

## War and Moral Consistency

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### 1. The Moral Challenge of War

Armed conflict kills and injures hundreds of thousands of people each year. In this respect, war is a scourge like disease, poverty, and natural disasters. But while no one thinks that states could be justified in intentionally causing a disease pandemic or a drought, most people think that states may be justified in resorting to war. This common view is supported by the traditional theory of the just war. Open any textbook on the ethics of war and you will find two familiar sets of criteria. The first – known as *jus ad bellum* – specifies the conditions under which the *resort* to war is justified. The second set of criteria – known as *jus in bello* – set out the permissible *means* by which wars may be fought.

#### *Jus ad Bellum*

- Just Cause. The war must aim at preventing or correcting a sufficiently serious wrong, such as violations of national sovereignty or (more controversially) preventing genocide and crimes against humanity overseas.
- Proportionality. The harms that the war produces must not be excessive in relation to the good that it achieves.
- Last resort. The war must be the least harmful feasible means of achieving the just goals.
- Right Intention. The war must be fought with the intention of achieving the just cause, and not for ulterior motives.
- Reasonable Prospect of Success. The war must a reasonable probability of achieving the just cause.
- Legitimate Authority. The war must be declared and fought by the right kind of entity, such as a state, a coalition of states, or (more permissively) certain types non-state group (such as national liberation movements).

#### *Jus in Bello*

- Discrimination. Combatants are permitted to target enemy combatants, but are prohibited from attacking non-combatants.
- Proportionality. Collateral harms to non-combatants must not be excessive in relation to the military advantage gained.
- Necessity. Belligerents must minimise the amount of harm they cause when selecting between different ways of achieving their goals.

Given the extent of disagreement on many ethical issues, there is a remarkable degree of consensus that as long as a belligerent ticks all the items on the ‘checklist’, then their war is justified and individuals commit no wrong by fighting in it. However, it is unclear whether this widely-shared view can be reconciled this with our other moral commitments. The basic moral challenge of war can be understood in terms of a tension between three claims:

- (1) Ordinary, common-sense morality places a very stringent constraint on killing and maiming.
- (2) War involves killing and maiming on a huge scale.
- (3) Wars can be morally justified.

The first claim seems uncontroversial. If individuals possess *any* fundamental rights not to be treated in certain ways, then the rights not to be killed and injured are surely among them. The second claim is a straightforward empirical truth<sup>1</sup>. Pacifists argue that these three claims are inconsistent: they cannot all be true together. If we accept the first two claims, we must give up the third and jettison our belief that wars can be morally justified. The pacifist's argument is straightforward and powerful. If we think that killing just *one* person is normally very hard to justify, then the justificatory burden on the *mass* killing constitutive of war must be hundreds (if not thousands) of times greater. Once we recognise this, it seems practically impossible that war can be justified, at least in the real-world.

It's worth pointing out that this argument for pacifism does not rely on the controversial claim that killing is always morally wrong. Instead, it aims to show that the seemingly 'common-sense' belief that wars can be justified is incompatible our other, more fundamental, common-sense moral commitments. So, despite its reputation, pacifism is not an extreme or partisan view. On the contrary, pacifism seems like the natural default position, with the burden of proof lying with those who think that war can be justified.

Just war theorists think that this challenge can be met and that the three claims above can be made compatible. There are two broad strategies for reconciliation. The first option is to argue that the supposed inconsistency rests on a mistake. We may grant the pacifist that waging war is incompatible with the moral constraints imposed by ordinary, everyday moral norms. But this only renders warfare unjustified if the moral principles that govern war are *the same* as those that govern all other domains. But should we accept this assumption? So-called *exceptionalist* just war theorists argue that we should not. On this view, war is (to some degree) morally discontinuous with other activities, and so the usual constraints on killing need not be decisive.

This approach has a long lineage in the just war tradition. The early Christian just war theorists, such as St Augustine of Hippo, grappled with the problem of how to reconcile waging war with God's commandment that "Thou Shall Not Kill". Augustine's solution to the puzzle was to argue that this prohibition applies only to individuals in their private capacity, but not to killings carried out by rightful, God-appointed rulers, nor to subjects who kill at their command.<sup>2</sup> A more modern, and secular, version of this idea grounds the moral specialness of war in the fact that it is carried out by political collectives. As Jean Jacques Rousseau famously put it, "War...is not a relationship between one man and another, but between one State and another."<sup>3</sup>

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<sup>1</sup> Empirical social scientists typically define war as requiring at least 1000 battle deaths per year.

<sup>2</sup> Augustine, *The City of God Against the Pagans*, R.W Dyson (ed), (Cambridge: Cambridge University Press, 1988), Bk.1. Ch.21

<sup>3</sup> Jean Jacques Rousseau, *The Social Contract and Other Writings*, Victor Gourevitch (ed), (New York: Cambridge University Press, 1997), pp. 50-51.

