

The moral status of combatants during military humanitarian intervention

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I

One of the most important recent debates in just war theory has been concerned with the moral status of combatants.² Unfortunately, though, participants in this debate have neglected its implications for the ethics of military humanitarian intervention (abbreviated as MHI hereinafter) and *vice versa*. This article tries to close the gap in the literature. In a nutshell, it argues that, while MHI challenges the main theoretical approaches in the field, the so-called Neo-Classical View, suitably conceived, offers a coherent and normatively attractive account of the status of combatants during an interventionist campaign. In order to defend this claim, the article proceeds in five steps. Part II introduces the two dominant contemporary approaches to the status of combatants, while Part III explains why MHI challenges both of them. Part IV discusses the standing of those combatants who participate in what the paper calls Atrocity Crimes. Finally, Part V examines the status of those combatants who are not engaged in Atrocity Crimes but are merely summoned to the defence of the ‘target’ state.

II

As was indicated above, there are, in contemporary political philosophy, two dominant approaches to the moral standing of combatants. According to the first, defended by Michael Walzer, combatants are liable to intentional attack, regardless of the justness of their cause. In order to be liable to attack, of course, an agent must lose, or ‘forfeit’, his (negative) right not to be attacked. On Walzer’s view, soldiers lose their right not to be attacked because, amongst other things, they pose material threats to each other. Since *all* combatants usually do so, they are *equally* permitted, or at liberty [under no duty no to], to use force against their adversaries.³ The resulting ‘moral equality of soldiers’ leads to the normative separation of the *jus ad bellum* (justice in the declaration of war) from the *jus in bello* (justice in the conduct of war).⁴ According to Walzer, compliance with JIB, rather than JAB, is a necessary and sufficient condition to be recognised as a moral equal.

¹ I would like to thank all members of the LSE Political Philosophy Research Seminar, where this paper was first presented, for their comments. A different version of this paper was presented at the Association for Legal and Social Philosophy annual conference at the University of Nottingham in 2008. I am grateful for the comments I received there, especially those from Seth Lazar. Lastly, I would like to thank Cecile Fabre for her written comments on an earlier version of this piece.

² There is a difference between a soldier and a combatant. Soldiers usually fight under the command of a sovereign, whereas, by definition, a combatant is simply someone who engages in battle. In light of the problem of illegal combatants in ‘asymmetrical’ conflicts, contemporary debates in just war theory have been concerned with ‘the difference uniforms make’. This issue is particularly important for the topic of this article, military humanitarian intervention, as individuals *qua* private citizens may partake in those forms of mass killing that warrant an interventionist response. But for the sake of convenience, the article won’t explore the issue of ‘illegal combatants’ further. The following reflections apply to all combatants, regardless of whether they are soldiers. For a contemporary treatment of ‘illegal combatants’, see C. Kutz, ‘The Difference Uniforms Make’, *Philosophy & Public Affairs*, 33/2 (2005), pp. 148-180.

³ For some doubts about the claim that all combatants pose material threats, see R. Norman, *Ethics, Killing and War* (Cambridge: Cambridge University Press, 1994).

⁴ Abbreviated as JAB and JIB hereinafter, respectively. Principles of JAB include: Just cause, proportionality, right intention, right authority, last resort and reasonable likelihood of success. Principles of JIB include: discrimination and proportionality of means. For Walzer’s famous moral equality of

Jeff McMahan, in a number of incisive critiques, has challenged Walzer's position.⁵ For McMahan, unjust combatants, i.e. combatants who pursue an unjust cause, are liable to attack, but lack a liberty to intentionally kill their (just) adversaries. Contrary to Walzer's view, McMahan assumes that just combatants, i.e. those combatants who pursue a just cause, are not liable to attack. They have not, in other words, forfeited their right not to be attacked. Consequently, unjust combatants violate negative duties not to cause harm when they target their just adversaries. On McMahan's view, the presence or absence of a just cause for war at the level of JAB largely determines the permissibility of the use of force once hostilities are underway.⁶ Those who lack a just cause are not moral equals. JIB and JAB are not independent of each other.

Let us refer to Walzer's and McMahan's positions as the Legalist View and the Neo-Classical View, respectively. Although, as we shall see, the Legalist View amounts to a quasi-Hobbesian position on self-defence, it largely models the ethics of war on the contemporary laws of war.⁷ By contrast, the Neo-Classical View returns to an older, pre-legalistic understanding of just war theory, which operates with a less pronounced distinction between JAB and JIB. As McMahan acknowledges, his position can be traced back to the writings of Francisco de Vitoria, Francisco Suarez and, more problematically, Elizabeth Anscombe.⁸

In order to get a better grasp of these two views, it is useful to place them within the following fourfold normative taxonomy. First, A's use of force against B, it is assumed here, is morally *excused* if A can be exculpated from wrongdoing. Second, A's use of force against B is morally *permissible* if A is under no moral duty not to use force against B, subject to necessity and proportionality. Third, A's use of force against B is morally *justified* if there is a strong normative reason in favour of A's actions, subject to necessity and proportionality. Fourth, A has a *right* to use force against B if (and only if) she holds a negative claim against *a*) third parties not to interfere with her use of force and *b*) B not to repel her attack, subject to necessity and proportionality. Obviously, it must be specified whether the resulting right to self-defence is a moral *and* a legal right. But because it is primarily interested in the *ethics* of war, the article does not seek to tackle this issue. It focuses on moral rights only.

Viewed in terms of this taxonomy, the Legalist View rests on the assumption that (unjust) combatants act permissibly. As we just saw, if all combatants are liable to attack, no combatant violates any negative duties not to cause harm. However, without offering a detailed account of McMahan's critique, the problem is that the Legalist View's argumentative structure resembles, in Walzer's work at least, a plea for excuses. For instance, combatants are excused for taking part in an unjust war because they *a*) pose a threat to each other, *b*) have a sense of patriotism, or *c*) have been conscripted into the

soldiers, see M. Walzer, *Just and Unjust Wars: A moral argument with historical illustrations*, 3rd ed. (New York: Basic Books, 2000), pp. 34-37.

⁵ For some of McMahan's most influential writings on the status of combatants, see J. McMahan, *Killing in War* (Oxford: Oxford University Press, 2009); 'On the moral equality of combatants', *Journal of Political Philosophy*, 14/4 (2006), pp. 377-393; 'The Ethics of Killing in War', *Ethics*, 114/ 4 (2004), pp. 693-673; 'Innocence, Self-Defense and Killing in War', *Journal of Political Philosophy*, 2/3 (1994), pp. 193-221.

⁶ McMahan, it needs to be stressed, does not consider a just cause as a sufficient condition for the use of force. Typically JAB also requires that war must be proportionate. A war may still be unjust if, despite its just cause, it is not proportionate. For reasons of space, the paper focuses on the just cause criterion only.

