

UNDERSTANDING THE POLITICAL DEFENSIVE PRIVILEGE

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Waging war is an act of profound moral gravity. War inflicts some of the worst conceivable harms on persons. A polity that goes to war wrongly is, potentially, complicit in mass murder – either as instigator or accessory. Going to war is, therefore, an act that stands in radical need of moral justification.

It is therefore striking how frequently the use of military force is tolerated, or even advocated, in contemporary political life. While the use of military force for the purposes of internal repression is widely condemned, and seen as a mark of political illegitimacy, the waging of international warfare is central to the practice of stable and powerful states whose legitimacy is rarely questioned in mainstream politics. And the use of military violence in pursuit of national self determination has also been central to international political practice for close to two centuries.

The permissible use of force in interpersonal dealings is generally confined to defensive violence – either in self-defence or defence of others. Similar such notions are used in the international context. The *Charter of the United Nations*, for example, states that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”.¹ This seems to appeal to notions of individual self-defence as well as the defence of others (“collective self-defence”). Of course members of the United Nations are not persons, but polities, described in the preamble to and the principles of the *Charter* as “peoples” and “nations”, and in the operative text as “states”. Under the *Charter*, these entities pledge to relate to one another on the basis of “sovereign equality”² and to “develop friendly relations among nations based

¹ Article 51. The article continues “... until the Security Council has taken measures necessary to maintain international peace and security.” This limitation on the inherent right of self-defence is best understood not as internal to that right, but as a consequence of the establishment, under the *Charter*, of a (rudimentary) system of international government. In particular, article 25 obliges all member states “to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

² Article 2, paragraph 1; article 78.

on respect for the principle of equal rights and self-determination of peoples”.³ This suggests a picture of national sovereignty pursuant to which polities, much like persons, enjoy a right⁴ not to be subject to external aggression. The entitlement of going to war, then, arises simply in response to an infringement of that right – it is a privilege of *national self-defence*.

It is immediately evident that the justification of warfare involves reference to collective and political entities, such as nations, states, or peoples. (In the inquiry that follows, we will use these various terms for a polity roughly as follows: a *people* is a group of persons living together in some form of common society; a *nation* is a people understood as a politically unified collective; and a *state or similar entity* is a set of institutional arrangements governing a nation.⁵) The role of these collective elements in our understanding of warfare is a source of much theoretical disagreement, because there is very little consensus on the value and normative status of such collectives.

Virtually all participants in this debate are in agreement that what we call “romantic” collectivist views, whereby some political collectives instantiate intrinsic goods that can be overwhelmingly greater than individual goods, are highly implausible. Such views are rightly associated with some of the worst political horrors of the twentieth century. So there is apparent convergence on statements like “individual persons are the fundamental units of moral concern”. But beyond this relatively vague slogan on which we can all agree, there is still significant room for disagreement. For instance, it remains to be settled:

- (i) What sorts of collectives, if any, instantiate value?
- (ii) How do the values (if any) instantiated by collectives relate to goods and evils which are enjoyed or suffered by individuals?

³ Article 1, paragraph 2; and see also article 55.

⁴ A claim right, in Hohfeld’s terminology: W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Legal Reasoning* (New Haven, Conn.: Yale University Press, 1919). For further discussion, see below n 15.

⁵ This usage corresponds to that of David Luban, “Just War and Human Rights” *Philosophy and Public Affairs* v 9 (1980):160–81, 168, although we use the phrase *state or similar entity* to make the point that not all states in the philosopher’s sense are states in the international legal sense, because the philosopher does not require of a state that it possess the legal capacity to enter into relations with other states (*Montevideo Convention on the Rights and Duties of States* (1933), article 1). Thus, under our usage the Hamas-governed Gaza Strip fits the description “state or similar entity”, although at international law Gaza is not a state but rather a somewhat anomalous entity. Our usage of *people* differs from Rawls’, who uses “people” to refer to a particular sort of state-possessing nation: see the discussion below, text to n 58. Our usage of *state* differs from Walzer’s, who uses “state” to refer to the union of nation and state: Michael Walzer, “The Moral Standing of States” *Philosophy and Public Affairs* v 9 (1980):210–29 212. As can be seen in the text quoted above from the *Charter of the United Nations*, international legal instruments demonstrate a terminological pluralism that gives rise to a similar scope for conceptual confusion, but also for the drawing of significant distinctions.

While international law does not explicitly address these questions, it enshrines a set of norms regarding war which appear implicitly to endorse “statist” responses. According to the legal tradition, all states enjoy a right to go to war in national self-defence, but there is only a very limited privilege – if any – of humanitarian intervention against states that are harming their own citizens.⁶ Since humanitarian interventions are usually justified in defence of individual human rights or in defence of non-state collectives, such as peoples, the legal tradition appears committed to a value of state sovereignty that overrides significant interests of individuals and of peoples. It favours state sovereignty, moreover, without regard for the internal character of states – tyrannical states just as much as peaceful democracies are entitled to national self-defence. Even where contemporary international law emphasises the value of self-determination, the relevant norms are still stated in terms of the rights and privileges of political collectives, and emphasise the inviolability of states from external interference.⁷ Consequently – and rightly in our view – the legal tradition has come in for very serious criticism for an apparently fetishistic commitment to state-centric values.

One of the most prominent alternative approaches to these questions is the liberal cosmopolitan view. While subtle differences exist between different proponents, the stereotypically liberal cosmopolitan answers to the above questions would be as follows: (i) the only collectives that instantiate value are those that promote individual welfare or rights, and thereby individual autonomy;⁸ (ii) collectives are only of value insofar as they contribute to goods enjoyed by individuals. Collective

⁶ For example, *Security Council Resolution 1973* (2011), which authorised a limited humanitarian intervention in Libya, appears to presuppose the necessity of Security Council authorisation for such activity, which in turn implies that states do not enjoy any general privilege of humanitarian intervention at international law.

⁷ The General Assembly of the United Nations has declared that every state bears duties “to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples”, “to refrain from any forcible action which deprives peoples ... of their right to self-determination and freedom and independence”, and to “refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country”: *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (UNGA Res 2625 (XXV) 1970). Thus, while self-determination is a pre-eminent international principle, the *realisation* of self-determination is predominantly an internal matter, and orthodox international law probably requires that any action in support of self-determination that would interfere with a state’s sovereignty be authorised (pursuant to Chapter 7 of the *Charter of the United Nations*) by the Security Council of the United Nations – itself a highly statist institution. This view of the international legal situation draws support from *Security Council Resolution 1973* (2011), which seems to presuppose that Security Council authorisation is a necessary legal precursor to the taking, by states, of “all necessary measures ... to protect civilians and civilian populated areas” in Lybia, and thereby of helping to “find a solution to the crisis which responds to the legitimate demands of the Libyan people”.

⁸ Or perhaps more broadly: those that states that achieve a sufficient degree of justice. But generally the liberal understands justice as involving the defence of individual rights combined with the enforcement of certain norms of equality, which may be understood outside of a framework of rights.

value is therefore to be ranked alongside individual goods only once it has been converted into an ultimate currency of individual interests. So for instance, Cécile Fabre writes, in this volume, “essentially collective goods such as political self-determination have value only to the extent that they promote some aspect of individuals’ well-being”.⁹

This view is morally universalist, and there is often much made of the contrast between cultural relativist views and cosmopolitanism. But it is important to note that liberal cosmopolitans do not merely endorse a form of moral universalism, but a highly *individualistic* form of universalism. As such, it is structurally similar to classical utilitarianism, which is also universal and highly individualistic. What further distinguishes the liberal cosmopolitan from a utilitarian is that the liberal cosmopolitan regards certain rights – especially human rights – as non-instrumentally valuable and universally valid.

