Thinking about War and Justice: A Reply to Jean Bethke Elshtain

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Professor Elshtain’s thoughts on war and justice recall the idea — made famous by Reinhold Niebuhr — that failure to act can be morally more worrisome than violent action. For Niebuhr, the anarchy that accompanies the use of force is the lesser of two evils when compared to the tyranny that a false peace can permit. ¹ And so, too, with Professor Elshtain: Avoiding conflict with Iraq is to condone a false peace, a “peace of cruelty” that tolerates chicanery before the U.N. and the continuation of tyrannical rule.

The problems to which Professor Elshtain refers — that Iraq has stockpiled weapons of mass destruction in direct defiance of the truce after the first Gulf War, and that Saddam Hussein is a brutal dictator — point to two possible justifications for the invasion of Iraq: to enforce international law and to rescue Iraqis from Hussein’s oppressive regime. Although the latter rationale is more pronounced in Professor Elshtain’s paper, we do well to examine them both, as each has played a role in the recent political and cultural debate.

Let us call these the “legal” and “rescue” rationales for intervention. The legal rationale presumes that states may use force against another state in order to enforce international law, such as U.N. resolution 687 requiring Iraq to disarm after the Gulf War in 1991. The rescue rationale says that states may use force against another state to protect innocent victims within that state from human rights abuses. The rescue rationale comes in two forms. According to one version, states have the right to rescue victims of gross violations of human rights, recognizing that such an intervention violates the “guilty” state’s territorial integrity and political sovereignty. According to the second version, regimes that grossly violate human rights lose their claims to legitimacy and hence their claims to political sovereignty. A regime that tyrannically suppresses individual freedoms is unable to secure popular consent, the basis of the state’s legitimacy and a necessary condition for claiming the right of political sovereignty. On that account, interventions do not violate the principle of sovereignty; it has been forfeited because of a rogue regime’s human rights abuses.

Professor Elshtain’s essay invites us to think carefully about the legal and rescue rationales for armed intervention -- to note their differences and the different rationales within the latter. ² Here I want to sort through some distinctions with an eye not only on Professor Elshtain’s argument but on President Bush’s justification for invading Iraq. In his speech to the nation on March 17, President Bush refrained from appealing to the idea of political legitimacy as a basis for the allied invasion. But in my view, questions of political illegitimacy lie at the heart of the Bush initiative. Whatever the stated reasons for invading Iraq, the Bush administration pursued a regime change on the premise that Hussein’s rule was illegitimate and that an illegitimate state can make no appeal to the moral claims surrounding political sovereignty as a basis for condemning military aggression. But such reasons could not be made explicitly. Appealing to political illegitimacy would have been embarrassing to Bush’s political standing in the United States, and it would have generated expectations (or fears) that Washington would pursue regime change in other rogue states. Hence a certain murkiness about American purposes and principles – both in the White House and beyond.

¹ Reinhold Niebuhr, Christianity and Power Politics (New York: Charles Scribner’s Sons, 1940), chap. 1.
² Like Niebuhr’s work on war, Professor Elshtain’s argument here focuses on the jus ad bellum — whether and on what terms states have a right to go to war. But unlike Niebuhr, Elshtain draws on an understanding of universal human rights that would provide a basis for thinking about the proper means of war, the jus in bello, in the invasion of Iraq. In bello judgments lie beyond the scope of this exchange, although no comprehensive moral assessment of the invasion of Iraq can omit them.

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Let us sharpen these thoughts by returning to the legal rationale for the recent invasion. The legal rationale presumes that states have the right to enforce international law against a noncompliant state, even at the expense of respecting that state’s political sovereignty. The idea is that sovereignty is a weighty value in international affairs, but that it is subordinate to the rule of law on which all sovereign states depend. In this view, democratic and non-democratic states have the right to be left alone so long as they abide by international law and avoid inter-state aggression. On the assumption that states generally have a right to be left alone, there is thus a strong presumption against armed intervention. This rationale for intervention would not justify using force against illiberal states that abide by international law. It would justify using force (or coercion of some sort) against any state that is in material breach of international law.

