

## 6

# What Rights May Be Defended by Means of War?

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## 6.1 The Problem of Lesser Aggression

In the ancient world, defeat in war was often followed by the slaughter of the adult males in the defeated population and the enslavement of the women and children. This was the fate of the Melians at the hands of the Athenians in 415 BC and of the Carthaginians after the Third Punic War with Rome in 149 BC. The ancient Israelites were often less discriminating. Moses, for example, is reported as boasting that, of ‘threescore cities, . . . we utterly destroyed them, . . . utterly destroying the men, women, and children, of every city. But all the cattle, and the spoil of the cities, we took for prey to ourselves.’<sup>1</sup> Similar practices were followed by Genghis Khan and his Mongol warriors in the twelfth and thirteenth centuries against those whom they defeated. But in more recent centuries, particularly in Europe until the Second World War, defeat in war often resulted in relatively little harm to the vast majority of people in the defeated state. If, for example, one European state lost a war with another, ordinary life for the citizens of the vanquished state might go on much as before, with relatively little disruption. Although the victors often took spoils, they neither slaughtered the vanquished nor reduced their country to a dungeon, as the Soviet Union did to Eastern European states after the Second World War.

Saki’s last novel, *When William Came*, written just prior to the First World War, depicts Britain in the aftermath of a German conquest. Although the novel is stridently

<sup>1</sup> Deuteronomy 3:4–7. This tendency to be lenient with the animals sometimes got the Israelites into trouble. On one occasion, God commanded Saul to ‘go and smite Amalek, and utterly destroy all that they have, and spare them not; but slay both man and woman, infant and suckling, ox and sheep, camel and ass.’ Yet under pressure from his soldiers, Saul spared ‘the best of the sheep, and of the oxen, and of the fatlings, and the lambs’, an act of insubordination he came to regret. See 1 Samuel 15. Compare Numbers 31, Deuteronomy 7, Deuteronomy 20: 13–17, Joshua 8: 25–6, and Ezekiel 9.

tingoistic, the only noticeable difference that the conquest seems to make is that it is the Kaiser who sits in the Royal Box at the opera rather than the King.

Steinbeck's *The Moon is Down*, which was written for propaganda purposes during the Second World War, tells the story of the occupation of a town following the successful conquest of the country in which it is located. The commander of the forces stationed in the town sincerely pleads to the Mayor for cooperation:

The colonel began: 'We want to get along as well as we can. You see, sir, this is more like a business venture than anything else. We need the coal mine here and the fishing. We will try to get along with just as little friction as possible.'

The Mayor said, 'I have had no news. What about the rest of the country?'

'All taken,' said the colonel. 'It was well planned.'

'Was there no resistance anywhere?'

The colonel looked at him compassionately. 'I wish there had not been. Yes, there was some resistance, but it only caused bloodshed. We had planned very carefully. . . . I am more engineer than soldier. This whole thing is more an engineering job than conquest. The coal must come out of the ground and be shipped. We have technicians, but the local people will continue to work the mine. Is that clear? We do not wish to be harsh.'<sup>2</sup>

As the story progresses, one miner who is ordered to go to work—to do what he would ordinarily do anyway—attacks the officer who has given the order, but another officer interposes himself to protect his comrade, so that his own head is crushed by the attacker's mining pick. The miner is portrayed in the novella as a hero and a martyr, whose widow, after he is executed for the killing, later brings the story to a climax when she stabs and kills a lonely and gentle occupying soldier who goes to her meekly yearning for sympathy and warmth. Presumably both Saki and Steinbeck counted on their readers' passions being stirred on behalf of the victims of aggression no matter how mild the consequences of their defeat, conquest, or occupation.

Moral and emotional antipathy to military aggression had increased between the turn of the century, when Saki wrote, and the Second World War, which itself provoked a further sharp escalation in the general condemnation of aggression. For several centuries prior to the twentieth, however, the main focus of both just war theory and the law of war had been the regulation of the *conduct* of war, or *jus in bello*, rather than the regulation of the resort to war, or *jus ad bellum*. Aggression, while feared and resented by its victims, was not generally considered a great moral crime, and by the nineteenth century was not even illegal under international law. The resort to war was by then considered a sovereign prerogative of states. There are many dimensions to the explanation of why this was so, among which are the exaggerated conception of state sovereignty current at the time and the practical difficulty of regulating the resort to war. But two considerations that were probably even more important are that wars

<sup>2</sup> John Steinbeck, *The Moon is Down* (New York: Penguin, 1995), 14–15.

were not generally as destructive as they later became and that the consequences of defeat were generally not catastrophic.

But after the First World War, with its unprecedented destructiveness on the battlefield, and particularly after the Second World War, which was unprecedentedly destructive both on and off the battlefield, and in which defeat by either Nazi Germany or the Soviet Union involved a grave risk for the vanquished of genocide or enslavement, the prohibition of aggression came to be seen as virtually absolute in both morality and law. Yet the prohibition of aggression could be enforced, and further aggression deterred, only through self-defence or collective defence whenever aggression occurred. It therefore came to be regarded as not only always permissible but even generally obligatory to resist aggression by means of defensive war.

In recent years, however, doubts have begun to emerge about the view that a state that has not attacked another state always has a moral and legal right of defence against attack. The main ground for doubt about this has come from the increasing acceptance of the permissibility of humanitarian intervention in certain cases. It has seemed to many that when it is permissible to intervene militarily against a state whose government is egregiously violating the basic human rights of many of its own citizens, that state has no right of defence against the intervention. I believe that this is correct but will not discuss it here. My topic will be a second ground of doubt, which is that some instances of *wrongful* aggression may be insufficiently harmful for defensive war to be proportionate.

To understand the problem I will address and why it is important, it may help to distinguish between the *ends* that unjust aggressors seek and the *means* they use to achieve their ends. Sometimes aggressors have among their ends some that essentially involve grave harms to their victims. They may seek, for example, to kill, enslave, or expel people from their own country. But many aggressors are motivated by ends that do not require killing, enslaving, exiling, or even physically harming anyone. They may seek only to capture certain territory, control certain resources, or exercise certain forms of political control over the citizens of another state. In Steinbeck's novella, for example, the aggressors want only their victims' coal and fishing.

I call such instances of wrongful aggression *lesser aggression*. They contrast with 'major' aggression, which has killing or seriously harming among its ends. In lesser aggression, violence is a *means* only. The threat to use military force is thus *conditional*—that is, the aggressor will need to use military force only if the victims resist rather than capitulate. And such aggressors would obviously prefer to achieve their aims without having to fight a war, as Steinbeck's colonel wistfully observes. The victims of lesser aggression can therefore avoid both suffering and inflicting death and physical injury simply by allowing the aggressors to have what they want. The question is, then, whether it can be permissible for the victims to go to war to defend the values or rights, such as rights to territory, resources, or political sovereignty, that are threatened by lesser aggression.

## 6.2 The Domestic Analogy and the Orthodox View of Lesser Aggression

As I have noted, the traditional theory of the just war, the law of war, and common sense thought about war, which is exemplified in the two works of fiction cited earlier, all assume that it is virtually always permissible, and generally obligatory, to fight in defence against lesser aggression. The main reason why traditional just war theory accepts this assumption is that its account of the morality of the resort to war, or *jus ad bellum*, is based on what Michael Walzer calls the *domestic analogy*.<sup>3</sup> This is the view that states are sovereign individuals that are morally analogous to individual persons. The traditional theory of the just war combines the domestic analogy with the view that war is, as Rousseau expressed it, ‘something that occurs not between man and man, but between States.’<sup>4</sup> Because states are analogues of individual persons, relations among states are governed by the same moral principles that govern relations among persons. In particular, the principles that determine the permissibility of self-defence by states are the same as those that determine the permissibility of self-defence by individual persons. When a state confronts a wrongful threat to its political sovereignty or territorial integrity, this is thought to be analogous to an individual’s confronting a wrongful threat to life or limb. For sovereignty is, according to many theorists, an essential property of a state—that is, a property it cannot lose without ceasing to exist. Loss of sovereignty is thus, for a state, analogous to death, while a loss of territory is like an amputation. (Michael Walzer sees the parallels differently. He writes that the domestic analogy explains why ‘territorial integrity and political sovereignty can be defended in exactly the same way as individual life and liberty’. But this suggests that he thinks that it is loss of territory that is analogous to death and loss of sovereignty that is analogous to the loss of liberty. Yet a state can clearly survive the loss of some of its territory. That it could be so unclear what the analogues are for a state of harms to individual persons such as death, physical injury, restriction of personal liberty suggests at the outset how tenuous and unstable the domestic analogy is as a basis for reasoning about war.)

Lesser aggression, then, is not really lesser according to the traditional theory. While it is lesser in its effects on individual persons, it may be lethal, or severely disabling, in its effect on the state. Yet defensive war in response to lesser aggression need not be either lethal or disabling. If it merely repels the aggression without advancing to conquest or annexation of territory, it leaves the aggressor state intact. It is therefore analogous to an individual’s defending her life or bodily integrity against a wrongful attack by means that are neither lethal nor disabling, which of course seems uncontroversially permissible.

<sup>3</sup> See Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), 58.

<sup>4</sup> Jean-Jacques Rousseau, ‘The Social Contract’, in *Social Contract: Essays by Locke, Hume, and Rousseau* (London: Oxford University Press, 1947), 249–50. ~~EDITOR’S NAME IS SIR ERNEST BARKER.~~

The traditional theory's appeal to the domestic analogy does not, however, altogether exclude the possibility that a war of defence against lesser aggression could be impermissible on grounds of proportionality. But it does mean that any disproportionality must be in the relation between the aim of defeating the aggression and the harmful effects that defensive war would have on *noncombatants*. The harms caused to soldiers participating in the aggression, to whom I will refer as 'lesser aggressors', do not count. For if the domestic analogy is taken seriously, the individual lesser aggressors are the embodiment of the aggressor state; therefore the harms they suffer, including the harm of being killed, should be understood as non-lethal harms to the state, which are proportionate if the alternative is loss of sovereignty by the state that is the victim of the aggression.

This implied rejection of the possibility that defensive war against wrongful aggression could be disproportionate because of its effects on the aggressing combatants is reinforced by the claim of the traditional theory that combatant status alone is sufficient to make a person liable to be killed at any time during a state of war. For if all combatants are liable to be *killed*, there is no scope, in practice, for disproportionality in the harms that might be inflicted on them.

The traditional theory does, of course, include an explicit *ad bellum* proportionality condition. Since the theory does not recognize the possibility of disproportionality in harms inflicted on enemy combatants, proportionality is, as I noted, assumed to be entirely a matter of harms inflicted on noncombatants. It is doubtful, however, whether this is consistent with the domestic analogy. For it is arbitrary to suppose that the state is embodied in its soldiers but not in its civilian citizens. It seems, therefore, that the claim that combatants are legitimate targets but noncombatants are not must be, according to the domestic analogy, morally like the claim that an individual engaged in self-defence may permissibly attack certain parts of a threatener's body but not others.<sup>5</sup> Since states can and sometimes do survive the loss of a substantial proportion of their civilian population, even within a short period of time, it seems that, short of genocide, the killing of civilians in an aggressor state is no more lethal or disabling, *to the state*, than the killing of its soldiers. By this reasoning, which is based on the domestic analogy, defence against lesser aggression should also be proportionate even if it requires the killing of a significant proportion of the aggressor state's civilian population.

I will leave it to the defenders of the traditional theory to try to explain how to reconcile their doctrine of civilian immunity with their appeals to the domestic analogy. My aims here are to give brief descriptions of the way lesser aggression is viewed by the traditional theory of the just war, in international law, and in common sense moral

<sup>5</sup> Here and elsewhere I use 'threatener' to refer to someone who poses a threat rather than to someone who issues or utters a threat. Similarly, I generally use 'threatens to' to mean 'will cause unless prevented'; not 'issues a threat to'.

thought, and then to consider whether the view on which these perspectives converge is actually defensible.

International law is unambiguous in its affirmation that states have an ‘inherent right’ to resort to war in defence against aggression by another state. The UN Charter recognizes only two conditions in which a state may permissibly resort to war: when authorized to do so by the Security Council to ‘maintain or restore international peace and security’ and in ‘individual or collective self-defence if an armed attack occurs.’<sup>6</sup> The scope of the right of defence against aggression is unrestricted, for in law there is no *ad bellum* proportionality constraint. It is legally permissible to go to war in response to armed aggression by another state no matter how minor the aggression may be.

Although international law does not and indeed could not *require* defensive war in response to lesser aggression, it is understandable that theorists of international law should be sympathetic to the idea that it is *morally* obligatory. This is because the aim of the legal proscription of aggression is obviously to prevent aggression. But since there are as yet no reliable international means of enforcing the proscription, the law must rely on individual and collective defence by states for enforcement. Defensive war is the only reliable means of upholding the legal prohibition of aggression.

