

# JUST WAR THEORY AND THE INVASION OF AFGHANISTAN

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In his 2006 textbook, *The Morality of War*, Brian Orend defends a “Core Principle on Aggression” (CPA) that allows a minimally just state to go to war, in defence of its rights, in response to an act of international aggression. Orend also uses this just war principle to represent the 2001 invasion of Afghanistan as a morally justified response to the terrorist attacks of 9/11. This paper argues that the CPA is an indefensible moral principle that cannot justify the invasion of Afghanistan.

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Brian Orend is certainly one of Canada’s leading just war theorists, as well as an enthusiastic supporter of Canada’s current military mission in Afghanistan. His recent popular textbook, *The Morality of War*, for example, offers a detailed and original just war justification of the 2001 invasion of Afghanistan.<sup>1</sup> In this paper I will suggest that Orend’s arguments in support of that invasion are deeply problematic.<sup>2</sup> In sections I to IX, I will concentrate on Orend’s account of *jus ad bellum*—the conditions under which a state is morally justified in going to war against another state—and in the concluding sections X to XII, I will examine how Orend applies this general account to the specific case of Afghanistan.

## I

Orend’s version of just war theory is grounded in a substantial theory of human rights. From a logical point of view, individual human beings are the primary bearers of rights and, according to Orend, we all have rights to whatever we “need to live minimally decent and tolerable lives in the modern world” (33). “Human rights are core entitlements we all have to those things we *both* vitally need as human beings *and* which we can reasonably demand from other people and social institutions” (33).<sup>3</sup> States, then,

have rights only derivatively, and only to “those objects genuinely needed to enable them *to do their part* in realizing the human rights of their people” (34). Within this general framework, Orend then argues that the classic state rights to political sovereignty and territorial integrity are grounded in the universal and foundational moral rights of human beings to physical security, material subsistence, personal freedom, elemental equality, and social recognition as persons and rights holders (33-34).

Just war theory now enters the picture as follows. A state is “minimally just,” for Orend, only if it makes “every reasonable effort to satisfy the human rights of [its] own citizens” and also “avoid[s] violating the rights of other countries” (36). Since aggression—unprovoked military invasion across an international boundary, for example—violates both state rights and human rights, minimally just states do not commit aggression against other states, and in return they possess the right not to be attacked themselves. Therefore, when one state *does* commit aggression against a minimally just state, it violates the right of that minimally just state and “forfeits” (39) whatever right it may have had not to be attacked. Aggression, therefore, constitutes a “just cause” for going to war. That is, as articulated by Orend’s “Core Principle on Aggression” (CPA):

the commission of aggression by any aggressor A, against any victim V, entitles V—and/or any third-party vindicator T, acting on behalf of V—to employ all necessary means to stop A, including lethal force, *provided* that such means do not themselves violate human rights (37)

where it is understood that the variables A, V and T range over (i.e., can be replaced by the names of) state actors (38). In other words, a war of retaliation that stops and punishes aggression is morally justified so long as that war does not violate the rights of the aggressor state.<sup>4</sup> It matters, therefore, that, in the very act of committing aggression, A has lost the right not to be attacked.

The citizens of A have rights too, however. And while it is possible that these rights have been (drastically) altered as a result of A’s bad behaviour on the international scene, it is not plausible to claim that each of these rights (like A’s right not to be attacked) has simply evaporated altogether. How, if at all, then, do the individual human rights of A’s citizens figure into the interpretation of CPA?

## II

Orend understands that a war cannot be conducted without killing innocent civilians (259). Therefore, if V goes to war against A, then V's military forces will certainly kill some of A's civilians. Now, if killing civilians of A necessarily violated the rights of those civilians, then CPA would not allow V to retaliate in this manner against A. It is clear, however, that Orend wants to use CPA to morally justify V's going to war against A. Orend's strategy, therefore, hinges crucially upon the peculiar claim that it is possible to kill (innocent) people without violating their fundamental human rights.

This claim certainly sounds paradoxical but part of the problem, I suspect, is terminological. Let us say that an individual's right is *satisfied* when that person actually enjoys (or receives) the benefit to which that right entitles her. Further, a right is *sacrificed* just in case it is not satisfied. So if my right to life is satisfied, then, at the very least, I am alive. But if you kill me, my right to life and physical security has been sacrificed.

As we have seen, Orend accepts the point that when V goes to war in retaliation against A, V will kill civilians of A and, in so doing, V will also sacrifice the right to life of those citizens. But Orend is committed to the claim that it is possible to sacrifice someone's right to life without violating that right. The most plausible reading of what Orend must mean by this claim is simply that V does not necessarily do anything morally wrong in killing citizens of A. This is exactly how Orend describes V's moral relationship with the *state* A.<sup>5</sup> And it is compatible with Orend's later pivotal claim that "civilians are *not* entitled to some kind of absolute, or fail-safe, immunity from attack; rather, they are owed neither more nor less than what Walzer has called 'due care' from the belligerent government(s) that they not be made casualties of the war activity in question" (206). In other words, "providing due care is, in fact, equivalent to 'recognizing their rights as best we can within the context of war'" (117). So the human rights of the individual civilians of A protect them from being intentionally and recklessly slaughtered, for example. But if V exercises due care then V will violate no one's rights, and will do no wrong in killing citizens of A.<sup>6</sup>

However, this claim, though readily intelligible, appears to be in tension with a number of other claims that Orend makes about human rights throughout the rest of his book. On page 133, for example, Orend writes that

the whole point of rights—or, at least, human rights—is not

merely to benefit the masses and to protect the well-being of the majority but, moreover, to benefit everyone and be mindful of every individual human being's need for protection. There is no defensible hierarchy according to which one can sacrifice one human right for the sake of another—they all go together and form a package.

In other words, in addition to claiming that human rights are universal entitlements that benefit everyone (52), Orend also defends a strong holistic thesis to the effect that

human rights must be thought of as forming *an interlocking whole*, for instance, that entire set of entitlements demanded when we focus on the one concept of guaranteeing to every human being a minimally good life. Since human rights form an interlocking whole, there is no question of picking some for privileged protection. . . . It is all or nothing, and I believe this is demanded by the quest for consistency in human rights theory (129).

Consistency may be more elusive than Orend imagines, however. According to CPA, V can be morally justified in sacrificing the rights (to life, physical security, and freedom, for example) of citizens of A, as V pursues a course of action designed to vindicate the rights (to life, physical security, and freedom, for example) of the citizens of V that have been sacrificed (or otherwise placed in jeopardy) by the aggressive actions of A. Therefore, at its core, CPA endorses a fundamentally anti-holistic claim, namely, that, in certain contexts, from a moral perspective the rights of some people matter more than the rights of others. (It is morally preferable, that is, that aggression be defeated than that aggression triumphs.) Contrary to what he says elsewhere, Orend seems committed to privileging certain rights (and certain people) over others.

