



WAR & LEVEL ^① MORALITY

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MORALITY & NUCLEAR WARFARE
INDIVIDUAL RESPONSIBILITIES IN
WAR

THE MORALITY OF MILITARY
INTERVENTION

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United States Military Academy
West Point, New York
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The dedicated labors of the philosophy faculty of the Department of English produced the symposium from which the presentations collected in this pamphlet have originated. The secretarial and administrative skills of Jean Huebner have made possible the publication of the proceedings.

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PREFACE

The importance of the subject of war and moral responsibility to the Military Academy can be gauged by the excellence of the distinguished scholars who spoke at the War and Morality Symposium. While the participants did not have the time to exhaust their assigned topics, each speaker exerted himself to present a thoughtful viewpoint stimulating to faculty and cadets alike. The papers collected in this pamphlet represent intellectual efforts greatly appreciated at West Point and obviously worth preservation for future reference and study.

TABLE OF CONTENTS

MORALITY AND NUCLEAR WARFARE

- WHEN IS IT MORALLY PERMISSIBLE TO USE TACTICAL NUCLEAR WEAPONS? 2
by Richard B. Brandt
- TACTICAL NUCLEAR WEAPONS AND THE ETHICS OF CONFLICT 8
by Thomas Nagel
- THE DANGER OF THE NUCLEAR ALTERNATIVE 13
by Robert H. Gurland

INDIVIDUAL RESPONSIBILITIES IN WAR

- TWO KINDS OF MILITARY RESPONSIBILITY 20
by Michael L. Walzer
- THE PRESENT PERIL 25
by William Barrett
- INDIVIDUAL RESPONSIBILITIES IN WAR 29
by LTG William R. Peers (USA, Retired)

THE MORALITY OF MILITARY INTERVENTION

- THE MORALITY OF INTERVENTION IN REVOLUTIONARY AND COUNTERINSURGENCY WARS 35
by Guenter Lewy
- MILITARY INTERVENTION IN CIVIL WARS 42
by Telford Taylor
- MORALITY AND MILITARY INTERVENTION 48
by Marshall Cohen



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WHEN IS IT MORALLY PERMISSIBLE TO USE TACTICAL NUCLEAR WEAPONS?

Richard Brandt

There are two major questions about the morality of nuclear warfare. One is: Under what conditions is it morally acceptable to become involved in military combat of such seriousness that the use of nuclear weapons might be considered? If the answer to this question were, "Never," then the second question need not arise. But, I believe it would be agreed that there are circumstances in which it is permissible to become involved in such a war; the circumstances of World War II are an example. Such conditions exist if there is a clear threat to a decent, civilized way of life for a large number of people. So, the second question is: If a nation is involved in a serious war, under what conditions is it permissible morally for it to employ nuclear weapons? It is this second question which I propose to address. Actually, I shall address only part of this second question: I shall concern myself only with the employment of tactical nuclear weapons. I mean by a "tactical" nuclear weapon one of comparatively low yield (e.g., one kiloton), capable of being accurately directed at targets a short distance away (e.g., by an artillery shell), and used for combat purposes only, not one employed to strike at targets of more long-range significance, such as factories: and I shall assume only defensive employment is contemplated. I wish to inquire when such weapons are morally permissible.

1. What Kind of Principles Are To Be Appraised?

In asking this question, I take it what we want to know is what principles commanders ought to use in deciding whether to request, or approve, permission to use nuclear arms. I do not mean merely which moral principles would it be helpful for commanders to know that moral philosophers would recommend they use. What we want to know is what principles should be firmly embedded in the practice of the army and navy, in somewhat the way in which the manuals of land warfare and naval warfare have binding force on the behavior of military personnel. Such rules probably cannot be formulated in such a way as to eliminate altogether evaluations on the part of a commander. But, one wants something better than reliance on case-by-case gut-decisions of an officer. One wants a set of rules which at least considerably reduce the range of discretion. In other words, local commanders should not be called upon to do a high-level job of balancing in coming to a decision on what to recommend or permit. A commander can hardly be expected to know decision theory, to weigh up the utilities and disutilities for the long run, marking each down in accordance with the unlikelihood that it will occur if he takes a desiderated action. Judicious weighing is unlikely to occur in the heat of combat. So, although some judgment must be used in the interpretation of rules, the officer must go by a book, and someone must give him a book to go by. Of course the principles in the book must be simple and clear enough to become part of a directive that can be used for decision-making without indulging in speculation.

2. The Principles for Moral Appraisal of the Rules.

But what basic moral considerations should govern the choice of such rules? It is certainly desirable that whatever rules there are should be matters of treaty obligation, and recognized by all parties to a war. But, we are not in a situation where there are such treaty obligations. The Hague Convention of 1907 prohibits the use of weapons which can cause "unnecessary suffering," but that is too vague a restriction to be of use. Atomic weapons are not clearly prohibited by international law, although the experts do not speak with one voice on the matter. The UN General

Assembly passed a resolution in 1961, by a far from unanimous vote, prohibiting the use of all nuclear weapons, but this has no legal force. So, we have to ask ourselves what restraints on our own conduct are morally required, knowing that there are not legal restrictions, and that others may not restrain themselves in the same way. So, what general principles must govern our decision about what rules should go in the desiderated book of rules?

There are some differences of opinion about this matter among philosophers around the world at present. I propose to employ what I think is the most widely accepted relevant set of principles, namely utilitarian principles. I shall in a moment suggest some reasons for employing utilitarian analysis, and point to a very different alternative in which someone might be interested. But, what is the utilitarian idea?

The utilitarian theory holds that that set of rules should be adopted, the total effect of adopting which will probably maximize the long-term well-being or happiness of everyone affected. Let me now explain how this utilitarian conception might be applied to our problem. But, before suggesting an example, let me emphasize that philosophers are not in a position to identify by themselves what rules of this sort should be. Specialists in warfare are needed in order to know what types of situations are apt to occur, and what would be the likely outcome of one procedure or another in those circumstances. Philosophers can perhaps be of help in arriving at the idea of an optimal set of rules, but it would be absurd for them to go at it alone. Having said that, let me propose a simple example--one drawn from the Army's own manual for field commanders. This rule states that an atomic weapon may not be used if its employment would cause more than 5% civilian casualties, except in cases of great emergency. I am not suggesting this is the right rule. Further, it does require some judgment about what constitutes a severe emergency. But, the rule of thumb, "no more than 5% civilian casualties" is clear enough, and the tables furnished by the Army on the fatalities to be expected at various distances from detonation of a bomb of a certain size at a certain altitude, taken along with information about the spread of nearby civilian population, permit the rule to be applied without speculation. This rule, or some amendment of it, could be chosen on utilitarian grounds.

Utilitarian theory has an implication for this simple case, however, which deserves careful attention. For we must get one thing clear. Which civilians? It sounds as if French and German civilians are the ones in mind. But, how about civilians of an enemy, e.g., Russians, Hungarians, or Japanese? The general utilitarian program is to count all lives, the welfare or happiness of everyone, alike. What makes it bad to kill a person is the kind of good life he might have lived, but doesn't get a chance to live. And the quality of life of a Japanese is just as good, or may be just as good, as that of a Frenchman. One thing that the recent 1977 Geneva protocol emphasizes is that the protections it invokes should be without distinction based on race, color, sex, language, religion, political opinion, national origin, wealth, birth, or other status (Article 75). That is what all utilitarians would affirm.

I said I would offer some reasons for selecting rules in this utilitarian way. What are they? Some philosophers have thought no further reasons are necessary, that manifestly rules should be selected on the basis of a cost-benefit analysis including everyone affected. Some, however, would say rules so selected are morally justified because they would be chosen by rational persons who were impartial, e.g., if they were ignorant of facts which would enable them to advantage themselves. More

specifically, they would say that rules so selected would be moral because they would be chosen by nations (say at a Hague Convention) which expected some day to be involved in a war, but when none knew whether in that war it would be more powerful or better equipped than its enemy. This conception has been worked out most recently by John Rawls (but without the utilitarian conclusion), but it is very similar to the theory of R. M. Hare and also what is often called the "ideal observer" theory. Another line of thinking in support of utilitarian selection of rules might be this. One might argue that rules so selected are morally justified because they are ones we, if we were fully rational and were given all information, would support as rules for all nations, perhaps partly from humanitarian commitments, perhaps partly from the thought we would all be better off if these rules were generally accepted. One needs an argument, of course, to show that either impartial persons, or rational fully-informed persons, would go for a utilitarian-type selection of rules, and the argument would be a long story. But, I believe the argument can be made out, and therefore feel confirmed in the view that utilitarian-type rules are morally justified. We should note that utilitarian-type rules may be shown to be morally acceptable or required, even if in fact such rules are neither accepted nor followed by other nations.

There are some philosophers, however, who would not support a utilitarian-type selection of rules at all. Some of them would rather start from some vague principle like "Respect human beings as persons" or "Never use a person merely as a means to your own ends." Or else they start with a variety of common-sense principles that seem to them evident, and think they can show that reflection on these leads to a coherent set of non-utilitarian principles which comprise a reasonably satisfactory moral guide. I think myself that if one starts in one of these ways one is not going to be able to give a convincing rational argument for any rules of nuclear warfare. But I shall not comment further on this possible view, except to caution against a possible confusion. Some people think we have no business talking about rights--prisoner's rights, human rights, etc.--unless we hold this sort of theory, and especially not if we hold a utilitarian theory. This is a mistake. There is a utilitarian theory of rights, and a highly plausible one. As J. S. Mill said, what it is for a person to have a prima facie right is roughly for some other person or persons to be prima facie morally bound not to do certain things to him, or to be bound to do some things for him, and a utilitarian theory--which of course implies that people are morally bound to do or not do certain things to or for others--clearly does have implications for human rights, prisoners' rights, and so on.

So much, then, about the utilitarian conception of how to select rules for use of nuclear weapons, and for support that may be given that conception.

3. Applications of the Utilitarian Principles for Constraining Rules.

What can we say, now, on this basis, about the use of tactical nuclear weapons?

In the first place, we must ask what there is special about nuclear weapons that requires special attention, as contrasted with conventional weapons. If we talk of nuclear weapons generally, of whatever size and however employed, there are certainly differences which set them apart. First, the widespread, enormous,

and quite indiscriminate killing. Second, the fact that exposure to radiation can cause very unpleasant prolonged suffering followed by death, or by disability where it doesn't end in death. Third, the radiation can cause genetic injury, affecting severely members of the next generation. Fourth, the radioactivity of the affected area may last for many years, the whole area rendered impossible for human use. Fifth, the fall-out can be blown considerable distances, and affect civilians even of neutral countries. It is such features that raise questions whether the use of nuclear weapons does not cause the "unnecessary suffering" prohibited by the Hague Convention. Now, these effects are greatly reduced in the case of tactical weapons, if as advertized, they can be delivered with great accuracy, affect only a small area, are relatively "clean," and are directed only at prime military targets (tank concentrations, bridges, tunnels, etc.). Nevertheless, the contemplated human destruction must raise some question about their use.

Are there circumstances in which the use of tactical nuclear weapons might be morally permissible, by any reasonable rules we might adopt? I believe the answer is affirmative. Which circumstances? First, the values at stake in the war must be so great that we are justified in fighting it with all the legal weapons at our disposal, if absolutely necessary to avoid defeat, such as was the case with the Second World War. I avoid the question of when there is such justification. Second, the battle in which they are employed must have crucial importance. For instance, if such weapons could have halted the German breakthrough into Holland and Belgium, or destroyed Marshall von Rundstedt's tank concentration at the battle of the Ardennes, their use would have been morally justified. I am inclined to think that if the Soviet Union undertook a massive breakthrough into NATO territory, and if it could be halted by use of such weapons, the employment would be justified. The justification would lie in the prospective long-term loss of quality of life for the defending nation, plus the long-term gain of establishing the principle that spreading of an ideology is not to be effected by force of arms.

There is a further important reason supporting the use of such weapons: their deterrent value. If the enemy knows one has them and will use them, he will count the heavy cost to himself in advance, and perhaps will behave himself and stay home. Unfortunately, if the enemy is to be deterred from an attack in this way, there must be readiness to use the weapon if he does attack, and he must know this.

The importance of this deterrence by tactical nuclear weapons is greatly enlarged by the fact that possession of such weapons appears to be about the only high card in NATO's hand, since the ground forces of the Soviet Union greatly outnumber what is available to NATO, and the same for artillery and tanks. So, it seems that, in the next decade, the only deterrent to missionary enterprises by the Soviet Union is these atomic weapons. So, the argument is: a deterrent is of great importance; having the deterrent requires willingness to employ; so employment is morally justified in the total circumstances. It has been argued that it is immoral even to pose a nuclear threat. This view must rest on a misunderstanding. The "threat" is only a defensive one (and of course it is assumed, what might not be true in a given case, that it is morally justified to offer a defense). In effect, this is saying, "If you attack me, I shall hit you back hard." The whole idea is that there is not to be a fight in the first place.

There is, of course, a grimmer way of looking at matters. Suppose that the Soviet Union, for whatever reason, decides to invade anyway, despite the expected losses. And suppose it uses the nuclear response on the part of NATO as a pretext for unleashing its own nuclear weapons, not merely at the battle front, but against targets of military importance in cities, and so on. And that would risk, to some extent, a general nuclear war. But, this argument does not amount to much. There are two points to be made. First, it is clear to everybody who is doing the escalating--or at least it should be, barring a gross failure of communication--for tactical nuclear weapons are essentially defensive, battlefield weapons, which pose no threat to the Soviet Union. But, much more important, one must ask what is the alternative option? We are in the position of a householder, whose home is being broken into by a burglar with a lethal weapon, who has to decide whether to risk resisting him, or to let the burglar in, to do as he will. If tactical weapons are not used, it is true there is not risk of a general nuclear war. But, the price is Soviet control of Europe. That might not be catastrophic, but I have assumed we are talking about whether these weapons should be used in a war we are justified in waging in the first place. If the values at stake in the war are such that NATO is morally justified in fighting it with all the legal weapons it can deploy, and if the use of tactical nuclear weapons is the only possible successful defense, and promises to be a successful defense, then their use is justified.

So far, I have avoided a very thorny question by saying merely that the use of tactical nuclear weapons is justified in a very special situation--when it is the only way to stop a catastrophic invasion. But, is the employment of such weapons morally justified in any other situations? In thinking about this, the philosopher needs the aid of military men who know what are possible types of situations in which one might seriously consider such a tactic. I do not know what they would say. Have they thought such weapons might be used to deny the Soviet Union access to the Persian Gulf? Might their use be permitted to shorten a war and save American lives when an enemy is already effectively defeated but refuses to stop fighting, as perhaps was the case with Japan? One might say these questions are outside my topic, since they are about whether to begin or continue a war, not about how to fight it. But, this is a point at which these questions merge. For a government might go into, or continue, a war which it thought could be won cheaply with atomic weapons, when it would not go into, or continue it, if it thought there would be a high price in American lives. So, we might ask simply whether it is morally permissible to wage a war in such a way as to be cheapest in terms of American lives, irrespective of its cost to the enemy, or at least to the enemy in uniform?

