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The Morality of War and the Law of War

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2.1. PATTERNS IN THE HISTORY OF IDEAS

There is a general presumption that the law should be congruent with morality—that is, that the prohibitions and permissions in the law should correspond to the prohibitions and permissions of morality. And indeed in most areas of domestic law, and perhaps especially in the criminal law, the elements of the law do in general derive more or less directly from the requirements of morality. I will argue in this chapter, however, that this correspondence with morality does not and, at present, cannot hold in the case of the international law of war. For various reasons, largely pragmatic in nature, the law of war must be substantially divergent from the morality of war.¹

Our understanding of the morality of war has for many centuries been shaped by a tradition of thought known as the theory of the just war. In its earliest manifestations in ancient and medieval thought, this theory emerged from a synthesis of Christian doctrine and a natural law conception of morality. Its tendency was to understand the morality of war as an adaptation to problems of group conflict of the moral principles governing relations among individuals and to see just warfare as a form of punishment for wrongdoing. Its concern was with a rather pure conception of right and wrong that made few concessions to pragmatic considerations and was unwilling to compromise matters of principle for the sake of considerations of consequences. During this classical phase in the history of the theory, the principles of the just war were quite different from the laws of war in their current form.

Later, beginning in the sixteenth century but principally during the eighteenth and nineteenth centuries, some juridical writers, seeking to develop a workable account of the law of nations, began to argue for principles governing the practice of war that were more 'realistic' in character. These principles were formulated in ways that were more sensitive to pragmatic concerns. This shift in thinking about the normative dimensions of war helped to lay the groundwork for the development and institutionalization of the international law of war from the late nineteenth century to the present.

¹ This chapter is thus an expansion and elaboration of arguments I first presented in a section called 'The Divergence Between the Morality of War and the Laws of War' in 'Innocence, Self-Defense, and Killing in War', *Journal of Political Philosophy* 2/3 (1994), 193–221.

Over the course of the twentieth century, the theory of the just war and the international law of war evolved in tandem, though far more attention was paid to the development of an effective body of law than to the refinement or revision of the theory of the just war. Roughly from the end of the First World War to the end of the Vietnam War, serious and rigorous thinking about moral issues, including war, languished under the baleful influence of the two Wittgensteins. During the period between the world wars, the work of the early Wittgenstein prompted many philosophers to regard moral propositions either as meaningless or as mere expressions of emotion over which it was pointless to argue. And for a quarter of a century following the Second World War, the work of the later Wittgenstein led moral philosophers to spend their time worrying about moral language and to deny that they had any special expertise in thinking about practical matters. Legal thought was not, however, similarly disabled by absurd philosophical doctrines, so that by the time that philosophical thinking about moral issues revived in the early 1970s, the influence of international law on normative thought about war had become pervasive. In 1977, when the principles of a newly emergent just war theory found canonical expression in Michael Walzer's *Just and Unjust Wars*, they had come to coincide quite closely with the doctrines of the law.²

In these trends, there was a reversal of the traditional direction of derivation. While early theories of the law of nations drew heavily on the ideas of the classical just war theorists, the contemporary theory of the just war is in many respects discontinuous with the classical theory and relies instead on doctrines drawn from the law. Walzer and other exponents of the theory in its now dominant form tend nonetheless to argue that this theory is, like the classical theory, derived from principles requiring respect for the *moral* rights of individuals and provides the moral foundations for the law of war in its current form. They claim, in other words, and in contrast to what I have asserted, that the close congruence between their moral theory and the international law of war is not the result of moral theory modelling itself after the law, or being conscripted to lend its support to the authority of the law, but is instead just the happy convergence of law with morality—the same phenomenon we find in domestic criminal law. In their view, the authors of the contemporary law of war have been more successful in understanding the basic morality of war than the classical just war theorists were.

2.2. CENTRAL DOCTRINES IN THE LAW OF WAR

These differing interpretations of the relation between the contemporary law of war and the currently dominant, or orthodox, understanding of the just war can be illustrated by reference to three principles that are central to both the law and the theory.

² Walzer, Michael, *Just and Unjust Wars* (New York: Basic Books, 1977).

1. *The Moral Equality of Combatants*: Combatants on all sides in a war have the same moral status. They have the same rights, immunities, and liabilities irrespective of whether their war is just. Those who fight in a war that is unjust ('unjust combatants') do not act wrongly or illegally when they attack those who fight for a just cause ('just combatants'). They do wrong only if they violate the principles governing the conduct of war.³
2. *Non-Combatant Immunity*: Non-combatants on all sides in a war are morally and legally immune to intentional attack. They are innocent in the generic sense—that is, they are illegitimate targets of attack.
3. *The Privileged Status of Prisoners*: Prisoners of war on all sides have neither criminal nor combatant status. They may be detained for the duration of the war to prevent them from again becoming combatants but must not be otherwise harmed.

Principles 1 and 2 together comprise the central requirement of the doctrine of *jus in bello*: the requirement of discrimination. In law and in the dominant theory of the just war, this is the requirement to discriminate morally between combatants and non-combatants, confining one's deliberate attacks to the former only. The principle of the moral equality of combatants asserts the relevant permission, while the principle of non-combatant immunity asserts the prohibition.

In the writings of Walzer and others, these principles are grounded in claims about the possession and forfeiture of individual moral rights. The crucial assumption is that one makes oneself morally and legally liable to attack by posing a threat to others. The principle of the moral equality of combatants, for example, derives from the idea that those who pose a threat to others have no right against being attacked in self-defence. This explains why all combatants are permitted to attack their adversaries in war, irrespective of whether their war is just. And there are parallel explanations of the principle of non-combatant immunity and the privileged status of prisoners. Because non-combatants threaten no one, they retain their right not to be attacked. And prisoners of war, by having ceased to pose a threat, regain their right not to be attacked, though they do not recover their right to liberty until the end of the war.

It is, however, a mistake to suppose that the legal principles can be defended in this way, for the corresponding moral principles are false. It is not true, for example, that one makes oneself liable to defensive attack simply by posing a threat to another. If that were true, those who engage in justified self-defence against a culpable attacker would then lose their right not to be attacked by him or her. And police would forfeit their right not to be attacked by criminals they justifiably threatened. The correct criterion of liability to attack in these cases

³ Strictly speaking, the label 'unjust combatants' is best reserved for combatants who fight in a war that is unjust because it lacks a just cause. But I will ignore this subtlety here.

is not posing a threat, nor even posing an unjust threat, but moral responsibility for an unjust threat. According to this criterion, just combatants cannot be liable to attack by their unjust adversaries. As in the case of an individual who engages in justified self-defence, a combatant who takes up arms in self-defence or in defence of other innocent people against an unjust threat does nothing to lose his or her moral right not to be attacked or to make himself or herself liable to attack. So principle 1, the moral equality of combatants, cannot be defended by appealing, as Walzer and others do, to the claim that just and unjust combatants alike lose their right not to be attacked by posing a threat to their adversaries.