The fact that violence is done on behalf of a political entity means that it is subject to different, and more permissive, moral rules than those that govern other forms of violence.<sup>4</sup>

Despite its heritage, many contemporary philosophers now reject the idea that war is morally exceptional. As Jeff McMahan puts it, this idea seems to involve a rather mysterious and objectionable form of “moral alchemy.”<sup>5</sup> How can the fact that a group of individuals has banded together and subjected themselves to a religious or political authority someone create moral permissions to engage in what would otherwise be wrongful mass killing? These special permissions seem hard to square with a commitment to basic human rights, which are meant to impose moral limits on how we may treat others outside our communities.<sup>6</sup>

In light of these worries, many contemporary just war theorists pursue a second strategy against the pacifist. Unlike the exceptionalist approach, this strategy grants the pacifist assumption that war should be evaluated by the same moral standards we use to judge all other violent activities. As Jonathan Glover puts it:

It is widely held that killing in war is quite different. It is not, and we need to think about the implications of this...apart from important special side-effects, killing in war is morally on a par with other killing. Declarations of war, military uniforms and solemn utterances by national leaders in no way reduce the burden of justification for an act of killing.<sup>7</sup>

However – against the pacifist – proponents of this second approach argue that wars *can* be justified in terms of justifications for killing that we accept in other contexts. More specifically, the idea is that wars can be justified as a large-scale aggregation of individual justifications for killing in self-defence and in defence of others. This is known as the *reductivist* approach to war.<sup>8</sup> If this strategy is defensible, then there need be no deep inconsistency between justifying war and a common-sense commitment to individual rights.

Reductivist just war theorists typically focus on two intuitive justifications for defensive harm. The first justification is based on the idea that individuals’ rights against harm, though weighty, are not *absolute*. They may sometimes be permissibly overridden if necessary to achieve a significantly greater good. To illustrate, consider the following example:

*Boulder 1:* Benny and Sammy have pushed a boulder down a hill in order to kill five innocent people below. Sally is walking by and is able to divert the boulder onto an alternative path. If she does so, the five victims will be saved, but the boulder will now kill one innocent person.

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<sup>4</sup> For a detailed contemporary development of this idea, see Christopher Kutz, ‘The Difference Uniforms Make: Collective Violence in Criminal Law and War’, *Philosophy and Public Affairs* 33, No.2 (2005), 148-180.

<sup>5</sup> Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), p.82.

<sup>6</sup> For an extended discussion of this issue, see Jonathan Parry, ‘Community, Liability, and just Conduct in War’, *Philosophical Studies* 172, No.12 (2015), 3313-3333.

<sup>7</sup> Jonathan Glover, *Causing Death and Saving Lives* (London: Penguin, 1977), pp.251-252.

<sup>8</sup> For prominent reductivist treatments of war, see McMahan, *Killing in War*; Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012); Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014).

Is it permissible for Sally to divert the boulder? Most people think that it is, and the intuitive explanation seems fairly straightforward. Although Sally will kill someone who has a right not to be killed, the good of saving five lives outweighs that right and justifies killing as the *lesser-evil*.

A second kind justification for defensive killing holds that individuals can, under certain conditions, come to *lose* their normal right not to be harmed. Consider:

*Boulder 2:* Benny and Sammy have pushed a boulder down a hill in order to kill one innocent person below. Sally is walking by and is able to divert the boulder onto an alternative path. If she does so, the one victim will be saved, but the boulder will now kill Benny and Sammy.

Again, many think that killing is morally justified in cases like this. But the explanation seems quite different than in the first case. Since Sally will kill two people in order to save one, she can't have a lesser-evil justification for overriding Benny and Sammy's rights. Instead, it seems more plausible that Benny and Sammy lack a right not to be killed by Sally in the first place, in virtue of their behaviour. Since Benny and Sammy are morally responsible for creating an unjustified lethal threat, they have no complaint against being made to bear the costs of preventing that threat. This is known as a *liability* justification for killing.

Armed with these two forms of justification, we can now give a more precise statement of the reductivist response to the pacifist. On this view, war can be justified by showing that the individuals it will harm are either liable to be harmed, or that their rights against harm are overridden by the (much) greater good that the war will achieve. As Seth Lazar puts it, on this view "justified warfare . . . is no more than the coextension of multiple acts justified under these two principles."<sup>9</sup>

At root, then, the moral and philosophical challenge of war is one of getting our moral beliefs concerning war into a state of coherence and mutual support with our wider set of moral beliefs about harming and killing. In the following sections, we will consider three key areas of possible inconsistency. As we shall see, resolving these tensions may require some unpalatable revisions.

## **2. The Puzzle of National Defense**

Under what circumstances could war be a justified response? While some purported just wars are very controversial – such as wars of humanitarian intervention – most people think that there is at least one paradigmatic example: National self-defence in response to clear and imminent aggression. This view is reflected in international law, where states' "inherent right to self-defense" is enshrined in the UN Charter.<sup>10</sup>

However, despite this widespread agreement, it has proved surprisingly difficult to reconcile the permissibility of national-defence with our more general views about the permissibility of harming others. Again, the issue is one of moral consistency. The problem

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<sup>9</sup> Seth Lazar, 'National Defence, Self-Defence, and the Problem of Political Aggression', in Cecile Fabre and Seth Lazar (eds), *The Morality of Defensive War* (Oxford: Oxford University Press, 2014), 11-37 at p.12.

<sup>10</sup> Charter of the United Nations. Chapter VII. Article 51.

emerges once we start reflecting on the moral *limits* of defensive harm.<sup>11</sup> One very intuitive limit is that the harms we inflict must be *proportionate* to the threat averted. To illustrate, consider the following examples:

*Thief:* Thief grabs Jimmy's wallet and runs away down the street. The only way that Jimmy can get his wallet back is by shooting Thief before he gets away.

*Voter:* Jimmy is about to drive to his polling station to vote in an important general election. Tim wants to stop Jimmy from voting, and starts to let the air out of Jimmy tires. The only way that Jimmy can get to the polling station before it closes is to shoot Tim before he flattens his tires.

