



The Ethics of War. Part II: Contemporary Authors and Issues

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Abstract

This paper surveys the most important recent debates within the ethics of war. Sections 2 and 3 examine the principles governing the resort to war (*jus ad bellum*) and the principles governing conduct in war (*jus in bello*). In Section 4, we turn to the moral guidelines governing the ending and aftermath of war (*jus post bellum*). Finally, in Section 5 we look at recent debates on whether the *jus ad bellum* and the *jus in bello* can be evaluated independently of each other.

1. Introduction

In *Just and Unjust Wars*,¹ a work that continues to serve as the central point of reference for current debates on Just War theory, Michael Walzer observes that “[w]ar is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt” (Walzer 1977: 21). The Just War tradition classifies the moral criteria guiding these two kinds of judgments under the headings of *jus ad bellum* (literally: “right to war”) and *jus in bello* (literally: “right in war”).² The first, according to Walzer, signals an “adjectival” sense of *jus*, i.e., it concerns whether the war as such is just, while the second signals an “adverbial” sense of *jus*, i.e., it concerns how the war is fought.

This paper surveys recent critical debates about the criteria organized under the headings of *jus ad bellum* and *jus in bello*, placing special emphasis on the many intricate connections between them. On the side of *jus ad bellum*, most accounts list the following criteria:

1. Just cause
2. Legitimate authority
3. Right intention
4. Proportionality
5. Reasonable hope of success
6. Last resort

And on the side of *jus in bello*:

1. Proportionality of means
2. Discrimination

Finally, we examine two further issues: (i) the development of a distinct set of moral guidelines governing the ending and aftermath of war (*jus post bellum*), and (ii) recent

arguments to the effect that the criteria of *jus ad bellum* and *jus in bello* cannot, as has been widely supposed, be evaluated independently one from the other.

2. *Jus ad bellum*

2.1. JUST CAUSE

Although it is a commonplace within Just War theory that no war can be just unless *all* of the above criteria are satisfied, there is an important sense in which pride of place is held by the criterion that armed force should never be employed without *just cause*: if the criterion of just cause is not satisfied, then no other *ad bellum* criteria will even come into play.

However, this leaves open the question of precisely what is to count as providing just cause for war. Over the centuries, the set of recognized just causes has expanded and contracted considerably. Walzer (1977) advocates a very restrictive conception of just cause, according to which national self-defense against territorial aggression constitutes its paradigm, and *prima facie* its only, instance.³ Moral justification for *humanitarian intervention* to prevent genocide, massacre, or enslavement is accepted reluctantly, as a matter falling outside the proper domain of Just War theory.⁴

The key philosophical question about intervention concerns its apparent threat to state sovereignty. At stake is the question whether a state's claim to sovereignty should be assessed independently of the degree to which it honors and protects the rights of its citizens (what Walzer (1980) calls the question of "the moral standing of states"). Walzer (1977, and to some extent Rawls 1999) holds that it is, and accordingly favors a robust presumption against intervention even with respect to states that deny a wide range of political rights to their citizens. Others (most forcefully, perhaps, Luban 1980a,b) have taken issue with this view, arguing that states have no moral standing except as they represent the rights and interests of their citizens.⁵

It seems safe to say that these days, especially following the Rwandan genocide in 1994, consensus has swung toward the latter position and that humanitarian intervention is now almost universally recognized as providing a possible just cause for armed force.⁶ However, substantial disagreements persist about questions such as (i) just which cases are grave enough to warrant intervention; (ii) who can rightly undertake such interventions⁷; and (iii) what the aim of a humanitarian intervention should be: merely to stop the atrocities, or – as sometimes seems necessary – to seek regime change and deeper political-institutional changes as well.⁸

Since the US-led invasion of Iraq in 2003, the question of *preventive war* has come to occupy much attention.⁹ Commentators are virtually unanimous in their condemnation of that invasion (at least on those grounds – others believe it might be justified under a wider understanding of the mandate for humanitarian intervention; under the heading of regime change for democratization¹⁰). The first move here is usually to distinguish between *preventive war* and *pre-emptive strikes*.¹¹ The latter, involving strikes to halt an imminent attack, is widely, if reluctantly, accepted as a legitimate extension of the right of self-defense.¹² A preventive war, by contrast, attempts to stop a state from building a threat-potential in the first place. Nonetheless, if most commentators agree on the importance of the distinction, they also recognize that the distinction can be hard to draw in practice. Perhaps the most important issue is this: granted that war to prevent a regime from building a threat-potential is unjustified, can it nonetheless become justified in light of that regime's past history?¹³ For instance, it is conventionally accepted that one may

forcibly disarm an enemy in the closing stages of a just war to seek reassurance against future aggression. Yet if that enemy succeeds in rearming after a short period, why should it not be permissible to disarm them again?

Finally, where these discussions concern whether or how to expand the set of recognized just causes, David Rodin has questioned whether the Just War tradition has successfully provided any theoretically cogent moral justification for the employment of military force at all, even for the favored case of national self-defense.¹⁴ The right of national self-defense is usually presumed to be grounded in the right of personal self-defense.¹⁵ Yet, Rodin argues, there is no good argument which will bridge the gap between personal self-defense and national self-defense in the way that the tradition presumes. National self-defense is neither a collective expression of personal self-defense, nor in any relevant sense analogous to personal self-defense. Rodin uses this argument as the platform for a wide-ranging critique of the moral and legal underpinnings of Just War theory.¹⁶

A different set of debates bears on what we may call conceptual questions concerning just cause. For instance, McMahan and McKim (1993) offer as a refinement of the traditional category of just cause, a distinction between *sufficient* and *contributing* just causes. Sufficient just causes are those which, on their own, can justify the resort to war. By contrast, contributing just causes add to the justification of a war only conditionally on the supposition of a sufficient just cause. For instance, self-defense against aggression is usually taken to constitute a sufficient just cause. By contrast, our interest in deterring future aggression cannot, on its own, justify the resort to war.¹⁷ However, once we have a sufficient just cause, it seems that we can legitimately pursue deterrence. Deterrence may, in this sense, provide a contributing just cause of war, according to McMahan and McKim. This line of thinking is supported by analogy to the theory of punishment: we cannot punish anyone merely in order to deter future offenses. But once an offense has been committed, deterrence can legitimately feature as a consideration in weighing punishment.