The answer to this question, I think, must be negative, in general. Military action is justified only to the extent necessary to bring the enemy to a negotiating table in a mood to settle disputes in accordance with just principles, and within a reasonable time. The military "action" involved in use of atomic weapons is very considerable, and the total lives lost--American or other--must be justified by the importance of having reasonable negotiations on the issue in dispute. Obviously, diplomatic and economic pressures should be employed to the fullest extent, both before and in the course of a war; what can be accomplished by these methods need not be accomplished by more drastic means. It might be replied that it is not reasonable to count enemy lives, particularly enemy in uniform, as a cost of military action. This view is mistaken. It is of course true that one tends to

bring the enemy to the bargaining table by decimating his forces, not by decimating your own. But, enemy forces, who after all presumably had no part in the decisions which led to the war and are normally unwilling victims of their own political system, have a right to life just as much as American forces. Hence, minimal destruction of enemy forces, compatible with the goal mentioned, should always be a desideratum. And further, the importance of the issue to be negotiated must set a restriction on the degree of violence to be tolerated; one is not to use an atomic weapon, even if it would be very effective, in stopping minor raids at a border, even if the enemy has no atomic weapons and cannot reply. Application of a principle of this sort, of course, requires patience and self-restraint and political leadership, and the American public has only a limited supply of these goods. In my opinion, the U.S. did not show a suitable level of self-restraint at the end of the war with Japan, at least in dropping a second atomic bomb without some patient negotiation, and should be on its guard to avoid similar mistakes in future.

I have no idea how this general policy could be spelled out in terms of more specific rules. Nor have I shown that its adoption would maximize expectable long-range utility, and the reasoning might not be easy. But, I suggest it can be done, and that the general strategy for doing so is fairly clear.

TACTICAL NUCLEAR WEAPONS AND THE ETHICS OF CONFLICT

Thomas Nagel

1. It is a familiar problem for any nation that relies heavily on nuclear weapons, whether tactical or strategic, that its primary means for achieving its ends are too costly. The costs are of two kinds: self-interested costs and moral costs.

The self-interested costs are fairly obvious. Whether we are talking about tactical or strategic weapons, there is the danger of all-out thermonuclear war and destruction of the society, either in retaliatory response to a strategic strike or as the result of escalation from the use of tactical weapons in the theatre. Also, there are the costs of destruction of allied territory and of friendly troops, by the use of tactical weapons in defense of a populous territory like Western Europe. It is important in thinking about Europe to remember that the Soviets, too, have tactical nuclear weapons. As far as I know we don't have a clear edge in this respect in Europe, and they would presumably use such weapons in a European war without necessarily waiting for NATO to use them first. Our own tactical weapons and their importance in current planning give the Soviets a strong incentive to do so. When you add up the damage to Europe that would be caused by both sides in even a purely tactical nuclear exchange, you get a high self-interested cost even without escalation.

The moral costs are simply the costs of a commitment to wipe out huge numbers of civilians, either deliberately in strategic strikes, or as collateral damage from the counterforce use of tactical nuclear weapons. In addition, as Professor Brandt mentioned, such a war would produce long-term radioactive contamination that would affect future generations as well.

This problem of excessive cost of both kinds has the further effect, for a nation that is heavily dependent on nuclear weapons, of reducing its military credibility because it inhibits action and this is obvious to any potential opponent. The Soviets knew they had nothing to fear from the West when they marched into Czechoslovakia in '68, and they can be pretty sure that they will encounter military resistance in Europe only for the highest possible stakes, since the cost of a European war to the West would be so enormous.

There are obviously strong reasons, then, to reduce these costs, and to make it possible to fight effectively with more selective and less destructive weapons. But this in turn involves other costs--economic costs and costs in manpower. Nuclear weapons, in proportion to their destructive capacity, are relatively cheap, and their use doesn't require a great deal of manpower; so at least for that purpose you don't need conscription. It seems to have been thought by many that these weapons could substitute for the kind of manpower that would require universal conscription in the West. So far, it has been politically, if not physically, impossible for NATO to approach Soviet-bloc conventional strength in Europe, despite the fact that the Soviets have to maintain a huge conventional strength on the Chinese border as well.

So, we are faced with a real dilemma. There are strong reasons both for and against heavy reliance on nuclear weapons. I want to elaborate on one of the types of reasons against: the moral costs. I shall concentrate, like Professor Brandt, on the case of tactical nuclear weapons, and in the course of my remarks I shall comment on some of the things he has said.

2. The question of moral costs in warfare has become especially prominent in public debate in this country since the Vietnam war--though even before that there had been some discussion of the morality of city bombing raids aimed at civilian populations during World War II--the bombings of Dresden, Tokyo, Hiroshima, and Nagasaki--and also of the postwar policy of massive nuclear retaliation. In the debate about Vietnam, one can distinguish two aspects of the moral opposition to that war. The first objection was that we were fighting in a bad cause; and the second objection was that we were using immoral methods, and specifically that we and our allies showed too little regard for the lives of noncombatants. This second criticism shows that the problem of such moral costs is not limited to the case of nuclear weapons. It is essentially a problem about the use of any extremely powerful and indiscriminate weaponry.

Now it is very important that these two types of criticism can be separated. It is possible to object to the conduct of a war without objecting to the war itself; and in fact, those two strands of criticism in the case of Vietnam were sometimes pursued independently. One may fight in a good cause using immoral methods, as in the case of the raid on Dresden. One may also fight in a bad cause using morally acceptable methods, as in the case of Rommel's campaigns in North Africa, an example that Professor Walzer discusses in his book. To some extent, means can be evaluated independently of ends. In this respect, I believe Professor Brandt and I disagree, at least to some extent, and this is the question I want to focus on, because our difference in moral theory leads to a difference in view about certain policies.

As a defender of utilitarianism, Professor Brandt believes that civilian casualties, like all forms of suffering, are bad and should be avoided unless the alternatives are clearly worse. He's described some of the indiscriminate and long-term effects that make tactical nuclear weapons particularly sensitive to this sort of objection. I only want to enter two caveats to what he said. I don't know the range and power of tactical nuclear weapons now in place in Europe on both sides; I believe that many of them are much more powerful than 1 kiloton and quite a number of them are more powerful than the bomb that was dropped on Hiroshima--although that may have changed more recently, maybe there's been a downgrading. Also, as in a way he suggested, rules are one thing; but what would actually happen in a war being conducted officially according to a certain set of rules is another. Difficulties of target selection, accuracy, and the details of control in battle make what will actually occur only a rather shadowy reflection of what is described in the rules. A nuclear war in Europe would be devastating even if it didn't escalate.

Having said that about the expected results, let me first record that Professor Brandt and I disagree at the level of ethical theory. I am not a utilitarian, for I believe it is worse to kill non-combatants than it is to kill combatants, and worst of all to aim deliberately at the killing of civilians, as in terror bombing. For a utilitarian the moral cost of an action depends simply on the amount of suffering produced. For some non-utilitarians, myself included, the moral cost depends partly on that, but also on whom you're inflicting the suffering, and what your relation to him is. But, instead of arguing about this theoretical issue directly, I want to concentrate on something much more specific to the morality of warfare.

3. I want to take issue with Professor Brandt over his insistence on considering the question of means only against the background of an assumption about ends, and his unwillingness to treat it as an independent question. It is natural for a utilitarian to do this since utilitarianism holds that means must be judged by their tendency to produce good ends. But, as a method of arriving at principles for the conduct of war, I believe it is inadequate and probably disastrous. I think in fact that it's disastrous even from a utilitarian point of view, although in a way that admits of no utilitarian solution.

In summarizing his suggested principle for the use of tactical weapons, Brandt said this: "If the values at stake in the war are such that NATO is morally justified in fighting it with all the legal weapons it can deploy, and if the use of tactical nuclear weapons is the only possible successful defense, and promises to be a successful defense, then their use is justified." Let me concentrate on the initial clause, "if the values at stake in the war are such that NATO is morally justified in fighting it with all the legal weapons it can deploy"--the clause about the values. Brandt gives some examples in which he thinks this condition was or would be fulfilled; he says something about the preservation of a decent, civilized way of life, though he doesn't actually give a detailed general account of those conditions. Nevertheless, it is a striking feature of this principle that it offers a moral recommendation that applies only to the side that is overwhelmingly in the right.

What would the corresponding utilitarian recommendation be to the opposing side in such a conflict? The strict analogy, if we were to include the corresponding assumption about ends, would be: "If you're in the wrong, surrender." But this would not be very useful as a principle of morality in the conduct of war, since if two nations are prepared to make the sacrifices involved in going to war in the first place, they, or their governments, are presumably both convinced that they are in the right and the others are in the wrong, and that the values at stake are extremely important.

I believe the problem must be approached quite differently. If we wish to find moral principles applicable to the conduct of war we should look for principles that are general, and that could be recognized as valid by parties to a conflict who are in other ways radically opposed--who are in fact mortal enemies because of the opposition between their values. The problem of whether to accept any restraints in the methods we may use to defend our ultimate political values cannot be solved by reference to those values alone: If there is a moral answer it should apply also to those who don't share our values. If there is such a thing as the general morality of warfare, it can't presuppose the values of either party to a military conflict, since at least one of them must be in the wrong. It requires instead some broader standards by reference to which each side can justify certain aspects of its conduct--if not the pursuit of the war itself, at least the way it is being conducted--to itself, to the opponent, and to neutral parties who may be affected. Even if we cannot justify the ends, at least we can hope to justify the means.

I don't believe a simple utilitarian method accomplishes this very well. If each side is supposed to adopt a policy on the basis of utility--i.e. its estimation of the contribution of its policy and its efforts to the general good of humanity--then there is no way to prevent each of them from putting the stakes arbitrarily high, in accordance with the conviction that the preservation of liberty, or as it might be, the victory of socialism, or national liberation (whatever the ultimate

value is) is of incalculable value--so that these ends will justify almost any means. In fact, I think that Brandt's own recommendations about tactical nuclear weapons were quite conservative by utilitarian standards. Why, if one is fighting for the ultimate values, should their use be limited to cases in which they provide the "only possible successful defense"? Why not allow them in cases where they provide a better chance of success than other methods? Why, for a utilitarian, should they be limited to cases where the civilian casualty rate will not be more than 5%?

4. I think that in a way Brandt is right in describing utilitarianism as the majority view, not among the philosophers, which is what he meant, but among political agents in the world today. I think that there is at present a tendency for all parties to international conflict to accept a kind of utilitarianism, which they then apply in accordance with their different ultimate values. The situation is very like that in wars of religion, in which the stakes are seen as eternal salvation; which makes it possible to justify almost anything.

The result is that certain more universal standards of humanity are easily swept aside. I don't mean to minimize the importance of those ultimate political, cultural, social and economic values for which nations are prepared to go to war. Probably all of us have a very profound commitment to certain values of this kind. I claim only that they can't serve as the basis of a general morality of warfare. And though it may seem paradoxical, I believe that there are other standards which can be mutually acknowledged and given priority even by deadly enemies: standards of human decency, which are not based on utilitarian calculations.

Our ideological antagonism with the Soviets, for example, profound and mutual as it is, need not obliterate our common moral interest in not killing civilians, either deliberately or incidentally. The aim of destroying each other's combat forces, once hostilities have begun, is inseparable from the conflict of values to which those forces are giving violent expression. But the protection of those who are not directly engaged in a military conflict has a powerful value of its own, a universal value that can be recognized by either party to the conflict, quite independently of the other values that divide them. It is therefore the kind of standard that deserves special and prior weight in the morality of warfare between enemies. It provides a powerful reason to exclude from utilitarian justification, from the possibility of utilitarian justification, the use of nuclear weapons with their indiscriminate and long-term effects, and to seek acceptance of the same standard by others.

Nations and their military forces have a moral interest in not being put into the position where the only way they can defend their most important political values is to use methods which will kill a lot of civilians and radioactively contaminate large areas. And in our case, even if we believe that certain ultimate ends would be worth these morally repellent means, we still have a moral incentive to try to get out of the position in which they are the only means available to us. I believe the moral cost is sufficiently great so that it would be worth paying other costs and accepting other risks in order to be in a position to reduce the indiscriminate destructiveness that tactical nuclear weapons would bring to a war in Europe, by relying on them less. This would involve a change of emphasis from a policy of pure deterrence toward the development of a capacity to actually win such a war, or at least to avoid losing it. It is possible that this move may be facilitated by recent

developments in precision guidance of more conventional defensive weapons which produce less collateral damage. But, that's a technical matter that I really don't know much about. As I said at the outset, this moral interest, in relying less on nuclear weapons, coincides with our interest in military credibility.

To sum up, I believe the commitment of this country and other powerful nations to increasingly indiscriminate weapons is a moral failure insofar as it expresses the rejection of common values of humanity that could be mutually acknowledged in the morality of warfare. Just as we share an ordinary interest in not being destroyed, so we should share a moral interest in not causing indiscriminate destruction. It is sometimes possible for those who disagree violently about almost everything else, nevertheless to agree on basic principles which may govern the conduct of their disagreement. Whether we and our potential enemies can seriously attempt this, let alone succeed, remains to be seen. But our common incentives for doing so are not just self-interested, but moral.

THE DANGER OF THE NUCLEAR ALTERNATIVE

Robert H. Gurland

In my role as commentator, I intend to focus my attention on Professor Brandt's arguments concerning the moral permissibility of the employment of nuclear weapons. Professor Brandt opens his presentation by posing two questions:

- Q1. Under what conditions is it morally acceptable to become involved in military combat of such seriousness that the use of nuclear weapons might be considered?
- Q2. If a nation is involved in a serious war, under what conditions is it permissible morally for it to employ nuclear weapons?

As Professor Brandt indicates, we need concern ourselves with Q2 only if we do not answer Q1 with "Never!" Brandt willingly entertains Q2 because he holds that conditions could exist which would make "Never!" an inappropriate response to Q1. This situation would arise when "a clear threat to a decent civilized way of life for a large number of people" exists. It is my contention, however, that the response we must make to Q1 is "Never," not only because I take exception to the conditions stipulated by Professor Brandt which allow him to pass from Q1 to Q2, but also because no satisfactory resolution to Q2 can be generated. In my view, this fact provides us with adequate justification for answering Q1 negatively.

I will argue that in order to resolve Q2 satisfactorily, two criteria must be met. First, we must be able to frame a set of rules which delineate the conditions under which nuclear weapons can be employed which would be acceptable to all parties who might be involved in an armed conflict. Second, there must exist some machinery which would ensure that these rules, once accepted, would be respected in an actual war situation. By appealing to principles of economy and proportionality, and to notions which might serve to define adequately an "innocent" and those targets/situations suitable for nuclear assault, parties safely sequestered behind a Rawlsian veil of ignorance conceivably may be able to formulate the set of rules required by the first criterion.

Unlike a prizefight, war presents us with an adversary situation without an external, impartial monitor. In the absence of the "third man in the ring," warring parties bear the moral burden of self-restraint. If a nation involved in war has nuclear potential, then it would be required to act under self-imposed constraints as defined by the agreed-upon rules. Taking into account the destructive potential of nuclear weaponry, one must conclude that self-regulatory mechanisms provide inadequate insurance that the war game will be played in accordance with the rules. History reveals that the track record of nations is poor with regard to their ability to regulate their own activities when engaged in warfare. Even within the bounds of conventional (non-nuclear) warfare, nations have resorted to aggressive strategies and means of waging war which must be judged morally deficient because nations tend to employ the most lenient moral criteria. If all the obstacles, and they are many, in the formulation of an acceptable set of rules for regulating the use of nuclear weapons during time of war could be surmounted, then I contend that they would prove as ineffective within the actual war context as those forged under the rubric of the Geneva Convention.

I maintain that a nation confronted by what it perceives to be an operational or military necessity or by a situation which may result in a serious defeat will abandon the rules and risk moral condemnation in order to salvage its position. Within contexts which threaten survival, moral considerations are obliterated for the most part. In extremis, morality is cast to the winds. Unfortunately, the consequences of ignoring the conventions governing the use of nuclear weapons are potentially so dire that such a risk cannot be chanced unless one considers the righteousness of the cause. In addition, if the far-reaching effects of nuclear fall-out are to be avoided, the rules and conventions hammered out in response to Q2 would prove so stringent that, for all intents and purposes, nuclear weapons would be banned from use. Such rules could only condone the use of very low kiloton weapons against very isolated targets; thus the real advantage of using nuclear weapons would be undermined. If this is the case, then the war might just as well be fought within the parameters afforded by conventional weaponry.