In both cases Jimmy is subjected to an unjust threat: He clearly has a right to his wallet and a right to cast his vote. But nonetheless it seems morally wrong for Jimmy to defend those rights with *lethal* force. Doing so is excessive in relation to the good that he achieves. More generally, there seems to be an intuitive distinction between those of our interests that are important enough to justify defensive killing and those that are not. This is known as the distinction between 'vital' and 'non-vital' interests.<sup>12</sup> Several of our interests do seem to clearly qualify as vital, such as our interests in not being killed, maimed, raped, or enslaved. Killing to prevent ourselves from suffering these sorts of harms seems proportionate. But the two examples above suggest that our interests in protecting our property and in exercising our political liberty just aren't important enough to warrant lethal defence, and therefore don't qualify as vital.

This way of drawing the distinction between vital and non-vital interests raises a serious challenge to the common-sense belief that national self-defence is a clear just cause for war. The problem is that while some extreme cases of international aggression do threaten the vital interests of their victims – such as wars of genocide or enslavement – many other cases of aggression only seem to threaten non-vital interests. For example, aggressors often only aim to annex disputed territory, or steal natural resources, or curtail the political independence of the victim state. None of these unjust goals involve killing or enslaving anybody. Rather, people will only get killed if the victim state decides to use force to resist. But if these forms of so-called 'lesser aggression' do not target anybody's vital interests, then it seems to follow that resisting with lethal force must be disproportionate. This conclusion seems very counter-intuitive, but consistency with our wider views about the limits of defensive killing seems to commit us to it. This is known as the 'problem of lesser aggression' and serves to rekindle the pacifist challenge that war is incompatible with our more general moral commitments.<sup>13</sup>

Before we consider some possible responses to the problem, it is worth noting that in contexts other than national self-defence, most of us *do* seem to think that war is justified only when the most fundamental interests – such as life and limb – are at stake. Within debates about

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<sup>11</sup> For influential formulations of the problem, from which several of the following examples are drawn, see Richard Norman, *Ethics, Killing, and War* (Cambridge: Cambridge University Press, 1995); David Rodin, *War and Self-Defence* (Oxford: Oxford University Press, 2002); David Rodin, 'The Myth of National Defence' in Fabre and Lazar (eds), *The Morality of Defensive War*, 69-89. For an excellent overview, see David Mapel, 'National Defence and Political Independence' in Seth Lazar and Helen Frowe (eds) *The Oxford Handbook of Ethics of War* (Oxford: Oxford University Press, 2018) 204-222.

<sup>12</sup> See Rodin, 'The Myth of National Defence'.

<sup>13</sup> Sometimes alternatively called the problem of 'bloodless invasion'.

the morality of humanitarian intervention there is a widespread consensus that war can only be justified in the most extreme cases of human rights violations. For example, according to the hugely influential ICISS report *The Responsibility to Protect*, a just cause for intervention requires that:

...there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:

1. **large-scale loss of life**, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, of a failed state situation; or
2. **large scale ethnic cleansing**, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.<sup>14</sup>

So when the issue is one of defending *others* rather than *ourselves*, the common-sense view seems to be that violations of civil and political rights are *not* serious enough to warrant remedy by lethal means. Given our differing attitudes about the two cases, perhaps we should be wary of whether our intuitions about permissible killing are affected by a self-serving bias that leads us to inflate the moral importance of our own interests.

A successful solution to the lesser-aggression must identify some morally relevant difference between cases of lesser-aggression and examples like *Thief* and *Voter*, so that the conclusion that lethal defence is unjustified in the latter cases need not also apply to the former. One popular line of response points out that while lesser-aggressors might only aim to violate their victims' non-vital interests, these aims are usually backed up by a *conditional* threat to the victim's vital interests if the aggressors are resisted. Unjust invaders don't simply declare "We've come to take your natural resources" but rather "We've come to take your natural resources, *and we'll kill you if you fight back*". This makes cases of lesser-aggression importantly different to examples like *Thief* and *Voter*. A more accurate analogy is this:

*Mugger*: Mugger demands that Jimmy hand over his wallet at gunpoint. Mugger threatens that if Jimmy resists or refuses to hand over his wallet then Mugger will kill him.

Many philosophers argue that the presence of a conditional threat to a vital interest makes an important difference to what it is permissible to do in self-defence. On this view, Jimmy is permitted to impose greater harm on Mugger than on Thief, even though both (unconditionally) threaten the same interest (his wallet). If that's correct, then we have a potential explanation of how defensive wars in response to lesser-aggression can be justified. There are two different ways of making this argument.

First, we might argue that the victims of lesser aggression are permitted to *escalate* the conflict and trigger conditional threats to their vital interests, thus bringing about a situation in

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<sup>14</sup> *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001), p.XII.

which defensive killing become proportionate.<sup>15</sup> For example, perhaps Jimmy is permitted to push Mugger away, knowing full well that this will cause Mugger to try to kill him. Once Mugger poses this lethal threat, it becomes proportionate for Jimmy to kill him in self-defence. Similarly, we might argue that the victims of lesser-aggression are permitted to use non-lethal resistance against their invaders, and thereby bring it about that the invaders react by threatening their lives. Once those vital interests are threatened, war becomes a proportionate response.