The question raised by McMahan and McKim might, however, be better put by reference to the traditional distinction between just cause and right intention (more about this below): assuming that debates were to terminate in an agreement about the set of (sufficient) just causes. Now, given such a just cause, could a state rightly pursue *further war aims* than those that justified the war in the first place? To borrow McMahan and McKim's own words, the issue at stake is not properly about the range of conditions which can justify the resort to war, but rather about the range of goals "that it can be permissible to pursue by means of war" (McMahan and McKim 1993: 502). This is precisely a question about right intention.

McMahan (2005) points out several important lacunae in the received view of just cause. For instance, the received view presumes that just cause is a matter to be settled, as it were, before the war starts. But as McMahan points out, the conditions which justify a war may change along the way, in such a way that the question of just cause must be asked continuously during the pursuit of the war, not just before starting the war.¹⁸ For instance, a just cause may arise during the course of a war unjustly started and a war justly started may cease to have a just cause once its objectives have been achieved.¹⁹

Finally, it is worth pointing out that in all of the above, it is assumed (usually without comment) that states alone can possess just cause for war. One may certainly ask why this should be so: is it the case that sub-state political communities, though they may be aggrieved, may never possess just cause? This issue is best raised under the heading of legitimate authority, to which we now turn.

2.2. LEGITIMATE AUTHORITY

The criterion of legitimate authority states, not very helpfully, that only an entity possessing legitimate authority can instigate war. In the tradition, this provision was introduced to ensure that only the highest political authority in charge of the common good could instigate wars, thereby discouraging private wars between feudal lords or roving bands of criminals. On the received contemporary interpretation, the criterion of legitimate authority entails that only states – governments – can rightly instigate wars.²⁰

As noted above, a serious problem attaching to this criterion is whether non-state actors may possess war powers. To some extent, philosophers' reluctance to tackle this question may owe to an implicit conceptualization of war as – by definition – an inter-state matter: civil war is war in name only, a matter of domestic politics, and as such not subject to the war convention. The Walzerian paradigm strives to be uncompromisingly legalist and statist in its approach, stooping to recognize intra-state affairs only in its grudging recognition that one state may have just cause to intervene on behalf of another state's tyrannized populace, as in humanitarian intervention. But even here, it grants war rights only to the would-be intervening state. The separate issue of whether repressed citizens themselves can rightly take up arms is usually not addressed. This is surely not satisfactory: ethicists should have something to say about conditions under which groups suffering from severe human rights violations can be entitled to take up arms against the agents of such repression (e.g., their government or the militants of a persecuting ethnic group).²¹ This is a largely neglected area in contemporary Just War theory and one which in light of recent events, e.g., the Arab Spring, calls out for further analysis.²² Once this question is raised, however, other questions of wider political ramification follow in its wake: for instance, when, and under what conditions, should the international community recognize the claims of national minorities to separate statehood? What powers should it be willing to put behind this recognition?

The question of legitimate authority in the context of humanitarian intervention is much discussed in the contemporary literature. Many hold that it would be best all things considered if this authority were to reside with the UN (or a reformed UN, or some less ethically challenged and more effective successor organization).²³ Alternatively, they hope for stable regional alliances. At the same time, they recognize that there are few good such international organizations around. When the need is severe or acute, the authority should fall to willing and able bystander states, provided they are guided by the right intention, and not simply, say, striving to maintain regional hegemony.

But this opens up a further problem, namely the need for prolonged presence and institutional reform which follows in the wake of many interventions.²⁴ Who has the authority to guide and oversee these processes? To some critics, these issues raise the specter of colonialization and protectoracy, casting shadows over the whole enterprise of intervention.²⁵ Wherever we stand on such issues, it is clear that the intervening state(s) might lack the resources – military, economic, political, and, frankly, moral – to oversee such processes. This might deter effective interventions, even in cases where such interventions would be both possible and desirable. The problem of intervention, then, encompasses at least two distinct political-institutional problems: (i) the lack of efficient and authoritative institutions to undertake the interventions where and when they are needed, and (ii) the lack of efficient and authoritative institutions to guide the reconstruction process once the intervention is complete in its military aspect.²⁶ Most commentators agree that such institutions are sorely needed, and that granting authority to bystander states is merely the least of bad options. But few have any substantial or realistic proposals for how such institutions might be brought into existence.²⁷

2.3. RIGHT INTENTION

The requirement that states resorting to war must be guided by the right intention receives relatively little discussion today. It is not hard to see why: traditional understandings of the criterion which look to the agent's inner moral rectitude have no clear application to contemporary politics.²⁸ As Walzer (2002a) argues: "A pure moral will doesn't exist in political life, and it shouldn't be necessary to pretend to that kind of purity." Moreover, there may have been a time when decisions to go to war were taken by individual persons – princes or magistrates. Today, however, deliberations about going to war typically involve large corporate bodies such as governments: yet we lack a cogent theoretical or practical sense of what it is for such corporate bodies to be guided by a particular right intention.

But there is more substance to the criterion of right intention, as is suggested by our discussion of just cause above. As we saw, a state may possess just cause, yet use it as a pretext to pursue its war for unrelated reasons, such as the aim of maintaining regional hegemony or seizing the opportunity to oust a competitor in natural resource trade. Such a state would, according to the received picture, be engaging in an unjust war despite having a just cause. The criterion of right intention, then, excludes the use of war as an instrument for the pursuit of unrelated political ends.