In short, even if the first criterion for satisfactorily answering Q2 could be met by having a set of rules regulate the use of nuclear weapons while still preserving some of the advantages afforded by the use of such weaponry, the second criterion concerned with enforcing the rules has no likelihood of being satisfied. I do not deny that there is a virtue in attempting to formulate a set of rules which might serve to satisfy Q2, for these rules will provide a basis for identifying those parties whose behavior in warfare is morally wanting. However, nations do not enter into a state of war in order to demonstrate how civilized or moral they can be. They enter such a state in order to gain certain objectives and advantages and, in the main, will endure moral bad marks in order to gain these ends. If violating the rules is deemed necessary to achieve this mission, then that is a regrettable, but necessary, price for success. The inability to resolve Q2 (when confronted by desperate situations, nations will not feel absolutely bound by the rules to which they themselves previously agreed) leaves us with no choice but to eschew the use of nuclear weapons entirely and recognize that no war is of sufficient "seriousness" to permit the moral use of such instruments of destruction. Ergo, my answer of "Never!" to Q1. Not only is the use of nuclear weapons immoral, but since every putative participant in a nuclear war is a loser, the use of such weaponry represents an irrational alternative as well. It might further be argued that since the technology of nuclear warfare exists, the morality/rationality of engaging in conventional warfare becomes suspect, given the real danger of its escalation into a nuclear conflict. An individual nation's resolve to fight a war on a conventional level can be undercut by circumstances. The temptation to employ weaponry once it exists and is perfected is hard to resist once its use can be rationalized. The notion that non-nuclear military adventures can be carried on with impunity under a protective umbrella of nuclear power is a dangerous one.

I should now like to consider Professor Brandt's justification for entertaining the nuclear alternative, a justification which, in my view, rests upon a challengeable assumption. Brandt maintains that we can legitimately consider using nuclear weapons in a war which is "serious." He holds that such a war is one which is fought in order to counter a "clear threat to a decent and civilized way of life for a large number of people." This criterion is of questionable value in identifying a "serious war" since I expect that most nations justify their wars, both to the world at large and to their own people, on precisely such grounds. Warring nations invariably perceive their way of life as threatened, either directly or indirectly, and they consistently inflate the legitimacy of their cause. It is this defensive posture, coupled with the inherent "rightness" of their position, which provides nations with the moral dispensations needed to permit a bending of the rules when circumstances demand that immoral means be overlooked if they serve a just cause.

These objections aside, the prime obligation of a nation to its citizenry may not be, as Professor Brandt implies, to preserve a particular ideology, economic system, theory of justice, life-style, etc., but rather to preserve life and to maintain habitable environments which permit life systems to flourish biologically. This is a moral obligation shared by all nation-states. Hence, it is incumbent on all nations not to embark on policies which would be conducive to loss of life on any scale or which would diminish the habitability of the physical environment. This latter obligation is owed to future generations as well as to those persons who currently inhabit the biosphere. That there are alternative ways of living in a decent and civilized manner and that currently competing ideologies can coexist in relative harmony must be taken as axiomatic. In this light and in recognition of the intolerable consequences of pursuing the war alternative, nations must assume an attitude of toleration and restraint, while being governed by the dictates of a moral imperative which categorically requires negotiation and compromise. The argument here is that it may well be that there are no "good reasons," ideological or otherwise, which would morally sanction embarking on a war which could result in nuclear conflict.

In fairness to Professor Brandt, he limits his arguments to the use of tactical nuclear weapons of low yield, excluding high yield tactical as well as strategic nuclear weapons from his discussion. Brandt argues that "in the case of tactical nuclear weapons, the difference from conventional weapons is not so great." If Brandt is correct, then one must wonder why we would consider resorting to such weaponry since it would seem evident that the losses which we may be forced to endure significantly outweigh any gains which might accrue from their use. I should like to point out that the distinction between strategic and tactical nuclear weapons may be a bit facile for in the last analysis the differences, if they exist, are in degree rather than kind. The guarantees are slim that by the employment of tactical nuclear weapons we will be able to keep conflicts below the nuclear threshold. Tactical nuclear weapons come in many varieties, and a high yield/30 kiloton "tactical weapon" encroaches on the kill-power of a strategic nuclear weapon. At this point we become engaged in a dangerous semantic game where it matters little whether we choose to call the weapon tactical or strategic. The way it is used and its effects become the critical issue, and, in my view, the use of such instruments of war cannot be condoned. But what of the low kiloton weapon? If the practical effects of such weapons are no greater than those of conventional weapons, then it seems that their use may be tolerable, but, in fact, it does not reduce to a matter of "six of one, half dozen of another." Use of the tactical weapon brings with it an added and significant danger. The shift from conventional to nuclear weapons (no matter how low the yield) represents a breach of the nuclear barrier, thus initiating the processes which cause the progressive erosion of the inhibitory mechanisms which work against the use of nuclear weapons.

Brandt treats the escalation problem in rather cavalier fashion. One can easily envision the gradual escalation of nuclear weaponry from low yield tactical to high yield tactical to strategic as military exigencies provide appropriate rationale for such upgrading. Brandt provides the argument in favor of escalation from conventional weaponry to tactical nuclear (a change in kind), but seems not to worry about escalation from tactical to strategic (an alteration in degree, hence easier to establish in a gradual and less noticeable manner). Brandt merely places the moral burden of such escalation on the enemy, thereby dismissing the problem. Brandt seems to imply that there would be sufficient resolve on our side to prevent escalation from tactical to strategic weaponry, a faith which is ill-founded given our willingness to experiment with nuclear weaponry in World War II when the situation seemed to

dictate its use. The justification for NATO's use of tactical nuclear weapons in a conflict situation with the "Red Horde" seems based upon our failure to maintain parity on the conventional level. NATO would require such weaponry if it is to engage the superior conventional war-making power of the Communist nations successfully. However, it is apparent that such a move by NATO would permit a response in kind from the enemy, offsetting our newly-gained advantage. This scenario suggests that the burden of escalation will shift back to the NATO block for, in order to recoup military parity, the NATO forces might well be forced into the position of employing high yield weapons of the strategic type. Once the nuclear barrier is penetrated, there seems little chance of controlling creeping escalation with consequences to be felt by all humanity, warring protagonists and neutrals alike.

Brandt stipulates that the use of tactical nuclear weapons must be limited to "prime military targets." I am unconvinced that such targets can be easily identified. In practice, I expect that warring parties will employ such weapons indiscriminately by directing their lethal powers at targets which have military significance vis a vis deciding certain battles, etc. When this scenario involves heavy civilian losses, they will then trot out the much beloved double-effect justification to save their moral consciences. The intention in employing such weapons is of course to destroy military targets, concentrations of troops, and war material. A foreseen but undesirable consequence of the employment of these weapons will be the destruction of civilians, etc. Moral absolutism comes with a denial of intent. The double-effect justification is an oblique way of assuming a posture which claims that the military advantage gained by using tactical nuclear weapons outweighs the horrible suffering inflicted upon innocents. But choosing to bring an undesired circumstance into existence as a price for a tactical or strategic gain does not provide an escape from moral culpability. When we make such choices, we exhibit a readiness to meet exorbitantly high moral prices in order to gain tactical/strategic advantages.

Professor Brandt calls attention to the deterrent value of nuclear weapons as an important reason in support of their use. In order for nuclear weapons to serve as a deterrent (a) our "enemies" must be convinced that we are prepared to use such weapons, and (b) we, ourselves, must believe that we would employ them. In addition, the enemy must be unwilling to suffer the consequences if a threat to employ such weapons is acted upon. However, an enemy's willingness to endure nuclear exchange is easily miscalculated. Since such calculation is made on incomplete, inadequate, and often erroneous information, error seems more likely than not. We should not indulge in arithmetic which, if faulty, yields such tragic results. I do not share Professor Brandt's belief that it is morally permissible to threaten to perform an immoral act if by doing so we avoid some undesirable state of affairs. If it is morally wrong to perform an act, then one stands on morally shaky grounds if one threatens to perform the act, which may be true independent of the reasons for making the threat. Certainly those who are threatened must live under the psychic anguish which flows from having to live with the notion that the threatened act will be performed. In fact, the tension created by the threat is felt by both sides. If the effectiveness of deterrence is contingent upon a nation's credibility in being ready to honor its treaties and to live up to its promises (or in this instance, to carry out its threats), then a nation may be driven to establish its credibility with regard to its nuclear threats in morally objectionable ways. Ironically, the United States has already provided sufficient evidence that it would employ nuclear weapons by its bombing of Hiroshima and Nagasaki in WW II.

If a nation is willing to purchase credibility at the risk of violating the moral sensibilities of the civilized world, it might demonstrate its willingness to use nuclear weapons in a conflict situation where no retaliation in kind is possible. It is important for a nation to secure its general credibility among nations. If we must honor our commitments, they must be made with care. We must not make threats which, if carried out, leave us in a morally suspect position. Nations, like individuals, are often goaded into face-saving actions, which, although we do not condone them, we perform in order to maintain our credibility and show "we mean what we say." I cannot help but recall the scene from the current movie Kramer vs. Kramer in which the father has placed himself in the position of having to strike his son, an act he performs with tears in his eyes, because he has made a threat which he feels compelled to act upon. In making threats we often extend the range of actions we would normally perform or sanction. Hence, we place ourselves in the unenviable position of behaving in a manner which we cannot morally underwrite or risk losing face/credibility. Nations would be well advised to refrain from the use of threatening gestures as a means to gain certain ends. They should, instead, rely upon sensible diplomacy grounded in trust, good faith, and a willingness to compromise as a means to harmonize competing interests.

In winding down my comments, I notice what seems to be a circularity in Professor Brandt's justification for the use of tactical nuclear weapons. He argues that their use is acceptable if the war is one "we are justified in fighting with all the weapons at our disposal." If there are such wars and if tactical nuclear weapons are obviously at our disposal, then we are justified in using them. The real issue which Brandt fails to engage concerns the existence of such wars. In fact, if such a war exists, and if we have strategic nuclear weapons at our disposal, then we must be equally justified in using them since it is a war we are justified in fighting with all the weapons at our disposal.

It is clear that after all is said and done, Brandt's position suffers from all the maladies which normally accrue to utilitarian theories. In a moral cause anything goes as long as it can be shown to be "necessary." He argues as follows:

If NATO is morally justified in defending itself and if the use of tactical atomic weapons is the "only possible successful defense," then their use is justified.

He gives no reason why it would not be acceptable to replace 'tactical' with 'strategic' if it is in the interests of a morally justified cause and if it is the "only possible successful defense." What if adhering to the rules will ensure a nation's defeat? Surely, if the cause is just, then a nation would be justified in "doing what is needed" to enhance its chances of success or to avoid serious defeat. I believe that the central question to be entertained is the one which asks "Is it ever the case that a nation at war, independent of the justness of its cause, is morally obligated to accept defeat?" If we are not willing to hold that the agreed upon rules which define the conduct of war are absolutely binding on all participants, then we are opening the door to an "anything goes" policy regarding the conduct of war.

With the advent of nuclear weapons, just war theory goes down the tubes, a casualty of new technologies. In the war context we cannot trust ourselves nor our enemies to "do right" nor "to play by the rules" because the stakes are too high. Dominated by ideological fervor, caution and moral sensitivity are discarded, hence

the moral requirement that we refuse to entertain war as a viable means of settling differences between nations. The utility theorist must play his game within the parameters bounded by such an absolute. Given the consequences of a war fought with contemporary technology, we had best heed the advice of Haight Ashbury and the Woodstock Nation and "make love not war," for the impersonal character of modern warfare seems to diminish any sense of individual responsibility/ accountability and, in general, leaves little room for moral contemplation.



Professor Michael Walzer - Michael Walzer was educated at Brandeis, Cambridge, and Harvard Universities. He taught at Princeton, 1962-66, and then returned to Harvard where he has been since, giving courses on political theory in the Department of Government and chairing the Social Studies program. His recent writing has focused mostly on questions of political and moral philosophy: obligation, means and ends, equality, and war. His most recent book is Just and Unjust Wars, published in 1977. He also writes frequently for such political journals as Dissent and The New Republic. A collection of his political essays will be published by Basic Books later this year under the title Radical Principles.

Professor William Barrett - William Barrett is Visiting Professor at the U.S. Military Academy. He comes to West Point from New York University. He received his Ph.D. degree at Columbia in 1939 and has been active in the intellectual and literary life of the country ever since. He was an editor for The Partisan Review during the years following World War II, and later served as literary critic for the Atlantic Monthly. Professor Barrett is the author of Irrational Man (1958) and The Illusion of Technique (1978). He has received fellowships from the Guggenheim Foundation, the National Endowment for the Humanities, and the Rockefeller Foundation.



Lieutenant General William R. Peers, U.S.A.(Ret.) - Born in 1914, General Peers attended UCLA and entered the Army in 1937. During World War II, he commanded the Office of Strategic Services operations in Burma and Southern China. In the early fifties he organized the initial CIA training program. He served four tours on the Army General Staff and the Joint Chiefs of Staff. General Peers was an instructor at the Command and General Staff College and is a graduate of the Army War College. During the war in Vietnam, he commanded the 4th Infantry Division and the First Field Force. General Peers conducted the Army's investigation of the My Lai incident. He recounts the history of this study in his recent book, The My Lai Inquiry (1979). In 1973, he retired from active duty as Deputy Commander, Eighth U.S. Army, Korea.

TWO KINDS OF MILITARY RESPONSIBILITY

Michael Walzer

I really did not anticipate an audience of anything like this size when I planned this talk. I hope you are not prisoners of war and morality. In talking about responsibility this evening, I shall try gracefully, I hope, to avoid all reference to questions of free will, the theory of action, and of intention. I'd like to address myself instead to what I take to be a very difficult, practical problem in our understanding of military responsibility and in our enforcement of it.

Now it's one of the purposes of any institutional hierarchy, and most especially of the bureaucratic or military chain of command, to resolve questions of responsibility. Who is responsible to whom, and for what? That is what the organizational chart is supposed to show. And once I locate myself on the chart, or in the chain of command, I ought to know exactly who my superiors are and who my subordinates are and what they rightly can expect of me. I am in the relatively happy position of being able to anticipate praise and blame.

Let's consider now the hierarchical position of a middle-level officer in time of war, a field commander, let's say, at whatever level it is where local tactical decisions are required. He has a two-fold responsibility that can be described in simple directional terms. First, he is responsible upward--to his military commanders and then through the highest of them, the commander-in-chief, to the sovereign people, whose "officer" he properly is and to whose collective safety and protection he is pledged. His obligation is to win the battles that he fights or, rather, to do his best to win, obeying the orders of his immediate superiors, fitting his own decisions into the larger strategic plan, accepting onerous but necessary tasks, seeking collective success rather than individual glory. He is responsible for assignments unperformed or badly performed and for all avoidable defeats. And he is responsible up the chain to each of his superiors in turn and ultimately to the ordinary citizens of his country who are likely to suffer for his failures.

But there are other people likely to suffer for his failures and, often enough, for his successes too--namely, the soldiers that he commands. And so he is also responsible downward--to each and every one of them. His soldiers are in one sense the instruments with which he is supposed to win victories, but they are also men and women whose lives, because they are his to use, are also in his care. He is bound to minimize the risks his soldiers must face, to fight carefully and prudently, not to waste their lives, that is, not to persist in battles that cannot be won, not to seek victories whose costs overwhelm their military value, and so on. And his soldiers have every right to expect all this of him and to blame him for every sort of omission, evasion, carelessness, and recklessness that endangers their lives.

