

NON-CULPABLE IGNORANCE AND JUST WAR THEORY*

Abstract: The so called “non-culpable ignorance” is an instrument to justify participating in a war on a defeated side, on condition that fighters sincerely believe that they are defending a just cause and had some valid reasons to believe in having a chance to win. Within the just war theory this instrument is needed to make both sides prima facie right, otherwise the theory would imply that those who lose are guilty in advance, especially if they are the weaker side. However, in contemporary context of criminalizing war the very concept of war is changing and becoming extremely vague. As wars are more and more “asymmetric”, just war theory might face serious challenges regarding incorporation of “non-culpable ignorance” within its scope, as well as difficulties in showing that justice goes with the victory, opening thus the issues of articulation of a just peace.

Key words: Just war theory, non-culpable ignorance, victory, just peace.

The topic I am going to talk is not a pleasurable one, and also – contrary to glorious tone prevailing in literature regarding this topic – not honorable, not at all: there is nothing honorable in war, indeed. In fact, there is a hidden supposition here: in honoring war, war is always taken as something in the past. It seems virtually impossible to honor some *future* war. This clearly reflects a crucial feature of war, which is a part of its definition: war is, according to its very nature, something temporary, something that should pass and end, better sooner than later. War cannot be conceived as a permanent state of affairs (although a permanent war can be a part of a policy – a vicious policy we may say – of some powerful state; there are examples in history of states living in a double-state of peace in cen-

* A lecture delivered at the Portland State University’s *Tour the World at Home This Summer*; Free Lecture Series, on July 25, 2007. I wish to thank Dawn White, director of International Office at the PSU for the invitation to give this lecture and to the Philosophy Department and its chair, Grant Farr, for inviting me to come and teach a course in “Ethics of War” during the PSU Summer Session.

tre, or inside, and a permanent war on its borders, or outside; but even then war is to be conceived as temporary at any particular point in space and time).

Peace, of course, can and should be permanent, peace is the home of life (if I am allowed to use this metaphor). This is obvious. But there is nothing obvious for philosophers, and we have to ask Why it is so? Philosophers cannot be satisfied with something just stated, and even less with preaching of any kind – they are trying to *explain* or, if this is not affordable as sometimes is the case, then to *understand* the phenomena they explore. They usually do this by using conceptual distinctions which sometimes may seem to be abstract and far from the reality, but that's only an impression, coming probably from their refusal to preach or advocate or take any side in advance. They respect only the power of arguments, not taking for anything for granted - no goal, no purpose, and no value, before it goes through the rigor of those arguments. So, true as it is, the thesis that peace is home of life is not an explanation of anything: after all we have peace in graveyards (and an eternal one at that), places associated more with war than peace, and there is no life there.¹ So to answer the question: What makes peace valuable, for our purposes here and phrased in the shortest way, is that *peace is giving us control of time*: it is predictability that we attain by peace. If we define *life as the activity of setting goals and attempting to realize them* (again a very short and succinct definition – but sharp and precise one!), then it is obvious that life is future oriented and dependent on (some) capacity to control our future time. This is what *laws* give to us. Laws require, and are dependent on, peace. The main part of the definition of war corroborates this: it is per definition a suspension, a temporary suspension, of some important laws, and for that matter some important rights and liberties. There is no controlled future in war as the immediate future of our life, it looks more as if the future resided in one single point, or after that point, and that point is the end of war – the point of victory or defeat, and of established peace.

By giving us control of (future) time, peace is a central issue of social power, and an expression of its articulation and structure.

¹ Cf. I. Kant, *Zum ewigen Friede (Toward Perpetual Peace, 1795)*, in: I. Kant, *Practical Philosophy*, translated and edited by Mary J. Gregor, Cambridge University Press, 1999, p/ 317.

So why not just proclaim peace as the supreme value and accept the position of pacifism? Peace movements are based in a need, or desire, to defend against violence – however, as such, peace movements do not proclaim anything regarding the articulation of power or its structure. The only demand is that violence, i.e. power, should not be used in any case: any power at all, because any power would become violence by being used, should be abolished. That's why peace movements make themselves irrelevant: they do not deal with peace, as a state of affairs and as a matter of controlling the future; instead, they are concerned only with a certain feature of one of its pre-conditions, power. Power is however a crucial component or ingredient within the instruments of controlling the future. It consists of a combination of two factors: possessing the means (resources) to attain a certain end, and possessing the will (determination) to use those means to realize that end. (Power of work is one obvious example of this). Without the power to realize it, an end would not be a set end but something else, an imagined, desired, fantasized, or conceived end. Its realization would not be an opportunity, something belonging to the inventory of possible achievements (it would not be, at least potentially, in the future time – it won't be in any time at all – but only in a-temporal (eternal?) sphere of what has been conceived or imagined, fantasized). Power entails, as its essential part, the capacity of efficient predictability, usually articulated as a certainty or high probability of succeeding in realizing a set end. Power has the same structure as laws, or rules, whose existence consists precisely in this overcoming the future time regarding future state of affairs, which are not only projections and goals but are taken as things that will certainly or very probably be realized. The regularity of its articulation is what makes the value of peace. Pacifists however only seek the absence of violence, no matter what else might there be at stake. Being not concerned with anything else but absence of violence, peace movements are not concerned with *conditions* of peace, i.e. the articulation of rules of power (as a part of resources which in a general distribution of means for possible ends make a crucial part of life, individual and social).