A third approach to these issues is some sort of pluralism about value, whereby political communities such as states, peoples, or nations are regarded as valuable in their own right, but not in the overriding and fetishistic fashion exemplified by the international legal tradition. We place thinkers such as John Rawls in this category. Rawls answers question (i) by identifying *peoples* rather than states, as a collective which can instantiate a distinctive value of self-determination. Consequently, Rawls posits distinctive political norms directed towards the peaceful participation of peoples in a society of mutual understanding and respect. Answering question (ii) for Rawls is more difficult because it is not clear exactly how Rawls understands the nature of the value of a people’s self-determination, but one plausible interpretation is that he sees collective self-determination contributing to individual welfare because of its connection to the individual but relational good of self-respect.¹⁰ There is also an important relationship, in Rawls’s account, between self-determination and the existence of an international overlapping consensus, which in turn is a necessary condition of stability for the right reasons, which is in turn a constraint, in Rawls’s theory, upon judgements of individual welfare.¹¹ In these sorts of ways, then, these collective goods make a distinctive normative contribution to the sorts of reasons we have that cannot be straightforwardly reduced to their contribution to individual goods.

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¹⁰ For an account of the good of self-respect, see John Rawls, *A Theory of Justice* (Oxford, OUP, 1971), esp pp 178–79, 440; and for an apparent extension of this notion into a critique of ethnocentrism and a defence of the value of collective self-determination, see John Rawls, *The Law of Peoples* (Harvard University Press, Cambridge, MA, 1999) 61–62, 121–23.

¹¹ See the discussion below, §3.2.

In this paper, we argue that both liberal cosmopolitan and pluralist approaches face serious difficulties in explaining the entitlement to use military violence in defence of a nation-state. Our initial step, in Section 1, is to consider a range of possible threats that a polity might face, and to thereby disaggregate the privilege of national self-defence into its various component parts. This inquiry will show that the broad scope of the traditional *jus ad bellum* rests upon the imputation to polities of a particular type of defensive privilege, which we call a “political defensive privilege”. We then examine, in Sections 2 and 3, how liberal cosmopolitan and pluralist thinkers might account for the political defensive privilege. Our conclusion is that liberal cosmopolitanism has implausibly radical implications for political morality, and cannot in fact ground the political defensive privilege. Pluralists, we argue, do better, but fail to draw the line in an entirely plausible fashion between those polities which do, and those which do not, possess a right of self-defence. In Section 4, we suggest an alternative approach which promises to provide a more plausible foundation for the political defensive privilege: prosaic statism.

In broad orientation, prosaic statism is a consequentialist and individualist approach to political morality – much like utilitarianism. All manner of collectives may contribute to individual welfare, but states are of particular importance because, in the modern era, states are the institutions which make the most important contributions to the satisfaction of vital interests of individual citizens. Thus the view is statist in that it regards states as of distinctive value, but is prosaic because it denies any romantic or non-contingent reason for this.

Why not call our view utilitarian or consequentialist? We adopt a distinctive label to highlight our endorsement – over and above standard consequentialist theses – of something like a communitarian claim about the nature of individual value. When liberal cosmopolitans stress the importance of promoting individual welfare, they share an assumption with utilitarians and most other universalists that all facts about individual wellbeing are largely independent of economic and political context. We dissent from this claim. Of course there are some properties like health, wealth, and wisdom which are of universal value to human flourishing; we can all agree with that. But we are sceptical that there are any facts about the relative ranking of these basic goods and the acceptable trade-offs to be made among them, independent of the social and institutional context in which people live. In terms of our diagnostic questions, the prosaic statist agrees with the liberal cosmopolitan on question (i): the only collectives of value are those that contribute to individual goods; but adopts a position closer to the pluralist on question (ii): there are profound difficulties in attempting to identify and compare the different collective goods that arise in different polities. Consequently, we should be willing to credit some value to the stable existence of a political collective that is at least partly

distinct from the readily identifiable value of that collective to its individual members.

Any view of this sort immediately risks being labelled as “cultural relativism”, so let us confront that misnomer from the outset. Peoples, states, and nations have all, sometimes, engaged in abhorrent and vicious treatment of individuals.¹² We in no way endorse any such practices – even if they have been endorsed by a majority of the relevant culture or by a relevant governing elite. Furthermore, we agree with the moral universalist that there are *some* properties which are of universal value to individuals. For the purposes of political morality, however, these universals are so abstract and devoid of practical content that, in practice, assertions of universalism frequently amount either to vacuous generalisations (with which we will happily agree) or to parochial claims about value that are mistaken for timeless truths. That is, we contend that the typical universalist underestimates the extent to which many of the political ends at which she or he aims are of instrumental rather than ultimate value. Instrumental value is, of course, relative rather than absolute by its very nature, and we are therefore relativists to that (limited) extent. But we are not *cultural* relativists at all. As generally understood, culture provides a framing and context for answering questions of ultimate value and meaningfulness.¹³ Whereas our focus is not upon questions of ultimate value, but upon the social, and particularly institutional, means to such ends, which therefore are themselves, in virtue of this, valuable to those for whom they are means. And we wish to urge a greater modesty on the part of liberal cosmopolitans and their universalist colleagues when determining the legitimacy of other polities in which humans may be prospering in ways mediated by very different institutional contexts. Particularly when military violence may be authorised on the basis of such judgments, liberal cosmopolitans should be very cautious in applying the particular conception of human wellbeing common today in liberal industrial economies as if those conceptions can be projected, without difficulty, onto very different institutional arrangements and the patterns of human life that have arisen within them, in which the established paths to the realisation of such ultimate values as health, wealth and wisdom may be very different from those to which the liberal cosmopolitan is accustomed.

¹² Simon Caney, *Justice Beyond Borders: A global political theory* (Oxford: OUP, 2006) 89 gives some examples, by way of throwing down a challenge to the cultural relativist.

¹³ See, for example, the discussion in W Kymlicka, *Multicultural Citizenship*.

1 INTRODUCING THE POLITICAL DEFENSIVE PRIVILEGE

1.1 Some varieties of national self-defence

Walzer says that the entitlement of a polity to go to war in national self-defence is simply the “collective form” of the privilege enjoyed by its individual members to defend themselves and each other against violations of their rights to life and liberty.¹⁴ Like Walzer, we take it for granted that each individual enjoys a personal privilege to defend herself against threats to her physical wellbeing, provided the individual has not forfeited some rights through her prior culpability (an attacking mugger has no right not to be assaulted).¹⁵ We also assume that this privilege extends to the defence of non-culpable others, although in this latter case stricter proportionality constraints may apply.¹⁶ The difficulty, of course, is to specify in a plausible fashion *how* these individual rights and entitlements can be aggregated or translated to give rise to something similar at the level of political collectives.¹⁷

Of course, it does not immediately follow from the fact that a right is being unjustly infringed that it is permissible to use force – let alone massive and lethal force – to prevent that infringement. I may have a right that you not park on my lawn, but it would – in typical circumstances – be both prudentially and morally unwise to resort to fisticuffs to prevent such an infringement. In this spirit, the traditional theory of just war offers a number of further conditions that must be met before a state can be justified in going to war. These requirements of proportionality, necessity, right intention, and the like limit the occasions in which warfare is permitted in pursuit of national self defence, even when a privilege of defensive violence exists. A further element of our inquiry will be to consider how these additional requirements – which we will generally refer to under the rubric of “proportionality” – relate to more fundamental features of the varying accounts of the relationship between individual and collective moral claims.

¹⁴ Michael Walzer, *Just and Unjust Wars* (1977) 54.

¹⁵ Ibid; Patrick Emerton and Toby Handfield “Order and Affray: Defensive Privileges in Warfare” *Philosophy and Public Affairs* v 37 (2009):382–414, 383–87. Note: some may prefer to characterise the right of self-defence as a claim right, rather than as a mere privilege. We do not pretend to understand exactly how this is supposed to work, but will sidestep that dispute here. Presumably those who think that a right to self-defence involves a claim right will also agree that it involves at least some privileges, such as the privilege to inflict harm on one’s attacker. So we trust that our characterisation of the right of self-defence can be accepted as at least minimally adequate.

¹⁶ “Order and Affray” 405.

¹⁷ In this section of the chapter, we cover some of the same ground as does Rodin in chapters 7 and 8 of *War and Self-Defense* (2002), but apply a different analysis and thereby reach somewhat different conclusions.