⁷ C. Brown, *Sovereignty, Rights and Justice: International Political Theory Today* (Cambridge: Polity, 2002), p. 108.

⁸ McMahan, *Killing in War*, pp. 32-34.

army against their will.⁹ Yet, while these points might show that unjust combatants are not *blameworthy* for killing just combatants, it does not prove that the latter lose their right not to be attacked. In brief, the Legalist View tends to *exculpate* (unjust) combatants from wrongdoing instead of showing that they act permissibly.

There are a number of strategies available to advocates of the Legalist View to confront this problem. It is beyond the scope of this paper to discuss all of these here, but it is useful to point out two prominent ones. First, as was indicated above, it is possible to appeal to a quasi-Hobbesian understanding of self-defence. Roughly, the Hobbesian position rests on the claim that it is permissible to kill material threats to one's self-preservation. But any appeal to Hobbes is problematic for two reasons. First, as McMahan shows, in the initial stage of a war of unjust aggression, combatants *victim_state* do not pose a material threat to combatants *aggressor_state*.¹⁰ Second and more significantly, the Hobbesian strategy makes it difficult, if not impossible, to draw a distinction, central to just war theorising, between combatants and non-combatants; for it is easy to imagine situations where the presence of non-combatants poses an obstacle to the self-preservation of combatants.¹¹

The second strategy invokes the notion of consent. Yet, as Walzer himself concedes, one of the characteristics of war is that it severely restricts the possibility of rendering consent.¹² Moreover, as McMahan points out, it is by no means clear that it is possible to render morally valid consent to being attacked.¹³ Taken together, these brief points show that it is doubtful whether the Legalist View can successfully bridge the justificatory gap between excuse and permission.

Contrary to the Legalist View, the Neo-Classical View maintains that unjust combatants are not permitted to target just combatants, subject to qualifications. This claim is, in McMahan's work, the result of an analogy between the ethics of war and a non-Hobbesian understanding of the ethics of domestic self-defence.¹⁴ In regard to the latter, McMahan argues that (domestic) attackers who are morally responsible for a forced choice between lives, i.e. a situation where an individual must be harmed, *a*) are liable to attack because they forfeit their right not to be attacked and *b*) are not permitted to repel their victim's (V) counterattack. The last consideration is the outcome of our intuitive understanding of justice. Those who are morally responsible for creating a state of affairs in which an individual must be harmed are liable to bear the resulting costs. Consequently, the attacker should suffer the harm he would have otherwise inflicted on the victim.

In terms of our normative taxonomy, McMahan's theory of self-defence assumes that V's use of force is justified, as there is a justice-based reason in favour of targeting the (responsible) attacker (RA). In addition, if RA should suffer the costs that result from the

⁹ Walzer, *Just and Unjust Wars*, pp. 39-40.

¹⁰ McMahan, 'The Ethics of Killing in War'.

¹¹ For this and related worries, see N. Zohar, 'Collective War and Individualistic Ethics: against the conscription of self-defence', *Political Theory*, 21/4 (1993), pp. 606-622 & J.J. Thomson, 'Self-Defense', *Philosophy & Public Affairs*, 20/4 (1991), pp. 283-310.

¹² Walzer, *Just and Unjust Wars*, pp. 25-29.

¹³ McMahan, 'On the moral equality of combatants'.

¹⁴ See, J. McMahan, *The Ethics of Killing: Problems at the Margins of Life* (Oxford: Oxford University Press, 2002) & 'Self-Defense and the Problem of the Innocent Attacker', *Ethics*, 104/2 (1994), pp. 193-221. For a contemporary critique of McMahan's position on self-defence, see S. Lazar, 'Responsibility, Risk and Killing in Self-Defense', *Ethics*, 119/4 (2009), pp. 699-728.

forced choice between lives he created, V holds a moral *right* to self-defence against RA. This implies that RA lacks a right of self-defence against V and that third parties are not permitted to intervene on behalf of RA against V. Since this article focuses on the ethics of war, it assumes that McMahan's account of the ethics of *domestic* self-defence is, by and large, normatively sound. In particular, let us accept that moral responsibility for a forced choice between lives is a necessary and sufficient condition to *a)* forfeit one's right not to be attacked and *b)* be prohibited from using retaliatory force. The next question is whether this model is relevant for and applicable to the ethics of war.

Not surprisingly, the Neo-Classical View answers this question affirmatively. In doing so, it ultimately contends that unjust combatants are morally on a par with domestic RA. As a result, unjust combatants are not allowed to repel their just adversaries, who are holders of a moral right to self-defence. The idea of a right to self-defence also explains why the Neo-Classical View denies the independence of JAB and JIB. The lack of a just cause leads to a duty not to resist just combatants. Needless to say, while the Legalist View must bridge the gap between permission and excuse, the Neo-Classical View must show that the extension of its view about RAs in self- and other-defence to unjust combatants in war is defensible. As we shall see, this is a complex and complicated undertaking.

These are the rough contours of the Legalist and Neo-Classical Views, respectively. It is noteworthy, though, that the debate between their respective advocates and critics has almost exclusively been concerned with the status of combatants during self-defensive wars. The Legalist View argues that combatants_{aggressor_state} and combatants_{victim_state} must be considered as moral equals, whereas the Neo-Classical View maintains that the former are morally obliged not to target the latter. Since self-defensive war against unjust aggression is usually considered as *the* paradigmatic case of a just war, the focus on self-defence is hardly surprising. But, as Part III explains, it is premature to conclude that these two approaches are also readily applicable to non-self-defensive wars, most notably MHI.¹⁵

III

Amongst contemporary political philosophers, there is a broad consensus that MHI is sometimes morally permissible, perhaps even morally obligatory. Overall, it is fair to say that contemporary liberal political philosophy is pro-interventionist.¹⁶ Although it is impossible to do justice to the intricacies of the theoretical debate about MHI here, let us assume that it is at least morally permissible to militarily halt certain large-scale atrocities, including genocide, politically motivated mass murder ('crimes against humanity'),

¹⁵ It is not entirely true that MHI are strictly non-self-defensive wars. The justification of MHI may sometimes include considerations of self-defence. For instance, India justified its intervention in East Pakistan by arguing that the large stream of (Bangladeshi) refugees undermined its own security. For the sake of convenience, our discussion assumes that considerations of self-defence play a secondary role in MHI. For a superb account of the role of self-defence in the actual justification of MHI, see N. Wheeler, *Saving Strangers: Humanitarian Intervention and International Society* (Oxford: Oxford University Press, 2000).

