

The Moral Equality of Modern Combatants and the Myth of Justified War

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Introduction

In the tradition of just war theory two assumptions have been taken pretty much for granted: first, that there are quite a lot of justified wars, and second, that there is a moral inequality of combatants, that is, that combatants participating in a justified war may kill their enemy combatants participating in an unjustified war *but not vice versa* (Reichberg, 2008).[1]

In the second part of this paper I will argue that the first assumption is wrong and that therefore the second assumption is virtually irrelevant for reality. In the first part of this paper, I will in addition also argue, primarily against Jeff McMahan, that his particular thesis about the moral inequality of “just” and “unjust combatants” is an analytical truth which, moreover, does hardly apply to anything (there are few if any “unjust combatants” as he defines them).[2] If one takes his thesis less literally, namely in the above sense of a thesis about combatants participating in a justified war and combatants participating in an unjustified war, it is correct in principle, but still of little practical relevance even if one disregarded the fact that there are virtually no justified wars.

McMahan’s Moral Inequality Thesis is True by Stipulation

According to McMahan, the combatants on the “just” and the “unjust” side do not both have a liberty-right to kill each other and are not both liable to attack (McMahan, 2004, p. 706).[3] Rather, the “unjust” combatants have *no* right to kill the “just” ones, and the “just” ones have a claim-right to kill the “unjust” ones (McMahan, 2009, p. 64). This is why:

People don’t lose moral rights by justifiably defending themselves or other innocent people against unjust attack; therefore, unless they lose rights for some reason other than

acquiring combatant status, just combatants are innocent in the relevant sense. So, even when unjust combatants confine their attack to military targets, they kill innocent people. Most of us believe that it’s morally wrong to kill innocent people even as a means of achieving a goal that’s *just*. How, then, could it be permissible to kill innocent people as a means of achieving goals that are *unjust*?

McMahan is of the opinion that arguments of this kind “conclusively demonstrate the moral *inequality* of combatants at the level of basic morality” (McMahan, 2006, p. 379).

However, his thesis that just combatants are not liable to attack by unjust ones and unjust ones are liable to attack by just ones actually doesn’t need any arguments, for it is true by definitional fiat. This is relatively easy to see, as McMahan gives the following definitions:

As I understand it, a just cause is an aim that satisfies two conditions: (1) that it may permissibly be pursued by means of war, and (2) that the reason why this is so is at least in part that those against whom the war is fought have made themselves morally *liable* to military attack. With this notion as background, we can now distinguish between “just combatants,” who fight in a just war, and “unjust combatants,” who fight in a war that lacks a just cause. (McMahan, 2009, p. 5)

Thus, obviously, “just combatants” are *defined* in such a way that those they are fighting against (the unjust combatants) are liable to their attack, while the “unjust combatants” are *defined* in such a way that those they are fighting against (the just combatants) are not liable to their attack.

This definitional fiat, however, cannot decide the question of whether combatants participating in a justified war and combatants participating in an

unjustified war have an equal liberty-right to kill each other or not, for the question is precisely whether combatants participating in an unjustified war are “unjust combatants” in McMahan’s sense. It is quite possible that there are no such “unjust combatants” at all.

There Are No “Unjust Combatants” in Modern Wars

It is correct *in principle* to reject Walzer’s thesis of the moral equality of combatants, that is, the thesis that combatants on the unjustified side have as much a liberty-right to kill combatants on the justified side as *vice versa*. By saying that it is correct in principle I mean that it is not true that in *all* wars the combatants on both sides have the same liberty-right to kill enemy combatants, provided they abide by the traditional *jus in bello* restrictions. Nevertheless, McMahan (and others) greatly exaggerate the scope of their counter-position.[4] For many, if not most modern wars it has little relevance, since in many, if not most modern wars “just” soldiers do kill innocent and non-threatening people or participate in their killing. The military euphemism for this is “collateral damage”; I prefer the term “concomitant slaughter.” By participating in or engaging in the killing of innocent and non-threatening people one wrongs these people, for innocent and non-threatening people have (and McMahan agrees) a *right* not to be killed; and someone who *wrongs* others cannot be *just*. Thus, the soldiers are at best justified, but that does not make them innocent in the relevant sense (namely in the sense of not wronging others). They remain liable to attack. And therefore those warring against them are not “unjust combatants,” for “unjust combatants” war against people who are not liable to attack.