Sometimes, it is possible to understand collective privileges to inflict defensive violence – and hence, justify acts of war – in terms of the aggregation of individual defensive privileges. For example, if polity A is intent on killing many (or all) of the members of people B, and there is no culpability on the part of the Bs that would licence such violence towards them, then individual Bs enjoy a defensive privilege against individual aggressing As. Furthermore, if the Bs were organised as a nation, and hence capable of commissioning a designated sub-group to act as defenders of the whole, they would certainly be entitled to do so; and if the Bs possessed a state, then that state could exercise the defensive privilege on their behalf. Either possibility would result in something like a war between, on the one hand the As, and on the other hand, the military of the Bs or of their state. Let us call this a *war licensed by defence against murder* (or, in the extreme case, *genocide*).¹⁸

This sort of case is atypical, however, because a great deal of warfare is not motivated by the intention to inflict murderous violence. Rather, wars tend to be about political control: control of territory, control of populations within that territory, control of other resources and opportunities.¹⁹ It is more difficult to analyse this sort of warfare in the individualist framework of the previous paragraph.²⁰

Consider, first, war waged by state A to gain control of a territory presently subject to the control of state B. If the territory is uninhabited, then B does not enjoy a defensive privilege of the sort discussed above, because A's war does not immediately threaten any individuals. Of course, if B were to send soldiers to defend the territory in question, those soldiers would be subject to threats, and in virtue of that fact might enjoy a defensive privilege.²¹ But we are concerned here with whether B enjoys any privilege to send soldiers to defend the territory in the first place. This will only be so if B enjoys some sort of defensive privilege in respect of its present political standing as the government of the territory. We will return to this issue shortly.

If the territory in question *is* inhabited, then it might seem that B does enjoy a defensive privilege of the sort discussed above, arising out of the threat posed to

¹⁸ David Rodin notes that defence against genocide is one case in which the privilege of waging defensive war can be explained simply by appeal to the individual privilege of self-defence: *War and Self-Defense* 139–40.

¹⁹ International law refers to this sort of control using the phrases *political independence*, *territorial integrity* and *national unity*: *Charter of the United Nations*, article 2, paragraph 4; *Declaration on Friendly Relations*, above n 7.

²⁰ Seth Lazar (this volume) argues that it is not merely difficult, but impossible. See also David Rodin (this volume).

²¹ See “Order and Affray”.

those inhabitants. We need to think through, however, what exactly it means for A to seek to take control of territory inhabited by members of B. If A seeks to *expel* these occupants by the use of force, then unless the expulsion is licensed by the prior culpability of the members of B, the ordinary defensive privilege will clearly arise. (In any given case, the answer to this question of culpability will depend upon the details of the proprietary relationship between these members of B and the territory in question; certain sorts of colonists, for example, may be liable to expulsion in virtue of their culpability in colonising territory to which others have a stronger claim.²²) We might call this *war licensed by homeland defence*.²³ Even if there were no state exercising control over the territory in question, those people who occupy the territory would nevertheless enjoy a defensive privilege of this sort, pursuant to the analysis undertaken above, and could exercise this privilege collectively if they so desired. (A more tentative instance of this sort of collective defence of property might arise if A's army engages in widespread looting, or takes over housing for the purposes of billeting its troops. The defence of such "lesser" property rights by means of lethal force obviously puts greater pressure on the proportionality of the defensive violence to the wrong defended against. The analysis of the infringement of such "lesser" property rights is also complicated by the fact that some such acts may be licensed under general principles of political authority and obligation.²⁴)

It is possible, however, for A to seek control over the territory of B without seeking to expel the present population of that territory. That is, A may be seeking to exercise political control over that population, replacing B as its government. (Henceforth we will describe this as *mere change of government*.)²⁵ In this sort of case, individual inhabitants of the territory may well be subject to threats of violence – some soldiers and officials, for example, are likely to be threatened with violence in order to obtain their compliance with A's political directives. Is it possible to explain

²² This sort of case is one rough moral equivalent to the legal possibility of a state that is not entitled to defend its sovereignty against some particular claim to national self-determination: above n 7.

²³ Rodin does not consider homeland defence as a possible basis for justifying defensive warfare in individualist terms.

²⁴ For example, the Annex to the *Hague Convention (IV) respecting the Laws and Customs of War on Land* (1907) states that "Territory is considered occupied when it is actually placed under the authority of the hostile army" and that "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country" (articles 42, 43), and also vests in the occupying army certain powers of requisition of goods and services (articles 51, 52). One natural interpretation of this is that enjoyment of a power of requisition is understood to follow from the occupying army's status as governing authority in the occupied territory.

²⁵ Rodin calls this the "bloodless invasion" argument against any attempt to ground the traditional conception of the *jus ad bellum* in individual privileges of self-defence: *War and Self-Defense* 131–137.

the privilege of national defence in terms of individual defensive rights? This seems implausible, for two reasons. First, if the only wrongdoing here is the making of conditional threats to individual soldiers and officials (“Make way or we will harm you!”) it is hard to see how these sorts of purely individual wrongdoings could warrant a violent response which will foreseeably lead to outright war.²⁶ No doubt some privilege to use defensive means exists, but the magnitude of the wrongs being done to individuals seems absurdly slight, and hence will not satisfy proportionality requirements. It might be contended that in this sort of scenario A’s threats against the Bs will not be confined in the way that we have suggested, because the demand for obedience by A will be enforced by coercive threats against all the Bs, and not just B’s soldiers and officials. Even if this is so, however – and the actual history of warfare suggests that, in practice, obtaining the surrender of B’s soldiers and the cooperation of its officials frequently *will* be sufficient to establish A as the new government of B – it is nevertheless the case that the threats are conditional, and therefore raise significant issues of proportionality that outright murderous threats do not. Second, suppose the soldiers and government officials all yielded willingly to the request to make way for the new government. On the reductionist proposal being suggested, there would be no rights being infringed by the invaders, so no privilege for the populace at large to resist the change of government by violent means. (At best, they might have rights to force the soldiers and officials to behave differently.)

In a case such as this, then, if B is to be permitted to go to war with A in order to maintain its control over its territory and population, it seems that something more than the ordinary, individual defensive privilege must be relied upon. Just as we saw in the case of uninhabited territory, A would need to enjoy a privilege to defend its present political standing.²⁷ Together, these two privileges make up what we call the *political defensive privilege*. Focusing on the circumstances that might give rise to this more particular privilege, rather than simply assuming that any breach of sovereignty licenses defensive warfare, identifies a point of greater pressure, and interest, for the moral theorist of war.

²⁶ Government, including government by occupation is typically backed by a readiness to use force. *Contra* Fabre and McMahan (both this volume), it does not, however, generally consist in the making of conditional threats.

²⁷ Lazar (this volume) and Rodin (this volume) both consider further replies to this argument that the political defensive privilege cannot be straightforwardly reduced to ordinary individual defensive privileges.

1.2 The nature of the political defensive privilege

Corresponding to the two examples considered in the previous sub-section, the political defensive privilege would permit the use of force by a political collective to resist attempts to displace a state as the government of some particular region and/or population (provided that the requirements of proportionality and the like are satisfied: the privilege itself is a necessary condition for the use of force in such circumstances, but not sufficient.). If it exists at all, then, it presumably corresponds (i) to a right of control over uninhabited, but governed, territory, and (ii) to a right not to be subjected to mere changes of government. Roughly the same two rights might be thought to underpin the obligations stated in the *Charter of the United Nations*, that “Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”.²⁸

These two rights need not be enjoyed together. The first of these rights would seem to be enjoyable only by states or similar entities. While it is not essential for the existence of government that a nation be a state – a politically unified people might, in the right circumstances (e.g. if sufficiently small in population and undifferentiated in social organisation) govern itself without mediation via distinctive institutions – it is nevertheless the case that, without institutions, a nation cannot govern *uninhabited* territory.

The second of these rights, however would seem in principle to be enjoyable even by a stateless people, in the particular form either of a right on the part of a people *not to be subjected to government*, or a right on the part of a people or nation *not to be incorporated into (this) state*. As a practical matter, however, the exercise of the privilege would presumably require sufficient political organisation to constitute a nation, because a people that was not politically unified would seem unable to raise an army or otherwise coordinate a military defence.²⁹

Although the two rights that underpin the political defensive privilege are not always enjoyed together, this paper will treat the privilege itself as a unity. For it does no harm to our understanding of the privilege that some of those who enjoy it

²⁸ Article 2, paragraph 4.