Unsurprisingly, common sense moral thought agrees with traditional just war theory and international law that defence against aggression is always, or nearly always, permissible. It is natural that there would be processes of reciprocal influence here, in which common sense beliefs would influence the content of the principles of just war theory and law, which then come to be regarded as authoritative and thus reinforce the beliefs that once shaped them. Common sense thought affirms that states have not merely a right but also a duty to defend their citizens against aggression, including lesser aggression. A state that could mount a military defence against lesser aggression but failed to do so would presumably be widely denounced as derelict, not least by its own citizens. It is therefore generally assumed that an account of the morality of war that cannot provide a justification for the resort to war in response to lesser aggression is deficient, perhaps fatally so. Thus Seth Lazar, in his contribution to this book, repeatedly suggests that what he variously calls a ‘reasonable’, ‘plausible’, or ‘sensible doctrine of national defence’ will nearly always permit the resort to war in defence against threats to state sovereignty or territorial integrity.

I once accepted this assumption myself. In an early article in which I argued against the traditional theory of the just war, I suggested that one might object to the theory that, despite what traditional theorists have said, it cannot recognize the permissibility of defence against lesser aggression. I then argued, however, that the theory could be defended against this objection.<sup>7</sup> I now think that the objection as I stated it as well as the two responses that I offered on behalf of the traditional theory were all mistaken.

<sup>6</sup> *Charter of the United Nations*, articles 42 and 51.

<sup>7</sup> Jeff McMahan, ‘Innocence, Self-Defense, and Killing in War’, *The Journal of Political Philosophy*, 2 (1994), 193–221: 195–6.

But the point is that I uncritically followed the received wisdom in assuming that it would have been highly damaging to the traditional theory if it could be shown that it did not provide a general justification for war in response to lesser aggression.

A few writers have criticized the traditional theory on the ground that while it claims that war against lesser aggression is generally permissible, it actually lacks the resources to justify this claim.<sup>8</sup> They have argued, for example, that insofar as the traditional theory's defence of the permissibility of war in response to lesser aggression appeals to the domestic analogy, it fails because it is a mistake to reason morally about an activity that involves the mass killing of individual persons in a way that treats those killings as non-lethal harms to the state. In this I think they are correct.

These writers tend to be skeptical of the permissibility of war in response to lesser aggression. Other writers, notably Seth Lazar, Patrick Emerton, and Toby Handfield, in their contributions to this volume, assume that the consensus view is correct and argue that revisionist approaches to the morality of war that are individualist in orientation are challenged by their inability to provide an adequate general justification for defence against lesser aggression. They argue, in effect, that individualist approaches are unlikely to be acceptable because they seem incapable of explaining how state sovereignty and territorial integrity could be sufficiently important to justify the large-scale killing that is usually necessary for successful military defence against lesser aggression.

The position I will defend is intermediate between these two views. I agree with critics of the traditional theory who claim that it is excessively permissive in its presumption that war is generally justified in response to lesser aggression. But I do not share the view that defence against lesser aggression is seldom morally justified. In particular, I will argue that the critics of the revisionist approach to just war theory are mistaken to claim that this approach cannot justify defensive war against lesser aggression. According to the revisionist approach, which I accept, war in response to lesser aggression is sometimes permissible, sometimes not. I will suggest that this approach's implications are intuitively more plausible than those of either the traditional theory or the restrictive position adopted by those who have cited the problem of lesser aggression as an objection to the traditional theory.

But before I explore the implications of the revisionist approach, it is necessary to explain why the question whether war is permissible in response to lesser aggression is neither simple nor easy to answer. It is overly complacent to suppose, as most people do, that defence by the state against any form of aggression is nearly always permissible. To see why this is so, we need to understand the nature of the problem of lesser aggression, which is essentially a problem of proportionality.

<sup>8</sup> Richard Norman, *War, Ethics, Killing, and War* (Cambridge: Cambridge University Press, 1995), esp. 132–58; and David Rodin, *War and Self-Defense* (New York: Oxford University Press, 2003), esp. 132–8.

### 6.3 The Varieties of Proportionality

I noted earlier that the traditional theory of the just war recognizes an *ad bellum* proportionality constraint but assumes that the only relevant bad effects are those suffered by people who are not combatants in the war. I also indicated why the traditional theory claims that harms inflicted on aggressing combatants cannot make war disproportionate. Yet the reasons the theory gives do not necessarily explain why common sense moral thought supports the exclusion of harms to aggressors from the proportionality assessment. Our intuitive sympathy with that exclusion derives not from our acceptance of the domestic analogy but from our sense that innocent victims are not morally required to submit to bullies on the ground that defence would be too harmful to the bullies. We are sympathetic to the doctrine, associated with the German legal theory of necessary defence, that ‘fight need never yield to wrong’ (though for most of us, our sympathy stops short of the absolutist form of the doctrine, which led the German Supreme Court in 1920 to the acquit a farmer who had shot two thieves seeking to flee from his orchard with some stolen apples).<sup>9</sup>

Traditional theorists also tend to believe, for a variety of reasons, that the anticipated harms that the state’s own combatants would suffer by going to war are excluded from the determination of whether the war is proportionate. One such reason is that these harms would be caused, the theorists assume, not by the state’s own resort to war but by the action of enemy combatants. Another reason is that these harms are, according to the domestic analogy, ones that are voluntarily incurred by the state and as such cannot make the state’s action morally impermissible. The state may engage in self-sacrifice if it chooses. Sacrifices that are voluntarily incurred may make the state’s action imprudent, but they cannot make it impermissible. Hence, they cannot make the resort to war morally disproportionate.

Both of these exclusions are, however, unjustified. Consider first the traditional theory’s claim that war cannot be disproportionate because of the harms it would inflict on enemy combatants. I cited two defences of that claim, one that appeals to the domestic analogy and another that appeals to the assumption that all combatants are liable to be killed at any time during a state of war. Yet one cannot justify the killing of people on the ground that all that one is doing is inflicting a non-lethal injury on a state. While one may in some metaphorical sense be injuring a state, one is also killing people, and that requires a justification that the domestic analogy cannot provide. It is, furthermore, false that all combatants are morally liable to be killed while war is in progress. Just combatants—those who fight in a just war—are not morally liable to be attack provided that they fight by permissible means.<sup>10</sup> And some unjust combatants

<sup>9</sup> George Fletcher, ‘Proportionality and the Psychotic Aggressor’, *Israel Law Review*, 8 (1973), 367–90: 381. Also see George Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, and Co., 1978), 865.

<sup>10</sup> I have argued for this claim *ad nauseum*. See, for example, Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009), ch. 1.

(those who participate in a war that lacks a just cause) are also not liable to attack—for example, those who make no contribution to their side's unjust war, and those, such as some military lawyers, who actually restrain or impede the prosecution of the war. One therefore cannot infer from the fact that a person is a combatant, or even from the fact that he is an unjust combatant, that he is liable to be killed.

The idea that war cannot be disproportionate because of the harm it would cause to aggressors is also intuitively untenable. Suppose there were a few barren, uninhabited, and unused acres on the California side of the border with Mexico to which Mexico had no legal claim but that it sought to annex because they were a sacred site to Mexicans. Suppose the Mexicans had mobilized an enormous conscript army to seize this tiny piece of territory and that the US would have to kill tens of thousands of those soldiers to prevent the annexation. It would be impermissible, because disproportionate, to kill so many people merely to retain a few acres of useless land, especially given that the soldiers were acting under duress. Or, to take a more controversial example, but one that actually occurred, consider the attempt by Argentina to wrest sovereignty over the Falkland Islands from Britain in 1982. The aims of the Argentine junta were wholly political. If they had been unopposed, the Argentine forces would not have killed or physically harmed anyone. Indeed, the shift from British to Argentine sovereignty would probably have had relatively little effect on the daily lives of the islanders, of whom there were only 1,800 at the time (and who could have been resettled in Britain and compensated for their losses). Yet 650 Argentine combatants were killed during the war and another 1,100 were wounded, so that there were almost as many Argentine casualties as there were inhabitants of the islands. It is therefore a serious question whether this war was proportionate in its effects. And, of course, the rate of casualties could have been considerably higher if the Argentine junta had been more determined to achieve its aim. One can, therefore, ask whether the killing of 10,000, or 100,000, Argentine combatants would have been proportionate in relation to the legitimate goal of preserving British sovereignty over the islands.

The Falklands War was in many ways a paradigm instance of lesser aggression. But it was unusual in one respect, which is that because it was largely a naval war and in any case the number of islanders was small, it imposed comparatively little risk on innocent bystanders. Only three civilians were killed in the course of the war, and they were accidental victims of what is curiously known as 'friendly fire'. If, therefore, there is a serious question whether this war was disproportionate, or would have been had it been necessary to sink more Argentine ships, it seems that harms to aggressors do count in the assessment of proportionality, contrary to the claim of the traditional theory.

The aggressing Argentine combatants were potentially liable to some form of harmful defensive action. Had it been possible, for example, to sink their ships and then rescue them, taking them all prisoner without killing anyone, that would clearly have been permissible. And it would have been permissible because, by virtue of their participation in wrongful aggression, they would have been liable to the lesser harms that

this action would have caused. This non-lethal action would have been proportionate in what I call the *narrow* sense. Narrow proportionality is a matter of harms to those who are potentially liable to be harmed. If an act harms a wrongdoer in a way to which he is liable (or by less than the amount to which he is potentially liable), that act is proportionate in the narrow sense. If it harms him to a degree that exceeds the harm to which he is liable, it is disproportionate in the narrow sense. It would, for example, be disproportionate in the narrow sense for a person to kill a pickpocket even if that were the only way to prevent the theft of his wallet.

I call this form of proportionality ‘narrow’ because it is generally limited to a narrow range of the people who might be harmed—namely, those who are potentially liable to be harmed by virtue of their own action. It contrasts with proportionality in the *wide* sense, which is proportionality in harms caused to those who are not liable to suffer them. In the Falklands War, for example, the risks imposed on civilian inhabitants of the islands, and the harms they suffered, were matters of wide proportionality.

In the past it has been assumed that there is only one *ad bellum* proportionality requirement and one *in bello* proportionality requirement. But this is a mistake. There are instead both narrow and wide *ad bellum* requirements and narrow and wide *in bello* requirements. The narrow and wide requirements are separate and distinct because they are constraints on different forms of justification. The narrow proportionality requirements are constraints on a liability-based justification (and also on a desert-based justification, though it is doubtful that the latter form of justification is relevant to the morality of war), while the wide proportionality requirements are constraints on a lesser-evil justification.<sup>11</sup>

Just as harms to aggressors are relevant to the *ad bellum* proportionality of defensive war, so too are the harms that would be suffered by combatants fighting in defence against the aggression. As I mentioned, one can appeal to the domestic analogy to argue that these harms cannot constitute a moral constraint on the state’s resort to war, because the state is permitted to make voluntary sacrifices if it wishes. But what this actually shows is the implausibility of the domestic analogy. That the resort to war is voluntary on the part of the state does not entail that the participation of those who would be killed is voluntary in the relevant sense. If people, including soldiers, in a state confronted with lesser aggression were spontaneously and freely to volunteer to fight, that might indeed mean that the prospect of their deaths could not make the defensive war in which they would fight impermissible; therefore it could not make that war disproportionate. But if they are ordered to fight by the state, the harms they are likely to suffer have to be taken into account in assessing whether the war that the

<sup>11</sup> For the suggestion that desert may have a justificatory role in self-defense and war, see John Gardner and François Tanguay-Renaud, ‘Desert and Avoidability in Self-Defense’, *Ethics*, 122/1 (2011), 111–34. For discussion, see Jeff McMahan, ‘Duty, Obedience, Desert, and Proportionality in War: A Response’, *Ethics*, 122 (2011), 135–67; and the exchanges on *Pea Soup* at <http://peasoup.typepad.com/peasoup/2012/01/ethics-discussions-at-pea-soup-john-gardner-and-françois-tanguay-renauds-desert-and-avoidability-in-.html#more> (last accessed 1 July 2013).

state has decided to fight would be proportionate. It can be morally wrong for a state to fight, even in defence against wrongful aggression, if the harms that would be suffered by its citizens, including its soldiers, would exceed those they would suffer if the state were not to fight.

It is worth mentioning, if only parenthetically, that there are interesting questions here about the connections between liability and disproportionality. First, suppose that a state's resort to war in response to lesser aggression would be disproportionate because the harms its own soldiers would suffer would be excessive in relation to the importance of averting the harms threatened by the aggression. In the canonical terms of just war theory, a disproportionate war is an unjust war. Does that mean that these combatants would be unjust combatants and thus liable to attack by the aggressors? Clearly not. Their state's war would be wrong because of the harms that *they* would suffer. That is, they would not be the agents of unjust action but the victims of wrongful action by their own state. This means, among other things, that the judgment that their war is disproportionate is a claim about wide rather than narrow proportionality. It is thus misleading to say that their state's war is unjust, and absurd to suppose that combatants could make themselves liable to attack by participating in a war that is wrong because the harms they will suffer in it are excessive.