Such verdicts are relatively straightforward when the unrelated political ends are clearly nefarious. They are considerably harder when these are ends we might otherwise approve of. (This, we suggest, is the appropriate venue in which to pose McMahan and McKim's question about sufficient and contributing just causes.) Thus, we may ask whether a state, in addition to seeking to rectify the injustice that provided it with just cause, may also use the war, for instance, to force democratization or improvements in the offending regime's human rights record. McMahan and McKim (1993) insist, reasonably in our view, that certain further war aims are permissible, specifically those that hinder the offending state's ability to commit similar offenses in the foreseeable future. Thus, pursuing deterrence and disarmament might be compatible with right intention even though they do not provide just cause in their own right.²⁹

In an important sense, then, the criterion of right intention bears on the legitimate range of war aims, and thus, differently put, with the setting of conditions for surrender. Here there are at least two issues to consider: (i) that the conditions for surrender should be limited and reasonable (under most circumstances, the demand for unconditional surrender or relinquishment of sovereignty is widely deemed incompatible with right intention); (ii) that political leaders should specify what the aims of the war are, so that the enemy will know what constitutes defeat, and the public will have something by which to judge the success of the war.³⁰ All too often in our day, political leaders find it convenient to reset or redefine war aims as they go along, thereby citing only the war's just cause, and possibly some long-term nebulous aims such as democratization or achieving regional stability. Witness, for instance, how pundits were not quite able to say whether the United States was still at war in Iraq after the transition from Operation Iraqi Freedom to Operation New Dawn. Such uncertainty contributes to the erosion of the distinction between war and other forms of international political action, a matter of great concern to Just War theory.

2.4. PROPORTIONALITY

In its basic form, the proportionality criterion says that although a state may possess just cause, the war will not be just unless it is proportional to the wrong that it seeks to set

right.³¹ It is akin to, but not identical to, the requirement which jurists and some philosophers place under the heading of “necessity.” The difference between the two criteria is not a matter of settled doctrine. For lawyers “[n]ecessity is commonly interpreted as the requirement that no alternative response be possible,” while “[p]roportionality relates to the size, duration and target of the response.”³² The same author acknowledges, however, that “[i]t is not clear how far the two concepts can operate separately.”³³ Taking up this issue from a philosophical perspective, Thomas Hurka maintains that necessity is in fact derivative on considerations of proportionality: “the proportionality condition considers the relevant benefits and harms of a war or act considered on its own, while the necessity condition compares the result of that calculation with the results of similar calculations for relevant alternatives, allowing a choice only when its balance of benefits to harms is better than that of any alternative.”³⁴

Proportionality considerations are relevant to the moral assessment of (i) the armed force which is intentionally directed at an adversary, and (ii) the harm which will unintentionally, yet foreseeably, fall on non-combatants as a result of waging war even for a just cause. Jeff McMahan terms these “narrow” and “wide” proportionality, respectively. It is the latter that is most often mentioned in contemporary philosophical discussions of *ad bellum* proportionality. Frequently cited examples are the Soviet invasions of Hungary (1956) and Czechoslovakia (1968). These invasions might certainly have provided just cause for military interventions by Western powers. But in light of the political background and the overshadowing threat of nuclear conflagration – which would likely have resulted in millions of casualties throughout Europe and beyond – such interventions could not but appear highly disproportionate.³⁵ McMahan argues, however, that narrow proportionality (observing due measure in the intentional targeting of enemy combatants) should have as integral a place in Just War reasoning as the standard accounts of “collateral” or side-effect harm.³⁶ For instance, some have maintained that the full-scale invasion of Afghanistan by the United States and its allies, quite aside from the collateral harms that followed, was a disproportionate response to the wrong which had been committed by the Taliban regime in allowing a terrorist organization to plan the 9/11 attacks within its borders.

In an important paper, Thomas Hurka (2005) points out that it is not clear, on the face of it, which range of goods and evils are to be weighed in the proportionality calculus. He criticizes what he takes to be the standard view,³⁷ according to which *all* good and bad consequences of a war are to be reckoned in order to determine whether a war is proportionate. Arguing (it seems) in terms of narrow proportionality,³⁸ Hurka points out that this cannot be right: for instance, if a war can be expected to have positive economic effects, this might be a good consequence, but not one which should count in its favor in determining whether to go to war. Hurka accordingly argues that the proportionality calculus must be restricted so that only those goods which are related to the war’s just cause (in which he includes both sufficient and contributing just causes, as per McMahan and McKim 1993) should count on the positive side. By contrast, no such restrictions hold on the negative side: *all* of a war’s negative consequences should count in determining its proportionality.

A further complication involves finding the appropriate baseline for comparison when determining the proportionality of resort to war. It is widely agreed that the comparison baseline would have to involve some range of counterfactuals.³⁹ This opens the door to many forms of epistemic uncertainty. Moreover, there is considerable uncertainty as to precisely what counterfactual information to include. For instance, as David Mellow (2006) points out, an unrestricted comparison baseline would render the proportionality

criterion sensitive to what state leaders would do if they had not chosen to intervene. But this would entail that whether an intervention is proportionate is determined in part by how morally scrupulous these state leaders are in other respects. Accordingly, Mellow (2006: 444–6) calls for a “morally qualified counterfactual baseline.” In Thomas Hurka’s summary, we “should compare the net effect of war with that of the least beneficial alternative that is morally permitted” (Hurka 2008: 130).

The above considerations apply most clearly to intervention scenarios. It may be harder to see why proportionality should constrain the exercise of self-defense against territorial aggression. However, invasions of outlying or inessential territories, perhaps territories retained after colonial exploits, are sometimes cited as examples. One such case is the Falklands war of 1982, which might be deemed disproportionate without in any way drawing into doubt that the UK had just cause in virtue of Argentina’s aggression on British territory. On the other hand, the Thatcher government cited the need to deter future such aggression elsewhere. As suggested above, this connects the proportionality criterion with the question of right intention: assuming that deterrence can never provide just cause in its own right, may it nonetheless be part of a right intention of a war otherwise possessing just cause, thereby influencing the proportionality calculus?

