

(1) Because *there is no alternative system available!* This may appear simplistic, but considering the time it takes to have new rules of international law universally ratified, the argument should not be underestimated. Additionally, the system continues to function in most of today's conflicts.

(2) For *humanitarian reasons*: the victims of armed conflicts (i.e., those who are not or no longer involved in hostilities) deserve as much protection against a belligerent fighting in conformity with *jus ad bellum* as against an enemy who has violated *jus ad bellum*.

(3) And, finally, because *otherwise IHL simply doesn't work!* This was made very clear by Hersch Lauterpacht, who observed that “[i]t is impossible to visualise the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from them without being bound by them.”⁶

More than fifty years after they were issued, these words remain, in our view, absolutely relevant.

MORALITY, LAW, AND THE RELATION BETWEEN *JUS AD BELLUM* AND *JUS IN BELLO*

*By Jeff McMahon**

The distinction between *jus ad bellum* and *jus in bello* was drawn in the traditional theory of the just war long before it appeared in modern international law. The theory of the just war is a theory about morality, not law—although most of its earlier proponents understood it as an account of the *natural* law. In this moral theory, the main reason for the traditional insistence on the separation of *jus ad bellum* and *jus in bello* is that the two doctrines must be independent if the orthodox doctrine of the “moral equality of combatants” is to be justified. The moral equality of combatants is the view that all combatants, irrespective of whether they fight in a just or unjust war, have the same rights, immunities, and liabilities. Under this view, a combatant is not guilty of wrongdoing merely by virtue of fighting for an unjust cause, or in an unjust war.

According to the traditional theory of the just war, responsibility for matters of *jus ad bellum* lies with the sovereign, not his soldiers. In Shakespeare's *Henry V*, the king, disguised as an ordinary soldier, is conversing with some of his soldiers on the eve of the battle of Agincourt. He remarks: “Methinks I could not die anywhere so contented as in the King's company, his cause being just and his quarrel honorable.” One soldier replies: “That's more than we know,” whereupon a second says: “Ay, or more than we should seek after; for we know enough if we know we are the King's subjects: if his cause be wrong, our obedience to the King wipes the crime of it out of us.”¹

What I will argue is that the doctrine of the independence of *jus in bello* from *jus ad bellum*, and its implication that whether the war in which a combatant fights is just or unjust, has no bearing on that combatant's rights and liabilities in the conduct of war, and no foundation in the basic, nonconventional morality of war. If it is desirable in law—and I think it is—to have rules for the conduct of war that are neutral between those who fight in a just cause and those who do not, there must be substantial divergence between the basic, nonconventional morality of war and the law of war.

⁶ Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L L. 206 (1953).

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¹ Please provide a cite for this.

The fundamental reason why, as a matter of basic morality, the principles of *jus in bello* cannot be independent of those of *jus ad bellum* is that it is simply not morally permissible to fight in a war with an unjust cause. This is so for a number of reasons, one of which is that acts of war that promote an unjust cause cannot be proportionate, since any good effects they have are not of the sort that can justify being at war and hence cannot outweigh the serious forms of harm that war inflicts.

Neither can acts of war that promote an unjust cause be discriminate. Let us refer to those who fight in a just war as “just combatants” and to those who fight for an unjust cause as “unjust combatants.” My claim is that acts of war by unjust combatants cannot be discriminate because just combatants are innocent in the relevant sense and are therefore not legitimate targets.

This may seem a strange claim. For in the context of war, “innocent” is usually treated as synonymous with “civilian,” and just combatants certainly are not civilians. But in fact the term “innocent” has *two* uses in discourse about war that are commonly assumed to coincide. My claim invokes the *other* sense, according to which the innocent are simply those who have done nothing to lose their right not to be attacked. Just combatants are innocent in this sense because people do not lose rights by justifiably defending themselves or other innocent people against unjust attack. So even when unjust combatants confine their attacks to military targets, they kill innocent people.

Most of us believe that it is normally wrong to kill innocent people even as a means of achieving a *just* goal. How, then, could it be permissible to kill innocent people as a means of achieving goals that are *unjust*?