There is, however, a more difficult issue. Suppose that a state resorts to war in defence against lesser aggression but that the war is disproportionate not because of the harms that its combatants will suffer but because of those they will inflict. Their aims are legitimate but their means are disproportionate. Because their action is disproportionate and therefore impermissible, are they then liable to attack by the lesser aggressors? If, for example, the Falklands War was in fact disproportionate because the harms that had to be inflicted on Argentine combatants were excessive in relation to the importance of preserving British sovereignty, were British combatants then liable to attack by the Argentine aggressors? One reason for thinking they were not is that killing them was unnecessary for the defence of the Argentine combatants, who could have avoided being harmed by simply stopping their wrongful aggression. We can also ask, however, whether it would have been permissible for a third party to have intervened militarily to stop the British from continuing to fight a disproportionate war. My intuition is that it would not have been, particularly if the third party would have inflicted greater harm on the British than they suffered at the hands of the Argentine forces. But that is only an intuition, not an argument. One consideration is that because it was easier to see in this case that the aggression was wrong (especially given that all of the islanders wanted to remain British subjects) than to see that defensive war was disproportionate (as we are assuming), the fault was greater on the Argentine side. And it seems reasonable to suppose that in a war that is unjustified on both sides, third parties ought not to intervene on the side that is more at fault unless doing so will *greatly* diminish the amount of harm that will be caused. Another possibility is that, as I will later suggest, it can sometimes be morally justifiable to fight a war against lesser aggression even when doing so is disproportionate. If that had been true of the British action in the Falklands,

British combatants would not have been liable to attack even by a third party, for morally justified action is not, in general, a ground of liability to defensive action.<sup>12</sup>

## 6.4 The Problematic Features of Lesser Aggression

To see why the received view—that defence against lesser aggression is nearly always justified—is less plausible than it may initially seem, it is helpful to distinguish and list separately the various features of lesser aggression that support the claim that defence against it may often be disproportionate.

### 6.4.1 *Unconditional threat of lesser harms only*

By definition, the ends that lesser aggressors seek do not include the infliction of lethal or serious physical harms. The achievement of their ends would mean only that the victims of the aggression would suffer certain lesser harms or losses, such as losses of wealth, employment, property, or political liberty or self-determination. One way to understand the losses caused by lesser aggression is to stipulate that they would, in general, be the sorts of loss that, outside the context of war, the potential victim would not normally be permitted to avert by means of killing the person who would otherwise cause them, particularly if the latter were not fully culpable. There are, of course, some harms that are non-lethal and even non-physical that it can be permissible to prevent by killing the person who would inflict them, such as enslavement or captivity for a significant or indefinite period. Hence aggressors who would impose an indefinite occupation with martial law, curfews, house arrest for leaders, tight restrictions on emigration, and so on are not lesser aggressors.

It is, of course, unlikely that there would ever be a pure case of lesser aggression in which the aggressing soldiers would never kill or seriously injure a single citizen of the state they invaded. I will assume, however, that the inevitability of a limited number of isolated acts of serious violence against individuals is insufficient to prevent an instance of aggression from counting as ‘lesser’. While such isolated acts of violence can justify defensive killing of the perpetrators, they cannot justify large-scale killing by military means. (Some may doubt this claim. The reasons that support it will emerge in the subsequent discussion.)

### 6.4.2 *War involves killing on a large scale*

Killing on a large scale by military means is what we commonly mean by ‘war’. Yet there is no conceptual incoherence in the idea of a very small-scale war, or even a war in which no one is killed. In legal terms, the Israeli bombing of Iraq’s Osirak nuclear

<sup>12</sup> For a defense of this latter claim, see Jeff McMahan, ‘Self-Defense Against Justified Threateners’, in Helen Frowe and Gerald Lang (eds.), *How We Fight: Issues in Jus in Bello* (Oxford: Oxford University Press, 2013).

reactor in 1981 was an act of *war* although only a few people were killed and there was no military response. Even so, defensive military action against lesser aggressors is almost certain to involve killing and wounding on a substantial scale. So one salient dimension of the problem of lesser aggression is that a defensive response is likely to involve killing and wounding large numbers of people as a means of preventing less serious harms to others.

It is worth calling attention here to two dimensions of the morality of killing in war that are seldom fully appreciated. One is that, because combatants who are killed in war tend to be young, typically in their twenties, they are harmed by being killed to a substantially greater degree than an older person would be. This is because the amount of good life they lose by dying is greater. The other dimension also derives from their comparative youth; it is that their parents are usually still living and they often have a spouse or partner as well as one or more small children. Many parents reasonably believe that the death of their child would be worse for them than their own death. Given the choice, they would prefer to die than to have their child die. People who are married, and perhaps especially those who are newly married, often have the same view of the death of their spouse. And it is a familiar fact that the death of a parent is usually terribly traumatic as well as a great objective loss for a small child. So the killing of a soldier in war normally has further effects on several innocent people that are almost as bad for them as death itself, and certainly worse for them than a loss of property or a limited loss of political or economic liberty. Of course, the bereavement of relatives and friends caused by the killing of a soldier must weigh in the wide proportionality assessment of *all* wars, including wars of defence against major aggression. But the difference is that in cases of major aggression, many people who are the victims of the aggression will suffer grave harms such as death and bereavement whether or not their state resorts to war in self-defence, whereas in the case of lesser aggression, these more terrible harms can be avoided altogether if the victims choose not to fight.

#### 6.4.3 *Mitigating conditions*

The fact that most soldiers are quite young may also be relevant to the degree of their responsibility for their participation in unjust aggression. Although we conventionally treat 18 as the beginning of adulthood, when people can be assumed to be fully responsible for their action, the prefrontal cortex of the brain, which is crucially involved in our ability to deliberate about and act on the basis of reasons, does not fully develop until a person is about 25 years old. If this means that soldiers below that age in general have a slightly diminished capacity for responsible agency, we should take that into account in assessing the degree to which they are responsible for their participation in lesser aggression. Much more importantly, most combatants who fight in unjust wars act in conditions of significant factual and moral uncertainty and also under some degree of duress. Their knowledge of the relevant history, current political events, and the morality and law of war are all inevitably limited and they will almost certainly

have been deceived in various ways by their government, whose pronouncements they tend to regard as authoritative. They are therefore likely to believe both that their war is just and that it is their patriotic and professional duty to fight. They also know that if they were to refuse to fight, they would be punished, perhaps savagely, and that they might also face an array of informal sanctions, such as social disgrace and ostracism. These various conditions tend to mitigate their culpability, which in turn affects the amount of harm to which they may be liable or, to put it another way, the amount of harm it may be proportionate in the narrow sense to inflict on them in self-defence.<sup>13</sup>

#### *6.4.4 Causal contributions to harms to individuals*

Another factor that affects the liability of lesser aggressors to defensive harm is the degree to which they would contribute causally to the harms that would be suffered by the victims of their aggression in the absence of a defensive war. Since the issue is what harms they are liable to as a means of preventing their contributions to the harms of lesser aggression, it is obviously relevant to assess the extent of their individual contributions to the occurrence of these harms. For it is these contributions that would be prevented by killing them or otherwise incapacitating them by defensive military action.

It seems that in the absence of military resistance, most individual lesser aggressors would make only a small contribution to the lesser harms they would collectively inflict. As individuals, most would make only a very small contribution to the harm suffered by any particular victim. If, for example, an individual victim were to suffer a reduction in wealth and a restriction of certain political rights, the contribution that any one lesser aggressor would have made to those harms is likely to have been negligible. That means that killing any one lesser aggressor would probably have made little or no difference to the harm suffered by any individual victim.

#### *6.4.5 Harms that defensive war would cause to innocent bystanders as a side effect*

The considerations noted in points 3 and 4, and in the first half of point 2, are concerned with proportionality in the narrow sense—that is, proportionality in harms that would be caused to those who are potentially liable to be harmed. But in almost all present and likely future conditions, fighting a war will inevitably involve the killing and wounding of innocent civilians on the adversary's side, and possibly civilians on one's own side and in neutral states as well, as a side effect. These serious and inevitable harms weigh heavily in the determination of whether defence against aggression can be proportionate in the wide sense.

<sup>13</sup> For further discussion of the relevance of excusing conditions to liability, see McMahan, *Killing in War*, ch. 3 and section 1.1 of ch. 4.

#### 6.4.6 *The effects of provoking lesser aggressors to counterattack*

If a state responds to lesser aggression by engaging in defensive war, it will provoke the initially lesser aggressors to fulfil their conditional threat to use military force to achieve their ends. So among the consequences of choosing defensive war rather than submission will be the large-scale intentional killing and wounding of the defending state's own soldiers as well as the killing and wounding of many of the state's civilian citizens as a side effect of the aggressors' military action. Assuming that the state's soldiers do not make themselves liable to attack by engaging in defence against unjust aggressors, all of these casualties must be taken into account in determining whether defensive war would be proportionate in the wide sense.

Some just war theorists reject these claims. As we have seen, some reject the claim that anticipated harms to the state's own soldiers can make its war disproportionate, for they implausibly understand these as harms to the state that the state freely consents to suffer, or to risk suffering. One might argue, however, that the fact that common sense endorses the view that states have a duty to defend their citizens against aggression implies that most of a state's citizens both expect and presumptively demand that their state defend them and thus implicitly consent to the risks involved in defensive war. Similarly, one might argue that most soldiers would freely consent to fight in defence against lesser aggression if they were asked rather than ordered to do so. If these assumptions are correct, it can be argued that the harms that a state's soldiers and civilian citizens would suffer in a war of defence against lesser aggression cannot make such a war impermissible by making it disproportionate. For morality does not forbid people to take great risks or even sacrifice themselves to protect the rights of their community, even if their doing so would be imprudent. Suppose, for example, that the citizens of Melos had unanimously voted to resist the imposition of Athenian rule, despite the knowledge that resistance would almost certainly be futile and therefore suicidal. It does not seem that morality would say that in resisting they were acting impermissibly because the effects of their action were disproportionate.

The problem with this reasoning is that even if many or most of the victims of lesser aggression support, or would support, a defensive war against the aggression, there are inevitably some who do not. In addition to adults who would prefer to suffer the losses the aggression would cause rather than be exposed to the risks of war, there are always children and others who are incapable of having an autonomous preference about the matter. Hence, there are always many among the victims of lesser aggression who do not autonomously choose to accept the risks that defensive war would expose them to. If the expected harm these people would suffer from defensive war would be greater than that which they would suffer through capitulation to the lesser aggression, that net expected harm must count in the assessment of wide proportionality. In practice, of course, these matters cannot be determined with even approximate precision. But we know enough to justify a practical conclusion. We know that some victims of lesser aggression do not consent to accept the risks of defensive war

and that the harms they would suffer must count assessing whether war would be proportionate in the wide sense. We also know that other victims of lesser aggression support or even demand defensive war and thus consent to accept the risks that war involves. This suggests that the harms they would suffer in war cannot make the resort to war impermissible, which in turn suggests that these harms cannot count in the assessment of whether war would be proportionate in the wide sense. In practice, therefore, it seems that the harms that a state's own citizens would suffer if it were to engage in defence against lesser aggression must count in determining whether the war would be proportionate in the wide sense, but that the weight that these harms have should also be discounted. The rationale for the discounting is that it takes account of the fact that some of the harms to the state's own citizens count while others do not. Thus the degree to which the overall harms should be discounted should be determined by reference to the degree of popular support for war as opposed to capitulation.

A second reason that some have given for either excluding or discounting harms that would be suffered by the defending state's citizens and soldiers is that these harms would not be attributable to the action of the state but to the action of the aggressors. They are, it is claimed, the responsibility of the aggressors rather than of the defenders. But the moral significance of the fact that it is the aggressors' 'intervening agency' that is the proximate cause of these harms is a disputed issue that cannot be settled here. I will say only that because these harms would not occur if the state were not to resort to war, they cannot be altogether irrelevant to the permissibility of the state's action. I will not attempt to determine whether it is reasonable to ~~further~~ discount their weight for these causal considerations in determining whether the state's action would be proportionate in the wide sense.

#### ~~6.4.7~~ *The possibility of defeat*

Finally, it is possible that military defence against lesser aggression will end in defeat, so that the aggressors will get what they wanted and all the losses on both sides will have been in vain. And the aggressors might then be vindictive in ways they would not have been had the defenders simply capitulated. These are of course obvious points that simply highlight the claim that the probability of success in achieving the just cause in war is an essential element of proportionality.