“Unjust combatants” therefore also do not have a just cause. But in modern wars all combatants have a just cause, namely to defend their own innocent bystanders from being killed or maimed by enemy combatants. After all, for a war to *have* a just cause it need not be fought *for* that just cause. To claim the

contrary would be to confuse the criterion of just cause with that of right intention. And the mentioned cause certainly “satisfies two conditions: (1) that it may permissibly be pursued by means of war, and (2) that the reason why this is so is at least in part that those against whom the war is fought have made themselves morally *liable* to military attack”, (McMahan, 2009, p. 5). If those the war is being fought against violate the rights of innocent people, they are liable to attack (provided justification does not defeat liability; I argue below that it does not).

Helen Frowe however, struggles “to see this [the defense of innocent people on the unjustified side] as a *just cause* when the need for defence arises from my own impermissible action” (personal communication). Yet, first, McMahan’s definition is entirely compatible with considering this as a just cause, and it is McMahan’s definition I am talking about. Second, while the *first* aggressive soldiers have acted impermissibly, it is simply question-begging to claim that their comrades who *later* join the fray act impermissibly, too. One must not tar all combatants on the unjustified side with the same brush. There are *different* unjustified soldiers, not an amorphous mass called “the unjust combatants.” Besides, one must not ignore collective action problems. An individual combatant joining the fray later cannot reasonably be said to have provoked the justified war (he can, however, reasonably say to have been provoked by the “just” soldiers’ killing innocent people on the unjustified side), nor can he reasonably be said to be able to stop it by simply surrendering.[5]

Thus, there will always *be* a just cause even in an unjustified war. Moreover, many combatants who fight in an unjustified war will actually fight *for* a just cause. Conversely, in every war, including the “just” ones, there *is* also an unjust cause, for example the unjust cause of killing or maiming large numbers of innocent people on the other side.[6] And many combatants on the justified side will actually be fighting *for* unjust causes. However, even if they aren’t, they still objectively *contribute* to an unjust

cause. Thus, we again have a moral equality of combatants: there are just and unjust causes and contributions and intentions on both sides.

Justification Does Not Defeat Liability

McMahan tries to block the argument that “just combatants” who wrong innocent people are liable to attack by claiming that “justification defeats liability,” and he tries to rest this claim on the authority of the law.[7] In particular, he mentions tort law and explains that strict liability is “the only kind of liability in either criminal or tort law that is not defeasible by a justification, and it governs only a very limited domain of the law of torts” (McMahan, 2008, p. 233). However, this statement is a pure tautology. Strict liability is *defined* as liability that is not defeasible by a justification or an excuse. The more interesting question to ask, therefore, is whether in tort law justification always defeats liability. The existence of strict liability shows that it does not, which proves my point.

Moreover, McMahan now explicitly says the justification with which the “just” combatants kill innocent bystanders as a side-effect of their attacks on military targets is a *necessity* justification (McMahan, 2010, p. 2). However, in tort law (and in common moral sense, which tort law simply expresses here) *the necessity justification is the prime example of a justification that does not defeat liability*.[8]