### III

I doubt that Orend is actually contradicting himself, however. In the interests of clarity, let us define *holism* as the view that it is never morally justifiable to sacrifice even a single human right of one individual for the sake of protecting some other right (of either that same individual or someone else). This is a very strong thesis, but it does seem to be consistent with the strong language that Orend uses in the passages cited from pages 129 and 133

above. It is important to acknowledge, however, that these passages occur within the context of a discussion of a state's responsibility to respect the domestic human rights of its own citizens. So one might think, although he never directly confronts this issue in *The Morality of War*, that Orend wants to uphold a holistic thesis about domestic human rights according to which no state may justifiably sacrifice the rights of some of its own citizens while privileging certain other rights, again, of its own citizens. But one might think that, at the same time, he wants to *allow* these kinds of trade-offs when dealing with conflicts between the various rights of citizens of different states. Further, it is possible to consistently affirm a holistic thesis with respect to domestic rights while denying that any such thesis obtains within the international realm.

There is some textual evidence for this interpretation. On page 130, for example, Orend writes,

Human rights are not mere privileges, they are entitlements which governments owe to *their people*. . . . [G]overnments have as their ultimate point and purpose the fulfilment of the human rights of all *their citizens*, and thus cannot consistently engage in an attack on, or derogation of, those same human rights (my italics).

Since governments gain moral legitimacy by upholding the rights of their own citizens, it makes sense that governments have special obligations towards their own citizens. Now, in and of itself, this does not explain holism with respect to domestic rights. (Why should a government not be allowed to privilege certain domestic rights over others if, in difficult circumstances, this is the best way, on balance, to promote the rights of its own citizens in the long run?) But it does explain why a government would stand in a different and weaker moral relationship with the citizens of other states. There are, of course, many ways in which this weaker relationship could manifest itself. But *if* a government is not morally permitted to privilege certain rights within the domestic realm, then perhaps it ought to be allowed more leeway when dealing with the citizens of foreign states—that is, citizens from whom it does not derive its legitimacy, and to whom it bears less, if any, responsibility.

In principle, this would allow a state to privilege the rights of its own citizens over the rights of the citizens of other states. And here it is interesting to note that while Orend's definition of a minimally just state requires that

state to avoid violating the rights of other states (36), it makes no mention whatsoever of the rights of the *citizens* of other states. Orend also repeatedly frames the entire moral justification of war in terms of the need to protect “the state rights of legitimate communities and the human rights of their individual residents” (105), again without mentioning the human rights of the individual residents of other (illegitimate) communities.<sup>7</sup>

All of this suggests that a state has a very strong and very distinctive relationship with its own citizens when it comes to the matter of upholding human rights. But, frankly, the text as a whole is remarkably ambiguous on this issue. Even when explicitly discussing domestic rights, Orend tends to express his claims about rights in terms of the entitlements of every single human being. (Recall the quotations from pages 129 and 133 above.) Elsewhere he acknowledges unequivocally that rights are “genuinely *universal* . . . and genuinely *beneficial*” (52), where it is understood that rights cannot possibly benefit rights holders, in the way intended, without imposing a significant cost upon others. Therefore, Orend writes, “*one has to be both strict and frugal when one is deciding what truly counts as a human right in the first place*” (129) since “human rights protection comes at a price. It takes real resources and commitment to make rights real” (127). It is no small matter, then, to acknowledge that human beings as such are entitled to that kind of protection. And all of this suggests in turn that, by recognizing human rights, we place a severe constraint on what we may justifiably do to others. Orend himself makes this point eloquently on pages 52-53, just a few pages after his discussion of CPA.

Human rights, perhaps alone amongst political concepts, genuinely acknowledges the worth of each individual human life and the importance of that life’s value being protected against all the other people, forces and institutions who might otherwise plot to use that life as a mere prop in their own projects.

This certainly makes it sound as if the rights and the very lives of the citizens of one state cannot justifiably be sacrificed while another state pursues its own project of vindicating and protecting the lives and the very same rights of its own (aggrieved upon) citizens. But, as we know, this is exactly what CPA is deliberately designed to encourage.

## IV

It is unfortunate, especially for a textbook, that *The Morality of War* is so unclear about these crucial issues. But, again, I do not believe that Orend is contradicting himself since it is clear, from his other writings, that he actually rejects holism with respect to rights of any sort.<sup>8</sup> Rights are not literally “absolute” for Orend, since exceptional personal (lethal attacks), domestic (famines, epidemics), or international (aggression) circumstances may arise that sometimes justify one in sacrificing some of the rights of certain people. In his earlier text, *Human Rights: Concept and Context*, Orend writes,

Human rights are high-priority reasons that *generally* trump rival claims but they can themselves be overturned, by utilitarian appeals, in the face of a genuine social emergency. Human rights remain firm, but not rigid; they are high-priority, but not invincible, reasons for personal and political action (183).

In other words, privileging some rights above others is, in principle, permissible within any sphere of human activity and for many different kinds of reasons. And this means that rights may be sacrificed with moral justification, that is, without doing anything wrong. So it may be permissible during an epidemic, for example, to sacrifice the liberty rights of infected individuals by forcing them to live within a quarantined environment, so as to lower the risk of infection to others and thereby protect their (more important) right to physical security.<sup>9</sup> And an enforced quarantine may be further justified by the fact that infected individuals who are not sequestered in this manner may be subject to a high risk of death or injury at the hands of angry non-infected individuals. So here we have a case where it is morally justifiable to sacrifice an individual’s right as a way of protecting another (more important) right of that same individual.

Logically speaking, therefore, CPA makes good sense within the coherent overall theory of human rights that Orend has carefully developed elsewhere. The next question, however, is whether this principle is morally defensible. That is, in its actual implementation, does CPA privilege or trade off rights in a manner that is morally acceptable? I suspect not, and I fear that there is something extremely problematic about Orend’s commitment to the idea that, from a moral perspective, the human rights of the citizens of a minimally just political community matter more than the human rights of the citizens of less legitimate states.<sup>10</sup> I fear, more specifically, that, on

Orend's understanding, CPA slides into something dangerously close to political realism.

## V

For our purposes, realism can be understood as the view that moral considerations have no normative force (i.e., do not generate genuine reasons for action) when considering relations between states, and that accordingly, states ought to be concerned with nothing but the promotion of their own self-interest when acting on the international stage. Realists, therefore, claim, for example, that a state has no reason to regulate its own conduct so as to ensure that it does not violate the human rights of citizens of other states.

It is very clear that Orend is not a realist. But it is not so clear that CPA places much of a substantive constraint on what a minimally just state may do (to the citizens of other states) in pursuit of its own self-interest. Notice, to begin with, that, in its actual wording, CPA is a highly indiscriminate principle. It allows *any* victim state to use *all* means necessary to stop and punish *any and all* forms of aggression. Conspicuously absent from CPA itself is any kind of utilitarian appeal that asks us to consider the (probable) costs and benefits of either the act of aggression itself, or the various possible means of retaliation.