One of the main reasons for invading Iraq according to the Bush administration was to enforce U.N. resolutions by finding and eliminating weapons of mass destruction. Remarked Bush: “Under [U.N.] resolutions 678 and 687, both still in effect, the United States and our allies are authorized to use force in ridding Iraq of weapons of mass destruction.” In November 2002, the Security Council passed U.N. resolution 1441, finding Iraq in material breach of its obligation to disarm after the Gulf War. In response to these problems, Bush observed, “a broad coalition is now gathering to enforce the just demands of the world.” Arguing that Iraq cannot disarm until Hussein and his sons are deposed, Bush gave them 48 hours to leave the country or face military attack.

Yet a close reading of the U.N. resolutions in question indicates that no permission is granted to depose Hussein. Disarmament, not regime change, is the focal concern. Justifying intervention in the name of law enforcement as a pretext for regime change is to play fast and loose with the permissions provided by the legal rationale. In effect, Bush invoked the legal rationale as a basis for seeking to overthrow the Baath regime.

Consider now the rescue rationale. The core idea is that states have the right to use force to protect human rights elsewhere in the world. As I noted, this rationale comes in two forms. The first justification can begin by saying that there is presumption in favor of states’ right to be left alone, a presumption that rests on the value of respecting state sovereignty as a cardinal principle of international law. This is not to say that intervention is wrong, only that it shoulders a heavy burden of proof. In this view, nations should refrain from intervening except in cases of grave human rights abuses that “shock the conscience of humanity.” This version accepts the cause of rescue as an exception to the presumption against intervention that shapes international affairs. The presumption against intervention may be overridden only under carefully defined and exceptional circumstances: the visible and egregious violations of human rights by a despotic regime. In those instances, respect for human rights trumps the value of sovereignty.

3 Readers familiar with Michael Walzer’s work on just-war theory will hear an echo of his idea of the legalist paradigm for justifying the use of force. Walzer’s legalist paradigm justifies using force in part to punish states that carry out the “crime of aggression.” Enforcing international law against Iraq does not fall within Walzer’s legalist paradigm. That said, one of President Bush’s rationales for invading Iraq attempts to come close to the legalist paradigm. Bush appealed to the connection between Hussein’s possession of weapons of mass destruction with the threat of aggression against the United States and other countries. On that description, the invasion was in part an act of preemptive self-defense or preemptive law enforcement. But Walzer’s account of justified preemptive action, premised on a state’s right to defend itself against actual and imminent attack, is more restrictive than Bush’s argument. Because these aspects of Bush’s claims have little direct relevance to Professor Elshtain’s paper, I will not pursue them here. See Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations 3rd ed. (New York: Basic Books, 2000), 58-63, 74-85.

4 Ibid., 101-108. The Religion and Culture Web Forum comes from the Martin Marty Center at the University of Chicago Divinity School. Persons seeking to copy or use this material must obtain permission from the Divinity School. 1025 East 58th Street, Chicago, IL 60637. (773) 702-8230.
Interventions should aim to rescue innocent people and restore a state’s capacity for self-determination, enabling that state to govern itself within its own borders. The door this rationale opens for intervention is not wide enough to permit paternalism.

From the point of view of this position, Professor Elshtain’s argument — that respect for human rights as equal moral regard can create a presumption in favor of intervention — understates the tension between respecting human rights and respecting state sovereignty. According to this first account of the rescue rationale, nations do not have the right to deploy military force wherever grave human rights violations occur. And this limit is not, as it is in Professor Elshtain’s argument, a function of prudence — of determining what’s possible and what’s futile. It rather derives from the idea that states enjoy the presumptive right to be left alone. One way to understand this presumption is to consider the role of reciprocity in global relations. The idea is that a robust embrace of human rights would invite other do-gooding nations to meddle in our own affairs. If we don’t want such meddlesomeness, then better to operate from a presumption against intervention. States that intervene where rights are grossly abused violate a principle on which they rely for their own peace and security.

According to the second version of the rescue rationale, the door to intervention is somewhat wider than it is in the first account. Here the idea is that regimes that grossly violate human rights lose their claims to legitimacy and hence their claims to sovereignty. In this view, sovereignty is not a legal category, but a moral one. “True” sovereignty is premised on the notion from social contract theory that political authority is legitimate owing to the consent (tacit or explicit) of its members. A regime that systematically violates human rights undermines the possibility for genuine consent. States that oppress their citizens forfeit their legitimacy and thus open the door to intruders with beneficent aims. Armed intervention in this account involves fewer tensions than we see in the first version of the rescue rationale, since the value of sovereignty falls away with the charge that an oppressive regime is illegitimate. If sovereignty is contingent upon legitimacy, and legitimacy is abrogated by human rights violations, then intervention to protect human rights does not violate a rival moral principle. Here the barrier to intervention is lower because sovereignty is not so much trumped by rights as dependent on them.