Peace, however, if unjust, contains its own negation, and is a structure that is unstable or a source of conflict, rather than a source of stability. Complete security is not possible, and it seems that jus-

tice provides the best if not only guarantor of peace. This is the crucial point: wars are undertaken for reasons, and sometimes these reasons are reasons of justice. In such cases wars could be justified, and this is the main point in just war theory, according to which war, with just intent, could vindicate justice. And indeed, it seems that we are incapable of mass armed violence, which characterize any war, without *believing* that there *are* some good reasons making our participation in the war *just*, not unjust. It seems virtually impossible, and it probably never happened, that in any war a nation and its leaders assert that they are not right while their enemies are.

On the other side, it seems that war might be morally an appropriate remedy to redress some kinds of injustice. Anyway, in allowing such a possibility a need for justification has been developed, and this need finds its tentative solution in so called “just war theory”. It is a theory which justifies war in terms of *defense*, or rather *self-defense*, stating that defense is giving a morally satisfactory justification of war. Historically, just war theory was a product of Christian thought, at the point in which pacifistic “turning the other cheek” policy was replaced with a policy of securing newly acquired power, which we may call newly attained peace or a promise of it - after Christians came to power in 4th century (as peace is, in essence, the issue of power and its distribution). The theory, connected usually with St. Augustine, but developed and refined later, says that war can be just if a certain set of conditions is satisfied, those conditions being divided in two parts: *jus ad bellum* (a right to war), and *jus in bello* (rights within the war). The second part is by far easier than the first (because it takes the *fact* of war as supposed, justified or not, and has not a problem to establish how war is possible at all). It is dealing with restrictions in war activities: necessity, proportion, and combatants/non-combatants delineation. The restrictions are not always simple, nor it is a simple matter to define them. But the real issue is with the first part, *jus ad bellum*. It states that *war* – starting and waging a war – is morally justified if a set of conditions is fulfilled. Originally, in Augustine and Aquinas, there were three such conditions: 1) War should be waged for a *just cause*, 2) by “competent authority”, i. e. by a sovereign, and 3) with a right intention. Later some other conditions were added: 4) that war should be the last resort, taken after all other options are exhausted, 5) that there is

a convincing probability that peace will be the result, i. e. that there is a likelihood of victory (or at least a real possibility of it), 6) that total evil of the war cannot outweigh the good achieved by it.

There is a huge debate about “just war theory”, and it is sometimes described more as “just war tradition” than a “theory”. It is especially interesting in light of new phenomena in this area, like “*asymmetric wars*” we are witnessing these days, where we have two sides of incomparably different size and power, or in the light of an approach in which we have a tendency to *criminalize* war – visible in theories of human rights and humanitarian military interventions, in which war has been described in terms making it similar to police action. All of these should somehow come under the umbrella of just war theory approach. I think it is a natural course of events because the “theory” was devised from the outset to justify offensive wars in terms of “defense”, introducing in the concept of “defense” a logic according to which defense can mean not only defending forms and places of life but also defending of whatever makes “our” system of values. This “defense” can even occur independently of restrictions of territoriality, i.e. outside, sometimes very far away, from the boundary of countries whose system of values has been endangered. It became thus a defense of *world* as we see it, for example a defense of “right faith”, or “true values” (not our values here and now, but what we take as the only true values). Crusades and jihads are natural consequence. And criminalization of war too – with an implication of rejecting *our enemies* the right to defend themselves, equalizing war with police action seems to be natural as well.