Aggression can take many forms.<sup>11</sup> It is clear that, for Orend, aggression must be an act that poses a serious threat to the rights and interests of others.<sup>12</sup> But notwithstanding this point, different acts of aggression can violate state rights to a greater or lesser extent. And they can also violate the rights of the citizens of the victim state to a greater or lesser extent. CPA is blind to these distinctions, however. Beyond appealing to "the raw act of aggression itself," CPA makes no reference to the specific nature, the magnitude, or the scope of the harm caused by the act of aggression in question, or to the specific nature, the magnitude, or the scope of the rights violations that aggression brings in its wake.<sup>13</sup> Rather, CPA encapsulates a perspective that views (any form of) aggression as such an egregious and elemental affront to core human values that its occurrence allows a victim state to do whatever is necessary to set things right again. The principle itself accordingly also makes no reference to the harms caused by retaliation, or to the specific nature, the magnitude, or the scope of the rights violations that retaliation brings in its wake.

We saw in section IV that in an earlier work Orend allows for the



possibility that human rights may justifiably be “overturned, by utilitarian appeals, in the face of a genuine social emergency.” But it is important to note that utilitarian appeals do not figure in any way in the statement of CPA itself, and that Orend views aggression as instigating a kind of genuine social emergency that, in and of itself, justifies a victim state in “overturning” (i.e., sacrificing) the rights of other states, as well as the rights of the citizens of those other states, so that it may vindicate its own rights. So a victim state is at liberty to do whatever is necessary, at whatever cost, to protect “its own citizens from the ravages of aggression.”<sup>14</sup> In other words, it may do whatever is necessary to promote its own self-interest. So once aggression rears its ugly head, something close to realism takes over.<sup>15</sup>

## VI

Of course, CPA also stipulates that, in vindicating its rights, V may not employ means that themselves violate human rights. However, as we have seen, this means simply that V may do no wrong in promoting its own self-interest, and CPA itself gives no content to this claim. CPA, therefore, is not a self-standing moral principle but one that implicitly appeals, as will soon be evident, to every other principle within just war theory.

Let us return to our pivotal question: how is it possible for V to sacrifice the rights of, and in particular kill citizens of A without doing any wrong? Orend is very clear on this point. V can do this provided that V “fully adheres to the other criteria of *jus ad bellum* and *jus in bello*” (40). In other words, if a “victim state fights its just war in accord with the [moral] laws of war” (263), then it has exercised due care towards civilians, and fulfilled (i.e., not violated) “*the human rights of persons as best they can be fulfilled during warfare*” (40).

V will therefore be seriously constrained in the manner by which it may promote its self-interest (in response to aggression) only if some of these other principles of *jus ad bellum* and *jus in bello* so constrain it. Arguably, however, they do not.

Consider, for example, the *ad bellum* principle of proportionality. According to Orend, this principle states that in order for a war to be justified, “the expected *universal* (not just selfish national) benefits” of going to war must outweigh “the expected *universal* costs” (59). In simpler terms, the war must, on balance, produce more good than evil. This principle certainly has the potential to significantly restrict V’s use of retaliatory force since it is

easy to imagine circumstances in which the harm caused by killing a certain number of A's civilians is greater, from an impartial perspective, than the good produced by vindicating the rights of a certain number of V's citizens. Presumably, then, proportionality would prohibit V from retaliating against A in any manner that would likely produce such (purely self-interested) outcomes.

Surprisingly, however, Orend comes close to abandoning the principle of proportionality. The calculations needed to give teeth to this principle, he argues,

are simply too complex and wide-ranging. It is wildly improbable that we could ever devise a completely satisfying set of cost-benefit formulae with regard to wartime action. Far better, I believe, to stick to a firm set of clear and universal rules to guide conduct, which is what the rest of just war theory strives to offer (60).

Orend admits that we can “usually recognize” disproportionality.<sup>16</sup> But beyond this simple intuitive appeal, the principle of proportionality is essentially empty of content, and so it does surprisingly little work within the structure of Orend's overall theory. This in turn means that Orend's strategy suffers from a worrisome kind of circularity. When we analyze CPA carefully, we see that it points us to the other principles of just war theory. But when we turn to one of the principles that is most likely to have some bite to it, we are referred back to such “clear and universal rules” as CPA.

Proportionality has, so to speak, negative content: it does not really positively add anything except to remind us that the problem in question has to be so severe (like unjust armed invasion) that war is, in fact, an appropriate response—and to suggest that the good to be gained from the war must be better than the substantial costs and evils we know war always brings in train (60-61).

But we already know that aggression constitutes a serious violation of human rights. What we do not know—and what CPA cannot tell us—are the specific conditions, if any, under which war can be a morally appropriate response to aggression. And that is because CPA itself cannot dictate *which means* (or methods or tactics or acts of retaliation) violate human rights. The above quotation, therefore, either simply begs the question in assuming that one *can* go to war without violating human rights (i.e., without

doing any wrong). Or, if it does not beg the question, that is, if it asks us to take seriously the possibility that certain forms of retaliation can be so disproportionate that they violate human rights, then Orend's account of proportionality really does not provide us with any positive *principled* guidance that will help us in determining when a victim state has gone too far in overzealously promoting its self-interest.

Orend's discussion of the principle of last resort is disappointing for similar reasons. After echoing Walzer's conviction that there is literally "no such thing as a *last* resort" (57), Orend interprets the principle as creating nothing more than "a strong presumption against the resort to force" (58). And this is a presumption, furthermore, that requires only that states be "reasonable" and not "hasty in their resort to force" (58). Of course, none of these claims say anything directly about the protection of human rights, and none of them place any kind of well-defined, substantive constraint on what a state may do in pursuit of its own self-interest. Without an independent account of what constitutes unreasonable or hasty behaviour, the principle of last resort remains pretty well devoid of content.

The only other *ad bellum* principle that offers any hope of constraining V's use of retaliatory force is the principle requiring that it must be probable that the war in question will succeed in defeating aggression. On the face of it, this principle would seem to significantly limit civilian casualties insofar as it would seem to prohibit states from initiating long and drawn-out military confrontations that hold little promise of victory. But in fact Orend waters down the content of this moral principle as well, and at the same time chooses to highlight its decidedly "prudential flavour" (58).

First, he notes that it is difficult to calculate the expected probabilities in question (59). So, again, it is not reasonable to expect too much guidance from a principle of this sort. And, second, since

victims of aggression ought to be permitted at least some resistance, should they decide on it, as an expression of their strong objection to the aggression and as an affirmation of their rights. . . . There is a presumption in favour of permitting some kind of armed response, even when the odds of military success (however defined) seem long (59).

In other words, the "probability of success" criterion does not in fact require any substantial probability of success.

One might quibble that this amounts to an abuse of language. But the

more serious worry is that Orend frames his entire discussion of this moral criterion solely in terms of the rights and interests of the citizens of the victim state. They owe it to *themselves*, Orend says, to think carefully about whether retaliation holds any reasonable prospect of success (59). After all, war is a bloody business. Entirely absent from Orend's discussion is any consideration of the harm that would be inflicted on the civilian population of A should the citizens of V, out of "self-respect" (59), opt to pursue a military victory that is, by all accounts, a long shot. Once again, the discussion is framed so as to privilege the rights and interests of certain individuals above the rights and interests of others.

