

War Crimes and Immoral Action in War

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I. The Traditional Theory of the Just War

War crimes are grave violations of the legal principles of *jus in bello*, the principles governing the conduct of war, for which individual combatants may be punished. In international humanitarian law, these principles are found in the Hague Conventions and the Geneva Conventions. They have subsequently been absorbed, though with some modifications, into international criminal law.

As in domestic criminal law, the ideal in the law of war is that all and only those acts that harm their victims and are seriously morally wrong should be criminal, and thus punishable. The law ought, within certain limits, to deter by threat of punishment all acts that are morally impermissible and inflict wrongful harm. Yet it ought not to punish people for acting in ways that are morally permissible. Ideally, therefore, the category of war crimes should include all forms of morally wrong action in war that inflict serious harms on their victims.

In this chapter I will argue that there are insurmountable obstacles to achieving this ideal. I first offer a brief account of the way that *jus in bello* is conceived both by the traditional theory of the just war and by the law. I next indicate why *jus in bello* so conceived cannot be right as a matter of morality and then sketch a revisionist account of the morality of *jus in bello*. Yet I also argue that the requirements of this revisionist account cannot in general be satisfied by those who fight without a just cause. Because *in bello* law has as one of its purposes the effective constraint of the action of those who fight without a just cause, it cannot simply declare that all their acts of war are impermissible. It seems, therefore, that *in bello* law cannot be modelled directly on *in bello* morality. *In bello* law and *in bello* morality must be substantially divergent. I conclude by considering what the criterion, or

criteria, ought to be for determining which forms of morally impermissible action in war should be treated as war crimes.¹

As a preliminary, it is necessary to define a couple of terms. By ‘just combatants’ I mean those who fight for a just cause in a just war. By ‘unjust combatants’ I mean those who fight without a just cause. These categories leave out those who fight for a just aim or just cause within a war that is unjust. A war can be unjust overall even if it pursues a just goal. There are several ways in which this might be the case. The war’s only aim might be just and yet the war as a whole might be disproportionate or unnecessary for the achievement of the just cause. Or the war might be unjust because, although it pursues a just cause, it also pursues unjust aims that are unnecessary for the achievement of the just cause. Given that the just cause could be pursued by means of war without the pursuit of the unjust aims, the war as a whole is unjust. Combatants who fight in such a war might be able to fight in a way that would advance only the just cause and not the unjust aims. But it is more likely that their contributions to the war would support both the just and unjust aims. If so, both their own status and the moral permissibility of their acts of war are more difficult to evaluate than the status or acts of just combatants or unjust combatants as I have defined them. I will leave these complications aside here.

Jus in bello as understood in traditional just war theory is closely congruent with *in bello* law as it has developed over more than a century. In both, there are three main principles: the requirement of discrimination, the requirement of necessity, and the requirement of proportionality. Particularly in law, there are various other rules governing the treatment of prisoners of war, combatants attempting to surrender, the wounded, and so on. Also in law there are prohibitions of the use of particular weapons and other rules that seem to be wholly conventional in nature. I will not discuss these latter prohibitions here, but will instead explain and then criticize the traditional interpretations of the *in bello* principles of discrimination, necessity, and proportionality.

The requirement of discrimination in its generic form is simply the requirement not to conduct intentional attacks on individuals who are not legitimate targets. Legitimate targets are generally thought of as persons who can be attacked without infringing a right against attack, either because they have waived that right or because they have forfeited it. While some just war theorists argue that all combatants waive their right against attack by enemy

¹ In criticizing the traditional theory of the just war and sketching the alternative revisionist account, I must repeat some material that I have published elsewhere. Since I obviously cannot assume that readers will be familiar with my other work, the overlap, though regrettable, is unavoidable.

combatants, I think consent has little or no role in explaining the permissibility of killing in war.² The primary moral justification for killing in war is that those who may permissibly be killed have forfeited their right against military attack or, in other words, made themselves liable to intentional, potentially lethal attack.

In law, and according to the traditional theory of the just war, those who are legitimate targets are combatants. Non-combatants are not legitimate targets. In traditional just war theory, this is because what makes people morally liable to attack is that they are *nocentes*, or injurious—that is, they pose a threat to others, so that to attack them is to engage in defence. Those who are not threatening are *innocent*, or not *nocentes*. Hence the familiar identification of those who are ‘innocent’ in war with non-combatants. Indeed, this assumption of equivalence is so common that the terms ‘requirement of discrimination’ and ‘principle of non-combatant immunity’ are generally taken to be synonymous.

In law and traditional just war theory, the *jus in bello* requirements of necessity and proportionality are constraints on the harms that may be inflicted on non-combatants as an unintended side effect of military action. The *in bello* requirement of necessity, or ‘minimal force’, condemns as impermissible any act of war that inflicts harm on non-combatants as a side effect when there is an alternative act of war that would have an equal probability of achieving either the same military aim or an alternative aim of comparable military significance, yet would cause less harm to non-combatants. The requirement of proportionality is traditionally understood as the requirement that an act of war not cause expected harm to non-combatants that is excessive in relation to the military importance of the act.

II. Critique of the Traditional Requirements of *Jus in Bello*

While there is no disputing that the legal principles of *jus in bello* are as they are, the *moral* principles of *jus in bello* are not best understood in the way they are in traditional just war theory. I have argued against the traditional interpretations at tedious length elsewhere so will here offer only a brief rehearsal of the objections.³ I do not dispute that there are moral requirements of discrimination, necessity, and proportionality. The problems are in

² J McMahan, *Killing in War* (Oxford: Clarendon Press, 2009) 51–60. Also see J McMahan, ‘Duty, Obedience, Desert, and Proportionality in War: A Response’ (2011) *Ethics* 122, 135–67, at 146–50.

³ See, for example, *Killing in War*, n 2 above.

the ways in which the requirements are interpreted by the traditional theory. These problems derive from the fact that the traditional theory treats *jus in bello* as wholly independent of *jus ad bellum*; that is, it asserts that what it is permissible or impermissible for combatants to do in war is unaffected by whether their war satisfies the requirements of *jus ad bellum*. In particular, what it is permissible to do is independent of whether the war has a just cause. The traditional principles of *jus in bello* therefore make no distinction between just and unjust combatants. They are supposed to be neutral between just and unjust combatants and to be equally satisfiable by either.

The requirement of discrimination as traditionally understood incorporates both a permission and a prohibition. The permission is that all combatants may kill enemy combatants at any time during a state of war. The prohibition is of intentional attacks against non-combatants. The permission, of course, applies to the killing of just combatants by unjust combatants. Just combatants, it is claimed, have lost their right not to be killed by posing a threat to others. Yet people do not forfeit their right not to be killed merely by engaging in morally justified defence of themselves and others against wrongful attacks by those pursuing unjust ends. It is in general impermissible to pursue ends that are unjust, and it is even more obviously impermissible to pursue such ends by means of attacking and intentionally killing people who have done nothing to make themselves liable to attack. It is therefore not, in general, permissible for unjust combatants to kill just combatants in war, though there are exceptions, such as when just combatants would otherwise impermissibly kill or seriously harm people who are not liable to those harms. Although this is less obvious, it is also in general impermissible for unjust combatants to kill just combatants as a means of achieving ends that, although not positively unjust, cannot permissibly be pursued by means of war (that is, neutral ends or even ends that are good but insufficient either to constitute a just cause for war or to establish a lesser evil justification for the resort to war).

The prohibition in the traditional requirement of discrimination, which might be thought to be the more important of the two constituent elements, is also incorrect as a matter of basic morality. That a person is a non-combatant is sufficient to show that he or she cannot be liable to defensive attack on the ground that he or she poses an *immediate* threat of wrongful harm, but it does not entail that he or she cannot be liable to attack on other grounds. An academic physicist in Nazi Germany who would otherwise have provided the breakthrough to enable Hitler to have an atom bomb would have been liable to be killed to prevent him from achieving that breakthrough. Or a wealthy businessman who stood to profit from victory in an unjust war might also be liable to be killed if that was necessary to prevent

him from providing his government with the resources necessary to win the war. These are, of course, anomalous examples and it is seldom morally permissible intentionally to attack non-combatants by military means in war. But the examples provide intuitive support for the claim that mere status as a non-combatant is not by itself sufficient to exempt a person from liability to attack in war.⁴

The traditional *in bello* requirement of necessity asserts that any harms that military action causes to non-combatants must be necessary. But necessary for what? It cannot be that they must be necessary for the achievement of a just cause, for the requirement of necessity applies to unjust combatants, who have no just cause. Nor can it be that these harms must be necessary for personal self-defence by combatants, as that would mean that offensive military action undertaken by combatants who were not otherwise under threat would violate the requirement of necessity if it would cause any harm to non-combatants as a side effect—clearly too demanding a requirement. Rather, the requirement seems to be that combatants must not act in a way that harms non-combatants as a side effect if there is an alternative act that would yield at least an equivalent military advantage, would not be significantly costlier to the combatants, and would cause less harm to non-combatants.