If defensible, the ‘escalation argument’ provides a neat solution to the problem of lesser-aggression. However, it rests on the controversial assumption that it is morally permissible to provoke aggressors into posing more serious threats, in order to create a justification for killing them. But it is not at all obvious that this is permissible. Since our non-vital interests are insufficiently important to justify killing, it doesn’t look like we can appeal to those interests in order to justify manufacturing a situation in which we acquire a permission to kill.<sup>16</sup>

A second form of argument attributes a different significance to the presence of conditional threats. On this view, the mere existence of a conditional threat to a victim’s vital interests is *itself* a deep moral wrong, independently of whether it will be enacted in the future if the victim does not submit. Even if lesser-aggressors do not have the goal of killing their victims, have made *plans* to kill them if they resist. Having such plans constitutes an extremely serious form of disrespect (as well as imposing a significant risk that the plan will be carried out). Given the presence of this additional wrong, the amount of defensive harm it is proportionate to inflict on a lesser-aggressor is significantly increased. Thus, using lethal force against lesser-aggressors can be justified.<sup>17</sup>

Again, there are worries with this argument. One objection concerns whether the wrong of conditionally threatening someone’s life is *sufficiently* grave to warrant killing the threatener. After all, Mugger conditionally threatens Jimmy’s life (as well as his wallet), but it is not obvious that this is enough to justify Jimmy *killing* Mugger, even if we accept that it is permissible for Jimmy to inflict *more* harm on Mugger than on Thief.

However, we may be able to avoid this objection by weakening the argument. Rather than claiming that conditional lethal threats are sufficient to justify killing, we need only claim that these threats justify killing when *combined* with threats to sufficiently weighty non-vital interests. On this weaker view, the wrong of Mugger’s conditional threat to Jimmy’s life combined with his (unconditional) threat to Jimmy’s wallet might not be serious enough to justify killing him. By contrast, the conditional lethal threats posed by invading armies combined with the (unconditional) threats they pose to more significant non-vital interests (such as territory, natural resources, or political independence) may be sufficient to justify lethal defence.

The solutions that we have considered above both grant the assumption that the interests threatened by lesser aggressors are not important enough to justify defensive killing. But should we accept this? A different response to the problem holds that we should not. On this view, there are important differences between cases like *Thief* and *Voter*, on the one hand, and international aggression, on the other. Invaders who steal our territory and resources, and

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<sup>15</sup> Jeff McMahan, ‘Innocence, Self-Defense, and Killing in War’, *The Journal of Political Philosophy* 2. No.3 (1994), 193-221; Christopher Finlay, *Terrorism and the Right to Resist: A Theory of Just Revolutionary War* (Cambridge: Cambridge University Press, 2015), Ch.3.

<sup>16</sup> For a detailed discussion of this objection, see Lazar, ‘National Defence, Self-Defence, and the Problem of Political Aggression’.

<sup>17</sup> Cécile Fabre, ‘Cosmopolitanism and Wars of Self-Defence’ in Fabre and Lazar (eds), *The Morality of Defensive War*, 90-114.

undermine our political independence, commit much more serious wrongs than those suffered by Jimmy. Hence, it *is* in fact proportionate to resort to war to resist lesser-aggression. According to this proposal, so-called lesser-aggression is typically not so ‘lesser’ after all, because our interests in goods like political independence, territory, and natural resources *do* qualify as vital.

Let’s start with the case of political rights, such as the right to political participation. There seem to be important differences between the *Voter* example and the case of living under foreign political domination. In the former Jimmy suffers a one-off injustice perpetrated by another private individual. By contrast, the latter involves living under a political system which repeatedly and systematically denies one’s right to political influence. As Matthias Iser argues, the second case seems far more serious. The political system doesn’t simply violate your rights, but subjects you to a legal system that treats you as *lacking* certain rights in the first place. This expresses a much graver lack of recognition for one’s moral status.<sup>18</sup> Moreover, the case of political subjugation involves violating the political rights of a large number of individuals.<sup>19</sup> Each of these factors plausibly increases the amount of defensive harm that victims may permissibly inflict on aggressors, and so potentially justify lethal resistance.

Analogous arguments can be made in the case of rights to property, territory, and natural resources. There seems a clear difference between, on the one hand, having one’s property stolen by another individual and, on the other, having one’s ‘national property’ appropriated by another state. While the former involves taking what you have a legal right to, the latter is an assault on the right itself.<sup>20</sup> And again, such losses typically harm large groups of individuals, potentially for many generations. Certain aspects of national property may also have great cultural or religious significance, and so their theft could have great impact on individual wellbeing.

Let me conclude this section with a general challenge for all solutions to the lesser-aggression problem.<sup>21</sup> In the discussion thus far, we have focussed on whether it is proportionate to kill *aggressors* in response to lesser-aggression. But, of course, these aren’t the only people who will be killed in the course of resisting lesser-aggression. Wars of national defence typically kill many innocent non-combatants too. So, to fully respond to the problem of lesser-aggression, it is not enough to identify a wrong that is intuitively serious enough to justify killing the wrongdoers. The wrong must also be serious enough to justify overriding innocent persons’ rights not to be killed. That is a very high bar.

### **3. The Morality of Participation in War**

As we saw above, the traditional tenets of *jus in bello* hold that combatants do not act wrongly by killing as long as they (i) target only enemy combatants, (ii) proportion the collateral harms they inflict on civilians to the military advantage thereby gained, and (iii) avoid causing harm that is not necessary for achieving their goals. Crucially, the permission to kill is assumed to apply equally to *all* combatants in war, irrespective of whether they fight in wars that are justified or

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<sup>18</sup> Matthias Iser, ‘Beyond the Paradigm of Self-Defense? On Revolutionary Violence’ in Saba Bazargan-Forward and Samuel C. Rickless (eds) *The Ethics of War: Essays* (Oxford: Oxford University Press, 2017), 207-226.