However, regardless of the firmness of our belief in our own cause, there is still a question characterizing the very essence of war: “Whether a war can be just on both sides?”, and after this: “How we should treat “others”?” In absence of a world state, which could “vindicate justice” in a formal and legal way in a sense in which all “others” who are not obeying world laws (the laws of such a state) would become criminals, we have to accept a very different viewpoint from “just war theory”, one of war as a conflict between two rights where victory has a constitutive role. This implies that our enemies are not to be considered to be criminals, and that (per supposition of “just war” clause, and our sincere belief in having the right to wage the war in the first place) we are not to be considered as such by

our enemies. As Americans had in *Lieber's Code*, proclaiming (or ordering, in fact) the treatment of Southerners not as “rebels” but as a kind of captured soldiers of a warring party,² so now we have the same conceptual difficulties in treating others, when we treat our actions as “interventions”, as if they were police actions. However, in treating “our enemies” as, in principle, protected by a right they fight for, as a candidate for a legitimate right, we recognize them as, in principle, equal. Even after a defeat they may be protected by presumption of defense: they sincerely believed that they are defending a right cause. (And what can make a stronger case in this regard than their sincere belief in self-defense?!) However, one side might *in fact* be wrong, and this in two different senses: 1) in believing that their cause is just, and 2) in believing that they have any chance to win – and, at the same time, in both of these cases they can sincerely believe what they believe *and* believe to have good reasons for their beliefs. If this is the case, we would have “non-culpable ignorance” because we cannot blame someone for fighting for something one sincerely believe to have a right to fight for, and at the same time sincerely and with good enough reasons believed to be in a position of justified (self)defense, for example to counter an aggression. This part of just war theory deserves to be explored in more detail, and part of my work in ethics of war is devoted to this point.

Ignorance, of course, can be “culpable” (for example, if self-afflicted), or if there is a justified supposition to not believe what one believes. But if ignorance about the prospects of future outcomes in cases of war was culpable, it would destroy the distinction between war and police action, between law and morality, and would make all those who are defeated in any conflict criminals! It would imply the end of political freedom – because it is impossible – on the basis of our epistemological status in the universe: fallibility – to predict with absolute certainty what the outcome finally will be: who would make any decision on the terms that you will burn in hell if your judgment turns out to be wrong? The very concepts of decision-making, responsibility-taking, risk-taking, and also of “decision”, “responsibility”, “risk”, “freedom” would lose their meaning under such conditions.

² Cf. “General Orders No. 100”, April 24, 1863; cf. also F. Lieber’s “Guerrilla Parties Considered with Reference to the Laws and Usages of War”, both in: R. Shelley Hartigan, *Lieber's Code*, Precedent Publishing, Inc., Chicago 1983.

There is another relevant point here: If there is a just war justification for a self-defense, this does not entail that there is an analogous right to pursue – through war – any rational, rationally justified interest of the state. This raises a question of difference in two kinds of ignorance: ignorance regarding the result of defense and ignorance regarding the result of attacking (the one that, according to just war theory, should not necessarily be designated as “aggression”, or perhaps any attack with good prospects to win). If both of these would be designated as “non-culpable ignorance” we would have equally justifying non-culpable ignorance in defense and in participating in an aggressive war. I.e. your defense of your country without knowing that you will lose in the end would be on the same foot as if you were attacking for what you think is a right cause (or with a good reasons to believe in victory) but without knowing that defenders are determined not to surrender. In both cases *sincerity*, taken by itself, is playing the same justificatory role in producing motivation to act, but still – shouldn’t there be some difference here? Perhaps the answer is positive; however there is still room for application of non-culpable ignorance doctrine: even defeated aggressors should not be treated as mere criminals if the war, no robbery or anything similar has taken place. This is so precisely because in war *ignorance of the end-result* is really non-culpable. Unlike the case of criminals, there is always room for a specific kind of reciprocity here: both sides can expect reciprocity, in whatever they are doing, implying that enemies deserve a kind of tolerance that criminals in principle do not deserve. There is no expected reciprocity between criminals and, say, police force, because the distribution of rights and duties is quite different in the two cases. In case of criminals there is no reciprocity possible and also no tolerance is allowed, while in case of enemies reciprocity is to be expected on both sides, and a kind of tolerance is needed and even necessary. (This might be considered as a part of the definition of war).

Nearing the conclusion we may assert, however, that US policy is much closer to just war theory approach than to non-culpable ignorance approach. It is perhaps most visible in doctrine of non-negotiability, which characterizes American policy in last hundred years (but we may safely say was based in American civil war). It is visible also in a way US is treating world organizations like IMF,

WB, or UN. In a way US treatment of the rest of the world is similar how the North was treating South in Civil War. It is also visible in a widespread thesis that democratic countries do *not* wage wars against each other – implying that the presence of war is an indication that the *other side* is not “democratic”. Eagerness in taking sides, and eagerness to jump to conclusions often without sufficient factual corroboration (and actually impatience in dealing sometimes with subtle factual issues, especially historical ones) - all these show strong inclination to just war theory. Iraq is only but the last example.

