

The Inversion of Just War Theory

Written by Piki Ish-Shalom

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PIKI ISH-SHALOM, AUG 25 2014

During the latest round of violent conflagration in Israel/Gaza, known by the Israeli codename 'Operation Protective Edge', mutual accusations of war crimes have been exchanged by Israelis and Palestinians. As the dust tentatively begins to settle, appeals are under preparation for recourse to the Hague International Court of Justice (ICJ). The constancy and intensity of appeals to Just War Theory (JWT) and International Humanitarian Law (IHL) have almost inverted Clausewitz: ethics and law have become a continuation of war by other means, both sides weaponizing liberal ethics and institutional order to contrive both their legitimacy, and the other's criminality and evil.

Accompanying this propaganda war is the usual barrage of scholarly and semi-scholarly debates on JWT and its application in the current conflict. This moralizing debate is not limited to merely political or sectarian groups, but has divided scholarly opinion roughshod: what does JWT entail vis-à-vis the present crisis? What is the appropriate allocation of blame and legitimacy? The spectrum of judgments is dazzling (for my stand, see Ish-Shalom 2014). In this contribution, I hope to outline a theoretical perspective on the rhetorical politicization and weaponization of JWT.

JWT is an evaluative framework for thinking morally about war. Its purpose is to help us limit wars and curb killing as much as possible in the wars that do erupt. However, being a forceful rhetorical tool, JWT can, if politicized, supply forceful arguments in political struggles. In the wrong hands, it can be perverted to the effect of *more* rather than less killing. That is to say, the rhetorical capital of authoritative moral concepts is frequently exploited and distorted for particular ends. In the case of JWT, this is usually to legitimize and escalate killing. The elevation of moral precepts to global institutions, who undertake the authoritative observance and condemnation of violations to those terms, potentially gives rise to what might be called the 'humanitarian dilemma'. The global-institutional framework of legitimate action effectively incentivizes conflicting parties to court their adversaries into violating those terms; they become instrumentalised as just one more weapon and, in doing so, erode the force of the precepts and institutions which they play on. Operation Protective Edge is another stepping stone down this road.

JWT and Rhetoric

At the heart of the rhetorical politicization of JWT lies the notion of rhetorical capital, defined as the aggregate persuasive resources inherent in entities (Ish-Shalom 2008). This theoretical concept offers insights into what attracts politicians and ideologues to rhetorically use, misuse, and abuse certain entities (material objects and idea constructs), and how this rhetorical use, misuse, and abuse is being carried out. Examining the internal features of moral theory in general and JWT in particular will help us understand why and how they are rhetorically used, misused, and abused. For the purposes of our analysis, several features of moral theory in general and JWT in particular should be pointed out. First, tautologically, moral theories carry moral weight and stature. They are equipped to serve as moral guidance to those who wish to act morally (or at least pretend to act morally). Second, and closely related, moral theories generally address and conform to our moral intuitions. Accordingly, if correctly stated, they concur with our deepest moral intuitions, and this concurrence bestows them with a familiarity which helps to establish their moral guidance, like do no necessary harm and assume responsibility to one's own actions. Third, moral theories, especially in their modern academic incarnation, seek to build on and refine our intuitions. As such they are complex, composite, and subtle sets of arguments, mostly couched in academic jargon. Think of such relevant concepts and theories as threshold deontology, dirty hands, and the doctrine of double effect, or on the distinction between *jus ad bellum* and *jus in bello*, which is not particularly easy to comprehend or even accept.

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Accordingly, despite their intuitive familiarity, moral theories are difficult to comprehend fully. Thus, they are relatively sensitive to misunderstanding, and sometimes to intentional misrepresentation and misuse. Fourth, moral theories are generally universal, which lends them additional normative weight, as their dicta are intended to transcend particularistic interests and viewpoints. In other words, moral theories provide lofty standards to which we can appeal in partisan political disputes. Supposedly, a party would then not be serving its own particularistic interests, but protecting the sensibilities of humanity as a whole. Despite this pretense of impersonal universality throughout the mutual accusations of the Israel/Palestine conflict, the underlying nationalistic motivation is apparent.