Assuming that this principle sometimes requires combatants to expose themselves to greater risks, or to suffer greater costs, to avoid harming non-combatants, it is a substantial and plausible principle. Without that assumption, the principle would simply prohibit the infliction of wanton or gratuitous harm as a side effect. But with the assumption, it is, in its application to unjust combatants, analogous to a requirement that burglars take certain risks to themselves to avoid physically harming those from whom they steal—a strangely permissive but nonetheless plausible requirement.

Just as the traditional theory cites military advantage as the end for which foreseen harm to non-combatants must be necessary, so it also cites military advantage as the end in relation to which foreseen harm to non-combatants must be proportionate. But the assessment of proportionality by reference to military advantage is far more problematic. For military advantage is by itself morally neutral; whatever moral or evaluative significance it has must be instrumental—that is, must derive from the ends it serves, which are the ends or ‘cause’ of the war. In the case of an act of war by just combatants, any side-effect harms to non-combatants can coherently be weighed against the military advantage yielded by the act because this advantage has value in

⁴ For a discussion of the limits of non-combatant liability, see J McMahan, ‘Who is Morally Liable to be Killed in War’ (2011) *Analysis Reviews* 71, 544–59.

proportion to the contribution it makes to the achievement of the just cause. But suppose that the ends pursued by unjust combatants are bad, impartially considered, because they are unjust. In that case, the unjust combatants' means—military advantage—must be bad as well, which makes it nonsensical to suppose that the unintended harms they might cause to non-combatants could be proportionate in relation to military advantage. For the idea that bad side effects could be proportionate (or, for that matter, disproportionate) in relation to intended bad effects is incoherent. It makes no sense to suppose that bad side effects could be justified by being somehow outweighed by other bad effects of the same act. Bad effects can be proportionate or disproportionate only in relation to good effects.

A defender of the traditional theory might argue that if the theory's *in bello* proportionality requirement implies that an act of war that would yield a certain degree of military advantage would be disproportionate if done by just combatants, it must also imply that the same act would be disproportionate if done by unjust combatants. That shows that the requirement is coherent in its application to the action of unjust combatants. But this is only an illusion of moral coherence. The act would certainly be *wrong* if done by unjust combatants, but that is not because it would be disproportionate. For it has no intended effects in relation to which its bad side effects could be either proportionate or disproportionate.

The defender of the traditional theory might next seek to reinterpret the application of the *in bello* requirement of proportionality so that it does compare bad side effects with good intended effects. This might be accomplished by detaching the evaluation of the ends of unjust war from their being unjust, or wrongly obtained. Those who instigate unjust wars believe, usually correctly, that they would benefit from the achievement of their ends. Those benefits, it might be argued, are the good intended effects against which the side-effect harms to non-combatants can be weighed in the assessment of proportionality. Thus, in the assessment of whether an act of war by unjust combatants would be proportionate, the relevant good effects include the benefits to their side of achieving their aims, the prevention of harms to themselves and other unjust combatants on the battlefield, the protection of their own non-combatant population from harms they might otherwise suffer as a side effect of military action by just combatants, and perhaps any good side effects their action might be expected to have. The corresponding list for just combatants is the same except that their ends comprise the good effects that are constitutive of the achievement of their just cause.

To test the plausibility of this suggestion, consider the rough analogy with a nephew whose aim is to kill his uncle as a means of receiving a large inheritance, knowing that this will cause great grief to his aunt as a side effect.

Using the formula just stated to assess whether the killing would be proportionate, we should weigh the benefit to the nephew from the killing against the unintended harm to the aunt and, presumably, the harm caused to the uncle as a means. This seems coherent. Judged in this way, the killing may or may not be proportionate. But suppose it is. Suppose the benefits to the young nephew outweigh the harms to his elderly uncle and aunt. All that would show is that the killing is not ruled out on grounds of proportionality. Proportionality is a constraint, not a justification. Even if the constraint is satisfied in this case, that is irrelevant because the killing is already impermissible because it violates the uncle's right not to be killed. Parallel claims apply to acts of war by unjust combatants.

Yet so far as I am aware, no one has ever understood proportionality in this way. The benefits that wrongdoers derive from wrongful action have not been thought to weigh equally with the harms they inflict on their victims, whether intentionally or as a side effect. Indeed, it has been thought perverse to suppose that they have any weight at all in the determination of proportionality, which is a moralized notion. Proportionality does not simply weigh and compare good and bad effects independently of how they are produced, how they are distributed, and whether people are entitled to them, deserve them, or are liable to them. In particular, when we seek to determine whether the harms that an act would cause to innocent people as a side effect would be proportionate, we weigh them against the act's intended good aims, and at least some of its good side effects, taking 'good' to mean 'morally good', not merely 'good for someone'. To do otherwise would be to allow the benefits that wrongdoers derive from their wrongdoing to weigh morally against harms to innocent people. For example, in determining whether the nephew's act of murder is proportionate, it would allow the benefits he would derive from it to weigh against and perhaps morally outweigh the harm he would cause to his aunt. This seems inadmissible. If that is right, my original claim still stands: assuming that their war is neither just nor justified, it is incoherent to suppose that the harms that unjust combatants cause to non-combatants as a side effect of their military action can be proportionate in relation to the military advantage that action yields.

III. A Revisionist Account if *Jus in Bello*

Even though the *in bello* principles of discrimination proportionality as traditionally interpreted are mistaken as moral principles, and the principle of necessity is bizarrely permissive, there are alternative interpretations that

are morally plausible. I will state and elucidate these principles and then argue that they can only rarely be satisfied by acts of war by unjust combatants.

As a purely formal principle, the requirement of discrimination is as I stated it earlier—that is, a requirement to restrict intentional attacks to legitimate targets. One is a legitimate target in war if one has forfeited one's right not to be attacked—that is, if one has acted in such a way as to have become morally liable to attack. The mistake of the traditional theory is to identify legitimate targets with combatants, on the ground that what makes a person liable to attack in war is posing a threat to others. The fundamental problem with this, as I noted, is that one does not make oneself morally liable to attack by posing a threat if one is morally justified in posing that threat. This is particularly clear when the reason one is justified is that the person one threatens is morally liable to suffer the threatened harm.

I have argued elsewhere that the criterion of liability to intentional attack in war is moral responsibility for a threat of serious, wrongful harm, including though not limited to the wrongful harms whose prevention or correction constitutes a just cause for war.⁵ There are several points to note about this claim. First, one need not be the immediate agent of a threatened harm to be liable to be harmed in defence of the potential victim; it may be sufficient that one bears some moral responsibility for that harm even if someone else would inflict it. Second, it is not sufficient for liability to defensive harm that one *is* the immediate agent of a wrongful harm; one must also be morally responsible for the harm one would otherwise inflict. Third, responsibility does not entail culpability. There are ways in which one can be morally responsible for a threat of wrongful harm without being culpable—for example, if one has permissibly chosen to act in a way that foreseeably has a very small risk that, through bad luck, one will cause a great harm to innocent people unless one is harmed in their defence.

Given this understanding of liability to defensive attack, the requirement of discrimination in war states that while there is a stringent moral constraint against intentionally attacking those who are not morally responsible for a threat of serious, wrongful harm, it is in general permissible to attack those who are morally liable to be attacked by virtue of their moral responsibility for a threat of wrongful harm to others. Because whether one becomes liable to defensive action by posing a threat of harm to others depends on whether the threat one poses is morally justified, there is a connection between liability and just cause. Those whose war meets the conditions of a just war have a moral justification for fighting and therefore do not make themselves liable to

⁵ *Killing in War*, n 2 above.

attack unless they pursue their just cause by impermissible means, or pursue impermissible aims within the context of a war that is just overall. By contrast, those who fight without a just cause, and in particular those who fight for a cause that is positively unjust, are generally liable to attack, provided that they are morally responsible for their action, which combatants usually are. There are, however, exceptions. Unjust combatants may not be liable to attack during those times, if any, when they are acting with moral justification to prevent just combatants from acting impermissibly. It is also possible, though not likely, that a war could be justified on grounds of lesser evil even though it lacked a just cause—that is, even though those whom it was necessary for combatants to attack as a means of achieving their aims were not liable to attack. A just war requires two forms of justification: a liability justification for harms inflicted as a means and a lesser-evil justification for harms inflicted on innocent people as a side effect. I call a war that is justified entirely on grounds of lesser evil a merely ‘justified’ war. Combatants who fight in a war that is justified though not just are ‘unjust combatants’ but nevertheless have a moral justification for fighting despite the fact that those they attack are not liable to attack. If having a lesser-evil justification for harming non-liable people exempts a person from liability to defensive harm, unjust combatants whose war has only a lesser-evil justification are not liable to defensive attack.