In war, the criterion of liability to attack must be somewhat broader than it is in cases of individual self-defence. I believe it is this: a person is morally liable to attack in war by virtue of being morally responsible for a wrong that is sufficiently serious to constitute a just cause for war, or by being morally responsible for an unjust threat in the context of war. Liability to attack is of course subject to necessity and proportionality conditions, but it nonetheless follows from this view that non-combatants may, on rare occasions, be legitimate targets of attack in war. If, for example, there are certain non-combatants who bear a high degree of responsibility for a wrong that constitutes a just cause for war, if attacking them would make a substantial contribution to the achievement of the just cause, and if they can be attacked without disproportionate harm to those who are genuinely innocent, it may then be permissible to attack them. So, even if non-combatants pose no active threat in war, that is not sufficient to guarantee them moral immunity to attack. Hence, principle 2 also seems false.

Similar points apply to the treatment of prisoners of war. While prisoners of war, who were just combatants prior to their capture by unjust combatants, retain all the rights of the innocent, the same is not true of captured unjust combatants. If circumstances are such that harming them would significantly contribute to the achievement of the just cause, or if refraining from harming them would expose just combatants to significantly greater risks, they may be liable to be harmed. For through their own wrongful action, they have placed themselves in a position in which they have become an obstacle to the prevention or correction of a serious wrong, or in which they pose an unjust threat to others. In these circumstances, they will have no justified complaint if they are subject to proportionate harm in the service of the just cause, or in order to avert an unjust threat for which they are responsible. So principle 3 seems false as well.

It is worth emphasizing that any harms to which non-combatants or prisoners might be liable during war are not punitive harms. My claim is not that they might deserve to be harmed. There is no reason to harm them unless doing so is necessary for, or at least importantly instrumental to, the prevention or rectification of a wrong for which they bear responsibility (though not necessarily sole responsibility).

2.3. OTHER FORMS OF JUSTIFICATION

2.3.1. Lesser Evil

I have argued that the moral equality of combatants cannot be defended by arguing that just combatants make themselves liable to attack by virtue of posing a threat to others. There are, however, other forms of justification for killing that are independent of the claim that the person who would be killed has made himself or herself liable to be killed. Perhaps the defence of the moral equality of combatants does not depend on the claim that just and unjust combatants alike are liable to be killed, but rests instead on the claim that there is another form of moral justification that makes it permissible for combatants of each type to attack or kill those of the other.

One familiar form of justification for killing appeals to the moral necessity of averting some terrible catastrophe. People usually appeal to this form of justification only when those killed are innocent in the relevant sense—that is, they have done nothing to make themselves morally liable to be killed, so that killing them *wrongs* them or infringes their right not to be killed. This is, in effect, a form of lesser evil justification. Walzer's doctrine of supreme emergency, according to which the prohibition of the killing of the innocent yields or is overridden when the survival of the political community is imperilled, is an instance of this form of justification (though it may not, for him, be a *full* justification, since he believes that it leaves a moral residue: dirty hands, an ineradicable guilt for the 'blasphemy against our deepest moral commitments').⁴

This lesser evil justification, which applies to the killing of those who are liable and those (the innocent) who are not, is widely, though not universally, accepted. But for most of those who embrace it, its application is restricted to cases in which the killing of the innocent is necessary to avert an outcome that would be *very significantly* worse, from an impartial point of view, than the killing of the victim or victims, even if the latter are innocent in the relevant sense. But when people fight for a cause that is *unjust*, their action, if successful, will normally produce bad effects rather than consequences so good that they will greatly outweigh the harms inflicted on those who have opposed the achievement of the unjust cause. Hence, this justification cannot in practice support the killing of just combatants by unjust combatants and hence cannot support the moral equality of combatants.

I concede that in principle the appeal to the lesser evil can justify the killing of just combatants by unjust combatants. Suppose there were some small country with large oil fields that was refusing to sell its oil and that, as a consequence, the economies of various countries were being seriously eroded by oil shortages. The small country might be within its rights to refuse, but a point might be reached at which the damage to another country's economy became so great that

⁴ Walzer, *Just and Unjust Wars*, p. 262, and Chapter 16 generally.

it would be morally justified in going to war to obtain the oil it needed to sustain its economy. (It would not be justified in doing any more than was necessary to secure the oil and it would be required to pay for what it took and, to the extent possible, to compensate the small country for the harm it caused.) Given the assumption that the small country would have a right not to make its oil available to others, this would be a case in which those attacked would not be liable to be attacked. To go to war against them would be to infringe their rights. The war would therefore, in my view, lack a just cause; it would be an unjust war.⁵ But it might nevertheless be morally justified on the ground that it was the lesser evil—a case of infringing the rights of some to avert a greater evil to others.

Again, however, the possibility of this kind of case does not support the moral equality of combatants. For the moral equality of combatants is supposed to hold for all wars, not just those rare wars in which unjust combatants may be morally justified in attacking just combatants as the lesser evil, despite the latter's lack of liability.

2.3.2. Consent

A third form of justification for killing—after lesser evil and the appeal to liability—involves an appeal to consent on the part of the person killed.⁶ Many people, for example, see a person's rational consent as crucial to the permissibility of euthanasia. They believe that if it would be better for a person to die than to continue to live, if his or her death would not be so bad for others that he or she ought to continue to endure life for their sake, and if he or she autonomously requests or consents to be killed, then it can be morally permissible to kill him or her.

No one, of course, suggests that killing enemy combatants is a form of euthanasia. But it has been argued that what makes *all* combatants legitimate targets for their military adversaries, independently of whether they have a just cause, is that in one way or another, they consent to be targets in exchange for the privilege of making other combatants their own targets.

There are certain models or conceptions of the nature of war and a combatant's role in it that support the idea that the role of the combatant carries with it an implicit acceptance of the view that any combatant is a legitimate target of attack by his or her adversaries. Two such conceptions are adumbrated by Walzer when he writes that

the moral reality of war can be summed up in this way: when combatants fight freely, choosing one another as enemies and designing their own battles, their war is not a crime; when they fight without freedom, their war is not their crime. In both cases, military

⁵ On the connection between one side having a just cause and the other side being liable to attack, see McMahan, Jeff, 'Just Cause for War', *Ethics and International Affairs* 19/3 (2005), 1–21.

⁶ Some parts of this subsection draw on the argument of section III of my paper, 'On the Moral Equality of Combatants', *Journal of Political Philosophy* 14/4 (2006), 377–93.

conduct is governed by rules; but in the first the rules rest on mutuality and consent, in the second on a shared servitude.⁷

If either of these conceptions of war is correct, it supports the moral equality of combatants in those wars that fit the description it gives. If each accurately describes certain wars and the two together are exhaustive of wars as they are actually fought, then this vindicates the moral equality of combatants as a universal principle.

There have surely been some wars that fit the first description. A war in which none of the combatants on either side were compelled to fight, either by their adversaries or by their commanders, might be such a war. If neither side had a just cause (e.g. if both were fighting for control of territory to which neither had any right), if all the combatants on both sides were mercenaries fighting only for personal gain, and if all knew that they were symmetrically situated vis-à-vis one other and yet chose to fight anyway, it would be plausible to contend that they had all consented, at least implicitly, to be attacked by their adversaries, rather in the manner of boxers or duellists. They would be fighting for reasons of their own and would have no justified complaint against their adversaries for attacking them.

Wars of this sort are perhaps analogous to situations in which two men agree to 'step outside' to settle a dispute by fighting. But many wars are analogous to a different kind of individual combat, in which an unjust aggressor attacks an innocent victim, who is then compelled to defend himself or herself. It would be absurd to suppose that in this sort of situation, the initial victim consents at any point to be attacked by the aggressor. There is no waiving of rights, tacit, implicit, or otherwise. Similarly, when one country unjustly invades another, the just combatants who fight in defence of their country may do so voluntarily but do not do so 'freely' in Walzer's sense. It is hard to imagine a sense in which they consent to be attacked by the aggressors.