One outstanding issue, not well covered in the literature, concerns the fact that war inflicts death and suffering also on one’s own people, civilians or soldiers, and not just on the enemy. Thus, some 250 British soldiers died in the Falklands for the speculative aim of deterring future aggression. Such losses should be factored into the proportionality calculus, even in the case of national self-defense. Assume, for instance, that Norway’s leaders understood that they had no reasonable hope of success in defending the country against the German invasion in 1940. It would seem, then, that the Norwegian government would have violated the proportionality criterion had they thrown large numbers of their own soldiers into a futile war of defense, however much they would still have had just cause.⁴⁰

2.5. REASONABLE HOPE OF SUCCESS

This last point also frames the debates about the idea that just war requires a reasonable hope of success: this criterion is fundamentally constrained by considerations of proportionality and vice versa. Reasonable hope of success restricts states from undertaking futile military initiatives, whether because they lack the means to prosecute a war successfully, or because, although possessing such means, they are unable for political reasons to deploy sufficient force to get the job done. This underscores a point not often recognized in philosophical reflections on just war: that in undertaking a war, a state may substantially wrong its own citizens, and not just other states. In this connection, Suarez maintained long ago that reasonable hope of success has particular pertinence in wars of choice. Force can rightly be used to assist an ally or to aid a foreign people under severe repression only when success is prudently assured. Otherwise it would amount to a reckless waste of soldiers’ lives and national resources. By contrast, when war is forced on a state, for instance by virtue of an invasion which aims at occupation and political subversion, the standard of what counts as “reasonable hope of success” will naturally be set much lower, as the consequences of failure will be proportionately more severe.⁴¹

There are yet further sources of complication. For instance, it is clear that whether a state has reasonable hope of success in self-defensive action depends in large part on what *just means* it has at its disposal. We might take the traditional Just War criteria to specify the limits of such means. However, Walzer discusses the possibility of a *supreme emergency*

exemption, to which nations might be entitled when “faced with a threat of enslavement or extermination” (Walzer 1977: 254). This exemption would override a whole host of *ad bellum* and *in bello* restrictions in one fell swoop. Clearly, then, what counts as a just means, and thereby as reasonable hope of success, will differ dramatically if we accept that states may be entitled to a supreme emergency exemption. (Needless to say, the doctrine of supreme emergency is one of the most controversial aspects of Walzer’s theory⁴²; it will be discussed further below, in connection with the *in bello* requirements of proportionality and discrimination).

A final question concerns the epistemic uncertainties moderating the “reasonable” part of “reasonable hope of success.” A state may launch itself into a war with the hope that its cause will resonate with wider world powers (say via mass media and the internet), prompting diplomatic pressures or even third-party intervention. But this hope is hostage to fundamentally contingent and unpredictable circumstances, such as what else is currently occupying the world’s attention, how charismatic one’s leaders are, etc. Thus, a state may not have a reasonable hope of success at the start of the war, but see that its fortunes may change in ways that have little to do with military might or classic strategy. (The same applies, *mutatis mutandis*, to sub-state actors, if we recognize these as potentially having war powers in the first place.)

2.6. LAST RESORT

Usually included among the criteria of just war is the requirement of “last resort,” according to which a state may not undertake a war unless it has first exhausted all its non-war options. Appeal to this criterion was prominent in debates leading up to the 2003 invasion of Iraq. Many commentators agreed that the international community had just cause against Iraq,⁴³ but argued that the proposed invasion would come too soon, and that more time should be given to negotiations and economic sanctions. Thus, according to these critics, the invasion of Iraq failed on the criterion of last resort, however much there may have been just cause.⁴⁴

While the criterion of last resort certainly has important applications, it is also widely recognized as being problematic, both in theory and in practice. For instance, Michael Walzer notes that the criterion cannot be interpreted literally, on pain of making war “morally impossible”: “[W]e can never reach lastness, or we can never know that we have reached it. There is always something else to do” (Walzer 1992: 88). Additionally, while it might be sound general advice to seek diplomatic solutions before waging war, some situations would seem to require swift action, seizing the strategic opportunity when it presents itself.⁴⁵ This may be especially pertinent in cases of humanitarian intervention, where the masses of people under threat may not have time to wait until, e.g., a sanctions regime takes effect. Moreover, in some cases the effects of sanctions may arguably be more dramatic and less discriminate than those of limited military strikes.⁴⁶

To get around these objections it has sometimes been proposed that the last resort criterion should be re-formulated as the demand that all reasonable non-violent options should be *seriously considered* by any actor entertaining a resort to armed force. And such options may be rejected in favor of armed force only when they are reasonably deemed unrealistic or too costly (in humanitarian or resource terms). In an important sense, then, the criterion of last resort is meant to capture part of the idea that one should not resort to war unless circumstances render it necessary. The criterion’s primary weakness is that it captures this in a way which renders it hostage to the psychological resources of

political and military leaders. Thus, at best, “last resort” seems more a prudential rule of thumb than a hard and fast criterion of just war, since it bears not on an objective necessity to be determined, but rather on the requirement to engage in a mental act of a certain kind, namely deliberation about non-violent alternatives. It is altogether possible that political leaders will seriously consider these alternatives but nonetheless err in failing to see that, in this particular case, they could indeed achieve their just end without war. Arguably, however, substituting for last resort a criterion of objective necessity would introduce problems of its own. First, as applied to non-omniscient decision makers working under time-pressure, a criterion of truly *objective* necessity might simply be too stringent. Second, and as suggested above, it is not hard to imagine cases where limited military strikes, while not strictly speaking necessary, might still be vastly preferable to non-military options on broader prudential grounds.

3. *Jus in bello*

This concludes our review of the *jus ad bellum* criteria. On the *jus in bello* side, discussion is largely focused on two criteria, proportionality and discrimination. Analysis reveals that the two criteria are interestingly interconnected, and that it is impossible to give a full account of each in isolation from the other.

3.1. PROPORTIONALITY OF MEANS

According to this criterion, we should not employ more force than is necessary to achieve our strategic end, or more force than is warranted by that end. These two dimensions of the *in bello* proportionality criterion enjoy a degree of independence: the first requires us to use only such force as is necessary; the second requires us to ask whether the end is important enough to warrant the level of force that would be necessary.