After surveying the foregoing list of features that are characteristic of lesser aggression, one might suppose that this form of aggression is of limited significance, since it occurs only rarely. Wars such as the Falklands War, in which comparatively few combatants were engaged in fighting, and in which most of the fighting occurred well away from areas where innocent bystanders could be hurt as a side effect, are nowadays quite rare. But in fact the problem of lesser aggression is quite common. It arises in all cases in which an aggressor's aims do not include the infliction of grave harms, such as death, torture, or enslavement, so that the victims could avoid both *suffering* and *inflicting* significant casualties by allowing the aggressors to have what they want. In

these cases, war could either be avoided altogether or at least terminated almost immediately after it had begun.

Suppose, then, that one were to conclude that military defence against lesser aggression is in most cases disproportionate, either in the wide sense or the narrow sense, or both. One would not be committed to pacifism, since rejection of the permissibility of war in response to lesser aggression is compatible with the acceptance of the permissibility of war in response to major aggression. But if a significant proportion of acts of aggression are instances of lesser aggression and if war is generally a disproportionate response to lesser aggression, the upshot is a highly restrictive doctrine of the just war.

There is always a moral presumption against killing. That means that killing, especially on a large scale, always requires justification. Thus the burden of justification does not lie, as common sense thought supposes, with those who doubt the permissibility of war in response to lesser aggression, but with those who assert that defensive war is permissible. My aim, as I mentioned earlier, is to meet that burden, though only in a limited way. I will explain the considerations that support the permissibility of defensive war against lesser aggression in many though not all cases of lesser aggression. The considerations I will cite are all recognized as important by the revisionist approach to the morality of war. But the view I will defend, and which is implied by the revisionist approach, is significantly less permissive than that endorsed by the traditional theory of the just war.

I will present a series of reasons for thinking that defensive war can be a permissible response to lesser aggression. While I will suggest strong doubts or reservations about some of them, I will argue that others have considerable force, at least in some cases. The reasons that are most persuasive are, moreover, compatible with the revisionist approach to the morality of war that claims that the justifications for killing in war are no different from the familiar justifications for killing people in lesser forms of conflict, such as individual self- or other-defence.

## 6.5 The Survival and Independence of the Political Community

The most obvious response to the problem of lesser aggression is that it can be permissible to inflict a *greater* harm on a culpable aggressor if that is necessary to prevent him from inflicting a *lesser* harm, provided that the difference between the two harms does not exceed some reasonable limit. It is widely recognized, for example, that it can be permissible to kill a culpable aggressor to prevent oneself from being kidnapped, tortured, or mutilated. It seems, therefore, that it could be permissible to kill lesser aggressors even though they would otherwise inflict only non-lethal harms.

There are, however, two reasons why this point is largely irrelevant. First, and most importantly, I have stipulated that harms that are elements or unavoidable concomitants of the achievement of the lesser aggressors' ends are below the threshold at which

harms are in general sufficiently serious to justify the killing of the person who would otherwise inflict them. If torture, unjust imprisonment, or mutilation were among the aggressors' ends, their aggression would not be *lesser* aggression. Second, unlike virtually all torturers and kidnappers outside the context of war, soldiers who participate in lesser aggression tend, as I observed in the previous section, not to be highly culpable. Their culpability is typically mitigated by various conditions such as duress, social expectations, factual and moral uncertainty, and so on. Some lesser aggressors may even be fully excused, or not culpable at all. This is relevant because diminished culpability, or absence of culpability, can affect how much harm a lesser aggressor may be liable to suffer from defensive action or, in other words, what counts as a proportionate defensive response to his action. It is possible that even if it would be permissible to kill lesser aggressors who lacked any excuses and were thus fully culpable, it might not be permissible to kill them in the same circumstances if they were only minimally culpable or not culpable at all.

The suggestion that the harms caused by lesser aggression are insufficiently significant to justify killing those who would inflict them may seem to presuppose that the only relevant harms are those suffered by individuals, such as losses of wealth or certain political rights. But many people, particularly among defenders of the traditional theory of the just war, argue that the principal losses occasioned by lesser aggression are essentially collective in nature, in that they cannot be reduced to harms suffered by individual persons. According to this view, the domestic analogy is based on more than a metaphor. The state, though not literally a person, is the political union of a people; it is both the embodiment and guarantor of their culture, traditions, and way of life. When the sovereignty of the state is compromised and a people's control of their own collective life is compromised, a special form of association may be lost. Some dimensions of this loss can of course be accounted for in individualist terms insofar as the state is the focal point of identity, solidarity, and belonging for its citizens, as well as a source of more tangible forms of support. But even if all the individual members of the cultural and political community survive, and even if they are able to adapt to their diminished capacity for political self-determination, lesser aggression may nevertheless damage or ultimately destroy an irreducibly collective and perhaps transcendent set of goods: namely, the bases of collective identity that have bound these people and their ancestors together and would have encompassed their descendants as well. In Michael Walzer's words, 'the survival and freedom of political communities—whose members share a way of life, developed by their ancestors, to be passed on to their children—are the highest values of international society', and they are threatened not only by major aggression but even by lesser aggression.<sup>14</sup>

Walzer's claim is widely and passionately embraced. It underlies both the willingness of soldiers to fight and die in defence of political independence and territorial

<sup>14</sup> Walzer, *Just and Unjust Wars*, 254.

integrity and the general willingness among the civilian victims of lesser aggression to endure the risks of war rather than capitulate to the aggressors. It is the basis of such slogans as ‘Better dead than red’ and ‘Live free or die’.

Yet, as Richard Norman has rightly pointed out, the question that is relevant to the permissibility of defensive war is not whether political independence is worth dying for but whether its preservation can justify the killing of a large number of people by whose action it is threatened.<sup>15</sup> Of course, if a value is really worth dying for, that suggests that it is important enough to justify killing those who threaten it. But there is considerable vagueness in the claim that what is worth dying for is also worth killing for. One must first ask *how many* deaths the preservation of some value is worth. It might be desirable for a small fraction of a population to sacrifice their lives to preserve their state’s full political independence yet foolish for half the population to do so, even if they *believe* that it is better to die than to live in a way that is not wholly free—for that is not a belief that is self-validating. People can be mistaken about what is better for them. Moreover, once one takes numbers into account, claims that might otherwise have seemed platitudinous can come to seem obviously false. The claim that what is worth dying for can justify killing seems plausible if one considers only cases in which one person wrongly threatens what another person rightly believes is worth his dying to preserve. But it does not follow that it is permissible for him to kill 10,000 people to achieve that same goal. I will return to the issue of numbers shortly.

In discussing the problem of lesser aggression, Thomas Hurka appeals in part to the domestic analogy to explain why violent resistance can be permissible. He argues that just as it is widely regarded as both morally and legally permissible for a person to fight rather than retreat from an intruder in his home, and even, in some jurisdictions, to kill the intruder, so it can be permissible for a people, through the medium of their state, to fight and kill in defence of their homeland. For their territory, and their state’s sovereignty over it, has the same sanctity and inviolability that the home has in the case of an individual.<sup>16</sup>

Hurka may understate his own case. Many or most of those who invade people’s homes intend only burglary, and many are unarmed. Yet defenders of the sanctity of the home often claim that killing is morally and legally permissible even in such cases. As the former British Justice Secretary, Ken Clarke, has recently said, ‘If an old lady finds she’s got an 18 year old burgling her house and she picks up a kitchen knife and sticks it in him she has not committed a criminal offence.’<sup>17</sup> If the analogue at the state level of burgling a home is theft of a state’s resources, the domestic analogy might be thought to justify war to preserve natural or other resources, no matter how

<sup>15</sup> Norman, *Ethics, Killing, and War*, 136.

<sup>16</sup> Thomas Hurka, ‘Proportionality in the Morality of War’, *Philosophy and Public Affairs*, 33 (2005), 34–66: 55–6.

<sup>17</sup> BBC, ‘Right to Self-Defence in Homes to be “Much Clearer”’ (2011) <http://www.bbc.co.uk/news/uk-politics-13957587> (last accessed 1 July 2013).

insignificant. But if the aim of lesser aggression would involve a continuing restriction of the victims' political self-determination—through, for example, a forced change of political or economic policy or a change of government personnel—the appropriate domestic analogy might not be a burglar but an intruder who will remain in one's home indefinitely, dictating to a greater or lesser degree how one must conduct one's affairs. It seems plausible to suppose that if killing such an intruder were the only way to prevent him from invading one's privacy and controlling one's affairs for an indefinite period, it would be permissible to kill him.

Once again, however, it is the domestic analogy that is misleading. For the analogue at the state level of unwillingly having a stranger occupy one's home for an indefinite period need not involve any individual person having to endure the literal occupation of his or her home by a stranger. Indeed, if many of the civilian victims of some instance of aggression were forced to allow strangers to live in their homes and direct their domestic affairs, the aggression would arguably be so comprehensively invasive as not to count as 'lesser'. Having a foreign government exercise some degree of control over the governance of their homeland could be more tolerable, or less burdensome, for individuals than having strangers living with them and giving them orders in their own home.

The danger of appealing to the value of full collective self-determination as the basis of a right to resort to war is that it threatens to be overly permissive.<sup>18</sup> There are forms of association or community below the level of the state, such as communities based on national, religious, ethnic, or cultural commonalities, that are often more robust sources of collective identity and solidarity than citizenship in the state. (In some cases, such as pan-Arabism and Islam, the source of collective identity may be 'above' the level of the state, in that it can encompass the majority of the citizens of many states.) A conspicuous example of the dominance of substate identities was the way in which, in Yugoslavia in the 1990s, the sense that people had of being Serbian/Eastern Orthodox, Croatian/Roman Catholic, or Muslim was vastly more important to them than their being fellow citizens of Yugoslavia. The members of such national, ethnic, or religious communities, both within existing states (Kurds) and in a stateless condition (Palestinians), often aspire to be politically self-determining to the same extent that citizens are in states in which citizenship itself is the dominant focus of collective identity for the great majority of the population (the United States). Yet the states in which such groups live, or the states that control the territory in which they live, drastically restrict their ability to be self-determining. If political self-determination has the importance that defenders of the traditional theory of the just war attribute to it, it seems that many such groups would be permitted to go to war, or to engage in large-scale killing, to achieve it. This would be true even if a group were comparatively small, as the traditional theory ascribes a right of defence against lesser aggression even to the smallest

<sup>18</sup> I am indebted here to discussions with Jessica Flanigan.

states. But in the case of many substate groups (though not, in my view, in the case of the Kurds or the Palestinians), the costs for others of the group's achieving complete political independence and self-determination would be morally prohibitive.<sup>19</sup> But if it is true that some groups that fervently desire full political self-determination exist in conditions in which it is impermissible for them to seek it by violent means, then there should be a similar prohibition of *preserving* full self-determination by means of war when doing so would be equally or more disproportionate than a prohibited effort by a substate group to *attain* it.

Leaders of states have a pronounced tendency to hypocrisy about the use of violence by substate groups for the sake of freedom or self-determination. There have been various occasions on which Israeli or American leaders have preached to the Palestinians about the necessity of 'renouncing violence' and recognizing the legitimacy of the state of Israel as a condition of negotiations. American officials sometimes offered sermons with similar content to members of the African National Congress. But these same people would have rejected as absurd a demand by the Palestinians that the United States and Israel renounce violence and recognize a Palestinian state as a condition of negotiations. Most of us, whether consciously or unconsciously, have a double standard. We think that those groups that are not fortunate enough to have a state seldom have a right to go to war to achieve full political self-determination, but that those that already have a state may go to war to prevent any diminution of their power of collective self-determination, even a decrease that would leave them with substantially greater self-determination than any substate group enjoys. The reality is that not all groups with a strong sense of collective identity can be fully self-determining. Many must simply accept a limited power of collective self-determination.

This is usually compatible with the maintenance a strong sense of collective identity and the preservation of their culture, even if they are prevented from putting certain aspects of their culture into practice. The Poles and Poland itself have survived the division of the country between Germany and the Soviet Union, the systematic murder of Polish intellectuals and professionals, and decades of proxy rule by tyrants in Moscow. As the Welsh political and literary critic Raymond Williams once wrote, 'You can be proud without being independent: you often have to be.'<sup>20</sup> Indeed, it sometimes happens that imposed restrictions on self-determination have the effect of enhancing the sense of collective identity and solidarity among the members of a group. Golda Meir once notoriously asserted that 'there is no such thing as a Palestinian people. . . . It is not as if we came and threw them out and took their country. They didn't exist'. The small element of truth in this claim is that prior to the establishment of the state of Israel,

<sup>19</sup> Allen Buchanan, *Secession: Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, CO: Westview Press, 1991).

<sup>20</sup> Cited by Christopher Hitchens in 'George Orwell and Raymond Williams', *Unacknowledged Legislation* (London: Verso, 2000), 32. ~~THERE IS NO EDITOR. THIS IS A BOOK OF HITCHENS'S ESSAYS PUBLISHED UNDER HIS NAME.~~

and especially prior to the arrival of Jewish settlers in Palestine, the indigenous Arab population did not have anything like the sense of national identity that their descendants have now. The Palestinians' national identity was forged in part in response to the denial and suppression of their rights to self-determination by Israel.