Like the traditional understanding, this understanding of the requirement of discrimination contains both a permission and a prohibition. The permission is in one respect more expansive, for it allows for the possibility of non-combatant liability. It concedes, for example, that the Nazi physicist cited earlier would be liable to attack. But overall the permission is much narrower, since most just combatants are not liable to attack. The prohibition is correspondingly more expansive, as it applies to most attacks against just combatants, but is in another way narrower in allowing for a doctrine of limited non-combatant liability.

Next consider the revisionist interpretation of the requirement of necessity. In elucidating the traditional interpretation, I conceded that it imposes a plausible constraint if it requires combatants to accept greater risks to avoid harming non-combatants if they can do so without any sacrifice of military advantage in the pursuit of their larger goals. But this is a feeble and highly permissive constraint, since it assesses necessity independently of those goals. It plausibly rules out harms that are unnecessary for the achievement of aims that are unjustified, and plausibly requires that unjust combatants accept some sacrifices to avoid causing such harms *if* they are going to pursue unjustified aims; but it also permits harms to innocent people that are necessary *only* for the achievement of unjustified aims. Yet morality demands

more than that the harms one causes to innocent people be unavoidable if one is to achieve one's goals, whatever they may be. It holds instead that it is permissible to harm innocent people only when those harms are necessary or unavoidable in the achievement of goals that are morally just or justified and can thus properly weigh against and potentially outweigh the collateral harms. Harms that are necessary only for the achievement of unjust or unjustified goals are not *morally* necessary. The requirement of necessity in war must rule out such harms as impermissible.

The correct *in bello* requirement of necessity thus asserts that an act of war may permissibly harm innocent people as a side effect only if there is no alternative act of war that would make an equal or greater contribution to the just or justifying aims of the war. That an act of war is necessary for a certain degree of military advantage is insufficient to make it necessary in the relevant sense. The military advantage must itself be instrumental to the achievement of an aim that is morally justified.

Two further points are worth making. First, as with the interpretation I offered of the traditional principle, the revisionist principle implies that an act of war that would harm innocent people as a side effect is impermissible if there is an alternative act that would cause less harm to innocent people and make an equal or greater contribution to the achievement of a just or justifying aim, but would also involve a somewhat greater risk or harm to the combatants who would carry it out—though obviously there are limits to how much additional risk or harm just combatants would be required to bear.

Second, there is a question whether the requirement of necessity rules out not only unnecessary harms to non-combatants but also unnecessary harms to enemy combatants. The traditional theory has tended to ignore this question, as its proponents have assumed that all combatants are liable to attack at any time during a state of war and that all harms to enemy combatants lessen their military effectiveness and thus provide some degree of military advantage. But neither of these assumptions is true. There would be no military advantage, for example, in killing the members of a unit that has completed its tour of duty and, though still in the battle area, is awaiting the arrival of transport vessels to return home. As a matter of morality, the *in bello* requirement of necessity applies to intended and unintended harms to both non-combatants and combatants, but I will not pursue further the issue of unnecessary harms to combatants here.

It is, however, important to recognize a parallel claim about the revisionist understanding of *in bello* proportionality. The traditional theory holds that in the determination of whether an act of war is permissible, the only harms that must be shown to be proportionate are those caused to people who are not

liable to suffer them, who are assumed to be co-extensive with non-combatants. Combatants are all assumed to be liable to be attacked and killed. Harms caused to them are thus considered to be fully justified on grounds of liability, so that it is unnecessary or superfluous to attempt to justify them yet again by weighing them against the good effects that the act that causes them also achieves. But this is a mistake, for, again, it is not true that all combatants are liable to be attacked and killed. Just combatants who fight by permissible means do nothing to make themselves liable to attack. And even some unjust combatants, such as those whose responsibility for being in the military is mitigated by ignorance or duress and who will not contribute significantly to the achievement of an unjust cause or any other harm, are also not liable to attack. Also, the *number* of unjust combatants harmed or killed can render an act of war disproportionate.⁶ Suppose that it had been necessary for British forces to kill 50,000 Argentine combatants to preserve Britain's sovereignty over the Falkland Islands. In that case, the Falklands War would arguably have been disproportionate, as, therefore, would most of the constituent acts of war by the British combatants who would have done the killing.

We can refer to proportionality in harms to those who are potentially liable to be harmed as *narrow proportionality*. If a person is, in the circumstances, liable to be harmed in a certain way, harming him in that way is proportionate in the narrow sense. If a person is liable to only a certain amount of harm, harming him in excess of that amount is disproportionate in the narrow sense.

It has almost universally been assumed that any harms to which people are liable are ones that it is permissible to inflict intentionally. But people can be liable to suffer harms that occur as unintended effects. And the threshold for liability to suffer unintended harms is generally lower than that for liability to suffer intended harms. A person may not be liable to the intentional infliction of a certain harm and yet be liable to suffer that same harm as a foreseen but unintended effect. In war, unjust combatants tend to be liable to any harms that they might suffer as a side effect of the military action of just combatants. This can also be true, though only rarely, of non-combatants on the unjust side. There can be instances in which some non-combatants on the unjust side bear sufficient responsibility for a threat of wrongful harm that they may have no legitimate complaint if they are harmed as a side effect of military action necessary to eliminate that threat. In such a case, the unintended harms to non-combatants are a matter of narrow proportionality.

⁶ For discussion, see McMahan, 'Duty, Obedience, Desert, and Proportionality', n 2 above, pp 151–7, and J McMahan, 'What Rights May be Defended by Means of War?', in C Fabre and S Lazar (eds), *National Defence* (Oxford: Oxford University Press, 2013).

Even though, contrary to the traditional theory of the just war, wars and acts of war can be disproportionate in the narrow sense because of the harm they cause to enemy combatants, I will not further discuss narrow proportionality here. This is because, in practice, most unjust combatants are potentially liable to suffer significant harms and the great majority are liable to intentional military attack.⁷

I will focus instead on what can be called *wide proportionality*, or proportionality in harms caused to those who are innocent in the sense of not being liable to suffer them, either as a means or as a side effect. Such harms to non-liable people caused as a side effect are the ones that the traditional view of proportionality in war has been concerned with, though the traditional theory has also assumed, in my view incorrectly, that the group of those who are innocent in this sense is co-extensive with the group of non-combatants.

It is necessary to consider wide proportionality independently of narrow proportionality, as these different forms of proportionality are constraints on different forms of justification for harming. While narrow proportionality is a constraint on a liability justification, wide proportionality is a constraint on a lesser-evil justification.

Harms to non-liable people may be either intended or unintended. Intended harms to non-liable people violate the requirement of discrimination and are thus generally ruled out. But as it is implausible to take the requirement of discrimination to be absolute, it is possible for there to be a lesser-evil justification for intentionally harming people in ways to which they are not liable. The conditions in which it can be permissible intentionally to attack innocent people in war are generally understood, following Michael Walzer, to be the conditions that define a 'supreme emergency'.⁸ ('Supreme emergency' refers to a condition in which the *in bello* requirement of discrimination is overridden. The term has not been used to refer to conditions in which an unjust war fought entirely against non-liable people might be justified as the lesser evil.)

The usual focus, therefore, in the assessment of whether an act of war is proportionate is on the harms the act is expected to cause as side effects (hence the euphemism 'collateral damage') to people who are not liable to be harmed. These bad effects have to be weighed against good effects that are 'moralized' in the sense that they do not include all effects that are good for someone but only those that are morally good. They obviously include the

⁷ For discussion, see McMahan, *Killing in War*, n 2 above, pp 182–8, and 'Who is Morally Liable to be Killed in War', n 4 above, pp 547–9.

⁸ M Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977) 251–68.

good effects that are constitutive of the achievement of a just cause for war and any further good effects that might be caused by the achievement of the just cause. They may include other good effects as well, such as good side effects of a permissible means of achieving a good end. But they do not include the benefits that wrongdoers gain through wrongdoing.

There are other types of morally good side effect whose role in the assessment of wide proportionality seems unclear because of the way in which they are caused. These include morally good side effects (1) of a wrongful means to a good end, (2) of the achievement of a good end through morally wrongful means, (3) of a means to a wrongful end, and (4) of the achievement of a wrongful end.