One question that vexes this second rationale is whether a state’s lack of legitimacy is sufficient for permitting outside intervention. A state’s illegitimacy provides a clearer permission for internal revolution, the right to rebel. But the right of revolution is not the same as the right to intervene: One set of rights is internal to a regime, the other external. A loss of legitimacy may be sufficient to justify internal rebellion, but whether it is sufficient to justify armed intervention is another matter. Stated differently, human rights abuses do not justify insiders and outsiders to use force on the same terms to depose a tyrant. Outsiders who claim to respect the voices of “the people” must meet a higher threshold before intervening. If nothing else, they must wait to see if internal rebellion is possible.

Although Professor Elshtain refrains from addressing these questions of rights, consent, and legitimacy, her position appears to approximate this second rationale for rescue. Her argument avoids reference to the idea that respect for human rights competes with respect for political sovereignty. But intervening in Iraq is (or was) not only a matter of choosing between peace and conflict, omission and commission, tyranny and anarchy. Matters are more complex, even for those who choose the second term in each of these pairs. In any discussion of armed


intervention, it is important to clarify why respect for human rights permits states to resort to force in the name of rescue, and how (and when) states may presume to cross political boundaries.

I call attention to different ways of justifying rescue not only because they shed light on Professor Elshtain’s position, but because they highlight features of Bush’s address on March 17. In addition to the legal rationale, Bush expressed the rescue rationale — “to tear down the apparatus of terror.” Directing some of his comments to the Iraqi people, Bush added: “In a free Iraq, there will be no more wars of aggression against your neighbors, no more poison factories, no more executions of dissidents, no more torture chambers or rape rooms.” It comes as no surprise that Bush did not link his rescue rationale for invading Iraq to the idea that President Hussein was an illegitimate ruler. That is because Bush’s own claim to legitimacy is problematic. (A recent bumper sticker highlights Bush’s dubious electoral standing by enjoining us to “Re-elect Gore in 2004.”) Appealing to that idea of illegitimacy to justify a dramatic departure from the norms of international behavior would have been politically ill-advise, and it would have suggested a policy of aggressive military action against despotic regimes across the globe. Indeed, Bush’s rationale seems closer to the first version of the rescue rationale than to Elshtain’s: to remove a despotic authority and enable Iraq “to become an example to all the Middle East of a vital and peaceful and self-governing nation.” On the eve of the invasion, Bush reiterated this view: “We have no ambition in Iraq except to remove a threat and restore control of that country to its own people.” On that account, the invasion was an attack on the state, but not the nation(s), of Iraq.

The world now waits to see whether the Bush administration will make good on that promise. We must examine whether Washington will heed the voices of Iraqis who request self-determination, or if it will seek to control the political and financial rebuilding of Iraq in light of a more aggressive and paternalistic understanding of human rights. The first approach tolerates greater pluralism in international affairs than does the second. We must also watch vigilantly to ascertain whether the Bush administration will pursue naked economic interest in the post-war planning. As we wait and watch, we must think back on the invasion with an eye to various reasons that have been invoked in its defense. We must ask whether the reasons cited by the Bush administration hold up to the empirical and moral facts, and whether they cohere with what actually occurs in the “new Iraq.”

In my judgment, the weight of the evidence — or the lack of evidence — counts against the invasion in March. Evidence was not provided to show that ongoing sanctions, maintaining no-fly zones, and supporting weapons inspections were ineffective in restraining Hussein’s efforts to produce and conceal weapons of mass destruction. But even if we grant that Iraq was in material breach of U.N. resolutions, we do not thereby have the right to use force to liberate Iraq from Hussein’s rule. It is important to keep reasons of law enforcement, rescue, and regime change distinct. Using the first as a pretext for the second, or either as a pretext for the third, is to place political decision-making on shifting sand. As Niebuhr in another mood would remind us, finding ourselves on such sand in Iraq would be yet another irony of American history.8

7 President Bush also cited reasons of national self-defense to support the invasion, stating that so long as Iraq maintained weapons of mass destruction or ties to al-Qaida, the security of the United States remained at risk. Space does not permit discussion of that rationale here, except to note that I doubt its merits, that it differs from the legal or rescue rationales, and that it calls for a different set of supporting data.

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