## 6.6 Proportionality and the Number of Lesser Aggressors<sup>21</sup>

I argued earlier that, contrary to the traditional theory of the just war, the harms that it would be necessary to inflict on lesser aggressors are relevant to the permissibility of defensive war in response to lesser aggression. They are relevant because proportionality in the narrow sense is a condition of *jus ad bellum*. I also claimed that the *number* of lesser aggressors that would have to be killed is relevant to whether defensive war would be proportionate. Yet it is difficult to explain and defend the claim that the number of lesser aggressors killed can be relevant to whether war is proportionate in the narrow sense.

Assume for the sake of simplicity that if lesser aggression is unopposed by military action, each of the lesser aggressors will make a roughly equal contribution to the lesser harms they will together inflict. And suppose further that each is only minimally culpable for his contribution to these harms, as is often the case with unjust combatants because of the various mitigating conditions that apply to their action. (These simplifying assumptions are not altogether unrealistic. In many instances of lesser aggression, they seem to be true of most of the individual aggressors.) In these conditions, it seems intuitively that it would be permissible to kill a certain number of lesser aggressors if that would be sufficient to defeat their aggression but that there is a limit to the number that it can be permissible to kill since only lesser harms are at stake. As I suggested earlier, while it might have been proportionate, and permissible, to kill 650 Argentine combatants to preserve British sovereignty over the Falkland Islands, it would not have been proportionate or permissible to kill 100,000 of them for that purpose.

The reason these intuitions are difficult to explain and defend is that proportionality in the narrow sense is concerned with whether the harm inflicted on any individual exceeds that to which he is liable, and that seems to be independent of how many others must be harmed as well. It seems that how much harm an individual is liable to suffer as a matter of defence must be determined solely by how much wrongful harm he will otherwise cause, how responsible he is for the threat he poses, and how much harm

<sup>21</sup> This section was originally very long. It now merely summarizes the main points from the original version that are directly relevant to lesser aggression. I have converted the original section into a separate article called 'How the Number of Aggressors Can Affect Proportionality', which will be published in a book edited by Samuel Rickless. There is some overlap between the material in this section and that in the article, though I have tried to keep it to a minimum. Those interested in a more thorough discussion of the issues in this section may consult the article.

it is necessary to inflict on him to avert that threat. Given the simplifying assumption that all lesser aggressors make an equal contribution to the harms they inflict and are equally though minimally culpable for making those contributions, they should all be liable to the same degree of harm. If, therefore, one is liable to be killed, it seems they all must be. But if they are all liable to be killed, it seems that it must be permissible to kill them all. How, then, can it be permissible to kill a certain number but not more?

In certain cases, the number of threateners does seem irrelevant to the permissibility of killing each. Suppose, for example, that there are a thousand fully culpable assassins queued up outside the door to my room and that each one will kill me unless I kill him. Because each one is fully culpable and will otherwise kill me, all of them are liable to be killed. It therefore seems permissible, hence proportionate, for me to kill them all, either one by one or all at once. Their number seems irrelevant except insofar as my killing more of them would have increasingly bad side effects. The challenge, then, is to explain why the number of threateners does not affect proportionality in this case but does in the case of lesser aggression.

It is tempting to suppose that the explanation must lie in either or both of two obvious differences: that harm that each assassin threatens is greater than that which each lesser aggressor threatens and that each assassin is more culpable than each lesser aggressor. But there is in fact a further difference that is crucial to explaining the relevance of numbers to proportionality, at least in certain instances of lesser aggression. This is that, given that each lesser aggressor's contribution to the lesser harms is roughly the same as that of the others, the magnitude of each one's contribution must decrease as the number of aggressors increases, assuming that the overall harm to the victims remains constant. Similarly, if each of a number of painters must paint an equal area of a house, the area that each must paint is smaller the more painters there are. Thus, the share of the harm to each victim of lesser aggression that can be attributed to each aggressor is not independent of how many aggressors there are. If the number of aggressors is sufficiently large, each one's contribution to the harm suffered by any particular victim will be minuscule. And the smaller each aggressor's contribution to the lesser harms is, the less harm each is liable to suffer as a means of preventing that contribution. For if killing a single aggressor would only prevent him from causing only a quite small aggregate amount of harm, killing him would be disproportionate in the narrow sense *even* if he were fully culpable; a fortiori, it must also be disproportionate when he is only minimally culpable, as I am assuming most lesser aggressors are.

It seems that there must be an upper limit to the degree of harm to which a person can be liable on the basis of the amount of harm he will otherwise cause and the degree of his responsibility for that harm. When the harm that he would cause and the degree of his responsibility for it would both be comparatively slight, he cannot be liable to be killed. But how much harm he will cause through collaboration with others in the infliction of a fixed aggregate harm depends on how many collaborators act with him. If the number of lesser aggressors is comparatively small while the number of victims is large, it is possible that each aggressor is responsible for a sufficient amount of harm

to make him liable to be killed. But the number of aggressors is greater in relation to the number of victims, it may be that the amount of harm attributable to each aggressor is too small for him to be liable to be killed as a means of preventing it. This would explain how the killing of each of a number of lesser aggressors could be proportionate when the number is small but disproportionate when the number is large. Call this the *Variable Contribution* explanation of the relevance of numbers to proportionality.

This explanation is plausible so far as it goes but it leaves a significant problem unresolved. Suppose that the number of lesser aggressors is sufficiently large that the contributions that each makes to the lesser harms suffered by their victims are tiny, so that taking into account that the aggressors are also only minimally culpable, the harms they would cause are insufficient, even in the aggregate, to make any of them liable to be killed. (In the next section I will explain how this might be true even when the number of victims is very large.) Yet suppose further that it would be necessary to kill only a small proportion of the lesser aggressors to defeat their aggression—a realistic assumption, as it is never necessary to kill every combatant in an opposing army to defeat them militarily. If the number of victims of the lesser aggression would be very large while the number of aggressors it would be necessary to kill to defend those victims would be relatively small, it seems intuitively that it could be permissible, hence proportionate, to kill them. Yet the fact that only a small proportion of the lesser aggressors would have to be killed cannot change the fact that none of them is liable to be killed. So the justification for killing them, if any, cannot be a liability justification. It might be, moreover, that the aggregate harm that these minimally culpable lesser aggressors would otherwise cause is not substantially greater than the aggregate harm that they would suffer if the necessary proportion of them were killed. In that case there also could not be a pure lesser-evil justification for killing that proportion of them, for a lesser-evil justification for the infliction of harm requires that the harm inflicted be *substantially* less than that which is prevented, particularly when the harm is inflicted as an intended means.

Yet these two forms of justification—a liability justification and a lesser-evil justification—can be combined, and the combination might be sufficient to justify what neither could justify on its own. I will first explain how the combination might justify the killing of a single lesser aggressor and then explain the implications for the killing of a number of lesser aggressors.

While none of the lesser aggressors is liable to be killed, each is nevertheless liable to *some* degree of harm as a means of defence against the aggression. Let  $x$  be the maximum degree of harm to which a lesser aggressor is liable and let  $d$  be the average degree of harm that people suffer in being killed. Because we are considering an example in which no lesser aggressor is liable to be killed,  $x$  must be less than  $d$ . Finally, let  $y$  be the extent to which  $x$  is less than  $d$ —that is,  $y$  is the amount of harm that, when combined with  $x$ , produces a total harm equivalent to  $d$ . It is possible that it is permissible to kill the lesser aggressor even though he is liable only to harm  $x$ . For the proportion of the harm involved in his being killed that is equivalent to  $x$  can be justified on the ground

that he is liable to it, while the remainder of the harm, equivalent to  $y$ , might be justified as the lesser evil in relation to what would happen if he were not killed. Killing the lesser aggressor would be disproportionate in the narrow sense, but the infliction of harm to which people are not liable can sometimes be justified as the lesser evil. When that is the case, the act that is disproportionate in the narrow sense can nevertheless be permissible. For part of the harm it inflicts is proportionate in the narrow sense while the remainder is proportionate in the wide sense. This form of justification can be called a *Combined Justification*.

Here is how a Combined Justification might apply to the killing of many lesser aggressors. Suppose that the number of lesser aggressors is sufficiently great that each one's contributions to the harm they would cause are too small for him to be liable to be killed as a means of preventing them. Each, however, remains liable to harm  $x$  when harming him to that degree would be instrumental in preventing the harms he would otherwise cause. Suppose that the number of lesser aggressors it is necessary to kill to defeat their aggression is  $n$ . In that case, the total harm it would be necessary to inflict on these aggressors beyond that to which they are liable is  $n \times y$ . If, in the circumstances, the infliction of  $n \times y$  on the aggressors could be justified as the lesser evil in relation to what would happen if they are not defeated, then there can be a Combined Justification for killing  $n$  aggressors. Of the total harm inflicted on those killed,  $n \times x$  would be justified on the ground that they are liable to it, while the remaining  $n \times y$  would be justified as the lesser evil.

When a Combined Justification is necessary to justify the resort to war, the war is not a just war as I understand that term, as the achievement of the just cause requires intentionally killing people who are not liable to be killed, which is unjust. But even though the war is not, strictly speaking, a just war, it is nevertheless a morally justified war when all the harm it is necessary to inflict to achieve the just cause can be justified either by a liability justification or a lesser-evil justification.<sup>22</sup>

If, however, the number it is necessary to kill becomes larger, then even if each aggressor's contribution to the lesser harms remains the same, the aggregate amount of harm that must be inflicted on them that must have a lesser-evil justification increases, while the amount of harm to be averted remains constant. There is thus some number of lesser aggressors that it might be necessary to kill to achieve victory that would exceed the number that a Combined Justification could justify killing. If, in addition, the number it would be necessary to kill increases because the number of lesser aggressors itself increases, and if the increase in the numbers involves a reduction in the contribution of each, then the gap between the harm to which each is liable and the harm of death is correspondingly increased. In that case, the number it might be necessary to kill would exceed *by even more* whatever number the Combined Justification could

<sup>22</sup> For an elucidation of the distinction between a just war and a justified war, see Jeff McMahan, 'Just War: A Response to Neu', *Ethical Perspectives*, 19 (2012), 257–63.

justify killing. That is because the proportion of the harm to each that has to be justified as the lesser evil has increased along with the number of lesser aggressors.

Taken together, the Variable Contribution explanation and the Combined Justification seem to provide a satisfactory account of the relevance of the number of threateners to the proportionality of defensive war in response to lesser aggression. If the number of lesser aggressors is very small, so that the contribution that each would make to the lesser harm suffered by each victim is substantial, and if the number of victims is large, then each lesser aggressor might be liable to be killed. (I will say more about this in the following section.) But given that the contribution that most would make would decrease the more of them there were, there must be some number of them beyond which most or all of them would cease to be liable to be killed. My sense is that in many actual instances of lesser aggression, the number of lesser aggressors does in fact exceed the threshold beyond which most cannot be liable to be killed. It might nevertheless be permissible to kill more than this number if the harm to each beyond that to which he is liable could be justified as the lesser evil. But if the number it is necessary to kill continues to increase, while the lesser harms to be prevented remain the same, a point will be reached at which even the Combined Justification can no longer justify the necessary killing. At that point, the effects of defensive war on the lesser aggressors alone would be disproportionate in both the narrow and wide senses. The further side effect harm that defensive war would inevitably cause to civilian bystanders would only strengthen the conclusion that, in the circumstances, defensive war would be impermissible. These implications seem intuitively plausible.

## 6.7 The Number of Victims

In the preceding section I briefly discussed the relevance to proportionality of the fact that the number of lesser aggressors it might be necessary to kill to prevent their aggression from succeeding could be very large. In this section I discuss the significance of the fact that the number of potential victims of lesser aggression usually greatly exceeds the number of aggressors (though the Falklands War was an exception).<sup>23</sup> The effects of lesser aggression are likely to be pervasive throughout the society that suffers it, so that the individual victims may include most of the society's members. The bad effects may extend even to members of succeeding generations.<sup>24</sup>

The relevant question seems to be whether a person can be liable to be *killed* just to prevent him from inflicting only *tiny* harms, even if the number of people on whom he inflicts them is very large. Suppose, for example, that the only way to prevent a person

<sup>23</sup> For previous discussion, see Jeff McMahan, 'War as Self-Defense', *Ethics and International Affairs*, 18 (2004), 75–80: 79; and Hurka, 'Proportionality in the Morality of War', 53–4.