There are, it seems, three broad possibilities in the case of side effects of these sorts. The first is that the issue of wide proportionality does not arise in the absence of a morally good end that can be pursued by a means that, in itself, is permissible. If the end is bad or the means impermissible, the act is ruled out and there is simply no question of whether it might be proportionate. The second possibility is substantively equivalent. It parallels a suggestion I made earlier—namely, that while such morally good side effects do weigh against all relevant bad effects in determining whether an act is proportionate in the wide sense, this is irrelevant in the case of acts that are impermissible on other grounds. For wide proportionality is merely a constraint, so that when it is satisfied, that means only that one possible reason why an act might be impermissible does not apply. But descriptions (1) to (4) above are of acts that are wrongful on grounds other than proportionality. They are, according to this view, impermissible either because they constitute a wrongful means to the achievement of an end or because they produce or are intended to achieve a wrongful end. They are ruled out even if they are proportionate in the wide sense.

The third possibility is that these morally good side effects count, and indeed count in a way that might not only satisfy the wide proportionality constraint but also provide a justification for acts that have them. Along with any other morally good effects that acts of types (1) to (4) might have, these morally good side effects weigh against any relevant bad effects (though good and bad side effects have, on one version of this view, less weight than equivalent good and bad effects that are intended, either as a means or as an end). If the combined expected good effects outweigh the expected bad effects by a substantial margin, the act is justified on grounds of lesser evil. This possibility is more plausible in the case of acts of types (1) and (2), which have good intended ends. Such cases exemplify a familiar form of lesser-evil justification, in which morally bad means are justified by sufficiently important ends that are morally good, together with morally good side effects. In

cases of types (3) and (4), however, in which the intended end is morally bad, one must accept that neither intention nor the causal relations among the consequences matter to the permissibility of the act if one is to accept that such acts can be morally justified.

IV. Unjust Combatants Cannot in General Satisfy the Requirements of *Jus in Bello*

I will argue in this section that acts of war by unjust combatants can seldom satisfy any of the requirements of *jus in bello*, understood in their plausible revisionist forms. It is only rarely that an act of war by an unjust combatant can satisfy even one of the requirements, and more rarely still that such an act can satisfy all three. This is true even of unjust combatants whose war is morally justified as the lesser evil even though it is unjust because some or all of those who must be attacked as a necessary means of achieving the war's aims are not liable to attack. Although many acts of war in a merely justified war can satisfy the *in bello* requirements of necessity and proportionality, they can only rarely satisfy the requirement of discrimination. This is because they are virtually always directed against people who are not liable to attack. Yet the requirement of discrimination is by hypothesis overridden in an unjust but justified war. In such a war, there would be repeated lesser-evil justifications for intentionally harming and killing innocent or non-liable people.

It should not be surprising that unjust combatants cannot in general satisfy the requirements of *jus in bello*. For if a war that lacks a just cause cannot satisfy the *ad bellum* requirements of necessity and proportionality, it is difficult to see how the individual acts of war that are constitutive of such a war could satisfy the parallel *in bello* requirements of necessity and proportionality. And it is relatively uncontroversial that a war that fails to satisfy the requirement of just cause cannot satisfy most of the other requirements of *jus ad bellum*. Indeed, it is generally accepted, even among traditional just war theorists, that a war that lacks a just cause can satisfy only one of their theory's other *ad bellum* requirements—namely, the requirement of *legitimate authority*, which insists that war may be initiated only by a person or persons who are authorized by a people to lead them into war. That requirement is wholly independent of the requirement of just cause. But the other *ad bellum* requirements are not. I will briefly explain why a war that lacks a just cause cannot satisfy the remaining principles of *jus ad bellum* and then indicate how this is relevant to whether unjust combatants can satisfy the principles of *jus in bello*.

First, the traditional principle of *right intention* requires that war be intended to achieve a just cause—that is, that the just cause not be used merely as a pretext for fighting a war for other reasons.

Second, the traditional principle of *last resort*, which is the requirement of necessity under a misleading label, holds that war can be permissible only if it is necessary for the achievement of the just cause—that is, a war is ruled out if the just cause can be achieved by means that would involve the infliction of fewer or less serious wrongful harms.

Third, the narrow *ad bellum* proportionality principle holds that people who are potentially liable to be harmed must not be harmed in ways that exceed the harms to which they are liable. But in a war that lacks a just cause, there are no opponents who are potentially liable to be attacked as a means of achieving the war's aims. So the issue of narrow proportionality simply does not arise.

Fourth, there is the wide proportionality principle, which holds that the harms that a war can be expected to cause to people who are not liable to be harmed must not be excessive in relation to the morally good effects that the war can be expected to have. Among wars that are unjust because they are fought against people who are not liable to be attacked, I have distinguished between those that are justified and those that are unjustified. Those that are justified are so because their morally good effects substantially outweigh their morally bad effects, including the harms caused to innocent people, both intentionally and unintentionally. These wars necessarily satisfy the wide proportionality constraint, for the extent to which the good effects outweigh the bad must be greater for a lesser-evil justification than for a war to be proportionate in the wide sense. But in those cases, if any, in which an act of war can satisfy the wide proportionality constraint, the fact that the war is proportionate is substantively irrelevant unless the extent to which the good effects outweigh the bad is extensive enough to provide a lesser-evil justification. So the relevant questions are whether there are any merely justified wars and, if so, how common they are.

It is, I have argued, possible that a war could be justified entirely on the ground that it is the lesser evil—though this is not a possibility that is recognized by the doctrine of *jus ad bellum* in the traditional theory of the just war. There might be a lesser-evil justification for war if there were a morally extremely important end that could be achieved only by militarily attacking non-liable people. But although a war of this sort is possible, it is, I will argue, unlikely in practice ever to be an option. This is because a war fought for an end that is morally good but is not such that the people who must be harmed as a means of achieving it are liable to be harmed (that is, a good end whose achievement does not constitute a just cause for

war) inevitably causes severe and very extensive harms, many of which are intended, to people who are not liable to suffer them. These bad effects include, but are not limited to, (1) intended harms to soldiers on the opposing side who by hypothesis have done nothing to make themselves liable to attack, (2) harms caused to those same soldiers as a side effect, (3) harms caused as a side effect to non-combatants on the opposing side, (4) unintended harms to neutrals, and (5) harms to the unjust combatants' own non-combatant population caused as a side effect of defensive military action by combatants on the opposing side. These are all harms that wrong or infringe the rights of their victims, and those that are intended arguably infringe stronger rights than those that are merely side effects. It is highly unlikely that all these harms could be proportionate in the wide sense in relation to the good end the war seeks to achieve, together with any morally good side effects it might have. And it is considerably less likely, a fortiori, that the good end and good side effects could *substantially* outweigh the many and various wrongful harms, thereby providing a lesser-evil justification for the war. It of course follows, again a fortiori, that it is virtually impossible that an unjust war that pursues morally bad ends could be either proportionate in the wide sense or justified as the lesser evil. For this kind of war causes, in addition to the five types of wrongful harm listed above, the harms to innocent people that either consist in or are side effects of the achievement of the bad end. Thus, it is virtually impossible that such a war could have side effects that would be so good morally that they could outweigh, much less substantially outweigh, the bad end, the bad means, and the bad side effects. So, while it is possible in principle that there could be a war without a just cause that could be proportionate in the wide sense, it is very unlikely in practice. And it is even less likely in practice that such a war could be justified as the lesser evil.

For the sake of completeness, it is perhaps worth mentioning the traditional *ad bellum* principle of *reasonable hope of success*. This principle is either subsumed by the principles of proportionality or is mistaken. If it is subsumed by proportionality, the claims I have just made about proportionality apply also to reasonable hope of success. But suppose, as traditional just war theorists have thought, that reasonable hope of success is an independent principle. Then consider a war that has a probability of success below the threshold of whatever is considered reasonable but is nonetheless proportionate because the achievement of the just cause is sufficiently important that even a tiny probability of achieving it could outweigh all the bad effects. It would be permissible to fight such a war but reasonable hope of success would prohibit it. Hence, if reasonable hope of success is understood as independent of proportionality, it imposes an unreasonable constraint. One might, of

course, claim that what counts as success is the achievement of whatever a belligerent's ends happen to be. In that case, the requirement could be satisfied in the absence of a just cause. And such a requirement would prohibit some obviously unjust wars. But it would not prohibit most unjust wars and is thus too anaemic to be a plausible component of *jus ad bellum*. It is better to regard reasonable hope of success as a defeasible element of proportionality.