¹⁶ Liberal political philosophers who defend MHI include: G. Brock, *Global Justice: a cosmopolitan account* (Oxford: Oxford University Press, 2009); A. Buchanan, 'The internal legitimacy of humanitarian intervention', *Journal of Political Philosophy*, 7/1 (1999), pp. 71-87; D. Moellendorf, *Cosmopolitan Justice* (Boulder/Col: Westview Press, 2002); J. Rawls, *The Law of Peoples* (Cambridge/Mass: Harvard University Press, 1999); F. Teson, 'The Liberal Case for Humanitarian Intervention', in: J.L. Holzgrefe & R. O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), pp. 93-129; Walzer, *Just and Unjust Wars*, 'Arguing for Humanitarian Intervention', in: N. Mills & K. Brunner (eds.), *The New Killing Fields: Massacre and the Politics of Intervention* (New York: Basic Books, 2002), pp. 19-35, 'The Politics of Rescue', in: M. Walzer, *Arguing about War* (New Haven: N.J: Yale University Press, 2004), pp. 67-81.

enslavement and ethnic cleansing. For the sake of convenience, the article defines MHI as the deliberate and non-consensual military interference by a state or group of states (henceforth the intervening state) in the internal affairs of another state (henceforth the target state) in order to halt what we can loosely term Atrocity Crimes.¹⁷ Assuming that MHI is permissible, we must specify the relationship between intervening combatants and their counterparts in the target state. This issue, as was indicated above, is problematic for both, the Legalist and the Neo-Classical View.

Beginning with the former, combatants, just or unjust, who violate the rules of JIB aren't exculpated from wrongdoing. Compliance with JIB, as we saw above, is a necessary (and sufficient) condition for equal moral standing. But, as Walzer puts it, the atrocities a soldier commits 'are his'.¹⁸ Intuitively, it is inappropriate, if not perverse, to grant equal moral status to those who massacre defenceless individuals, destroy their homes or exterminate whole groups. But it is questionable whether the Legalist View can consistently support this intuition. Its underlying Hobbesian model of self-defence, for instance, would allow combatants engaged in the perpetration of Atrocity Crimes to defend themselves against intervening combatants. Since intervening combatants pose a material threat, they would presumably be liable to attack. In order to avoid such a counterintuitive position, advocates of the Legalist View must develop an *alternative* normative framework that regulates encounters between intervening combatants and perpetrators of Atrocity Crimes.

However, intervening combatants will also encounter 'regular' combatants^{target_state} who are not engaged in Atrocity Crimes. Rather, they are merely ordered to defend the target state against the intervening state. According to the rationale of the Legalist View, regular combatants^{target_state} can potentially be viewed as moral equals. This is so because the target state's campaign against the intervening state resembles a more traditional self-defensive war. While the perpetration of Atrocity Crimes necessarily involves grave violations of the rules of conflict, the target state's self-defensive campaign can in principle be fought within the rules of JIB. If this is sound, advocates of the Legalist View could propose a 'hybrid' position on the status of combatants during MHI. The moral equality of soldiers applies to encounters between regular combatants, while a different framework, perhaps closely resembling the Neo-Classical View, regulates the relationship between combatants engaged in Atrocity Crimes and those seeking to halt them.

Intuitively, though, the hybrid solution is unattractive. Its first part, i.e. the argument that there is a moral asymmetry between intervening combatants and perpetrators of Atrocity Crimes, is intuitively sound. But the second claim, i.e. that there is a moral symmetry between regular combatants^{target_state} and intervening combatants, isn't. This is so because resistance by the target state lessens the likelihood of a successful intervention. If we

¹⁷ This definition raises the issue of consent. From a moral perspective, although it would be odd to argue that the intervening state is obliged to obtain the consent of the target state, it must still secure the consent of the victims of Atrocity Crimes. For, if we assume that the victims have a *right* to defend themselves against the perpetrators of Atrocity Crimes, they hold, according to the normative taxonomy outlined in Part II, third parties under a duty not to interfere with their exercise of self-defensive force. For the sake of the argument, the paper contends that, if they do not resist the interveners or call for the intervention to be halted, the victims give their 'tacit' consent to MHI. For discussions of the notion of consent in theories of MHI, see Teson, 'The Liberal Case for Humanitarian Intervention' & J. McMahan, 'Humanitarian Intervention, Consent, and Proportionality', in: N. Davis, R. Keshen & J. McMahan (eds.), *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover* (Oxford: Oxford University Press, 2010), pp. 44-74.

¹⁸ Walzer, *Just and Unjust Wars*, p. 39.

assume that Atrocity Crimes represent some of the gravest moral evils, then, for reasons of proportionality alone, it is wrong to resist the interveners.¹⁹ Instead, everything should be done not to obstruct the rescue effort. In this light, it is reasonable to argue that *a*) self-defence against the intervening state does not, at the level of JAB, constitute a just cause for war (subject to further conditions) and *b*) regular combatants_{target_state} should not be permitted to resist intervening combatants.²⁰

These observations suggest that the Neo-Classical View is closer to our intuitions about MHI than the Legalist View. Although, as Part IV explains, this is correct when it comes to encounters between intervening combatants and perpetrators of Atrocity Crimes, the application of the Neo-Classical View to regular combatants_{target_state} remains problematic. Even if we assume that a self-defensive war against the intervening state is unjust, regular combatants_{target_state}, at least in the initial stages of MHI, do not pose an immediate threat to intervening combatants. Rather, regular combatants_{target_state} are the victims of *aggression*, albeit permissible aggression. Thus, defenders of the Legalist View can reply that, although a self-defensive war against the intervening state is unjust and delays the halting of Atrocity Crimes, there is a normative case in favour of considering regular combatants_{target_state} as moral equals. As one can see, the Neo-Classical View does not deliver an unambiguous verdict on the status of (regular) combatants during MHI either.

If the above analysis is sound, the phenomenon of MHI is not readily grasped by the dominant approaches to the status of combatants. Nevertheless, the following discussion tries to show that the Neo-Classical View comes closest to generating a normatively sound position on the status of combatants during MHI. To do so, Part IV first looks at the status of perpetrators of Atrocity Crimes, whereas Part V turns to the status of regular combatants.

IV

As we saw above, Walzer thinks that the atrocities a soldier commits are his. But it is not clear what he means by this. To be sure, since their occurrence signals large-scale non-compliance with negative duties not to harm, Atrocity Crimes usually involve some form of wrongdoing. But the question is how we should assess it morally.²¹ To tackle this issue, let us utilise the Nuremberg Defence, which replaced the older Superior Orders Defence during the Nuremberg Trials. Contrary to the Superior Orders Defence, which demands that combatants prove that the order they carried out was duly authorised, the Nuremberg Defence requires combatants to show that *a*) they thought that the actions set out by a [duly authorised] order were morally and legally permissible (moral perception) and *b*) that following the order was the only morally reasonable course of action available at the time (moral choice).²² As we shall see, a more philosophical

¹⁹ Claudia Card argues that Atrocity Crimes are *paradigmatic* of evil, see C. Card, *The Atrocity Paradigm: A secular theory of evil* (Oxford: Oxford University Press, 2002). My thinking about Atrocity Crimes is heavily indebted to Card's atrocity paradigm. Though we cannot go into detail here, the atrocity paradigm implicitly underlies the following reflections on MHI.