## VII

*Jus in bello* considerations do, of course, place substantive restrictions on how a state may engage with the enemy during the conduct of war. Like other just war theorists, Orend endorses a version of the principle of discrimination that prohibits a state from engaging in the direct and intentional killing of innocent civilians (106-115). Discrimination does signal a very significant departure from realism. But, again like most other just war theorists, Orend also endorses a version of the principle of double effect that allows a state to kill (substantial numbers of) innocent civilians provided that the killing in question is "genuinely unintended and indirect" (262).

This is not the place to explore the principle of double effect in any detail. But it is noteworthy, for our purposes, that Orend invokes this principle not so much to constrain a state in the manner by which it may pursue its own self-interest, but precisely to allow a victim state to kill others while engaged in a war aimed at vindicating its own rights. According to the principle of double effect, a victim V may engage in such a war provided that "the importance of vindicating [V's] rights is proportionately greater than . . . the badness of the resulting civilian casualties" (260). Double effect requires that V may not aim at (or intend to cause) these civilian casualties. It also requires that these casualties are not the means by which V vindicates its rights. But double effect itself is of no use whatsoever when it comes to identifying the specific conditions, if any, under which it is morally more important, say, to refrain from killing people rather than promote one's own human rights. So double effect allows for the killing of innocents without providing any guidance whatsoever as to the limits of its own application.

On the face of it, the principle of discrimination appears to provide

innocent civilians with substantial protection. But, in practice, the principle of double effect strips away much of that protection. And on this point it is relevant to note that Orend essentially rejects the *in bello* principle of proportionality on the grounds that—like the *ad bellum* principle—it is little more than “a limiting factor, a negative condition” that is incapable of adding “new content to the just war equation” (119). In other words, according to Orend, it is virtually useless to tell commanders that each particular military tactic must produce more good than bad overall, since there is no reliable way in which we can “definitively measure the costs and benefits of a tactic” (119). There is no “independent or stable” scale of values to which we can legitimately appeal.

But if there is no legitimate public court of appeal to which we can turn in assessing claims about the value of particular military tactics, then what mechanism could possibly be put in place that would legitimately allow others to challenge the claim of a victim state that the vindication of its own rights is more important (a greater good) than the lives of innocent civilians? Double effect, combined with a rejection of proportionality, comes dangerously close to allowing states to do virtually whatever they want in pursuit of their own self-interest.

## VIII

Orend repeatedly makes the point that the various just war categories and conditions are intimately “linked” (49), and that our understanding of one principle must often be informed by our understanding of other principles as well. CPA, we know, is a good illustration of this claim: “*Provided* that the other criteria of just war are fulfilled, then the defence of rights, the protection of people, and the punishment of aggression seem worth the cost of incidental, indirect civilian casualties” (261). But we have also seen that none of the other just war principles in fact do very much by way of constraining the manner in which a victim state may defend its own rights. And certainly none of the other principles explains *why* the defence of the rights of a victim state and its citizens is (or at least can be) worth more than the lives of the citizens of another state. So none of these principles explain why a victim state does no wrong in killing others. It seems, then, that something else—some kind of foundational realist intuition about the unparalleled evil of aggression—must underlie and inform this variant of

just war theory that so markedly privileges the rights of victim states and victim citizens over the rights of others.

It is doubtful, however, that this intuition can withstand careful critical scrutiny. At one point, in defending CPA, Orend notes that it would be unfair “to deny V the permission to resist A with force, should A unjustly invade” (38). Without such permission, Orend argues, V would suffer substantial losses while A would be “unfairly rewarded” in that it would “actually *gain* whatever object it had in mind in attacking V” (38). I agree that this would be unfair. But this argument overlooks the fact that it would also be unfair to punish those citizens of A who bear no responsibility for A’s act of aggression.

In a separate argument offered in support of CPA, Orend defends V’s permission to use retaliatory force by noting that it is A who bears sole responsibility for placing V in the difficult situation where it “must choose between its rights and those of the aggressor A” (38). But, again, in many cases the citizens of A will bear no such responsibility for foisting this dilemma upon V, and in many cases the citizens of A will not profit, in any tangible way, should V choose to refrain from military retaliation. (Recall that, in aggressing against V, A is not a minimally just state. So it is also possible that A may systematically violate the rights of its own citizens.) To punish and especially to kill citizens of A under these circumstances seems grossly unfair. Unfortunately, Orend’s text does not begin to address his crucial presupposition that morality permits certain kinds of unfair arrangements but disallows others.

## IX

Orend offers another important argument in support of CPA, and this argument deserves to be quoted in full.

[I]t would be *unreasonable* to deny V permission to take effective measures to protect its people from serious harm, or lethal attack, at the hands of A. Simply put, it is not reasonable, given the kinds of creatures we are, and the kind of world in which we live, to expect a state charged with the responsibility to protect its citizens to capitulate utterly—to just roll over—in the face of aggression. Indeed, one of the core functions of a government is precisely to protect its people from foreign invasion and the accompanying threats of slaughter or slavery (38).

The first thing that needs to be said in response to this argument is that it is also unreasonable to overlook relevant differences, and this argument overlooks at least two different kinds of relevant differences.

First, as noted earlier, aggression comes in many forms. Orend defines aggression as “*the violent violation of human rights*” (71) where it is understood that the violence in question must be physical violence—“the infliction of serious, direct physical force” (33). “The classic example of international aggression is . . . invasion” (33) and this seems to be the kind of aggression that Orend has in mind in the argument quoted above.

However, as also noted earlier, CPA does not discriminate between different kinds of aggression. It is possible, for example, to aggress against a country without occupying it, and an isolated act of military aggression may kill few, if any people.<sup>17</sup> It is also possible to occupy a country without seriously threatening its citizenry with slaughter or slavery.<sup>18</sup> One may agree with Orend that any kind of human rights violation—and therefore any kind of aggression—poses a “severe threat” to human well-being “since human rights serve to protect vital human needs” (255).<sup>19</sup> But since the character and the severity of that threat can vary significantly, it seems reasonable to insist that a morally appropriate response to aggression ought to take into account the specific nature of the associated threat. So CPA seems implausibly indiscriminate or too coarse grained.

This point relates to the further fact that CPA also overlooks relevant differences between different forms of retaliation. Orend argues that victim states must have permission to go to war against any state that aggresses upon them in any manner, since it would be unreasonable to expect a victim state “to capitulate utterly—to just roll over—in the face of aggression.” But this passage obviously poses a false dichotomy. There are a great many ways in which a state may vigorously respond to, or retaliate against aggression that fall short of the use of lethal force, and do not constitute acts of war. It is not obvious that it is always unreasonable to prohibit a state from going to war in defence of some set of rights, provided that that state is permitted at the same time to defend those same rights using any number of less violent (including nonviolent) techniques. Capitulation is clearly not the only alternative to war. Again, CPA seems implausibly coarse grained.