Although this proportionality criterion is clearly distinct from its *ad bellum* namesake, much of the same analysis applies, particularly concerning constraints on narrow proportionality: determining the proportionality of a particular action is not a matter of simply weighing all of an action’s good and bad consequences. Rather, only those good consequences which are conducive to our legitimate war aims will count in the proportionality calculus. By contrast, all of the action’s bad consequences count.⁴⁷

The proportionality criterion is frequently invoked in discussions about the moral status of specific classes of weapons such as cluster munitions, anti-personnel landmines, and nuclear, chemical, and biological weapons. It is not clear, however, that proportionality is necessarily what is at stake here. Instead, it might be more relevant to ask whether these weapons are prohibitively indiscriminate, inasmuch as they will tend to harm civilians as much as soldiers. The point can be illustrated in terms of Walzer’s supreme emergency exemption, according to which ordinary rules of war may be overridden in circumstances where the very survival of one’s political community and way of life is at stake.⁴⁸ In such cases, this exemption might sanction the use of whatever weapons are necessary to achieve our ends. It is tempting to think that Walzer’s supreme emergency exemption involves laying aside all *in bello* restrictions whatsoever.⁴⁹ But this cannot be right: for the argument is precisely that under circumstances of extreme duress, the use of such weapons may indeed be proportionate. By contrast, the argument from supreme emergency makes no attempt to disguise the fact that such weapons will still be non-discriminatory.

Thus, the real question about supreme emergency is whether any military end is important enough to allow the proportionality requirement to override fully the discrimination requirement. In this sense, questions about proportionality shade off into questions about discrimination. But as we shall see, central applications of the principle of discrimination also crucially involve questions of proportionality.

3.2. DISCRIMINATION

The criterion of discrimination says that only combatants can be targeted in a just war. Thus, it is also referred to as the principle of non-combatant immunity.⁵⁰ However, while non-combatants may not be targeted as such, it is generally accepted that we can legitimately pursue such actions as will foreseeably result in harm to them. This is what is referred to as the *doctrine of double effect* (or sometimes, the principle of side-effect harm). Its importance to classical Just War theory can hardly be overstated.⁵¹ For instance, Aquinas is often read as maintaining that lethal acts of private self-defense are permissible only in light of the doctrine of double effect: I may not intend to kill my assailant, though I may (under the right conditions) justifiably use such force as will foreseeably result in his death.⁵² But here, questions of proportionality once again come into play: for I cannot use more force than is necessary to repel him. I cannot kill him, if there are non-lethal ways of pacifying his threat. Thus (and to bring the point back to the ethics of war), the level of side-effect harm that follows from bombing, say, a munitions plant in a suburban area must be proportionate to the importance of the aim we seek to achieve, and must be necessary for achieving that end. Thus, considerations of proportionality lie at the heart of the criterion of discrimination.

The doctrine of double effect raises exceptionally thorny philosophical issues, most of which fall outside the scope of this survey.⁵³ An important recent paper is Kamm (2004), which purports to offer a justification for terror-bombing of non-combatants, by providing counter-examples to the principle of discrimination and the doctrine of double effect. Kamm's putative counter-examples all appear to take the following form: assume the permissibility of a plan for tactical bombing resulting in the foreseeable-but-unintended deaths of a large number of civilians, as covered by the doctrine of double effect. Now assume that we could achieve the same tactical result by intentionally targeting one civilian. Kamm argues that the second course of action would be no less permissible than the first. On this view, direct targeting of civilians can sometimes be justified, in contravention of the principle of discrimination.

However, while Kamm's argument highlights complex issues concerning the *theoretical* standing of the principle of non-combatant immunity, its *practical* significance is debatable. More applicable concerns about the principle of non-combatant immunity are raised in recent papers by Jeff McMahan (2010) and Cécile Fabre (2009).

McMahan's starting point is a recent trend in the conduct of war, whereby political and military leaders seek to minimize risks to their own soldiers, thereby exposing non-combatants to comparatively higher risks.⁵⁴ This problem was brought to public attention during the 1999 intervention in Kosovo, where NATO chose to bomb from high altitudes in order to shield their own fighter planes from anti-aircraft missiles, but thereby also increasing the level of expected side-effect harm.

Virtually everyone accepts that modern war must involve *some* trade-off between risks to combatants and risks to non-combatants. Under the heading of "double intention," Walzer argues that the ethics of war requires not just that we intend no harm to non-combatants, but also "a positive commitment" to reduce even side-effect harm: so far as

is possible, the risks of military operations should be borne by military personnel (Walzer 1977: 156). McMahan's point is that the justified trade-off point need not be constant across all types of military operations. Certainly, in intervention scenarios such as Kosovo, we can distinguish between non-combatant *beneficiaries* and non-combatant *bystanders*. It is not unreasonable, argues McMahan, and indeed appears to garner support from more general moral intuitions, that those who stand to benefit from some risk-filled operation be asked to shoulder some of these risks themselves.⁵⁵ By contrast, it would be immoral to shove some of this risk onto mere bystanders. McMahan concludes (2010: 364) that immunity cannot have its source in non-combatant status alone, since its application varies with different classes of non-combatants. We are not convinced, however, that this is the correct conclusion to draw from the argument: the argument concerns not immunity as such, but the proportionality component of the doctrine of double effect. What it shows is that proportionality thresholds for side-effect harm may be significantly lower in the case of non-combatant beneficiaries than in the case of non-combatant bystanders.

Where McMahan's paper concerns indirect harm to different classes of non-combatants, Fabre (2009) discusses the permissibility of direct targeting of non-combatants. Her starting point is the fact of increasing civilian involvement in – and contribution to – wars. She reports an emerging consensus according to which some non-combatants may be targeted as such, namely those that directly contribute to the war effort, for instance munitions workers.⁵⁶ By contrast, welfare workers such as medical personnel are held to be immune from targeting. Fabre questions whether this distinction is justified: there seems to be no morally relevant line to be drawn between the kind of contribution to the war effort provided by munitions workers and the kind of contribution provided by welfare workers, such as would entail that the one group can be legitimately targeted while the other group cannot.