²⁹ This practical point is important to the dynamics of international relations, because it means that once one people develops sufficient political organisation to become a potential military threat to other peoples, then whether or not any acts of aggression actually takes place, those other peoples have a reason – for some, perhaps, an overwhelmingly salient reason – to themselves develop a comparable degree of organisation, in order to be in a position to exercise their right of (henceforth national) self-determination. This is one way, then, in which polities can exercise a somewhat coercive international influence without actually violating the sovereignty of other polities, and it may be one part of the explanation as to why decolonised polities nevertheless retain forms of political organisation that in many ways resemble those of the former colonisers.

– namely, peoples and nations without states – will have no uninhabited territories that they govern; and treating the privilege as a unity is in keeping with contemporary international law and practice. We have already noted that international law is at best an unreliable guide to the content of international political morality. Nevertheless, it is significant that the same two rights apparently presupposed by the traditional account of the *jus ad bellum* also seem to be presupposed by the *Charter of the United Nations*. The assumption that political collectives enjoy such rights is not merely an idle philosophical hypothesis. It is central to the contemporary discourse and practice of international relations. Even when wars are waged that do not satisfy the requirements of the traditional *jus ad bellum* (as they frequently are, and not just by “rogue states”), the commentary upon and criticism of such wars typically deploys the language of the *Charter*, and deploys thereby the conceptions that underpin the political defensive privilege.

1.3 The basis of the political defensive privilege

It is one thing to note that the widespread, even (near-)universal enjoyment, of the political defensive privilege and its two underlying rights is presupposed by contemporary political practice, and by a certain traditional approach to the *jus ad bellum*. But it is another thing to show that enjoyment of them really *is* widespread in this way. In short: why should states possess rights of this sort?

Let us focus on the second of the two underpinning rights, which we will call the right to self-determination. In imputing this right to a polity, we seem to be ascribing to the polity at least two properties:

Endangerment: The polity is justified in endangering its own members in order to defend its political organisation;³⁰

Force: The polity’s political organisation is sufficiently valuable that it may be defended by the use of force, i.e., that the imperative to defend it licenses the exposure of the members of an aggressing polity to potentially lethal harm.

How might a polity possess these two properties?

One strategy that might be adopted to answer this question would be to treat political collectives as moral beings in their own right, enjoying their own moral claims that are independent of, and can be set up against, the claims of individuals. As we have noted above, however, we share the widespread assumption that individuals are the ultimate units of moral concern, and hence that collectives

³⁰ Rodin makes the point that “the number of casualties sustained by an invaded nation is related to the level and nature of that state’s resistance: against a determined aggressor, strong resistance will result in greater loss of lives”: *War and Self-Defense* 138.

cannot be so valuable that they give rise to normative properties of this sort in their own right.³¹ Which then brings us back to a variant of the question that we framed above with reference to Walzer: How can the interest of individuals ground *Endangerment* and *Force*, when *Endangerment* and *Force* themselves permit overriding the interests of individuals? How could the defence of the polity be sufficiently important that it is plausible to argue that individual interests can be compromised in the fashion described by *Endangerment* and *Force*? (To raise this doubt about the political defensive privilege is not to impugn the idea that lethal force may be used in the cause of homeland defence or defence against murder or genocide, for in these cases the privilege rests on the ordinary defensive privilege enjoyed by individuals.) Presumably, the polity's political arrangements would have to be of significant value, relative to individual interests. In the following section, we examine the liberal cosmopolitan account of this value, and its implications for a variety of occasions when military force might be called for.

2 LIBERAL COSMOPOLITANISM ON THE POLITICAL DEFENSIVE PRIVILEGE

2.1 The permissibility of humanitarian intervention

Some states are complicit in significant injustice towards the peoples that they govern. Those whom they govern may, as we suggested above, possess rights, exercisable collectively, to defend their property, their homeland, and their lives. Given that, in interpersonal cases, we recognise a privilege to use force in defence of others, it is plausible that here too others may acquire some privilege to use force to assist in defence of these goods. If an intervention does occur, would a state of this sort possess a defensive privilege to go to war in order to defend its political standing?

Liberal cosmopolitanism purports to answer such questions. As we characterise the view, liberal cosmopolitanism is committed to a reductionist thesis regarding the collective values instantiated by a polity. Collective goods such as equality, solidarity, military strength, or a polity's collective self-respect are of value only insofar as they contribute to the wellbeing of individuals. Further, however, the liberal cosmopolitan is committed to certain autonomy interests, conceived of

³¹ Charles Beitz and Thomas Pogge characterise moral cosmopolitanism in the following way: '[E]very human being has a global stature as the ultimate unit of moral concern.': Beitz, 'International Liberalism and Distributive Justice', above n 59, p 287, citing Thomas Pogge, 'Cosmopolitanism and Sovereignty', *Ethics* 103 (1992): 48-75, p 49. Our assumption is consistent with moral cosmopolitanism, but as we shall see does not entail it, at least on a certain understanding of "global stature".

independently of institutions, as the most important individual interests, and judges the worth of institutions in terms of the contribution that they make to these interests. Typically, liberal cosmopolitans regard the promotion of and respect for human rights as central means of protecting these crucial interests.³²

The argument for intervention, therefore, takes roughly this shape, for a liberal cosmopolitan:

1. The citizens of X are having their human rights violated.
2. Violation of human rights entails frustration of basic interests.
- Therefore, 3. The citizens of X are having their basic interests frustrated.
4. A political regime that frustrates its citizens' basic interests lacks the political defensive privilege.
5. Military intervention (to replace the government or to frustrate some of its actions) can assist in protecting the basic interests of citizens of X.

From premises like these, it is straightforward to generate at least the permissibility of intervention against X, and with further premises some cosmopolitans argue for intervention as morally required.³³

Premises (1) and (5) are empirical claims. Premise (4) appears plausible on any individualist attitude to the value of political collectives. The crucial premise (2) however, is distinctively required by the liberal cosmopolitan's non-instrumentalism about human rights.

This is not to say that all liberal cosmopolitans are committed to widespread privileges (or duties) of humanitarian intervention. Any intervention is likely to result in large scale killing, and must therefore be undertaken only in defence of sufficiently strong interests to permit defence by the use of lethal force. But if there is a famine, a dangerously unstable government, or some other variety of tragedy unfolding in polity A that is causing lives to be lost, what reason does the liberal cosmopolitan have to suggest that state B cannot (at least in principle, and subject to the constraints of proportionality etc) use military force to intervene? If it is judged that A enjoys no political defensive privilege, because its institutions are not serving the interests of its members, then B appears to be entitled to displace the

³² E.g. Caney, Chapter 3, Section VI.

³³ Caney, p. 234.

ineffective or pernicious government of A and to exercise political control in the interests of the members of A.³⁴

To argue that an intervention is justified one must hold not only that basic interests are being frustrated by the current government's policies, but also that these basic interests can be better served in an alternative state of affairs, brought about by the intervention. The way the liberal cosmopolitan conceives of interests – as captured by human rights claims, and explicable without reference to the nature of the polity – makes these judgments relatively easy. Of course, liberal cosmopolitans are well aware of the agonising choices to be made in contemplating a possible intervention: we do not mean to trivialize the decision. But the liberal cosmopolitan is committed to human rights as a universal checklist of basic interests, which can be applied across diverse institutional settings.

Contrast this view with prosaic statism. On this view, human rights are of instrumental value, and as such assessing the relevance of human rights to basic interests will at times require a rich sociological understanding of the society in question. The practical demands of such inquiry will make it harder to reach determinate conclusions such as (3). Whereas the liberal cosmopolitan will more frequently come to the judgment that premises (1) is true and therefore infer (3). The liberal cosmopolitan therefore puts forward a more transparent threshold for *jus ad bellum*, being able more frequently to come to an affirmative judgment that intervention definitely is justified, or that it definitely is not justified.

We contend that the widespread tendency in contemporary theorising about just war to regard humanitarian intervention as permissible is a manifestation (whether deliberate or not) of this feature of liberal cosmopolitan thought.³⁵ The practical consequence of establishing a more transparent threshold for *jus ad bellum* is to set a lower threshold than on the traditional account.

³⁴ A liberal cosmopolitan might attempt to resist this conclusion by insisting that the permissibility of intervention depends upon the consent of the people in whose favour the intervention is to take place. It is not clear, however, what it means to talk about the consent of *the people* in this sort of context. Presumably a majority opinion expressed in an opinion poll could not be treated as determinative, given that this is not the means by which any polity routinely determines its collective will. But the view of the government presumably cannot be taken as determinative, given that it is that very government that is to be displaced by the intervention. (This and related issues are taken up further below, in subsection 2.4 and section 3.)

