

RESPONSE TO WAR AND SELF-DEFENSE

Self-Defense in International Law and Rights of Persons

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In *War and Self-Defense* David Rodin uncovers many flaws of current thinking about war.¹ Rodin correctly points out that the justification of national self-defense goes beyond the justification of individual self-defense. He accurately rejects the standard notion of moral symmetry—the accepted view that both just and unjust warriors can permissibly kill enemies as long as they observe the laws of war. Rodin vindicates the right view: if a war is unjust, each and every injury caused by the unjust warrior is a criminal act. There are no morally justified killings by those who fight unjust wars. Further, Rodin rightly rejects various holistic theories of self-defense. Last but not least, he correctly denounces what I have called the Hegelian Myth,² the idea that tyrannical governments are worth defending against interventions aimed at deposing them because they are protected by the principle of sovereignty.

Despite these important achievements, which Rodin articulates in clear and penetrating prose, his rejection of a plausible version of national self-defense ultimately fails.³ I will concentrate on liberal arguments for self-defense—those for which the end of self-defense is the protection of vital rights or interests of individuals.

THE LIBERAL VIEW OF NATIONAL SELF-DEFENSE

Rodin rightly rejects the attempt to reduce self-defense to a collection of individual rights of self-defense. His main reason is that armies acting in self-defense cannot abide by the proportionality rules of individual self-defense. Soldiers in a defensive war can do more than individual self-defense would allow (for example, they can kill enemy soldiers who are sleeping or marching, whereas under criminal law people are not allowed to kill those who do not threaten them). Yet I believe that some of those extra permissions to kill in a defensive war can be grounded in a richer version of liberalism, one that, unfortunately, Rodin overlooks. This is the view that wars in self-defense are carried out by the government as an *agent* of the citizens.⁴ The

¹ David Rodin, *War and Self-Defense* (New York: Oxford University Press, 2003). All in-text citation references are to this book.

² See Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Ardsley, N.Y.: Transnational Publishers, 1997).

³ For the rest of this comment, when I use “self-defense” I mean “national self-defense” unless otherwise indicated.

⁴ See Michael Walzer, “The Moral Standing of States: A Response to Four Critics,” *Philosophy & Public Affairs* 9 (Spring 1980), pp. 209–29; and Fernando R. Tesón, “The Liberal Case for Humanitarian Intervention,” in J. L. Holzgrefe and Robert O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (New York: Cambridge University Press, 2003), p. 99.

idea is simple. Citizens create a state to protect their rights against potential internal and external threats to those rights. Let us assume that there is a philosophically sound account of social contract theory that tells us when and how a state is legitimate in this way. Respect for the autonomy of persons requires foreigners to respect that social contract. If this is sound, then it follows that citizens are bound to one another to defend not just one another's lives but *the social contract itself*. Let us call this the liberal view.

The liberal view indeed relies on more than individual self-defense, as Rodin says. Citizens defend not merely one another but also the just institutions that they have created together and under which they live. The government is simply their instrument. The justification of self-defense thus combines principles from political as well as moral philosophy. This account, I believe, is neither purely reductionist nor does it resort to the spooky communitarian views that Rodin rightly discards. The army of a justified state defends the citizens' lives and property threatened by the aggressor, but it also defends the liberal state itself, notably its institutions. It also defends its territory, morally understood as the *locus* for the exercise of liberal rights and the functioning of liberal institutions. This requires use of coercion that is not permitted in individual self-defense simply because individual and national self-defense cover quite different situations—despite the similarities in terminology. National self-defense is mediated by the concept of a legitimate state.

While Rodin concedes that the liberal view is an improvement over the pure reductionist view, he still rejects it. He gives two reasons. The first is that the liberal view, he thinks, treats humanitarian intervention (that is, war to defend human rights) as a form of self-defense. If self-defense is action

by a government to defend citizens, then humanitarian intervention is simply an extension of self-defense thus defined. The difference would simply be that in humanitarian intervention the government comes to the rescue of citizens other than its own. Yet, Rodin continues, it is wrong to consider humanitarian intervention and self-defense as having the same underlying rationale, because “common sense tells us that humanitarian intervention is a very different creature to national-defense.” They are even “antagonistic” and “in deep tension” with each other (pp. 130–31). This is because everyone knows that when a government invades another country, say, to stop ongoing domestic atrocities, “one of the moral considerations weighed against this action is the defensive rights of the subject of the intervention.” He writes,