Now these two sets of responsibilities, up and down the chain of command, together constitute what I shall call the hierarchical responsibilities of the officer. I assume that there can be tensions between the two, and that these tensions are commonly experienced in the field. They have to do with the regret that officers must feel that the primary instruments with which they fight are human beings, to whom they are morally connected. But I don't think that there

can be direct conflicts and contradictions between upward and downward responsibility. For there is only one hierarchy, a single chain of command, in principle at least, a singular conception of victory, and finally a commitment up and down the chain to win that victory. It can't be the case, then, that a commander who sacrifices his soldiers, so long as he does the best he can to minimize the extent of the sacrifice, does anything that he does not have a right to do. Whenever I read about trench warfare in World War I, I can hardly avoid the sense that the officers who sent so many soldiers to their deaths for so little gain in one attack after another were literally mad. But if that is so, the madness was reiterated at every level of the hierarchy--up to the level where political leaders stubbornly refused every compromise that might have ended the war. And so officers further down, at least those who carefully prepared for each successive attack and called off the attacks when it was clear that they had failed, did not act unjustly, while officers who were neither careful in advance nor willing later on to admit failure, can readily be condemned for violating their hierarchical responsibilities. And all this is true even if the war as a whole, or the continuation of the war, was unjustified, and even if this way of fighting it was insane. I don't think it can ever be impermissible for an officer to send his soldiers into battle: that is what he is for and that is what they are for.

But the case is very different I think, when we come to consider the officer's responsibilities for the civilian casualties of the battles he fights. As a moral agent, he is also responsible outward--to all those people whose lives his activities affect. This is a responsibility that we all have, since we are all moral agents, and it is, at least in the first instance, non-hierarchical in character. No organizational chart can possibly determine our duties or obligations to other people generally. What we ought to do when we face outward is determined by divine or natural law, or by a conception of human rights, or by a utilitarian calculation in which everyone's interest, and not only those up and down the hierarchy, must be counted. However that determination works out in particular cases, it is clear that the duties or obligations of moral agents may well conflict with the demands of the organizations they serve. In the case of a state or army at war, the conflict is often dramatic and painful. The civilians whose lives are put at risk are commonly neither superiors nor subordinates; they have no place in the hierarchy. The injuries done to them can be and often are wrongful and, what is most important, they can be wrongful (so I want to argue) even if they are done in the course of military operations carried out in strict accordance with the precepts of hierarchical responsibility.

Now the distinction that I have drawn between hierarchical and non-hierarchical responsibilities is, of course, too sharp and too neat. There has been an effort of long-standing to incorporate the second of these into the first, that is, to make soldiers answerable to their officers for crimes committed against the civilian population and to make officers answerable to their superiors (and even to their enemies) for the crimes committed by their soldiers. This is a commendable effort, and I don't want to underestimate its value. But I think that it is fair to say that it has not been very successful. It works best with regard to those crimes against civilians that are, so to speak, superfluous to the war effort as a whole--and best of all when the superfluousness is a matter of indiscipline. The ordinary desire of a commander to retain command of his soldiers will lead him to repress indiscipline as best he can and to hold his soldiers to a high and consistent standard of conduct. At least it should do

that: for the best soldiers, the best fighting men, do not loot and rape. Similarly, the best soldiers do not wantonly kill civilians. Massacres of the My Lai sort are most often the result of fearfulness and rage, and neither of these emotions make for the maximum efficiency of the "war machine" that soldiers sometimes ought to be. Like looting and rape, massacre is militarily as well as morally reprehensible, for it represents a loss of control as well as a criminal act, and so it is more or less easily dealt with in hierarchical terms.

I say "more or less easily" because even superfluous injury often takes place within a context of command and obedience: My Lai is again an example. And then, what we require of soldiers is that they refuse the orders--the illegal or immoral orders--of their immediate superior. That refusal does not constitute a denial of or a rebellion against the military hierarchy. It is best understood as an appeal up the chain of command from a superior officer to the superiors of that superior officer. Given the structure of the chain and its purposes, any such appeal is problematic and difficult, a matter of considerable strain for the individual who undertakes it. He is still operating, however, within the conventions of hierarchical responsibility.

But when the killing of civilians is plausibly connected to some military purpose, those conventions seem to provide no recourse at all. Neither in the case of direct and intended killing, as in siege warfare or terror bombing, nor in the case of incidental and unintended killing, as in the bombardment of a military target that results in a disproportionate number of civilian deaths, is there any effective responsibility up or down the hierarchy. I don't mean that individuals are not responsible for such killings, only that there is no hierarchical way of holding them responsible or no effective hierarchical way of holding them responsible. Nor is there any way of pointing to the organizational chart and explaining to whom they are responsible. For in these cases, the hierarchy seems to be working very much as it was meant to work. Here are victories, let's assume, and victories won at a wonderfully low cost to the soldiers who win them. Their commanding officer can look up and down the hierarchy and feel good about what he is doing.

I should make that last point more strongly: the officer can look up and down the hierarchy and feel that he is doing what he ought to be doing. He is pursuing victory with all the means at his disposal, which is what his superiors want him to do, and what we, as members of the sovereign people, want him to do. And he is pursuing victory at the least possible cost to his own soldiers, which is no doubt what they want him to do. And so he meets the moral requirements of his hierarchical position. It is worth noticing that these are exactly the moral requirements that President Truman claimed to be meeting when he approved the use of the atomic bomb on Hiroshima. He made his decision, so he told us in his radio broadcast of August 9, 1945, in order to end the war and to save American lives. Those two purposes, he seemed to assume, exhausted his responsibilities. And that is not an implausible assumption if we think of him only as the commander-in-chief of a nation and an army at war.

We can say, I think, that Truman's argument does address the full range of his hierarchical, but not the full range of his moral, responsibilities. But he might have gone on to argue--though it is important to say that he did not go on to argue--that he knew himself to be responsible as a human being and a moral agent for all the civilian deaths caused by his decision. But, he might still

have said, his responsibility to the American people as a whole and to individual American soldiers took precedence over his responsibility for Japanese civilians because of his hierarchical position. And any officer further down the hierarchy can make the same argument: that his oath of office and his immediate bond to his soldiers determine what he ought to do, whatever other considerations he might acknowledge.

Now, if this argument were true, or if it were simply true, then the killing of civilians, so long as it was connected to some military purpose, could no more conflict with hierarchical responsibilities than the different sorts of hierarchical responsibilities could conflict with one another. Civilians would be subordinated, exactly as soldiers are, to military purposiveness, and then further subordinated to the safety and preservation of one's own soldiers. In effect, they would be incorporated into the hierarchy at its lowest point and recognized within the system of hierarchical responsibility only when they were needlessly and superfluously attacked. But this incorporation is nothing more than an act of conquest and tyranny. For the civilians whose lives are at stake are citizens of other countries who have no place in this hierarchy. The middle-level officer that I am considering is not their agent; no legal or bureaucratic procedures make him answerable to them. Nor are they his agents, subject to his command, submitted to his care and protection. Indeed, he sees them only when he looks outward, away from his hierarchical responsibilities. And if he is to recognize them, to attend to their interests and rights, he may well have to turn away from those responsibilities and diminish the care and protection he affords to his own soldiers--that is, he may have to impose added risks on the soldiers for the sake of the civilians. The conflict, then, is a real one.

Because the conflict is real, it is vitally important that it be represented in some institutional form. But I don't know of any easy or obvious way of specifying, let alone of establishing, the appropriate form. Ideally, an army ought to be watched and checked by something like a civilian board of review. But if we think of the place that such boards occupy alongside police departments in some of our major cities, we can immediately see the problems that would arise in the case of an army. For while the board of review represents civilians as potential victims of police neglect or brutality, those same civilians are also the ultimate employers of the police. They elect the mayor who appoints the police chief, and so on. They have a place in the urban chain of command, perhaps a double place, at the top and bottom of the chain. But citizens of other countries have, as I have just argued, no place at all and no power over the political leaders who appoint army generals. They are potential victims, and that is all they are, and we cannot imagine them effectively represented by any civilian board of review.

They might be represented internationally, by a court like the Nuremberg Tribunal after World War II. But it is, I think, an interesting feature of the decisions made at Nuremberg and by the associated courts that they did not go very far toward enforcing the non-hierarchical responsibilities of soldiers. Mostly, they worked at the margins of the moral space that I have meant to mark out with that term, condemning individual officers for the killing of hostages, of sailors helpless in the water, and of prisoners of war. But they convicted no one for siege warfare or terror bombing or any form of disregard for civilian lives. In part, this was because these kinds of warfare were by no means peculiar

to the Germans. In part, it was because the legal status, even of massive disregard, is at best uncertain. Traditionally, in the laws of war, hierarchical responsibilities have dominated non-hierarchical responsibilities. Recent revisions of the law, at Geneva in 1949 and again in 1978, have not produced any radical challenge to that domination.

So, I must conclude that the non-hierarchical responsibilities of officers have, at this moment, no satisfactory institutional form. Nor are they likely to have until we include them systematically in our understanding of what military office requires. Conceivably, this might be easier to do in an era when so many wars are political wars, fought as much for the loyalty of the civilian population as for control of land and resources. In such a time, one would think, responsibilities outward and upward will often coincide or at least overlap more extensively than in a time of conventional warfare. And then purposive crimes as well as crimes of indiscipline might come under hierarchical scrutiny. But in all times, and in conventional as well as political wars, we ought to require of officers that they attend to the value of civilian lives, and we should refuse to honor officers who fail to do that, even if they win great victories thereby.

"The soldier," wrote General Douglas MacArthur at the time of the Yamashita trial, ". . . is charged with the protection of the weak and unarmed. It is the very essence and reason of his being . . . /a/ sacred trust." Now, I suppose that is overstated. The "reason" of soldiering is victory, and the "reason" of victory is the protection of one's own people, not of other people. But the others are there--the ordinary citizens of enemy and of neutral states--and we are not superior beings who can reduce our risks by slaughtering them: certainly soldiers cannot do that. The lives of the others may or may not be a sacred trust, but they are an ordinary responsibility whenever we act in ways that endanger them. And we must make a place for that responsibility within the more specialized and more easily institutionalized "reasons" of war. Since the most immediate conflict and the most urgent on the battlefield itself, is the conflict between outward and downward responsibilities, between responsibilities for enemy civilians and one's own soldiers, this means first of all that we have to insist upon the risks that soldiers must accept and that their officers must require. I can't detail these risks here with any hope of precision. What is necessary is a certain sensitivity that the chain of command does not ordinarily elicit or impose. No doubt, that sensitivity would make soldiering even harder than it is, and it is already a hard calling. But given the suffering it often produces, it cannot be the purpose of moral philosophy to make it easier.

THE PRESENT PERIL

William Barrett

For some time a fragment of an imaginary conversation has been running through my mind; it goes something like this: My grandson asks me, "Grandfather, what were you doing before we capitulated to the Russians?" And I answer, "Grandson, I was debating the logical niceties of war and morality at West Point."

With the way things are now going, the speed with which the balance of power is tilting against us, I may not have to wait for my grandson to ask the question.

I'm reminded, rather ridiculously, of the story about the man, who, while mountaineering, is buried under a landslide. The rescuers finally spot him, dig down to him, and call out "We're from the Red Cross." To which he calls back, "I already gave at the office." A business as usual response.

The landslide is gathering for us, and we still carry on business as usual. I hope whatever I have to say in this brief talk tonight will give me something more positive to answer my grandson's question should that unfortunate situation ever turn up.

Now all philosophical and moral questions are carried in the context of our actual situation. When the actuality is benign, we tend to forget it, and we seem free for a while to spin our hypothetical and contra-factual cases in the thin air of abstraction. But, even in such cases of ease and relaxation we proceed at our peril if we forget this fact of actuality; the actual situation must always be part of our human context. The options we face in life--the big ones--as William James reminded us, are usually forced options. Ones we wouldn't have to face at all if we didn't have to. After all, we wouldn't have to face any options at all if we'd never been born. In the present case, in the situation of the world as it now stands, this actuality is so urgent and threatening that we cannot forget it if we want to; though I must admit that a good deal of philosophical discussion often seems to take place as if that actuality never existed.

Two conditions, among others, define our present situation. (1) The United States is confronted by an implacable enemy in the form of the Soviet Union. This enemy, moreover, is not a nation state in any traditional sense and not to be dealt with wholly within the framework of traditional diplomacy, despite the naiveté of some of our officials. How can you enter into reliable agreements with a state that for the more than sixty years of its existence has not dealt even minimal justice to its own citizens? As a communist state, moreover, it is the spearhead and leading power of international communism. The American people and most of their politicians still do not understand the nature of communism. Perhaps only ex-Marxists or those dissidents who have lived under Marxist rule, grasp it. This brief talk is not the occasion to educate you in it. Since our subject here is morality, or touches on morality, suffice it to say that the communist state is an evil, an oppressive blight on the human spirit, organized moreover with all the apparatus and weapons of the modern age. This evil thing, furthermore, is committed to our destruction. That ultimate hostility is both a part of communist doctrine and a necessity for it in practice. The communist state cannot stand long beside the capitalist world in peaceful coexistence of competition. The discrepancy becomes too glaring. "West Berlin," Khrushchev remarked, "sticks like a bone in my throat." Why? It was not a military threat. But, quite simply, the contrast between East and West at that focal point was too uncomfortable and shocking. In the same sense, the United States sticks like a bone in the throat of the whole communist world. The bone has to be eliminated.

(2) The second overriding fact in our actual situation is the presence of atomic weapons. It might have been well if such weapons had never been invented, or invented only after humanity had become morally mature and the planet was in peace. But, there one begins to drift off into hypotheticals--which, alas, is so easy to do. While the fact is that these weapons exist, we have them, and the other side has them, and in this situation any option we elect is bound to be a forced option. What to do then? As moral individuals pursuing the moral aspect of the matter, we naturally think of these weapons and the awful havoc they will wreak if ever used, and we recoil. Why not renounce them altogether? That would seem to be the clearcut way to moral purity, perhaps even sanctity; though we might remember there have been warrior saints as well as peacemakers.

Of course, the other side would not follow suit and our unilateral disarmament would, in fact, be a capitulation. We could then, it has been suggested, follow the path of passive resistance in the manner of Gandhi in India and in due time, and without the destruction of atomic war, liberty might slowly and painfully reappear upon this earth. Such was the rationale, when any was offered, behind the slogan, "better red than dead," when it first appeared in the 1950's. The example of Gandhi's passive resistance, however, would not be altogether relevant to that future situation of capitulation. While he was dealing with the British rule, the British raj, with his own traditional moral compunctions and its residual sense of fair play, he was not dealing with an implacable communist regime. Moreover, the British rule was already there when Gandhi started his crusade; he did not invite them in by capitulation in order then to practice passive resistance against them. If not capitulation then, the only other choice open to us is resistance. Indeed, if we are concerned with the morality of the matter, there should be no doubt of this option. In the face of so grim an evil, so distorting of the human mind, our duty would plainly be seen to be to resist with all the energy and powers we command. But, this point must be emphasized, a token or half-hearted resistance would be equivalent to capitulation. We are brought up abruptly then by the unpleasant reality of atomic weapons. If we are not to capitulate, we do not renounce these weapons. What then? Do we sit on the stockpiles of atomic weapons as our deterrent? The other side is not proceeding so passively. The Soviet high command pursues another strategy than mere deterrence. Their war plans envisage an atomic war as a war that they can successfully wage and win. Because of the greater dispersion of their cities and population, and because the communist leaders are willing to accept a rate of civilian casualties far in excess of what we would find tolerable, they calculate they can survive a first, second, or even a third strike and be able to retaliate.