In addition to not defeating liability to pay compensation, it also does not defeat (and this is of course of the highest importance for the issue at hand) liability to being killed. Following the Model Penal Code, the statutes of some US states seem to allow deliberately killing an innocent person in order to save many others. Still, this same Model Penal Code makes clear that this privilege “does not abolish or impair any remedy for such conduct that is available in any civil action” (*Official Model Code*, section 3.01, as quoted in Christie, 1999, p. 1026), which means, as the legal scholar George C. Christie points out, that a person killing another innocent person out of necessity “would

be liable in tort for substantial damages in a wrongful death action brought by [the victim’s] next of kin” (Christie, 1999, p. 1026). It seems, however, that if the potential victim killed the self-helper, such a wrongful death action could not, for good legal reasons, be brought against the potential victim (ibid., pp. 1034–9). As Christie notes: “If any of the parties would be free from tort liability, it would be the [innocent potential victim of a “necessary” attack]. I cannot conceive of any American court holding an innocent person liable in tort for shooting another person to prevent that other person from killing him” (ibid., p. 1039).[9] Thus, American tort law takes it that a person who kills another innocent person out of necessity *wrongs* this innocent person, while the innocent person killing the attacker does *not* wrong the attacker. But this then *means, both* on McMahan’s previous definition of liability and on his current one, that the first person must be legally liable to be killed, while the second is not.[10]

Thus, McMahan’s claim that justification defeats liability in the legal cases relevant for the present discussion is simply wrong. In addition, McMahan certainly has not advanced any argument to undermine my verdict that his claim that justification *morally* defeats liability is and remains ad hoc and implausible.[11]

McMahan’s Thesis Has (Virtually) No Scope of Application

In the first part of this paper we saw one reason why McMahan’s thesis about the inequality of “just” and “unjust combatants” with regard to their existent or absent liberty-right to kill the enemy combatants is of no practical relevance. The reason is that in modern wars “unjust combatants” do not exist.

A further reason, one which reduces to near zero the scope of applicability of even the revised (and hence non-analytical) thesis, namely the thesis of an inequality with reference to combatants in justified wars and to combatants in unjustified ones, is that there are virtually no justified wars.[12]

The reason for this is that if you look into the actual historical facts, there simply is no war that comes close to fulfilling all just war criteria. Let me only focus on four of these criteria, namely on the two *ius ad bellum* criteria of legitimate authority and right intention, and the two *ius in bello* criteria of discrimination and proportionality.

For legitimate authority, formal authority is not sufficient by itself. The medieval just war theorist Francisco de Vitoria already emphasized that the decision to go to war must not be taken without extensive deliberation, including discussion and entertaining the advocacy of contrary opinions (Vitoria, 1952, p. 137; see on this also Steinhoff, 2007, pp. 20-1). In addition, it seems that in a democracy the state leader or the parliament must not lie to the people in order to gain public support for the decision to enter a war. Nor may they manipulate them, for example by bringing about events or situations that might then in turn prompt the public to support a decision to go to war. (The latter, for example, was arguably the strategy of Roosevelt with regard to Japan. One aim of the oil boycott after July 1941 might well have been to provoke a Japanese military reaction.) If they do, they are not a *legitimate* authority with regard to the decision to go to war any more. Given the enormous extent to which state leaders, if war is at issue (and, actually, not only then), lie barefaced to the people or withhold information, it would be very naive indeed to think that there are many wars which would satisfy the criterion of legitimate authority.

The problem with right intention is also considerable. The Allied war against Nazi Germany, which is for many the unrivalled paradigm case for a just war, did certainly *not* fulfill this criterion. To take a domestic analogy: someone, X, witnesses a rape and attacks the perpetrator with the intention of stopping him. That is a good intention, isn't it? Well, actually, that depends. If X fights off the rapist in order to do the raping himself, it is not (even if X should be the less brutal rapist). The evil intention alters the act itself: it is not, or not only, saving from rape any more, it is

preparing to rape.

To apply this to the case under discussion: Yes, the USA and Great Britain declared in the Atlantic Charter that they endorsed the right to self-determination of all people; but as we know Britain had second thoughts (peoples were supposed to be self-determining only if they weren't already determined by Britain) and the USA never really meant *peoples* in the first place, or it could not have propped up so many dictatorial *regimes* and plundered and exploited with their help the riches and the resources of third world countries (compare Barkawi and Laffey, 2006; Friedman, 2003; Niess, 1990). With this I do not want to say that right intention vanishes as soon as the intentions aren't "pure" or there are ulterior motives. Such a purity is not required (Steinhoff, 2007, p. 27-8). However, the additional intentions or ulterior motives have at least to be legitimate, which only means (but this at least it does mean) that one does not intend the good thing (for example the defeat of Nazi Germany) in order to do or to continue doing bad things without having to worry about a competitor.

