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**To Be Killed or Not to Be Killed? On McMahan’s Failure to Draw a Line between Combatants and Civilians**

In a recent paper, McMahan argues that his ‘Responsibility Account’, according to which ‘the criterion of liability to attack in war is moral responsibility for an objectively unjustified threat of harm’,[[1]](#footnote-2) can meet the challenge of explaining why most combatants on the unjustified side of a war are liable to attack while most civilians (even on the unjustified side) are not.[[2]](#footnote-3) It should be added, however, that in the light of his rejection of the ‘moral equality of combatants’,[[3]](#footnote-4) McMahan would also have to explain why combatants on the justified side of a war are not liable to attack. I will argue here that McMahan does not succeed in meeting these challenges.

*1. The Alleged Liability of (Unjust) Combatants*

McMahan first tries to explain why nearly all ‘unjust combatants’ are liable to attack:

[E]ven though only a certain proportion of unjust combatants who have combat roles end up killing someone, it is true of almost all of the others that they go armed into a war zone and would kill just combatants rather than allow themselves or their comrades to be killed. That their circumstances do not prompt them to kill is a matter of luck in avoiding a situation in which they must kill or be killed. Because they are able and conditionally committed to kill, and because the conditions that would prompt them to kill have a significant probability of arising, they significantly increase the objective risk that people who are not liable to be killed will be killed by them. They are therefore responsible for making it unavoidable that, unless they are killed, others will remain at significant risk of being wrongfully killed. That is the basis of their liability …[[4]](#footnote-5)

As an answer to the question *why* (nearly) all unjust combatants are liable to attack (while ‘just combatants’ are not), these remarks of McMahan’s are question-begging: McMahan claims here that ‘unjust combatants’ are liable to be killed because they themselves would kill enemy combatants in many situations. Yet, so would ‘just combatants’. So why are they not alsoliable? Because, McMahan says, *their* enemies, the unjust combatants, *are* liable. But *why* they are liable is precisely what we wanted to know in the first place. In other words, McMahan claims that unjust combatants *become* liable because they pose a threat to combatants who are not liable since the threat they pose to the unjust combatants is a threat to persons who already *are* liable. This is circular.

On might object here that McMahan would probably claim that the reason why the unjust combatants are liable to attack is that they are fighting in an unjust war. However, given how McMahan defines ‘unjust war’ and ‘unjust combatants’ this is *again* circular. He states:

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.[[5]](#footnote-6)

Obviously, far from *explaining* here why unjust combatants are liable to attack while just combatants are not, he simply *stipulates by definitional fiat* that this is the case: he simply defines ‘just combatants’ in such a way – namely as having a ‘just cause’ – that those they are fighting against (the unjust combatants) are liable to their attack, and he defines the ‘unjust combatants’ in such a way – namely as lacking a ‘just cause’ – that those they are fighting against (the just combatants) are not liable to their attack.[[6]](#footnote-7) (It should be noted that this definition of McMahan cannot be set aside as an ‘infelicitous formulation’;[[7]](#footnote-8) rather, it is the logical result of McMahan’s sustained analysis of the concept of a just cause.)[[8]](#footnote-9)

However, the original question was precisely whether – and *why* –unjust combatants in a more colloquial sense, that is, understood as combatants on the unjustified side in a war that also has a justified side, are liable to attack. That is, the question is why unjust combatants in the colloquial sense are unjust combatants in McMahan’s sense. McMahan’s definition of ‘unjust combatants’ does not answer this question.

Elsewhere, however, McMahan proposes ‘that the difference [that is, that just combatants are not liable while unjust ones are] is best explained by the fact that the just combatants act with moral justification, while the unjust combatants do not’, and immediately adds: ‘This may seem to beg the question.’[[9]](#footnote-10) Indeed, it does. He simply assumes that the unjust combatants (I use the term in the colloquial sense now) do *not* have a positive moral justification for their actions. Such a ‘positive justification’, explains McMahan, is different from mere permissibility – it includes permissibility *and* ‘a significant moral reason’ to perform the action.[[10]](#footnote-11) Yet it would seem that trying to defend the innocent on one’s own side, including one’s relatives and friends, from the ‘collateral damage’ produced by the allegedly just combatants, *is* a significant moral reason to engage in combat.

