations, is another distortion of his philosophical thought.

<sup>vi</sup> In my judgment this statement by Shklar has to be the most brilliant thing ever said about the character and *telos* of a just war theorist. Hopefully, the rest of this essay will provide further support for this insight.

<sup>vii</sup> Walzer's method in his own words is one of *practical casuistry*: "we look to the lawyers for general formulas, but to historical and actual debates for those particular judgments that both reflect the war convention and constitute its vital force. I don't mean to suggest that our judgments, even over time, have unambiguous collective form. Nor, however, are they idiosyncratic and private in character. They are socially patterned, and the patterning is religious, cultural, and political, as well as legal. The task of the moral theorist is to study the pattern as a whole, reaching for its deepest reasons." (Walzer, 1992, p. 45).

This is, no doubt, an idiosyncratic conception of the proper role of the moral theorist, one that is not in line with the usual understanding found in moral philosophy. But Walzer is untutored in philosophy, and according to his own testimony has no interest in "managing real philosophy." Hence, Walzer's conception of the task of the moral theorist as one engaged in "practical casuistry" involves a very different sort of thing, whatever it might be in its own right, than the familiar kind of work we find actual moral philosophers practicing, which crucially involves the use of thought experiments. Walzer explicitly rejects the latter: "I don't think that I ever managed real philosophy. I couldn't breathe easily at the high level of abstraction that philosophy seemed to require, where my friends in the group were entirely comfortable. And I quickly got impatient with the playful extension of hypothetical cases, moving farther and farther away from the world we all lived in." (From an interview available at: [http://jeffweintroub.blogspot.com/2003\\_08\\_01archive.html](http://jeffweintroub.blogspot.com/2003_08_01archive.html), last accessed September 20, 2011.) Consequently, the methodology, a kind of "practical

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casuistry," chosen by Walzer to study the rules of war cannot be considered to belong to an endeavour of moral philosophy.

<sup>viii</sup> Examples of pronouncements about the goodness of NATO aggression against Yugoslavia despite its illegality are not difficult to find among public figures (politicians) and scholars turned publicists. Here is Vaclav Havel:

This war places human rights above the rights of the state. The Federal Republic of Yugoslavia was attacked by the alliance without a direct mandate from the UN. This did not happen irresponsibly, as an act of aggression or out of disrespect for international law. It happened, on the contrary, out of respect of the law, for the law that ranks higher than the law which protects the sovereignty of states. The alliance has acted out of respect for human rights. (Havel, 1999: 6).

Hence, when a supreme crime in international law—aggression—is committed, of course without a mandate from the UN, that can still be a good thing, because some presumed "higher ranking" (moral) law will somehow obviate the illegality in question. Conveniently, "morality" trumps law, in the view of this politician. But also scholars exist who are capable of asserting the same. A good example is Antonio Casese who evaluates NATO's 1999 aggression against Yugoslavia as "illegal under international law" but in his "ethical viewpoint resort to armed force was justified" (Casese, 1999: 23). Thus, the vocabulary of "illegal but good" enters narratives about international relations with the serious consequence of effectively decriminalizing aggression of powerful states against the weak ones. This could not have been achieved without Walzer's revivalism of medieval just war theory.

<sup>ix</sup> Amnesty International USA, "Reframing Globalization: The Challenge for Human Rights," available at <http://www.amnestyusa.org/events/agm/agm2002/panels.html> (accessed January 9, 2011). For Amnesty International Schabas is an "activist-scholar" with respect to events in Rwanda as he was a member of the International Commission of Inquiry that produced a notorious report (see example below) on the situation in Rwanda. More on the exploits and the report by this Commission below.

<sup>x</sup> The report was published (apparently) only in French on March 8, 1993 by Africa Watch/New York and Fédération Internationale des Droits de l'Homme (FIDH)/Paris. The original title: "Commission Internationale d'Enquête sur les Violations de Droits de l'Homme au Rwanda depuis le 1er octobre 1990 (7-21 janvier 1993). Rapport final". Hereafter cited as "ICI". The report was financed mostly by an NGO, Africa Watch (later renamed Human Rights Watch) and compiled by legal experts (William Schabas, Eric Gillet, René Degni-Ségui, et al.) and human rights activists (Jean Carbonare, Alison Des Forges, Philippe Dahinden, et al.). The *Mugesera v. Canada* (Minister of Citizenship and Immigration) (F.C.A.) is available online at <http://reports.fja.gc.ca/eng/2003/2003fca325/2003fca325.html> (accessed last on December 9, 2010). I urge careful reading of this document.

<sup>xi</sup> Based on a more detailed summary in *The Mugesera v. Canada* (my emphasis).

<sup>xii</sup> See paragraph 117.

<sup>xiii</sup> My emphasis.

<sup>xiv</sup> It is quite amazing that instead of being held in contempt of court this "expert" returned on many occasions to act as a key witness in many cases at the International Criminal Tribunal for Rwanda (ICTR) laying out the history of that country and similarly wanting the heads of many more accused there.

<sup>xv</sup> We have already seen how Havel played it; see note 8.

<sup>xvi</sup> See paragraph 102.



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<sup>xvii</sup> This finding is in no way challenged by the fact that the judgment by the Canadian Federal Court of Appeals was reversed by the Canadian Supreme Court (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 2005 SCC 40). Des Forges' testimony was not directly considered by the Supreme Court, which found that the Federal Court of Appeals had exceeded its jurisdiction by reconsidering evidence tendered in earlier immigration proceedings. Nonetheless, its final decision in this case is an unfortunate example of the corruptive influence of international politics on the quality of domestic legal work.

<sup>xviii</sup> The pamphlet announcing the conference is available at: <http://www.nyutikvah.org/events/docs/Walzer%20Conference.pdf>. Accessed January 11, 2011.

<sup>xix</sup> We don't have as yet these words directly from Walzer, but I quote him here as reported by one proud conference attendee, Kenneth Anderson, at: <http://volokh.com/2010/11/10/where-jus-in-bello-and-jus-ad-bellum-come-together/>. Accessed on January 11, 2011.

<sup>xx</sup> Referred to by Judith Shklar as "we," [Walzer's] favourite characters" (Shklar, 1998: 379).