<sup>19</sup> Helen Frowe, ‘Can Reductive Individualists Allow Defence Against Political Aggression?’, *Oxford Studies in Political Philosophy*, Vol.1 (2015), 173-193.

<sup>20</sup> See Iser, ‘Beyond the Paradigm of Self-Defense?’

<sup>21</sup> This point is emphasized in Mapel, ‘National Defence and Political Independence’.

unjustified. As Michael Walzer famously puts it, *jus ad bellum* and *jus in bello* are “logically independent. It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules.”<sup>22</sup> This view is reflected in both common opinion and in international law, which grants combatants immunity from prosecution for homicide provided they fight in accordance with *jus in bello*, even if they kill in illegal wars.

However, the idea that combatants are equally permitted to kill has recently come under sustained attack. Once again, the problem arises once we start comparing this idea with our more general common-sense views about permissible killing. In all other contexts, whether it is morally permissible to seriously harm other people depends on whether or not the harm serves a morally valuable goal. But the idea that combatants are moral equals, who may kill one another irrespective of the justice of their wars, seems incompatible with this very intuitive thought.

Many contemporary just war theorists argue that we should resolve this inconsistency in favor of our more general moral commitments, and jettison the idea that combatants can fight permissibly in unjust wars.<sup>23</sup> According to these ‘revisionist’ just war theorists, killing in an unjust war is typically a grave moral wrong. In contrast to Walzer’s claim that *jus in bello* and *jus ad bellum* are ‘logically independent’, revisionists argue that combatants cannot satisfy the *in bello* discrimination, proportionality, or necessity requirements *unless* the war in which they fight is justified at the *ad bellum* level. To illustrate this idea, consider the following example:

*Invasion:* State A launches an unjustified invasion of State B. State B responds by deploying its armed forces. Combatants on each side confront each other on the battlefield and pose lethal threats to each other. Combatants on each side also collaterally kill civilians as a side-effect of their war efforts.

Revisionist just war theorists argue that State A’s combatants cannot fight discriminately because have *no* legitimate targets, morally speaking. No matter who they target – enemy combatants or non-combatants – they will be intentionally killing innocent persons. To help see this, consider the following non-war case:

*Bank Shootout:* A large armed gang are robbing a bank at night. The police arrive on the scene to arrest the robbers and a gunfight breaks out. During the gunfight, the police officers and robbers pose lethal threats to each other.

Imagine that one of the bank robbers is captured. He protests that he did nothing morally wrong by fighting, since he targeted only his armed opponents, who were themselves trying to kill him. It looks like the robber has made a moral mistake here. Even though the police officers posed a lethal threat, our common-sense theories of self-defence do not treat this as sufficient to lose one’s normal rights not to be harmed. Rather, one only becomes liable to defensive harm if one poses an *unjustified* threat. If one uses force justifiably, in response to unjust attack, then one retains one’s ordinary right not to be killed or injured. This explains the bank robber’s mistake. In virtue of their justification for engaging in violence, the police officers retain their rights not to be killed. Revisionist just war theorists think the same is true in the case of war. Just as the

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<sup>22</sup> Michael Walzer. *Just and Unjust Wars: A Moral Argument with Historical Illustrations* 4<sup>th</sup> ed (New York: Basic Books, 2006), p.22.

<sup>23</sup> The most prominent defender of this view is Jeff McMahan. See McMahan, *Killing in War*.

police officers do nothing to render themselves liable to harm, State B's combatants do nothing to lose their rights not to be killed simply by defending their nation from unjustified aggression. Both are innocent in the relevant sense. State A's combatants thus have no legitimate targets and so cannot satisfy the requirement of discrimination.

A similar argument applies to the *jus in bello* requirements of proportionality and necessity. Our ordinary, common-sense notion of proportionality requires that when our actions have bad effects (such as harming innocent people) they must also have morally good effects that outweigh the bad. But military 'advantage' is not in itself a morally good (or bad) effect that can be invoked to outweigh anything morally bad. The moral value of military advantage, depends on the value of the goals that the military advantage contributes to. When achieving a military advantage contributes to achieving the aims of a *just* war, then that may be a good effect that can justify harming innocents. But when the military advantage contributes to *unjust* aims – such as invading another country – that looks like a morally bad effect. Bad effects presumably cannot be invoked in order to justify killing and maiming. The same goes for the necessity requirement: The fact that causing a certain amount of harm to innocents is the minimum necessary in order to achieve a goal doesn't help justify the harm when the goal is a morally bad one. To illustrate, consider:

*Bank Explosion:* A large armed gang are robbing a bank at night. The only way to open the safe is to set off a powerful bomb. The bomb destroys the house next to the bank, badly injuring a family sleeping inside.

Imagine, once more, that one of the robbers is captured and argues that he did not act morally wrongly by participating in the robbery. He accepts that it is unfortunate that the family were injured, but argues that the gang carefully weighed up the bad effects of blowing up the safe against the advantage to their mission of doing so, and concluded that the advantage rendered the harm proportionate. Moreover, they deliberately carried out the explosion at night in order to minimise the number of people harmed. Again, it looks like the robber is making a basic moral error. Since robbing the bank is not a morally good goal, no contribution to that goal can be invoked to justify the bad effects of achieving it. Revisionist just war theorists argue that the same logic applies in the case of war. Just as State A's combatants cannot fight discriminately because they have no morally legitimate targets, they cannot satisfy the *jus in bello* proportionately or necessity requirement because their war achieves no morally relevant goods that can outweigh the harms they will cause by fighting in it.