Nevertheless, I think that there might be some wars that have historically fulfilled this criterion. Wars of pure national self-defense (that is, without afterwards seizing other peoples' territory) come to mind. Yet I doubt that the number will be particularly large. States rarely go to war without illegitimate ulterior motives undermining right intention.

Let us finally turn to *ius in bello*, which comprises the principle of discrimination (between innocents and non-innocents) and the proportionality principle, which demands to not cause disproportionate destruction in pursuing one's military aims. Discrimination and proportionality are not completely separate. If the number of civilians killed as a "side-effect" of attacks on military targets is grossly disproportionate, it is disingenuous to claim that one discriminates in one's attacks between innocents and non-innocents (indeed, it is questionable whether the death of the civilians is really a mere side-effect under these conditions). But then it is quite difficult (in fact,

I claim, impossible) to find a war in which the principle of discrimination would actually have been honored. As far as I see, all wars share, to a greater or lesser degree, a distinct *nonchalance* about “collateral damage.” In fact, already the term is *nonchalant*. Michael Neumann aptly describes the usual military approach towards discrimination and proportionality:

Strategic bombing aims at military installations, factories important to the war effort, or vital infrastructure. It is often impossible to mount such attacks without inflicting civilian casualties. . . One might suppose that, before undertaking acts that we know with moral certainty will kill innocent civilians, we would require a very high degree of certainty that the act were truly necessary. Not at all. For one thing, as a matter of fact, military men rarely if ever claim anything like such certainty: of course there might be yet-unconceived strategies and tactics that would work as well or better. Besides, the strategic bombing strategy could fail, or prove far less effective than supposed. Usually the proponents of a particular strategic bombing campaign claim only that it would confer an important local advantage, not make the difference between victory and defeat. . . In practice, military men use air power largely because they fear that otherwise they'll take considerably more casualties, and because they'd rather not test unproven alternatives.

(Neumann, 2006, pp. 3-4ff.)

Neumann concludes from this: “The doctrine of the double effect [which claims that killing innocents as a means to some further end is prohibited while killing them as the side-effect of an attack on a legitimate target is allowed if such killing is proportionate in light of the good that arises from the attack on the legitimate target] has questionable authority, but even unquestioned it does little to raise expected collateral damage above terror” (Neumann, 2006, p. 5). This conclusion presupposes that this relaxed attitude of collateral killers is a correct application of the doctrine of double effect and *ius in bello* proportionality. However, it seems to me that very few just war theorists endorse such a relaxed attitude. A notable exception is Michael Walzer:

The proportionality rule [posits that] civilian deaths and injuries, euphemistically called “collateral damage,” should not be disproportionate to the value of the military victory that is being sought. But because I don't know how to measure the relevant values or how to specify the proportionality, and because I don't think that anyone else knows, I prefer to focus instead on the seriousness of the intention to avoid harming civilians, and that is best measured by the acceptance of risk. (Walzer, 2004, p. 137)

Yet, the fact that there are no uncontroversial criteria to determine proportionality (or that there are perhaps no criteria at all) does not mean that we should or can throw proportionality overboard. One simply might have to rely on judgment, *phronesis*, *Urteilskraft*. This is more than relying on mere intuition; it involves argumentation. Incidentally, there aren't any uncontroversial criteria either which would establish what liberalism required. Should we therefore simply throw liberalism overboard instead of continuing the discussion? I don't think so.

