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Review of Defending Humanity: When Force is Justified and Why by George P. Fletcher and Jens David Ohlin

Alexander K.A. Greenawalt

Elisabeth Haub School of Law at Pace University

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DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY. By George P. Fletcher and Jens David Ohlin. Oxford: Oxford University Press, 2008. Pp. 288. \$27.95 (hardback).

Few issues are both more central to and more elusive for the project of international law than identifying the conditions under which the use of armed force is justified. The U.N. Charter (in its English version) provides a deceptively simple answer: states may deploy armed force only in self-defense or when explicitly authorized by resolution of the U.N. Security Council.¹ Yet as the controversies over preemptive war in Iraq and humanitarian intervention in Kosovo, among other examples, reveal, vigorous debate remains over both the acceptable boundaries of self-defense and the availability of additional exceptions to the general ban on armed force.

Fletcher and Ohlin join this debate with the provocative claim that international law has been impoverished by its neglect of the more developed doctrines of self-defense existing in domestic criminal law. Borrowing a phrase from the equally authoritative French version of the U.N. Charter, the authors argue for a six-part model of “legitimate defense”² that justifies the defensive use of force against attacks that are (1) overt, (2) unlawful, and (3) imminent; provided the defense is (4) necessary, (5) proportional, and (6) knowing or intentional. The substance of the argument lies mainly in the elaboration and application of this six-part framework. For example, in opposition to the International Court of Justice’s approach,³ the authors maintain that states may deploy force in the legitimate defense of other states regardless of whether the state under attack has consented either before or after the fact to such assistance. They further maintain that the right of legitimate defense—and by extension the right to receive assistance from third parties—accrues to “nations” in addition to states. Other chapters deal with questions of justification and excuse, preemptive war, and the collective dimension of war.

1. U.N. Charter, arts. 2(4), 41, 51.

2. The French version of Article 51 speaks of “*légitime défense*” rather than self-defense, a broader civil law concept that, according to the authors, embraces both the defense of one’s body, as well as the defense of others, and the defense of nonbodily interests such as property and privacy (Fletcher & Ohlin 63–64). The authors also observe that the Spanish and Russian texts (which, along with the Chinese, also have equal authority to the English) parallel the French (64).

3. See *Military and Paramilitary Activities in and against Nicaragua*, 1986 I.C.J. 14, reprinted in 25 I.L.M. 1023 (1986).

This short review cannot attempt to do justice to every argument in this thought-provoking book. The authors' approach is especially effective when it reveals how international law scholarship has either ignored the lessons of criminal law principles or misread them to defend an overly narrow doctrine of self-defense. Fascinating too is the authors' application of the justification/excuse distinction to the United States' misinformed Iraq intervention (127–28). Too often, however, the authors' argument is weakened by confusion surrounding how best to analogize the “self” of individual self-defense for the international context. Are we concerned here with the defense of living, breathing human beings, more abstract notions of state sovereignty and territorial integrity, or something else entirely?

To take only one example, the authors invoke the problem of justifying the killing of a “psychotic aggressor” whose mental condition renders him just as blameless as his threatened victim.⁴ The authors posit an international version of the hypothetical centered on justifying reparations for aggression directed by a psychotic dictator who lacks democratic legitimacy. The example is a trick, however, because it plays on both the literal psychosis of a real human being—the dictator—and the metaphorical psychosis of an abstract person—the state—that acts without democratic legitimacy. Given the fundamental lack of popular consent, the fact of the dictator's personal medical diagnosis seems morally irrelevant to whether his people should continue to suffer on his account, especially after, according to the hypothetical, they have overthrown him. Yet the dictator's illegitimacy raises deeper problems of international justice and state responsibility that the psychotic aggressor analogy cannot hope to capture.

Also troublesome, and of greater significance, is the authors' approach to the problem humanitarian intervention. What rights does international law provide when a state attacks its own population rather than another state? May the international community intervene to protect Albanians in Kosovo or Kurds in Iraq? Yes, say the authors, subject to a troubling caveat: the people under attack must be a “nation.” Fletcher and Ohlin acknowledge some of the many pitfalls inherent in defining, reifying, and privileging nationhood as a discrete form of identity. They defend their view principally

4. This topic has been a previous focus of Fletcher's work. See George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 *Israel L. Rev.* 367 (1973); George P. Fletcher, *The Psychotic Aggressor—A Generation Later*, 27 *Israel L. Rev.* 227 (1992).

because the U.N. Charter affirms the right of self-determination, and it is the Charter upon which, in their view, “any theory of humanitarian intervention must be focused” (134). But this right is vaguely stated,⁵ perennially controversial, and not limited to nations,⁶ whereas the Charter explicitly recognizes defense rights only on behalf of “Member[s] of the United Nations,” who, of course, are states.⁷ Considering too the difficulty of knowing when a “nation” has been attacked (as opposed to, say, a large group of people who happen to be citizens of the same state), as well as the dubious moral basis for focusing on nations in the first place, the authors’ already difficult Charter interpretation has insufficient payoff. A more promising approach is one the authors explicitly reject—developing a more inclusive theory of humanitarian intervention based on evolving principles of human rights and international justice that are arguably more central to the Charter’s mission.⁸ This path too, is fraught with difficulty,⁹ but it better aspires to the promise of the book’s title: that of defending humanity, and not contested social constructs.

Alexander K.A. Greenawalt
Pace University School of Law

5. The Charter refers, in fact, to the “self-determination of peoples,” and does so only twice in contexts that have no obvious relation to the use of force. Article 1 states that a purpose of the United Nations is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.” Article 55 reiterates this goal as a reason to promote human rights, as well as various economic and social values.

6. In the colonial context, for example, the right of self-determination has been understood to extend, collectively, to the “people” who live within particular colonial administrative boundaries, regardless of whether they share other common bonds.

7. U.N. Charter, art. 51.

8. Although this fact is hardly decisive, it is instructive to note that the Charter contains seven references to human rights, compared with only two for self-determination.

9. The authors note, for example, that an argument of this nature cannot “fall within the four corners of the U.N. Charter and its standards for the use of force” (134). That criticism, however, also applies to the authors’ approach.