Fifth, and closely related to the last point, even though moral theories lay claims to universal validity, to be applicable in the real world, they must be supplemented by additional information. Knowing the theory will not suffice when applying moral judgment. Two additional kinds of information are required for the theory to be applicable as a tool for moral judgment. The first kind of information that is needed is the context of the situation-to-be-judged. A more explicit and obvious kind of information that is required is the factual setting of the situation-to-be-judged. For example, one must know the sequence of events and causal chain leading to the events, and the intentions of the actors involved (for the problem of using intentions in JWT, see Steele 2011). Expressed more concretely, we need to know which party initiated hostilities, with what intentions, and how that initial act escalated into the use of lethal weapons and war. Think of Operation Protective Edge, its context, and the chain of actions that lead to its eruption. Is Gaza still under Israeli occupation or not? What caused the war to erupt? Was it the missiles fired by Palestinians at Israel; was it the arrest of Hamas leaders following the kidnapping and murdering of three Israeli teenagers? Or was it the revenge murder of the Palestinian teenager by three Israelis? Or was it the siege that Israel and Egypt enforce on the Gaza Strip? Which of all these events is morally relevant as a just cause to launch a military offensive? And even more importantly, what are the intentions of both sides? Does Hamas operate to fulfill the Palestinians' rightful claim for sovereignty, or does it operate to annihilate the existence of Israel? And the mirror concern is equally disturbing: does Israel act to defend itself, or is it committed to preventing the Palestinians from their right of self-determination and secured sovereignty? Those are real world facts and questions, and they do not order themselves neutrally into an objective description of reality. And these real world facts – questions of causality and intention – are necessary to answer the broader moral questions of who is the aggressor and who is the defender, and therefore who is just and who unjust. Consequently, to be able to apply a moral theory in the real world, to use it to judge the justness of an act taken by a party to a conflict, an interpretation of the situation-to-be-judged must be accepted, usually one interpretation out of several conflicting and partisan ones. Because of the crucial role of interpretations and narratives when applying any complex social judgment, moral theory is more elastic than its adherents would normally grant (see also Galeotti 2007; Kratochwil 2007, 506; Seymour 2010). More importantly, it makes the theory's application more amenable to political cherry picking; the arrangement of facts to satisfy partisan interests. Thus, while assuming a universal scope and standard of application, moral theory can become a sectarian political instrument. These claims of universality from particularity are frequent in accounts of the moral status of Operation Protective Edge, as divergent supporters organize interpretations to satisfy pre-given attitudes and interests (for pro-Israeli account, see Walzer 2014, and for pro-Palestinian account, see Shaw 2014). How to account for the tunnels prepared by the Palestinians for years? Who breached the humanitarian ceasefires? What about the IDF and its use of indiscriminatory, heavy fire in Rafah that killed over 130 Palestinians during its Hannibal Directive (a procedure operated in kidnap attempts of troops)? Did the Palestinians fire from hospitals, and who was responsible for each of the incidents in which innocent Palestinians were killed? And what are the real dangers posed by Palestinian missiles, especially with Israel's Iron Dome defense system? Do they really represent a sufficiently grave danger that wholesale war is a reasonable and proportionate response? Answering these questions for the Palestinians and Israelis can uncover historical truth, but, no less importantly, it can be rhetorically beneficial. Accordingly, moral theory can provide justification (honest and dishonest) for different, even conflicting, acts. When this point is understood, along with the first four points, it becomes quite understandable that moral theory abounds with rhetorical capital; ripe to be used, misused, and abused politically.

