

When May Soldiers Participate in War?

Abstract:

I shall argue that in some wars both sides are (as a collective) justified, that is, they can both satisfy valid *jus ad bellum* requirements. Moreover, in some wars – but not in all – the individual soldiers on the unjustified side (that is, on the side without *jus ad bellum*) may nevertheless kill soldiers (and also civilians as a side-effect) on the justified side, even if the enemy soldiers always abide by *jus in bello* constraints. The reason for this is that with regard to some forms of inflicting harm on others one may give special weight to one's own interests and the interests of those to whom one has special responsibilities when assessing the proportionality of those acts. That is, the proportionality calculation may be agent-relative. This is in particular so in the case of foreseeably preventing innocent and non-threatening people from being saved (for instance, by shooting down a tactical bomber who would have saved them by destroying an ammunition factory) but less so in the case of the intentional or foreseeable direct harming of innocent and non-threatening people (dropping bombs on people standing near an ammunition factory). In the light of these considerations, I will then answer the question as to when soldiers may justifiably participate in war (and when not).

Key words:

agent-relativity; moral equality; necessity justification; proportionality; self-defense; special responsibilities; soldiers; war

Introduction

On the traditional view in just war theory, there cannot be a (morally) just cause for war on both sides (Grotius 2005, 1130 [II.XXIII.XIII]; Reichberg, Syse and Begby, 316-17 and 322 for Vitoria, 335 for Molina, 348 for Suárez, 374 for von Wolff). Call this the “*jus ad bellum* inequality doctrine.”¹ Moreover, on the traditional view combatants participating in a justified war may kill their enemy combatants participating in an unjustified war – but not vice versa (at least not as long as the combatants on the justified side always abide by *jus in bello* requirements and the unjustified combatants know their war to be unjustified). Call this “the *jus in bello* inequality doctrine.”² The opposing view,

¹ This is the preprint version of an article forthcoming in *International Theory*. The article on *FirstView* is currently available at

<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=10291565&fulltextType=RA&fileId=S1752971916000051>; and the final version will be available at <http://dx.doi.org/10.1017/S1752971916000051>. © Cambridge University Press, 2016.

¹ Just war theory distinguishes between *jus ad bellum* and *jus in bello*. The former gives the conditions under which resort to or the continuation of a war is justified, the latter spells out the conditions for justified conduct *within* war, that is, the moral rules of engagement.

² The claim that this view is the traditional one might surprise many readers who have become accustomed to associating Michael Walzer's doctrine of the moral equality of combatants with “the orthodox view” and who think that Jeff McMahan's account is

in contrast, claims that as long as the combatants on the unjustified side abide by the *jus in bello* requirements, they may kill the combatants on the justified side (and, of course, vice versa). Call this “the *jus in bello* equality doctrine.”³

I think that all three doctrines are wrong – the reality is more complicated and differentiated. In some wars both sides are (as a collective) justified, that is, they can both satisfy valid *jus ad bellum* requirements. Moreover, in some wars – but not in all – the individual soldiers on the (as a collective) unjustified side (that is, on the side without *jus ad bellum*) may nevertheless kill soldiers on the justified side, even if the latter always abide by *jus in bello* constraints. In the present paper I will focus on the two *inequality* doctrines, but my conclusions will also contradict the *jus in bello* equality doctrine.⁴ However, I will also argue that there can be justified wars in which soldiers participate unjustifiably, even if they abide by *jus in bello* requirements.

While the moral inequality thesis is indeed, as I pointed out, the traditional view, and authors like McMahan do therefore not “revise” the tradition in this respect,⁵ there is certainly a shift of attention as far as the paradigmatic justification for war and for harming and killing in war is concerned. To wit, the tradition largely relied on the punishment and authorized law enforcement justification,⁶ while current-day writers, including the “revisionists,” largely rely on the self-defense justification. Interestingly, however, *both* foci – the recent one on self-defense, and the traditional one on punishment or authorized law-enforcement – are prone to lead, and have lead, to the *same* mistake, namely to the rather premature endorsement of the inequality theses. This is so because both self-defense and law-enforcement are *intrinsically asymmetrical* justifications: there is no justified self-defense against justified self-defense,⁷ neither in law nor in morality, nor is there justified law-enforcement against justified law-enforcement. More precisely: if Albert has a self-defense justification for using force against Berta, then Berta cannot have a self-defense justification for using force to counter Albert’s defensive force; likewise, if Albert has a law-enforcement justification to use force against Berta, then Berta cannot

“revisionary.” However, for a defense of this claim, and for an overview of its history and pertinent references, see Steinhoff (2012a, section 2). For further corroboration of this interpretation of the tradition see also Ryan (2011, 13-18) and Reichberg (2013a).

³ Its most prominent proponent is of course Walzer (2000, 34-41).

⁴ I have argued against the latter at length elsewhere, see Steinhoff (2007, ch. 4).

⁵ “Revisionists” could perhaps point out that they at least revise Walzer and that one becomes revisionist by revising something. This claim has in fact been made by Seth Lazar, see <http://peasoup.typepad.com/peasoup/2015/05/ethics-discussions-at-pea-soup-cecile-fabres-war-exit-with-critical-precis-by-helen-frowe.html>. Yet, by the same logic, Walzer would also be a revisionist (he revised a lot), and virtually all present-day just war theorists deviate from Walzer in one way or the other.

⁶ For the importance of punishment and the administration of justice in traditional just war theory, see in particular Reichberg (2013b) Biggar (2013, esp. 160-75, and 190-1).

⁷ This is an established principle in criminal law, see for example Hallet (1999, 29). The reason for this principle is precisely that there is a “moral asymmetry” between aggressor and defender, so that the former forfeits his right to life if killing him is necessary and proportionate under the circumstances. This view has a long tradition in natural law thinking and the just war tradition. For a clear and early statement (1688), see Pufendorf (1934, 323 [219, III.I.7]). Overlooking this asymmetry is the mistake made by Walzer. For a critique of Walzer (and others who make the same mistake), see for example McMahan (2009, 11-15).

have a law-enforcement justification to use force against Albert's law enforcement.⁸ However, there *can*, as we will see below, be justified self-defense against force that is justified by a *necessity justification*,⁹ and there can be force justified by a necessity justification being used against force that is *also* justified by a necessity justification. The necessity justification is *not* intrinsically asymmetrical.