Fabre appears to try to limit the radical implications of her argument by appeal to two general considerations: (i) many welfare workers operate under unavoidable ignorance of the injustice of their war, and therefore should not be held morally responsible for their contributions (Fabre 2009: 48–9). (ii) Since determining individual liability is nigh on impossible, we should “err on the side of not harming” (Fabre 2009: 63). We have several concerns about this argument. First, it is manifestly clear that these civilians often *do not* operate under conditions of unavoidable ignorance – in most cases, they *can* know, even if they do not, what their contribution to the war effort is, and whether that war is just. Further, Fabre's assessment of the epistemic quandary of determining individual liability, while conceivably correct on the whole, may vary in its application from case to case. We would want to know, then, what her argument implies for the cases where we are able to make the relevant assessments.

More generally, however, we believe the argument goes wrong at an earlier stage, with the report of the emerging consensus that munitions workers may be directly targeted. This strikes us as a problem which calls precisely for McMahan's insight that proportionality constraints may vary with different classes of non-combatants. Contrary to the consensus view, munitions workers cannot be targeted as such, any more than regular civilians can. However, the degree of side-effect harm to which they can rightly be exposed is significantly higher.

4. *Jus post bellum*

As we have seen, standard discussions in Just War theory primarily concern the initiation and prosecution of war. Comparatively little is said about how to end wars and the

conduct to be observed in their aftermath.⁵⁷ Brian Orend, in particular, has sought to fill this gap, developing a distinct set of moral guidelines for a *jus post bellum*.⁵⁸ As he points out (2002: 43), the lack of such a generally accepted code for terminating war is likely to lead to prolonged fighting and greater probability of relapse into conflict.

The first question to ask within the *jus post bellum* is what the goal of war is. This naturally connects the *jus post bellum* with the question of right intention. While the primary goal of a just war is the vindication of those rights whose violation provided us with just cause, our aim cannot simply be a return to the conditions that obtained prior to the war, the *status quo ante bellum*.⁵⁹ In most cases, this would be neither possible nor desirable. Once the war is over, we can rightly demand war crimes trials for the instigators of unjust wars as well as compensation for its victims. However, the call for compensation must be tempered by a sense of proportionality: in particular, there should be no sweeping sanctions, as these cut too deeply into social life and thereby threaten the long-term prospects for peace.

On this point, Orend's analysis differs importantly from Walzer's. Orend takes seriously the possibility that, at least in some cases, compensation can be sought primarily from the fortunes of the political leaders guilty of instigating the unjust war. This would introduce further disincentives for leaders to start such wars, and would spare the population from having to pay for political decisions over which, in most cases, they had no say.⁶⁰

Further, while Walzer argues that we should be extremely reluctant to seek regime change or political restructuring after war,⁶¹ Orend, by contrast, holds that the *jus post bellum* is consistent with seeking some measure of "political rehabilitation" for defeated aggressor states. Exactly what measures are appropriate will depend on the specifics of the case. But our legitimate interest in "reasonable security against future attack" (Walzer 1977: 118) grounds a general presumption in favor of imposing such measures, according to Orend.⁶²

5. Conclusion

We have seen throughout that there is a high degree of interconnection between the various principles of *jus ad bellum*, on the one hand, and the principles of the *jus in bello*, on the other. However, our discussion has been consistent with the assumption that the two sets of principles are independent of each other. This assumption is strongly entrenched in Just War theory,⁶³ forcefully expressed, for instance, in our opening quote from Michael Walzer. On Walzer's view, a fundamental tenet of Just War theory is that a just war can be unjustly fought, and vice versa: an unjust war can be justly fought.⁶⁴

It remains uncontroversial, of course, that a war which satisfies all of the *ad bellum* criteria may nonetheless be unjustly fought. But the converse view that a war lacking just cause can be justly fought has recently come under serious scrutiny. Walzer's view affirms the "moral equality of soldiers": just and unjust combatants possess "an equal right to kill," provided they stay within the bounds of the *jus in bello*.⁶⁵ In a sweeping criticism of this assumption, Jeff McMahan has argued that one's justification for using lethal force must surely depend on the justice of one's cause.⁶⁶ Only combatants fighting for an unjust cause have made themselves morally liable to be harmed or killed. If this is right, then no strict sense can be made of the claim that the *jus ad bellum* and the *jus in bello* can be evaluated independently of each other: combatants fighting for an unjust cause simply cannot satisfy the *jus in bello* criteria.

From the standpoint of ethical theory, it is not hard to see where the Walzerian paradigm arguably goes astray. Walzer's starting point is the *legal convention* that soldiers on

both sides of a war are to be treated as equals.⁶⁷ He combines this with the moral sentiment that we ought not to punish, and indeed ought to praise, commanders and soldiers who fight for an unjust cause but nonetheless abide by the war convention. But as McMahan points out,⁶⁸ these elements entail the moral equality of combatants only if we wrongly conflate the categories of excuse and justification. To say that there are various factors (including duress and ignorance) which *excuse* unjust combatants from prosecution or even from moral condemnation is not to say that they are justified in killing. That remains the exclusive remit of soldiers fighting for a just cause.

From the standpoint of ethical practice, by contrast, the debate between Walzer and McMahan appears rather to concern competing strategies for limiting wars, their impact and incidence. The doctrine of moral equality continues to play an important role in international affairs, not least through the Geneva Conventions and the work of the International Committee of the Red Cross. Walzer believes that by making it known to soldiers that they will be held accountable for their conduct irrespective of the justice of their cause, we provide an incentive for soldiers on all sides to abide by the war convention, thereby reducing the *impact* of war. By contrast, if soldiers believed they would be condemned merely for participating on the losing side, they would lack an important incentive to limit their conduct.

McMahan does not dispute this. Rather, he argues that the doctrine of moral equality must bear some part of the blame for the *incidence* of wars, inasmuch as a government's ability to recruit military personnel for unjust wars depends on their beliefs about the morality of participation in war. If soldiers were disabused of the notion that such justification is independent of the justice of the war's cause, this "could make a significant practical difference to the practice of war" (McMahan 2009: 7).

Whatever our confidence in the soundness of this projection – minimally, one should make note of the distinction between believing that one's war is just and believing that one's war satisfies the Just War criteria – McMahan's proposal does make an important point about the normative horizon of Just War theory. Limiting the scope and damage of the wars that do occur, while certainly a worthy goal, should not be our sole aim. Even more important is to find ways of reducing the frequency of war. If stronger disincentives for resorting to unjust war were in place, and the underlying inequalities which lead to war were reduced, we would certainly have a more peaceful world.