Orend will, of course, insist that a victim state ought to avoid going to war if diplomatic measures, for example, hold out some reasonable prospect of halting and appropriately punishing aggression. And Orend, at this

point, might remind us that CPA does not *require* a victim state to go to war when less costly and less forceful alternatives are available. “[O]ne can have the right to do something which it is still not wise, or prudent, or smart to do” (97). This sensible reminder does not address my principal concern, however.

Imagine that a victim state V’s rights have been violated by some act of aggression, and imagine furthermore that a war of retaliation, and likely nothing short of a war of retaliation will vindicate those rights. Is it possible, given the *specific nature* of the rights violations in question, that it is *morally impermissible* for V to engage in a war of retaliation (so that it may vindicate its rights) because *the cost to others* (and, in particular, the citizens of A) of going to war is simply too great? Is it possible, in other words, that morality might sometimes require V to *sacrifice* its own rights even though it has the power, or the capability to vindicate those rights?

If Orend says No in response to these questions, then it truly is difficult to see how he can distance himself, in any meaningful fashion, from realism. For, on this view, within the context of aggression, the rights of victim states and victim citizens really do trump the rights of others to an extraordinary extent. So long as a victim state can vindicate its rights by going to war, and no other available option can achieve the same end, then it is permissible to do so. That is, within the context of aggression, it is permissible to promote one’s self-interest in virtually any way one can. Accordingly, there are contexts within which just war theory essentially creates a moral vacuum.

And there is strong textual evidence to suggest that this really is Orend’s view. On page 38, Orend claims that “any victim V has the *implicit entitlement* to use whatever means are necessary to realize the objects of its rights and those of its citizens.” And this, Orend argues, “follows as a matter of moral logic: if person P has the right R to object Q, and M is a means necessary to get and secure Q, then P must also have a right to M. Otherwise, to what extent could we speak of P’s original right to Q” (38)?<sup>20</sup> So if a state can vindicate its rights in no way other than by going to war, it has the right to do so.

On the other hand, if Orend says Yes in response to these questions, then he owes us a more substantial principled account of exactly how one is to balance, weigh, or trade off the rights (of V) that are sacrificed or threatened by aggression against the rights (of others) that are sacrificed or threatened by a retaliatory war. Since we know that Orend rejects holism with respect



to rights, he should be keenly interested in the precise mechanisms by which these kinds of trade-offs are fairly negotiated.

But if we take seriously the possibility that the cost of going to war in response to certain specific kinds of rights violations may simply be too high, then it is very hard to imagine how CPA can survive, in its present form, as a defensible moral principle. And if we take seriously the possibility that there are defensible moral principles that will sometimes require victim states to make (substantial) sacrifices out of a direct concern for the well-being of others, then it is not unreasonable to expect victim states to comply with these norms, given the kinds of creatures we are—namely, creatures with the capacity to transcend the personal point of view and to understand that sometimes the welfare of others must take priority over our own self-interested concerns.

## X

Orend's justification of the 2001 invasion of Afghanistan depends crucially upon CPA, and his account runs essentially as follows. On 11 September 2001, the terrorist group al-Qaida committed aggression against the United States. In knowingly providing material support to this non-state actor, the government of Afghanistan, the Taliban, thereby also committed aggression against the US. CPA, therefore, applies directly to this aggressive act of one state actor against a minimally just state, the US (71-74). And CPA, therefore, entitles the US to use all means necessary—including invasion—to punish the Taliban and prevent any further aggressive activity on their part, even if such means will knowingly result in the deaths of innocent Afghan civilians.

This argument is deeply problematic on many fronts. First, Orend's sole argument in defence of the claim that the Taliban committed aggression against the US is unconvincing. When a non-state actor's aggression is itself "sponsored" by a state actor, Orend writes,

war is justified *not only* against the non-state threat but the state sponsor as well. Aggression is, in this regard, a symmetrical relation: if Q commits aggression against R, and Q had substantial support from P in doing so, then P also aggressed against R (73-74).

From a logical point of view, however, this is simply nonsense. Aggression is clearly not a symmetrical relation. (If it were, then whenever Q commits

aggression against R, it would necessarily have to be the case that R also commits (or had committed) aggression against Q. But of course we know that an aggressor Q can violate the rights of a completely innocent party R.) In the passage cited above, Orend has identified *three* separate actors that are involved in *two* logically distinct relationships, and he has presented a controversial normative thesis about the behaviour of different kinds of actors embedded in that complex network of relationships as if it were an incontrovertible logical claim. But there is no standard terminology within logical theory for the kind of relationship (between relationships) that Orend is talking about.

Furthermore, the substantive normative claim that Orend makes is certainly far from obvious. It is clear that, when he talks about the provision of “substantial support,” Orend means that P (the Taliban) knowingly provided substantial material support for Q (al-Qaida). P, that is, acted as a “material accomplice” (74).<sup>21</sup> But if a state P materially aids and abets a non-state actor Q in committing aggression against R, then how does it follow that P is *literally* an aggressor against R as well? Is there not a significant and morally relevant difference between being an aggressor on the one hand, and being merely a material accomplice on the other? At the very least, we need a better argument.

Orend might respond as follows. Aggression involves the violent violation of (state) rights. Q, as we know, has committed aggression against, and therefore violated the rights of R. But, then, in the very act of knowingly aiding and abetting Q, P must also have violated the rights of R. So P is also guilty of aggression against R. In other words, every accomplice is also an aggressor.

There is a serious problem with this argument, however. Orend insists that aggression involves the *violent* violation of (state) rights. So, even if P *ipso facto* violates R's rights in knowingly aiding and abetting an aggressor Q, and even if this violation is substantial enough to qualify as a criminal act, P may aid and abet Q without committing violence against R.<sup>22</sup> And, if so, then P cannot literally be an aggressor against R. So it is not true, as a matter of logic, that every (criminal) accomplice must also be an aggressor. (Just as, within the domestic realm, not every accessory to murder is also a murderer.) So we cannot conclude, on logical grounds alone, that the Taliban, in knowingly aiding and abetting al-Qaida, committed aggression against the US in 2001. And if they did not, then CPA cannot be used to

justify retaliation against, never mind a military invasion and occupation of, Afghanistan.

## XI

Let us assume, however, merely for the sake of argument, that it can be established on empirical grounds that the Taliban are guilty of aggression against the US. The introduction of empirical considerations at this point in the argument is important since, as we know from sections V and IX of this paper, there are many different kinds of aggression. Even if aggression must, as a matter of definition, pose a *serious* threat to the rights of a minimally just state and its citizens, the severity of these threats, and the gravity of the harm caused by an aggressive act may vary considerably. So, for example, even if Orend is correct in claiming (71) that al-Qaida violated the territorial integrity and political sovereignty of the US on 11 September 2001, it is not at all obvious either that the Taliban violated exactly those same rights or, if they did, that they violated them in the same manner or to the same extent.