To explain both the mistake and the way to avoid it in more detail, I will first, in *section 1*, consider the main argument that has been offered for the two inequality doctrines and argue that it is unconvincing. The main problem with the argument is that it proceeds by giving certain clear examples of conflicts where only one side may justifiably kill the other, and by then assuming the applicability of these examples to *all* wars in which there is a justified side. The two main examples are – not surprisingly in the light of what has been said above – paradigmatic self-defense examples (one isolated culpable aggressor vs. one isolated innocent defender) and typical law-enforcement examples (a police officer trying to stop a murderer in a surgical way, that is, without endangering innocent bystanders). However, there are, as we will see, also clear examples – examples involving the unduly marginalized necessity justification on at least one side – where *both* sides in a conflict may justifiably kill each other; and while some wars indeed correspond to the first group of examples, there are *also* wars that correspond to the second group of examples. They do so in two ways: there are some wars where both sides, as collectives, are justified; and there are some wars in which one side is justified and the other is not but where nevertheless the soldiers on the unjustified side may justifiably kill those on the justified side.

Moreover, one common and mostly unspoken assumption underlying the two inequality doctrines is that an agent contemplating the use of force against an attacker or threat must not give special weight in his proportionality calculations to himself, to those near and dear to him, or to those towards whom he has special obligations. Once this assumption is dropped, the two doctrines in question become untenable. Accordingly, in *section 2*, I will provide (additional) examples that strongly suggest that the proportionality of the use of force is, indeed, partly dependent on agent-relative considerations. For instance, a person may do things to save one's own child that he or she would not be allowed to do in order to save an unknown child. Applying this idea to wars

⁸ The “more precisely” is important: the point is, as I said, that both parties in a conflict cannot have a *self-defense justification* (understood as a particular type of moral or legal justification) to kill the other. Yet, they might nevertheless have *another* kind of justification for defending themselves against the other. Having a justification to defend oneself without having a self-defense justification might sound paradoxical but it is not. For instance, if I am unjustly hitting B, and B can only stop me by knocking me out, but I suddenly hear the super villain credibly telling me through my earphones that he will destroy Earth if I do not defend myself against B, then I am justified to defend myself against B's justified self-defense. But my justification to defend myself is not a self-defense justification (which is only triggered by an *unjust attack*, and which A indeed has), but rather the lesser evil or necessity justification. McMahan himself (2014a, 113 and 118) also draws this distinction, while simultaneously firmly and quite rightly upholding the idea that the *self-defense justification itself* is asymmetrical. Authors who claim that there can be symmetrical self-defense justifications are in fact lumping different kinds of justifications together, which is a problem endemic among moral philosophers as opposed to legal scholars.

⁹ See also the simple example offered in the last note.

further helps to rebut the moral inequality doctrines.

In *section 3*, I will try to give an (admittedly general, but nevertheless practically meaningful and applicable) answer to the question of which wars soldiers may justifiably participate in. I will also address there the issue of the soldier's personal responsibility. Not only the rejection of the equality thesis, but also the focus on the individual's responsibility is most certainly not an innovation of "revisionary" just war theory but a stock in trade of the tradition. Traditional just war theorists from Augustine to Elizabeth Anscombe have argued that it is impermissible for a soldier to take part in a war if he knows the war to be "unjust," that is, unjustified. Anscombe flatly states: "Nor, if we know that a war is wrong, may we take part in it without sin, however grievous it may seem to stand apart from our fellow countrymen." (Anscombe 1981, 73) Walzer, who himself subscribes to the moral equality thesis, confirms this view of the tradition: "Catholic writers have long argued that [men] ought not to volunteer, ought not to serve at all, if they know the war to be unjust." (Walzer 2000, 39) As already indicated, I will argue that this view is wrong. However, this does not amount to an endorsement of the moral equality thesis. Instead, I will argue that whether or not an *individual* may justifiably participate in a war is not already decided by the war's justifiability or unjustifiability; rather, the concrete circumstances of the individual have to be taken into account too. Thus, a conscientious soldier might not only be one who deliberately serves in a justified war or deliberately refuses to serve in an unjustified war, but also one who deliberately refuses to serve in a justified war or who deliberately does serve in an unjustified one. However, it is the soldier himself who has to come to an understanding of whether the objective circumstances that would make his participation in the war justified obtain or not. Without such an understanding, the soldier's participation would still be unjustified. Thus, morally, there is neither an *a priori* reason to condemn soldiers for their participation in unjustified wars, nor a reason to let soldiers simply "off the hook."

1. The Dubious Argument for the Two Inequality Doctrines

The clearly most popular and most widely discussed argument for inequality in war proceeds on the assumption that killing in war must be justified as a form of law enforcement or as a form of self- or other-defensive killing, emphasizing the asymmetry between law enforcer and criminal or between culpable aggressor and innocent defender, respectively, and from there drawing conclusions for the ethics of war.¹⁰ Hugo Grotius, for example, states that "no Man [has] a Right to oppose Force to a just Attack, no more than a Criminal can plea a Right of defending himself against the publick Officers of Justice, who would apprehend him, by Order of the Magistrate" (2015, 417 [II.1.XVIII.1]). And Jeff McMahan states (more than 400 years later): "If a murderer is in the process of killing a number of innocent people and the only way to stop him is to kill him, the police officer who takes aim to shoot him does not thereby make herself morally liable to defensive

¹⁰ Another, more recent argument basically deducts the two inequality doctrines from an alleged more general principle or claim, namely that it is *always* (or at least in situations where a conflict is not valuable in itself) impermissible to use lethal force against a permissible or justified act. Such arguments have been advanced by Shalom (2011) and Tadros (2011, 202-216). Since the principle or claim in question is refuted by the many counter-examples provided below anyway and I have dealt with it at length elsewhere, I will not further consider it here. See instead Uwe Steinhoff, "Shalom on the Impermissibility of Self-Defense against the Tactical Bomber," unpublished ms., available at <http://philpapers.org/rec/STESOT-9>, and Steinhoff (2014a).

action, and if the murderer kills her in self-defense, he adds one more murder to the list of his offenses.” (McMahan 2009, 14) The underlying assumption here is that if the murderer in the domestic context may not defend himself against a justified law-enforcer or defender, soldiers in the international context are not allowed to defend themselves against soldiers justifiably defending their nation or enforcing natural law either.

The problem, however, with Grotius’s and McMahan’s examples are that they abstract from certain realities of many wars. To wit, there are at least two important disanalogies between the examples and many wars. First, domestic police officers can, at least in some states, be regarded as having been in some sense authorized (through democratic and constitutional procedures, for example) by the majority of the population of the very state on whose territory they are operating, while, in contrast, the soldiers justifiably invading *another* state in order to stop the majority from killing a certain minority group there often cannot be regarded as having been authorized by the majority of the population of the invaded state on whose territory they are now operating. Second (and more importantly for the line of reasoning in this paper), in many wars justified soldiers kill not only culpable aggressors and criminals but also *innocent* people (“collaterally”).