We could expect then that some day the following scenario might be enacted: At a certain crisis in our relations with the Soviet Union--say, something like the Cuban missile crisis in 1962--their leader approaches our President and declares "We are ready for atomic war, are you?" At which point the American President backs down, and the first step in our surrender has been taken. Here, terrorism seems to have become a principle of statecraft, and perhaps in this period of ubiquitous and random terrorism--the age of assassins to come which was prophesized so startlingly by the French poet Rimbaud in the 1890's--in this age of assassins, I say it is only proper, after all, that the terrorist philosophy should find its organized and official embodiment in a nation-state.

Yet, this terrorist aspect of the situation should not weaken, and in fact, should strengthen the force of the moral imperative that claims us here, or that ought to claim us. Namely, that we resist the evil all the more when it shows its

most violent side. But, just here, alas, tactical complexities of a moral, as well as a military nature, tend to becloud our sense of the basic imperative. There is a remark by Kant, one of his most profound, though philosophers in the hunt for more subtle matters tend to overlook it; the remark, namely, that the honest citizen, the decent citizen, knows what his duty is, he does not have to learn it through the dialectic of philosophers. If this were not so, the moral life of mankind could not be carried on and the race would have long since foundered. I know that it is wrong to lie without being required antecedently to settle all the tactical complications and circumstances in detail that lying or telling the truth in any given situation may bring with them. It would be regrettable, though I am sorry to say that it seems to have happened among some intellectuals, if those casuistical complexities were allowed to weaken the force of the original imperative, and we should begin then, because we hadn't settled all those dialectical details, to question whether it was really wrong, after all, to lie. Now, it is even more difficult to settle the intricate questions of what might constitute a just or unjust act of war in certain given situations. But, does one have to solve these questions to know that tyranny and terror ought to be opposed?

In any actual situation the distinction between a first strike and a completely justified pre-emptive first strike could be a very academic and formalistic question to settle. A terrorist appears in a plane brandishing a bomb, and holds the passengers captive. At a certain moment he turns his back carelessly and I, happening to have a pocketknife handy, as a matter of fact I think I do, I learned that at a lecture at West Point it always helps to bring your props; this one in my hand is formidable, also dirty, I use it to clean my pipe--anyway, having a pocketknife handy, I stab him in the back. Afterward, one of the passengers, a moralizing little old lady, but why pin it on that cliché, why be a sexist about it, why not a moralizing little old man--well, why pin it on age, it could be anyone, a young pedantic squirt. Anyway, he says the terrorist's back was turned and you really didn't have to kill him, and in fact we found out later that the bomb he had wasn't activated. I doubt whether that would win the sympathy of the other passengers. Now, in retrospect, I wonder--and I say I wonder, for I am just entertaining this question--whether the argument for a preventive war advanced in the late 1940's when the Soviets did not yet have the bomb--and advanced by, surprisingly enough, Bertrand Russell among others--I wonder whether the argument would appear so shocking to some of us now as we look back on it from this particular point in time. Of course, the whole occasion has vanished, but it's rather interesting to think about.

But, such speculation aside, my main point comes back to that of Kant: that we can know our moral duty in a certain situation without having solved antecedently all the difficulties or complexities that may attend it, and we cannot let the deliberation upon these latter weaken our primary resolves. Details, of course, have to be attended to and if possible planned for. But, he who enters any situation with a firm purpose is more likely to find that the details fall in place, and above all the opponent will know when he encounters that strength of purpose and he may be induced to take a step backward.

It is the morality of calculation that is more likely to find itself at sea in the details of the actual situation and in consequence become irresolute and infirm of purpose. The responsibility of the individual here and now, try to get back to the subject of this symposium, whether we call the present situation war or not is to maintain this resoluteness and not to succumb to the spirit of appeasement that in so many subtle forms is now adrift throughout the land.

So, "Dear Grandson, I come back to you in the end. It is my duty to do all in my poor power to make sure that that imaginary conversation can never take place, and that, in any case, if anything like it should, I could not be a party to it for it would have to take place over my dead body!"

INDIVIDUAL RESPONSIBILITIES IN WAR

William Peers

In a few days those of you who are First Classmen will graduate from the Military Academy and will be sworn in as Second Lieutenants in the United States Army or one of the other services. At that time you will take an oath. It states--"I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic, and that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office upon which I am about to enter, so help me God."

Every military officer--Army, Navy, Air Force and Marine--takes this oath when he is commissioned. Then, to remind him of his continuing and increasing responsibilities, the oath is renewed at every promotion, from First Lieutenant to Four-Star General. This oath clearly spells out an officer's first responsibility--to completely dedicate himself to the defense of our nation. The military forces do not make the defense policies of our country. Such policies and decisions, including a declaration to go to war, priorities between theaters and others, are made by our civilian heads of government with the President as the Commander-in-Chief of all of the military forces. But, once these policies or decisions are made, it is the duty and obligation of the military forces, and the people within those forces, to carry them out, whether they agree with them or not. It is here that the part of the oath--"I will well and faithfully discharge the duties of the office I am about to enter"--becomes so meaningful. Once the decision is made to enter hostilities and the battle is joined, every military officer, non-commissioned officer, and enlisted man must have but one objective--to win the war, under honorable conditions, and in the shortest possible time. That is your first responsibility.

Another responsibility held by officers, non-commissioned officers and others in positions of authority is to protect the lives and provide for the well-being of all of those serving under them. Obviously, the greater the authority or rank of the individual, the more encompassing will become his responsibilities. The keynote to all of this is leadership. It is an all-inclusive responsibility which cannot be delegated and certainly not an easy task.

A senior commander carries out this responsibility by knowing his job, making thorough analyses of the situation, being aware of the capabilities and limitations of his own forces and their equipment, preparing plans appropriate to the situation, and issuing orders to implement such plans. But that is only part of his command responsibility. He must visit his units engaged in combat to make his presence felt and to influence the course of the battle. He must at all times be abreast of the situation and take corrective action whenever and wherever it may be necessary. All of the modern means of communication--radio, television, satellites and others--are necessary, but they are no substitute for the presence of the commander on the battlefield, to have person to person contact with his subordinate commanders and to be personally aware of the condition of his troops. His ultimate objective is to win the battle with a minimum of casualties to his own forces.

Junior officers, company grade officers, have comparable responsibilities, but their relationship with their troops is much more intimate. Not in the buddy-buddy sense, but rather in insuring that they are properly fed, clothed, and administered. He must know their individual problems and, more importantly, he must take action to correct or alleviate such problems. The relationship between an officer and his men at this level is of critical importance. It is a two-way street. If an officer properly cares for his troops, he can be assured that they, in turn, will give him their loyalty and support.

Being a company commander or platoon leader is a difficult task. One must know when to praise and when to reprimand and be sufficiently strong of character to take appropriate action. This may sound simple, but it is often difficult to discharge.

Such a commander position is also a complex and dangerous assignment, requiring the utmost in courage. Imagine, for example, the situation of a company commander in battle. He must direct the actions of his platoon leaders, designate targets for attack helicopters and close air support by TAC air, assure proper adjustment of mortar and artillery fires, arrange for essential logistics support, and a variety of other things. To do this, he needs communications, radios with their antennas, which pinpoint him and his command group and make them prime targets for enemy fire. From time to time, sometimes frequently, he must take additional risks in moving about the battlefield to visit his platoons, encourage his troops and control the course of the battle. Yes, it is a difficult and perilous job. In my view, it is the most dangerous one on the battlefield, but, if it is done and done properly, it derives the utmost in satisfaction.

Sometimes a commander must require his troops to do things that do not meet their immediate approval. As an example, after a long hard day of patrolling and searching for the enemy and finally arriving at the night bivouac area, the easiest course of action is to let the troops eat and bed down. But, a good commander won't do that. First, the troops must prepare defensive positions, dig in, provide overhead cover from enemy mortar and artillery fires, establish outposts and internal security against enemy surprise attacks. Then, and only then, the men are fed and bedded down for the night. And they must do this every day. The troops may not appreciate it at the time, but in the long pull, they will admire and respect him for it, because they know that his action was in their interest and it saves lives and avoids casualties.

An effective leader at any level of command is a combination of many things: he must be intelligent, but have an abundance of common sense; he must be courageous both physically and in making command decisions; a father confessor yet capable of meting out disciplinary action when needed; he must also have a feeling for the attitude and temperament of his troops; and he must not seek glory for himself, but rather for his unit, the Army, and the country. These few qualities of leadership are certainly not inclusive, but they are some of the things I would look for in a truly professional commander. You will note that I have omitted one very important characteristic--integrity. I expect that not only of officers, but of non-commissioned officers and all in positions of authority. Integrity is a combination of many things--honesty, trustworthiness, reliability, dependability, and so on. Integrity is an essential quality at all times, but particularly so in combat.

When an officer, or anyone in a position of authority, does not measure up to his responsibilities, he must be replaced or put in a position of lesser responsibility. This is especially important in combat. Why?--because mens' lives are at stake and here there is no place for mediocrity. This is not to say that a commander

through effective guidance, counseling and supervision cannot bring out the best of an individual and develop him into a competent leader. I mention this point because on occasion I have seen some commanders who were overzealous in relieving their subordinates. While I do not believe in mediocrity, I believe a commander must be fair and judicious in dealing with his subordinates and do all possible to improve their capabilities. Then, if the individual does not measure up to accepted standards, action must be taken to replace him.

In combat, all military personnel, officer and enlisted alike, have still another responsibility--to protect the lives, the safety and the property of the innocent. This responsibility is governed by what is generally referred to as the Law of War which emanates from the Hague and Geneva Conventions. They seek to regulate the conduct of war between civilized nations. Our nation is a signator to these conventions. Additionally, some of the Law of War is not incorporated in the conventions. This is called the unwritten or customary law whose usage has been firmly established through past conflicts. Our country is also a party to these laws. Collectively, the conventions and the unwritten laws seek to protect both combatants and non-combatants, to safeguard the lives of prisoners of war, the wounded, the sick, and civilians and to facilitate the restoration of peace.

In applying the Law of War, the U.S. Defense Department has issued directives to the military departments spelling out our national obligations and directing the training of all military personnel in such principles. The Army and the other services have developed their own regulations and training manuals to insure that each individual is acquainted with the conventions and understands his personal responsibility. Additional regulations and directives are issued within a Theater of War to elaborate on the Laws as it may apply to that specific area. This was especially true of Vietnam with its many unique features.

Before considering Vietnam, let's look at what are termed breaches of the Law of War. Any violation of the Law is a war crime. These include the willful killing, torture, inhumane treatment (including rape) of civilians and prisoners of war, maiming bodies of the dead, poisoning of water and foodstuffs, taking of hostages, and the destruction or appropriation of property not justifiable by military necessity. There are other war crimes, but these should be sufficient to give you the foundation upon which the Law is based. One point I should add is that as a signator of the conventions, our nation agreed to seek out those of our own forces who may have committed war crimes and bring them to proper justice. This is highly important from my viewpoint.

Getting back to Vietnam, General Westmoreland and his successor, General Abrams, went to great lengths to protect the civilian population, to prevent needless killings and injury and to avoid the destruction of property. At the top command level, this was done primarily through a series of detailed regulations which were periodically reviewed and updated. The most pertinent was 20-4, entitled "Inspection and Investigation of War Crimes." It required any person having knowledge of or receiving a report of a war crime to report it to his commanding officer and that such reports be properly investigated. This was later changed from having knowledge of a war crime to include any alleged or suspected war crime. Also, pocket-size cards were issued to each soldier outlining his responsibilities and to all commanders to emphasize their duties in this regard. Additionally, Rules of Engagement, or ROE, were issued covering the application of all forms of firepower--artillery, mortar, automatic weapons, helicopter gunfire, close air support and so on. To illustrate how definitive these rules were, a rifleman was not to fire into a house unless he was receiving

fire from it. At corps level and below, Standing Operating Procedures (SOP's) were prepared and each of them included a section or annex devoted solely to the prevention of war crimes and reporting procedures. The point I would like to emphasize is that an extensive effort was made throughout the command to minimize the loss of lives and suffering and the destruction of property.

With all of these rules and regulations, one would think that no war crimes would have been committed in South Vietnam, but there were. There was My Lai, and there were others of much smaller magnitude, some reported and some heresy. The pertinent question, however, is why did these things happen?

The first critical factor was the very nature of the war in Vietnam. A portion of the enemy, the Viet Cong, was often hidden within the population and some segments of the population acted in their behalf, either willfully or through threat of force. The VC habitually dressed in black pajama-type uniforms. Without their weapons and equipment, it was difficult to distinguish them from the ordinary civilians. Also, the mines and booby traps employed by the enemy created fear and frustration in the minds of many of our soldiers. Overall, the tactics employed by the Viet Cong and the North Vietnamese Army soldiers were vicious, if not brutal. Any war crimes committed by American or allied forces were minimal in contrast to the thousands of civilians killed, executed, or massacred by the enemy. Aside from this were the difficulties of the terrain--mountains, jungles, swamps, rice paddies, etc.--and the hot, debilitating climate. These points are mentioned not as excuses for our actions in South Vietnam, but rather as a brief description of the situation with which one had to cope in that environment.

Another cause was the rapid turnover of personnel in South Vietnam. The tour of duty was only one year, and there were also casualties and replacements, in country and out of country leaves, infusion or the exchange of personnel between units, and so on. Trying to keep track of people was utter confusion, let alone insuring that each of them had received the proper training in the Law of War.

Still another factor was that the instruction given to the individual soldier with respect to the Law of War was inadequate and in part misleading. The regulation upon which the instruction was based was written in such terms that it would require a lawyer to understand it. Certainly it was over the head of the ordinary soldier and no mention was made as to what a soldier was to do in the event his commander violated the law. These inadequacies were one of the principal findings of the My Lai Investigation. Fortunately, the Army took immediate action to bring the training down to the soldier level and extended the required training time. The instruction today with its illustrative films, photos, and simulations is vastly superior to that which existed previously.

A final factor--to me, rules and regulations within themselves are but pieces of paper. Their effectiveness depends entirely upon their execution and enforcement. Most commanders in South Vietnam were keenly diligent in applying the war crimes regulations, but some were more diligent than others. Those who were highly concerned insured that every known, alleged or suspected war crime was reported and properly investigated. Even a minor wound inflicted upon a civilian by an errant artillery round had to be investigated. However, there were some individuals who were not overly sympathetic to the Vietnamese people and did not employ the utmost care in their tactics and their actions. Fortunately, these instances were but few and I for one am proud of the overall performance of our American forces in this respect.

There are other factors which may have contributed to war crimes having been committed in South Vietnam, but the four I have mentioned are, I believe, the principal ones.

In closing, I would remind you, who will be our future military leaders, that you, as well as every other American military participant, will have responsibilities to your country, to the men serving under you, and to the civilian population and captured enemy. To this I would add that you also have an obligation to yourself, that is, to employ your talents to the utmost and to do the best job you possibly can.



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THE MORALITY OF INTERVENTION IN REVOLUTIONARY AND COUNTERINSURGENCY WARS

Guenter Lewy

In the wake of the American involvement in Vietnam, the term "intervention" has acquired a distinctly pejorative meaning. Recent events in Iran and Afghanistan appear to have weakened somewhat the strength of isolationist sentiments generated by the Vietnam debacle, but the fear of an excessively assertive American foreign policy remains strong especially among elite groups. Indeed, if military intervention in general--the use of the military instrument for the purpose of interfering in the affairs of another sovereign state--is seen as presumptively wrong, this negative attitude is especially pronounced with regard to intervention in revolutionary wars which raise the image of a fight against oppression and injustice, a struggle that should be allowed to play itself out to its victorious conclusion.