Hard, but perhaps not impossible. Thomas Hurka argues that 'by voluntarily entering military service, soldiers on both sides freely took on the status of soldiers and thereby freely accepted that they may permissibly be killed in the course of war'.⁸ Yet, why should freely enlisting for the role of soldier involve waiving one's right not to be killed? Why suppose that soldiers, in addition to consenting to *risk* being killed, also *consent* to be killed by their adversaries? Those who become police officers agree to risk being killed but certainly do not accept that criminal suspects are permitted to kill them. I suspect that the appeal to the role of the professional soldier simply begs the question. Hurka may believe that a person waives his or her right not to be killed when he or she freely takes on the role of a soldier because he assumes that the moral equality of combatants is already implicit in our conception of the role of a soldier. So, for example, he writes that 'the common conception of military status includes the moral equality of soldiers'.

Yet, he also suggests that there is a reason why this is so. This is that governments demand that their soldiers commit themselves to fight in any war they may be

⁷ Ibid. 37.

⁸ Hurka, Thomas, 'Liability and Just Cause', *Ethics and International Affairs* (forthcoming).

ordered to participate in. If in voluntarily joining the military, soldiers are agreeing to fight in any war, just or unjust, they must be accepting a neutral conception of their role, one according to which they are permitted to kill their adversaries, irrespective of whether the latter are just or unjust combatants, and that thus implicitly concedes that their adversaries are also permitted to kill them whether they are themselves just or unjust combatants.

This is an ingenious argument, but I think it succeeds only if its factual presuppositions are correct. And while it accurately describes the position of some who volunteer, it can hardly be true of all who enter the military. Some people enlist in the military intending and implicitly agreeing to fight only in wars that are just, presuming that their government will not command them to fight in an unjust war but prepared to refuse to fight if their assumption proves incorrect. Others are of course conscripted and may think of themselves as excused by duress rather than justified in fighting, if they believe or suspect that the war in which they are required to fight is unjust. Perhaps most importantly, some people voluntarily enlist only when their country has already been unjustly attacked, intending not to become a professional soldiers but to fight in this one just war only. These combatants are very much like the man who is suddenly compelled to defend himself against an unjust attacker. He has no reason to waive his right not to be killed and there is no reason to suppose that he does so.

Finally, even if all combatants, just and unjust alike, do in fact consent to be attacked by their adversaries in exchange for a global permission to engage in attack, this would not be sufficient to establish the moral equality of combatants. For their waiving their rights in favour of each other would mean only that none would wrong another, or violate the other's rights, by attacking him or her. There would remain an important moral asymmetry between just and unjust combatants, which is that the latter, but not the former, might still be acting wrongly because their action would be instrumental to the achievement of an unjust cause. So even if all consented, that would not give them all the same moral status.

The second conception of war cited by Walzer—in which combatants on both sides are irresistibly compelled to fight—may also be interpreted as offering to all combatants a justification for fighting based on consent. In these circumstances, combatants might be likened to gladiators who are forced to fight to death by a threat of immediate death as the penalty for refusal. If both gladiators refuse to fight, they will both be killed. If they both fight, one may survive. It is therefore in the interest of both to agree to fight—that is, to consent to be attacked in exchange for the permission to attack.

But war is never like this. A government may order the execution of individual soldiers who refuse to fight, but it cannot execute its entire army. Indeed, in countries such as our own, the penalties now for refusal to fight are quite mild and are probably preferable from a purely prudential point of view to the risks involved in fighting. It is therefore never the case that it is better for all combatants on both sides to fight than for none to fight (or for only the just to fight). Even

in wars in which combatants on both sides experience a 'shared servitude', their situation does not give them a reason to consent to be killed in exchange for the privilege of killing.

2.4. THE PRAGMATIC BASIS OF THE LAWS OF WAR

2.4.1. Epistemic Limitations and the Necessity of Neutral Rules

None of the three familiar forms of justification for killing that we have considered—liability, lesser evil, and consent—provides a justification for the killing of just combatants by unjust combatants. But the first of the three does provide a sound justification for the killing of unjust combatants by just combatants. What this suggests is that even if it were true that all combatants consent to be attacked as part of their professional role, there still would not be a moral symmetry between just and unjust combatants, since the latter but not the former would also be morally liable to attack. It seems to me, therefore, that the moral equality of combatants can have no foundation in basic morality. And I believe that the same is true of the principle of non-combatant immunity. The distinction between combatants and non-combatants in itself has no moral significance. Some combatants—the ones who fight for a just cause within appropriate constraints—retain all their rights and are therefore innocent in the relevant sense, while some non-combatants bear a significant degree of responsibility for a wrong the prevention or correction of which constitutes a just cause for war; they may therefore be liable to certain harms if harming them would make a proportionate contribution to the achievement of the just cause. And the same may be true in certain cases of unjust combatants who have been taken prisoner.

The claim that the three legal principles I identified earlier—the moral equality of combatants, non-combatant immunity, and the privileged status of prisoners—are incompatible with the liability rules of basic morality does not imply that these principles have no role in the normative regulation of war. At least in present circumstances, these principles are highly important. It is just that their sources and status are different from what people usually suppose them to be. I will focus here on explaining the foundations of the principle of the moral equality of combatants—though on the understanding of the principle for which I will argue, a better label for it would be the 'legal equality of combatants' or perhaps the 'conventional equality of combatants'.

The case for the legal equality of combatants begins with an account of the epistemic constraints under which combatants must act. There is considerable uncertainty about what constitutes a just cause for war. Comparatively, little serious philosophical work has been devoted to this issue and even the supposed experts disagree about the justice of particular wars. And even if we had a plausible and relatively uncontroversial account of the requirement of just cause, there are numerous factors that would greatly restrict an individual combatant's ability to

apply that account in any particular case: for example, inescapable limitations on factual knowledge, efforts at deception by governments determined to go to war for discreditable reasons that cannot be publicly avowed, the absence of leisure for deliberation during mobilization, the cognitive and emotional immaturity and educational limitations of soldiers who are very young, and so on. There are, moreover, many other factors that tend to discourage moral reflection about matters of *jus ad bellum* by active duty military personnel: for example, a patriotic tendency to trust in the moral rectitude of one's own society and government, deference to political and military authority, the sense of professional obligation, and—last but not least—the pervasive assumption, promulgated by the dominant theory of the just war, that it is not a combatant's responsibility to enquire whether the war in which he or she has been commanded to fight is just.⁹

As a consequence of these and other factors, most combatants believe that the wars in which they fight are just. This applies to unjust combatants almost to the extent that it applies to just combatants. I believe that among unjust combatants, the belief is seldom reasonable, though there clearly are cases in which unjust combatants are epistemically justified in believing that they are in fact just combatants. But whether the belief is reasonable or unreasonable in the circumstances (which I do think is relevant to determining an unjust combatant's liability), the fact remains that most unjust combatants have it. And those who do not—those who recognize or suspect that their war is unjust—are nevertheless likely to fight anyway rather than refuse to fight on moral grounds. But if they fight despite a lack of conviction that their war is just, they are then likely to *assert* that it is just in order to rationalize their action. Because virtually all unjust combatants will either believe or claim to believe that their war is just, they will claim whatever rights are granted to just combatants. So whatever is legally permitted to the just will be done by the unjust as well. In present conditions, therefore, a legal rule that grants permissions to just combatants that it denies to unjust combatants would be wholly ineffective in constraining the unjust.