³⁵ E.g. Luban, "Just War and Human Rights"; Beitz, "Nonintervention and communal integrity", *Philosophy and Public Affairs* 9 (1980): 209–29; Caney *Justice Beyond Borders*, chapter 7; McMahan, *Killing in War*, p. 149.

2.2 Purely political warfare

Consider a war which is not being fought in the interest of homeland defence, nor in defence against murder or genocide, and which is not a humanitarian intervention. Such a war cannot be justified simply by reference to ordinary, individual defensive privileges. It is a “merely” political war. Now suppose that such a war is taking place between two polities that lack the political defensive privilege. This would mean that neither side enjoys a defensive *jus ad bellum*.³⁶ That is not to say that such a war would be morally permissible – the sorts of reasons we noted earlier in this paper, and particularly the proportionality constraint upon the use of force, will still operate to prohibit aggression. The point is, however, that if such aggression does occur then a right of national self-defence will not arise. Hence, for example, if the most effective way to end such a war is simply for one side to surrender, then each polity is under a duty to do so.

This is an implication at odds with the traditional account of the *jus ad bellum*, and with contemporary political practice, both of which hold that it is the aggressor state but not the victim state which is under a duty to surrender. Whether the implication is of practical importance, however, depends upon how common purely political warfare is between states that lack the political defensive privilege.

On an account which tends to see the value of institutions consisting only in the contribution that they make to the satisfaction of independently specified individual interests – such as liberal cosmopolitanism – the answer is likely to be that such circumstances are quite common. Many wars in the past – including many of those fought in the early modern and modern periods in Europe – have been fought over merely political disputes, and between polities whose governments would not seem to have a special claim not to be displaced, on an individualistic conception of their value. Giving contemporary examples is somewhat more contentious, but in our view the 1979 invasion of Afghanistan by the Soviet Union, and the 1990 invasion of Kuwait by Iraq, may be instances of this type.³⁷

³⁶ Cécile Fabre, in her forthcoming *Cosmopolitan War*, argues that illegitimate states can still exercise a right of territorial integrity and sovereignty on behalf of citizens (§1.4), and on this basis have just cause for defensive war; but her analyses of these rights reveal that they crucially involve the rights of homeland defence and defence against murder, and therefore do not extend to cases of merely political war.

³⁷ Although each invasion contained murderous elements, it is not clear that either invasion was such as to license war in defence against murder. We believe there is a contrast, in this respect, between these two wars and the German invasion of the USSR during the Second World War. Fabre, in *Cosmopolitan War* (§2.3), discusses this later case, and argues that although the USSR was not legitimate it possessed a defensive privilege. Given that this invasion involved mass murder, mass enslavement and mass expulsion, it would not be classed as purely political warfare, and hence we concur that it poses no difficulty for the liberal cosmopolitan.

A further consequence of the liberal cosmopolitan attitude to purely political warfare arises in relation to national self-determination movements. Paradigms would include post-World War II anti-colonial movements as well as the African National Congress and comparable politico-military organisations. It is natural to think of such movements as exercising a privilege of national self-defence against an illegitimate government.³⁸ If a movement of this sort is not acting in the cause of homeland defence or in defence against murder or genocide, but is merely attempting to substitute itself for the current government, then the permissibility of this will depend upon whether the movement itself possesses *Endangerment* and *Force*. Given that the majority of self-determination movements are non-liberal ones (if only because they lack the opportunity and resources to establish themselves on a liberal basis), they will typically be judged unfavourably by liberal cosmopolitans on this score.³⁹ Furthermore, the liberal cosmopolitan's tendency to more readily judge humanitarian intervention as permissible suggests that in some cases it may be better for powerful and effective liberal states to intervene, rather than to defer to the self-determination movements within those polities.

This implication is implausible. It is not simply that liberal cosmopolitans diverge from contemporary international legal and political practice, but that they appear to do so in a manner that would turn back the clock on some of the most significant and hard-won political transformations of the twentieth century: the substitution, in international life, of decolonisation and national liberation as pre-eminent values in place of imperialism – even liberal imperialism.

2.3 Liberal cosmopolitanism on the self-determination of liberal polities

Above we noted that liberal cosmopolitans seem to be committed to the thought that merely political wars between non-liberal states will not give rise to defensive privileges for *either* polity. It has also been suggested, and we are inclined to agree, that it is hard to see how, for a liberal cosmopolitan, liberal states *themselves* would acquire a political defensive privilege, if the aggressing state is itself liberal, and

³⁸ This is one natural way of interpreting the principles stated in the *Declaration on Friendly Relations*, above n 7. Walzer also treats the obstruction of self-determination as a species of aggression: *Just and Unjust Wars* 93–94.

³⁹ James Pattison, commenting on a version of this material, has suggested that the liberal cosmopolitan should adopt a forward-looking orientation to such movements, supporting them if they can be expected to establish a liberal regime if successful. This seems puzzling, however. How does a future possibility of a political organisation that may serve the interests of those individuals who are subject to it establish *Endangerment* and *Force* – and hence a political defensive privilege – in the here-and-now? And as a practical matter, given the history of the Americas, of post-Ottoman South-Eastern Europe, and of post-colonial Africa and Asia, it would require quite a degree of optimism to be confident that any given movement for national self-determination was likely to result in a liberal government.

intends to establish liberal institutions that are every bit as good at respecting the rights and autonomy of the individual citizens of the state.⁴⁰ Given the character of the liberal cosmopolitan's instrumentalism about the value of a polity, it is hard to see how ties to any particular institutional arrangement can be derived. As long as the institution is replaced by another, equally just institution, then how can fighting to protect that institution be justified?

Of course, there are lots of reasons to think that such "liberal" instances of aggression are extremely unlikely. Nonetheless, we think that this highly counterintuitive implication of liberal cosmopolitanism is worth considering further, as it helps to show the sorts of considerations that motivate alternative conceptions of the political defensive privilege.

One response that the liberal cosmopolitan might make to this objection is to press the idea that a liberal state has something analogous to an individual's right to *self-determination*. A forcible change of government – even if a change to a liberal government – will infringe this right. Such a right of political self-determination cannot be granted to the liberal cosmopolitan gratis, however. Any such right must be traced to the particular individualistic values served and protected by the state. In this case, it must be some sort of value derived from the fact that the state is a manifestation of *individual citizens'* political agency and self-determination.

It seems, however, that any other genuinely liberal political arrangements would likewise be a manifestation of individual citizens' political agency, and thus that these considerations do not appear to license the defence of any *particular* set of liberal political arrangements. What seems to be needed is to be able to point to something particular about *this* state and its relationship to *this* citizenry.⁴¹ But if, for example, a liberal state is able to point to its citizenry's special way of being liberal, or the traditions, practices and default expectations that underpin their liberalism, then why may other, non-liberal states not do the same? One answer the liberal cosmopolitan might offer to this question, which obviously is not available to the anti-liberal, is to argue that any particular liberal state has, in some less than literal but nevertheless important sense, been *chosen* by its citizenry, in virtue of being the autonomy-affirming state that is associated with that particular citizenry.

This response faces its own difficulties, however. It is a standard objection to liberalism that it denies the moral force of tradition and of historically derived, non-voluntary social relationships. This response, in effect, embraces that objection, and

⁴⁰ *War and Self-Defense* 148.

⁴¹ This argument is similar in structure to that of A. John Simmons, "Justification and Legitimacy" *Ethics* v 109 (1999): 739–71.

affirms the particular liberal state as enjoying the political defensive privilege *because* chosen by its citizenry. While this preserves the liberal cosmopolitan's desired distinction between liberal and other forms of social arrangement, it fails to explain why *other* voluntary associations, to the extent that they too are expressive and affirming of the autonomy of their members, do not also enjoy the political defensive privilege. Presumably no liberal cosmopolitan wants to conclude that (for example) transnational corporations or NGOs enjoy the right to go to war in self-defence – a self-defence which it would no longer be appropriate to call “national”, the liberal cosmopolitan at this point having effectively forsaken the category of nationhood.⁴²

In order to avoid this absurdly expansive conception of *jus ad bellum*, the liberal cosmopolitan must therefore affirm the significant difference between voluntary associations, on the one hand, and states and similar entities on the other. This requires renouncing the appeal to choice, and hence (if the general anti-liberal appeal to particularity is to continue to be denied) rejection of the claim of liberal states to enjoy a general political defensive privilege. At best they enjoy a privilege to defend themselves against changes to non-liberal forms of government. This reinforces the conclusion already reached above, that liberal cosmopolitanism is committed to a picture of international life in which liberal polities are the only legitimate international actors, enjoying a range of privileges (both aggressive and defensive) that other political collectives do not.