In close scrutiny, justice is taking a primacy, compared with its rivals freedom and welfare; this seems to be the ethical substance of a political action consisting or aiming towards democratization of the world. Justice is the leading principle in justification of new wars, not freedom (of those who should be asked because it is their political position and destiny at stake), nor welfare of those who are to be “democratized”. Justice is at the root of the process of “liberation” with the result of just making more deeply undemocratic, i.e. unjust, societies. This is in accord with the perception that these wars are *just wars*, the same perception which produces the feeling that they are crusades. After all it is *our* justice, or our concept of justice, we are eager to spread around.

This leads to the doctrine of pre-emptive attack. As Gentili says: “We kill the snake as soon as we see it, even though it has not injured us, and perhaps will not harm us. For thus we protect ourselves before it attacks us”.³ The case of Iran comes to mind here: the very *possibility* they could have nuclear weapons is taken as a serious concern and actually as a threat. But *fear*, which lies behind this logic, is not enough to justify a war – and here we have another, this time incorrect application of doctrine of non-culpable ignorance: it would imply that a war could be justified if one is non-culpably ignorant that justice is not on your side (i. e. that other side *in fact* has no “unjust intent”)! It would imply a decisive role of a factor like fear: As long as one is sincere in one’s beliefs, and beliefs have *some* basis, it would be enough for justification of going to war. However, unlike defensive wars which are in a sense wars of necessity – as

³ Alberico Gentili, *The Law of War (De Jure Belli)*, 1598), quoted from L. May, E. Rovie, S. Viner, *The Morality of War; Classical and Contemporary Readings*, Pearson/Prentice Hall, 2006, p. 56.

there is no question of choice after of being attacked, except to capitulate immediately - in all of these other considerations we deal with a different type of wars: wars of choice – based on judgment of their justification in reasons which partly are reasons of justice, or are perceived as such. And among them there is, in contemporary context and in situations of supremacy we in fact have now, one striking moment, introducing a new element of asymmetry. It is *strictu sensu* a moral demand of just war theory (taken in its pure form) to *subordinate jus ad bellum* to *jus in bello*: if a war cannot be fought justly, then it should not be fought at all!⁴. As all parties always believe that their own cause is just, yet they very often are mistaken in this judgment, and the risks of fighting an unjust war in error are very much greater for the strong – or for the disproportionately stronger side – than for the weak, it seems that onus of the responsibility in great deal lies more with the stronger than the weaker. This implies that states, unlike individuals under certain circumstances, - and statesmen: leaders of countries and their elites – are *not* covered by doctrine of non-culpable ignorance, especially if they are perceived as in advance stronger. This has a very peculiar consequence: strong ones have no excuse in defeat. Or at least it is what justice should say. They should cautiously assess real dangers, the ones which could have a real impact on issues of self-defense, as “immediate and imminent in point of time”⁵, and then we would be able to discern truly non-culpable ignorance as a validating reason from what should be seen and taken as *culpable* pre-text. If this is not the case we are left with a mere presumption of supremacy, and very little besides it.

⁴ Cf. D. Rodin, “The Ethics of Asymmetric War”, in R. Sorabji & D. Rodin, *The Ethics of War*; Ashgate 2006.

⁵ Hugo Grotius, *On the Law of War and Peace (De Jure Belli ac Pacis, 1625)*; quoted from L. May, E. Rovie, S. Viner, *op. cit.*, p. 36.

Jovan Babić

NESKRIVENO NEZNANJE I TEORIJA PRAVEDNOG RATA

Sažetak

Teza o „neskrivljenom neznanju“ je instrument u okviru teorije pravednog rata koja služi da se moralno opravda učešće u ratu za pripadnike one strane koja je poražena; uslovi za neskrivljenost su da su poraženi borci iskreno verovali da brane pravednu stvar i da su takođe iskreno verovali da imaju nekih izgleda da pobjede. Bez ovog instrumenta teorija pravednog rata, jedna teorija koja opravdava rat preko pravednog uzroka rata, bi poraženoj strani, naročito ako je slabija, morala da unapred pripiše krivicu što je uopšte ušla u rat. Međutim, u savremenoj situaciji raširene kriminalizacije rata sam pojam rata se menja i postaje izuzetno neodređen. Kako ratovi postaju sve više i više „asimetrični“, pre svega u snazi sukobljenih strana, čini se da se teorija pravednog rata suočava sa teškoćom da u svoje okvire uopšte situira „neskrivljeno neznanje“, ali to povlači teškoću te teorije da pokaže da pravda ide sa pobedom, otvarajući tako pitanje artikulacije pravednog mira.

Ključne reči: Teorija pravednog rata, neskrivljeno neznanje, pobjeda, pravedan mir.