<sup>24</sup> The moral significance of this fact is complicated by Parfit's well-known Non-Identity Problem, but this is not the place to discuss that intractable problem. See Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), ch. 16.

from maliciously inflicting a tiny, barely perceptible pain on each of a thousand people is to kill him. The tiny harms he would cause seem insufficient to make him liable to be killed in defence of his potential victims, despite his culpability.<sup>25</sup> Call this person the Inflictor of tiny harms. I will return to him shortly. His victims differ from the victims of lesser aggression in that the latter suffer much more than a barely perceptible and therefore insignificant pain. But if lesser aggressors achieve their aims in the absence of violent opposition, and if they are greatly outnumbered by their victims, the contribution that any lesser aggressor makes to the lesser harm suffered by any one victim is likely to be no more significant than the harm that the Inflictor of tiny harms inflicts on any one of his victims.

The intuition that a person cannot be liable to be killed to prevent him from causing a tiny harm to each of a large number of people is, however, challenged by Derek Parfit's celebrated example of the *harmless torturers*.<sup>26</sup> These torturers, of whom there are a thousand, begin as ordinary torturers. Initially, each tortures a single victim and there is no overlap among their victims. Later, however, they adopt a new method. Each torturer inflicts 1/1000th of the pain of torture on each of the thousand victims. The results of the new method are the same as those of the old: each of the same thousand victims suffers the same agonizing pain that he or she suffered under the old method. But now no individual torturer inflicts more than a tiny degree of pain on any single individual.

In Parfit's example, the pain that each harmless torturer inflicts on each victim is so tiny as to be imperceptible. This is because one of Parfit's aims is to explain how their action can be wrong when none of them causes a perceptible effect on anyone. Since my concern here is different, I will assume that each of the harmless torturers causes a barely perceptible pain to each victim. Each therefore inflicts a large number of tiny harms, each on a different victim. My question is whether the thousand harmless torturers can be liable to be killed in defence of their thousand victims.

If, as I and most other people think, it can be permissible for one person to kill another who will otherwise culpably torture him, and if the justification for the defensive killing is a liability justification, then each of Parfit's torturers is liable to be killed in defence of his victim when they all follow the old method. And, given certain assumptions, it seems that each could also be liable to be killed when they all use the new method. Suppose that each harmless torturer knows that he is inflicting a tiny harm on each of a thousand victims, knows that he has no justification for doing so, and knows that he is acting together with 999 others who are all doing the same. Suppose further that the victims, or some of them, or even a third party, could prevent all the torture by

<sup>25</sup> This claim is based on an 'anti-additive-aggregationist' view of the sort that is discussed with extraordinary thoroughness in Larry Temkin, *Rethinking the Good: Moral Ideals and the Nature of Practical Reasoning* (New York: Oxford University Press, 2012). As Temkin demonstrates, our intuitions about trade-offs between the magnitude of harms and the number of victims of those harms lead to deeply intractable problems.

<sup>26</sup> Derek Parfit, *Reasons and Persons*, 80–1.

killing all the harmless torturers. Suppose that this is the only way to prevent or even mitigate the harms the torturers will otherwise inflict—and that killing fewer than all thousand of them is not an option. In these conditions, it would be permissible to kill all the harmless torturers. And given that the justification for killing them when they use the old method is a liability justification, it seems that the justification for killing them when they use the new method must be a liability justification as well. The harmless torturers therefore seem to provide an example of people who can be liable to be killed to prevent them each from causing a tiny harm to each of a large number of people. If this is true of the harmless torturers, perhaps it can be true of lesser aggressors as well. Perhaps the large number of their victims can make them *liable* to be killed as well, even though each is responsible for no more than a tiny harm to any particular victim.

There are, however, important respects in which lesser aggressors differ from the harmless torturers. The most obvious is that lesser aggressors do not together inflict a harm on any individual that is as bad as torture—or, perhaps, that is so bad that killing can be justified as a means of preventing it. Instead, the individual victims of lesser aggression may suffer lesser harms such as reductions of wealth or opportunity, or certain restrictions on political freedom. Thus, even if it is permissible to kill the thousand harmless torturers to prevent their thousand victims from suffering torture, it does not follow that it is permissible to kill a thousand lesser aggressors to prevent them from together inflicting lesser harms on a thousand, or even more than a thousand, innocent victims. In the case of a person who inflicts a tiny harm on each of a large number of people, it may be a condition of his being liable to be killed that the harms he inflicts be contributions to harms to individuals that exceed some threshold of seriousness. It may be, for example, that he is liable to be killed if the harms he inflicts are contributions to torture but not if they are contributions to lesser harms of the sort that would be suffered by the victims of lesser aggression.

This may seem an odd suggestion, as it implies that whether a person is liable to be killed can depend not just on what he is doing but on what others are doing as well. Yet, although this may initially seem odd, it seems to be correct. Compare the thousand harmless torturers with a thousand Inflictors of tiny harms. The difference between the two groups is that while the thousand victims of each harmless torturer are also, and simultaneously, the victims of the other 999 harmless torturers, there is no overlap among the victims of the thousand Inflictors. The victims of the thousand harmless torturers are a thousand people who experience torture, while the victims of the thousand Inflictors are a million people who each experience only a barely perceptible pain. That is, the harmless torturers are acting together to inflict harms on individuals that are beyond a certain threshold of severity, while the Inflictors are not. This difference makes it reasonable to suppose that the thousand harmless torturers can all be liable to be killed while none of the thousand Inflictors can be. Yet when considered in isolation from what others are doing, what each harmless torturer is doing is exactly what each Inflector of tiny harms does.

One might claim that it would be better to say that each Inflictor of tiny harms *is* liable to be killed but that it would nevertheless be disproportionate, and therefore wrong, to kill him because killing him would do no more for any particular person than to prevent a barely perceptible pain, which is a trivial harm. On this view, proportionality is not internal to liability—that is, it is not a condition of liability to a certain harm that the harm be proportionate. I cannot pursue this issue here but it seems to me better to say that because killing him would be disproportionate in relation to the harms he would cause, he is not liable to be killed. It is best, in other words, to understand liability as having an internal proportionality condition.<sup>27</sup>

Yet even if a person is acting with many others to produce torture, that alone is insufficient to make him liable to be killed (assuming that liability presupposes proportionality).<sup>28</sup> Suppose he is a harmless torturer acting along with the 999 others to torture the thousand victims via the new method. And suppose it is possible for the victims or third parties to kill him but not possible for them to kill any of the others. Intuitively, it would not be permissible to kill him, for again that would do no more for any victim than to reduce his or her suffering by a barely perceptible amount. For the one harmless torturer to be liable to be killed, it is necessary not only that others be acting with him to produce serious individual harms but also that enough of the others would be killed along with him to achieve a substantial reduction in the harm suffered by at least some of the victims (and in the circumstances, a significant reduction in the suffering of one can occur only if there is an equal reduction in the suffering of all the others). It is not enough, in other words, that killing him would achieve a significant reduction of the *aggregate* harm. Killing him must instead be part of the cause of a significant reduction of harm to particular individuals. Hence, just as it would not be permissible to kill only a few harmless torturers without killing more, so it would not be permissible to kill all of them rather than most—for once most have been killed, the further reduction of each victim's pain would be insufficiently significant to justify further killing.

It seems, in short, that a person who causes a tiny harm to each of many people can be liable to be killed only if the tiny harms are contributions to serious harms to individuals rather than contributions to lesser harms, and that this is true irrespective of how great the aggregate of the tiny harms might be. But even if the harms to which the person contributes are serious harms, it seems that he can be liable to be killed only if the elimination of his contribution to those harms would be accompanied by the

<sup>27</sup> See McMahan, *Killing in War*, ch 1. For arguments that challenge the idea that certain restrictions on liability justifications are internal to liability itself, see Joanna Mary Firth and Jonathan Quong, 'Necessity, Moral Liability, and Defensive Harm', *Law and Philosophy*, 31/6 (2012), 673–701.

<sup>28</sup> Suppose that the pain caused by one harmless torturer combines with that of 999 others to cause torture to *one* victim. Would any or all of these harmless torturers be liable to be killed? I think that even if each is fully culpable for his contribution to the torture, it would be disproportionate to kill any of them just to prevent his tiny contribution to the torture of one person. Hence none is liable to be killed. But I will not attempt to defend this claim here.

elimination of enough of the contributions of others to bring about a significant reduction in the amount of harm suffered by individual victims.

I find this plausible but it has curious implications. Suppose, for example, that person  $P_1$  inflicts a tiny harm on each of a thousand innocent victims, while  $P_2$  inflicts the same tiny harm on each of a million different victims. But suppose further that many more people also inflict tiny harms on each of  $P_1$ 's victims, so that those victims suffer great agony, but no one else inflicts any harm on  $P_2$ 's victims, so that they experience only a barely perceptible discomfort. In that case, the claims I have made imply that  $P_2$  is not liable to be killed though  $P_1$  is, provided that he is aware that others are also harming his victims and assuming that enough of those others would be killed along with him to produce a substantial reduction of their victims' suffering. Yet the total amount of harm that  $P_2$  causes is a thousand times greater than that caused by  $P_1$ . Although this is peculiar, it seems to me to be correct.

Another important difference between the harmless torturers and lesser aggressors is that it is necessary to kill all the harmless torturers to prevent all the harm that they would together cause, but it is not necessary to kill all the lesser aggressors to prevent all the harm they would otherwise cause. For killing some of the harmless torturers does nothing to prevent the others from making their contributions to the pain suffered by the victims. Yet, as I noted earlier, it is never necessary to kill all of the opposing combatants to win a war. It is necessary to kill only enough to convince their leaders that it would be better for them to terminate the war than to continue to fight.

One might think that the fact that killing only some proportion of the lesser aggressors would prevent all the harm that all of them would otherwise cause means that killing only the necessary proportion is likely to be proportionate, at least when that proportion is relatively low. Yet suppose that the total number of lesser aggressors is very large while the lesser harms that would be suffered by each of their victims are relatively small. In that case, each lesser aggressor's contributions to the individual harms would be so tiny that none of the lesser aggressors may be liable to be killed. In such cases, killings of lesser aggressors would be disproportionate in the narrow sense even if it is necessary to kill only a small proportion of the total. Thus the fact that it is usually necessary to kill only some proportion of the lesser aggressors may often have little relevance to whether there can be a liability justification for killing them.

Yet this same fact might be relevant to whether there is a Combined Justification for killing lesser aggressors in a range of cases. Suppose the conditions are as follows.

- (1) The number of lesser aggressors is sufficiently large that each one's contributions to the harms to individuals they would together inflict are very small.
- (2) Each lesser aggressor would therefore be responsible for only a tiny proportion of the harm suffered by any individual victim.
- (3) The tiny harms for which each would be responsible would be contributions to lesser harms, not to grave harms such as torture or killing.
- (4) No lesser aggressor, therefore, is liable to be killed.

- (5) Yet the number of potential victims is very large.
- (6) Only a relatively small proportion of the lesser aggressors—for example, one tenth—would have to be killed to defeat their aggression.

In the presence of the other conditions, condition (6) might provide the basis for a Combined Justification for defensive war against the lesser aggression. As I noted in section 6.6, each lesser aggressor is liable to some harm. When all six of the conditions just listed are present, it is possible that the harm beyond his liability that each of the lesser aggressors whom it would be necessary to kill would suffer by being killed can be justified as the lesser evil. That is, when the number of victims of lesser harm is very large but the number of lesser aggressors it is necessary to kill is small by comparison, the harms involved in killing them might be justifiable partly on the basis of liability and partly on the ground that the harms beyond those to which they are liable are, in the circumstances, the lesser evil.

Yet it seems implausible to suppose that the prevention of some aggregate of tiny harms could justify the infliction of a major harm on a single individual on the ground that the major harm is the lesser evil but not on the ground that the individual is liable to the major harm as a means of preventing the many tiny harms. Given that it is hard to justify the infliction of a major harm on a single individual to prevent a large number of very tiny harms, it seems that the infliction of the major harm is more likely to be justifiable by appeal to the fact that the individual harmed is the one responsible for the tiny harms to be prevented.

It seems that the number of victims *has* to be relevant to whether there is a justification for defensive war against lesser aggression. Yet, as I just noted, it seems more likely that killing people to prevent them from inflicting tiny harms is more likely to be justified on grounds of liability than on grounds of lesser evil. I have also suggested that even if the number of victims on whom an agent inflicts only a tiny harm is vast, that person is not liable to be killed unless the harms he causes are contributions to harms to individuals that are beyond some threshold of seriousness. If that is right, it seems that if at least some lesser aggressors can be liable to be killed to prevent their tiny contributions to lesser harms, those lesser harms must be beyond the relevant threshold. It seems, therefore, that the threshold level of harm is not as high as the harm involved in torture. It may, indeed, be considerably lower than that.

The suggestion, then, is that lesser aggressors may be liable to be killed to prevent them from making tiny contributions to the harms suffered by the victims of lesser aggression. But whether they are depends on how serious the lesser harms they would inflict would be. The harms to individual victims must be significantly greater than a momentary, barely perceptible pain, but may be significantly less bad than torture. Whether the lesser aggressors are liable to be killed also depends on the number of potential victims. Finally, whether any lesser aggressor is liable to be killed depends, as I argued in section 6, on how many of them it is necessary to kill as a means of defeating their aggression. If, as may sometimes be the case, lesser aggression would cause lesser

harms to a very large number of victims if it were unopposed but could be defeated by killing a much smaller number of lesser aggressors, those lesser aggressors may be liable to be killed.