The presumption against intervention is supported by some of the most basic principles of international law--the principle of the equality of states and the right of self-determination of peoples. These principles have been enshrined in the charters of various regional organizations as well as in the Charter of the United Nations and have been reaffirmed by these organizations many times. The inadmissibility under international law of unilateral military action is further strengthened by the prohibition of recourse to armed coercion adopted by the international legal system since the days of the League of Nations. Thus, Article 2(4) of the United Nations Charter provides: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations." The only exceptions to this rule are enforcement actions by the United Nations (Chapter VII of the Charter) or the use of armed force in individual or collective self-defense (Article 51).

In actual practice, this outlawry of war has proven generally ineffective, in part because of the great difficulty of achieving a workable definition of "self-defense" and "aggression." The legal principles governing intervention in civil wars have been equally difficult to apply. While legal arguments exist which prohibit such intervention in principle, exceptions allow aid to an incumbent government that invites assistance, counter-intervention to repel the prior intervention of another foreign power, and aid to insurgents who have achieved belligerent status.¹ Moreover, there exists no agreement on the criteria for determining when insurgents should be granted the status of belligerents, and it is notoriously difficult to achieve a clear judicial determination on who intervened first and whether an invitation to intervene was genuine or a mere cover for the exercise of hegemonial interests.

But even if the law on the issue of intervention in a civil war were to be clear and easy to apply, that would not necessarily solve all problems, especially the moral issue which is the main subject of this presentation. The growth of international law has not been accompanied by the concomitant development of institutions able and prepared to enforce this law. Conflicts between the superpowers have prevented the

¹For a review of the literature see D. W. Bowett, "The Interrelation of Theories of Intervention and Self-Defense," in Law and Civil War in the Modern World, ed. John Norton Moore (Baltimore: The Johns Hopkins Press, 1974), pp. 38-50.

achievement of a system of collective security under the UN Security Council as envisaged by the United Nations Charter. For all practical purposes, therefore, the nations of the world still find themselves in a state of nature, a system of politics without government, in which reliance upon self-help in the pursuance of their interests and rights remains indispensable. In order to promote world order, there should prevail a presumption in favor of acting within the confines of international law, but this presumption may have to be overridden when resort to self-help alone will ward off unacceptable dangers and disadvantages. In such circumstances, an inability or unwillingness to act can have only one result: It will benefit and further strengthen the hand of those powers determined enough aggressively to promote their interests in defiance of international law and world opinion and at the expense of weaker nations unable to defend themselves.

All of the great powers, at one time or another, have intervened militarily in the affairs of other states, but in the post-World War II period it has been the Soviet Union which has assumed the most dynamic imperial posture, using Marxist-Leninist ideology in order to justify its expansionist drive. In 1960 Khrushchev spoke of "the intensification of the international class struggle." Under the so-called Brezhnev Doctrine of 1968, the Soviet Union affirmed that "the norms of law, including the norms of mutual relations of the Socialist countries," had to be interpreted in "the general context of the class struggle in the world" and that the sovereignty of its East-European allies was therefore subject to "the interests of the world of Socialism, of the world revolutionary movement" as defined by the center of that movement, Moscow. Under an extended version of this doctrine announced in January 1980, the Soviet Union, proclaiming "the international solidarity of revolutionaries," in effect now asserts the right to intervene in any revolutionary situation anywhere. According to the Marxist point of view, it is said, an assessment of the rightness of an act of intervention must not ignore "the fundamental difference between the nature and goals of the foreign policy of socialism and imperialism."² In line with the principle of "socialist internationalism," the Soviet Union, Cuba, and Vietnam for some time now have practiced a policy of "assistance" to communist regimes by intervening militarily in several African countries: South Yemen, Cambodia, and, most recently, Afghanistan.

Given this situation, for a major power like the United States to adhere unwaveringly to the principle of non-intervention, will not only encourage international disorder, but could mean abandoning basic moral values. As John Stuart Mill pointed out more than one-hundred years ago, "The doctrine of non-intervention, to be a legitimate principle of morality, must be accepted by all governments. The despots must consent to be bound by it as well as the free States. Unless they do, the profession of it by free countries comes but to this miserable issue, that the wrong side may help the wrong, but the right must not help the right."³ It is well to remember that the non-intervention of the Western democracies in the Spanish Civil War of 1936-39 represented a crucial factor intervening in favor of Franco's victory and helped prepare the way for World War II. America cannot and should not be the world's policeman, but, it can be argued, the United States has a moral obligation to

²David Binder, "Brezhnev Doctrine Said to be Extended," New York Times, 10 February 1980, p. 10, col. 6.

³John Stuart Mill, "A Few Words on Non-Intervention," Fraser's Magazine (Dec 1859), reprinted in The Vietnam War and International Law, ed. Richard A. Falk (Princeton, NJ: Princeton University Press, 1968), I, 38.

support nations in their endeavor to remain free and independent when we, and we alone, possess the means to do so. "A wealthy man who watches a poor neighbor starve to death cannot disclaim responsibility for the event; a powerful man who watches a weak neighbor being beaten to death cannot avoid being accused (if only through self-accusation) of culpability."⁴ As the case of Spain in the 1930's demonstrates, the fulfillment of the moral obligation to intervene in defense of freedom and human dignity at times may also coincide with prudential long-term national interests.

A revolutionary war is a form of civil strife in which a revolutionary organization utilizes unconventional means of armed conflict--principally guerrilla warfare, but often also terrorist acts against government officials and civilians--in order to achieve control of the state machinery; counterinsurgency describes the strategies and tactics used by an incumbent regime to defeat a revolutionary war effort. In my view, and summarily stated, U. S. military intervention in such conflicts is morally justified, whatever the legalities of the situation, when all three of the following conditions are met:

1. (a) The area of conflict represents a vital geopolitical national interest for the United States, or (b) the conflict involves the attempt by another power to impose by force an oppressive regime upon a people who are unable to defend themselves without U. S. aid, or (c) the conflict is accompanied by systematic brutalities that outrage the conscience of mankind.

2. There exists a reasonable probability of success achievable at costs proportionate to the importance of the end sought.

3. The domestic political situation allows the use of the military instrument.

In a formal sense, this position can be regarded as the mirror image of the Brezhnev doctrine and its successors. The difference lies in the purposes for which intervention is sanctioned--an extension of the communist bloc in one case as against a defense of the Free World, (I do not apologize for the use of this term or put it in quotation marks) and its moral values on the other. Needless to say, in this brief presentation I cannot elaborate upon my assessment of the moral differences between the two political systems involved. I will limit myself to putting forth some necessarily compressed arguments in support of my choice of conditions for a morally justified intervention.

Condition 1: A Vital National Interest and/or Resistance to the Forcible Imposition or Perpetuation of a Tyrannical Regime

The concept of national interest (or vital security interests) does not represent a fixed point of reference nor does it provide the statesman with oracle-like guidance for action. Decision-makers see the national interest through the fallible spectacles of their subjective judgment and in making determinations of dangers and interests they are liable to make mistakes. The assessment of the

⁴Irving Kristol, "Consensus and Dissent in U.S. Foreign Policy," in The Vietnam Legacy: The War, American Society and the Future of American Foreign Policy, ed. Anthony Lake (New York: New York University Press, 1976), pp. 95-6.

geopolitical importance of Vietnam and Southeast Asia by American leaders from 1950 on was an example of such misjudgment. At the same time, the conduct of foreign policy cannot dispense with a yardstick that can be used to rank and evaluate the importance of allies, pieces of territory, or raw materials crucial for a country's long-term interests and well-being.

There may be differences of opinion as to whether, say, the Panama Canal is a critically important strategic waterway for the United States that has to be defended. On the other hand, many times decision-makers will have no difficulty in reaching a unanimous judgment. For example, at the present time there appears to be general agreement that the Strait of Hormuz at the entrance to and exit from the Persian Gulf, through which must move a preponderant part of the Western World's oil supply, represents a vital security interest that must be protected, if necessary by force of arms. A communist-sponsored insurgency in Oman, a small country that controls the strait from the south, or a communist-directed "war of national liberation" aiming at the establishment of a communist state of Baluchistan that could choke off access from the northern side, might therefore create situations where a U. S. (or preferably a Western) military intervention could be necessary and justified.

Even when an insurgency does not take place in or around a territory of crucial geopolitical importance a moral justification may exist for military intervention. When another foreign state or states intervene in a civil war in order to help install an oppressive regime, as did the Axis powers in Spain in the 1930's, the U. S. (all other conditions being fulfilled) should engage itself on the side of the forces of democracy. Similar considerations dictate help to the Afghan rebels now seeking to repel the imposition of a communist regime, even though a non-communist Afghanistan may not live up to our own standards of political liberty. Whether the U. S. should support an incumbent government or insurgents should depend on the justice of their respective causes.

Finally, there are the situations when human rights are violated on a systematic and massive scale. Civil wars are notoriously brutal, though barbarities of genocidal proportions fortunately are the exception rather than the rule. But when the latter do occur, as happened during the secession of East Pakistan (Bangladesh) in 1971 or in the case of Idi Amin's regime in Uganda or that of Pol Pot in Cambodia, a moral obligation arises to prevent or minimize such outrages. I agree with Michael Walzer who states: "Humanitarian intervention is justified when it is a response (with reasonable expectations of success) to acts 'that shock the moral conscience of mankind'."⁵

Condition 2: Probability of Success at Reasonable Cost

The foreign policy of a democracy should not be based on "Realpolitik" to the extent of ignoring all moral considerations. Our own self-respect and concern for the principles for which this "first new nation" stands requires that our conduct in international affairs be infused with a moral purpose. By linking the national

⁵Michael Walzer, Just and Unjust Wars (New York: Basic Books, 1977), p. 107.

interest to the defense of human dignity and freedom we may increase the nation's reputation as well as its influence in the world; a reputation for justice will carry pragmatic rewards. At the same time, we must beware of the dangers of a "moralizing" foreign policy that ignores considerations of prudence and power and satisfies a crusading impulse without regard to the risks and costs involved.

As concerns the moral legitimacy of American intervention in revolutionary/counterinsurgency wars, this means that a just cause is a necessary but not a sufficient justification for our involvement in such conflicts. There must exist a reasonable probability of success, for a statesman who squanders human lives and treasures for the sake of a moral gesture acts irresponsibly as well as immorally. Since policy-makers have to act on incomplete information and uncertain assumptions there will always be dangers of failure. There are risks attached to action as well as to inaction, to using too much power and too little power. A reasonable probability of success is therefore all that can be demanded.

Among the most basic requirements of success is undoubtedly a willingness on the part of the people we seek to aid to help themselves. "Outside effort," Henry Kissinger stated, following the defeat of South Vietnam in 1975, "can only supplement, but not create, local efforts and local will to resist. . . . And there is no question that popular will and social justice are, in the last analysis, the essential underpinnings of resistance to subversion and external challenge."⁶ The ignominious collapse of the South Vietnamese armed forces, it must be acknowledged, was due not only to an inferiority in heavy weapons and a shortage of ammunition, but in considerable measure was also the result of lack of will and morale. The questions of how best to build military morale, how to encourage internal political cohesion in a new nation, and what kinds of military tactics to use in a counterinsurgency environment raise complex issues that are beyond the confines of this discussion and with which I have dealt in detail in another place. Here it must suffice to mention the importance of learning the correct lessons of Vietnam and of avoiding the fallacious historicist conclusion that communist insurgencies are invincible.

Other factors increasing the likelihood of success will include the endeavor to work with, and not against, the spirit of nationalism. In the case of Vietnam, the communist side benefited from the fact that it was seen fighting for the unification of Vietnam, while the government of the South suffered from the charge that it favored the partition of the country. In the eventuality of a communist-inspired war of national liberation aiming at the political unification of the Baluchi people now split up among Pakistan, Iran, and Afghanistan, U. S. counteraction committed to the preservation of the status quo would undoubtedly face heavy odds. If we add to that our limited knowledge of the region--it has been reported that our foreign service does not include a single Baluchi-speaking person--any recommendation of intervention on geopolitical grounds should probably be treated with great caution. For similar reasons, a recent Defense Department report "Capabilities in the Persian Gulf," has questioned U. S. competence to assist states such as Yemen and Oman in guerrilla-type conflicts.⁷

⁶U.S. Department of State, Henry Kissinger Before the Japan Society, Department of State Publication 1880, pp. 3-4.

⁷Richard Burt, "U.S. Sees Need for Nuclear Arms to Repel a Soviet Attack on Iran," New York Times, 2 February 1980, p. 1, cols. 1-2.

The moral calculus should include not only the probability of success, but also an estimate of the price to be paid in terms of human lives, financial costs, and domestic and international political repercussions. Our failure in Vietnam points up the great difficulty of anticipating what the costs of intervention may ultimately come to. To be sure, a major war among the big powers was avoided and, despite the fears of many, American relations with the two main communist powers--the Soviet Union and the People's Republic of China--were not damaged irreparably. Yet, there can be little doubt that the four presidents who had to deal with the increasingly intractable Vietnam problem--Truman, Eisenhower, Kennedy, and Johnson--would have acted differently had they been able to foresee what the eventual costs of U. S. intervention would be.

One of the important lessons of Vietnam is thus clear in principle. A good cause is not worth any price. But the application of this principle to concrete cases will always be difficult and much will depend on the intrinsic importance of what the intervention in question is trying to achieve or prevent. Many critics of the American intervention in Vietnam argued at the time that the methods employed in the counterinsurgency effort were morally so reprehensible that this involvement had to be stopped regardless of political costs. "All sorts of dire results might well follow a reduction or a withdrawal of the American engagement in Vietnam," noted the sociologist Peter Berger in 1967. "Morally speaking, however, it is safe to assume that none of these could be worse than what is taking place right now." Writing in early 1980, Berger acknowledged that he was no longer sure that the cruelties and crimes on the American side had been as pervasive and systematic as he had believed in 1967 (neither was he sure that the opposite was true), but he was convinced that he had been badly mistaken in estimating the consequences of the American withdrawal from Indochina. "Contrary to what most members (including myself) of the anti-war movement expected, the peoples of Indochina have, since 1975, been subjected to suffering far worse than anything that was inflicted upon them by the United States and its allies."⁸ In the final analysis, then, one is reduced in such cases to a balancing test that involves the weighing of relative evils, relying on the best evidence and foresight available. A very strong and just cause will tend to balance out negative elements on the side of costs and collateral side-effects, while a less clear-cut moral end should dictate greater scruples in the choice of morally dubious means.⁹ This use of a sliding scale, I should add, is not meant to suggest that a just cause vindicates the deliberate disregard of jus in bello rules, i.e., resort to clearly immoral methods of warfare.

Condition 3: Domestic Political Support

Just as a responsible statesman cannot disregard the objective prerequisites of success, so a decision-maker in a democratic society must take into account the domestic political environment in which he operates. There was a time when the mass of the people were deferential to any official definition of the national interest and

⁸Peter L. Burger, "Indochina and the American Conscience," Commentary, February 1980, p. 50.