Because of this, the laws of war must at present be neutral between just and unjust combatants and, in particular, the laws of *jus in bello* must be equally satisfiable by both. One possible neutral rule would be based on the recognition that morality forbids unjust combatants to fight for unjust ends and to kill just combatants, who are innocent in the relevant sense, as a means. This neutral rule would therefore make it illegal for both just and unjust combatants alike to fight and kill in war. It would, in effect, make war itself illegal. But a legal rule that prohibited participation in war by anyone would obviously be ineffective. It would be a travesty of the law that could have the effect of undermining people's respect for the law. It would also be an unjust law, since it would deny any right of self-defence to the innocent. I conclude that the only feasible option, at least at present, is to grant legal permission to both just and unjust combatants to fight and kill in war.

⁹ The following two paragraphs draw on material in my paper, 'The Sources and Status of Just War Principles', *Journal of Military Ethics*, special issue: *Just and Unjust Wars: Thirty Years On* (2007).

2.4.2. The Case Against Punishment for Unjust Combatants

There is little reason to regret that pragmatic considerations force us to forgo the possibility of criminalizing participation in an unjust war. For, at present, there would be few benefits and many costs to any attempt to hold unjust combatants criminally liable merely for fighting. The one notable possible benefit of making participation in an unjust war illegal is that it could help to deter people from fighting in unjust wars. Yet, given our present state of uncertainty about which wars are just and which are not, such a law could also deter people from participating in just wars. While, overall, the benefits would probably outweigh the costs, since, as the Vietnam War showed, people are not completely hopeless at identifying unjust wars, it is nevertheless true that the deterrent benefits would be unlikely to be significant, given the absence of effective measures for enforcement.

If the practice of *post bellum* punishment could be carried out in a just and impartial manner, the deterrent effects, both desirable and undesirable, would probably be negligible. This is because the action of unjust combatants is usually subject to a variety of excusing conditions that mitigate the combatants' liability to punishment. Since comparatively few unjust combatants would be deserving of harsh punishment and even those who were would be difficult to identify, a blanket dispensation of only very mild penalties, or even perhaps a universal amnesty, is likely to be appropriate in most cases.

To appreciate the intuitive force of this point, assume that it is true, as I believe, that there was no just cause for the US War in Vietnam. Can we really conclude that most of the Americans who fought in that war deserve criminal status, and perhaps punishment, simply for having participated in it, even if they rigorously adhered to the traditional rules of *jus in bello*? To have sent them into that war in the first place is already to have wronged them. How, then, could it be just to punish them as well? Considerations of this sort have led George Fletcher to argue quite generally that to insist that the legal permissibility of fighting should depend on whether one has a just cause 'would be unfair to individual combatants, who risk criminal liability if they make a false judgement about the lawfulness of the orders they execute'.¹⁰

At present, of course, institutions for the administration of just and impartial punishment for unjust combatants do not exist. International relations generally, and warfare in particular, are areas that are still inadequately regulated by law, and in these conditions, self-help efforts to enforce a legal prohibition of participation in unjust wars are likely to be unjust, counterproductive, or both. Acceptance of the idea that participation in an illegal war is itself illegal and that unjust combatants may be liable to punishment would, for example, exacerbate the risk of 'victor's justice'. Victors in war are often tempted to exact revenge for harms and humiliations they have suffered in the fighting. And they invariably declare themselves to have fought for a just cause. Even when such a declaration

¹⁰ Fletcher, George P., *Justice in the Face of Enemy Fire* (unpublished manuscript, unpaginated), Chapter 6: 'Lawyers and Philosophers'.

is transparently false, their vanquished adversaries are typically in no position to compel a recognition or acknowledgement that it is so. Acceptance of the view that unjust combatants may be liable to punishment even if they obey the traditional rules of *jus in bello* would therefore increase the risk of mass vengeance masquerading as retributive justice by the unjust against the just.

Even in cases in which the likely victor is the side with the just cause, the prospect of punishment for the vanquished could have the effect of unnecessarily prolonging the war. For the unjust combatants, fearing the prospect of punishment, could become more reluctant than they would otherwise be to surrender. They might rationally prefer the prospect of continuing to fight, even when the probability of victory is remote, to a high probability of punishment if they surrender. Thus, a practice of *post bellum* punishment of unjust combatants would establish perverse incentives that could protract wars beyond the point at which they would otherwise end.

There are various other reasons for retaining, at least for the present, the principle of the legal equality of combatants, reasons that have nothing to do with the practical objections to punishing unjust combatants merely for participation in an unjust war. One is that the legal equality of combatants discourages a moralized perception of war with its corresponding crusading mentality, and instead promotes among combatants the view of themselves and their adversaries as professional warriors with a job to be done well, with honour and without rancour. If both sides can be persuaded to adopt this view, it is likely to work to the benefit of all, and to the benefit of civilian populations, without unduly jeopardizing the ability of just combatants to achieve their ends.

The rejection of the legal equality of combatants would also carry the risk that, in cases in which it is fairly obvious to unbiased observers that one side in a war is in the wrong, and in which the world begins to point an accusing finger at the combatants on that side and to charge them with criminal action, this will provoke defiance and a renunciation of all restraint. Witness, for example, the pugnacious intransigence of Serbian forces in response to the global condemnation of their various aggressions in the 1990s. And self-righteous moral obtuseness is only one form that defiance may take. Unjust combatants who take the pointing finger seriously may conclude that because *anything* they might do in war would be wrong—that no course open to them other than desertion or surrender is morally or legally permissible—they might as well abandon all restraint in order to win the war as quickly and decisively as possible, thereby affording themselves as much protection as possible, since if they win, it will be more difficult to prosecute and punish them.

2.4.3. Indeterminacies of Moral Status

One last reason why it is important to retain the legal equality of combatants is that the division of combatants into only two moral categories—just combatants and unjust combatants—is in many cases an oversimplification. I have written

as if one side in war fights for a just cause while the other fights for an unjust cause. And indeed the received wisdom is that it is not possible for both sides to fight with just cause; therefore, either only one side has a just cause or neither does. Each side's cause, it is generally assumed, is singular and morally unitary: it is either just or unjust. But there are in fact various types of aims that may legitimately be pursued by means of war and thus are just causes for war. I suspect that the common tendency to think of just cause as singular rather than plural derives primarily from the insistence of the UN Charter that the only justification for the resort to war without authorization from the Security Council is national self-defence. But this tendency is also encouraged by the common assumption that a just cause for war must be an aim that is sufficiently important to justify a course of action as drastic as the resort to war—that is, that a just cause must be an aim that is overridingly important in the circumstances. I think, however, that this is a mistake, based on the conflation of the requirement of just cause with the *ad bellum* requirement of proportionality. There can be a just cause for war that is not sufficiently important to justify the resort to war. In that case, war is ruled out because it would be disproportionate and not because it would not achieve a just cause.¹¹

Given this understanding of just cause, it is possible for a country to be justified in going to war because it has *various* just causes for war that are together sufficient to make war proportionate, even though none would be sufficient on its own. But it is also possible for a country to have a just cause for war, or a set of just causes for war, sufficient to justify its being at war, but at the same time to pursue other aims that are unjust. In such a case, some of the missions that the military forces of the country would undertake would support a just cause, while others would support causes that are unjust. And some of their missions might contribute to the achievement of both just and unjust causes. The members of such a military force will therefore be neither unambiguously just combatants nor unambiguously unjust combatants. They may be morally liable to attack in some of their actions but not in others.