Besides, I really do not know how to escape proportionality requirements; and I don't think that Walzer knows. After all, he says:

But there is a limit to the risks that we require. These are, after all, unintended deaths and legitimate military operations, and the absolute rule against attacking civilians does not apply. War necessarily places civilians in danger; that is another aspect of its hellishness. We can only ask soldiers to minimize the danger they impose. (Walzer, 2000, p. 156)

Yet that is not what Walzer asks them to do. If they have literally to *minimize* the danger they impose, they would have to make it *as small as possible*. There is an easy way to achieve that: do not attack at all, then you will not produce dead innocents as a side-effect of your action. Or, theoretically, the soldiers could take an extremely high risk themselves, thereby not imposing risks on innocent bystanders. But Walzer requires neither of these two options. He does not require the soldiers to take extreme risks. Nor does he require that they impose no damage. He only requires them to

accept risks to a sufficient degree, and to sufficiently limit the danger they impose. But how could it be established what is sufficient in a given case without taking into account what is at stake? If, however, you take into account what is at stake in order to determine the risks the soldiers are required to bear and the danger they may impose on bystanders, you have already and inevitably engaged in proportionality considerations.

Thus, I see, morally speaking, no way to do without proportionality. And, morally speaking, I see (probably in accord with most just war theorists) no reason to accept the relaxed attitude towards proportionality that Neumann accurately describes. Since, however, it is quite right that this attitude is the habitual one in war, it is very, very difficult indeed to find any war that has satisfied the *ius in bello* criteria.

Thus it can be seen that it would be hard work to discover a war that has satisfied just one of the only four mentioned just war criteria: legitimate authority, right intention, discrimination, (*ius in bello*) proportionality. The idea then that there is a war that has satisfied *all* of them is rather daring.

This insight does not commit me to a pacifist position, though. Why not? The fact that the war the Allied *actually* fought against Germany was not justified does not mean that they should not have fought a war against Germany. It only means that they should have fought *another* war (one that was not partly constituted by the indiscriminate killing of civilians and partly driven by the intention to uphold an unjust British empire), they should have fought in a different way (for example, again, without indiscriminately killing civilians in terror bombing campaigns) (Anscombe, 1981).[13] The same holds good for some other wars.

It also does not follow that it is impermissible to participate in or to support an unjustified war (see Steinhoff, 2007, p. 26 and 95-7). The reason for this has nothing to do with the Walzerian arguments for the moral equality of combatants nor with somewhat oversophisticated contractarian reasons.[14] The *real* (and

mostly overlooked or unappreciated) reason why it can be justified to participate in (or to support) an unjustified war is less spectacular and does not rely on any special features of wars but on a quite general truth, namely: It is simply wrong that the *individual* participation in or support of an unjustified *collective* action is necessarily unjustified itself.[15]

Imagine, for example, that A tries to murder B. There is C, who cannot stop A but can instigate D, E and F, who are known for their brutality, to stop A. C knows that if she does so instigate D, E and F, A will become the victim of an impermissible collective act, namely of excessively brutal self- or other-defense. Nevertheless, if the damage done to A is still much less bad than B's death would have been, and C has no other means to interfere, then C is clearly allowed to support D's, Es, and F's attack against A. She is also allowed to *join* them in their attack against A if this heightens the chances of the defensive collective (comprising D, E, F and now also C) to succeed in their rescue of B, and does so without making the collective action even more excessive.[16] (You can imagine, if you wish, a group of martial artists known for their excessive force in bar brawls willing to join C in her attempt to stop a muscular racist from beating his victim to death.) According to the same logic, and all else being equal, British soldiers were justified in participating in the unjustified actual British war against Germany.