It must be conceded to the liberal cosmopolitan that there is an obvious consequentialist reason for deferring to local agency, namely, that once we allow a privilege of unilateral intervention there is a standing temptation for every international actor to claim it.⁴³ And there appears to be, here, a significant disanalogy between the individual and the international situation, namely, that the costs of the misuse of international privileges are so great, and misuse is so hard to police and remedy. But the possibility that on any given occasion there may be consequentialist reasons for refraining from exercising the privilege of intervention, or that there may be consequentialist reasons for using force to deter (at least some)

⁴² Rodin makes a similar point in *War and Self-Defense*, although he presents it as following from the empirical fact that “human communities do not coincide with the boundaries of states”: 158–160. To treat the issue as purely empirical in this way, however, depends upon a normative presupposition that political collectives have no distinctive value, which Rodin expresses by way of his rejection of “highly dubious assumptions about the organic unity of national communities and the nature of their relationship to states”: 158. Non-liberal cosmopolitans need not make such assumptions, however, in order to attribute distinctive value to political collectives: see below n. 58.

⁴³ This argument is parallel to Coady's argument for doubting the existence of a moral permission to depart from the principle of discrimination in cases of supreme emergency: C.A.J Coady, “Terrorism, Just War and Supreme Emergency” in Tony Coady and Michael O’Keefe (eds), *Terrorism and Justice: Moral Argument in a Threatened World* (Melbourne: Melbourne University Press, 2002).

mere changes of government even where no political defensive privilege exists, does not lessen the force of the point that on the liberal cosmopolitan picture, liberal polities at least possess a political defensive privilege against non-liberal polities, whereas non-liberal polities never possess the privilege, and are in that sense relegated to a second-tier moral status in international life. Unlike liberal polities, whatever entitlement to self-determination they enjoy is hostage to potentially changing, and certainly contestable, calculations of consequences and proportionality.

3 ALTERNATIVES TO COSMOPOLITANISM

3.1 Pluralism as an alternative to universalism

Liberal cosmopolitanism is committed to distinctive claims about the sorts of values that are possessed by polities, and how these values give rise to a political defensive privilege. As we have shown, the liberal cosmopolitan account is implausibly revisionary.

One alternative approach rejects the reductionism inherent in the liberal cosmopolitan attitude toward the polity: rather than conceiving of the polity as valuable for the way in which it serves or protects individual interests that are given prior to the organisation of the political community, the polity is held to have a species of intrinsic value for its members, because it is theirs. This is an interest that individuals have, but it is not prior to the polity. It arises with it, and is intimately embedded in the polity's particular form.

Walzer supports a much less revisionary account of the political defensive privilege, arguing that only the members of a given polity are properly placed to act upon judgments as to the legitimacy or illegitimacy of its political arrangements, as only they have access to the relevant facts of culture, history and tradition.⁴⁴ He describes this as “the politics of *as if*”⁴⁵ – although we may have good reason to think that a regime is tyrannical, we must treat such a polity *as if* it were not. This view is not a philosophical denial of universalism – Walzer accepts that philosophical argument shows that only liberal democratic states are capable of enjoying legitimacy – but rather a denial that anyone but the members of the polity in question may properly act upon the conclusions of such arguments.⁴⁶ Foreigners are obliged to presume that a political collective is serving the interests of its members, regardless of its

⁴⁴ “The Moral Standing of States” 212, 215–16, 224–26.

⁴⁵ Ibid 216.

⁴⁶ Ibid 214–16, 226, 228–29.

form of government., except in certain limited cases which make the absence of such “fit” between a people and its government “radically apparent” – when rebels are fighting foreign domination, when a foreign state has intervened in a civil war, or when a state is massacring, enslaving or expelling its own citizenry.⁴⁷ The source of this obligation, in turn, is a commitment to pluralism,⁴⁸ to politics,⁴⁹ and to the right of individuals “to live as members of a historic community and to express their inherited culture through political forms worked out among themselves”.⁵⁰

Walzer’s “as if” rejection of universality leads him also to an “as if” rejection of the liberal cosmopolitan conception of individual interests:

I oppose all ... violations [of individual rights]. But I don’t believe that the opposition of philosophers is a sufficient ground for military invasion.⁵¹

It is not clear that this “as if” position is tenable, however, and if it is not then, given that it follows from his “as if” rejection of universalism, doubt is cast upon Walzer’s position more generally.

To see why this is so, consider how the “as if” pluralist might go about explaining how various sorts of states do or do not come to enjoy the political defensive privilege. Given Walzer’s suggestion that national defence is simply the “collective form” of individual defence, and his use of the notion of “fit” between a people and its political arrangements, it would make sense for the “as if” pluralist to take *Endangerment* to obtain when a polity expresses the (collective) agency of its members. *Force* would obtain when a polity has sufficient value.

In the case of a liberal state, the task is an easy one. The argument for *Endangerment* would be that the decision of a democratic state to endanger its members in its political defence is in fact their own (collective) decision, as autonomous individuals whose autonomy is respected and effectuated by their state, to do so.⁵² They may not have directly endorsed the decision to go to war, but the special character of

⁴⁷ Ibid 212, 214, 216–18. See also *Just and Unjust Wars* 82n, ch 6.

⁴⁸ “The Moral Standing of States” 215–16.

⁴⁹ Ibid 228.

⁵⁰ Ibid 211. In a recent paper, Song similarly argues that a non-liberal state whose government is affirmed by its citizens is immune to intervention: Edward Song, “Subjectivist Cosmopolitanism and the Morality of Intervention” *Journal of Social Philosophy* v 41 (2010): 137–151.

⁵¹ “The Moral Standing of States” 229, citing Gerald Doppelt, “Walzer’s Theory of Morality in International Relations” *Philosophy and Public Affairs* v 8 (1978):3–26, 25.

⁵² One might say, for example, that the state’s decision to go to war in political self-defence is able to be articulated in terms of a public reason that not only respects the autonomy of its members but gives voice to the political commitments of an overlapping consensus of autonomously-embraced reasonable comprehensive doctrines: John Rawls, *Political Liberalism* (New York, Columbia University Press, 1996), esp 134–37; *The Law of Peoples* 31–32.

their relationship to the basic structure of their society means that they are bound by decisions that emerge from that structure.

Regarding *Force*, the “as if” pluralist can appeal to the fact that the liberal state exemplifies a preeminent political virtue, namely *justice*,⁵³ and hence itself is a thing of value worth defending. If we consider a contrasting extreme – a vicious tyranny in which the lack of fit between state and citizenry is radically apparent – the *absence* of a political defensive privilege can be explained by the “as if” pluralist with equal ease. Such a state will be alien from its populace, its decisions will not express the agency of its people, and it will not embody any value, such as justice, which is worthy of fighting to protect.

Beyond these extremes, how is the “as if” pluralist to proceed? *Endangerment*, for the “as if” pluralist, turns primarily on a question of fact — *in what sorts of ways might non-liberal polities give effect to the collective agency of their citizens?* And as we have seen, if a polity is *not* a vicious tyranny then Walzer has a ready answer: we must *presume* that the members of such a polity identify with it as theirs because there is a degree of fit – grounded in history and circumstance – which no one but those members is in a position to deny. Hence we must presume that such a polity gives effect to the collective agency of its members, and that at least in some loose sense its decision to endanger them is their collective decision.