²⁰ An exception, of course, exists if the intervening state and its combatants adopted unjust methods. But I won't pursue this problem here.

²¹ Card suggests that those engaged in Atrocity Crimes are culpably responsible for their deeds, but later revises this judgment. Nevertheless, in what follows, I stress the centrality of moral culpability for the moral assessment of Atrocity Crimes. For the revised version of the atrocity paradigm, see C. Card, *Confronting Evils: Terrorism, Torture and Genocide* (Cambridge: Cambridge University Press, 2010).

²² L. May, *Crimes against humanity: a normative account* (Cambridge: Cambridge University Press, 2005), pp. 181-184. For Walzer's views on this and related matters, see *Just and Unjust Wars*, chapter 19.

engagement with the moral perception and choice criteria reveals that perpetrators of Atrocity Crimes are not merely responsible for their deeds, but often also morally culpable for them.

Beginning with the moral perception criterion, combatants are required to demonstrate that the actions set out by an order were morally permissible. This requires a set of principles that enables them to make such an assessment. These principles must be *a*) universal in scope and *b*) responsive to the highly stressful conditions combatants face. According to Larry May, the bare moral minimum we can expect from combatants is not to intentionally attack individuals who are materially innocent, i.e. non-threatening, and defenceless. The intentional killing of *defenceless* individuals, May rightly observes, is usually deemed a great evil across cultures.²³ In order to assess the moral permissibility of an order, then, combatants must primarily determine whether it entails the intentional killing of the innocent. Although the moral perception criterion does not appear extraordinarily demanding, it is possible to raise the following objection against it.

Combatants, critics may point out, face considerable epistemological difficulties when assessing whether someone is innocent. In some conflicts, especially those that are asymmetrical, enemy fighters are not directly marked or, even worse, pose as non-threatening individuals.²⁴ As a result, mistakes are likely. This is certainly true. But history also shows that perpetrators of Atrocity Crimes deliberately target their victims when they expect the least resistance. Thus the situational context of Atrocity Crimes is often not analogous to conditions on a battlefield, asymmetrical or not. To illustrate the point, the Serb forces who executed 8000 Muslim men in Srebrenica did not face resistance from local groups or UN peacekeepers.²⁵ The killing of Jews in Eastern Europe during World War II, at the hands of the various military and civilian organs of the German state, customarily involved putting victims deliberately into a defenceless position, e.g. by stripping them naked and shooting them in the back. Under these circumstances, those who participate in Atrocity Crimes cannot cite non-culpable ignorance as an excuse for killing defenceless individuals.

Interestingly, research in social psychology and sociology supports this claim. It shows that perpetrators of Atrocity Crimes often encounter a cognitive dissonance, rather than epistemological restrictions, when carrying out their orders.²⁶ That is to say, perpetrators know that killing defenceless individuals is morally wrong, but also, for various reasons, intend to comply with their orders. Although there may be different psychological strategies available to overcome this cognitive dissonance, perpetrators correctly perceive the ‘wrongness’ of the situation.

That being said, while perpetrators might even acknowledge that they targeted innocent individuals, they could maintain that they had ‘no choice’ but to obey their orders. This

²³ (ibid.), pp. 188-191.

²⁴ See, R. Thornton, *Asymmetric Warfare* (Cambridge: Polity, 2007).

²⁵ See, J.W. Honig & N. Both, *Srebrenica: Record of a War Crime* (Harmondsworth: Penguin, 1996).

²⁶ On this point, see H. Welzer, *Täter: Wie aus ganz normalen Menschen Massenmörder werden* [Perpetrators: why ordinary people become mass murderers] (Frankfurt a.M: Fischer, 2007) & A. Hinton, *Why did they kill?: Cambodia in the Shadow of Genocide* (Berkeley: University of California Press, 2005). For further social-psychological and sociological perspectives, see J. Weller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing*, 2nd ed. (Oxford: Oxford University Press, 2007); M. Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing* (Cambridge: Cambridge University Press, 2005). For two critical historical studies, see D.J. Goldhagen, *Hitler's Willing Executioners* (Lancaster: Abacus, 1997) & C. R. Browning, *Ordinary Men: Reserve Battalion 101 and the Final Solution in Poland* (London: Penguin, 1992).

takes us to the moral choice criterion. As its name suggests, it requires that there are morally reasonable alternatives to following an order. If the agent has justified concerns that disobedience is going to lead to his death, his scope for action seems severely limited. Since societies in which Atrocity Crimes occur are often authoritarian, perpetrators will commonly claim that they acted under duress. But although it is important to realise that authoritarian societies limit our capacity for action, the appeal to duress is not as strong as it initially appears.

First, there are well-documented cases where perpetrators of Atrocity Crimes did not act because they were under duress. In Christopher Browning's famous historical study of the role of the (German) Reserve Police Battalion 101 during the Final Solution in Poland, officers were asked whether they wanted to take part in the killing of Jews. Most of the men complied, but, strikingly, not out of fear of death. There is not a single documented case that the refusal to kill Jews led to the death of potential perpetrators. Instead, police officers acted out of loyalty to the head of the Battalion and a sense of camaraderie. Building on Browning's analysis, the noted German social psychologist Harald Welzer argues that killing was nothing more than a 'job' that had to be done properly.

Second, Atrocity Crimes, as Claudia Card argues, are morally distinctive because they involve the infliction of 'intolerable' harms.²⁷ Gang rape, (sexually motivated) torture and even cannibalism often occur during Atrocity Crimes.²⁸ In an influential article on the civil war in Bosnia, Catherine McKinnon describes how 'one woman was allowed to live so long as she kept her Serbian captor hard all night orally, night after night after night', and how Muslim women who were taken away to be killed 'were raped, had their breasts cut off and their wombs ripped out'. Further, in their treatment of the moral uniqueness of the Holocaust, Avishai Margalit and Gabriel Motzkin stress that perpetrators do not only seek to exterminate their victims, but also (sometimes) deliberately and cruelly humiliate them in the process of doing so.²⁹ The pure gratuitousness of violence, humiliation and (sexual) sadism that accompanies, even characterises, Atrocity Crimes suggests that a shocking number of individuals are not coerced into their role, but take advantage of the 'killing opportunities' offered by their state.