Concluding Remarks

Whether or not persons are allowed to participate in an unjustified war, thus, cannot be decided without a closer look at the details and circumstances of the specific unjustified war in question. Even if the enemy-combatants they are fighting against should, oddly enough, be fighting in a justified war, this does not mean that they, the enemy-combatants, are not liable to attack. Conversely, even if they *are* liable to attack, this does not yet mean that one can permissibly kill them. It only means that one can kill them without wronging them. Yet,

considerations that have nothing to do with the liability of the target might forbid killing them. Conversely, if they are *not* liable to attack, this does also not mean that one *must not* kill them. Rights can sometimes be violated justifiably. The focus on “liability” obscures the fact that whom you may kill in war and why is not reducible to the question of who is liable to attack and who is not.^[17]

Finally, it is also worth mentioning that one cannot only sometimes participate in an unjustified war

justifiably, it is *also* possible to participate in a justified war *unjustifiably*. A person might have other, more important duties she or he would breach if she or he participated in the justified war.^[18]

Notes

1. Michael Walzer (2000, esp. pp. 34–41), of course, is a strong dissenting voice within this tradition, arguing for the moral equality of combatants.
2. This first part partly draws on arguments I develop in much more detail in Steinhoff (2011). Incidentally, I use the terms “just combatant” and “unjust combatant” in scare quotes because even on McMahan’s account combatants who kill innocents violate their rights and therefore cannot be just. Then, however, calling them “just” anyway is misleading, and I wish to dissociate myself from McMahan’s misleading usage. Second, as we will see below, given McMahan’s technical use of “unjust combatants,” there are no unjust combatants in the real world.
3. That a person has a liberty-right towards another person P to do *x* means that she is under no duty towards P not to do *x*. If she has a claim-right towards P to do *x*, this means that P is under a duty not to interfere (at least not violently) with her doing *x*. P is not under this duty if the person in question has only the liberty-right to do *x*.
4. I have made this argument in Steinhoff (2007), p. 95–7, and (2008). McMahan has replied to my criticism in McMahan (2008) and (2009), pp. 38–51.
5. Gerald Lang (2011), p. 515, commits the same mistake as Frowe.
6. Cécile Fabre, Helen Frowe and Jeff McMahan (personal communications) claim that this is not a cause but a side-effect. But that is mistaken. A cause, in McMahan’s account, is an *aim*, and hence something you can want to achieve with a war, and of course people can participate in or support a war because they want that certain innocent people get killed or mutilated. This happens, for example, in extermination wars, but of course people can have this aim in other wars too. Conversely, if nobody participates in or supports the “unjust war” with the unjust aim in mind, then the presumed unjust cause would in fact only be an unjust side-effect. Again we have reached equality.
7. He also tries to burden my account with two alleged counter-intuitive implications. However, in order to derive those implications he has two ascribe assumptions to me I simply do not make. Conversely, I think that it is actually his account that comes with completely counter-intuitive implications. I cannot go into these issues here but do so in “Rights, Liability, and the Moral Equality of Combatants” (Steinhoff, 2012).
8. The classic case in US tort law (and McMahan refers to US law) is *Vincent vs. Lake Erie Transportation Co.*
9. Helen Frowe (personal communication) claims that if we are talking about “unjust combatants” the proper analogy would be a different one, and states that she cannot conceive of a court finding *you* liable for the death of one person by diverting the trolley away from two hundred towards the one when I tied all those people to the track and set the trolley in motion. In response, let me note, first, that when we talk about “just” combatants the proper analogy is not to diverting existing threats (like trolleys already set in motion by someone else) but to initiating completely new ones

(like dropping bombs). And I can very well imagine a court finding you liable for wrongful killing if you blow up one hundred innocent people when this is the only way to keep me from killing one thousand. Second, Frowe *again* tars all “unjust combatants” with the same brush; see n. 5. Some of them have *not* tied the innocent people to the track but joined the fray later. And the question is whether *they* would be held liable if they kill you in order to defend themselves or people to whom they have special responsibilities from your attack.

10. Here is his old definition, and the new one: If “the person to be killed has acted in such a way that to kill him would neither wrong him nor violate his rights, even if he has not consented to be killed or to be subjected to the risk of being killed … I will say that the person is liable to be killed” (McMahan, 2005), p. 386). “What it means for a person to be liable to attack is that there’s a substantial *moral asymmetry* between him and those who might attack him. He has no right not to be attacked, and is therefore not wronged by being attacked, while the attackers *retain their right* not to be attacked” (McMahan, 2010, p. 5).