Their just missions ought not to be opposed. But their unjust missions ought to be. And that means that those who oppose their unjust missions are, in that capacity, just combatants. Perhaps those who oppose these unjust missions ought not to be at war at all. That would be true if their adversary's just aims ought not to be resisted and their own just aims are not sufficient to make their war as a whole

¹¹ For elaboration, see 'Just Cause for War', pp. 3–4. I now believe, however, that much of what I say in that article about the relation between just cause and proportionality is mistaken. There are, I now think, two *jus ad bellum* proportionality requirements, one that governs the infliction, usually intentionally, of harms to which the victims are liable, and another that governs the infliction, usually as a foreseen but unintended side effect, of harms to which the victims are not liable. Only those goods that consist in the achievement of the just cause count in the first of these proportionality calculations. But any good effects capable of compensating people for unintended harms to which they are not liable may count in the second. This more complex understanding of the relation between just cause and proportionality is defended in Chapter 5 of a book I am writing called *The Morality and Law of War* (forthcoming).

proportionate. Still, given that they are already at war, perhaps it is permissible in the context to resist their adversary's unjust missions. Those aspects of their war might be just even though overall their war is unjust.

There are various questions that arise here about the moral status and liability of combatants whose war supports both just and unjust aims. What is their status during missions that will contribute to the achievement of both just and unjust aims? Are they liable to attack while they are not engaged in combat—for example, when they are sleeping, or living in areas well beyond the combat zones, or are travelling from one area to another—given that in future they might fight only for just aims, or only for unjust aims, or for both? Even if their moral status were fully determinate at all times, if it depended on facts about what their mission was intended to achieve or what it was likely to achieve, it would be almost impossible for their adversaries to know what their status was at any given time.

With all this complexity and epistemic uncertainty, it may not be possible, in many cases, to distinguish cleanly between just and unjust combatants. In such a situation, the legal equality of combatants seems to be the necessary and inevitable default position.

There are similar pragmatic arguments in favour of the principles of non-combatant immunity and the privileged status of prisoners. Although it may be true, as I argued, that some non-combatants on the unjust side in a war (putting aside for the moment the complexities noted in the preceding subsection) are morally liable to attack by virtue of their role in fomenting or facilitating an unjust war, it remains true that whatever is legally permitted to the just will also be done by the unjust. If just combatants are permitted on rare occasions to attack non-combatants who are liable, it is inevitable that unjust combatants will attack unjust combatants who are innocent—and *all* non-combatants on the just side are innocent in the relevant sense in war. And even just combatants would be tempted to find liability among non-combatants where it would not actually exist. Hence, a non-neutral legal rule that would permit just combatants to attack non-combatants who met certain criteria for liability would be likely to have disastrous effects in practice. Since a neutral legal rule prohibiting intentional attacks on non-combatants by anyone would not deny the right of self-defence to the just, but would deny them just one option that would otherwise be morally permissible only on rare occasions, it seems clear that that is the rule we should have.

There may also be rare occasions on which, at least in the absence of a legal rule forbidding it, the killing of prisoners of war by just combatants could be morally permissible.¹² But, again, a non-neutral rule that would deny certain rights to unjust combatants who have been taken prisoner that it would grant to just combatants in similar conditions would in practice invite the denial of those rights to all. In the long term, it would be better for all, and more just, to uphold a neutral legal rule that guarantees to all prisoners of war as many of the protections that are owed to captured just combatants as a matter of moral right as it is reasonable to expect that unjust combatants could grant them. (The non-neutral principles

¹² For discussion, see my 'The Sources and Status of Just War Principles', Section 4.

of morality recognize a right of just combatants not to be taken prisoner at all, for they are doing nothing that could morally justify imprisoning them, just as they are doing nothing that could justify killing them. But a neutral principle of law cannot, for obvious reasons, recognize a right against capture.)

2.5. A TWO-TIERED MORALITY OF WAR

What these pragmatic arguments for the three legal principles I have discussed show is that the principles of the basic, non-conventional morality of war as I conceive it cannot be translated directly into law. Orthodox theorists of the just war resist this claim, arguing that the principles of the moral equality of combatants, non-combatant immunity, and the privileged status of prisoners are given directly by the moral rights that people have independently of law, convention, or agreement. Political realists conclude from these pragmatic considerations that morality is irrelevant to the regulation of war. I, by contrast, believe that what they show is that morality itself demands a two-level understanding of war.

My view, though it is certainly not shared by certain schools of legal thought, is that the main purpose of the criminal law, and of various other areas of the law as well, is to induce people to conform their behaviour as closely as possible to the requirements of morality. But the law cannot simply restate the requirements of morality. It has to be formulated to take account of the likely effects of its promulgation, institutionalization, and enforcement. This is familiar ground. There are forms of seriously wrongful action that resist effective regulation by the law. For example, a pregnant woman who injures her foetus through consumption of tobacco, alcohol, or other drugs, or even through reckless or negligent eating practices, seriously wrongs her child in ways that may adversely affect the whole of its life. But efforts to criminalize maternally inflicted prenatal injury are highly problematic. Attempts made *during pregnancy* to monitor compliance with a law intended to deter prenatal injury would have to be highly intrusive, violating women's rights to privacy, while attempts to enforce compliance through post-natal prosecution would establish perverse incentives for abortion or other harmful practices (such as avoidance of prenatal and post-natal health care) intended to conceal possible prenatal injuries or to disguise their cause.¹³

Another possible example of the necessary divergence between law and morality concerns the penalty for rape. Suppose for the sake of argument that it is true that some people can deserve to die and that the death penalty can be justified in some cases. And suppose it is also true that rape is such a serious crime that some rapists can deserve to die. It would nevertheless be wrong—indeed, morally wrong—to punish rape with death. For if rape were punishable by death, the punishment for rape would be no worse than the punishment for rape *and* murder. It would then

¹³ On the moral problems associated with prenatal injury, see McMahan, Jeff, 'Paradoxes of Abortion and Prenatal Injury', *Ethics* 116/4 (2006), 625–55.

be in the interests of rapists to kill their victims, since that would reduce their risk of identification and capture but would not increase the penalty they would face if caught.

Similar problems arise in the international law of war. Ideally, we would like for the laws of war to coincide as closely as possible with the requirements of morality. But here too, morality itself requires that the formulation of the law take account of the likely consequences of its promulgation and attempted enforcement. The laws of war must, for example, mitigate and contain the destructive effects of war rather than exacerbate them. And the obstacles to achieving congruence between the first-order principles of morality and the law are even more formidable in international law than they are in domestic law. This is because in the domestic sphere, we have been able, over many centuries, to establish institutions—police forces, courts, penal institutions, and so on—that have considerably reduced the pragmatic barriers to codifying the requirements of morality directly in the law.