A final qualification may be necessary. It is often characteristic of liability justifications for defensive harming that the harm caused may be greater than the harm averted. That may not be true when the harms caused by the liable individual are tiny harms distributed over a very large number of victims. It may be that for a person to be liable to be killed to prevent him from inflicting tiny harms on each of a large number of victims, not only must the harms he causes be contributions to harms to individuals beyond some threshold of severity but the harm to the threatener must not exceed the aggregate of the tiny harms he would otherwise inflict.

## 6.8 The Conditional Threat of Greater Harm

Thus far I have written as if the immediate harms from lesser aggression—the lesser harms themselves—are the only harms relevant to the liability of the lesser aggressors. But for lesser aggression to have a chance of success, it has to be backed by a credible threat to use force, up to and including killing, to overcome any resistance. Lesser aggressors cannot say, ‘Give us your oil! If you don’t, we’ll go away!’ Behind their unconditional threat to inflict lesser harms there must be a conditional threat to kill those who would engage in military defence.

The lesser aggressors’ conditional threat to kill those who resist their wrongful action must surely affect their liability—in particular, it seems to increase the degree of harm to which they may be liable. Thomas Hurka makes this point by appealing to the comparison between a thief and a mugger.<sup>29</sup> Suppose that a person’s purse, which contains \$10, is on the table in front of her at an outdoor café. A thief snatches it and begins to run away. Because the least harmful way in which she can stop him is to shoot him in the leg, she must let him go; for shooting him in the leg would be disproportionate in relation to the harm he would otherwise cause her. But if a mugger with a gun accosts the same victim in an alley and threatens to harm her in whatever way is necessary to take her purse if she does not surrender it to him, it is not implausible to suppose that his action makes him liable to be shot in the leg if that is the least harmful means of preventing him from taking her purse.

There are two facts about the mugger that make him liable to greater defensive harm than the thief is liable to. First, he violates more of the victim’s rights, and more important ones, than the thief does. He has, for example, violated her right not to be exposed to a risk of serious harm without justification. Assuming that his threat to use violence against her is sincere, his action has already increased the objective probability that she will be seriously and wrongly harmed. Second, the mugger is more culpable, for

<sup>29</sup> Hurka, ‘Proportionality in the Morality of War’, 54–5.

he, presumably unlike the thief, is prepared to wound or even kill a person merely to obtain a trifling \$10.<sup>30</sup> (Note the apparent implication for lesser aggression. In general, the less ambitious the goals of lesser aggression are, the less bad the harms suffered by the victims will be. When that is true, it seems that the less ambitious the lesser aggressors' aims are, the more culpable they are for conditionally threatening to kill people as a means of achieving those aims. Hence two factors that are relevant to liability—the degree of harm one threatens to cause and the degree of one's responsibility or culpability—may pull in different directions in the case of lesser aggression.)<sup>31</sup>

As I indicated, lesser aggressors are analogous to muggers, not thieves. Even lesser aggressors whose only aim is the theft of resources or territory must, for as long as they remain in possession of what they have taken, maintain a continuous threat of military action against any who might seek to recover from them what they have stolen.

Because there are similarities between lesser aggressors and muggers, it is worth pausing briefly to consider what it is permissible to do in the case of the mugger. Suppose the victim has a gun concealed in her pocket and could shoot the mugger. I stipulated that she could eliminate the threat from the mugger by shooting him in the leg. If, as I suggested, he would be liable to this harm, then she may permissibly shoot him in the leg and the problem is solved. But suppose, with greater realism, that shooting him in the leg would have only a high probability of success. Suppose, in other words, that there is a small chance that the wounded mugger might then kill her. I have claimed that shooting him in the leg is arguably a proportionate response given his conditional threat of violence and the high degree of his culpability. But if the victim's attempting the proportionate response will expose her to a risk of being wrongly killed by the mugger, it would be imprudent for her to attempt it merely for the sake of preventing the theft of \$10.

This leaves the victim two options: she can shoot to kill or she can capitulate. The second option is clearly permissible. What about the first? Consider the conditions in which the victim must act.

- (1) She must choose among options that the mugger has freely chosen to impose on her.
- (2) If she attempts the proportionate option but it fails, he will try to kill her.
- (3) If the proportionate option fails and he tries to kill her, it will then be permissible for her to kill him.
- (4) Because there is a significant probability that the proportionate option will fail, that option involves a grave risk to her life.
- (5) She does not owe it to him to risk her life for *his* sake—that is, to avoid causing disproportionate harm to him in circumstances that are of his own contriving.

<sup>30</sup> See Gerhard Øverland, 'Conditional Threats', *Journal of Moral Philosophy*, 7 (2010), 334–45: 339.

<sup>31</sup> Øverland, 'Conditional Threats', 339.

Given that she is permitted to attempt the proportionate option and then kill him if it fails, but the attempt would put her at risk of being wrongly killed by him, perhaps she is not required to take that risk just to give him a chance to avoid being killed. Perhaps it is instead permissible for her to kill him immediately.

I once thought this argument had a certain plausibility, but Hurka and others have since persuaded me that I was probably wrong.<sup>32</sup> Despite the mugger's conditional threat, if it is reasonably certain that he will not otherwise harm the victim if she surrenders her purse, it seems disproportionate to kill him rather than allow him to take the \$10.

It is, moreover, not clear that what I have referred to as the 'proportionate option' is really proportionate. For it carries a risk of escalation to lethal violence. Even a rather small risk that shooting the mugger in the leg will result either in his killing the victim or her killing him may be sufficient to make that option disproportionate. (This is so, even though whether the conflict would escalate would be his choice, not the victim's.) It may be, therefore, that shooting the mugger in the leg would be not only imprudent but also disproportionate.

It seems that we may be forced to conclude that the only permissible option is capitulation—that is, giving the mugger the purse. But even if this is right, it has no immediate implication for the permissibility of defence against lesser aggression. The comparison between the thief and the mugger is intended only to illustrate the claim that conditionally threatening people's lives can affect the degree of harm to which a person may be liable. The action of the mugger is in many ways disanalogous to that of a lesser aggressor. Some of the differences suggest that defensive action against him may be easier to justify than defence against lesser aggressors: for example, he threatens only a single victim, he does not act in ignorance or under duress, and so on. Yet other differences suggest that defensive action against him may be more difficult to justify: there is, for example, some chance that his victim may later be compensated, his success in mugging his victim is unlikely to weaken the general deterrence of mugging, which is provided more by the police and the judicial system than by instances of individual self-defence, and so on. The case of the mugger does, however, raise a further problem that may be relevant to the permissibility of defence against lesser aggression. For, by threatening escalation of the violence if the victim engages in what would otherwise be a proportionate defence, the mugger may have created conditions in which his victim has no proportionate response. Yet many people regard it as unacceptable to suppose that wrongful aggressors can manipulate conditions to make it disproportionate and therefore impermissible for their victims to engage in any defensive action. These people think that morality cannot permit wrongdoers to render their victims *morally* defenceless.

<sup>32</sup> McMahan, 'Innocence, Self-Defense, and Killing in War', 'War as Self-Defense'.

Morality does not, of course, *permit* wrongdoers to do this. It forbids them to do it. Yet they can defy morality by doing what it forbids. The question is whether, when they ensure that resistance to their wrongdoing would require their victims to inflict great and seemingly disproportionate harm, morality then forbids the victims to resist. Is it possible for wrongdoers to manipulate conditions to make it disproportionate and therefore impermissible for their potential victims to engage in defensive action? Can wrongdoers in this way reduce their victims to moral paralysis? This question breaks down into at least four distinct questions. I will consider them each in turn.

*6.8.1 Can wrongdoers make it so that the harms their victims would cause by engaging in necessary defensive action would be disproportionate in the wide sense?*

One would think that it must be uncontroversial that they can. If a wrongdoer rigs the situation so that the only potentially effective defensive action I can take against the threat he poses to me will involve my killing a number of innocent bystanders, either as a means or as a side effect, he has succeeded in making it disproportionate in the wide sense, and therefore impermissible, for me to defend myself. The old German legal adage, ‘Right need never yield to Wrong,’ is mistaken.

Suppose that the situation were such that the only way I could preserve my life in response to a naturally occurring threat, such as floodwaters or an avalanche, would be to act in a way that would kill several innocent bystanders, either as a means or as a side effect. It seems clear that it would be impermissible for me to save my life in this way. And it seems equally clear that it cannot make a difference to the impermissibility of my killing these innocent bystanders whether the source of the threat to my life is a natural event or a wrongdoer who has contrived to ensure that I can defend myself against him only at the expense of their lives.

There is, however, at least one dissenter from this view, at least in its application to national rather than individual self-defence. Referring to a situation in which all of a just defender’s options are disproportionate in the wide sense, Michael Walzer writes that,

if the number of likely civilian deaths is always disproportionate to the value of [successful defensive action], so that [just combatants] would be prohibited from responding in any fashion to [unjust aggression], then the prohibition associated with counterattacking collapses. Now even ‘disproportionate’ counterattacks are justified and, assuming the [just combatants] exercise the necessary care, responsibility for civilian deaths falls solely on [the unjust combatants]. It is a central principle of just war theory that the self-defence of a people or a country cannot be made morally impossible, and so the more successful [unjust combatants] are in hiding among civilians, the less useful the proportionality argument is—or, to be more precise, the less limiting it is. The more civilians are used as shields, the greater the danger to which they are exposed [that is, the more likely they are to be harmed by the permissible defensive action of just combatants], and responsibility for that exposure falls on the people who are using them.<sup>33</sup>

<sup>33</sup> Michael Walzer, ‘Responsibility and Proportionality in State and Nonstate Wars,’ *Parameters*, (Spring 2009), 40–52: 48.

Walzer's assumption seems to be that if wrongful aggressors have eliminated their potential victims' proportionate options, so that the victims are forced to cause disproportionate harm to innocent bystanders by acting in self-defence, all responsibility for those disproportionate harms lies with the aggressors. And since the defenders are absolved of all responsibility for their action, that action cannot be impermissible.

I cannot here discuss this view at length, but there are at least two significant objections to it. First, Walzer provides no reason to suppose that the intentional use of innocent shields by wrongdoers to deprive their intended victims of any proportionate response absolves those victims of responsibility if they nevertheless choose to kill the innocent shields. The victims have chosen to engage in disproportionate killing rather than allow themselves to be killed. They can be responsible for that just as they could if the threat to them had had a natural rather than a human source. Second, even if they are not responsible for the disproportionate killings, it does not follow that those killings are permissible. There are many instances in which people are not responsible for acts that are nonetheless impermissible. It may be, though I doubt it, that it is excusable for people to engage in defensive action that is disproportionate in the wide sense if wrongdoers have deliberately deprived them of proportionate defensive options. But an excuse is not a permission.

*6.8.2 Can wrongdoers make defensive action by their victims disproportionate in the wide sense, and therefore impermissible, by sincerely threatening that they will inflict disproportionate harm on innocent people if their victims attempt to defend themselves?*

Here again the answer is yes. Suppose that Saddam Hussein had had weapons of mass destruction in 1991 when Iraq invaded Kuwait and that he had sincerely threatened to destroy every town and city in Israel if the invasion had been militarily opposed. And suppose that there had been no way to prevent him from fulfilling that threat, so that he would in fact have killed most of the people in Israel if US forces had intervened. In that case, intervention by the US to prevent the annexation of Kuwait would have been disproportionate in the wide sense. This is true despite the fact that it would have been the Iraqi military rather than American forces that would have killed the Israelis.

It does seem, however, that harms that will be caused by others, though only if one acts in a certain way, can be discounted to a certain degree in determining whether it is proportionate in the wide sense for one to act in that way. Suppose that a person is about to kill me. I can kill him in self-defence but he has warned me, and I know it to be true, that he has arranged for an accomplice to kill an innocent bystander if I do. The killing of the innocent bystander by the accomplice does weigh against the preservation of my life in determining whether self-defensive killing would be proportionate. But it does not have the same weight as the killing of an innocent bystander would have if it were an immediate side effect of my own act of self-defence.