In other words, before one can launch a compelling moral argument in support of the invasion of another country whose government has “sponsored” terrorism, it is crucial that one first provides a precise and detailed account of exactly how that government contributed to the pivotal aggressive acts—in this case, the attacks of 9/11—around which that argument is constructed.<sup>23</sup> Exactly what kind of material support did the Taliban provide to al-Qaida, for example? What was the scope, the magnitude, or the temporal duration of that support? Can any of that support be linked *directly* to the *specific* attacks that occurred on 9/11?<sup>24</sup> Was Taliban support indispensable to al-Qaida’s aggression on 9/11? Or is it likely that these aggressive acts would have occurred even without Taliban support? To what extent, if any, were the Taliban aware of al-Qaida’s specific aggressive plans and intentions? To what extent, if any, did they share a common ideology? And, finally, is it not relevant that in October 2001, prior to November’s massive ground assault, the Taliban agreed to extradite Osama bin Laden to a neutral third country—most likely Pakistan—on the condition that the aerial bombardment ceased and they were provided with hard evidence of bin Laden’s involvement in the 9/11 attacks?<sup>25</sup> That is, is it not relevant that the Taliban were willing to cooperate with the US and other nations on a plan that would have allowed the Americans to defeat al-Qaida without occupying Afghanistan?

These questions seem to be of obvious moral relevance since, intuitively, it seems obvious that a morally appropriate response to an act of aggression ought to take into account the specific nature of that aggression. There is no question here of exonerating the Taliban of complicity with al-Qaida. That is not the issue. But if one's aim is to halt and punish aggression, then it seems that one ought to tailor one's response to the specific kind of aggression and the specific kind of aggressive actor with whom one is dealing. Yet, curiously, concern about the precise nature of Taliban support for al-Qaida is largely absent from Orend's discussion. He does not deal in any substantive way with any of the questions raised in the previous paragraph, for example. Instead, he seems to assume uncritically that military invasion is obviously a morally appropriate response to the Taliban's act of aggression, whatever its precise nature might be. And this belief, I suspect, goes a long way towards explaining Orend's rather cavalier attitude to the historical facts.

In concluding his moral appraisal of the American retaliation against the Taliban, Orend informs his readers that "most just war theorists, and twenty-eight other countries, agreed with America that it was just to respond with force when the Taliban refused to hand over al-Qaida suspects in November 2001" (196). This seemingly innocuous remark is troubling for a number of reasons. Most significantly, it conveniently overlooks the fact, noted earlier, that the Taliban were willing to participate in (national or international) legal proceedings against Osama bin Laden and other al-Qaida suspects. Second, because Orend makes no mention of the broader context within which the Taliban's refusal took place, he also fails to mention that the Taliban had (or at least claimed they had) good reasons for refusing to surrender bin Laden unconditionally to US authorities, namely, that they themselves had no evidence of bin Laden's direct involvement in the 9/11 attacks, and that the US had failed to provide (the world with) any such evidence.<sup>26</sup> Third, in referring to America's forceful response *in November 2001*, Orend curiously overlooks the fact that the US initiated an intensive air campaign against Afghanistan on 7 October 2001—less than four weeks after the attacks of 9/11—making it even more clear that the US had little interest in pursuing a careful and methodic legal resolution to the crimes under consideration.<sup>27</sup> This omission also allows Orend to ignore the fact that this aerial assault—that dropped over 3,000 bombs (including cruise missiles) on Afghanistan during the month of October alone, and is conservatively estimated to have killed many hundreds of civilians

that month<sup>28</sup>—was executed by the US almost unilaterally, principally with modest UK support, and arguably without UN authorization.<sup>29</sup> Finally, in appealing to the widespread consensus regarding the justice of America's forceful response, one has to wonder whether just war theorists from the Muslim world were consulted in Orend's survey.<sup>30</sup> And one also has to question why Orend makes no mention of the fact that numerous public opinion polls conducted throughout the fall of 2001 indicated that a majority of the world's *citizens* were strongly opposed to a military assault upon Afghanistan.

Orend appears to have little interest, then, in understanding this conflict from the Taliban's point of view. Further evidence for this can be found in the fact that Orend blatantly misinterprets the Taliban's motivations in agreeing to "sponsor" al-Qaida's terrorist activities in the first place.

The Taliban did so because it (*sic*) shared al-Qaida's radical Islamist ideology, which mandates the violent take-over of all governments in traditional Arab lands and their conversion into strict Islamic theocracies wherein there is a unification of church and state modelled after the Taliban's Afghanistan (196).

In fact, however, it is well known that there are "serious cultural, political, and ideological differences between the Taliban and al-Qaida."<sup>31</sup> And given that the Taliban's orientation is so "profoundly insular" that they are "deeply suspicious of the apparatus of the modern state, so much so that [in the 1990s] they destroyed most of its existing institutions," it is simply not true that al-Qaida's theocratic vision is in any way "modelled after" Taliban ideology.<sup>32</sup> So it is clear that Orend has misinterpreted the Taliban's intentions in committing aggression against the US. What is not so clear, however, is whether any of this matters on Orend's account, since it is not clear whether the intentions of an aggressor ought to play a significant role in influencing a victim's response to aggression.

In a way, the existence of serious errors and omissions within Orend's discussion of Afghanistan is hardly surprising. His moral argument in support of the invasion of that country crucially employs a theoretical principle—CPA—that itself, as we have seen, fails to discriminate in any substantial way between one "raw act of aggression" and another. So any detailed discussion about the empirical facts and the precise nature of an act of aggression can be seen both as an unhelpful distraction, and as something that can potentially blind us from appreciating the full implications

of the most salient moral feature of the situation, namely, that aggression *has* occurred. But what *is* surprising is that so *little* care and attention is paid to detail even when Orend is discussing a concrete historical case. And this, I fear, confirms the suspicion that it really is CPA—and so the bare fact of aggression itself—that does the bulk of the work in Orend’s argument. In other words, CPA operates pretty well independently of the other components and constraints of just war theory—especially proportionality—that require further factual input. And the proviso, that a victim state can retaliate to aggression only in ways that do not themselves violate rights, is largely devoid of content. In still other words, a victim state can do nearly whatever it wants in responding to aggression, and it may employ virtually any means necessary to the vindication of its rights and the promotion of its own self-interest.

Orend may rebel at this reading of his text, but frankly it is hard to see how he can plausibly resist it. In the early days following 9/11, a number of brave and lonely voices argued that a military invasion of Afghanistan would be morally impermissible, and that something more along the lines of a criminal investigation (or a “police action”) would better serve everyone’s interests in the long run.<sup>33</sup> In order to support this argument, one does not have to be a pacifist. But one does have to take seriously the need to *balance* the rights and interests of a victim state against the rights and interests of an aggressor state. And one does have to take seriously the possibility that *sometimes* a morally appropriate response to aggression ought to fall short of invasion. So it is revealing, I think, that Orend does not take this argument seriously enough even to mention it, never mind attempt to refute it. It is as if, in committing aggression, the aggressor state essentially vanishes from the moral landscape, and is erased from the ledger of moral deliberation. *Qua* aggressors, the Taliban become the archetypal faceless enemy, and any detailed examination of the lives, the practices, or the principles of that enemy—the reality on the ground, so to speak—becomes mostly irrelevant. But this makes perfect sense, of course, if the rights and interests of some people are fundamentally more important than the rights and interests of others.