11. I made this observation in Steinhoff (2007), p. 96, and in (2008), pp. 223-4. In addition, whether justification defeats liability does not even matter, as I have already argued *ibid.* McMahan (2010) now seems to concede me quite a lot of my points, but reinterprets his tactical bomber example on which my argument in question was based in a completely new way, drawing the line of defense in a different manner than he did in McMahan (2008), pp. 236-8. I do not think that his new argument is successful and argue so in detail in Steinhoff (2011). I cannot go into this here, but take the liberty to give just one hint: If the tactical bomber on the justified side has a necessity justification for killing the innocent bystanders (by doing so he saves the lives of a larger number of other people) the innocent bystanders and the combatants on their side *also* have a necessity justification to kill the bomber, for by doing so they prevent him from killing still more innocent bystanders “collaterally” on his next mission and thus save a larger number of innocent people to which, moreover, they might have special responsibilities.

12. In a single paragraph McMahan considers the possibility that both sides in a war might be unjustified and claims: “In a war in which all are in the wrong, none are justified in fighting. One need only reflect on urban gang ‘wars’ to appreciate this.” *Ibid.*, p. 17. Actually, I don’t think that one can never justifiably take part in a gang war. A moment’s reflection should show that one can. Second, if “being in the wrong” means “fighting unjustifiably,” McMahan’s statement is analytical and uninformative; if it means “being a participant in an unjustified war,” it is wrong, as the discussion in this section will show. Incidentally, I draw in this section on material I have published somewhat inaccessibly as Steinhoff (2007b).

13. Jeff,” McMahan, by the way, apodictically states twice in his book *Killing in War*, without ever providing any argument whatsoever for this claim, that in “World War II, Britain’s war was just.” See *ibid.*, p. 5, see also p. 153. He does, however, mention a “dissenting view, though one that is articulated through selective presentation of historical material rather than thorough moral argument” (*ibid.*, p. 243, n. 39). It might actually be also somewhat selective, on McMahan’s part, not to mention Anscombe, whom he quite often mentions in other contexts. However, McMahan (personal communication) has suggested to me that I might be unduly uncharitable here and that he actually only meant to say that Britain’s war had a just cause. In reply, let me note that he could and should have said that then; not least because there is no evidence in his published work that he means by a “just war” simply a war that has a just cause, quite the contrary (see *ibid.*, p. 5). Second, since McMahan acknowledges that even the soldiers on the unjustified side are permitted to oppose “just” enemy soldiers who are in the process of committing, or about to commit, war crimes, the German side would obviously have had a just cause, as defined by McMahan, too.

14. The paradigmatic example is Benbaji (2008) and (2009). For a critique, see Steinhoff (2010). Walzer’s account is to be found in Walzer (2000), pp. 34-41. McMahan (2009), in particular pp. 58-9 and 112-54, has provided an excellent criticism of Walzer’s account. For further criticism see also Steinhoff (2007), pp. 68-71.

15. Saba Bazargan (2010) has recently developed an argument along the same lines. Strangely, Bazargan seems to think that his idea that it can be permissible to fight in an unjust war is compatible with McMahan's rejection of "the Independence Thesis," namely of the thesis that "the moral permissibility of participating in a war does not depend on whether that war is just" (*ibid.*, p. 5). However, there obviously is no compatibility. Bazargan's own thesis not only implies, but *is* the independence thesis.

16. Sometimes, by the way, such participation can be justified even if it makes the collective action more excessive.

17. I answer the question as to who may be killed in war and why by reference to four different principles which all have to be taken into account. See *On the Ethics of War and Terrorism*, Ch. 4.

18. I thank the participants of the conference "War and Self-Defence" at the University of Sheffield (25th-27th August 2010) for comments on a first draft of this paper. I owe special thanks to Ned Dobos, Cécile Fabre, Helen Frowe, Bernhard Koch, Seth Lazar, Michael Neu, Gerhard Øverland, James Pattison, Daniel Statman and, in particular, Jeff McMahan for elaborate and enormously helpful written comments.