To many people, the idea that combatants act wrongly by fighting in unjust war is close to heresy. What can be said in defence of the permissibility of participation in unjust wars?<sup>24</sup> One common response holds that combatants are permitted to kill one another, independently of the justice of wars, because combatants *consent* to joining the military and thereby waive their normal right not to be killed. But this idea has several problems.

The first problem is that consent, in order to be morally valid, must be sufficiently voluntary and informed. But it is not clear how many combatants meet those conditions. Most obviously, many soldiers are conscripted. But even among enlisted personnel, we shouldn't assume that the decision to sign up automatically qualifies as valid consent. Combatants typically

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<sup>24</sup> For more detailed discussion of the proposals that follow, see McMahan, *Killing in War*, Ch.2.

join the army at a very young age, and many do so due to an impoverished choice of alternatives.<sup>25</sup> It is doubtful that such choices qualify as sufficiently voluntary to waive the right not to be killed.

The second problem is that the consent argument seems to prove too much. If it is true that combatants waive their right not to be killed by consenting to the risks of their professional role, then it looks like the same should be true of police officers. But it seems highly implausible that the robbers do not violate the police officers' rights in *Bank Shootout*.

A third problem with the consent argument it seems to prove too little. For even if it is true that combatants waive their basic rights, this is not true of non-combatants that are harmed in war. So even if combatants don't violate the rights of their armed opponents, they still violate that rights of the innocent civilians that they collaterally kill. That alone seems sufficient to render their participation in the unjust war morally wrong.

A different defence of the permissibility of participating in unjust wars focuses on the epistemic position of combatants. Unlike cases like *Bank Shootout* and *Bank Explosion*, where the wrongness of the activity is uncontroversial, the moral status of wars are far more complicated and contested. Given this we might argue that combatants cannot be expected to know if their war is unjust, and that this ignorance gives them a moral permission to fight.

Again, however, this argument has its difficulties. First, we might question the scope of the ignorance argument. While wars are certainly complicated, there do seem to be at least some wars that are *obviously* unjust. The ignorance argument presumably does not apply in these cases.

Second, in order to have an ignorance-based permission to cause harm it is not enough that I simply *believe* that I am acting morally permissibly. Instead, this belief has to be a *reasonable* response to my evidence. I also have to have made a serious effort to gather and assess relevant evidence. If, for example, I fail to check my mirrors when backing out of my driveway, then the fact that I *believed* the path was clear is no defence if I kill a toddler playing on the path. Similarly, in order for combatants to have an ignorance-based permission for fighting in an unjust war, it doesn't seem enough that they simply defer to the pronouncements of their politicians. Rather, their belief that their war is not unjust must be based on a serious attempt to investigate the facts.

Third, even if we assume that it is typically impossible for combatants to determine that their wars are unjust, it doesn't follow that they necessarily have a permission to fight. Imagine that I am about to back out of my driveway, but I am unable to determine whether there is a toddler behind me. There is evidence on both sides, and I estimate there is a 50:50 chance that there is a toddler on the path. What should I do, given my ignorance? It seems pretty obvious that I ought not to take the risk. A similar constraint applies to other risky activities, including participating in war. Imagine a combatant who is uncertain whether her war is just or unjust. If she fights and the war turns out to be unjust, she will have participated in wrongful killing. Moreover, since historically the vast majority of wars have been unjust, the odds that her particular war is justified don't seem particularly good. What should our combatant do? If we think that she shouldn't take the risk, then she presumably cannot claim an ignorance-based permission if she decides to fight and the war turns out to be unjust.

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<sup>25</sup> For an in-depth examination of the UK context, see David Gee, *Informed Choice - Armed Forces Recruitment Practice in The United Kingdom* (Redditch, UK: Read Books, 2007).

Fourth, and most generally, it is not clear that we can acquire moral *permissions* to kill on the basis of mistaken beliefs, even if our mistakes are honest ones. For example, imagine that before backing out of my driveway I carefully check all my mirrors and reasonably conclude that the path is clear. However, I then strike and kill a toddler who was playing in my blind spot. It seems odd to say that I was morally permitted to kill the child. Instead, my ignorance means I am *excused* for hitting the child, which makes it inappropriate to blame or punish me. But my conduct was nonetheless morally impermissible. If that's right, then appealing to combatants' unavoidable ignorance may not support the idea that participating in unjust wars is morally permissible, even if it might support some kind of excuse for their behaviour.