Third, it is notoriously difficult to determine what constitutes a justified belief that one's life is endangered. Someone held at gunpoint will experience a different form of duress than someone who has a mere suspicion that his life is at risk.³⁰ The greater the likelihood that the dreaded event is going to occur immediately, the more it seems appropriate to speak of duress. Conversely, if the likelihood is low (the threatening party is bluffing) or the consequences of non-compliance are vague, the less it seems appropriate to speak of duress. Generally, it is by no means the case that *every* potential perpetrator of Atrocity Crimes faces an *immediate* threat to his life in case of non-compliance. The appeal of duress is, therefore, limited.

²⁷ For Card, certain harms are intolerable because they deprive their victims of the opportunity for a minimally decent life or a dignified death. Survivors of intolerable harms, Card notes, may never be able to fully recover from them. Card, *Atrocity Paradigm*, pp. 3-4.

²⁸ C. McKinnon, 'Crimes of War, Crimes of Peace', in: S. Shute & S. Hurely (eds.), *On Human Rights: The Oxford Amnesty Lectures 1993* (New York: Basic Books, 1993), pp. 84-109, at p. 86, p. 90. Alex Hinton offers an anthropological account of the practice of cannibalism during the reign of the Khmer Rouge, see Hinton, *Why did they kill?*, pp. 34-35.

²⁹ A. Margalit & G. Motzkin, 'The Uniqueness of the Holocaust', *Philosophy & Public Affairs*, 25/1 (1996), pp. 65-83.

³⁰ May, *Crimes against humanity*, p. 193.

Finally, even if a potential perpetrator faced an *immediate* threat to his life, duress, in most cases, does not excuse the (intentional) killing of an innocent person.³¹ David Rodin notes that criminal law does not recognise duress as an excuse for intentionally killing the innocent.

These four points indicate that an appeal to a lack of moral choice is not a sound exculpatory strategy. Although highly oppressive societies remove options for individual action, combatants who are ordered to participate in Atrocity Crimes do not always face moral alternatives that are entirely unreasonable. Moreover, although duress, as the criminal law recognises, has some exculpating function, it does not excuse the intentional killing of an innocent person.

Taken together, our discussion of the moral perception and choice criteria shows that participants in Atrocity Crimes are often not only morally responsible for their actions. In addition, since they often lack a sound exculpating reason for killing the innocent, we can assume that they are morally blameworthy for what they do. In this sense, perpetrators of Atrocity Crimes *exceed* the basic moral requirement that, for the Neo-Classical View, is necessary and sufficient to establish liability to attack, namely, moral responsibility. Since many perpetrators are morally blameworthy for their actions, they are *culpably* responsible for the threat they pose. If this is true, we can interpret Walzer's claim that the atrocities a soldier commits 'are his' as indicating the presence of moral culpability. Hence it is not far-fetched to argue that perpetrators of Atrocity Crimes are often **analogous to** what the ethics of self-defence refers to as culpable attackers (CA), rather than RA.

If the **analogy** between perpetrators of Atrocity Crimes and CA holds, our analysis has interesting implications for the ethics of war. First, while the Neo-Classical View argues that moral responsibility is necessary and sufficient for combatants to incur liabilities to attack, the presence of moral culpability indicates that the considerations of necessity and proportionality that govern the use of interventionist force are not as strict as in cases involving RA.³² It would, for instance, be permissible to kill a higher number of CA than RA. Faced with the choice of killing perpetrators of Atrocity Crimes with RA and CA status, respectively, intervening combatants should target the latter. Second, since the use of force against CA is usually the least controversial case for the ethics of self-defence, the **analogy** between CA and perpetrators of Atrocity Crimes strengthens, though it does not fully establish, the normative case for a (moral) *right to intervene*, which is correlated to a negative duty, falling upon the target state and some of its combatants, i.e. those engaged in the perpetration of Atrocity Crimes, not to resist the interveners.

Nonetheless, there is at least one group of perpetrators, responsible for some of the most horrific atrocities, which neither falls into the category of CA nor RA. Child soldiers are often used to perpetrate Atrocity Crimes. Children have little deliberative agency due to

³¹ D. Rodin, *War and Self-Defence* (Oxford: Oxford University Press, 2002), p. 171. The philosophy of criminal law acknowledges, however, that duress can successfully function as an excuse for actions that fall short of killing. For example, briefly trespassing on someone else's property could be excused, perhaps even justified, through an appeal to duress. Moreover, a thirteen year old boy who kills under duress may be excused for the killing. Hence it is doubtful that duress can *never* excuse murder. For a discussion of these issues, see J. Horder, *Excusing Crime* (Oxford: Oxford University Press, 2004).

³² McMahan, *The Ethics of Killing*, pp. 403-404.

their lack of moral development.³³ Moreover, apart from brutalisation and brainwashing, they are often drugged by their captors in order to lower their threshold for aggression and ensure compliance. It is hard to see how child combatants could possibly be considered as morally culpable for their actions. Intuitively, child combatants seem to be excused for participating in large-scale wrongdoings. They do not even seem morally responsible for their actions, or at least their moral responsibility is strongly diminished. For the sake of convenience, let us refer to those types of attackers who lack moral agency as Non-Responsible Attackers (NRA). For the Neo-Classical View, NRA do not forfeit their right not to be attacked because they lack the precondition for the incurrance of liabilities to attack, namely, moral agency.

As a response to this problem, it is possible to argue that *self*-defence against an NRA, though impermissible, is *excusable*.³⁴ This claim raises a number of problems that we do not need to discuss here. But even if we assume that it is sound, it is problematic for the ethics of MHI because the victims of Atrocity Crimes do not defend themselves against NRA. Rather, a third party acts on their behalf. However, the third party, unlike the victim of NRA, cannot cite its own interests as an exculpating reason for killing NRA.³⁵ This is so because the rescuer is not himself threatened by NRA. In fact, because neither NRA nor the victim has lost its rights not to be attacked, it does not seem that, *ceteris paribus*, an intervening party could (and should) give preference to the rights of the victims over those of the perpetrators of Atrocity Crimes. Non-intervention, in other words, seems to be the only morally legitimate strategy. The question, though, is whether other things are equal. There are two proposals that suggest that they aren't.

The first proposal contends that a third party can be excused for killing NRA on behalf of a victim if (and only if) they share a special relationship. Using an example from domestic society, a father may be excused for defending his child against NRA. But unfortunately, the case of MHI is not analogous to the father-child relationship. Although considerations of self-defence may inform the decisions to intervene, the immediate victims of Atrocity Crimes are, in most cases of MHI, non-citizens of the intervening state. An appeal to special relationships is thus likely to fail.