If one reintroduces these realities (that is, *lack* of authorization by the majority of the population of the very state on whose territory the agent is operating and *presence* of “collateral damage”) into one’s examples, the picture changes. Consider, for instance, this example:

Bob and Juanita: Vigilante Bob plans to kill the drug cartel’s hitman Carlos on Thursday because he knows that otherwise Carlos will kill 15 innocent witnesses on Friday. Juanita knows that. As it so happens, Juanita, her two young daughters, Carlos, and Bob all run into each other. Unfortunately, Bob could only procure a shotgun, and he is about to use it to kill Carlos (this is his only opportunity). However, if he shoots, Bob will, due to the dispersion of the pellets, also kill Juanita and her two daughters. Juanita shoots Bob in defense of herself and her daughters.

Was Juanita morally justified in killing Bob? Intuitively it seems so. She would also have been justified under the law of practically all Western jurisdictions (as far as I can see), and this would even be the case if she had not been with her daughters. The self-defense justification gives defenders a *prerogative* to defend themselves against an aggressor even if, from an impartial, consequentialist point of view, the evils produced by the self-defensive act outweigh the goods.¹¹

¹¹ Moore (2010, 39) talks in this context (self-defense) of “strong, agent-relative permissions” that “permit one to do some action A even if A does *not* maximize good consequences.” See also Steinhoff (2008, 224-5; and 2016a, esp. section VII). An anonymous reviewer suggested that Juanita might be justified in shooting not because she can give extra weight to her own interests and the interests of her daughters, but because she can give less weight to those foreseen consequences of her actions which come about via the voluntary decisions and actions of another agent. In other words, consequences caused by intervening action do not count or could at least be discounted. However, this is still *agent-relative*: an *impartial* agent would not be permitted to help Juanita instead of Bob. Moreover, intervening action has nothing to do with the lenient proportionality requirements of self-defense. To wit, Juanita would also be legally and morally justified in killing Bob in self-defense if Bob were a surgeon about to save 20 other people in the evening who could not be saved without him. Here no voluntary decisions and actions of another agent come into play. The 20 people do not die because somebody else kills them (there is no hitman, as in the original example), but they die because there is no

One might object here that Bob was not justified in attacking Carlos in the first place and claim that therefore the example cannot show that there is justified self-defense against justified attackers. Yet, as far as proportionality considerations are concerned, Bob's act does seem to be justified. Another way of denying that Bob's act was justified is to claim that his attack was *preventive* (while Juanita reacts to an imminent or ongoing attack, and thus in self-defense). However, while its preventive nature rules out that Bob's act can be justified by a *self-defense justification* – which only applies to force used against *ongoing* or *imminent* attacks (see for example Ferzan 2004)¹² – it can still be justified by a *necessity* justification. (Incidentally, even if one allowed for “preventive self-defense,” the self-defense justification applies only to inflicting harm on an aggressor, not to inflicting harm on an innocent bystander like Juanita [see Sangero 2006, 117-21; Tadros 2011, 179-181]; therefore Bob's act cannot be justified by the self-defense justification anyway. If it is to be justified at all, a necessity justification must come in.) After all, it is extremely implausible to claim that all use of preventive force is impermissible, as, for instance, real examples of battered women and a swathe of hypothetical examples demonstrate. An absolute prohibition of preventive force amounts in certain situations to condemning innocent people to death – as it does in the example of Bob. It is difficult to see how this could be justified.¹³ Moreover, most killings in war are of course also preventive: soldiers do not, nor are they morally required to, restrict their use of force to situations where they are facing an ongoing or imminent attack. Rather, they engage in “seek and destroy” tactics and prefer to surprise the enemy. They are preventively pro-active, not merely defensively reactive. If such preventive killing were unjustified, it would be difficult to see how wars could ever be justified (see Norman 1995, 134-5; Cochran 1996). Intuitively, however, preventive killing, both in and outside of war, *is* sometimes justified. Incidentally, it does not do to claim that in war soldiers are *already* faced with an imminent or ongoing attack, namely by the attack of the other state. First, this is not true if the war waged is itself preventive; and second, that the other state has already attacked does not mean that the individual soldiers have attacked – yet, it is killing *them* that needs to be justified. Moreover, if one declares (for no good reason, it seems) the individual soldiers imminent or ongoing attackers only because they belong to an organization (the state) that has already attacked, then the same is true of Carlos, since his organization, the cartel, has also already attacked.

To avoid confusions and unwarranted suspicions, it might also be worth emphasizing again that while it is indeed an established principle in criminal law that there cannot be justified self-defense against justified *self-defense*,¹⁴ law in many jurisdictions does allow self-defense against *other* kinds of justified acts (Robinson 1975-1976, 278), for example against acts that are justified by a necessity justification.¹⁵ And as far as morality is concerned, McMahan himself once explicitly stated that “people are permitted a necessary and proportionate defense of their rights against both violation *and infringement*,” and

intervening action at all (no intervener to kill them, and no intervener to save them). What she does is, as in the original example, to *prevent them from being saved*, and I distinguish this from directly killing them (“collateral damage”). See also the main text below.

¹² See also Uwe Steinhoff, “Self-Defense and Imminence,” unpublished ms., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2653669.

¹³ See on this and for further references, Steinhoff, “Self-Defense and Imminence” (see last note).

¹⁴ See n. 7 above.

¹⁵ See also below for further discussion.

with “infringement” McMahan means a *justified* transgression against a right (McMahan 2005, 400).¹⁶

If, however, one wanted to object that Bob’s act is not justified precisely because he had no legal authority, then let us modify the example:

Bob and Juanita in Mexico: FBI agent Bob goes to Mexico to kill the drug cartel’s hitman Carlos on Thursday because he knows that otherwise Carlos will kill 15 innocent witnesses on Friday. Mexico and the USA had entered into a contract that gives their law enforcement officers a legal liberty-right (in analogy to the legal liberty-right to kill enemy soldiers that international law grants soldiers in an international conflict) to attack armed Cartel hitmen if such attacks are necessary and proportionate under the circumstances. Juanita, a Mexican, knows that. As it so happens, Juanita, her two young daughters, Carlos, and Bob all run into each other. Unfortunately, Bob could only procure a shotgun, and he is about to use it to kill Carlos (this is his only opportunity). However, if he shoots, Bob will, due to the dispersion of the pellets, also kill Juanita and her two daughters. Juanita shoots Bob in defense of herself and her daughters.

It does not seem that the existence of the contract and thus of Bob’s legal authorization undermines Juanita’s moral justification of defending herself and her children.

2. *Proportionality and Special Responsibilities or Prerogatives*

If Juanita’s defense against Bob is justified, a reasonable explanation seems to be that there is a special prerogative about killing in self-defense,¹⁷ so that normal proportionality considerations do not apply and Juanita can give special weight to the survival of herself and her children.¹⁸ This permission to give special weight to one’s own interests also applies, as we will see, to the necessity justification.

That people may give greater weight to their own interests and must give greater weight to the interests of their close relatives and friends than to the interests of strangers in deciding what to do is a common sense assumption. If people were not allowed to give greater weight to their own interests, they would become slaves to the common good; and if they did not have to give more weight to the interests of friends or their own children, friendship would cease to exist and the parent-child relation would be diminished to a purely biological one.