To be sure, not all unjust combatants will actually fight *because* they want to contribute to the protection of their innocents. On the other hand, however, the just combatants will also not all be fighting *because* they want to contribute to the just cause. Some might even fight with the intention to promote unjust goals. But even if they fight without such an intention, as long as others do have the goal that innocent civilians on the unjustified side be killed (or other unjust goals that are promoted by the war), even the well-intentioned just combatants will contribute to the achievement of those unjust goals. There are just and unjust causes (in the colloquial sense) and contributions and intentions on both sides, and therefore not only is McMahan’s invocation of the alleged ‘difference’ circular, but the difference is also fictional.

But, one might propose at this point, perhaps the difference between just and unjust combatants is that the former’s contribution to just causes outweighs their contribution to unjust causes, while it is the other way around with the latter.[[11]](#footnote-12) Yet, it is certainly no *a priori* truth that just combatants can be neatly separated from unjust combatants along this line. Rather, whether a *particular, individual* (just or unjust) combatant’s contribution to just causes outweighs his contribution to unjust ones or *vice versa* is a contingent empirical question. Gerald Lang, in his defence of McMahan, ignores this and boldly claims that to ‘some degree, and despite Steinhoff’s strenuous denials, unjust combatants must indeed be tarred with the same brush’.[[12]](#footnote-13) However, this is a somewhat surprising claim in the light of his own admission that ‘the subtraction of any given individual just combatant from Allied forces was unlikely to make any decisive practical difference to the successful pursuit of the just causes …’[[13]](#footnote-14) After all, one should gather that this is also true of unjust combatants. Yet, the subtraction of an unjust combatant who is about to shoot down a plane that will otherwise produce a lot of collateral damage would probably cost the lives of many innocent civilians. Thus, this combatant’s contribution to just causes seems to outweigh his contribution to unjust ones.

Moreover, even if a particular unjust combatant contributes more to unjust causes than to just ones, this still does not make his actions unjustified. If, to give an example from the domestic context, my killing Bob in self- or other-defense will have the further effect (and I know this) that Bob cannot be a witness against Al Capone and Al Capone will therefore continue to kill innocent people with impunity, this does not (neither legally nor morally) undermine the proportionality and justifiability of my self- or other-defense. I am not obliged to sacrifice myself or others for the lives of a larger number of people. In self-defense or the defense of others, proportionality simply is not a utilitarian or consequentialist calculus.[[14]](#footnote-15)

Thus, McMahan does not provide any plausible explanation of why combatants on the unjustified side of a war are liable to attack (while the combatants on the unjustified side are not). In fact, most of his remarks on the issue appear to be circular.

*2. The Alleged Non-Liability of Non-Combatants*

Equally problematic is his subsequent attempt to argue that nearly all *non*-combatants are *not* liable to attack. After all, it should be pointed out that non-combatants too – unless they are suicidal or radical pacifists – ‘would kill just combatants rather than allow themselves or their comrades to be killed’ (and many non-combatants in war zones *do* have weapons; besides, you can also kill without weapons). But do ‘the conditions that would prompt them to kill have a significant probability of arising’?[[15]](#footnote-16) Well, that depends. If the enemy combatants start killing or even targeting the civilians, the civilians will probably be ‘prompted’ to defend themselves if they can (and many can in one way or another). But then it would seem that the reason why the civilians are not as likely as combatants to kill enemy combatants in more ideal situations is that the enemy combatants spare them in the first place. However, if that is sufficient to say that they are not liable, then most ‘unjust combatants’ at which nobody is disposed to shoot are not liable, either: after all, if the ‘just combatants’ would not shoot at them (but, for example, simply surrender), many, probably most, unjust combatants would not shoot either. It is, however, somewhat bizarre and again circular to imply – as McMahan’s remarks here do – that by the very act of shooting someone (or by the very psychological state of being disposed to shoot at someone) and thereby making it more likely that he shoots back at you, you actually *make* the person you (are disposed to) shoot at liable to attack. What McMahan would have to do is to explain why you are allowed to shoot at them (or to be disposed to do so) in the first place.

In any case, the moral responsibility (in McMahan’s sense) for creating the conditions that would prompt the ‘unjust combatants’ to kill is shared by the ‘just combatants’ since they, after all, *co*-create those conditions. Thus, McMahan fails to overcome the responsibility dilemma. In fact, this dilemma seems like quicksand: the more McMahan struggles against it, the deeper he sinks into it.