There is obviously a lot more to be said about this particular debate, but let me conclude by discussing two common motivations for resisting the revisionary view that fighting in unjust wars is morally wrong. The first is the worry that endorsing the revisionary view commits us to radically revising the laws of war by removing combatants' legal immunity for participating in unjust wars. This would likely be a very bad idea. Such a law could end up prolonging wars, because the fear of legal punishment would give belligerents an incentive not to surrender. It would also give combatants less incentive to refrain from targeting civilians because, if their war is judged to be unjust, they would be liable to punishment for homicide regardless of who they target. Given these worries, critics conclude that we should continue to endorse the traditional view that participating in unjust wars is morally permissible. But the inference here is faulty. The fact that there are good moral reasons not to criminalize a type of conduct is perfectly compatible with that conduct being morally wrong. By way of analogy, consider the practice of diplomatic immunity, whereby foreign diplomats are exempted from legal prosecution by their host states if they engage in criminal conduct. This immunity may well be justified, in virtue of facilitating inter-government relations. But this doesn't mean that diplomats enjoy any corresponding *moral* permission to engage in criminal behaviour. The same may be true of the laws of war: the goal of minimising war's brutality may justify granting combatant's certain legal immunities, without those immunities reflecting any moral permissions.<sup>26</sup>

A second source of resistance comes from the worry that the revisionist view is in tension with the patriotic imperative to 'Support the Troops'. It is certainly true that the revisionist view places greater emphasis on the individual moral responsibility of soldiers. But if the arguments in support of the revisionary view are compelling, then we are doing a grave disservice to the members of our armed forces by propagating the idea that combatants do no wrong provided they follow the rules of *jus in bello*. If participating in unjust wars typically involves grave moral wrongdoing, then supporting the troops involves doing everything we can to reduce their exposure to this moral risk. This might include: raising the minimum age of recruitment, greater public scrutiny of foreign policy, providing greater opportunities for selective conscientious objection, and creating more impartial institutions to evaluate the justification of armed force.

#### **4. Non-Combatant Immunity in War**

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<sup>26</sup> For more on these points, see Adil Ahmed Haque, *Law and Morality at War* (Oxford: Oxford University Press, 2017).

Of all the standard tenets of just war theory, perhaps none is more widely endorsed than the idea that non-combatants may not be deliberately targeted in war. This immunity is usually grounded in the idea that non-combatants do nothing to lose their normal right not to be killed. As discussed above, once we reflect on the general principles that govern defensive harming, the traditional *jus in bello* requirement of discrimination may turn out to be too permissive: combatants who fight in justified wars *also* retain their rights not to be killed. However, the discrimination requirement has also come under attack from the opposite direction. On this view, once we consider our wider beliefs about permissible harm, the requirement is revealed to be too *restrictive*: a non-trivial proportion of non-combatants are liable to defensive harm, and so qualify as legitimate targets in war.

This claim strikes many as repugnant. A common objection is that war is something that the armed forces do, at the command of their political leaders. The civilian population, by contrast, is not involved. But this seems quite obviously false. As Helen Frowe points out,

We can think of many ways in which non-combatants contribute to their country's war effort. They contribute politically, perhaps by voting for the war, or writing pro-war newspaper articles. They contribute materially, by producing weapons, clothing and food for the armed forces. They also make technological contributions to war, by designing and testing weapons and machinery. And, of course, the war is financed by taxes paid by combatants and non-combatants alike.<sup>27</sup>

So, we can't plausibly defend the immunity of non-combatants by claiming that only combatants contribute to threats in war. There are also other factors that cast doubt on the idea that only combatants can lose their immunity. As discussed above, combatants are typically very young and recruited from the most under-privileged segments of society. Moreover, the conditions of military service place them under severe pressure to fight (indeed, they may be punished if they refuse) and they often have less access to information and the opportunities to critically reflect. Given all these factors, combatants may well be partially excused for their contributions to an unjust war. These excuses are far less pervasive in the case of non-combatants.

In order to defend the idea that only combatants are legitimate targets, a more promising strategy is to identify some relevant difference between the *kinds* of contribution that combatants and non-combatants make, and show that only the former can render an individual liable to defensive harm. In what follows, we will consider three possible differences.

One suggestion is that while both combatants and non-combatants contribute to unjust wars, only combatants actually *inflict* the harms of war. The idea here is that liability only attaches to the person who directly poses an unjust threat, and does not continue down the causal chain of persons who contributed to their posing that threat. If that's right, then only combatants can be legitimate targets.<sup>28</sup>

However, this proposal has at least two problems. First, the idea that only individuals who directly pose threats are liable seems to have some very restrictive implications. Consider:

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<sup>27</sup> Helen Frowe, 'Non-Combatant Liability in War' in Helen Frowe and Gerald Lang (eds) *How We Fight: Ethics in War* (Oxford: Oxford University Press, 2014), 172-188, at p.174. The arguments of this section are heavily indebted to Frowe's work on this topic.

<sup>28</sup> David Rodin, 'The Moral Inequality of Soldiers: Why *jus in bello* Asymmetry is Half-Right' in David Rodin and Henry Shue (eds) *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford: Oxford University Press, 2008), 44-68.

*Gunner.* Combatant A fires the artillery gun. Combatant B passes him ammunition. Combatant C supplies ammunition to them from the weapons store. Non-combatant D builds the army trucks that Combatant C uses to make the deliveries.

If only those who directly pose threats can become legitimate targets in war, then it looks like Non-Combatant D is not a legitimate target, but neither are Combatant B or Combatant C! Since the majority of combatants in war do not pose direct threats, the argument seems to entail the pacifistic conclusion that very few military targets in war are legitimate.

Second, it does not seem to be part of our common-sense conception of permissible defensive harm that only direct threateners can be liable. Consider:

*Mob Hit:* Mob Boss want to kill Witness. He instructs Lieutenant to have Witness killed. Lieutenant hires Hitman to kill Witness.