## XII

As we have seen, the political character and the moral perspective of the Taliban government are largely ignored throughout Orend’s discussion. The

people of Afghanistan themselves, however, are simply forgotten altogether. In fact, it is astonishing that, throughout his entire discussion of the moral justification for the invasion of Afghanistan, Orend refers not even *once* to the citizens of Afghanistan.<sup>34</sup> They may as well not exist, so far as the logic of his argument is concerned. And there is no indication that the death and suffering that resulted within the Afghan population as a result of the American invasion have any substantial bearing on Orend's case. The citizens of Afghanistan seem to have been erased even more decisively from the moral ledger.

Following Walzer, Orend claims that "aggression is usually committed by powerful nations against the weak" (126).<sup>35</sup> If this is right, then the American-Afghanistan conflict is atypical, since here the "victim" is one of the wealthiest and most powerful nations on earth. And reading Orend's text, one would have no inkling that Afghanistan is one of the poorest nations on earth, with a per capita annual income of approximately \$230, an unemployment rate of between 40 to 60 per cent, and an average life expectancy of 43 years. Or that millions of Afghans live without such basic amenities as electricity and running water. Or that Afghanistan is ranked near the bottom (174<sup>th</sup> out of 178 countries in 2007) of the UN's Human Development Index, that almost half of all Afghani children are malnourished, and that this country suffers from the world's highest maternal mortality rate and the world's second highest child mortality rate, with one-quarter of all children dying before the age of five. Or that approximately 1.2 million Afghan civilians were killed during the ten-year Soviet occupation that ended in 1989. Or that the Soviet occupation and the ensuing civil war produced literally millions of Afghan refugees and displaced persons. And so on. It is with good reason that Afghanistan is frequently referred to as a veritable human rights catastrophe.

These grim facts bear on Orend's argument in three ways. First, it is evident that the Taliban did next to nothing to uphold and protect the fundamental human rights of the citizens of Afghanistan during the approximately five-year period (1996-2001) that they exerted some kind of military control over Afghanistan. The point here is not simply that the Taliban failed to function as a minimally just state, or that Afghanistan is a desperately poor country. Rather, the point is that the Taliban did not function, and in fact never had any interest in functioning, as a traditional state government at all. In describing "the withered state" that emerged "in the

five years after they occupied Kabul,” one former UN regional administrator notes, “The Taliban did not appear to have given any priority to state-building, nor to the development of the economic and social infrastructure that is essential for the functioning of a viable state and for the welfare of its citizens.”<sup>36</sup> And if this is right, then the entire argumentative model wherein the Taliban are regarded as a “state sponsor” of non-state terrorism collapses as an inaccurate, artificial, and thoroughly misleading ideological construct.

Second, whatever the Taliban either did or took themselves to be doing, the majority of Afghans clearly did not benefit from their rule. This means that there was no valid social contract in place binding the people of Afghanistan, in any significant normative sense, to their rulers.<sup>37</sup> And so it is grossly unfair that the people of Afghanistan should suffer (further) as a result of the Taliban’s misdeeds on the international stage, since they neither benefited from nor consented to Taliban rule.

Finally, and most significantly, as Orend acknowledges, to adopt the moral point of view is to recognize “the need to minimize human suffering” (233). Morality surely cannot be reduced to this single concern. But any legitimate moral perspective must find some way of addressing the needs and alleviating the suffering of the weakest and most vulnerable members of human society who, for whatever reason, are compelled to endure lives of extreme misery.

Of course, Orend acknowledges the theoretical point that the citizens of an aggressor state have rights. He notes explicitly that, at the conclusion of a war, these individuals have “claims to human rights fulfillment, and the objects of such rights require that resources be devoted to them” (166). And so if the human rights of the citizens of an aggressor state can survive the conduct of an entire unjust war, it is inconceivable that their rights would evaporate, some time earlier, as a result of their government’s initial act(s) of aggression. So the Afghan people clearly had human rights, and therefore some kind of a claim upon others throughout the fall of 2001. Yet Orend gives no voice to these rights in his discussion of American retaliation to the attacks of 9/11. Nor does he consider the possibility that the satisfaction of these rights might even have had a particular urgency at that time, given the profoundly impoverished condition of the traumatized and already war-weary population of Afghanistan. In mid-September 2001, for example, while observing how the mere threat of an American invasion was already severely disrupting the delivery of aid as well as normal civilian life within



Afghanistan, international NGOs warned of an impending humanitarian crisis that placed over six million Afghans at risk of starvation.<sup>38</sup> A morally appropriate response to the problem of aggression cannot possibly ignore these kinds of considerations. Furthermore, suffering on this scale surely ought to be given some kind of moral priority.

Aggression ushers in a regime of human rights violations. When aggression occurs, people suffer, and rights are often violated *on both sides*. Yet any morally legitimate treatment of aggression ought to recognize the need to *balance* the rights of victims against the rights of aggressors, and also against the rights of innocent third parties. That Orend shows little inclination to do this is deeply troubling, and it is a major shortcoming of *The Morality of War* that it offers no serious principled discussion of this issue. In his treatment of Afghanistan, the rights of an extraordinarily prosperous, secure, and powerful victim state are trumpeted so loudly as to drown out the cries of a long-suffering and desperately beleaguered people who are altogether innocent of the acts of aggression under consideration. From a moral perspective, this is utterly indefensible.

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#### ENDNOTES

- 1 (Peterborough, ON: Broadview Press, 2006). Most references to this work are cited within the text. In his *Parameters* 37 (2007) review, Martin Cook praises *The Morality of War* as “the best single volume in English on Just War” (111). In a review in *The Journal of Military Ethics* 6 (2007), George Lucas writes that Orend has had “a revolutionary impact on just war theory, comparable to that of [Michael] Walzer himself” (249). And in his *Millennium* 36 (2008) review, Michael Neu describes Orend’s work as not only “deep” and “subtle” but “inspirational” (663) as well.
- 2 In this paper I do not consider Orend’s arguments regarding the separate, large, and complex topic of coercive regime change in Afghanistan.
- 3 Italics in quotation marks are Orend’s unless explicitly stated otherwise.