⁹This point is well made by William V. O'Brien in his thoughtful U.S. Military Intervention: Law and Morality, The Washington Papers, vol. VII, no. 68 (Beverly Hills, Calif.: Sage Publications, 1979), pp. 38-39.

of the objectives of foreign policy. For good or for bad, this situation no longer holds in a modern democracy. Moreover, the experience of Korea and Vietnam demonstrates that the willingness of a democratic people to support a limited war is precarious at best, and that when such a war for limited objectives drags on for a long time it is bound to lose the backing essential for its successful pursuit. America's moralistic approach to world affairs creates special difficulties in the case of intervention in a revolutionary war on the side of an incumbent regime for Americans are uneasy about being identified with governments striving to suppress rebellions. "We tend to suspect that any government confronted with a violent challenge to its authority is probably basically at fault and that a significant number of rebels can be mobilized only if a people has been grossly mistreated. Often we are inclined to see insurgency and juvenile delinquency in the same light, and we suspect that, as 'there is no such thing as bad boys, only bad parents,' so there are no bad people, only evil and corrupt governments."¹⁰

The mixture of compulsion and propaganda which a totalitarian regime can muster in order to extract popular support for military intervention abroad is not available to the leaders of a democratic society. American statesmen, therefore, face the extremely difficult task of providing a justification for such interventions that will convince a citizenry skeptical of official explanations and wary of foreign involvements that do not succeed fast. Yet, without such domestic support, we are bound to repeat the tragedy of Vietnam where more than 50,000 Americans (and a far larger number of South Vietnamese) died with hardly any positive accomplishments to show for it.

In the wake of Vietnam and Watergate, America today is afflicted with a serious loss of self-confidence. Important elite groups have convinced themselves and others that the exercise of American power abroad is one of the main sources of evil in the contemporary world. Whether the American people can regain a sense of pride in the values of their own society and rebuild in time the battered shield of American power only time will tell. One of the essential elements of such a regeneration of American strength and spirit will have to be clear moral thinking about what constitutes just military intervention abroad. The ability and willingness to use military force, in turn, may deter hostile foreign behavior and thus will be an important contribution to stability and peace.

¹⁰ Lucian W. Pye, Aspects of Political Development (Boston: Little, Brown & Co., 1966), p. 131.

MILITARY INTERVENTION IN CIVIL WARS

Telford Taylor

Professor Lewy has opened the discussion of this morning's subject by striking a note of realism. Especially under present international circumstances, I think that is entirely appropriate and indeed necessary. I agree with much of what he has said, and I accept in principle his basic position that, in view of the lack of reliable machinery for collective action under the United Nations Charter, America's vital interests may require resort to self-help, and the use of armed force outside the provisions of the Charter.

In line with the moral theme of this symposium, Professor Lewy has addressed the moral aspects of such intervention, in a world of nations whose relations in terms of war and peace are not governed by law--a world which he describes as being in a "state of nature." He is certainly right that neither civil nor international strife in today's world is subject to an enforceable rule of law and, as I have already said, nations may therefore find it necessary to use self-help.

I would like to interpolate at this point a matter arising out of the session here yesterday afternoon. And for the benefit of those unfortunate enough not to have heard that discussion, Professor Brandt, in supporting his thesis that there are circumstances under which the use of nuclear weapons may be justified, based his position in part on the statement that, in a confrontation between ourselves and the Soviet Union in Europe, our cause would be a just one and theirs would not. Professor Nagel, in commenting on that, rightly pointed out that, however much all of us might agree with Professor Brandt's assessment, that is hardly a position that we would expect the Soviet Union to accept. Therefore, Professor Brandt was not putting forth a general principle which was capable of agreement on a world-wide basis.

I think the same is basically true of Professor Lewy's presentation this morning, because his justification for the principles of intervention that he has stated is again quite frankly based on the difference between intervention in support of expanding a communist bloc, or intervention to repel that and protect the areas of the free world. I say this really not in criticism of Professor Lewy's presentation because I do not think that he set out to frame a set of standards to which one might expect the Soviet Union to accept. I agree with Professor Nagel that the pursuit of standards of possible general acceptance is very important and should not by any means be abandoned, but in line with the principle of "first things first," or "its a situation and not a theory that confronts us," or any number of other bromides that I'm not going to inflict on you, I think it's right that we should pay attention to the immediate problem, which is that the likelihood of agreement with the Soviet Union on an objective set of standards for intervention is not presently in the cards.

Returning now to Professor Lewy's presentation, the basis of my position is that the nations do not live in a pure state of nature. Unlike the beasts of the jungle, mankind is forever talking about, and even doing something about, the extension of law to govern quarrels and disagreements among nations. The effective rule of international law is still a remote prospect, but the talk and the deeds--in modern times focussed in international organizations such as the League of Nations and the United Nations--are part of the contemporary scene, and they considerably influence

the play of both force and morals among the nations. My essential point is that we cannot intelligently apply Professor Lewy's standards and criteria, or undertake the formulation of others, without taking careful account of these legal and quasi-legal phenomena.

Thus, while I generally agree with the substance of Professor Lewy's set of standards, I am troubled by their immediate prelude, in which Professor Lewy declares that military intervention in accordance with standards "is morally justified, whatever the legalities of the situation." As a conceptual matter, I do not believe that law and morals can be so casually thrown into separate compartments. And as a practical matter, legal considerations may weigh heavily in determining the "probability of success," or the "oppressive" character of a regime, or even the existence vel non of a "vital" national interest.

Now, I am well aware that the validity, including the consistency, of my position is by no means self-evident, and that I must give it some foundation before decorating the superstructure. Are legal prohibitions as flexible as all that? Is there any logic or policy in a system under which those affected by the law are entitled to weigh its importance, and disregard the law if, in their judgment, considerations of morals or policy outweigh the law? And, if we look either at the classic texts on international law or at the Charter of the United Nations, do we not find, in the former, explicit injunctions against aid to either side in civil strife once the insurgents are recognized as belligerents, and, in the latter, prohibition of intervention in matters of domestic jurisdiction and of forceful violation of the territory or independency of any state?

There is distinguished support for the point of view that, from these sources old and new, we can extract only a very rigorous set of prohibitions against intervention of civil strife.¹ But, I believe that this absolutist position is based on unsound premises. Furthermore, I believe it can be shown that the gulf between law and morals or policy in this context is not so wide or unbridgeable as is often supposed and, as it seems to me, Professor Lewy assumes.

Looking first at the classic writings, such as those of Oppenheim, Lauterpacht, Hodges, and many others, it is true that one finds, in varying forms, the general statement that civil war, as long as its course threatens no other nation, is an internal or "domestic" matter from which other nations must, in law, stand aloof. But, these pronouncements must be read in the context of other passages in which exceptions to the rule--including self-preservation, maintenance of the balance of power, and the prevention of atrocities--are discussed sometimes with approval. The negative views of these writers of past generations are by no means unanimous or unqualified and, great as is the respect in which some of them are held, these are learned opinions, but not treaties or collective declarations of an official nature.

Much more important, however, is the fact that these writings are the product of a period when war was regarded as a lawful means of achieving national objectives. Our own Army's famous General Orders No. 100, drafted by Dr. Henry Lieber, then of Columbia University, and promulgated in 1863, speaks of war not as something unlawful, but as "the means to obtain great ends of state, or . . . defenses against

¹See, e.g., Bowett, "The Interrelation of Theories of Intervention and Self-Defense," in Law and Civil War in the Modern World, ed. J. N. Moore (Baltimore: The Johns Hopkins Press, 1974), pp. 38-50.

wrong," and this remained the accepted view at least until after the First World War and, in some quarters, much longer. Oppenheim himself described intervention as "de facto a matter of policy just like war."² Thus, an intervention could always be "legalized" by a declaration of war, a device actually resorted to by Great Britain and Germany during the Venezuela dispute in 1901. The point has been cogently made by the late Professor Brierly:³

. . . the extremist form of intervention is war, and until recently modern international law . . . has not attempted to distinguish between legal and illegal occasions for making war . . . there was a certain unreality in attempting to formulate a law of intervention and at the same time admitting, as until recently it was necessary to admit, that a state might go to war for any cause or for no cause at all without any breach of law.

Viewed closely, therefore, these pre-1945 condemnations of intervention do not really label it as intrinsically unlawful, but as unneutral. If a nation wished to preserve a state of neutrality with both the incumbent government and the insurgent belligerent, it had to stay out of the quarrel. Thus, prior to 1945, the law of intervention is really part of the law of neutrality rather than the law of war.⁴

The benchmark year is 1945, which witnessed the international adoption of the United Nations Charter, and of the London Agreement under which the Nuremberg trials were held. Both of these documents condemn and purport to render unlawful the initiation of aggressive wars, and both recognize, explicitly or implicitly, the right to use force in self-defense. The United Nations Charter embodies an international agreement that disputes be peacefully settled and that breaches of the Charter be dealt with by collective action through the United Nations Organization, as well as the prohibition of interference in matters within a state's domestic jurisdiction. I think it is beyond argument that these documents worked a fundamental change in the legal structure of international society, that the provisions I have mentioned constitute binding international law to the full extent that any international agreement constitutes law, and that the United States Government is fully committed to observance of these limitations upon the use of force.

But, the foregoing statement of the problem is incomplete; indeed, it is only a beginning. The framers of the Charter saw clearly enough that the Organization might disintegrate should the Security Council embark on collective forceful action over the objection of one or more of its Great Power members, and the so-called "veto" provision (Article 27) was adopted as a guard against that hazard. However, the result is that there may be, as there have been, situations in which collective enforcement through the United Nations is, in effect, embargoed. And the "uniting for peace" resolutions of the General Assembly, adopted during the Korean War, go only a very little way toward coping with that difficulty.

²Lauterpacht, as editor, struck this passage from the fifth edition of Oppenheim's International Law, on the ground that he thought it inconsistent with other passages. See the fifth edition, vol. I, p. 256, footnote 3.

³J. L. Brierly, The Law of Nations, 5th ed. (Oxford: Clarendon Press, 1955), pp. 308-9.

⁴See Oppenheim, 7th ed., vol. II, pp. 659-60, for an implicit acceptance of the above analysis.

Well aware of these probable consequences, the Charter framers recognized (Article 51) the "inherent right of individual or collective self-defense" against "armed attack," as well as (Article 52) "regional arrangements" for dealing with "matters relating to the maintenance of international peace and security" which are "appropriate for regional action." The Charter, thus, explicitly envisages the legitimacy of individual or group resort to force outside the Charter's enforcement provisions.

But, "outside" does not mean "in conflict with" the Charter. Nothing in Articles 51 and 52 or elsewhere absolves states acting outside the Charter from respecting the purposes on which the Charter is based and its prohibitions against acts of aggression and other breaches of peace. From a legal standpoint, the question is whether these limiting provisions stand in the way of American actions of the type which Professor Lewy and others--including myself--would regard as pragmatically and morally justified. In my opinion, they do not.

There are, of course, problems in construing the general language of the Charter, and Professor Lewy laments the lack of "workable definitions" of "self-defense" and "aggression." If by "workable" he means "self-defining," of course he is right for these are words denoting abstractions, the application of which in particular instances will forever arouse disagreement. But, that is a failing which afflicts many specifications of prohibited or protected conduct, as every lawyer knows. "Aggression" and "self-defense" are not meaningless concepts, and they are no less precise in contour than "negligence," "reasonable care," "due process of law," "equal protection," or "obscenity," to name only a few of the phrases that courts constantly wrestle with.

The primary difficulty is not with the wording of these provisions, but the lack of any interpretive and enforcing authority which law-abiding nations will respect and other nations fear. It is idle to expect the emergence of such an authority in the foreseeable future, and therefore, in the present turbulent state of international relations, and considering that the United Nations' actions are now generally restricted to investigative and conciliatory means, we must expect continuing use of armed force, which those using it will seek to justify under Article 51, and those opposing it will condemn under paragraphs 4 and 7 of Article 2. Some of these justifications will be transparent, some debatable, and perhaps some well-founded. The judgments passed on these episodes by both the countries involved and the on-lookers will be subjective and heavily influenced by ideological and bloc viewpoints.

In looking for objective factors to bring to bear on the interpretation and application of these Charter provisions, such as "domestic jurisdiction," "threat to peace," and "act of aggression" there are two factors I would like to stress. The first is that, in recent weeks, official spokesmen for the Soviet government, including General Alexsei Yepishev (Chief of the Political Department of the Soviet armed forces) and Stepan Chervonenko (Ambassador to France) have proclaimed not only extension of the so-called "Brezhnev doctrine" to friendly communist regimes anywhere in the world, but also the use of armed force to overthrow "bourgeois" governments.⁵ This is flagrantly contrary to the Charter stipulations and, indicating as it does that the march of communism backed by force will be always an advance and never a retreat, greatly increases the risk to the security of other nations and the degree of threat to peace inherent in any Soviet intervention, such as in Afghanistan.

⁵See the New York Times for April 12 and 22, 1980.

The second factor is that, despite the mention of "armed attack" in Article 51 of the Charter, the right of self-defense should not be regarded as triggered only by such action.⁶ The world is much more tightly knit economically than it was when the Charter was adopted, and action involving no armed force may sometimes be more lethal than an armed attack. Whether or not within Iran's technical capacity, it appears to be possible to block the Strait of Ormuz (mentioned by Professor Lewy) by means of sunken ships. That, or stopping the flow of Mideast oil by other means, might not only be economically disastrous to other nations, but also soon render them virtually defenseless, and would, I believe, furnish a basis for collective counteraction under Article 51.

In summary, I think it possible and indeed probable that the United States, in shaping its policies, will not have to face a conflict between morality and legality. The United Nations Charter is more like a Constitution than a municipal ordinance; many of its provisions are like those in our Constitution that have been called "magnificent generalities," the intent of which is to provide a basis in the future, with changing circumstances, to do what needs to be done to preserve the essential structure intact.

In presenting this point of view, by no means do I suggest that our country should throw its military weight around except in circumstances of clear necessity. I would not countenance the cynical notion that because the Charter provisions are general they can be bent to any desired purpose. Use of the word "intervention" does not obscure the fact that intervention by force of arms, unless the victim is both friendless and too weak to offer resistance, means war. Geopolitics is an even less exact science than domestic politics, and even unopposed interventions may entail ultimate consequences adverse to the intervenor.

For 60 years, the nations have been in search of a more stable international order through international organization. The very fact that these efforts persist, despite the discouraging course of events, bears witness to the depth of feeling which animates the aspiring architects. Why else do men of intelligence, with wide and varying opportunities for investment of their energies, carry on the work of shaping declarations and norms for the governance of international relations? Despite the ambiguities in the General Assembly Declarations of 1965 and 1970,⁷ the general thrust of these unanimously adopted resolutions is unmistakably anti-interventionist.

Now, I would like to say just one further word arising out of something that happened at our meeting last night. One member of the audience, a cadet, put a question to Professor Barrett asking him to give an assessment of the relative dangers of communism and nazism. And with all respect for Professor Barrett, it seemed to me that the question deserved a reply more extensive than he gave which in substance was they're both bad enough so that there's no need to worry about which is worse.

It seems to me that the importance of the question doesn't lie in trying to strike a balance of evil here, but in noting differences which are very important and, I think, pertinent to our present subject.

⁶See the discussion of this point by Sir Humphrey Waldock in Brierly, The Law of Nations, 6th ed. (Oxford: Clarendon Press, 1963), pp. 417-18, the thrust of which appears to be unanswerable.

⁷General Assembly Resolutions 2151 (Dec 21, 1965) and 2625 (Oct 24, 1970).

If you look back at the situation in 1933 when Hitler took power and compare it with the situation in 1917 when the communist regime in Russia took power, the differences are extraordinary. Hitler came into power in a country which was heavily industrialized and possessed a large, well-educated middle class, very extensive professional and technological resources, an extraordinary military history, and an officer corps of acknowledged competence. The communist authorities in Russia came into power in a country which indeed had a thin layer of very expert artists, intellectuals, engineers, scientists, and others, but it was very thin indeed. Russia was underdeveloped, and had a low level of general education and very scant technological resources.