Imagine that Witness cannot kill Hitman (or that, if she kills him, another assassin will be sent in his place), but she can instead protect herself by killing Lieutenant or Mob Boss. This seems straightforwardly permissible. If that's correct, then legitimate defensive killing is not restricted to those who pose direct threats, but also encompasses those who contribute to threats posed by others.

A different approach to justifying non-combatant immunity also appeals to the causal role that non-combatants play in supporting the war. But rather than appealing to the *location* of their contributions in the causal chain, this argument focuses on *how much* non-combatants contribute. The key claim is that the contributions non-combatant make to the war efforts are typically too small and insignificant to make them liable to defensive killing.<sup>29</sup> Again, however, it is not clear that this idea finds support in our wider views about permissible killing. Consider:

*Drowning.* Attacker holds Victim down in the bath, while many others contribute the water that will drown Victim. 1000 pints of water are required to kill Victim. Each of 1100 contributors each pour in one pint.

In this case, each contributor makes only a very small and casually insignificant contribution to the lethal threat to Victim. Each contributor's pint of water individually makes *no difference* to whether Victim faces a lethal threat (If any contributor did not make their contribution, Victim would be no better off). Here's the important question: If Victim could escape the drowning by killing one of the contributors, would it be permissible for her to do so? Again, it seems clear (at least to me) to me that the answer is yes. If that's right, then it looks like liability to defensive harm isn't particularly sensitive to the significance of one's contribution to unjust threats. Instead, as Helen Frowe put it, what matters is the size of the threat *to which one contributes*, and not the size *of one contribution*.<sup>30</sup> If this is correct, then it is not obvious that we can support non-

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<sup>29</sup> See Cécile Fabre, 'Guns, Food, and Liability to Attack in War', *Ethics* 120, No.1 (2009), 36-63; McMahan, *Killing in War*, Ch.5.

<sup>30</sup> Frowe, 'Non-Combatant Liability in War'.

combatants' immunity from attack by appeal to the triviality of their contributions to the war effort.

Our final strategy to support non-combatant immunity does not appeal to any causal difference between combatants' and non-combatants' contributions to the war effort. Instead, it focuses on *what* is contributed. As Michael Walzer puts it:

The relevant distinction is not between those who work for the war effort and those who do not, but between those who make what combatants need to fight and those who make what they need to live, like all the rest of us. When it is militarily necessary, workers in a tank factory can be attacked and killed, but not workers in a food processing plant. . . . An army, to be sure, has an enormous belly, and it must be fed if it is to fight. But it is not its belly but its arms that make it an army. . . . Those men and women who supply its belly are doing nothing peculiarly warlike. Hence their immunity from attack: they are assimilated to the rest of the civilian population.<sup>31</sup>

The basic idea here is that we can distinguish between contributions that are relevantly 'warlike' and those that are not, and that only persons who make the former can be legitimate targets in war. Note that this view classifies *some* non-combatants as legitimate targets, such as those who produce weapons and other military goods. But *most* non-combatants who contribute to the war effort remain immune from attack.

One tricky question is how exactly to draw the key distinction between 'warlike' and 'non-warlike' contributions. What should we say about body-armor, or bullet-wound dressings, or specially designed army rations? But the most important question is whether the distinction between 'warlike' and 'non-warlike' contributions makes a difference to whether a person can become a legitimate target of defensive force. This idea doesn't find obvious support in our more general views about permissible defence. Consider the following case:

*Mountain Assassination:* Bob plans to kill Jimmy, who is holidaying at his secluded mountain lodge. To get to Jimmy, Bob must make a long trek through the snow. Sarah gives Bob a gun to kill Jimmy, Tony gives Bob with a jacket to stop him freezing to death, and Alice gives Bob food and water to sustain him on his trek.

It looks like only Sarah provides Bob with resources that are designed specifically for fighting and killing. Tony and Alice, by contrast, only provide Bob with what he 'needs to live'. According to Walzer's account of immunity, it looks like only Sarah loses her normal immunity from attack. But this seems quite counter-intuitive. If the only way to protect Jimmy were to kill Tony before he gives Bob the jacket, that seems permissible.<sup>32</sup> So again, it appears that our candidate justification of non-combatant immunity is hard to reconcile with our more general intuitions about permissible killing.

This is only a small snapshot of possible defences of non-combatant immunity, so we should not be too pessimistic. But neither should we underestimate the challenge posed by

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<sup>31</sup> Walzer, *Just and Unjust Wars*, p.146.

<sup>32</sup> For a similar case and objection, see Fabre, 'Guns, Food, and Liability to Attack in War', in p.52.

civilian involvement in war. Let me conclude by noting some wider implications of how we settle this matter. The question of non-combatant immunity is not simply a matter of *jus in bello* ethics. It also crucially bears on the question of whether particular wars are justified at the *ad bellum* level. To the extent that non-combatants lose their normal right not to be killed, in virtue of their responsibility for their country's unjust war, then a war that inflicts harms on those persons will be correspondingly easier to justify.

## **5. Conclusion**

In this chapter, we have looked at three aspects of the 'common-sense' morality of war: that national self-defense is a clear just cause for war, that combatants fight permissibly in wars provided they follow the traditional rules of *jus in bello*, and that non-combatants are never legitimate targets. In each case, we have compared these judgments with our more general views about permissible killing and injuring in all other contexts. It turns out that it is surprisingly difficult to bring all of our moral commitments into a state of coherence and mutual support. The jury remains out on how much reconciliation will be possible, but I hope to have demonstrated that at least some aspects of commonsense will have to make way in order to accommodate other, more cherished elements.