As this brief survey shows, a state's ability to satisfy the traditional requirements of *jus ad bellum* other than the requirement of legitimate authority depends on whether its war satisfies the requirement of just cause. Two of these requirements—right intention and necessity—explicitly require a just cause. Before I came to appreciate the importance of distinguishing between narrow and wide proportionality and thus assumed as others had done that there was a single, univocal requirement of proportionality, I thought it was also impossible in principle for a war to be proportionate in the absence of a just cause, for I assumed that the only good effects that could properly weigh against the bad were those involved in or consequent upon the achievement of the just cause. I now think that this was a mistake. While I still think that the only good effects that count in the assessment of narrow *ad bellum* proportionality are those associated with the achievement of the just cause, I now accept that other morally good effects, including morally good side effects, can count towards the satisfaction of the wide *ad bellum* proportionality requirement (which is the only proportionality constraint that the traditional theory recognizes). I therefore accept that it is possible that a war that lacks a just cause can be proportionate in the wide sense, though this is irrelevant in practice unless the good effects outweigh the bad to so great an extent that the requirement of just cause is overridden and the war is justified as the lesser evil. As I have noted, however, this is not accepted by the traditional theory, which treats the satisfaction of the requirement of just cause as a necessary condition of the permissible resort to war.

Yet I also argued that in practice it is highly unlikely that a war that lacks a just cause could be proportionate in the wide sense, and even more unlikely that it could be both proportionate and justified. In practice, virtually all unjust wars are disproportionate in the wide sense. According to the traditional theory, however, it is possible for *all* the individual acts of war by unjust combatants who fight in a war that is unjust and disproportionate to be themselves proportionate. (It is also possible, though less likely, according to this view, that a war as a whole could be proportionate even though all the acts of war it comprises are disproportionate.) But how can a war as a whole be disproportionate when all the acts of war of which it is composed are proportionate?

The answer that traditional just war theorists must give is that in assessing wide *ad bellum* proportionality, one weighs the relevant bad effects of a war primarily against the good of achieving the just cause, whereas in assessing wide *in bello* proportionality, one weighs the relevant bad effects of an act of war against the military advantage the act is expected to provide. According to the traditional theory, therefore, *ad bellum* proportionality and *in bello* proportionality are quite different types of constraint. They are similar in that the *bad* effects that count in the assessment of *in bello* proportionality are the same as those that count in the assessment of *ad bellum* proportionality. The traditional theory accepts, in other words, that the bad effects that count in *each* assessment of whether an individual act of war is proportionate are, taken together, the bad effects that also count in the determination of *ad bellum* proportionality—that is, in the determination of whether the war as a whole is proportionate. But the good effects against which these bad effects are weighed in assessing *ad bellum* proportionality are different from the effects (namely, military advantages) against which the bad effects are weighed in assessing *in bello* proportionality. (Recall here that I argued earlier that it is doubtful that serious harms to innocent people can coherently be weighed against gains in military advantage to unjust combatants to yield a measure of proportionality that has any moral significance.)

This seems arbitrary. The natural assumption is that just as *ad bellum* and *in bello* proportionality are concerned with the same bad effects, so they must also be concerned with the same good effects. Given that assumption, a war can be disproportionate only if enough of the acts of war that together constitute it are themselves disproportionate. And that is what one would expect.

To appreciate how problematic the traditional theory's schizophrenic understanding of proportionality is, consider a war that is unjust because the ends it seeks to achieve are ones that would involve the infliction of wrongful harms that would be serious and extensive. The achievement of those ends would, however, provide great benefits to the aggressors. I earlier endorsed the traditional view that such benefits do not constitute good effects against which harms to innocent people can be weighed in the assessment of proportionality. For they are themselves harms to innocent people. On both the traditional and revisionist views, the achievement of these ends counts as a *bad* effect, and one that is weighted for the fact that it would be intended, for the purpose of assessing proportionality. It therefore counts negatively in the *ad bellum* proportionality calculation. Yet the ends of the unjust war are what military advantage is advantageous *for*. If the *in bello* proportionality calculation requires weighing the harms to innocent people against the military advantages that the act of war would provide, the ends of the unjust war seem

to count positively, as that which gives military advantage its significance. So unjust ends count negatively in the traditional *ad bellum* proportionality calculation yet positively in the traditional *in bello* calculations.

The traditional theorist would presumably respond by claiming that the bad ends do not count positively because the value of military advantage is, at least in the assessment of *in bello* proportionality, wholly independent of the ends of the war. But this merely returns us to the original problem, which is that military advantage *has* no value that is independent of the ends it serves; therefore military advantage alone cannot weigh morally against and potentially outweigh harms to innocent people. The traditional theorist might argue further that one good aim that military advantage always serves is the defence of the combatants' lives. But that begs the question of whether unjust combatants have a right of self-defence, so that preserving them from harm is morally good in the context. And even if they do have that right, they could better protect themselves by simply terminating their unjust war, which is what they ought morally to do in any case. If their ceasing to fight would result in unjust vindictive action by their adversaries, they might then have a just cause for continuing to fight. If so, their continued war need not be unjust.

It seems, therefore, that the traditional theory's reason for claiming that it is always possible for unjust combatants to fight without violating the *in bello* proportionality constraint, even in a war that violates *ad bellum* proportionality, is unsustainable. I have also argued that unjust wars are almost invariably disproportionate in the wide sense, and that even among those that might be proportionate, relatively few, if any, could be morally justified as the lesser evil. Hence, given that *in bello* proportionality must take into account the ends that the war is intended to achieve (rather than excluding them via some stratagem such as comparing bad side effects with military advantage), it seems that acts of war by unjust combatants can only rarely satisfy the wide *in bello* requirement of proportionality.

It is also only in unusual cases that an act of war by unjust combatants can satisfy the narrow *in bello* proportionality requirement. Part of what it is for there to be a just cause for war is that there are many people who are liable to be attacked as a means of preventing or correcting a serious wrong, or set of wrongs, for which they are responsible. In the absence of a just cause, there are few if any people on the opposing side who are liable to be attacked. Most of the people who are attacked in an unjust war are therefore people who are not liable to attack. Thus the issue of narrow proportionality seldom arises in an unjust war. Recall that an act of war is proportionate in the narrow sense if the harms it inflicts are ones to which the victims are liable. An act of war is disproportionate in the narrow sense if the harms it inflicts exceed those to

which the victims are liable. If, as is generally the case in an unjust war, the victims of an attack are not liable to attack at all, there is no issue of narrow proportionality. For the victims are innocent or non-liable people and any harms inflicted on them are matters of discrimination and wide proportionality.

The reason why the issue of narrow proportionality seldom arises in an unjust war is also the reason why unjust combatants can seldom satisfy the requirement of discrimination. This requirement permits intentionally attacking people who are legitimate targets and prohibits the intentional attack of those who are not legitimate targets. Legitimate targets are those who by their action have made themselves morally liable to attack. But combatants who fight by permissible means in a just war have done nothing to forfeit their rights or make themselves liable to attack. And neither, of course, have their civilian fellow citizens. But this means that unjust combatants hardly have any legitimate targets, so that almost all of their acts of war are indiscriminate. Virtually the only occasions on which unjust combatants have legitimate targets occur when just combatants threaten to inflict wrongful harms through impermissible action—for example, when they pursue their just aims by impermissible means, or when they pursue unjust aims within a war that is otherwise just. For when they act in these ways, they make themselves liable to attack. It is only on these occasions, when just combatants become liable and unjust combatants therefore have legitimate targets, that acts of war by unjust combatants can also satisfy the narrow and wide proportionality requirements. (There is a further question whether just combatants make themselves liable to defensive attack when their military action is morally justified but will inflict proportionate harms on innocent people as a side effect, thereby infringing those people's rights. If this does make them liable to defensive attack, unjust combatants may frequently have legitimate targets and their acts of war may sometimes be proportionate. I will not address this issue here, though I have argued elsewhere that when just combatants act with moral justification, the fact that their action will infringe the rights of innocent people does not make them liable to defensive action even by the potential victims, and certainly not by unjust combatants.⁹)

There is, finally, the question whether acts of war by unjust combatants can satisfy the *in bello* necessity requirement. Unjust combatants could, of

⁹ *Killing in War*, n 2 above, pp 38–51. Also see J McMahan, 'Self-Defense Against Justified Threateners', in H Frowe and G Lang (eds), *How We Fight: Issues in Jus in Bello* (Oxford: Oxford University Press, 2013). For a contrary view, see U Steinhoff, 'Jeff McMahan on the Moral Equality of Combatants' (2008) *Journal of Political Philosophy* 16, 220–6.