Additionally, JWT, which is a particular kind of moral theory, has two additional features that add to its rhetorical capital. First, it has a long and prestigious tradition. JWT goes back as far as the Church fathers, to prominent figures like St. Augustine and Thomas Aquinas. Thus, it is deeply ingrained not only in our moral intuitions, but in our cultural connotations as well. Second and crucially, JWT, especially its Jus in Bello dimension, essentially aims and functions to help us think morally about wars, motivating us to minimize war-time killing. It identifies the few people whose

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killing might be permissible under very restricted conditions. All those that do not fall under this category cannot be legitimately killed. Their killing is impermissible and proscribed. What is especially important to the rhetorical capital of JWT is that, in delimiting certain killing as impermissible, in the same stroke it opens the legitimate killing of others. In other words, it is quite easy to turn the effect of the theory on its head and stress the permissibility of killing, rather than its impermissibility; the prescription rather than the proscription of killing. This inverse outcome of JWT becomes more likely because of the other aforementioned features of moral theory. First, identifying the appropriate category of those persons legitimately killed is far from straightforward. There is a continuous and unresolved discussion regarding the definition of those that are protected from killing. Are they civilians, non-combatants, uninvolved parties, or whoever comes under the heading of "innocents" (see, for example, Benbaji 2007; Coady 2004, 775; Gorry 2000, 181; McMahan 2006; Primoratz 2002)? Each definition involves a somewhat different population. Moreover, the content of the category is not constant. It depends on many criteria and conditions, some quite fuzzy. For example, one of the most important criteria in the justification of killing is proportionality, but there are no generally applicable guidelines for proportionality: is sacrificing the lives of ten of our soldiers to protect the life of one enemy citizen proportional? Or is a ratio of five to one, or two hundred to one, acceptable? And what is proportional if we consider risking our soldiers' lives to save an enemy soldier? And how many enemy citizens is it proportional to risk when trying to destroy a legitimate military target, say an ammunition factory in a crowded neighborhood? 10? 100? 1,000? The question is really whether a ready-made equation exists that will fit all scenarios. Proportionality is a crucial, yet fuzzy, requirement (see also Hurka 2005).

The demarcation of permissible killing also changes according to the circumstances involved, for example: Is this an all out war? Is it really a last resort? Who was the aggressor? All are relevant and contested questions in the case of Protective Edge. Circumstances depend on interpretations and, as mentioned above, each side can adopt the interpretation that politically suits it. In other words, it is far from simple to categorically determine which killing is permissible and which is not. Taking all these features together, we see that JWT is rich with rhetorical capital and becomes very attractive to people who wish to convince an audience of the permissiveness of the killing they inflict on others.

The Weaponization of JWT and the Humanitarian Dilemma

We have witnessed this inverted use of JWT and its dependency on partisan interpretations in many recent armed conflicts and wars, such as the 1999 NATO air campaign against former Yugoslavia, code-named Operation Allied Force, and the American 2003 Operation Iraqi Freedom, but I will here focus on the series of Israeli operations in Gaza. The first was Operation Cast Lead in 2008-9. More than thirteen-hundred Palestinians were killed, many of them non-combatants, in an operation that used heavy fire power and caused enormous destruction to life and civic infrastructure (including some UN installations). It is obvious that this scale of killing and destruction cannot be easily justified morally. However, all the fighting of the Israel Defense Forces (IDF) was conducted, supervised, and guided by the Military Advocates General (MAG), responsible for imposing the rules of warring conduct. That was the case, for example, with one of the IDF's most contested strikes. On the first day of the operation, Israeli air force attacked a Hamas Police graduation ceremony, killing dozens of the participants, including family members. The MAG authorized the attack, clearing the status of the police-persons as involved, hence as a 'legitimate kill'. Various reports subsequently claimed that the MAG's initial hesitation wavered under external pressure, finally capitulating and authorizing the strike (Feldman and Blau 2009; Fogelman 2010). Here we see JWT turned on its head. The main function of the MAG was to justify killing, not ban it; it was to provide the IDF with legal and moral justification for the large scale killing and destruction inflicted on the Palestinians.