For these and other reasons, unjust combatants act wrongly when they fight for an unjust cause. If this is right, the doctrine of the moral equality of combatants is false. And so is the idea that the moral principles of *jus in bello* can be independent of those of *jus ad bellum*. What is morally permissible to do in war (a matter of *jus in bello*) depends crucially on whether one has a just cause (a matter of *jus ad bellum*).

Why has almost everyone thought otherwise? There are, of course, arguments for the view that unjust combatants do not do wrong merely by participating in an unjust war. One appeals to the idea that the obligation that people may have to fulfill a role within a just institution can sometimes make it permissible for them to act in ways that would otherwise be impermissible. Consider, for example, domestic legal institutions. These institutions serve morally important functions but could not do so efficiently if people failed to fulfill their roles within them. Lawyers, for example, must seek acquittal even for clients they believe to be guilty, and jailers must keep people in prison even when the jailers believe those people to be innocent.

Similar claims can be made about combatants in the military. The military is a morally important institution but cannot function efficiently unless combatants obey the orders they receive from others higher in the chain of command. The need to maintain the efficient functioning of this morally important institution is thus what makes it permissible for combatants to obey orders to fight, even when the war turns out to be unjust.

This argument has considerable plausibility, but its implications for participation in an unjust war are limited. First, it applies only to combatants who serve in military institutions that are just overall and serve a legitimate government. Therefore, it cannot support the moral equality of *all* combatants because some unjust combatants serve institutions that are unjust or illegitimate. Second, there are limits to what people can be morally permitted to do by their role within a just institution. Even if the limits are set quite high, many of the

forms of action required by participation in an unjust war, such as the killing of people who have done no wrong, lie beyond them.

A second claim that can be invoked on behalf of the moral equality of combatants is that if it is *reasonable* for a combatant to believe that a war in which he has been commanded to fight is just, then it is permissible for him to fight in it, even if in fact the war is unjust. But even if this claim is true, it is not true that all unjust combatants are epistemically justified in believing that their war is just. While it may be reasonable for some to believe that their war is just, it may not be reasonable for others, who have or could have sufficient information to determine that the war is unjust. And many unjust combatants fight in full awareness that the war is unjust, though they may have been persuaded by the conventional wisdom to believe that they are not acting wrongly by participating in it.

These are the best arguments for the moral equality of combatants. But they fail to show that unjust combatants generally act permissibly in fighting in an unjust war. They do, however, indicate some of the many exculpating conditions that typically apply to the action of unjust combatants. Even if unjust combatants act wrongly in fighting in an unjust war, most are not evil or criminal but are ordinary people placed in extraordinary circumstances by forces over which they have little control.

This is one reason why ordinary combatants ought not to be held criminally liable for mere participation in an unjust war. If they could be given fair trials by an impartial international body, most would have excuses that would exempt them from severe punishment. Such trials would therefore be a waste of *post bellum* resources. If ordinary combatants could be tried by the victor, the result would likely be indiscriminate vengeance. Thus it would be a mistake, for pragmatic reasons, to make participation in an unjust war a crime. For to do so would have little deterrent effect, since most unjust combatants believe that their war is just, but could lead to terrible injustice in the aftermath of a war.

It would, however, be absurd to exempt unjust combatants from punishment for killing the innocent while subjecting just combatants to prosecution for war crimes if they kill the innocent. This suggests the need, in law, for neutral rules that can be satisfied by both just and unjust combatants—for example, a rule prohibiting intentional attacks on civilians. These are precisely what we have at present in laws of war that presuppose the independence of *jus in bello* from *jus ad bellum*.

My claim is that the justification for these neutral laws is pragmatic. Neutral laws are necessary only because they have better consequences than laws that discriminate between just and unjust combatants, not because they correspond more closely to what morality and justice demand.

THE DANGER OF CONFLATING *JUS AD BELLUM* AND *JUS IN BELLO*

*By Julie Mertus**

An old-fashioned red woman's bicycle, with a tan leather seat and wicker basket.

A half-packed black canvas suitcase and a silver Ipod.

The everyday stuff of war.

At the American War Museum today in Hanoi, Vietnam, the red women's bicycle is displayed proudly in a glass case to honor the elderly woman who rode a similar bike into

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