course, fight in ways that would satisfy the requirement of necessity if what it said is that an act of war can be permissible only if there is no alternative that would both cause less harm to innocent people and have at least an equal probability of achieving whatever the unjust combatants' aim or aims might be. But, as we saw earlier, while that is a plausible requirement as far as it goes, it is far too weak to be the whole truth about the necessity constraint in war. To be permissible, an act of war must, at a minimum, be necessary for the achievement of a morally good aim. While many or even most unjust combatants believe that the ends they pursue through war are morally good, their belief is seldom true. Wars that are unjust are rarely fought, either wholly or even in part, for aims that are morally good. Even self-defence and the defence of other unjust combatants are not morally good effects in the circumstances. And even if they were, attacking just combatants would seldom be a necessary means, since unjust combatants can generally protect their lives by withdrawing from the fighting (by refusal to fight, surrender, or desertion), which is normally what they ought morally to do in any case. The exception to these claims is again the case in which just combatants act impermissibly, either by using impermissible means or by pursuing unjust aims in the context of a just war. In such cases, acts of war by unjust combatants that seek to prevent these impermissible acts can often satisfy the necessity requirement. (Again, if just combatants make themselves liable to attack when their justified acts of war have side effects that threaten the rights of innocent people, many more acts of war by unjust combatants might satisfy the necessity requirement than can do so if the contrary assumption is true. Certainly the prevention of the infringement of a right seems in itself a morally good effect.)

V Why Mere Participation in an Unjust War Should not be Criminalized

We should conclude, I think, that acts of war by unjust combatants can seldom satisfy the *in bello* principles of discrimination, necessity, and proportionality, when these principles are plausibly interpreted. Unjust combatants may be able to satisfy these principles (1) when just combatants threaten to inflict wrongful harms through impermissible action, (2) if a just aim arises within a war that is unjust overall, or (3) when there is a lesser-evil justification for an act of war or, though this is extremely unlikely, for an unjust war as a whole. Otherwise, military action by those who fight in a war that is unjust because it lacks a just cause is likely to involve the objectively

impermissible infliction of serious harms on people who are not liable to be harmed. Much of their military action is intended to harm or kill just combatants as a means of securing military advantage, yet most just combatants have done nothing to make themselves liable to attack. And this same action often has as a side effect the harming or killing of innocent non-combatants on the just side as well. Finally, the achievement of the unjust combatants' unjust ends typically involves great and wrongful harms to many people, non-combatants and combatants alike, who are citizens of the state that is the victim of the unjust war.

This generates a serious problem for any morally informed account of war crimes. As I mentioned earlier, it would be ideal if all acts of war that are seriously wrong because they violate important rights and cause great harm could be criminalized—and if *only* such acts were criminalized. But the conclusion I have reached in this section is that the vast majority of acts of war by unjust combatants are wrong because they violate rights that people have, and have not forfeited, not to be seriously harmed. If all acts of war that satisfy that description were criminalized, most acts of war by unjust combatants would be war crimes. And if making a type of act criminal is roughly equivalent to making it legally punishable, most acts of war in an unjust war would render the unjust combatants who did them liable to punishment. Criminalization of seriously wrongful harming in war would be tantamount to making mere participation in an unjust war punishable.

Yet there are many reasons why it would be both unwise and morally wrong to hold unjust combatants liable to legal punishment for fighting in an unjust war. Some of these reasons seem decisive on their own. Together they overdetermine the case against the criminalization of fighting in an unjust and illegal war. Here are some of the main reasons.

1. Individual soldiers are often neither well enough informed nor otherwise qualified to determine with confidence whether the war in which they have been commanded to fight is just or unjust, legal or illegal. And there is no reliable authority, legal or otherwise, that they may consult for guidance. For most soldiers, their own government is the highest form of authority they have, and it tells them to fight. In many cases, therefore, their restricted epistemic situation is an excusing condition that is sufficient to exempt them from liability to punishment, even if it is not sufficient to exempt them from liability to defensive action.

2. They also act under duress, for they are threatened with punishment by their own government if they refuse to fight. Even if there were a reliable and authoritative source of guidance about which wars are just and which are unjust, it might still be unfair to punish genuine unjust combatants for fighting if they would also face draconian punishment domestically for refusing to fight.

3. Given that soldiers are threatened with punishment by their own government if they refuse to fight, a threat from an external source to punish them if they do fight is less likely to deter them from fighting but may deter them from surrendering, thereby unnecessarily prolonging unjust wars. Indeed, it might provoke unjust combatants to abandon all restraints in a desperate bid for victory as their best hope for avoiding punishment altogether.

4. As long as international institutions of criminal justice remain seriously defective and inadequate, acceptance of the claim that unjust combatants may be liable to punishment involves a risk of ‘victor’s justice’—that is, a risk that just combatants will be ‘punished’ by a victorious but unjust adversary, whose claim to have fought a just war cannot be controverted in a way that could prevent it from exacting *post bellum* vengeance.

5. Until international legal institutions are able to provide authoritative guidance to combatants before or during the course of a war on whether their side’s war is or would be legal or illegal, it may be unfair to hold combatants legally liable to punishment for fighting in a war that is illegal.

6. Even if the law had the ability to warn combatants in a timely manner that they were fighting in an unjust war, it would be impossible to provide fair trials for them all. It might, of course, be possible to try a limited number of them, perhaps selected by lottery. But in that case the likely deterrent effect would be insufficient to justify using scarce *post bellum* resources in this way.

7. No state could be expected to surrender a large number of its citizens for trial for doing what it had commanded them to do. It would have to be coerced to do so. Yet assuming that peace had been achieved, it would be absurd to suppose that compelling a recalcitrant state to extradite its former combatants for war crimes trials could be a just cause for a further war.

Some of these objections would have less force if there were an impartial international institution that could provide reliable and authoritative judgments, while wars were in progress, about which wars were just and legal and which were unjust and illegal, and if states had liberal provisions for selective conscientious objection. In these conditions, a threat of punishment by an international court might have a desirable deterrent effect without being unfair to those who might be punished. Even in these conditions, however, it might be necessary to offer amnesty to unjust combatants to induce them to surrender; but if unjust combatants could anticipate that there would be a significant probability that they would be offered an amnesty, this would diminish any deterrent effect that the threat of punishment might have. And the problem would remain that trials for a large number of former or demobilized combatants would be prohibitively costly, procedurally

inadequate and thus unfair, as well as likely to provoke further conflict. So even in conditions substantially more favourable than those that prevail at present, it would still be unwise to criminalize mere participation in an unjust war.

(It is perhaps worth noting that the objections to *criminalizing* most acts of war by unjust combatants do not apply to making those acts of war merely *illegal*. The law could, therefore, condemn such acts without holding offenders liable to punishment for committing them. An unenforced legal prohibition of fighting in an unjust war would have no *deterrent* effect, but it could have the effect of *inhibiting* at least some participation in unjust wars. For an official repudiation of the idea that the law permits fighting for the sake of unjust ends could have a psychological effect in at least some cases.)

VI. The Grounds for Criminalization in War

Even though it is and will likely remain infeasible to criminalize all morally impermissible acts of war by unjust combatants, there are nevertheless moral limits to what may permissibly be done even in a just and legal war and it is necessary that they be recognized and enforced through the threat of legal punishment. And if just combatants are to be potentially liable to punishment, unjust combatants must be as well. Indeed, it is, if anything, even more important to seek to restrain the action of unjust combatants through the threat of punishment. The problem is that, while it is feasible in the case of just combatants to criminalize only seriously wrongful acts, leaving most militarily advantageous acts legally permissible, it would, as we have seen, be both unfair and counterproductive, at least in current conditions, to criminalize all seriously wrongful acts of war by unjust combatants, as that would effectively criminalize their mere participation in the war. The task is thus to determine for which of their morally impermissible acts of war unjust combatants should be held liable to punishment. (Their morally permissible acts of war, of which there could be a few, should be legal. Among their morally impermissible acts, some might be either legal or illegal though not criminal; others would be criminal.)

If there were an international institution that could distinguish, authoritatively and publicly, between just and unjust wars while they were in progress, it might be possible to have a law of *jus in bello* that would be asymmetrical between just and unjust combatants precisely because they could be reliably identified as such. Even though the existence of such an institution would not make it feasible to punish all morally impermissible acts of war by unjust

combatants, it might make it possible for the range of punishable acts by unjust combatants to be wider, perhaps significantly so, than the range of punishable acts by just combatants. Yet at present there is no such institution and, at least in the near future, it is highly unlikely that there will be one. Most unjust combatants will therefore continue to believe, as most have done in the past, that they are in fact just combatants, and will consequently assume that the law that applies to them is that which applies to just combatants, whatever that law might be. In such conditions, it is impracticable, indeed futile, to have a law of *jus in bello* that is asymmetrical between just and unjust combatants. Hence, until there is an institution that can authoritatively distinguish between just and unjust combatants, the law of *jus in bello* must remain neutral, or symmetrical, between the two.