References

- Anscombe, G. E. M. (1981). The Justice of the Present War Examined. In *idem, The Collected Philosophical Papers: Vol. 3, Ethics, Religion and Politics* (pp. 72-81). Oxford: Basil Blackwell.
- Barkawi, T & Laffey, M. (2006). The postcolonial moment in security studies. *Review of International Studies*, 32 (2006), 329-352.
- Bazargan, S. (2010). The Permissibility of Aiding and Abetting Unjust Wars. Unpublished ms. (forthcoming in the *Journal of Moral Philosophy*), on file with author.
- Benbaji, Y. (2008). A Defense of the Traditional War Convention. *Ethics*, 118, 464-495.
- Benbaji, Y. (2009). The War Convention and the Moral Division of Labour. *Philosophical Quarterly*, 95, 593-617.
- Christie, G. C. (1999). The Defense of Necessity Considered from the Legal and Moral Points of View. *Duke Law Journal*, 48, 975-1042.
- Friedman, M. P. (2003). *Nazis & Good Neighbors: The United States Campaign against the Germans of Latin America in World War II*. Cambridge: Cambridge University Press.
- Lang, G. (2011). Excuses for the Moral Equality of Combatants. *Analysis*, 71, 512-523.
- McMahan, J. (2004). The Ethics of Killing in War. *Ethics*, 114, 693–733.
- McMahan, J. (2005). The Basis of Moral Liability to Defensive Killing. *Philosophical Issues*, 15, 386-405.
- McMahan, J. (2006). On the Moral Equality of Combatants. *The Journal of Political Philosophy*, 14, 377-393.
- McMahan, J. (2008). Justification and Liability in War. *Journal of Political Philosophy*, 16, 227-244.
- McMahan, J. (2009). *Killing in War*. Oxford: Oxford University Press.
- McMahan, J. (2010). Self-Defense Against Justified Threats. Unpublished lecture notes, on file with author.
- Neumann, M (2006). Terror and expected collateral damage: the case for moral equivalence. <http://www.law.ox.ac.uk/jurisprudence/colloquium/neumann.pdf>, accessed 18 November 2006.
- Niess, F. (1990). *A Hemisphere to Itself: A History of US-Latin American Relations*, transl. by Harry Drost. London and New Jersey: Zed Books.
- Reichberg, G. M. (2008). Just War and Regular War: Competing Paradigms. In D. Rodin & H. Shue (Eds.), *Just and Unjust Warriors* (pp. 193-213). Oxford: Oxford University Press.
- Steinhoff, U. (2007). *On the Ethics of War and Terrorism*. Oxford: Oxford University Press.

- Steinhoff, U. (2007b). On Not Believing in Justified Wars without Being a Pacifist. *Politika* (Annual Journal of the Politics and Public Administration Association of the University of Hong Kong), 152-5.
- Steinhoff, U. (2008). Jeff McMahan on the Moral Inequality of Combatants. *Journal of Political Philosophy*, 16, 220-226.
- Steinhoff, U. (2010). Benbaji on Killing in War and “the War Convention.” *The Philosophical Quarterly*, 60, 616-623.
- Steinhoff, U. (2011). "McMahan, Symmetrical Defense, and the Moral Equality of Combatants." *Journal of Ethics*(online first).
- de Victoria, F. (Francisco de Vitoria) (1952). *De Indis Recenter Inventis et De Jure Belli Hispanorum In Barbaros* (*Lateinischer Text nebst deutscher Übersetzung*), ed. Walter Schäzel. Tübingen: Mohr/Siebeck.
- Walzer, M (2000). *Just and Unjust Wars. A Moral Argument with Historical Illustrations*. NY: Basic Books.
- Walzer, M. (2004). *Arguing about War*. New Haven and London: Yale University Press.,"