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Notes

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¹ Walzer (1977).

² These criteria are the product of a moral discourse stretching back to the early middle ages and arguably to antiquity. For an overview of their development, see our companion piece “The Ethics of War. Part I: Historical Trends.”

³ Cf. Walzer (1977: 51–3), and Coady (2008: 58–63) for criticism.

⁴ Walzer (1977): ch. 6. For Walzer, these restrictions express a commitment to what he calls the *legalist paradigm* (Walzer 1977: 58–63). Walzer has since tempered his stance on this topic; cf. Walzer (1980, 1994, 2002a). See Begby (2003) for details.

⁵ Other important contributions include Walzer (1994, 2002a), Beitz (1979: 77–92), Slater and Nardin (1986), Hoffman (1996), Shue (1997), Annan (1999), Wheeler (2000), Lucas (2001), Miller (2003), Young (2003), Buchanan (2004), Téson (2005); Nardin (2005), and Altman and Wellman (2008). Pattison (2010b) surveys both the ethical, political, and legal dimensions of the problem of intervention, while Bass (2008) offers a much needed historical perspective.

⁶ The 2001 report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, offers a strong statement in favor of an emerging norm of intervention. See Bellamy (2009, 2010) for an assessment of the Report and its legacy.

⁷ This is connected with the criterion of right authority, which we will discuss below: it would seem (near) obvious that legitimate state governments possess the authority to judge on self-defense; however, defense of others seems a different matter.

⁸ This is connected with the criterion of right intention, more about which below. Moreover, regime change and political-institutional reform involve long-term commitments that interveners are not always willing or able to undertake. On this, see Walzer (1994, 2002a).

⁹ Cf. Crawford (2003), McMahan (2004a), Luban (2004), Buchanan and Keohane (2004), Kaufman (2005), Buchanan (2006), Miller (2008), Fletcher and Ohlin (2008): ch. 7, and the essays in Shue and Rodin (2007).

¹⁰ Roth (2006) and Johnson (2006)

¹¹ Cf. Walzer (1977): ch. 5, Crawford (2003), McMahan (2004a), Luban (2004), Miller (2008), and Fletcher and Ohlin (2008): ch. 7. Famously, the 2002 US National Security Strategy document conflates these two categories.

¹² Walzer (1977: 80–5) cites Israel’s first strike in the Six Day War as such a case. See Coady (2008: 100–2) for critical discussion.

¹³ This was one of the rationales advanced by classical theorists to justify preventive use of military force. See Reichberg (2007).

- ¹⁴ Rodin (2003, 2004). See also Norman (1995) for a similar argument.
- ¹⁵ This is an important aspect of what Walzer (1977: 58–9) calls the “domestic analogy.”
- ¹⁶ For criticism, see Tésón (2004), McMahan (2004b), Hurka (2005: 52–7), Mapel (2007), Blair (2008), and Coady (2008: 84–7).
- ¹⁷ More recently, McMahan (2005: 14–5; 16–7) has expressed doubts about this, but allows that the circumstances which might challenge the principle would be extremely rare.
- ¹⁸ See also Mollendorf (2008), and Rocheleau (2010).
- ¹⁹ There is also the question of whether both sides (or all sides) to a war may possess just cause (cf. McMahan 2005: 19–20). This question of *bilateral justice* has important historical precedent (cf. Reichberg 2008a), but can barely be cogently raised in the Walzerian view (at least with respect to *jus ad bellum*; as shown in Section 5 below, on the level of the *jus in bello* Walzer endorses bilateral justice under the heading of the “moral equality of soldiers”), due to its restrictive conception of just cause: if only territorial aggression can provide just cause, then only one side can have it; i.e., the side which is aggressed upon. With the more expansive view of just cause which is currently gaining acceptance, these matters are less clear.
- ²⁰ Cf. Brown (2011). Note, though, that this is not a purely procedural criterion. Holding *de facto* legal title to wage war (by virtue of a public office) does not entail having the moral authority and competence to do the same. A *de facto* legitimate authority may forfeit its *moral* right to wage war through incompetence or corruption. On this, see Syse and Ingierd (2005).
- ²¹ For instance, two otherwise excellent book-length studies on the morality of secession, Buchanan (1991), and Wellman (2005), have strikingly little to say about the subject. Moltchanova (2005), Fabre (2008), and Fotion (2006, 2008) offer glimpses in a more promising direction.
- ²² Reflection on these issues was an element in the tradition which has since been lost as Just War theory has sought to accommodate itself to the emerging state-centered international law. See, for instance, Aquinas’s treatment of just insurrection in *Summa Theologiae* II-II, q. 42, a. 2 (reprinted in Reichberg, Syse, and Begby 2006: 185–6) and Grotius’ discussion of “mixed war” in *De jure belli ac pacis* (Reichberg, Syse, and Begby 2006: 394–400).
- ²³ For a dissenting view, see Brown (2011), Johnson (1999: 58–66, 98–101, 103–9), and Johnson (2006: 114ff).
- ²⁴ Cf. Walzer (2003).
- ²⁵ Cf. Richmond (2006, 2011). For critical analysis of this line of thought, see Begby and Burgess (2009), Begby (2010).
- ²⁶ As is illustrated by the case of Iraq, these two phases will sometimes overlap to a considerable degree.
- ²⁷ See Pogge (2001, 2005), and Pattison (2010b): ch. 8 for reflections.
- ²⁸ Already among classical theorists after Aquinas, there was a tendency to replace right intention with what Suarez termed “debitus modus,” the right manner of waging war (see Reichberg, Syse, and Begby 2006: 360ff). Koeman (2007), Cole (2011), and Tesón (2011) are recent attempts to reinvigorate the criterion of right intention.
- ²⁹ See also McMahan (2005) and Hurka (2007) for further discussion.
- ³⁰ Cf. Anscombe (1939: 74–5) (selection reprinted in Reichberg, Syse, and Begby 2006: 632). See also McMahan (2005: 2–3).
- ³¹ Proportionality also appears among the *jus in bello* criteria which we discuss below. For a thorough review of the legal discourse surrounding proportionality, *ad bellum* and *in bello*, see Gardam (2004).
- ³² Gray (2008: 150).
- ³³ Gray (2008: 150).
- ³⁴ Hurka (2008: 129). By contrast, David Rodin maintains that necessity and proportionality are logically independent (Rodin 2003: 42).
- ³⁵ Cf. Hurka (2005: 35–6), and Walzer (1977: 94–5).
- ³⁶ McMahan (2009: 21–4, 155–202).
- ³⁷ Cf. Johnson (1999), National Conference of Catholic Bishops (1983), and Lackey (1989).
- ³⁸ Following McMahan’s analysis, Hurka’s account would appear overly restrictive if taken to apply to wide proportionality.
- ³⁹ Cf. Kavka (1991), and Hurka (2005).
- ⁴⁰ See Harbour (2011) for a justification of defensive action even against seemingly hopeless odds, on grounds that more intermediary goals could still be reached, such as stalling, letting certain people or institutions move to safety, as well as displaying and strengthening morale. Some of these points arguably apply to Norway in 1940 as well as to the Finnish cause against the Soviets in 1939–1940. For a review of these issues, see Coppieters and Fotion (2008): chs. 4–5.
- ⁴¹ Suarez, *On War*, section IV, §10 in Suarez (1944), selections reprinted in Reichberg, Syse, and Begby (2006: 352–3). For further reflection on the success condition for legitimate self-defense, see Statman (2008).
- ⁴² For discussion, see Rawls (1995, 1999), Toner (2005), Orend (2006): ch. 5, Statman (2006), and Cook (2007).
- ⁴³ For instance, Iraq’s non-compliance with a long line of UN resolutions. See Miller (2008: 54–6) for an illuminating discussion.
- ⁴⁴ Cf. Walzer (2002b).