One way in which the law of *jus in bello* might be neutral is for it to prohibit all and only those types of act that would be morally impermissible if done by just combatants. Such an arrangement would be non-comparatively fair to combatants on both sides, since it would not legally prohibit any acts that it would be permissible for them to do. But it would be comparatively unfair to just combatants, for they would be punishable for any impermissible act while many impermissible acts by unjust combatants would be exempt from punishment. This is, however, a form of unfairness that exists to an even greater degree in the present law of armed conflict. The comparative unfairness of this possible arrangement is therefore not an objection to a change from the current *in bello* law to a law that would permit all combatants to do only those types of act that are, under some general description, morally permissible for just combatants.

Yet this suggestion would, I suspect, be excessively permissive in its application to unjust combatants. There are various types of action in war that, though nearly always wrong, may in rare instances be morally permissible for just combatants, such as intentionally attacking civilians who contribute in important ways to the enemy war effort, or torturing an enemy agent as a necessary means of gaining information vital to the protection of one's own civilian population. But any provision in the law, however narrowly circumscribed, that would permit the intentional killing of civilians or the torture of captives would almost certainly be repeatedly exploited by unjust combatants in a cynical effort to justify acts that would be objectively unjustified. The same is true, though probably to a lesser extent, of just combatants, who are sometimes ordered to pursue just ends by impermissible means. (Indeed, because just combatants sometimes pursue just ends by impermissible means, or pursue ends that go beyond their just cause, the permission to use torture could in principle extend even to unjust combatants. Suppose, hypothetically, that in early August of 1945, Japanese

intelligence agents had known that the US planned to drop a powerful new bomb on a Japanese city. Suppose these agents had then tortured a captive American, thereby learning from him the identity of the targeted city and the timing of the attack, and had thus been able to evacuate most of the civilians from Hiroshima before the atom bomb destroyed the city, thereby saving tens of thousands of innocent lives. I would judge their action to have been objectively permissible, at least on the plausible assumption that the destruction of Japanese cities was neither necessary for nor proportionate in relation to the achievement of the US's just aims at that point in the war.)

If one surveys the history of such practices as intentionally killing civilians in war, killing prisoners of war, and torturing captured enemy agents, one finds that the morally justified instances, if any, are vastly outnumbered by the unjustified instances. This is true whether one examines the conduct of unjust combatants or that of just combatants. In these conditions, if the law cannot permit the justified instances without compromising whatever ability it has to deter or constrain the unjustified instances, it should prohibit all acts of these types. For it is more important for the law to do what it can to prevent the many acts of these types that would be wrong than it is for it to permit those few that would be morally justified.

One may wonder by what criterion I am judging what is more important here. Historically, the aim that has tended to guide both the interpretation of the morality of *jus in bello* and the formulation of the law of *jus in bello* is the reduction or minimization of the overall violence of war, or the harm caused by war. That this is the proper aim of the regulation of the conduct of war is still the consensus view. In an article rightly critical of the conduct of Israel's invasion of Gaza in 2008, Avishai Margalit and Michael Walzer wrote that 'the point of just war theory is to regulate warfare' because 'violence is evil, and... we should limit the scope of violence as much as is realistically possible'.¹⁰ More recently, a professor in the Human Rights Institute at Columbia University wrote in a letter to the *New York Times* that 'if "just war" theory has any objective, it is to minimize the use of violence'.¹¹ Although these claims may seem almost platitudinous, they are wrong. The primary objective of the regulation of war should not be the minimization of violence but the minimization of *wrongful* violence, or the minimization of the violation of rights, weighted for their comparative importance. It is often permissible to engage in greater violence to prevent lesser violence, or to cause more harm than one prevents, provided that the harm one prevents would

¹⁰ A Margalit and M Walzer, 'Israel: Civilians and Combatants' (14 May 2009) *The New York Review of Books* 56, 21–2, at 21.

¹¹ *New York Times Book Review*, 13 February 2011.

have been inflicted on people not liable to it, while the harm one causes is inflicted on those who are liable to suffer it.

If there are ways of reducing wrongful violence—violence that is indiscriminate, unnecessary, or disproportionate—that also reduce the harm suffered by wrongdoers, they are of course preferable to equivalent reductions in wrongful harm that require the harming of wrongdoers. Some conventions, such as bans of certain types of weapon, offer a reduction in harm to each side without unduly impeding either side's ability to win the war. Although such conventions function to reduce violence and harm overall, the moral reason that just combatants have to respect them may be only to maintain reciprocity and thereby prevent additional wrongful violence by the unjust combatants. While acts prohibited by such conventions are generally *mala in se* when done by unjust combatants, they may be only *mala prohibita* when done by just combatants.

In summary, rather than prohibiting all combatants from doing those types of act that are morally impermissible when done by just combatants, a neutral or symmetrical law of *jus in bello* should criminalize a form of action in war only when doing so would have the expected effect of reducing the amount of wrongful harm inflicted in war or, equivalently, the sum of weighted rights violations. A law of *jus in bello* designed using this criterion of criminalization would be unfair to just combatants in two ways. It would be non-comparatively unfair to them in that it would legally prohibit them from acting in certain ways in which it would be morally permissible for them to act. And it would be comparatively unfair because it would threaten them with criminal punishment for any seriously wrongful act they might do in war while exempting unjust combatants from punishment for a broad range of seriously wrongful acts.

These forms of unfairness seem tolerable. One might, however, think it would not be tolerable if the law were ever to prohibit the *only* possible means by which a people could achieve a significant just cause. Yet there is no objection to legally prohibiting the sole means of achieving a just cause if that means is independently prohibited by morality. Sometimes people are morally required to endure injustice if the only means of avoiding it is morally impermissible. Yet there remains the possibility that the criterion of criminalization I have suggested could, in a particular case, prohibit the only possible means of achieving a just cause even when that means would be permitted by morality. Although this possibility seems remote, it cannot be ruled out. But this too seems tolerable. Law is always imperfect; it cannot anticipate and take account of every contingency. There are therefore occasions on which it is morally permissible, or even obligatory, to violate the law.

There is no reason to suppose that the law of war crimes should be an exception to this.

VII. Discrimination, Necessity, and Proportionality

Having acknowledged that the law of *jus in bello* must for the present be symmetrical between just and unjust combatants and can probably never be asymmetrical to the same extent as the morality of *jus in bello*, we should next consider what the optimal formulations might be, at least for now, of the familiar legal requirements of discrimination, necessity, and proportionality.

By making significant and continuing contributions to an unjust war, civilians or non-combatants can make themselves morally liable to intentional military attack. Yet this is relatively rare, while the temptation to attack civilians for terrorist purposes is often strong, particularly for those who are already pursuing unjust aims, the achievement of which would also harm those same civilians. It is therefore more important to deny any pretence of legal justification to those who are tempted to kill innocent people opportunistically than it is to permit just combatants to kill non-innocent civilians on those rare occasions when that would be morally permissible.

The central problem for the formulation of a neutral requirement of discrimination is the traditional problem of drawing a precise distinction between combatants, who are legitimate targets, and non-combatants or civilians, who are not legitimate targets. The difficulty is that there are often many people who are clearly civilians, and are also non-combatants in that they do not participate in combat, who nevertheless contribute causally to the fighting of a war, sometimes in ways that are more significant than the contributions that most combatants make. The case most often discussed is that of munitions factory workers. Their work may have only one purpose: to provide the weapons necessary for the prosecution of the war. Their causal contribution seems little different from that of military support personnel who deliver weapons to combatants but do not themselves operate those weapons. If it is permissible to kill the latter to prevent the delivery of the weapons, it seems that it should also be permissible to kill the former to prevent the manufacture of the weapons. One might think that it matters that those who deliver the weapons are members of the military while factory workers are not. But consider a society in which the manufacture of weapons is done under the auspices of the military itself, by workers who are officially members of the military but do not have combat roles. It would be arbitrary to suppose that it should be legal to kill munitions workers in that society but

not in societies in which the manufacture of weapons was contracted to civilian industries.

Some just war theorists have argued that munitions factory workers may be killed while they are at work but not when they are away from work. This distinguishes them from combatants, who may be killed at any time or anywhere during a state of war. But the suggestion seems to be that when they are at work, their status is also different from that of an ordinary non-combatant, whose killing even as a side effect would be subject to a more stringent proportionality constraint. It seems, therefore, that munitions factory workers are regarded, at least by some just war theorists, as having a kind of status intermediate between that of combatants and that of non-combatants. No status of this sort is recognized in law, but it is worth considering whether there might be advantages to having gradations of legal status rather than the simple and perhaps Procrustean categories of legitimate and illegitimate targets. This would, however, introduce new complexities into the law of war crimes.