If there is a right to humanitarian intervention, then it is because the moral basis of the right of national-defense can in certain circumstances be justly overridden, not because the right of humanitarian intervention is, in some sense, an application of those moral considerations. (p. 131)

This is a strange reply to the liberal view. To begin with, as I noted above, it completely ignores the contractarian element in the liberal view. When liberals write about the duty of governments to defend citizens against aggression (and the assault to their rights that it entails), they presuppose that the government's action is not simple defensive rescue, but that it is based on the social contract. This gives self-defense additional grounding when compared to humanitarian intervention. A government has an *obligation* to defend its citizens—that's what it has been validly authorized to do. Rodin treats the liberal argument as if it were just an application of our duty to defend people, any people, in danger. Self-defense is more

than that: our government is *fiduciarily* obligated to defend us. It is a protection agency. In contrast, many people speak of the *right*, not the duty, of humanitarian intervention, because in that case the intervention is justified on general humanitarian grounds, not on a fiduciary relationship.

Further, and more important, if one believes that humanitarian intervention is *morally* justified, one also believes that a drastic alteration of the defensive rights of the state that is the target of humanitarian intervention is justified. Simply put: *Tyrants do not have a right of self-defense against true humanitarian wars—that is, wars aimed at deposing them. By extension, soldiers of the tyrants' armies cannot be exercising any morally justified right of national self-defense.* Rodin overlooks this very important consideration. Once it is acknowledged, there is no tension between self-defense and humanitarian intervention. Despot rulers have no defensive rights against justified humanitarian action. They, and their loyalists, must lay down arms.

Someone may object that this account cannot explain why we accord dictators the right to use force in *just* wars. The liberal view upholds both the defense of the liberal state and the legitimacy of genuine humanitarian interventions against which the dictator and his supporters have no defensive rights. Yet it seemingly cannot explain the defensive rights that illegitimate governments have against wars of aggression and other actions not supported by appropriate humanitarian reasons. On the liberal view, in those cases the dictator, by definition, would not be defending liberal institutions. This is indeed a troubling case for the liberal, yet I think that it can be explained. Citizens in states ruled by tyrants are, to put it mildly, in a bad position. They have not had the

chance to lawfully *delegate* authority to a government, including the authority to defend them against foreign attacks. Still, citizens have a right to defend their lives and territory (I am assuming they have a kind of collective title to the land and there is no international police to evict trespassers), just as citizens in legitimate states do. Because the tyrant commands the resources of the state, including its armies and weapons, only he is in a position to defend the state against aggression. Therefore, he has an obligation *to the citizens* to defend them, notwithstanding the fact that he has not been authorized to do so. This obligation derives from the *role* the tyrant occupies. A citizen would perhaps say: "You are illegitimate, we do not recognize your authority, but given that through usurpation you have grabbed control of our resources and thus have de facto political power, the least you must do is defend us against attacks." The citizens have a right to defend themselves (in the expanded sense analyzed above), but the dictator is the only one who can do it—and he must do it, because he has deprived citizens of the means to do so.⁵

The second objection that Rodin presents against the liberal view concerns the case of a bloodless invasion. When an aggressor occupies a remote or uninhabited territory, the standard view of self-defense authorizes deadly force to expel the invader. Yet, says Rodin, because this exercise of self-defense is not an action in defense of persons (the territory is uninhabited) the liberal view fails (p. 132). Again, Rodin is led astray by his misconstrual of the liberal position. The concept of territory in international law is

⁵ Someone who has unlawfully abducted a person still has the moral duty to protect the person from harm, even if he is not the person's lawful "protector."

complex, but the least that can be said is that states exercise jurisdiction over territory based on some form of collective territorial title loosely analogous to property ownership of land in domestic law.⁶ Rodin does not dispute this. Rather, he claims that just as property owners whose lives are not threatened may not use deadly force against squatters, so defending armies may not use deadly force against unlawful occupiers who threaten no lives.