Note that this position is entirely compatible with the well-known tenet that all persons have “equal moral worth.”¹⁹ Parents who deem themselves justified in caring more for their children than for the children of others need not think that their children are intrinsically or from an impartial point of view more valuable than the children of other parents. They can (and mostly will) simply think that they have an agent-relative prerogative – and probably even obligation – to care more for their children than for those of others. To wit, even someone who as emphatically endorses the equal moral worth of all persons as the “social justice cosmopolitan” Thomas Pogge concedes that human

¹⁶ Meanwhile, of course, McMahan (2014a) has changed his mind and thinks that the civilians are not allowed to fight back. Few just war theorists are willing to follow him here, though. For further discussion of this issue, see Steinhoff (2012a, section 4.3; 2014a; and 2016b).

¹⁷ See n. 11.

¹⁸ Alexander (1999, 1495) contemplates this possibility under the heading “personal justification.”

¹⁹ For both explorations and doubts about this tenet, see Steinhoff (2014c).

beings “need to have the option, at least, to have special relationships with friends and family that cause their conduct to be at variance with the cosmopolitan requirement of impartiality” (Pogge 2012, 328). McMahan himself even expands this idea to the relation between a government and its citizens, stating that a “government ought to give greater weight to economic benefits to its own citizens than it should give to equivalent benefits to foreigners” (and it stands to reason that then the government should also give greater weight to the *lives* of its own citizens) (McMahan 2014b, 437). Likewise, Cécile Fabre (who embraces the moral inequality thesis) endorses a “principle of fundamental equality whereby individuals have equal moral worth” (Fabre 2012, 20); yet she also permits “patriotic partiality” (2012, section 1.3.2) and admits that “individuals are permitted to confer greater weight on their own goals, projects, and attachments” (2012, 21).²⁰ Thus, this latter principle or permission is intuitive and widely accepted, and it stands unrefuted.²¹

Accordingly, a defender is not obliged to sacrifice herself or others for the lives of any larger number of people. In self-defense or the defense of others, proportionality simply is not a utilitarian or consequentialist calculus. Even if one accepted that there might be *some* number high enough to make self-sacrifice obligatory – maybe in a case where one is attacked by a culpable attacker whom one knows is developing a cure for a disease that otherwise would cost thousands or even millions of lives – there is still much room below this threshold, room enough to allow a defender like Juanita to kill a justified attacker like Bob even if she knows that due to her defense someone else will later kill a larger number of people than she has saved now.

In a *certain* sense, one might say, her self- and other-defense was “disproportionate” – by saving only three innocents she contributed to the death of 15 innocents at the hands of someone else in the near future (and killed one justified attacker now). However, as far as the moral and legal self- and other-defense justification is concerned, it was not disproportionate in the *relevant* sense.²² (For that to be the case, the harm inflicted on *Bob* would have to have been disproportionate. Of course, Juanita might herself “collaterally” and directly harm innocent bystanders – maybe she also only has a shotgun. Such harm might be covered by a necessity justification, but it could not be covered by the self-defense justification, which only deals with the harm inflicted on an attacker. However, in the example Juanita simply does not, herself, directly harm any bystanders.)

Of course, the claim that an agent may prevent someone from saving a certain number of innocent people in order to save a *smaller* number of innocent people – maybe simply herself, or those towards whom she has special responsibilities – might be flat-out rejected. That is, one might simply reject the idea that in contemplating the permissibility of interference with justified agents one may give special weight to one’s own interests or the interests of those with whom one has special ties. Yet, such a flat-out rejection appears to be rather implausible. Consider the following three further examples:

²⁰ For a criticism of Fabre’s view, see Steinhoff (2013). Fabre (2014, 405, n. 12) has called my criticism of her quite contradictory “egalitarianism” “entirely misconceived.” It would appear, however, that it is rather her completely uncritical reliance on Stephen Darwall’s notion of “recognition respect” that is entirely misconceived. For reasons why, see Steinhoff (2014d, 156-158).

²¹ Of course, people could flatly deny that principle, but it seems the burden of proof would then be on them.

²² McMahan (2009, 41-2, and note 3) now concedes this point, which I had already made in Steinhoff (2008, 224-5).

Boat: Carl hates children and has thrown the children of Anna and the children of Betty into different parts of the lake to see them drown. Anna can only save her three children by stealing Bill's boat from his property at 2:50 PM and rushing out to the lake; and Betty can save her eleven children only by stealing Bill's boat from his property at 3:00 PM. Thus, if Anna steals the boat at 2:50 in order to save her children, she would thereby prevent Betty from saving her greater number of children.

Lions: Carl hates children and lets a pride of lions loose on Betty's children. Betty has only her grenade-launcher to kill the rapidly approaching pride of lions that would kill all her eleven children. The grenade would, however, kill Anna's three children, who are in a security cage (safe from the lions) near the point where the grenade will hit the ground. Anna could only keep Betty from killing Anna's children by shooting her dead.

Clan: As in *Lions*, with some differences: Betty asked to use the stun gun of Anna's family clan, but the clan, through its leaders, denied the request, and there is nothing Anna can do about it. When the clan realizes that Betty has a grenade-launcher, is about to use it, and would thereby kill Anna's children, they open fire at Betty. They are all terrible shots, apart from Anna. Anna could only keep Betty from killing Anna's children by shooting her dead.

It seems to me quite clear that intuitively Anna is justified in *Boat* to give precedence to the lives of her own children and go ahead and steal the boat,²³ although she would thereby *not advance the greater good* (considered from an impartial perspective) and, moreover, *would advance someone's unjust cause or aim*, namely Carlos's aim to see Betty's children drown (and given that B has more children, he prefers, if he cannot have both, to see Betty's children drown rather than Anna's children). Moreover, it also seems that intuitively Anna is justified to kill Betty in *Lions* and *Clan*.

This view can be corroborated by a look at law. This is also important since, of course, part of the force that some might attribute to Grotius's (and McMahan's) example is that it is clear that the criminals in that example would not have a legal defense (that is, a legal justification) for killing the agent of the magistrate or the police officer. Thus, the example need not merely rely on moral intuitions, but can also enlist the authority of the law.