But for the “as if” pluralist to explain how a non-liberal but non-tyrannical state satisfies the requirement of *Force*, there is also a question of value that must be addressed – *are such political arrangements sufficiently valuable to be justifiably defended by the use of force?* Consider a state of the sort that Rawls calls a *decent hierarchical society*. A state of this sort honours a range of human rights, including rights to personal security, to the means of subsistence, and to participation in political life (via a decent consultation hierarchy), and its laws are experienced by its citizenry not merely as commands imposed by force. A society of this sort is governed by a “common good” conception of justice, however, which means that some religions may be favoured over others (although none may be the object of suppression), that there may be restrictions upon expression and association, and that there may be no universal access to education.⁵⁴ It seems that an account of the value of *this* sort of state cannot simply appeal to the way in which it satisfies the interests of its individual members, given that it is dedicated to pursuing a “common good” which may be quite at odds with what liberals regard as the most important interests of at least some of those members. And the challenge of the case only gets greater if we imagine a less idealised hierarchical state, in which the commitment to

⁵³ “Justice is the first virtue of social institutions”: *A Theory of Justice* 3.

⁵⁴ *The Law of Peoples* 64–65, 71, 74–75, 80 n 23, 83, 88.

human rights is weaker and the measures adopted in pursuit of the common good more extreme (although not so extreme as to amount to tyranny of the sort considered above). At this point, the rejection of individual inviolability needs to go beyond an “as if” rejection to a genuine rejection: some other value, such as the value of collective political life, must be affirmatively set up against it.

3.2 Self-determination as a pre-eminent value

In the *The Law of Peoples*, Rawls argues that a state which is a member in good standing of the international society of peoples, and which therefore is not subject to political criticism from within the public reason of the society of peoples, enjoys the political defensive privilege in virtue of that fact.⁵⁵ According to Rawls there exists a fact of reasonable pluralism among *peoples*: the world is made up diverse national societies with varying and mutually inconsistent conceptions of domestic justice and corresponding governmental arrangements, and this diversity is not going to go away. Liberals, being committed to reasonableness, must therefore take this pluralism as given, and recognise that international public reason cannot be such as to cast the legitimacy of these diverse conceptions of justice into doubt.⁵⁶ Of course a liberal might acknowledge reasonable pluralism among peoples and yet wish that all states were liberal,⁵⁷ just as a liberal Catholic might embrace political liberalism yet nevertheless hope that, over time, more and more individuals will recognise the truth of Catholicism and adopt it as their religion. But this desire is a purely private one which is excluded from the domain of international public reason.

What this account adds to Walzer’s politics of “as if”, then, is a theory of public reason as a proper response to reasonable pluralism. However, international public reason will secure the political defensive privilege only to polities that are *peoples* in Rawls’ sense, and which therefore figure in the pluralism that Rawlsian liberals are committed to acknowledging. Rawls’ account is rather sketchy, but the basic idea seems to be that a people is not merely a polity possessing an internal government in a defined territory, but is a society whose members are united *by common sympathies* grounded in one or more of a common language, a shared political culture and shared historical memories.⁵⁸ Furthermore, a people is capable of enjoying, in virtue of these common sympathies, a sense of *self-respect*. This self-respect also rests upon upon the receipt of proper respect from other peoples.⁵⁹ Despite their

⁵⁵ *The Law of Peoples* 37, 62, 83–84, 91–92.

⁵⁶ *The Law of Peoples* 11–12, 59–60, 121–3.

⁵⁷ Rawls himself expresses this desire: *The Law of Peoples* 61–62, 122.

⁵⁸ *The Law of Peoples* 3, 23–25, 38–39. .

⁵⁹ *The Law of Peoples* 34–5, 47–48, 61–2.

different political cultures, all peoples are able to recognize and respect the equal freedom and independence of other peoples, and to deal with one another on a basis of mutual respect without seeking conquests or domination,⁶⁰ Rawls, in this way, affirms self-determination, and also the higher order value of “toleration”,⁶¹ in priority to the interests of particular individuals.

Rawls’s notion of a people is morally much richer notion than that of a mere politically organised collective. Indeed, Rawls claims that for a nation to possess this sort of collective personality requires it to honour at least a wide range of human rights, so that what exists is a system of genuine social co-operation rather than “command by force” or slavery.⁶² But this sets the bar very high indeed, relative to the existing political order. There are many polities which are not so oppressive that the lack of fit between the collective and its individual members is “radically apparent”, yet which because of their oppression of women, their denial of free choice of occupation, their insistence on religious exclusivity, or some comparable violation, do not honour human rights sufficiently to count as systems of genuine social co-operation. The prohibition of forced occupation, freedom (although not necessarily equal freedom) of religion, the right to privacy, the right to formal equality (i.e. like cases treated alike) and the representation of historically oppressed groups, such as women, in political decision-making, are all human rights which, if violated, may fail to constitute a tyranny so extreme that the lack of normative integration between state and citizenry is radically apparent, but which a Rawlsian people nevertheless must satisfy.⁶³ For Rawls, these polities will lack the political defensive privilege just as extreme tyrannies do, and will be subject, at least in principle, to intervention by peoples acting in pursuit of human rights compliance.⁶⁴ Rawls himself suggests that the category of decent peoples may well be a purely theoretical, empirically empty one.⁶⁵

⁶⁰ Ibid 23, 25 (particularly the discussion of the ‘moral character’ of peoples), 29, 35, 45, 47, 64, 69.

⁶¹ *Political Liberalism* xxvi–xxvii, 154; *The Law of Peoples* 59–60.

⁶² Ibid 65, 68. For a fuller discussion of Rawls’ account of peoplehood, see Patrick Emerton, “International economic justice: is a principled liberalism possible” in Sarah Joseph, David Kinley and Jeff Waincymer (eds), *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (Cheltenham, Edward Elgar, 2009). David Reidy suggests a similar reconstruction of that account: “Rawls on International Justice: A defense” *Political Theory* v 32 (2004):291–319; “An Internationalist Conception of Human Rights” *The Philosophical Forum* v 36 (2005): 367–97.

⁶³ *The Law of Peoples* 65, 75, 80 n 23

⁶⁴ Rawls himself accepts this conclusion: *The Law of Peoples* 80–81.

⁶⁵ *The Law of Peoples* 75. The only example Rawls offers of a decent hierarchical people is his imagined ‘Kazanistan’: ibid 75–8. The only historical example hinted at is the Ottoman Empire of several centuries ago: ibid 76 n 17 (discussing toleration in non-liberal societies). Pogge expresses similar doubts: Thomas W Pogge, ‘Rawls on International Justice’, *The Philosophical Quarterly* 51 (2001): 246–53, 247–8. Reidy suggests Oman as an example of a society with a decent consultation

One way of establishing the political defensive privilege for those polities which lack it on the Rawlsian account would be to adopt an even more thoroughgoing pluralism. The criticism of liberalism espoused by such classical conservatives and romantics as Burke, Carlyle and Ruskin, and by contemporary philosophers such as Sandel and Taylor, might provide a starting point for articulating a pluralism of this sort. Such anti-individualist positions, however, would take us too far afield from the current debate. For, as we stated earlier, we agree with liberal cosmopolitans that individuals are the ultimate units of moral concern.

Given this, we conclude that pluralism is no more able than liberal cosmopolitanism to give a satisfactory account of the political defensive privilege. While it may be able to extend that privilege to some non-liberal polities, many (perhaps most) such polities would nevertheless be left hostage to changing and contestable calculations of consequence and proportionality.

4 PROSAIC STATISM

Despite this conclusion, the romantic criticism of liberalism is nevertheless interesting. We believe that it suggests an avenue for rejecting liberal cosmopolitanism, without embracing romantic notions of “the common life” or of political institutions as “belonging to a people”. The thought has two components: first, that the interests of individuals are mediated to a very high degree by the institutions which shape, and within which they live, their lives; second, that these interests might therefore, in different circumstances, be quite different from those interests focused upon by the liberal cosmopolitans (or, at least, different from those autonomy interests that are the typical focus of liberal interest, and tend to underpin the standard liberal vocabulary of human rights).

Prosaic statism looks in detail at the range of institutional situations in which particular individuals find themselves, and denies that rights claims, and the interests that underpin those claims, can be framed independently of those institutional situations. It can be seen as beginning in a Hobbesian vein, by reference to the contribution made by a polity to the satisfaction of its members’ urgent interests in security, shelter, and nutrition, whether directly or by providing a peaceful framework within which production and exchange can take place. Out of this state of affairs, in the typical political community, a more complex structure of institutions will arise, which – this approach contends – not only contributes to the satisfaction of, but contributes to the shape and content of, individuals’ interests.

hierarchy: David A Reidy, ‘Rawls on International Justice: A defense’, *Political Theory* 32 (2004): 291–319, 315 n 25.