- ⁴⁵ Thus, we note in passing that preventive strikes cannot, virtually by definition, constitute last resort. To some, this will constitute a further consideration against the idea of preventive strikes. To others, however, it may constitute a further consideration against the criterion of last resort, which they see as already buckling under pressure from the modern realities of war and international politics.
- ⁴⁶ The sanctions regime in Iraq (1990–2003) is a much-debated example. Cf. Ali and Shah (2000), *Global Policy Forum* (2002).
- ⁴⁷ Cf. Hurka (2005: 44–5).
- ⁴⁸ Walzer (1977): ch. 16. See Section 2.5 above for further discussion and references.
- ⁴⁹ Walzer himself discusses it in terms of “[o]verriding the rules of war” (Walzer 1977: 255).
- ⁵⁰ The combatant/non-combatant distinction is not identical to the soldier/civilian distinction. Some soldiers (e.g., prisoners of war) are not combatants, and it remains a matter of contention whether some civilians (e.g., politicians or intelligence analysts) may be counted as combatants.
- ⁵¹ Cf. Anscombe (1957: 66–7; 1961: 54–5, 58). Another standard application of the doctrine of double effect is the problem of abortion (cf. Foot 1978).
- ⁵² Aquinas, *Summa theologiae*, II-II Q. 64, art. 7, reprinted in Reichberg, Syse, and Begby (2006: 190–1). For an alternative reading of this passage, see Reichberg (2005).
- ⁵³ See Quinn (1989), Kagan (1989): ch. 4, McIntyre (2001), and Scanlon (2008) for important contributions.
- ⁵⁴ See also Shue 2011.
- ⁵⁵ We must point out, though, that McMahan is emphatically not seeking to justify NATO’s conduct in Kosovo. Cf. McMahan (2010: 373).
- ⁵⁶ Cf. Walzer (1977: 146), Nagel (1972: 139–40), and Coady (2008: 111–4). Here we leave aside the important matter of increasing civilian participation in *de facto* combat situations, for instance through private security companies such as Blackwater. On this, see Walzer (2008), Coady (2008): ch. 10, Pattison (2008, 2010a), Lucas (2009), Hedahl (2009), Fabre (2010), and Baker (2011).
- ⁵⁷ An important precedent is Kant’s discussion in *Metaphysics of Morals*, reprinted in Reichberg, Syse, and Begby (2006: 539–41).
- ⁵⁸ Cf. Orend (2000a,b; 2002), Bass (2004). For critical analysis, see Bellamy (2008) and Evans (2009).
- ⁵⁹ See also Walzer (1977: 119).
- ⁶⁰ See also Bass (2004: 408–11) for further reflection. For more general discussions concerning the morality of imposing collective responsibility for post-war reparations, see Miller (2007): ch. 5, Parrish (2009), Stilz (2011), Pasternak (2011) and Begby (forthcoming).
- ⁶¹ Cf. Walzer (1977: xvii–xx).
- ⁶² See Bass (2004: 390–6) for counterconsiderations.
- ⁶³ Although it is important to note that this view was not developed systematically until the 18th century, by writers such as Wolff and Vattel. Earlier Just War theorists tended to treat the two spheres as continuous. On this, see Reichberg (2008b).
- ⁶⁴ Cf. Walzer (1977: 21). Walzer believes this view is supported by our differential judgments of the conduct of Erwin Rommel and Arthur “Bomber” Harris during WWII. While there is no question who fought with just cause, Walzer observes that we commend Rommel’s war conduct and condemn Harris’s in a way that testifies to the independence of *jus ad bellum* and *jus in bello*. (Cf. Walzer 1977: 38–40; 323–4.)
- ⁶⁵ Walzer (1977: 41).
- ⁶⁶ Cf. McMahan (2004c, 2009). For further discussion, see McPherson (2004), Øverland (2006), Walzer (2007), and Benbaji (2008, 2009); and the essays collected in Rodin and Shue (2008). McMahan (2009) acknowledges that his rejection of the independence thesis links up with classical Just War theory, as explained by Reichberg (2008b).
- ⁶⁷ Cf. Fletcher and Ohlin (2008: 20).
- ⁶⁸ McMahan (2009): ch. 3.

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