Regretfully it looks like nothing has changed in the five years (and the passage of another operation, Pillar of Defense in 2012) leading to operation Protective Edge, but for the scale of killing, devastation, and the instrumentalization of JWT. Instrumentalizing JWT is not new, but we may have entered a new phase in which it is weaponized. Too often warring parties use JWT not as a standard of human rights ground their defense. Instead those normative standards are used strategically to outmaneuver and entrap the other party, motivating it to violate institutionalised normative standards. The violations are then monitored and rhetorically used to delegitimize the opponent and win the international propaganda war over hearts and minds. They who are delegitimized are bound to suffer, and in this propaganda, JWT and human rights are weapons and civilians are pawns of propaganda. Thus, Palestinians in

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Gaza, cornered by IDF surveillance, are forced to using civil enclaves as hiding places and firing sites for their missiles, and – in turn – the IDF is outmaneuvered to attack those places and kill many bystanders. When Hamas is fighting from among civilians and within places that are supposed to be safe havens, like hospitals, UNRWA encampments, and mosques, it is not just using civilians as human shields, it actually outmaneuvers the IDF, who feel compelled in such instances to use indiscriminate force, and kill civilian Palestinians (see Jain 2014 and Levitt 2014 for partial, but indicative, cases).

In an era of new wars, asymmetric warfare, and global mass media that tend to turn miseries into heartbreaking spectacles, there are strong incentives to the parties of a conflict to weaponize JWT and IHL. This is doubly true for the side that is weaker militarily, which, in compensating for that weakness, tries to maximize whatever scarce resources it has available, including international empathy and legitimacy. And it is not only the warring parties that contribute to that. Also third parties that try wholeheartedly to promote human rights and compliance with JWT and IHL, find themselves cornered into an unsolvable dilemma; into a humanitarian dilemma. Monitoring human rights violations in asymmetric warfare is necessary. Without this measure, the warring parties can roam freely and propagate crimes against humanity, with no need to account for them. However, there is also a dilemma not unlike the security dilemma. This necessary monitoring has the unintended consequence of further incentivizing the fighting parties to entrap their adversaries into violating human rights.

Brief Conclusions

Does its instrumentalization and weaponization mean that JWT has lost its relevance in our world of power politics? This is a far too sweeping conclusion. JWT is still very much relevant, and rightly so. But it does say that we need to be more aware of its politicization, and even more so its weaponization. Because more fundamental than who will win the Israeli/Palestinian propaganda war following Operation Protective Edge is the long-term status of JWT and human rights, given their ritual weaponization. When JWT and IHL are being weaponized, people develop cynicism and ditch commitment for them. This is surely not a recipe for a better world, but rather to a cynical world in which human rights are not respected and humans fare no better.

This is the real danger of weaponizing JWT during and following operation Protective Edge. The danger surely exists. The aim of this article was to contribute to our awareness of this troublesome risk, the dangers of our succumbing to political and partisan agendas over universal principles, and the problems associated with the so-called humanitarian dilemma. There are no easy solutions to this dilemma. Surely we should not throw out the baby with the bath water and discard JWT. JWT is a forceful and important moral tool. But maybe we should be more attentive and cautious in our wanderings the corridors of powers and screens of propaganda. Regardless of one's intentions, the application of moral precepts to complex social phenomena presents serious barriers of empirical interpretation which we struggle to overcome. Maybe the best advice is not to let the moral arena be captured by rhetoric. We should not forgo our responsibilities to bring theoretical insights to real-world politics, but we have to do so with some cautiousness and modesty that is easily lost in emotionally-charged conflicts, such as Operation Protective Edge.

Author's Note: As a scholarly study, this article is written with universal ends; as a study written by a scholar, it is written from a particular point in time and place, haunted by skepticism and despair that I wish to write away.

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