(One interpretation of the passage I ~~just~~ quoted from Walzer is that when combatants deliberately rig the situation so that defensive action by their enemies will harm innocent bystanders as a side effect, those harms are discounted in relation to the weight they would have if their unavoidability were fortuitous rather than contrived.<sup>34</sup> This, however, seems mistaken. Suppose that a commander fighting in a just war has two possible military targets. They are equally important to his war effort but he can destroy only one. Unjust combatants have forcibly bound 50 innocent bystanders to one target in the hope that just combatants will refrain for moral reasons from attacking it. The other target cannot be destroyed without killing 49 different innocent bystanders who are located beside it entirely by chance. Suppose that the side effect killings would be proportionate in either case. Which target ought the commander to destroy? If the view I am speculatively attributing to Walzer is true, he ought to destroy the first target, since the discounted badness of killing the 50 innocent shields is presumably less than the undiscounted badness of killing the other 49. But this is implausible. The commander ought, if other relevant considerations are equal, to do what will kill fewer innocent people. It is possible, of course, that he ought to attack the first target *if* killing the 50 would convince the unjust combatants that using innocent shields is pointless, for that would be a further good that would count in the assessment of proportionality. But this is a contingent consideration.)

*6.8.3 Can wrongdoers make defensive action by their victims disproportionate in the narrow sense, and therefore perhaps impermissible, by ensuring that the only defensive action the victims could take would cause excessive harm to the wrongdoers themselves?*

Yet again the answer is yes. Suppose that an aggressor deliberately rigs the situation so that the only way I can prevent him from giving me a vicious pinch is to kill him. He would then have made it impermissible for me to defend myself against being pinched in the only effective way.

Suppose next that in ordinary circumstances it would be proportionate for me to punch an aggressor in the abdomen to prevent him from pinching me in a very painful way but disproportionate to break his nose. But suppose that, in the hope of making my only defensive option disproportionate, he manipulates conditions so that the only way I can prevent him from pinching me is to break his nose. It may then be proportionate (in the narrow sense) for me to defend myself by breaking his nose. The reason is that by deliberately depriving me of what was formerly my only proportionate option, the aggressor has engaged in additional wrongdoing and increased his own culpability, thereby making himself liable to greater harm than that to which he would otherwise have been liable. There are, of course, limits to what can become

<sup>34</sup> I understood this to be Walzer's view in a keynote lecture he gave at the McCain Conference at the United States Naval Academy in April 2011.

permissible in this way: again, if he manages to exclude every defensive option other than killing, that cannot make him liable to be killed as a means preventing him from pinching me.

That wrongdoers can increase the harm to which they are liable by deliberately excluding proportionate forms of defence against them is in principle relevant to whether defensive action against lesser aggressors is proportionate in the narrow sense. But for it to be relevant, the aggressing combatants themselves have to be responsible for restricting their victims' defensive options. Lesser aggressors can sometimes do this in the course of war. When they do, this can affect *in bello* proportionality in the narrow sense. But because it is usually only the political leaders who can affect the conditions of *ad bellum* proportionality, their manipulation of those conditions can affect only their own liability, not that of the aggressing combatants. Hence it cannot affect *ad bellum* proportionality in the narrow sense.

#### 6.8.4 *Can wrongdoers make their victims' defensive action disproportionate in the narrow sense by sincerely threatening to harm themselves if their victims engage in defensive action?*

Suppose, for example, that an aggressor improbably but sincerely threatens to kill himself if I punch him in the abdomen to prevent him from viciously pinching me. While it seems clear that I ought not to punch him, it also seems that the reason is not that he has succeeded in exempting himself from liability to be punched by making punching him disproportionate in the narrow sense. For if punching him is in itself a proportionate defensive response to his threat to pinch me, I would not wrong him or violate his rights if I were to punch him. But, if he really would kill himself, I ought not, for reasons of beneficence, to do it.

## 6.9 The Risk that Aggression Will not Be, or Remain, Lesser

Writing about what I have called a mugger rather than an unarmed thief or pickpocket, John Locke declared that it is

Lawful for a Man to *kill a Thief*, who has not in the least hurt him, nor declared any design upon his life, any farther then by the use of Force, so to get him in his Power, as to take away his Money, or what he pleases from him: because using force, where he has no Right, to get me into his Power, let his pretense be what it will, I have no reason to suppose, that he, who would *take away my Liberty*, would not when he had me in his Power, take away every thing else. And therefore it is Lawful for me to treat him, as one who has put *himself into a State of War* with me; *i.e.*, kill him if I can; for to that hazard does he justly expose himself, whoever introduces a State of War, and is *aggressor* in it.<sup>35</sup>

<sup>35</sup> John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 2005), 279–80.

This passage goes beyond what I have said about conditional threats to point out a further feature of lesser aggression—namely, that what appears to be a threat of lesser harms may actually be more sinister. Those responsible for the lesser aggression may have a more ambitious but concealed agenda. Or, even if their aims are initially lesser, they may become emboldened by their victims' capitulation to enlarge those ambitions in the expectation that the victims will continue to acquiesce in their demands without resistance.

One consideration that is relevant, though not always decisive, is whether the aggressor would station occupying forces in the victims' territory to enforce compliance with its continuing demands. This would indeed render the victims vulnerable in the manner described by Locke. For this reason, the establishment of a major garrison may be sufficient to convert an apparent instance of lesser aggression into a presumptive case of major aggression. But, again, there are exceptions. If Britain had ceded the Falkland Islands to Argentina in the 1982, the Argentine junta would no doubt have stationed a garrison there but it is unlikely that those forces would have been used to oppress any of the population who had chosen to stay. If the generals had had the extraordinary good fortune to capture the islands without provoking a war, they would have had to be insane to turn world opinion decisively against them by immediately abusing their new political authority.

Still, any uncertainty about the present or future aims of those responsible for lesser aggression is clearly relevant to the proportionality and therefore the permissibility of defensive war. One might even say that if there is a serious risk that what appears to be lesser aggression is really major aggression in disguise, this is sufficient to make it reasonable for the victims to treat the action as a presumptive instance of major aggression. Yet this concession still leaves many cases of lesser aggression. It seems true at the time, and seems to have been borne out in retrospect, that the American invasion of Iraq in 2003, which I believe was morally wrong, was an instance of lesser aggression and that it would have been better for all concerned if it had not been opposed by continuing violent resistance. The members of the Bush administration, reprehensible though they were, did not have the killing, enslavement, expulsion, or torture of innocent people among their *ends*. They hoped instead that the establishment in the Arab Muslim world of a prosperous showcase democracy that would be closely tied to the US (because the elections would somehow produce pro-American leaders) would be a model to other countries in the region and assure continued access to Iraqi oil. Similarly, no one supposed that if Britain had surrendered the Falkland Islands to Argentina, the generals would then have trained their sights on the Orkney or Shetland Islands.<sup>36</sup>

<sup>36</sup> In responding to Locke's argument, David Rodin cites the Soviet demand for, and eventual conquest of a certain area of, Finnish territory judged to be vital to the defense of Leningrad during the Second World War. See Rodin, *War and Self-Defense*, 136.

## 6.10 Goods Other than the Avoidance of Immediate Harms

A final consideration that can contribute to the justification for defensive war against lesser aggression is that there are often values at stake other than those, such as sovereignty and territorial integrity that are immediately threatened. The most important of these is deterrence of aggression. If the victims of lesser aggression capitulate without resistance, both the successful aggressor and other potential aggressors may be emboldened to engage in further aggression, particularly lesser aggression, in the hope of achieving a similar cost-less success. Thus, in making the case in favour of Britain's war in the Falklands, Margaret Thatcher and others often stressed the importance of maintaining deterrence against aggression in a world in which states must rely on self-help for both defence and deterrence. They might have added that insofar as the failure to oppose aggression by military means weakens deterrence of further wrongful aggression, the aggressors make themselves liable to be harmed as a means of preventing their action from weakening deterrence and thus placing innocent people at increased risk from aggression.

Claims about deterrence are usually highly speculative. I am, for example, unaware of any evidence that Britain's defeat of Argentina has deterred any state from engaging in aggression. Even so, we know that if no state ever responded to lesser aggression by going to war, perhaps because of concerns about proportionality, deterrence of lesser aggression would be lost and such aggression would become significantly more common. It is for this reason that many just war theorists argue that defence against aggression—even lesser aggression—is normally a duty rather than being merely permissible.

This means that some wars of defence against lesser aggression that may initially seem to be disproportionate, in either the narrow or the wide sense, or both, are not actually disproportionate once their effect on deterrence is adequately taken into account. Yet taking account of deterrence in the assessment of *ad bellum* proportionality will not yield the conclusion that war in response to lesser aggression is always proportionate. It is not necessary to fight in response to every instance of lesser aggression to achieve an adequate level of deterrence. Of course, where deterrence alone is concerned, it would be better to fight every time. But the value of deterrence is not absolute; the permissibility of pursuing it is restricted by the prohibition of the infliction of disproportionate harms.

The fact that there will be cases in which defensive war against lesser aggression remains disproportionate even after the value of deterrence has been taken into account does not entail that war must be impermissible in all such cases. If defensive war will be disproportionate in the *narrow* sense, it is possible that the value of deterrence could support a Combined Justification for the resort to war in at least some of these cases.<sup>37</sup> Yet if war would be disproportionate in the *wide* sense, even taking

<sup>37</sup> Consider, for the sake of comparison, this hypothetical example involving disproportionate individual defense. Suppose there were a very large number of individuals who each day steal one dollar each from a number of different victims. Suppose that in each case there is no way to prevent the thief from stealing a

account of the importance of deterrence, then the victims must capitulate rather than fight. A war that would be disproportionate in the wide sense is one for which there cannot be even a lesser-evil justification.

Suppose that it is predictable that there will be a certain number of instances of lesser aggression to which a military response would be disproportionate in the narrow sense. Suppose further that the maintenance or strengthening of deterrence is sufficiently important that there will be a Combined Justification for defensive war in some of these cases but not all. How can it be determined on which occasions it is permissible to fight? If there is no criterion to which conscientious leaders can appeal, states faced with lesser aggression will always fight unless it is clearly against their own interests to do so.

One might think that states should fight in those cases in which war would be less disproportionate than in other cases. But this is too vague, as it does not specify where along the spectrum from the least to the most disproportionate case defensive war becomes impermissible.

There are various problems in identifying a criterion for when there is a Combined Justification for a defensive war that would be disproportionate in the narrow sense. One is that the level of deterrence is sensitive not only to the *proportion* of cases in which defensive war is fought but also to the *pattern* of defensive responses. Another is that to get the most deterrence from a limited number of defensive responses, the pattern of response must not be predictable. For if potential aggressors can predict the conditions in which aggression will provoke a defensive response, they will not be deterred in those instances in which they can predict that there will be no such response. But ensuring that defence remains unpredictable seems incompatible with having a publicly acknowledged criterion for determining in which cases a Combined Justification applies. And if there is no publicly recognized criterion, potential victims cannot coordinate their responses, with the likely result that states will fight more defensive wars than can be justified even by a Combined Justification. But, as this is a practical rather than a distinctively philosophical problem, I will not pursue it further here.

## 6.11 Conclusion

I have tried to show that the traditional view that defence against lesser aggression is nearly always justified is false. This view is insufficiently attentive to proportionality. But I have also argued that revisionist just war theorists should not accept the claim,

dollar other than to kill him. In no case would it ever be proportionate in the narrow sense for a victim to kill a thief to prevent the theft of a dollar. But if the instances of theft were sufficiently widespread—if, for example, each of the people in the society other than the thieves were being robbed ten times a day—there might be a Combined Justification for a certain number of defensive killings, perhaps done randomly, for the sake of general deterrence.

sometimes made by traditional just war theorists, that an individualist approach to war cannot justify defensive war in response to lesser aggression because it cannot account for the importance of state sovereignty and territorial integrity. While there is no algorithm for determining when defensive war is justified, there are various considerations that are largely independent of rights to sovereignty and territorial integrity that together can provide a justification for defensive war in certain cases. These are the ratio between the number of potential victims and the number of lesser aggressors it would be necessary to kill to defeat the aggression, the fact that the conditional threat posed by lesser aggressors increases the harm to which they may be liable, the risk that lesser aggression may escalate to major aggression, and the importance of maintaining deterrence against aggression.<sup>38</sup>

<sup>38</sup> Versions of this essay have been presented at Warwick University law school, the University of Szczecin, Stanford, Otago University, the New England Consequentialist Workshop at Harvard, the University of Alabama at Tuscaloosa, Clemson University, the University of Miami, Brown, Stockholm University, the University of California at Santa Barbara, Beloit College, the United States Military Academy, Goethe University in Frankfurt, the Rocky Mountain Ethics Congress, the New School for Social Research, Oberlin College, the University of Alberta, Victoria University, the University of British Columbia, and Oxford University. I am greatly indebted to Tom Dougherty, who commented on the paper at Stanford, and to Jens Johansson, who commented on it in Stockholm. I have benefited from written comments by Thomas Carson, Cécile Fabre, Christopher Finlay, Jessica Flanigan, Pablo de Lora, Derek Parfit, and especially Seth Lazar and Jonathan Parry. For discussion, I am grateful to the late Annette Baier, Christian Barry, Garrett Cullity, David Estlund, Todd May, and Walter Sinnott-Armstrong. I owe special thanks for exceptionally helpful discussion to Shelly Kagan, Frances Kamm, and Larry Temkin.