The idea that the practice of war may be governed by more than one set of principles deriving from different sources can be found at least as early as Grotius, who argued that war may be evaluated and regulated by reference to three different types of principles: universal principles of natural law, agreed principles of the law of nations, and individual codes of honour.¹⁴ Indeed, the distinction between the first two of these three types of principles corresponds quite closely to the distinction which have appealed between morality and law. The laws of nature, on the one hand, are not invented but discovered and are invariant over time and across cultures. They are moral principles that are grounded in the nature of things and are thus independent of convention or agreement. The law of nations, on the other hand, is a product of the will. It is devised and accepted in order to serve certain purposes, including, in particular, moral purposes. Thus, Grotius sometimes refers to the law of nations as ‘volitional law’, to distinguish it from the law of nature by its source in human choice and agreement.¹⁵

There is today a broad tendency to discuss the ‘rules of war’ without indicating whether these rules are to be understood as moral rules, legal rules, or both. Yet, it is often also suggested that these rules are not discovered but are instead designed to serve certain purposes. George Fletcher, for example, writes in defence of the equality of combatants that ‘the *reason for adopting* a rigorous distinction between *jus ad bellum* and *jus in bello* is the need for a bright-line cleavage that is workable in the field of battle. Combatants do not have to think about who started the war. They know that, whoever started it, certain means of warfare are clearly illegal’.¹⁶ And Larry May contends that ‘the rules of war are *designed* to help societies, and States, meet their responsibilities towards those [their own combatants] who have had their vulnerability increased by that same society, or State’.¹⁷ Many of those

¹⁴ For relevant discussion, see May, Larry, ‘Collective Responsibility, Honor, and the Rules of War’ (unpublished manuscript), p. 3.

¹⁵ Grotius, Hugo, *De Jure Belli Ac Pacis Libris Tres*, translated by Francis W. Kelsey (Oxford: Clarendon Press, 1925), reprinted by William S. Hein & Co. (Buffalo, NY, 1995), pp. 38–40.

¹⁶ *Justice in the Face of Enemy Fire*, Chapter 6 (emphasis added).

¹⁷ ‘Collective Responsibility, Honor, and the Rules of War’, p. 12 (emphasis added).

who hold that the rules of war are thus artefacts devised by human beings to serve certain functions do not take the same view of the principles of morality. Nor should they. They thus implicitly acknowledge a distinction between basic, non-conventional moral principles and conventional or legal principles, both of which may simultaneously govern the practice of war.

One difference between basic, first-order principles of the morality of war and at least some of the conventional or legal rules of war is that the binding force of the latter may be conditional on compliance by the other side. When the different parties agree to abide by a certain rule because universal compliance is better for all than compliance by neither, the violation of the rule by one side may have the effect of releasing the other from its duty of compliance. Whether a party that has thus far complied with a conventional law of war has a reason, moral or legal, to continue to comply when another party has begun to violate that law may depend simply on whether the violator is more likely to be motivated to resume compliance by reprisals in kind or by a show of good faith in continued adherence by its adversary. If, for example, one side begins to use a prohibited weapon, such as poison gas, the other side may have no reason to continue to refrain from using poison gas itself other than to encourage a resumption of compliance by the violator.

In this respect, at least some of the laws of war are different from both domestic laws and the principles of the morality of war. Even when a domestic law is entirely conventional in nature—that is, when there is no moral reason to obey it other than that general obedience is better for all than not to have it at all—its violation by some does nothing to release others from their legal obligation of obedience. The main reason why some laws of war are different from domestic laws in this respect is that domestic laws can be effectively enforced. Violations are addressed by neutral enforcement mechanisms rather than by self-help on the part of the victims. The principles of non-conventional morality are more different still. Their demands are categorical. Not only are they not suspended by violations by others, but they are also not suspended in the absence of effective enforcement. If our adversaries violate certain laws of war, we may then be legally and perhaps morally released from obedience to them. But our reason to abide by the requirements of the non-conventional morality of war (e.g. the prohibition of intentional attacks against the innocent) is wholly unaffected by the action of our adversaries and is independent of whether there are effective means of compelling their adherence.

My suggestion, then, is that we distinguish sharply and explicitly between the morality of war and the law of war. The morality of war is not a product of our devising. It is not manipulable; it is what it is. And the rights and immunities it assigns to unjust combatants are quite different from those it assigns to just combatants. But the laws of war are conventions that we design for the purposes of limiting and repairing the breakdown of morality that has led to war, and of mitigating the savagery of war, seeking to bring about outcomes that are more rather than less just or morally desirable. For the reasons given in Section 4, the laws of war must be mostly or entirely neutral between just and unjust combatants.

They should be equally satisfiable by both. The laws of *jus in bello* must be largely or wholly independent of the laws of *jus ad bellum*.

Jus ad bellum therefore divides into a wholly non-conventional morality of the resort to war and a set of ideal laws governing the resort to war. *Jus in bello* divides in the same way. I believe, though I will not attempt to argue for this here, that the divergence between the non-conventional morality of war and the ideal laws of war will be significantly more pronounced in the area of *jus in bello* than in the area of *jus ad bellum*.

The non-conventional principles of *ad bellum* morality apply to all those involved in the making of war. If a war would be unjust, political and military leaders must not order it to be fought. But if they do, individual soldiers must not fight and will wrong their adversaries if they do. The principles of *in bello* morality also apply both to leaders and to combatants. Leaders must not order acts that violate them and combatants must not violate them, even when ordered to do so.

The legal rules of *jus ad bellum* should apply only to political leaders and high-ranking military officers—that is, to those who are authorized to make decisions about whether or not to go to war. These people are not only accountable for adherence to the principles of *ad bellum* morality but must also be liable to punishment for violating the laws governing the resort to war. Individual combatants, by contrast, should not be held legally liable for the violation of *ad bellum* laws. For the various reasons given in Section 4, they must not be subject to legal punishment merely for fighting in a morally unjust or illegal war. For them, *ad bellum* morality and law alike are matters of individual conscience, though they are no less important for that.

2.6. OBJECTIONS

Thus far I have argued that at least in present conditions, the laws of war must diverge substantially from the basic, non-conventional morality of war. In general, morality forbids unjust combatants to attack just combatants, but the law permits this.¹⁸ The law forbids the intentional killing of non-combatants and prisoners of war, while in some cases, morality may permit or even require the killing of persons in these legally protected categories. There are, however, general objections to the idea that the law of war must diverge in substantial ways from morality. Some of those objections do not depend on the identification of any specific alleged differences between morality and law. I will now consider two such objections.

¹⁸ There are some instances in which morality permits unjust combatants to attack just combatants. These are cases in which the use of force is necessary to prevent just combatants from pursuing their just cause by immoral means. See McMahan, Jeff, 'The Ethics of Killing in War', *Ethics* 114 (2004), 712–13.

2.6.1. Conflicts Between Morality and Law

One challenge asserts that we must speak to those engaged in the activity of war, or those considering whether to become engaged in that activity, with a single voice. But if the morality of war and the laws of war are different, they can conflict. How can such conflicts be resolved?

There are really two questions here. One is how conflicts would in fact be resolved if it were generally recognized that they are possible. I think the answer to this is fairly obvious. Since the laws of war would be codified and would therefore be explicit and reasonably precise and determinate, well understood, and largely uncontested, while the morality of war would remain obscure, poorly understood, and controversial. Violations of the laws might also carry sanctions. Both combatants and political leaders would therefore be likely to follow the laws of war rather than the morality of war in cases of conflict—if, that is, they would follow either.