Another strategy McMahan uses to make (most) ‘unjust combatants’ liable and (most) non-combatants non-liable is to tie liability to the necessity criterion of self-defence and to claim that one cannot be liable to defensive force that is not necessary to avert the harm. I think that this is mistaken,[[16]](#footnote-17) but will just grant McMahan’s premise here for the sake of argument. He then goes on to claim (in the context of a *pars pro toto* example of an aircraft carrier) that most combatants ‘intentionally make immediate and necessary contributions to the ability of the flight crews and others to fight’, while ‘[i]ndividual civilians almost never make an essential causal contribution to the killing of another person in war’. Therefore, civilians must not (or even *cannot*) be defensively harmed because: ‘In the case of defensive harming, the extent to which successful defence will be effective in [and therefore necessary for] reducing the harm depends on the degree of the person’s causal contribution to it.’[[17]](#footnote-18)

McMahan is mistaken. In war (at least in modern war), people are killed with bullets from guns, or with bombs dropped from planes or by missiles fired from ships.In order for these weapons to come into existence and to function, a long causal chain was necessary: raw materials had to be gathered, refined, chemicals had to be produced, transported, mixed, all these things had to be made into the preliminary products (like screws, ball bearings, certain more complex chemicals, etc.), which then were further transported, and finally made into the weapons by workers who get served a timely breakfast by their wives or husbands and would otherwise come too late to produce a specific element in the causal chain; and these weapons in turn need to be transported to the soldiers who will use them. An incredible number of civilians, not only in the state waging an unjust war, are involved in these activities; and with regard to most of the materials and activities involved it was reasonably foreseeable that they would or could contribute to the production of weapons and therefore to the killing of people.

Let us come back to the aircraft carrier. Suppose one of the planes is in the air and about to fire a missile at you. Obviously, killing any or even *all* of the remaining crew on the ship will not do you any good; it will have absolutely no defensive effect now and will therefore not be necessary. But what if somebody had killed some of the crew earlier, before the plane started? Well, it is extremely unlikely that there was *any* crew member of whom we can say that merely killing *him* would have averted the later attack: some other crew member would just have performed the task that the killed crew member was supposed to perform. The ship crew is in this respect not different from random civilians.

But wasn’t there *some* group of crew members *cm1- cmn*and *some* time *t* such that killing these crew members at time *t* would have averted the attack on you at the later time? Yes, of course. But there was most certainly also *some* group of civilians *c1- cn*and *some* time *t’* so that killing this group of civilians at time *t’* would have averted the attack at you at the later time.

Thus, McMahan’s responsibility account of liability is and remains unable to draw a line between civilians and combatants.

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1. McMahan 2009: 35. [↑](#footnote-ref-2)
2. This challenge has been very forcefully raised by Lazar 2010. [↑](#footnote-ref-3)
3. McMahan 2006; McMahan 2009: 6 and *passim*. [↑](#footnote-ref-4)
4. McMahan 2011: 548-9. [↑](#footnote-ref-5)
5. McMahan 2009: 5. [↑](#footnote-ref-6)
6. For further elaboration of this point, see Steinhoff 2012, section 4.1. [↑](#footnote-ref-7)
7. Lang 2012: 55. [↑](#footnote-ref-8)
8. McMahan 2005; for relevant formulations there, see esp. 8–9. [↑](#footnote-ref-9)
9. McMahan 2008: 6. McMahan’s claim that justification defeats liability is mistaken, but I will not go into this here. See, however, Steinhoff 2012, section 4.4. [↑](#footnote-ref-10)
10. McMahan 2008: 231. [↑](#footnote-ref-11)
11. This idea might underlie some remarks in McMahan 2006: 379. It might also underlie some of Lang’s criticism of my views in Lang 2012, esp. 56. [↑](#footnote-ref-12)
12. Lang 2012: 59. [↑](#footnote-ref-13)
13. Lang 2012: 58. [↑](#footnote-ref-14)
14. In *Killing in War*, 41–2, and note 3, McMahan now concedes this (without finding a solution to the problem this fact poses to his theory), referring to an unpublished article by Adil Ahmad Haque. I had already made this point, with a different example, in Steinhoff, ‘Jeff McMahan on the Moral Inequality of Combatants’, pp. 224-5. Lang 2006 ignores this problem. [↑](#footnote-ref-15)
15. See the full quotation above, pertaining to n. 4. [↑](#footnote-ref-16)
16. See Uwe Steinhoff, ‘The Nature, Scope, and Limits of Self-Defense under Special Consideration of Killing in War’, unpublished ms. [↑](#footnote-ref-17)
17. McMahan 2011: 548. Incidentally, it is unclear why McMahan uses the terms ‘intentional’ and ‘immediate’ here: foreseeability is sufficient and immediacy irrelevant on his official ‘Responsibility Account’. [↑](#footnote-ref-18)