- 4 Though not explicitly mentioned within CPA, punishment plays a central role in Orend's interpretation of that principle—both for retributive reasons and because of its deterrent force (165).
- 5 “[T]he weight of reasons . . . indicates that no wrong is done to A in the event that victim V resists A's aggression with means of war” (39).
- 6 This reading is also consistent with how Orend discusses rights in his earlier text *Human Rights: Concept and Context* (Peterborough, ON: Broadview Press, 2002). “In general,” Orend writes, “a human right is violated when a duty-bearer fails to perform his correlative duty without just cause” (33). In other words, “in the ordinary course of life . . . for a person to take away an object of one's human rights”—in my terminology, for someone to sacrifice that right—“is for that person to violate one's human rights” (33). But “human rights are not absolute: there are very rare personal and social emergencies when the duties correlative to human rights may, with sufficient reason, be put aside” (33). So, for example, in response to aggression, V may justly—with sufficient reason and without doing anything wrong—sacrifice the rights of civilians of A by killing those individuals.
- 7 See also pages 40 and 62.
- 8 Although Orend does not contradict himself, his hyperbolic holistic claims within *The Morality of War* are nonetheless seriously misleading, especially since they are not qualified in any way within that text.
- 9 See *Human Rights: Concept and Context*, 20.
- 10 Not to mention the rights of stateless individuals.
- 11 On pages 52-53 of *Just and Unjust Wars* (New York: Basic Books, 1977), Walzer concedes this point but questions its moral relevance, arguing that “aggression is a singular and undifferentiated crime because, in all its forms, it challenges rights that are worth dying for.”
- 12 I will explore the meaning of aggression more carefully in section IX below.
- 13 That is, which rights are being violated, how seriously are they being violated, and how widespread are the violations? The phrase in quotation marks comes from Orend's earlier work *War and International Justice*:

*A Kantian Perspective* (Waterloo, ON: Wilfrid Laurier University Press, 2000), 184.

- 14 *War and International Justice*, 184.
- 15 In summary, then, Orend seems to endorse a rather complex view according to which (a) an individual or a state may forfeit some of its rights, by committing aggression, for example. Further, (b) it is possible (in a social emergency such as a famine or an epidemic, for example) that utilitarian considerations can override individual or state rights, so that no wrong is done (and so no rights are “violated”) when the rights of an individual or a state are sacrificed in the service of some good. But (c) the right of a victim state to retaliate with force in response to aggression is exceptional in the sense that it apparently cannot be trumped or overridden by any other considerations (including utilitarian concerns having to do with the harm inflicted upon the citizens of the aggressor nation, for example). It is worth noting that the “supreme emergencies” that Orend discusses in chapter five of *The Morality of War* allow a victim state to respond to aggression with even less moral restraint than usual.
- 16 Significantly, Orend offers no guidance as to how we should proceed in the face of disagreement over this issue.
- 17 Consider, for example, just two kinds of aggression that are mentioned in Article 3 of the UN General Assembly Resolution 3314—a military naval blockade of a state’s ports, or the annexation by force of a geographically isolated portion of a state’s territory.
- 18 It may be obvious to all concerned that resistance would be futile and highly imprudent. And the occupying force may be interested primarily in the exploitation of natural resources while lacking any genuine interest in controlling people’s daily lives. So here the possibilities of slaughter or slavery are quite remote.
- 19 See also page 186 of *War and International Justice*, where Orend defines aggression as “the presentation of an unjust, serious and potentially lethal threat to another’s vital needs, either by actual attack or by posing a clear and present danger of such an attack.”
- 20 This, however, does not follow as a matter of moral logic. Suppose that you have a right to Q1 but no right to Q2. Then you have some kind

of a claim upon others with respect to Q1, but no claim upon others with respect to Q2. (For example, others may have an obligation to provide you with Q1 or, at the very least, not to interfere with your pursuit of Q1. But no one has any obligation of any kind with respect to your possession or pursuit of Q2.) So we can explain how rights structure our relations with others in a very robust fashion, without insisting that we have an *unlimited* right to Q1 and to whatever else is necessary to secure Q1. Our right to Q1 may be defeasible in the sense that our claim upon others may be extinguished should the cost to others of securing Q1 become too high. Since Orend admits that rights are not “absolute,” he must also concede that they are defeasible in this sense.

- 21 As examples of the relevant sort of material linkages, Orend cites “financing; the provision of weapons; intelligence and/or training; the knowing provision of safe harbor, residence or citizenship” (74).
- 22 Recall, from section IX, that Orend has *physical* violence in mind when he claims that aggression involves the violent violation of state rights.
- 23 Orend admits that the failure of a government “to disclose publicly the evidence and sources behind arguments supporting something as deadly and far-reaching as war . . . renders the resort to war unjust” (44).
- 24 This question is especially important given the exceptionally loose and fluid character of the al-Qaida network. Even though it cannot be denied that the Taliban provided extensive support to al-Qaida over many years, it does not follow that the Taliban were directly involved in either the planning or the execution of the attacks of 9/11.
- 25 See the article “Bush Rejects Taliban Offer to Hand Bin Laden Over” that appeared in the *Guardian* on 14 October 2001. CNN also reported that on 7 October 2001 the Taliban themselves offered to try bin Laden in Afghanistan in an Islamic court of law.
- 26 This argument is not unique to the Taliban. It has frequently been argued that the evidence that the Americans and the British produced to implicate bin Laden and al-Qaida in the attacks of 9/11 was circumstantial at best and would not stand up in a court of law. See, for example, Gore Vidal, *Dreaming War* (New York: Nation Books,

- 2002); and the eighth chapter of David Ray Griffin, *The New Pearl Harbor Revisited* (New York: Olive Branch Press, 2008). The grounds for the Taliban refusal to extradite bin Laden were reported on CNN as early as 19 September 2001.
- 27 Bear in mind as well that the massive overseas deployment of military aircraft and personnel began as early as 19 September. See Michael Griffin, *Reaping the Whirlwind: Afghanistan, Al Qa'ida and the Holy War* (London: Pluto Press, 2003), 272.
- 28 See chapter 19 of Griffin, *Reaping the Whirlwind*, especially pages 299-300.
- 29 See "Canada's Role in the Occupation of Afghanistan" by the group Ehec A La Guerre, in Lucia Kowaluk and Steven Staples (eds.), *Afghanistan and Canada: Is There an Alternative to War?* (Montreal: Black Rose Books, 2009) for an extended argument about the lack of UN authorization.
- 30 Orend likes to appeal to consensus when it suits his purpose (see page 43 for another example of this). But when it does not, he is quick to point out that "sometimes consensus is wrong" (37). What one ought to conclude from this, I think, is that the appeal to popularity has little probative force within the field of moral or political argumentation.
- 31 Derek Gregory, *The Colonial Present* (Malden, MA: Blackwell, 2004), 42.
- 32 Gregory, *The Colonial Present*, 42. On page 43, Gregory also notes that, as early as 1998, the Taliban had been engaged in discussions to extradite bin Laden to Saudi Arabia. Clearly, therefore, there were serious and longstanding tensions in the relationship between the Taliban and al-Qaida.
- 33 See, for example, Arundhati Roy's brilliant essay "The Algebra of Infinite Justice" in her collection of papers entitled *Power Politics* (Cambridge, MA: South End Press, 2001).
- 34 On page 201 there is a very brief discussion of how the desperate plight of the Afghan people bears on the question of coercive regime change.
- 35 Walzer makes the same claim on page 67 of *Just and Unjust Wars*.

- 36 Angelo Rasanayagam, *Afghanistan: A Modern History* (London: I. B. Tauris, 2005), 202.
- 37 Orend himself makes this theoretical point on pages 83-84.
- 38 "Afghans Seek Sanctuary from Strife," *Guardian*, 17 September, 2001.