What does law say in the three cases just described? The first example, *Boat*, would be covered by a necessity justification (also called, depending on jurisdiction, "choice of evils justification" or "justifying emergency justification"). The reason is that Anna is infringing Bill's property rights as well as laws against theft or unauthorized use of other people's property. Section 3.02 of the American Model Penal Code – which is not law, but has influenced actual jurisdictions (see Hoffheimer 2007-2008) – provides a so-called "Choice of Evils" justification for such cases:

- (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
 - (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
 - (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
 - (c) a legislative purpose to exclude the justification claimed does not

²³ This is also the case in German law. I thank Prof. Volker Erb for an email-discussion of this topic.

otherwise plainly appear.²⁴

Now, the harm or evil Anna seeks to avoid is the death of her three children, and the harm sought to be prevented by the law she breaks is the harm that befalls Bill if someone takes away his boat. It is the case, however, that the first harm by far outweighs the second harm, and thus Anna clearly has a Choice of Evils justification. Thus, a crucial feature of this justification is that not *all* resulting harms or consequences enter the proportionality considerations, but only the harm or evil sought to be prevented by the infringed law and the harm or evil that the infringement of the law sought to prevent.²⁵

But, one might wonder, is there not a law that prohibits doing something (like stealing a boat) if the moral benefits (like the survival of three) of doing it are significantly less than the moral costs (like the deaths of eleven children) of doing it? And would not breaking that law then be what needed to be justified, and not merely the theft of Bill's boat? The answer is that there simply is no such law. If there were, a defender would be legally obliged to desist from defending herself against someone whom she knows would, but for her defensive action, do a good that would be greater than the harm he would inflict on her if she did not defend herself. Yet, again, there is no such legal obligation.

Section 35.05 of the New York Penal Law also only compares the “desirability and urgency of avoiding such injury [the one the agent seeks to avoid]” with the “desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue,” hence leading to the same result in *Boat* as does the Model Penal Code. Several other American jurisdictions have followed the Model Penal Code and the New York example in this respect (Hoffheimer 2007-2008, esp. 234-240). As regards common law, one sometimes hears that “the evil inflicted must not be disproportionate to the evil avoided” (Card 2010, 758), but the term “infliction” is narrower than “but-for-causing” (that is, than “causing” something in the sense that it would not have happened but for one's own act) – one *inflicts* death by shooting someone dead, but not by merely not helping him, nor by shooting his surgeon (without whom he will die) in self-defense, let alone by taking something somebody else might otherwise have taken to save him (unless, perhaps, one does these things *because* one wants him to die). As regards German law, it does not allow (according to majority opinion) weighing lives against lives anyway; so from the German legal perspective, strange as it may sound, eleven children drowning is no greater evil than 3 children drowning, which leads to Anna's clearly being justified in *Boat* under the German justifying emergency statute (Erb 2003, 1387-1390).

What about *Lions* and *Clan*? Betty, to act justifiably, needs a necessity or choice of evils justification here – after all, she is about to throw a grenade in the direction of 3 children, risking (or even foreseeing) their death. (If you think collaterally killing three children to save eleven is disproportionate and therefore unjustified, you can modify the example accordingly.) She thereby is about to infringe laws against negligent homicide or manslaughter or even murder. Anna, on the other hand, depending on jurisdiction, might

²⁴ American Law Institute (1962, 42). There is a further condition referring to the special case where the dangerous situation was created or provoked by the agent himself. This proviso is not relevant for the present discussion.

²⁵ This also clearly shows that such a necessity justification is not utilitarian or consequentialist. Rather, it is a *threshold deontological* justification. See on this concept Alexander and Moore (2015). Such a justification takes rights seriously (without absolutizing them). To wit, the necessity justifications in, for example, Germany, the United States, or Israel work against the backdrop of jurisdictions that come with “bills of rights.”

well have *both* a necessity and an other-defense justification to use force against Betty. (I will ignore here the fact that some jurisdictions and the Model Penal Code, clearly for purely pragmatic as opposed to principled reasons, allow a choice of evils justification only for acts that are not already covered by other justifications.) She clearly could avail herself of the choice of evils justification of the Model Penal Code and the jurisdictions that follow it: the evil she seeks to avoid – the death of her three children at the hands of an attacker – is greater than the evil that a law against killing Betty seeks to avoid (namely Betty’s death). In addition, she also can have a self-defense justification if the jurisdiction in question does not demand that justifiable self-defense be directed against unlawful attacks but only at what the defender *reasonably believes* to be an unlawful attack. Many American jurisdictions do exactly that. Furthermore, one must consider not only written law and its statutes, but also its interpretation in case law. As George C. Christie (1999, 1039) notes: “If any of the parties would be free from tort liability, it would be the [innocent potential victim of an attack justified by a necessity or choice of evils justification]. 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.” But, in the same vein, is it really (realistically) conceivable that an American criminal court would deny the justification of other-defense to Anna, who tries to defend her innocent children against an attacker? I doubt it. Anna, moreover, also has the common law defense of self- and other-defense. Again, while there cannot be justified self-defense against justified self-defense,²⁶ there is no evidence that common law prohibits self-defense against certain *other* kinds of justified acts (Robinson 1975-1976, 278).²⁷

Thus, we see that both the moral and the legal situation as far as relevant domestic cases are concerned is more complex and complicated than Grotius’s and McMahan’s simple example, and the simplistic conclusion drawn from it, suggest.

To avoid misunderstandings, however, let me clarify that I am certainly not arguing here that Anna may *directly kill* – whether intentionally or as a side-effect – Betty’s children. For example, if Betty has a head start and would take the boat before Anna, and the only way Anna could prevent this from happening is by shooting all of Betty’s children in the lake (thereby removing Betty’s motive for taking the boat), Anna would most certainly not be allowed to do this. Thus, I merely argue that Anna may *prevent*, as a side-effect of her attempt to save her children, greater numbers of innocent people *from being saved* by Betty. Thus, one may probably not in *all* circumstances give special weight to the interests of oneself and those near and dear to one, and not in all circumstances where one may do so may one do so to the same degree. There is (all else being equal: there are exceptions) a difference between intentional killing and letting die and also between intentional killing and foreseeably preventing someone from being saved. The constraints on killing are much stronger, including the proportionality constraints.

Again, some people, in particular defenders of the inequality doctrines, might think that the proportionality constraints on foreseeably preventing someone from being saved are stronger than I make them out to be: they might simply not share my intuitions in *Boat*,

²⁶ See note 7 above.

²⁷ As regards German law, it does not allow a necessity justification for homicide in the first place. However, if it were allowed, German law would seem to be compelled to allow defense against such a form of justified homicide, since it firmly holds that innocent people do not have a duty to sacrifice their lives or bodily integrity for the benefit of strangers.

Lions, and *Clan*. But many will. And while Grotius's and McMahan's examples, especially due to their abstraction from "collateral damage," are not applicable to all wars which have a justified side – which, however, they would have to be in order to constitute positive arguments for the inequality doctrines – the *Bob and Juanita* example is applicable to at least *some* wars, which is, if Juanita is permitted in killing Bob, sufficient to refute the moral inequality doctrines (remember that I am not defending the moral equality doctrine: I reject *both* generalizations).