What did the two countries do with what they had? Of course the Germans created a military striking force of extraordinary strength, but with very short staying power. Why was it that Britain, with far less resources than Germany, was able in 1940 to pass Germany in the production of aircraft? Why was it that when Albert Speer took charge in 1943 of the war economy he was able to pick things up so much? It was because there was so much slack in the system; because the organization for war under the Nazis had been very superficial, typified by the lack of reliance on the industrial power of women, and many other things that could be mentioned.

In contrast to that, despite all their disadvantages, the Soviet Union has built up an enormous, well-equipped, and highly technicalized military machine. More important than that, they have a decision-making procedure far better than anything like the impulsive, now brilliant, now blind, sort of decision-making that the personality of Adolf Hitler produced.

Therefore, in terms of the degree of threat, it seems to me there is no comparison between the two. The threat from communism, organized the way it is, is far the greater. Even more important than that is the fact that there was very little of nazism that had appeal much beyond Germany's borders--some, while there are proclaimed values in communism that have a deep and wide appeal. Why did we have the proliferation of those who were called, at the time, "fellow travelers" in the 30's? Because there were many who had no interest in violent revolution, but regarded the communist party as offering the only road to stable race relations, unionization, and other social goals. Many of these values are still proclaimed by communism. It has a wider intrinsic appeal. And, coming more to the present, the Soviet Union has been much shrewder than we have in its sensitivity to and ability to exploit the worldwide move toward national self-determination, and nationalism in general. Thus, we have been repeatedly cast in the position of seeming to back the incumbent against the insurgent, the immediate regime against the revolutionary nationalist aspirations of others.

This is obviously a factor which we haven't yet overcome, a factor which we must take account of in assessing not only the prospect of success in the military sense, but also the probable reaction in the rest of the world.

Part of the opinion of the rest of the world is embodied in the United Nations and the prohibitions the Charter embodies, and in conclusion, therefore, I suggest that the value of due regard to the purposes and spirit of the Charter is not only legally and morally valid, but also is eminently practical as a matter of enlightened self-interest.

MORALITY AND MILITARY INTERVENTION

Marshall Cohen

I will argue that, at the present time, the heavy presumption against intervening in the affairs of another state, especially by military means, is very difficult to overcome. This is not to say that it cannot be overcome. Many writers who defend a position of this sort rest the case very largely on their view that people have a moral right to self-determination or to what Michael Walzer describes as a government they can call their own. Unquestionably, these considerations carry considerable weight, whether one thinks of them as instantiations of a more general right to liberty or as a direct consequence of a right to live in a community of one's own choosing. But, even where these principles are actually realized in the life of a state, they are capable of limitation. After all, a state may constitute an active threat to the liberties of another, or it may be engaged in actively frustrating or abridging them. Then, too, it is often far from plausible to argue, in the case of some states, that they realize in practice the moral principles that supposedly provide the moral foundations of their sovereignty. Sovereign states often engage in acute, and even in obscene, denials of freedom to their citizens, and the claim that states give legal or political expression to a genuine community is often a cruel and ridiculous fiction. In particular cases, then, a state's claim that it should be free of interference because it protects important moral rights of its population (I do not say its citizens) while honoring the moral rights of others, may be much weaker than many champions of the policy of nonintervention suggest or are willing to presume. I believe, in contrast, that often enough the moral argument in favor of such a policy carries conviction only when we supplement it with certain other considerations. One of these considerations is our moral obligation to conform to, and contribute to, the strengthening of the regime of international law. In contrast to Professor Lewy, I accept the reality, and acknowledge the seriousness, of our anti-interventionist commitment under the U.N. Charter and under various Pan American treaties. I emphatically reject Lewy's view that because international society is without effective government it is in a state of nature either in the sense that it is without law or in the sense that it is literally in a state in which there is a war of all against all. In the present circumstances of international society, it seems to me that a great and morally serious nation has a weighty obligation to strengthen the rule of international law and to do so even in situations in which this may involve a measure of self-sacrifice. In addition to moral considerations that derive from our commitment to a regime of international law, I would add to the list of anti-interventionist considerations the moral prohibition on creating disproportionate risks of immense suffering and death to vindicate some otherwise acceptable or even highly desirable moral principle or policy. In a time when military interventions often court the risk of a super-power confrontation, with the attendant risks of military escalation, this is often a consideration of immense moral weight (and it is one that did not figure in anything like so important a way in nineteenth-century discussions of the topic like John Stuart Mill's). Needless to say, the ever-present threat of a nuclear confrontation also provides powerful prudential reasons for eschewing a policy of military intervention where this may seem, otherwise, to be in our interests or defensible, or even required, on more disinterested moral grounds.

It will be useful, at this point, to review some of the considerations that can argue in favor of an intervention in the affairs of a foreign state. Among those which have traditionally been considered the strongest are (1) an intervention to aid oppressed or seceding nationalities (what would now be called wars of national liberation), (2) humanitarian interventions either to protect one's own nationals (or property) or to rectify situations that "shock the conscience of mankind" and (3) counterinterventions designed to restore the status quo ante the original intervention.¹ More recently, and shaped in part by the legal regime of the United Nations, arguments have been made for interventions where internal situations (particularly racial situations) are deemed to constitute threats to world peace. Increasingly, too, many writers have been arguing that interventions would be justified on the thoroughly non-traditional ground that a regime denies basic political and even welfare rights to the population that is subject to it. Each of these arguments seems to me to have very great weight and, if only the moral arguments supporting state sovereignty counted against them, they would often be strong enough to make the case for intervention.

But, as I have said, those are not the only moral considerations that weigh against an intervention. We were, I think, right to refrain from counterinterventions in the cases of Czechoslovakia and Hungary because of the intolerable risks that we would have run both for the Czechs and Hungarians themselves and for the world at large. I think that similar considerations should have prevented, or sharply limited, our Vietnamese intervention even if we think of it, somewhat dubiously, as a bona fide invitational intervention. But aside from what might be called first order moral considerations (and I am far from having suggested them all), there are those second-order moral considerations that derive from our obligations to support the present international legal order with its sharp limitation on military interventions. Any illegal intervention, no matter how justifiable it may be when considered on its own moral merits, sets a precedent for the violation of international law. It also compromises the moral position of any nation that performs such an action and makes it less eligible to criticize the actions of another, perhaps more flagrant and less defensible violator (our recent incursion into Iran, however attractive and otherwise justifiable, has had this effect and has helped the Soviets deflect some of the moral disgust aroused by their Afghanistan adventure). I believe, too, that the present international rule against the unilateral use of force is a very strict one with very narrow exceptions. The interpretation of this rule is, however, a matter of considerable controversy, and I do not think it wise for us to contribute, either by our actions or by our arguments, to greatly broadening the exceptions to that rule. I disagree with Professor Walzer that a rule with very narrow exceptions is as easily abused (and seen to be abused) as a rule with many (and broader) exceptions. And the virtue of a strong rule with narrow, clearly defined exceptions is all the greater in the strained circumstances of international politics. The infrequency of adjudications in international law also adds to the value of this sort of rule. We need only mention some of the abuses which the traditional exceptions have suffered to see that a rule permitting the use of military force only in situations of clearly defined self-defense would have been much harder plausibly to abuse. Hitler's intervention in Czechoslovakia was ostensibly in defense of the right of self-determination of the Sudeten Germans; the classical humanitarian interventions were characteristically those of strong states pursuing interests well beyond those that might seem to justify them (the United States in Cuba in 1898; the Great

¹Michael Walzer, Just and Unjust Wars (New York: Basic Books, Inc., 1977), pp. 86-108.

Powers and Japan in China in 1900), and one of the main justifications the Soviets offer today for their intervention in Afghanistan is that it is itself a counter-intervention designed to offset a prior imperialist intervention. Certainly, to make a different point, it would have been wholly implausible to justify these interventions as actions of self-defense, especially so on the Charter's rigorous--perhaps excessively rigorous--conception of self-defense.

We must acknowledge that some interventions that would be otherwise justifiable, and even highly desirable, will offend against present international law. But it is important in this connection to remind ourselves of a general point that is often forgotten in discussions of this subject. In accepting a legal rule we must often forgo the liberty of acting as we would otherwise like to do, or as it might otherwise be morally desirable to do. To see this, one need only consider our own strong rules in favor of freedom of speech or against assault in municipal law. In accepting these strong rules, we agree to refrain from doing what it would otherwise be morally desirable to do. We must refrain from silencing an irresponsible speaker who may in fact be causing considerable pain or harm, and we must refrain from responding with physical force to those who may very well deserve to be met with physical force. In accepting a particular legal regime, we often renounce the right to do what in its absence, or given a different set of rules, would be right to do. And I believe that this general truth survives whatever fundamental differences there may be between an effective municipal system and the present relatively ineffective regime of international law.

So, despite the moral desirability of successfully executed interventions that really satisfied the moral criteria underlying the traditionally recognized (and the more recently suggested) exceptions to the rule against interventions, I think that at the present time international society is better off with a strong, clear rule (in the Charter spirit) forbidding unilateral interventions, and I believe we should support such a rule.² As a nation we have much to gain by such a course. We have, I believe, often overestimated the value of our own interventions because we have exaggerated the dangers posed to us by nationalist and left-wing regimes while underestimating both the costs and dangers of intervention from both a military and a political point of view. More generally, I think our international position today would be stronger than it is if we had been more restrained in our behavior and more punctilious in our support of international law. While my view of international law is in general much closer to Professor Taylor's than it is to Professor Lewy's, I do think there is a greater possibility than Professor Taylor admits of conflict between what international law now permits and what it might otherwise seem morally desirable to do. Some of this conflict is, I believe, inevitable in any workable legal regime, but where some loosening or alteration of the Charter rules seems desirable, I think we should attempt to alter those rules or even to repudiate them. This is preferable to making the hypocritical claim that we are conforming to them when it is plain for all to see that we are not. Such a course is morally preferable and in the long run more likely to encourage the successful development of international law. None of what I have said is meant to suggest, however, that in present circumstances we

²As against the views of those like Bowett and Waldock that Taylor seems to think "unanswerable" see the answers given in Brownlie, Ian, International Law and The Use of Force by States (Oxford: Clarendon Press, 1963), pp. 424-36.

should reject absolutely the possibility of a unilateral military intervention. There will be some humanitarian causes to which we must respond if we have a reasonable chance of success. And we cannot prostrate ourselves before an endless succession of Russian-made Trojan horses. In saying this I am, nevertheless, very far from accepting the principles for an acceptable intervention that Professor Lewy has sketched, and I shall conclude by commenting on them briefly.

Even where Lewy's second and third conditions are met, the alternatives mentioned in his first condition seem to be far too liberal as conditions for a justifiable, unilateral intervention. Thus, the mere fact that "a vital geopolitical national interest" of the United States is thought to be at stake will not justify an intervention. The idea of a vital national interest is, obviously and notoriously, a notion of extreme vagueness. Even those who understand it in a narrow way take it to cover far more than matters of self-defense and, indeed, far more than Professor Taylor would seem to allow (I therefore find his accommodating remarks about Professor Lewy's views somewhat misleading). Professor Lewy's unapologetic rhetoric about Communism and the Free World invites the suspicion that anything that frustrates the advance of Communism or contributes to strengthening the Free World, is likely to be thought of as constituting a vital national interest. And if he doesn't, others certainly do. But what is the moral foundation of such a view? Is it morally proper to do anything that is vital to one's personal interests? If not, why should the collective equivalent be morally acceptable? Will this doctrine justify military interventions to protect economic interests that are important to us--even if our economic interests are unfair and contrary to the economic interests of those we use force against? Does this doctrine suggest that it is morally acceptable for us to support oppressive regimes that cooperate in our "security" arrangements? Does it justify us in intervening to support a regime that the black majority rejects in South Africa or that Moslems reject in Lebanon? Would it have justified us in intervening in the civil war in Kuomintang China? It seems plain to me that often such actions are not morally justifiable and even more often that they are not in our long-run self-interest either.

Professor Lewy's alternative condition is certainly more attractive, though it, too, raises many difficult questions. He would permit us to intervene where another power is attempting to impose an oppressive force upon a people who are unable to defend themselves without U.S. aid. Again, there is great difficulty in construing the key term. There is considerable disagreement--and not only between the Communist and the Free World--about what constitutes "oppression." What to one man is political oppression may to another, especially to one in other circumstances, constitute economic or cultural liberation. Even where there are no problems about the "domain" of oppression, there are difficulties with Lewy's formulation. Surely, he must say that the regime for which we intervene if it is not a liberal one must at least be less oppressive than the one that is being imposed. For, if we take him literally, we could intervene where we were supporting a regime just as oppressive, or even more oppressive, than the one we are opposing. An intervention in favor of Pol Pot against the Vietnamese might be of precisely this sort, and I hesitate to think of the military dictatorships that we might (and sometimes have) supported against left-wing authoritarians on the basis of doctrines like Lewy's. In fact, in many cases in which we have wanted to intervene (in the national interest? against an oppressive regime?), there has been no outside oppressor, and Professor Lewy's second condition will

not do the work many (including Professor Lewy?) would like to do. There was no outside oppressor to trigger our intervention in Chile, in the Bay of Pigs, in Lebanon.

Professor Lewy's third alternative, permitting intervention where a conflict is accompanied by "systematic brutalities that outrage the conscience of mankind," is unquestionably attractive. If these brutalities do outrage the conscience of mankind, however, we should first try to show this by having it recognized in the U.N. Even if we could not achieve this, I would consider intervening against an Idi Amin although it was obviously preferable for a Nyerere to do it. However, are not many of the attempts of people to achieve political change, and indeed to achieve political freedom of the sort that Professor Lewy in principle supports, guilty of "systematic brutalities"? Is their presence (especially where they are also practiced on both sides) a justification for interventions--and on which side? Would their systematic brutalities (if there were such) justify us in intervening against the Sandinistas, the Algerians, the Jews of the Mandate? Is it clear that there was another way for these people to achieve their freedom? And can we act against them even if it is in our national interest to do so? Most importantly, we should remember that the conscience of much of mankind was shocked by the systematic brutalities that attended our own intervention in Vietnam. Interventions in guerrilla wars will inevitably provide the temptation to precisely such excesses, and this is a factor we must consider when contemplating them.

Professor Lewy's conditions for justifiable interventions seem to me excessively vague and imprecise, and often enough violate both the rules of international law and our own principles of political morality. They seem to me far from acceptable. I would add, however, especially for the consideration of those who find the pursuit of the national interest a more appealing and justifiable principle than I do, that in my opinion most of our recent interventions have not, in fact, furthered the national interest. I would mention, in this connection, the interventions in Lebanon, Cuba, the Dominican Republic, Vietnam and, most recently, in Iran. We ought to remember, more often than we do, that restraint on our part would strengthen our appeal to nationalist regimes in the Third World and South America, and might well compensate us for the occasional setbacks a policy of restraint would inflict. Where a counterintervention is tempting we ought to remember that it may be in our interest, and in the interest of international law, for us to seek neutralization by diplomatic means rather than to pursue a military policy. This is especially so where there is any danger of a super-power confrontation accompanied, as it inevitably is, by the risk of escalation to nuclear war. This grim possibility and the moral consequences that it entails must, unfortunately, be faced in some of the cases that on moral grounds will most tempt us to intervention. This is an inescapable aspect of our present moral situation. Precisely where the moral claims of a military intervention might otherwise seem very strong--as in the cases of Czechoslovakia and Hungary especially--they are in fact morally impossible. This is a conspicuous, and unavoidable, aspect of the moral tragedy of our time.