This objection vanishes, however, once we identify the central feature of international relations: the absence of government. Consider the intruder on my property who simply trespasses to occupy, say, the shed in my backyard. He is not threatening me or my family, so, let us concede, I may not use deadly force against him. Yet surely I can call the police to evict him from my property. If he resists he will be dragged out by force, and if he uses violence he may even be killed. Now consider the international example. The defending government requests the invader to leave and the latter refuses. Now, unlike what happens in the domestic example, the victim of trespass, the invaded state, *cannot call the police, for the good reason that there is no police*. Because there is no international enforcement agency, states must resort to self-help, not as part of self-defense narrowly understood but as enforcement action.⁷

Curiously, Rodin correctly sees that much of what is called self-defense is really law enforcement (ch. 8), but fails to draw the consequences for the international system. International relations are regulated—that is, there is law (treaties and custom)—yet there is no superior authority. From this lack of sovereign Rodin concludes, with Hobbes, that there can be no lawful self-help. As is well known, for Hobbes there can be no justice in the absence of central adjudication and enforcement. Yet many people have

pointed out that this conclusion is extreme. There are many reasons to say, with Locke and others, that in the “regulated” state of nature we can make moral distinctions between justified and unjustified violence. If I understand Rodin correctly, he takes the view that, if the standard account of self-defense really amounts to law enforcement, then it cannot possibly be justified because there can be no law enforcement in the absence of a sovereign. Self-help is never justified.

This conclusion, however, is highly implausible. Perhaps a world state would be better, but if all we have is a political system in which there is no central government and yet actors are still governed by rules they have created, I think it is implausible to conclude that no self-help can ever be justified. We try to evaluate the justice of war under applicable principles. And, while the lack of compulsory jurisdiction and enforcement are major inefficiencies of the system, it does not follow that normative evaluation of the behavior of states is nonsense. Moreover, Rodin’s suggestion that a liberal world government would eliminate the problems associated with self-defense because it would provide law enforcement is mistaken: there would still remain the issue of planetary self-defense. Rodin would have to say that we do not have self-defense against invaders from another world, should we encounter them, because of the problems of

⁶ For discussions on territory, see Lea Brilmayer, “Secession and Self-Determination: A Territorial Interpretation,” *Yale Journal of International Law* 16 (Winter 1991), pp. 177–202; Allen Buchanan, *Secession* (Boulder, Colo.: Westview Press, 1991), pp. 38–45; and Fernando R. Tesón, *A Philosophy of International Law* (Boulder, Colo.: Westview Press, 1998), pp. 144–47.

⁷ UN Security Council action under Chapter VII of the UN Charter is a partial exception to this. However, under Article 51 (self-defense broadly understood) states may unilaterally evict invaders.

lack of proportionality that he mentions. Furthermore, Rodin is committed to the view that unless the invaders intend to wipe us out (in which case our defensive action would be identical to individual self-defense), we would not have a right to use deadly force. If they just wanted to conquer us, abolish our democratic institutions, and establish an autocratic yet not genocidal government, according to Rodin we would not have a right to resist. Whatever the proper justification of our resistance may be, this conclusion is surely wrong.

RETHINKING—NOT DISCARDING—SELF-DEFENSE

In general, Rodin takes the analogy between individual and national self-defense too seriously. A morally justified right of self-defense in international law must include more than those acts analogous to the individual counterpart. It encompasses acts of *self-help* that do not fit the common definition of individual self-defense (certain forms of reprisals, belated action to counter aggression, action against terrorists in foreign nations, and so forth). So it is simply wrong to define self-defense *tout court* as “the right to use necessary and proportionate lethal force against an imminent unjust threat to life” (p. 127) and then dismiss national self-defense simply because some acts that defensive soldiers can do under current international law do not fit that definition. “Self-defense” in international law is a term of art. It includes acts in defense of

imminent threats of life, plus acts that are best viewed as law enforcement. Of course, the issue remains whether those acts can be morally justified. But it is no refutation of the right of self-defense to say that it does not meet the requirements of imminence, necessity, and threat to life that are typical of individual self-defense.

Rodin is correct that the current international law of self-defense is seriously flawed. He scores important points in his criticism of moral symmetry, the defensive rights of dictators, and holistic accounts of self-defense. Rodin’s criticisms force a revision of the standard account of self-defense. Still, the implausible conclusions that he reaches stem from two unwarranted transitions in his argument: the move from individual self-defense to national self-defense, and the move from the absence of world government to the illegitimacy of self-help. Rodin jumps from a moral-philosophical analysis of individual self-defense to criticize both reductionist and communitarian versions of self-defense, without pausing to consider applicable liberal *political* philosophy and the moral principles that govern state behavior in the absence of world government. I believe his effort fails for those reasons. But any serious philosophical account of the right of self-defense in international law must contend with the trenchant criticisms Rodin advances. And international lawyers might start thinking about reforming the UN Charter and the laws of war to address some of the problems he identifies.