The second proposal involves what I call the Numbers-Harm Thesis. As its name suggests, it comprises two elements. The first appeals to the normative weight of numbers, especially the claim, defended by some non-consequentialist moral theorists,

³³ For McMahan's own treatment of child soldiers, see McMahan, *Killing in War*, pp. 198-202. McMahan would be critical of my classification of child soldiers as *non-responsible* attackers. As McMahan points out, the category of child soldiers includes all those who are under eighteen, and there is a difference between a 7 and a 17 year old in terms of agency. But I think that child soldiers, even older ones, should not be seen as morally on a par with culpable or fully responsible adult participants in Atrocity Crimes. For a critical view that suggests that child soldiers are not entirely passive, see D. M. Rosen, *Armies of the Young: Child Soldiers in War and Terrorism* (Camden/N.J: Rutgers University Press, 2005). For an account of various issues involving child soldiers, see P.W. Singer, *Children at War* (Berkeley/CA: University of California Press, 2006).

³⁴ For two views that contend that the killing of NRA is excusable, see M. Otsuka, 'Killing the Innocent in Self-Defence', *Philosophy & Public Affairs*, 23/1 (1994), pp. 74-94 & McMahan 'Self-Defense and the Problem of the Innocent Attacker'.

³⁵ Nancy Davis raises this point, albeit in the discussion of abortion. N. Davis, 'Abortion and Self-Defence', *Philosophy & Public Affairs*, 13/3 (1984), pp. 175-207. For McMahan's response to Davis, see *The Ethics of Killing*, pp. 411-418.

that one should rescue the greater number.³⁶ If this is correct, the number of potential victims, which is likely to be high in Atrocity Crimes, *does* count for our moral assessment of the situation. An appeal to numbers, though, is not sufficient in order to allow the non-self-defensive killing of NRA. To illustrate the point, it would be impermissible and inexcusable for a rescuer to kill a remote controlled person who is forced by a mad scientist to press a button that will administer a very mild electric shock for the duration of one second to one million people involuntarily hooked up to the mad scientist's latest invention. The number of victims does not change the fact that the harm they experience is relatively trivial.

However, as was mentioned above, the harm inflicted during Atrocity Crimes is morally distinctive because of its severity, if not gratuitousness. If we combine this observation with the fact that Atrocity Crimes usually involve large numbers of victims, the killing of NRA at the hands of a third party does not seem entirely unjustifiable, notwithstanding the absence of a special relationship between the rescuing party and the victims of Atrocity Crimes. For the Numbers-Harm Thesis, the intolerability of the harm inflicted and the large number of potential victims are jointly sufficient to tilt the moral scale in favour of harming non-responsible perpetrators of Atrocity Crimes in order to rescue their victims.

But it is worthwhile stressing that even though NRA threaten large numbers of victims with gratuitous levels harm, they, in the absence of moral agency, do not lose their right not to be attacked. The Numbers-Harm Thesis should not be used to define negative duties not to cause harm out of existence. They are too important in our ethical thinking to be cast aside like that. Instead, the Numbers-Harm Thesis provides intervening combatants with a normative reason in favour of *overriding* negative duties not to harm when targeting child soldiers or other types of NRA. If this is sound, intervening combatants *justifiably infringe the rights of NRA*.

In the present context, the concept of a rights infringement raises two critical questions. First, it must be clarified whether child soldiers, unlike culpable participants in Atrocity Crimes, are permitted to defend themselves against intervening combatants. The answer is negative because the intervening combatants do not pose an *unjust* threat and, therefore, have not lost their right not to be attacked. Nevertheless, since their *rights* (no less) are infringed, NRA have an agent-relative excuse for attempting to repel intervening combatants. On similar grounds, intervening combatants have an excuse for repelling child soldiers or other NRA.

The second question is whether it is excusable or even permissible for a third party to intervene in order to defend one side against the other. Let us first consider whether a third party is justified in assisting intervening combatants who have come under attack from child soldiers. Since the institution of the military establishes strong special relationships between its members, intervening combatants may potentially be excused for defending their comrades against child soldiers. But since the Numbers-Harm Thesis already permits intervening combatants to target child soldiers, an appeal to special relationships appears superfluous. It is possible to reply that one must distinguish between force aimed at rescuing fellow intervening combatants and force aimed at rescuing the victims of Atrocity Crimes. Strictly speaking, the Numbers-Harm Thesis

³⁶ Michael Otsuka raises this point in his discussion of NRA, see Otsuka, 'Killing the Innocent in Self-Defence'. For a critique of the claim that numbers count, see J. Taurek, 'Should the numbers count?', *Philosophy & Public Affairs*, 6/4 (1977), pp. 293-316.

only permits the latter. But in practice the two acts are so closely intertwined that it would be difficult to separate them.

Let us now consider whether third parties are justified in assisting child soldiers who have come under attack from intervening combatants. On the one hand, it would be strange to argue that child soldiers stand in a special relationship to their superiors. In general, special relationships should have moral weight if (and only if) they fulfil certain preconditions. For instance, they should be non-exploitative, respectful of the rights held by the members of an association *qua* individuals, valued by the members of an association, and not detrimental to the rights of non-members of an association. None of these conditions are met in the case of an army that uses child soldiers to perpetrate Atrocity Crimes. On the other hand, as was argued above, the relationship between children and parents or the close-knit relations between members of a village may provide parents or fellow villagers with an excuse to defend child soldiers against intervening combatants.

That being said, one should mention that parents or villagers should assist intervening combatants by eliminating those who irresponsibly (and culpably) put children into the firing line. Further, it must be pointed out that principles of 'due care' and criteria of necessity and proportionality are extremely stringent in cases involving NRA. In regard to the former, intervening combatants should accept greater risks to themselves when confronting child soldiers. They are usually not obliged to accept these risks in cases involving RA or CA. In regard to the proportionality and necessity, intervening combatants are allowed to target an almost unlimited number of RA and CA if doing so means that they will not have to kill child soldiers.

Admittedly, the case of NRA poses a challenge to the Neo-Classical View in general and the idea of a right to intervene in particular. But unless Atrocity Crimes are exclusively perpetrated by NRA, the existence of an exception to the rule does not undermine the Neo-Classical View as such. Having dealt with the moral status of the perpetrators of Atrocity Crimes, we must now turn to the status of regular combatants who are summoned to the defence of the target state. In particular, we must find out whether they are also bearers of the duty of non-resistance which is correlated to the right to intervene.

V

As was pointed out in Part III, advocates of the Legalist View, the main competitor to the Neo-Classical View, can potentially endorse a hybrid position on the status of combatants during MHI. They can argue that because regular combatants_{target_state} are not involved in the perpetration of Atrocity Crimes, they should be recognised as moral equals. Unlike perpetrators of Atrocity Crimes, they are the victims of (just) aggression without having posed an unjust threat. In order to challenge this kind of reasoning, the Argument from Derivative Liability, to be developed below, contends that regular combatants_{target_state} who defend their state against combatants_{intervening_state} are morally complicit in Atrocity Crimes. In the language of the criminal law, they are *derivatively* liable for Atrocity Crimes. If this is sound, the Argument from Derivative Liability would be a clear indicator that the Neo-Classical View, rather than the Legalist View, governs the relationship between combatants_{intervening_state} and regular combatants_{target_state}, giving the former a right to intentionally target the latter.