Bob and Juanita is, for instance, analogous to the following example of a war:

Resisted Intervention: In state X, there are four different ethnic groups, the A, the B, the C, and the D. The national army is practically exclusively made up of members of A (the B and the C do not want to join ranks with the A, whom they deem racially inferior). The B hate the C, have their own very strong militia, and suddenly start a genocide against the C. The A refuse to intervene, since they do not want to risk their lives for the C (or perhaps even because they are not militarily strong enough – the B's militia might be stronger than the A's army). Y, another state, intervenes to save the C. Y could send its troops via two different routes to the location where the genocide takes place. On both routes it would face fierce resistance by B, but on the first route 50,000 civilian As would die as collateral damage and on the second route 60,000 civilian Ds. Y tries to take the first route. The As resist Y's army in order to save their own civilians. In the face of the combined resistance by the A and the B, Y decides to take the second route instead.

It seems that this war of the A against Y can be justified from an *ad bellum* perspective. This is so particularly since the A will hardly inflict any harms on the innocents of Y. After all, the conflict is taking place on A's territory (that is, in X). Nevertheless, one might object that the duties and prerogatives of citizenship cannot be as weighty as one's duties towards one's family members and friends. One might muse, for instance, that if a British person can either save 50,000 British people or 60,000 Germans, he should rather save the Germans. In reply, I doubt that this is the case if among the 50,000 British are members of his own family. Moreover, if 500 British people who all have family members among the 50,000 are to cooperate to either save the British or the Germans, I find it hard to accept that they are under a duty to save the Germans. The British rescuers will now have 1,000 or even 2,000 or more of their friends and relatives among the British who are in need of rescue, and this, it seems, should be quite able to tip the scales (just remember the Anna and Betty examples from above). In other words, the objection overlooks that Y's war will threaten *all* the A in the theater of war, and thereby the family and friends of a *large* number of soldiers (who might be friends with other soldiers willing and perhaps feeling obliged to help them in their defense of their families). In other words, if 500 soldiers can either save a group of 60,000 containing none of their friends or relatives or a group of 50,000 containing 2000 of their children or spouses, then they are justified in saving the latter group, just as a mother is justified in saving her own child instead of saving ten others.

A final objection might be that the doing/allowing distinction has some weight, and by attacking the soldiers of Y, the A are not only letting them die but they are actively killing them. Yet, one should note that the soldiers of Y are not non-threatening people, but *attackers*, they are about to kill many innocent A collaterally. This should severely reduce the restraints against killing them.²⁸ After all, Anna in *Lions* seems to be clearly allowed to

²⁸ I have argued elsewhere (Steinhoff 2012a and 2016b) that justified soldiers who engage in "collateral killing" forfeit their right not to be attacked.

kill Betty.

Thus, the claim that the war of the A against Y can be justified from an *ad bellum* perspective is indeed plausible. However, we get to a war that would not be justified from an *ad bellum* perspective if we modify the example in such a way (call it *Resisted Intervention Revised*) that parts of ethnic group A itself started the genocide against the C. It would not be justified from an *ad bellum* perspective since A, as a collective, could simply stop the genocide – then Y would not attack and endanger A’s civilians. However, those individual soldiers of Y who do not take part in the genocide themselves (and could not stop it) but instead fight to divert Y onto the second route can still be justified in participating in the war and in attacking Y’s soldiers. They are analogous to Anna in *Clan*. The Clan, as a collective, was under an obligation not to fight Betty but to give her the stun gun instead; but Anna, in an attempt to save her children, is nevertheless justified in her individual participation in the unjustified collective use of force against Betty.

3. *In Which Wars May Soldiers Participate*

The above analysis and further considerations to be provided suggest that the answer to the question as to when soldiers may justifiably participate and kill in war is more complex than assumed by either the *in bello* inequality doctrine or the *in bello* equality doctrine.

As already noted in the introduction, traditional just war theorists from Augustine to Elizabeth Anscombe have argued that it is impermissible to take part in a war one knows to be “unjust,” that is, unjustified. It is clear, however, that this traditional view must be wrong. Consider, for example, John, who is drafted to serve in an unjust war of aggression (which, however, will without doubt be victorious). He knows that his participation in the war will make only a minuscule contribution to the war effort (in fact, he will see to that), but he also knows that his non-participation would have some terrible consequences: his country’s dictator swore (and he is known to keep his oaths) that for every drafted citizen who refuses to participate he will kill 100 innocent civilians on the other side. It seems that here John would actually *save* lives by his participation in an unjust war of aggression. It is therefore difficult to see how his participation could *not* be justified. He not only has a necessity justification, but he actually seems to have a full-blown lesser evil justification to participate in the unjustified war. Moreover, if Bob could only save large numbers of civilians from his dictator if he actually killed some enemy combatants (thereby demonstrating that he “seriously participates,” as the dictator demands), he still seems to have a lesser evil justification to do so.²⁹ Of course, one might object that the situation described here is highly unlikely to occur. However, that does not change the theoretical point that in principle a soldier can have a lesser evil justification for his participation in an unjustified war. Nor does it undermine the fact that the argument is even strengthened by envisioning a situation where the dictator threatens to kill family and friends of a soldier who does not participate.³⁰ Now the soldier might still have the lesser evil justification, but in addition he has also an agent-relative necessity justification for participating in the war.

Consider another example. Evil A tries to murder innocent B. There is C, who cannot

²⁹ Incidentally, it is easy to come up with hypotheticals where the stakes are even higher.

³⁰ This seems to have happened in Iraq, see Voice of America, “Report from Iraq: More Iraqi Troops Would Surrender if They Could, says Iraqi Defector – 2003 – 03 – 31,” available at <http://m.voanews.com/a/a-13-a-2003-03-31-32-report-66845687/375516.html>, accessed on 1 Sept. 2015. My guess is that this is not an isolated historical occurrence.

stop A alone 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 sufficiently 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, E's, 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) of succeeding in their rescue of B, and does so without making the collective action even more excessive.³¹ (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.)³² According to the same logic, and all else being equal, soldiers can be justified in joining a humanitarian intervention even if they know that the intervention will be unjustified since the force used will be somewhat excessive. At least as long as by joining the unjustified collective intervention the soldier helps, on the collective level, to avert a decisively greater evil than he helps to produce, and also personally averts decisively more evil than he personally produces, the soldier is justified in his participation. In short, individual participation in unjustified collective acts is not always unjustified, and this is also true for participation in unjustified wars.

The previous examples and the analysis above thus suggest the following more general and pleasantly commonsensical assertions: One may participate in an unjustified war if the moral costs of one's participation are outweighed by the moral gains. (By "moral costs" I simply mean "whatever goes into the proportionality considerations on the negative side," and by "moral gains" I simply mean "whatever goes into the proportionality considerations on the positive side.") Moreover, this is the case not only when the weighing uses an *impartial* scale, but also when it is done with a scale that is in a morally proper way *adjusted to valid agent-relative considerations*. If, however, the moral costs are not outweighed by the moral gains on either of the two scales (that is: if participation is disproportionate both from an impartial and an agent-relative view), participation in an unjustified war appears to be impermissible.