The important question is which they *ought* to follow. To answer this, we need first to identify the different types of conflict that are possible. Assume that both morality and law can permit, prohibit, or require certain forms of action. This yields six *prima facie* forms of conflict. I will discuss each in turn. These forms of conflict can arise either within the domain of *jus ad bellum* or within the domain of *jus in bello*. As I noted earlier, I think that conflicts will be more numerous or pervasive within the area of *jus in bello*, but I will assume that the rational resolution of conflicts does not differ significantly between the *ad bellum* moral and legal rules and those of *jus in bello*.

One type of conflict is that in which a principle from one domain permits a certain act or form of conduct while a corresponding principle from the other domain forbids it. Thus, the morality of war might permit a certain act while the laws of war would forbid it, or morality might forbid it while the law would permit it. This is not a serious form of conflict. In each case, one ought to obey the prohibition.

A second type of conflict is that in which a principle of one type requires a certain act while the corresponding principle of the other type permits one not to do it. Again, this is not a serious form of conflict. If morality requires an act that the law permits one not to do (i.e. that the law neither requires nor forbids), or if the law requires an act that morality permits one not to do, one ought in either case to obey the requirement.

The only potentially serious conflicts are those in which morality forbids what the law requires and those in which morality requires what the law forbids. It may well be, however, that conflicts of the first sort will seldom, if ever, arise; for in general, the laws of war do not require positive acts (e.g. self-sacrifice) but instead prohibit various forms of action. If that is right, we need not worry about this form of conflict in practice.

It might be objected that I earlier claimed that morality prohibits participation in a war that lacks a just cause; but if that is so, then this form of conflict in fact occurs very commonly, because participation in unjust wars is very commonly

required by law. This is not, however, a counterexample to my claim that in practice the laws of war do not require what morality forbids. For the laws that may require participation in an unjust war are not the international laws of war or even laws of war that might be specific to a particular country. They are, rather, domestic laws pertaining to conscription or domestic military laws concerning contractual or other obligations of serving military personnel. The claim that morality forbids even combatants on active duty to participate in a war that lacks a just cause is certainly unsettling to many people; but what it conflicts with are not the laws of war but well-established expectations of societies and military organizations about the obligations of citizens and combatants in wars authorized by the government.

This leaves the last of the six possible forms of conflict: when morality requires what the laws of war forbid. Again, there is reason to doubt that instances of this form of conflict will be extensive. But there is one significant possibility. If I am right that the criterion of liability to attack in war is moral responsibility for a wrong that provides a just cause for war, or for a threat of unjust harm, then some civilians will be liable to attack in certain conditions—for example, when certain civilians bear a high degree of responsibility for their side's unjust war, when attacking them would significantly contribute to the achievement of the just cause, and when attacking them would not cause disproportionate harm to the innocent. Given such conditions, it could in some instances be morally *required* to attack them. If we assume that the ideal laws of war will continue to prohibit intentional attacks on civilians, this would be a serious conflict between the morality of war and the laws of war.

Before I suggest how I think such conflicts should be resolved, it is worth emphasizing how unlikely this type of conflict would be. First, even if responsibility for wrongs whose prevention or correction constitute a just cause for war can make civilians liable, in most cases, the degree of their responsibility will be low; hence they would not be liable to military attack, for that would be disproportionate to the degree of their responsibility. (They might, however, be liable to lesser harms, such as those caused by the imposition of economic sanctions or a demand for reparations.) Second, because civilians or non-combatants in general make little or no material contribution to the threat their country poses, there are very few ways in which attacking them might be instrumental in advancing a just cause. And, third, even that small proportion of the population whose degree of responsibility would be high enough to make them liable to military attack are normally mingled with others who bear lesser responsibility or no responsibility at all, so that it would be difficult or impossible to attack them without attacking the others as well. For these reasons, military attacks against civilians or non-combatants will almost inevitably be disproportionate.

There is one further reason why this one serious form of conflict may arise only rarely. This is that, because there are moral reasons for having laws that can potentially conflict with the first-order demands of morality, morality itself will require the violation of the law only after taking into consideration the effect that a violation of the law of war might have on general respect for the law. If a violation

of the law of war would diminish the future effectiveness of the law, this provides a further moral reason to obey rather than to violate the law.

But one must not evade the challenge by appealing to the improbability of this kind of conflict between morality and law. When the morality of war requires what the law forbids, I believe that one must do what morality requires. And those who violate the law for moral reasons ought not, in general, to conceal the violation but ought instead to acknowledge what they have done and cite their moral justification for having done it. In this way, they demonstrate their respect for the law, thereby encouraging a general climate in which even morally motivated violations of the law are exceptional and undertaken only with reluctance. This is important precisely because it is so easy for people to persuade themselves that their own violations of the law are morally necessary.

There are parallels between morally motivated violations of the laws of war and acts of civil disobedience in domestic society, though there is this important difference: that civil disobedience is practised with the aim of trying to change a law that is perceived to be unjust, whereas a morally motivated violation of a law of war need not challenge the law or even make a claim of justification in the legal sense of asserting that, appearances to the contrary, no violation has in fact occurred. When morality requires the violation of the law of war, the violator ought to concede the violation but make a plea for leniency by appealing to a higher form of justification.

These conclusions are troubling, for it seems a serious defect in the law to penalize people for their adherence to the demands of morality. This is not, however, the ordinary sort of defect that involves the malfunctioning of the law. When a person is punished for a morally motivated violation of the laws of war, the law is in a clear sense operating exactly as it ought to, fulfilling the functions that morality itself assigns to it. This kind of defect seems ineliminable if it is true that the non-conventional morality of war and the laws of war cannot coincide.

2.6.2. Motivating Compliance with the Laws of War

A second objection is that if the laws of war are acknowledged to be different from the non-conventional morality of war—to be rules devised merely for the achievement of certain purposes—it will be difficult to achieve the level of compliance that would be achievable if combatants and political leaders believed instead that these laws were deep, non-conventional requirements of morality. Suppose that, as I have suggested, some civilians can in principle be morally liable to attack in war but that the laws of war that would be ideal in present conditions would include a prohibition of the targeting of civilians. If combatants are told that although there are moral reasons for having the legal prohibition of targeting civilians, the targeting of civilians is not always morally wrong, they are likely to be less scrupulous in observing the prohibition than they would be if they believed that it expressed a categorical demand of morality, so that if they were to violate it, they would not be mere lawbreakers but murderers. It may, therefore, work against the

purpose and effectiveness of the law to draw a sharp distinction between the laws of war and the morality of war.

There are several possible responses to this objection. One is to note that claims about the necessity of this or that belief for motivating restraint have proved to be notoriously fallible. It has, for example, been frequently claimed by Christians and other theists that belief in God is necessary to motivate adherence to morality. But comparisons between largely secular countries, such as Sweden, and highly religious countries, such as the United States and Afghanistan, offer little comfort to those who persist in holding this belief.