4.1 Individualism, reductionism and universalism

When characterising liberal cosmopolitanism, we made much of the idea that liberal cosmopolitans adopt a reductionist attitude towards the sorts of value embodied in political collectives. One extreme form of reductionism would be the claim that social properties such as equality, solidarity, harmony, and the like are of value only to the extent that they contribute in a *causal* fashion to the interests of individuals (for example, by contributing to their subjective experiences of self-respect). However, while there may be some liberal cosmopolitans who would adopt this view, many will want to say that social properties such as the degree of material equality in a society affect individual wellbeing in a *constitutive* fashion.⁶⁶

Despite possible differences on this particular question of reduction, liberal cosmopolitans nevertheless maintain that all individuals have certain interests in possessing a suite of liberties and opportunities, and that the relevance of these interests to individuals does not vary between polities. We can use the following schematic formulation to specify this more precisely, and thereby bring out the distinctive character of prosaic statism. Let the set of properties, P be the supervenience basis for individual wellbeing: individual wellbeing is some function w of the properties P instantiated by any given individual, and the social welfare of the polity is a function of the welfare of individuals. Liberal cosmopolitanism is, then, committed to universality of interests in the following sense:

Universality of Individual Interests: For all individuals, in all societies, there is a single welfare function w , and a single set of properties P , such that individual welfare is determined by w and by what properties in P are instantiated by a given individual.⁶⁷

The significance of this definition depends upon the properties that are included in P . As implied by the example of equality, not all the properties that the liberal cosmopolitan includes in P need be intrinsic properties of individuals; some may be relational, social, properties such as “being a member of a highly egalitarian society”. Consider now the sorts of liberties and opportunities which liberal cosmopolitans regard as fundamental – the sorts of entitlements protected by human rights, for instance. Although it has not (as far as we are aware) been explicitly stated, we claim that liberal cosmopolitans are typically committed to the possession of these

⁶⁶ This sort of understanding of the value of equality is advocated by John Broome, *Weighing Goods* (Oxford: Blackwell), chapter 9. (Though Broome is not directly engaging the issue of cosmopolitanism.)

⁶⁷ To avoid this definition being potentially tautologous, we should insist that w is an *increasing function* of the degree to which an agent possesses any property in P . But we shall overlook the details of this nicety here.

liberties as among the fundamental properties of P. Consequently, the satisfaction of a individual's interests depends in part upon possession of these liberties, regardless of the sort of polity the individual lives in.

The prosaic statist accepts Universality of Individual Interests, but claims that *different properties* constitute the universal basis of welfare. According to prosaic statism, although there may be universally invariant interests in nutrition, health, longevity, and other marks of flourishing, it is not the case that there are invariant interests in liberties and opportunities across all polities. The institutional structure of one's society contributes to welfare not only by contributing causally to the satisfaction of interests, or (perhaps – we take no firm view) by contributing constitutively to the satisfaction of interests, but also by *constituting* individuals' interests in liberties and opportunities. (This is the mediation of interests by institutions that we referred to above.)

To give an example: the extent to which the failure of a particular polity to provide for individuals to enjoy a free choice of occupation amounts to an injustice may at least to some degree depend upon the character of the polity's economic system. Free choice of occupation is a more significant matter in an industrial economy in which free labour and commercial exchange predominate, than in a small-scale agrarian or hunter-gatherer economy in which subsistence production is the norm. To put this more formally: Suppose that in institutional context C1, suffering a limited choice of occupation L strictly entails a very low welfare level: one's welfare will be badly affected by L, no matter what other goods one enjoys. In context C2, suffering L does not entail such a low welfare level – depending upon how other things are arranged, one may enjoy a reasonably high welfare level despite suffering this limited opportunity. Clearly this scenario is at odds with the liberal cosmopolitan conception of justice. But this scenario is compatible with Universality of Individual Interests, provided that the set of properties P includes complex social and conjunctive properties such as *is in C1 and suffers L*, and *is in C2 and suffers L*, and so forth. By understanding the value of particular liberties to be dependent upon social context, it is possible for prosaic statism to be subsumed under a universalist formula. But the universalism is more modest than that of liberal cosmopolitanism, because of the complex and social character of many of the properties that figure in P.⁶⁸

⁶⁸ Fabre (this volume, section ??) suggests the liberal cosmopolitan can accommodate the sensitivity to social context of resource entitlements, but because of her commitment to “civil and political freedoms” (*Cosmopolitan War*, p. 18; see also this volume, p. ??) as being among the universal moral entitlements, the contrast with prosaic statism remains marked.

The upshot, then, is that for the liberal cosmopolitan there are some liberties and opportunities that are thought to be relevant to welfare independent of institutional context. For the prosaic statist, liberties and opportunities derive whatever value they have from the particular institutional context within which they are enjoyed.

4.2 Application of prosaic statism

How far does this approach go in justifying conventional understandings of international life and the political defensive privilege? This depends on both (i) the extent to which the various polities of the world really do, on balance, promote wellbeing, and particularly the wellbeing of their members, which on this approach is significantly shaped by the institutional character of those polities; and (ii) the extent to which attempts to change the governments of those polities would be likely, on balance, to reduce wellbeing. Such a reduction in wellbeing would have three probable causes: the almost inevitable disruption to civilian life that any military activity produces; the likelihood of enduring resistance to a new government by members of the polity in question; and, most significantly, the undermining of the particular institutions in which interests are shaped and realised.

The greater the contribution to wellbeing made by actually existing political arrangements, and the greater the actually obtaining “fit” between peoples and their actually existing political arrangements, the more that (i) and (ii) respectively will tell in favour of widespread political defensive privileges. If, on this approach, a benevolent absolutism, decent hierarchical society, or other radically non-liberal polity enjoys the political defensive privilege, this will be because – on balance – the political arrangements of the polity in question promote wellbeing more than would be the consequences of an intervention aimed at producing a mere change of government. (That is, it would be because the Walzerian account of the integration between polity and its citizens that obtains in a benevolent absolutism could be affirmed with no need for the politics of “as if”.)

Rodin expresses scepticism about this sort of account of the political defensive privilege, on the grounds that it offers no account of “why one form of stable political life should be preferred over any other”.⁶⁹ This objection presupposes, however, that a successful aggressor is capable of establishing stable political life following a mere change of government. But there is good reason to think that the

⁶⁹ *War and Self-Defense* 147.

viability, and stability, of any given form of government is intimately connected to its history and “fit” with those whose government it is.⁷⁰

We call this approach *prosaic statism*, for three reasons. First, it grounds the value of particular forms of political organisation, in virtue of which they enjoy the political defensive privilege, primarily in the prosaic contributions that they make to the realisation of the interests of their members. Second, while it takes “fit” seriously, it does so not as a presumption motivated by a normative commitment to pluralism, but rather as an empirical state of affairs, to be ascertained and weighed up in any particular case. This is a prosaic rather than a romantic treatment of “fit”, and also a reason for “statism” rather than “nationalism”: the romantic nationalist emphasises the value of collective “ownership” of the polity, whereas the prosaic statist emphasises the mediation of individual interests by political institutions, of which the state is the contemporary paradigm. Third, and consequent upon the first two reasons, it renders the existence of the political defensive privilege for all polities, liberal or non-liberal, a historically contingent, prosaic matter, rather than a matter of abstract moral theorising. Finally, there is no doubt that, despite the horrors of war, a certain romantic allure attaches to military conflict. Our view is prosaic in another sense, then, in encouraging a focus upon non-military techniques of state power.⁷¹

⁷⁰ See, for example, the discussion in Martin Krygier, “Transitional Questions About the Rule of Law: Why, What and How?” *East Central Europe/L'Europe Du Centre Est*, v 28 (2001):1–34.

⁷¹ For an argument that modern European states have become civilian states rather than military powers, rejecting violence as incompatible with the promotion of the welfare of both citizens and foreigners, and affirming the superiority of non-military instruments of both domestic and foreign policy, see James Sheehan, *The Monopoly of Violence* (London, Faber and Faber, 2007).