This is a very general, but nevertheless meaningful principle with practical implications. For instance, while the British war waged against Germany from 1939 to 1945 was unjustified due to an often disproportionate and indiscriminate use of force (terror bombing),³³ a British soldier could nevertheless justifiably participate in this

³¹ Sometimes, by the way, such participation can be justified even if it does make the collective action more excessive.

³² I take this example from Steinhoff (2012b, 40).

³³ This was also the verdict of Anscombe (1981, 72-81, originally published as a pamphlet in 1939), a British scholar. A number of people pointed out to me that the British war against Germany might not be a good example since many people consider this war to be justified. Let me point out, in turn, that the justice of wars is not decided by opinion polls (not even among philosophers) but by the valid criteria of just war theory. I do not deny that the British had a just cause nor that *a* war against Germany would have been justified, I simply deny that the war the British *actually* waged was justified. And while Anscombe has given a detailed argument for her assessment (which I share), I have yet to come across a detailed argument that would bother to address Anscombe's line of reasoning, let alone one that would show it to be wrong. Therefore, I take the liberty of sticking with this example, however politically incorrect that might be. Incidentally, that there was no terror bombing in the first stages of the war might mean that those first stages were justified.

unjustified war (see also Steinhoff 2012b, 40). On the other hand, German soldiers could not justifiably participate in the German invasion of Poland. Yet, in my view they could, towards the end of the war, participate in the attempt to stave Soviet troops off as long as possible, given the behavior (widespread rape, see Beevor 2003) of these troops and the imperialist intentions of the Soviet Union.

To be sure, how exactly such proportionality considerations will have to proceed is a contentious issue, and even people who do agree on which considerations apply in theory (for example, is the relevant proportionality consideration one that an omniscient observer would subscribe to, or is the relevant perspective that of “the reasonable person,” etc.) might still disagree on the empirical facts pertaining to a concrete case. However, my intention here was to show that there can in principle be circumstances where the participation in an unjustified war is justified. In some circumstances one might only be able to justify it under an appeal to agent-relative considerations, but this is still a justification. In other circumstances, however, one will even be able to justify it under an appeal to agent-neutral considerations and with the help of a genuine lesser evil justification.

In still other, probably in most, circumstances, however, one will *not* be able to justify one’s participation in an unjustified war. Consider, for example, a variation of *Resisted Intervention*, namely *Counterproductively Resisted Intervention*. In this variation, the A’s resisting Y’s army will lead to *more* A being killed, not less, and no overriding benefits (like, for example, certain gains in freedom for the rest of the A) will be achieved to overcompensate these losses. Such a war would be unjustified, since it would be disproportionate even from an agent-relative perspective. If a soldier actually knows this, and does not have a necessity justification to participate in the war (like, for example, the justification that the dictator would kill his family if he would not participate), then he cannot be justified in participating in the war.³⁴

However, since the *whole* war included not only the (perhaps) justified first stages but also the unjustified latter ones, the whole war (the collective action as a whole) was unjustified. This is no different with self-defense: a complex act of self-defense comprising the following sequence: pushing, stabbing, pushing again will be morally and legally unjustified if the stabbing was unjustified, even if the two acts of pushing were justified.

³⁴ Some authors claim that soldiers of a democratic state have – on the grounds of a combination of *certain institutional arrangements* with certain further circumstances – a duty to wage an unjustified war even if they know the war to be unjustified. For one of the most nuanced formulations of this view, see Estlund (2007), pp. 213-234. (For a critique of Estlund, see Renzo [2013]). If there is such an *institution-based* duty, however, there are two possibilities. Either the duty is “deontological,” like a promise or a contract or some obligation of fairness. However, it is difficult to see how any promise (or mere fairness considerations) could be so weighty as to override the countervailing pro tanto duty not to participate in unjustified wars and the deontological duty (which is not only pro tanto) not to kill innocent people. (If some other kind of deontological duty is in play, one would like to know what duty that is.) Or the duty is “consequentialist,” referring to the bad things that would happen if one does not abide by it. Maybe the democratic state’s just institutions would crumble. (This possibility is more clearly entertained by Cheyney Ryan [2011, esp. 30-2] than by Estlund. Ryan, however, in the end draws pacifist conclusions instead of endorsing obedience.) But this is simply entirely implausible: democratic institutions won’t crumble only because private Bob stays at home. The reply might be: “What if everybody stayed at home?” But the response to this is that the mere

Moreover, and obviously, agent-relative considerations work differently in different circumstances: they interact with other normative principles in different ways. For instance, while in cases where you foreseeably prevent someone from being saved, as in *Boat, Lions, and Clan*, you may give considerably more weight to your own interests and to the interests of those near and dear to you than to the interests of strangers, it seems that you are not allowed to do that in cases where you intentionally or foreseeably directly harm innocent and non-threatening people.³⁵ To wit, a mother must not kill the neighbor's child in order to harvest her organs for the benefit of her own child, nor must states invade other countries to harvest its resources for the benefit of their own country, let alone to harvest their citizens as slaves for their own population. Persons must not participate in such wars – unless, again, there are other factors in play that provide them with a countervailing and overriding necessity justification to participate anyway. That might sometimes be the case. More often, it clearly won't.

While, as I showed, individual participation in unjustified collective acts is sometimes justified, the converse is also true: individual participation in *justified* collective acts can under certain circumstances be *unjustified*. Consider Sartre's famous example of the son who is torn between his felt duties towards his mother and his felt duty to join the French Free Forces in their fight against Nazi Germany (Sartre 2005, 212-13). It is clearly possible that under certain circumstances a person's duties towards his family and friends would make abandoning them to fight in a war that simply does not need him or her unjustified. In fact, a person might even serve the *wider* community better by serving it as a scientist or doctor, for example, than by joining a justified war effort, and if his service to the wider community is of sufficient moral importance and he has promised and is relied upon to not simply abandon his post, as it were, then doing so anyway in order to join the war would be unjustified.

Finally, it should be noted that a soldier is not already justified in participating in a war if the objective justifying conditions are fulfilled. Rather, he has to *know* or be aware or perhaps even reasonably believe that they are fulfilled: that is, his justification would comprise a subjective or mental element, namely (at least) awareness of the objective justifying conditions. After all, there is a *presumption* against killing and maiming people, and it is the moral responsibility of the very individual who is about to engage in an activity where he or she is supposed to kill and maim people to make sure that the

fact that something will have terrible consequences if everybody does it (like all New Yorkers going to the MOMA on the same hour on the same day) does not mean that it is immoral for Bob or Kate to do it. Again, in the case of war, it might be "unfair" to stay at home if the others go, but to kill innocent foreigners out of fairness to one's fellow citizens seems to ascribe far too much weight to fairness considerations and far too little weight to the rights of innocent people. Obviously, more could be said on these issues, but they are beyond the scope of the present paper.