It is also worth noting that most people recognize that domestic law diverges from morality in various ways and yet are not obviously more prone to violate the law than they would be if they thought it reflected more perfectly the demands of morality. This may, of course, be because in domestic society, people have various different reasons to obey the law, including the threat of punishment, so that even when people do not believe that the law directly expresses the demands of morality, the other reasons are usually sufficient to motivate compliance. It is precisely the point of the law to supply the requisite motivation to those who are not or even cannot be motivated by moral considerations alone to act in ways that are socially necessary or desirable. If that is right, a belief that the law is a direct expression of morality may be more important in motivating compliance with the laws of war, for those laws are notably more difficult to enforce than domestic laws are. It is often reasonable for combatants to expect that they will be exempt from punishment by their own government for violations of the laws of war, especially since governments are often complicit in violations of the laws of war committed by their own forces. And combatants could anticipate punishment by an enemy government only if they expected to lose the war—and in any case, granting the right to punish to victors in war would be a mistake, for reasons given earlier.

If, however, we could create impartial international courts with the authority and the ability to punish infractions of the laws of war, those laws could then be more effective in controlling the conduct of war. The prospect of punishment through an international court could motivate compliance with the laws of war without our having to claim that the laws are direct expressions of the demands of morality, thereby perpetuating the conflation of law and morality.

An alternative response is to urge that if the law must diverge from morality, we ought not to trumpet this about but should maintain the illusion of congruence by promulgating an account of the just war that coincides closely with the law of war. We should, in other words, at least pretend to accept the currently dominant version of the theory of the just war. Yet, there are obviously numerous objections to this proposal—for example, that it would require large-scale deceit, that the discovery of the deception would threaten the authority of the law and thus its ability to contain the violence of war, that the representation of the laws of war as objective and immutable moral principles would inhibit or impede efforts to reform the law, and so on. It is hard to see this proposal as a realistic option.

Perhaps the best response to this second objection to the explicit separation between the morality of war and the laws of war is simple candour. Combatants

and others should be told that although the laws of war have been formulated to coincide as closely as possible with non-conventional moral principles, and although their formulation has been guided by moral considerations to serve moral purposes, they nevertheless diverge in important respects from the principles of the non-conventional morality of war. There may, therefore, be some instances in which morality requires the violation of the law. But the presumption is against violation and combatants should be reluctant to give their individual judgement priority over the law, for the law has been designed in part precisely to obviate the need for resort to individual moral judgement in conditions that are highly uncondusive to rational reflection.

Finally, it is reasonable to expect that people can be motivated to obey the law when they recognize that general obedience is to everyone's advantage, including their own. Most combatants are capable of recognizing that there is no significant moral difference between killing enemy combatants by tearing their bodies apart with explosives and killing them with poison gas. Yet, the legal prohibition of poison gas has nevertheless been highly effective, presumably for the simple reason that most people recognize that it would be worse for everyone to introduce the use of gas.

2.7. A LEGAL REMEDY?

I will conclude by briefly sketching a vision that I hope is not altogether utopian. As I argued earlier, some of the most serious obstacles to bringing the law of war closer to the morality of war derive from epistemic constraints. It is, in particular, difficult for individual combatants to be justifiably confident in their private judgement about matters of *jus ad bellum*. This is in part the result of the absence of any impartial and recognizably authoritative source of pronouncements on these matters that could counter the normally distorted and always partisan pronouncements of their own government. In this situation, it is easy for all combatants, just and unjust alike, to believe that their cause is just. This is the principal obstacle to the formulation and implementation of non-neutral laws that would accord rights to just combatants that they would deny to unjust combatants. And the fact that unjust combatants generally, and not always wholly unreasonably, believe their war to be just is also an important excusing condition that mitigates their liability in war and may therefore impose certain requirements of restraint on just combatants that may increase the risks they face and impede their ability to achieve their just cause.

These are only a few of the problems traceable to the absence of authoritative guidance in matters of *jus ad bellum*. Much could change if such guidance were available. Suppose, for example, that we could formulate a philosophically informed body of law about matters of *jus ad bellum*. It would have to be vastly more sophisticated and complex than the crude state of the law today, which makes self-defence against aggression the only legal justification for war in the

absence of authorization by the Security Council, but does not even contain an agreed definition of aggression and otherwise leaves matters to the discretion of the Security Council, which is composed not of independent moral and legal thinkers but of diplomats who take orders from their governments. But suppose that we could develop a body of law about what constitutes a just cause for war, when pre-emptive or preventive force is justified, and so on that would be modelled as closely as possible on the moral principles that are best supported by philosophical argument. And suppose further that we could create a neutral, impartial, international court empowered to apply the law to particular cases—not just in the aftermath of war but during the course of war and, ideally, even prior to the initiation of war. If such a court were to operate according to procedural rules that were carefully designed to yield judgments about just cause, necessity, proportionality, and so on that would have the highest possible degree of epistemic reliability and were widely recognized as such, its determinations could serve as the foundation for a revision of the *in bello* laws of war that would bring them into greater harmony with the morality of war.

If, for example, such a court could judge in advance of the outbreak of war that one side would have a just cause and the other would not, this could provide the basis for holding the combatants on the side without a just cause to a different standard from that to which the just combatants would be held. It would provide a basis for holding the unjust combatants legally liable for participation in the war, denying them certain excuses to which they might otherwise appeal in claiming exemption from legal liability. It might also release the just combatants from a duty they might otherwise have had to exercise certain forms of restraint on the ground that their enemies could not reasonably be expected to know that their war is unjust. Such a court could, in other words, undermine the pragmatic case for the legal equality of combatants.

There are, no doubt, a great many obstacles and objections to the formation of such a court even quite apart from the opposition that can be anticipated from powerful states, such as the United States, which would resist the imposition of any constraints on their ability to pursue their interests with impunity. One such obstacle derives from the problems I noted earlier in Section 4.3. While it may normally be true that only one side in a war is justified in resorting to war, or being at war, it is compatible with this that the side that has this justification might pursue unjust aims along with its just aims. And while combatants on the other side are not morally permitted to resist their adversaries' just aims, they may be permitted to resist their unjust aims, given that fighting is in progress. In conditions such as these, it might be difficult for the international court to issue a determination of each side's war as either just or unjust or, more particularly, to designate all combatants on one side as just combatants and all on the other as unjust combatants. The moral status of an individual combatant might have to be relativized to particular roles, or particular missions, rather than to the justice of his or her side's war as a whole.

I acknowledge this problem without, however, pursuing it further here. This is not the place to consider whether it could ultimately be feasible to have a

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philosophically sophisticated body of law on matters of *jus ad bellum* and an impartial international court to interpret and administer it. The most important point for my purposes here is that simply imagining or envisioning the possibility of these legal arrangements may help us to adjudicate between the understanding of the relation between the morality of war and the law of war for which I have argued and the more familiar understanding according to which the law already coincides quite closely with morality. According to the view for which I have argued, an international court empowered to administer a richer, more detailed, and more nuanced law of *jus ad bellum* would enable us to abandon the legal equality of combatants, and that would be a great advance in bringing the law into harmony with morality. Yet, according to the dominant contemporary version of the theory of the just war, which endorses the moral equality of combatants, the principle of non-combatant immunity, and the inviolability of prisoners of war, all at the level of basic, non-conventional morality, the court I have imagined and the law it would administer would be mistakes. They would create a gap between law and morality that does not now exist. According to this view, making progress in the international law of war would be mainly a matter of creating more effective mechanisms of enforcement of the existing neutral laws that permit combatants on both sides to fight with impunity. Intuitively, the contrast here seems to support my view.¹⁹

¹⁹ I am grateful to Uwe Steinhoff and Larry May for perceptive comments on an earlier draft of this essay.