Discussions of complicity usually involve two elements.³⁷ The conduct element, the *actus reus*, shows how an accessory's (S) actions are causally related to a wrongdoing perpetrated by a principal agent (principal/P). S typically enables P to do x by aiding, encouraging or counselling P (or via a combination thereof). The fault element, the *mens rea*, specifies the circumstances under which S is morally responsible for wrongfully aiding P. In order to explore the relevance of complicity for MHI, it is easier to start with *actus reus*. We can then turn to *mens rea*.

To begin, if regular combatants_{target_state} are complicit in the perpetration of Atrocity Crimes, they are also (at least) morally responsible for atrocious mass killing. From a moral perspective, they are on a par with those individuals who directly carry out the killing. But this claim seems striking for three reasons.

First, regular combatants_{target_state} are not involved in Atrocity Crimes themselves and might not even be close to the site where they take place. Second, regular combatants_{target_state} do not cause perpetrators to engage in Atrocity Crimes. Regular combatants_{target_state} are not, say, threatening to kill or otherwise punish potential perpetrators should they fail or refuse to comply with their orders. Third, it is questionable whether regular combatants_{target_state} aid the perpetrators of Atrocity Crimes at all. Regular combatants_{target_state} do not support perpetrators by directly acting towards them, e.g. by transporting weapons to the killing site or providing other forms of assistance such as food, water, and medical supplies.³⁸ Regular combatants_{target_state} are merely ordered to defend their state against combatants_{intervening_state}. Contrast this with Gun Case where *S_{gun}* gives P a gun that P uses to kill V. Here we encounter a positive act, the handing over of the weapon, for which *S_{gun}* is clearly responsible and perhaps even culpable. In light of these arguments, it sounds reasonable to maintain that regular combatants_{target_state} are only responsible for actions restricted to their encounters with combatants_{intervening_state}.

The Argument from Derivative Liability negates this type of reasoning. It emphasises that, by defending the target state, regular combatants_{target_state} are morally responsible for sustaining a state of affairs in which very serious wrongs are committed. Hence they are (indirectly) morally responsible for Atrocity Crimes. From the perspective of the *actus reus* criterion, there are three points in support of this position.

First, the criminal law does not require that, in order to be derivatively liable for x, S needs to cause P to engage in x. Consequently, in order to have accomplice status, regular combatants_{target_state} do not need to cause the perpetrators of Atrocity Crimes to act. On the other hand, if it can be shown that P would have been, say, killed by S if P did not do x, it is likely that S's derivative responsibility increases up to a point where S himself could become the principal. If the perpetrators of Atrocity Crimes only engage in wrongdoing because their comrades would otherwise kill them, combatants_{intervening_state} should try, for reasons of necessity and proportionality alone, to minimise the infliction of harm on the former, while increasing their attack on the latter.

³⁷ A.P. Simester & G. R. Sullivan, *Criminal Law: Theory and Doctrine* (Oxford: Hart Publishing, 2nd ed., 2003); A. Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 5th ed., 2006); S. Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine', *California Law Review* 73 (1985), pp. 323-410.

³⁸ For a critical approach to the provision of welfare goods during war, see. C. Fabre, 'Guns, Food and Liability to Attack', *Ethics*, 120/1 (2009), pp. 36-63.

Second, an agent does not need to positively act towards a principal in order to be the latter's accessory. It is sufficient that the accessory's actions place P in a position where P can carry out the wrongdoing. If S helps P rob a bank by distracting the police, S has the same level of derivative liability as P's second accomplice who hands P the dynamite to break open the bank's safe. By analogy, if regular combatants *target_state* successfully repel intervening combatants, perpetrators of Atrocity Crimes are in a position to continue their attack on their victims. Regular combatants are thus morally on a par with, say, those soldiers charged with transporting weapons to the killing site.

Thirdly and directly related to the preceding point, it is also not required that the accessory is present when the wrongdoing is carried out. If, in the bank robbery case, S distracts the police three blocks away from the bank, his moral responsibility does not diminish. If regular combatants *target_state* render assistance that shields the perpetrators of Atrocity Crimes, it does not make a difference whether they are present at the killing site or not. The point is that the perpetrators of Atrocity Crimes will not be able to continue the assault on their victims if their comrades fail to halt the advance of combatants *intervening_state*. The possibility that the accessory is absent from the actual execution of the wrongdoing does not stand in the way of considering him complicit in it.

Although we have overcome these initial obstacles, we must note a related problem for the *actus reus* criterion. S's contribution to P's design is not always (morally) impermissible. To use Gun Case as an example, Sgun's act of giving P the gun may not be in itself morally wrong. Critics can therefore argue that it is absurd to maintain that Sgun should be derivatively liable for V's murder. But we can reply that, under these specific circumstances, Sgun is under a duty not to give P the gun. Sgun's liberty to dispose of his property ('the gun') as he pleases must be balanced against the rights of the prospective victim.³⁹ If the latter's rights are in danger of being violated, an otherwise morally permissible act can be wrong. In the context of Atrocity Crimes, it is clear that we must balance the Legalist View's moral permission to participate in an unjust war against the rights of the victims of Atrocity Crimes. Even if one generally supports the Legalist View, one could maintain that it does not apply to MHI for exactly this reason. This point lends further support to the Neo-Classical View.

But naturally, while the fulfilment of the *actus reus* criterion is a necessary condition for derivative liability, S, as the *mens rea* criterion demands, can only be derivatively liable for x if S is also aware of the relevant circumstances that lead to x. In Gun Case, for instance, Sgun is only complicit in V's murder if he knows that P is plotting an attempt on V's life. More precisely, the *mens rea* criterion for complicity, on which much of the Argument from Derivative Liability hinges, requires that:

1. S intends to do the acts through which he assists P and is aware that these acts aid P to engage in a wrongdoing.
2. S must know what P is about to do, that is, he must know the relevant circumstances. This is not to say that S must be *fully* aware of all facets of P's plans. Sometimes *culpable* ignorance, i.e. 'closing one's eyes to the obvious', can also lead to complicity.⁴⁰

³⁹ Ashworth, *Principles of Criminal Law*, pp. 434-435.

⁴⁰ (ibid.), p. 438.

The first part of the *mens rea* criterion necessitates a brief engagement with the role of intentions in assessments of complicity. It is possible to approach the issue in two ways. On the one hand, one can argue that S's intention to aid P is necessary to establish S's derivative liability. In this respect, Christopher Kutz stresses the centrality of what he calls 'participatory intentions' for the theory of complicity.⁴¹ On the other hand, it is debatable whether S's intention to contribute to P's wrongdoing is really necessary for S to be considered complicit in it. The second approach thus contends that we should hold S responsible for what he *does* to further P's wrongdoing, regardless of S's intentions. As a result, S is derivatively liable for P's wrongdoing, even if S does not *intend* to assist P. To establish S's derivative liability, it is (merely) necessary that S is *morally responsible* for aiding P.