³⁵ There are exceptions. Consider this example: You are driving down a road. Through no fault of yours you are losing (full) control of the car. You will, whatever you do now, kill one of the two children playing on the street by running him or her over. One child is a stranger, the other your daughter. You need not to be impartial in this case of the foreseeable infliction of harm because you *already have* a necessity justification to harm *one* of them. It is not that partiality gives you the justification to start with. Incidentally, you are even allowed to prefer your own child if the accident is your fault (perhaps you are driving under the influence).

presumption is indeed overcome and the objective justifying conditions satisfied.³⁶ To wit, in Anglo-Saxon law there is the *Dadson* principle (so named after a court case), according to which “justified force requires belief in, or knowledge of, the presence of justificatory circumstances” (Christopher 1995, 229). One author even argues that the rejection of this principle leads to a logical contradiction in certain cases and must therefore be accepted on grounds of logical necessity (Christopher 1995; 1998).³⁷ Moreover, Anglo-Saxon law is not alone in accepting this requirement: “The consensus of Western legal systems is that actors may avail themselves of justifications only if they act with justificatory intent.” (Fletcher 1978, 557)³⁸ Thus, given this Western consensus, which, moreover, might be backed up by logical necessity, there is no reason to apply more lenient standards to soldiers. “They don’t know what they are doing” is no excuse if they *should* know. And if they are about to kill people, they indeed should know.

This result, incidentally, cannot be avoided by simply making a distinction between subjective and objective justification here. One cannot answer substantive legal or moral questions simply by making distinctions. To wit, if the question is whether the legal self-defense justification requires a subjective element or not, one cannot answer this question by saying: “Let’s distinguish between subjective and objective justification.” What we want to know is under which conditions a certain act is *actually* legally or morally justified, and either actual justification (instead of only believed or imagined justification, which is no justification at all) does require a subjective element or it does not. Derek Parfit, for instance, who makes such distinctions, states that some “act of ours would be *wrong* in the *fact-relative* sense just when this act would be wrong in the ordinary sense if we knew all of the morally relevant facts” (Parfit 2011, 150).³⁹ This definition, however, does not answer any important substantive questions about when someone is, *in fact*, justified. One reason for this is that Parfit does not give a clear definition of the “ordinary sense” of justification in the first place (compare Bazargan 2014, 115, n. 2). Another and

³⁶ This seems to be also the opinion of Estlund (2007, 213): “the soldier will need to think for himself about whether they [certain justifying conditions] are met.”

³⁷ Rivera-López (2006) shows that some accounts of justified self-defense that include an subjective element also run into a logical contradiction, but he does not show that all of them do. In contrast, Christopher’s argument, if correct, undermines *all* purely objectivist accounts of justified self-defense. Admittedly, I am myself not entirely convinced that this logical error is indeed inescapable, but nevertheless, it is certainly a suggestive point against objectivist accounts that virtually all objectivists seem to maintain an embarrassed silence on the issue.

³⁸ This is not to say that there are not (very few) dissenting voices. Most notable amongst them, as far as legal scholarship is concerned, are Robinson (for instance 1996, esp. 47-8) and Hurd (2008). Note, however, that Robinson concedes that unknowingly *justified* defenders could still be *guilty* and thus *punishable* on grounds of attempt liability, while Hurd (2008, 263-5) not only concedes that but in fact insists on it. That is, even defenders of objective justification seem not to be particularly inclined to let the unknowingly justified defender morally and legally off the hook. Likewise, there is no reason to let unknowingly “justified” soldiers off the hook.

³⁹ Parfit is not the first to make distinctions of this kind. See, for example, Graham (2010, 89, n. 3). Yet, Parfit has popularized this distinction among those who call themselves “revisionary just war theorists,” with the pernicious result to be expected: the substantive question whether *moral* justification requires a subjective element or not is mostly ignored by these theorists.

in the present context more important reason is that this definition of “*wrong* in the *fact-relative* sense” does not answer the question whether someone’s subjective state of mind also belongs to the “morally relevant facts” or not. This, however, is precisely what we would like to know if we are interested in substantive answers as opposed to conceptual fragmentation.

Thus, the result remains: soldiers cannot just blindly stumble into a war and hope to be “accidentally” justified. Only if they are at least aware of there being an objective justification for their participation in the war can they be morally justified. This, in effect, is the “right intention” (or, more precisely: mental state) requirement as applied to soldiers.⁴⁰ Conversely, if the objective justifying conditions are *not* satisfied, then the soldier’s participation in the war will be unjustified, however much the soldier *believes* it to be justified.

To conclude, *both* the traditional view (from Aquinas through Vitoria and Grotius to Anscombe and McMahan) and the “legalist” Walzerian view on the moral (in)equality of combatants are wrong. To recall, the traditional view states that there cannot be a (morally) just cause for war on both sides, and it also states that combatants participating in a justified war may kill their enemy combatants participating in an unjustified war – but *not vice versa* (at least not as long as the combatants on the justified side always abide by *jus in bello* requirements and the unjustified combatants know their war to be unjustified). The opposing Walzerian view, in contrast, claims that as long as the combatants on the unjustified side abide by the *jus in bello* requirements, they may kill the combatants on the justified side (and, of course, vice versa).

Thus, the reality is more complicated and differentiated. First, the justifiability of a collective actor A’s war against B does not yet imply that B’s war against A is unjustified. Moreover, whether an *individual* may justifiably participate in a war or not is likewise not already decided by the war’s justifiability or unjustifiability; rather, the concrete circumstances of the individual have to be taken into account too.⁴¹ Thus, a conscientious soldier might not only be one who deliberately serves in a justified war or deliberately refuses to serve in an unjustified war, but also one who deliberately refuses to serve in a justified war or who deliberately does serve in an unjustified one.

Acknowledgements

The research presented in this paper was supported by a grant from the Research Grants Council of the Hong Kong Special Administrative Region, China (Project No. HKU 17610315). I am very grateful for this support. I presented a first draft of this paper at the Philosophy Department of Lingnan University and thank the audience for valuable feedback. I owe particular thanks to James Pattison, David Whetham, three anonymous reviewers, and the editors of *International Theory* for very helpful written comments.

⁴⁰ While present day just war theorists often list the right intention condition only under *jus ad bellum*, traditionally it is also a *jus in bello* condition, applying not only to state leaders but to individual soldiers as well. The traditional Christian just war theorists were also addressing the question whether, and under what circumstances, individuals may participate in war, and they made it clear that when they do participate in war, these individuals must have a right intention. For more on this and the relation of the traditional right intention requirement to the legal and moral mental state requirement of the justification to use force, see Steinhoff (2014b, esp. section II).

⁴¹ For a different argument to the same effect, see also Pattison (2013).

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