The Argument from Derivative Liability tends towards the second approach. That is to say, it is interested in moral responsibility rather than intentions. To illustrate the point, consider the case of the Patriotic Soldier who knows that Atrocity Crimes are taking place, but denies that he *intends* to aid their perpetrators by resisting combatants *intervening_state*. Known to be sincere, the Patriotic Soldier intends to protect the target state and its culture from the intervening state. The Patriotic Soldier is opposed to Atrocity Crimes, but foresees that the actions necessary to defend his country contribute to the continuation of mass murder. The Argument from Derivative Liability assumes that the Patriotic Soldier is complicit in Atrocity Crimes, since he can be held morally responsible for actions that assist the perpetrators in carrying out their deeds. Similarly, if, in Gun Case, *Sgun* disagrees with P's plan to kill his brother but sells P the gun out of sheer greed, he is still derivatively liable for the murder.

Turning to the second component of the *mens rea* criterion, in order to be derivatively liable for x, S must have knowledge of P's plan to engage in x. In the present context, the question is whether regular combatants *target_state* have sufficient information about the occurrence of Atrocity Crimes so as to fulfil the *mens rea* criterion. This is problematic because they are, as we just saw, usually not present at the killing site. Moreover, while *Sgun* may know that P has a severe grudge against his brother, regular combatants *target_state* have usually no personal knowledge of the orders issued to potential perpetrators of Atrocity Crimes by the target state's government. Fortunately, both objections can be dealt with relatively quickly.

First, MHI is usually a response to an already existing state of affairs. There are reasons to be sceptical that even an entirely authoritarian society can completely cover up Atrocity Crimes. For example, in Cambodia, the epitome of an authoritarian state, many people had heard of the killing fields through eye witness accounts, word-of-mouth, and other more informal channels of communication.⁴² It is unlikely that there will be no information about Atrocity Crimes available to regular combatants *target_state*.

Second, while regular combatants may have no knowledge of the orders the perpetrators received, they can reasonably be expected to consider that their government is capable of ordering Atrocity Crimes. After all, as was noted in Part IV, regimes that order or tolerate Atrocity Crimes are often highly authoritarian and have a history of committing violence against their own people or unjustly aggressing other societies. If regular combatants do not consider this possibility, they really do close their eyes to the obvious.

⁴¹ C. Kutz, 'The collective work of citizenship', *Legal Theory*, 8 (2002), pp. 471-494.

⁴² Hinton, *Why did they kill?*.

If these two points are sound, we can assume that regular combatants_{target_state} fulfil the second part of the *mens rea* criterion. They can, therefore, be held derivatively liable for Atrocity Crimes. More precisely, the rendering of support to those engaged in Atrocity Crimes entails the violation of negative duties not to worsen the condition of potential victims. For the Argument from Derivative Liability, regular combatants_{target_state}, even though they may not intend to assist the perpetrators of Atrocity Crimes, are morally responsible for the violation of these duties, therefore incurring derivative liability to attack. Contrary to the Legalist View, then, regular combatants_{target_state} should not be considered as moral equals. As a result, the Argument from Derivative Liability rejects calls for a possible hybrid position on the status of combatants during MHI. Rather, the Neo-Classical View should apply to all groups of combatants in the target state, i.e. those engaged in Atrocity Crimes and those summoned to the defence of the target state. This reinforces the aforementioned idea of a right to intervene.⁴³ If the above arguments are sound, intervening combatants do not only hold a claim against perpetrators of Atrocity Crimes not to resist the intervention, but also regular combatants_{target_state}.

Conclusion

The article considered one of the key debates in contemporary just war theory. While the moral status of combatants during self-defensive war against unjust aggression has generated wide-spread interest, the status of combatants during MHI has received less attention. To shed light on this issue, the article argued that, first and foremost, theorists of MHI must distinguish between two types of combatants. The first group contains individuals who participate in Atrocity Crimes. Combatants in this group cannot be recognised as moral equals. Notwithstanding some exceptions, they are often **analogous to morally culpable attackers in ordinary domestic circumstances**. If this is sound, intervening combatants hold a right against them not to repel interventionist force.

The second group of combatants includes ‘regular combatants’ summoned to the defence of the target state. Although they are not directly engaged in Atrocity Crimes, their resistance to intervening combatants assists principal perpetrators in carrying out their deeds. Appealing to the notion of complicity found in criminal law, the article argued that regular combatants are *derivatively* liable for Atrocity Crimes, provided they are morally responsible for rendering aid to the perpetrators. As a result, they, too, are under a duty not to resist intervening combatants.

In sum, the discussion shows that McMahan’s version of the Neo-Classical View, though not unproblematic, provides a coherent framework in which we can place the interactions between all combatants during MHI. It also becomes apparent that the justification (JAB) and conduct (JIB) of interventionist military action cannot and should not be separated from each other. This is an important point that has recently received some attention in the literature on MHI.⁴⁴ Hopefully, the above arguments will contribute to further discussions of this claim.

⁴³ Needless to say, the Argument from Derivative Liability, like the Neo-Classical View more generally, has its limits when it comes to those regular combatants_{target_state} who do not have moral agency. As our discussion of NRA showed, intervening combatants may only permissibly infringe the rights of NRA. Again, this constitutes an exception to the rule, but as we observed above, it does not undermine the Neo-Classical View as such.

⁴⁴ See, J. Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who should intervene?* (Oxford: Oxford University Press, 2010).

Last but not least, it is noteworthy that the application of McMahan's Neo-Classical View to MHI is not merely a theoretical exercise conducted for its own sake. There is a growing consensus amongst international lawyers and theorists of MHI that societies in which Atrocity Crimes have taken place should be reconstructed.⁴⁵ This raises a number of issues pertaining to the moral status of combatants. The Neo-Classical View provides a challenging starting point for theorising the responsibilities of unjust combatants after Atrocity Crimes have been halted. It warrants discussion, for instance, whether the target state's combatants, especially those who participated in Atrocity Crimes, are obliged to appear before truth commissions, contribute to the reconstruction effort, or even compensate their victims (perhaps symbolically). Most importantly, the Neo-Classical View, due to its emphasis on individual moral responsibility, provides a point of orientation for the construction of a new military and political culture in the target state. In order to prevent the occurrence of Atrocity Crimes in the future, the Neo-Classical View can be used to instil a sense of individual responsibility and conscience in citizens and members of the armed forces. This, I take it, is the most attractive implication of McMahan's theory.

⁴⁵ G. Fox, *Humanitarian Occupation* (Cambridge: Cambridge University Press, 2008).