The issue is important because there are often people who are unambiguously civilians and non-combatants who nevertheless make extremely important contributions to a state's ability to fight a war. One might think in this connection of certain civilian contractors, who have become increasingly important in recent years, particularly in the wars that the US has fought in Afghanistan and Iraq. But civilian scientists who work to develop new weapons technologies are arguably more important. The outcome in the European theatre of the Second World War would have been quite different if the scientists who were working to provide an atom bomb for Hitler had succeeded. They would clearly have been morally liable to be killed if that had been necessary to prevent Hitler from getting the bomb. But any legal permission, however restricted, to kill scientists in an enemy state seems too dangerous even to contemplate.

Weapons manufacturers, civilian contractors, and weapons scientists are only a few of the types of people who are not comfortably classifiable as either combatants or non-combatants, legitimate targets or illegitimate targets. Others include medics, military lawyers, civilian strategists and others who do consulting work for the military that is relevant to the conduct of war, and so on. The legal status of these and other such people must be clearly and decisively resolved if the requirement of discrimination, and hence the law of war crimes, is to have determinate scope.

Consider next the *in bello* requirement of necessity, or minimal force. To be neutral between just and unjust combatants, it seems that it must stipulate simply that an act of war is permissible only if there is no alternative act that would cause less harm and yet have at least an equal probability of achieving

either the same military goal or another military goal of equal importance. As I noted earlier, morality imposes a necessity constraint both on the harming or killing of civilians or non-combatants as a side effect and on the intentional harming or killing of enemy combatants. But in conditions of war, whether the killing of an enemy combatant will contribute to the achievement of one's aims is almost always a matter of uncertainty. For while it may seem that killing a certain combatant would serve no purpose, it is possible that that combatant would otherwise pose a threat later. Because of this uncertainty, it may be wisest not to hold soldiers liable to legal punishment for causing unnecessary harm to enemy combatants, except in such well-defined situations as when enemy combatants are attempting to surrender.

This legal *in bello* necessity constraint is of course a rather weak constraint in its application to unjust combatants, as all it requires of them is that they take some risks to avoid harming innocent bystanders in the course of pursuing their unjust goals. It is analogous to a rule that prohibits burglars from burning down the house they have just burgled and killing its inhabitants, even though by doing so they could eliminate both fingerprints and witnesses.

Finally, how should the legal requirement of *in bello* proportionality be formulated? For the same reasons that the legal *in bello* necessity requirement should not take account of harms caused to enemy combatants, so the legal *in bello* proportionality requirement should concern itself exclusively with harms caused to civilians or non-combatants. That is, while morality imposes a narrow *in bello* proportionality requirement, only a wide *in bello* requirement should be enforced by law. As I argued earlier, unjust combatants can only rarely satisfy the correct moral version of the wide *in bello* proportionality requirement. Yet it is important to try to restrain their action in any ways possible and proportionality is a familiar restraining principle that many combatants, including unjust combatants (most of whom believe that they are just combatants), are motivated to try to respect. The law should therefore include a neutral, coherent, and workable proportionality constraint that serves to diminish the wrongful harms inflicted in the course of war. And at least the most flagrant or egregious violations of this constraint should be punishable as war crimes.

At present, the proportionality constraint in the law of armed conflict requires that expected harms to civilians caused as a side effect of an act of war not be 'excessive in relation to the concrete and direct military advantage anticipated'.¹² But, as I argued earlier, this is incoherent if understood as a

¹² Article 51 of the 1977 Geneva Additional Protocol 1 condemns any 'attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a

moral requirement, and it is difficult to make sense of if it is conceded that military advantage has no value independent of the ends it promotes. For *in bello* proportionality, as generally understood, is a relation between the expected bad side effects of an act of war and the act's intended *good* effects (together, perhaps, with certain foreseen good side effects). Yet military advantage is itself not a good effect.

Earlier I suggested, but rejected, the idea that the good effects that count in the proportionality assessment of acts of war by unjust combatants are the benefits that the unjust side would gain from the achievement of its aims. A related though different suggestion is that the relevant good effects consist solely in the protection of combatants on the battlefield.¹³ On this view, an act of war is proportionate only if the expected harm it will foreseeably but unintentionally cause to civilians is not excessive in relation to the expected harm it will prevent the combatants themselves from suffering. Since civilians are thought to have a protected status *vis-à-vis* combatants, a certain harm to a civilian would have greater weight than an equivalent harm to a combatant. And proportionality assessments would tend to give a certain priority to civilians for another reason as well—namely, that the harms to civilians would be ones that the combatants would *cause*, while those the combatants would suffer would be ones they would merely *allow* to occur. Still, all the relevant effects would be confined to the battlefield. The goals for which the different parties were fighting would have no role in the assessment of proportionality. And because of that, the assessment would be entirely neutral between just and unjust combatants. Finally, the good and bad effects that would have to be weighed against one another would all be of the same kinds: the infliction of harms on some individuals would be weighed against the prevention of comparable harms to others. Hence, the problems of incommensurability that plague comparisons between harm to civilians and military advantage would not arise.

But as promising as this suggestion may seem, it is vulnerable to a decisive objection. This is that it rules out as disproportionate any act of war that

combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'. In international criminal law, Article 8 of the Rome Statute states that the following is a war crime: 'Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.' For a careful argument that the protections afforded to civilians in international criminal law are weaker than those provided by international humanitarian law, see A Haque, 'Protecting and Respecting Civilians: Correcting the Substantive Defects of the Rome Statute' (2011) *New Criminal Law Review* 14, 519–75.

¹³ For an earlier discussion, see *Killing in War*, n 2 above, pp 31–2.

would be purely offensive, in that it would be unnecessary for the protection of one's own forces, but would also harm civilians as a side effect, even if the harms would be comparatively slight. Even if such an act would make a significant contribution to the achievement of a just cause, the fact that it would harm civilians but do nothing to protect combatants means that, on this view of *in bello* proportionality, it would be disproportionate.

One might reply that any act of war that increases the probability of victory thereby hastens the end of the war and thus helps to preserve the lives of combatants on that side. But this is not true. Some acts of war increase the probability of victory simply by preventing defeat. These acts prolong the war, usually ensuring that more combatants will be killed than would have been had their side been defeated. Defeat would, of course, mean that their side would lose what it had hoped to achieve by fighting the war, and this would involve harms to the defeated combatants. But such harms do not count in the assessment of *in bello* proportionality, according to this proposal. For the harms involved in defeat are consequent on the failure to achieve the goals of the war; they are not harms caused directly by combat, which are the only harms that this proposal recognizes as relevant to proportionality.

Consider a war of humanitarian intervention. No matter how important the humanitarian aims are and no matter how likely it is that the war would achieve them, the initial attack by the intervening forces would necessarily be disproportionate on this view of proportionality if it would cause even the slightest harm to civilians. For prior to the initial attack, the intervening combatants face no threat from the forces they will attack; therefore the attack cannot protect those combatants from harms caused by combat. Hence, on this view, there are no good effects to weigh against the harms to civilians in assessing the proportionality of the initial attack. But a formulation of the *in bello* proportionality requirement that necessarily rules out the initiation of a humanitarian intervention as disproportionate cannot be correct.

Another proposal for a workable *in bello* proportionality requirement that is neutral between just and unjust combatants is that the harm that an act of war could be expected to cause to civilians should be weighed against the contribution the act would make to the achievement of the aims of the war, taking the aims to be whatever the combatants could most reasonably take them to be on the assumption that they are just combatants. In the initial phases of the Iraq war, for example, most American combatants could have reasonably believed that their victory would prevent the Baathist regime from being able to use weapons of mass destruction against regional enemies or from supplying those weapons to terrorists for use against other countries, such as the US. Perhaps for legal purposes the right way to assess the proportionality of their acts of war was to ask whether the harm such an

act would cause to civilians as a side effect was excessive in relation to the contribution the act would make to the goal of eliminating Iraq's weapons of mass destruction. That there were in fact no weapons of mass destruction is irrelevant, on this view.¹⁴

This proposal has some plausibility when unjust combatants can believe they are just combatants on the basis of false beliefs that are empirical in character, as in the case of American combatants in the Iraq war. But it breaks down when unjust combatants cannot reasonably believe that they are just combatants on the basis of false empirical beliefs, but can believe that they are just combatants only on the basis of a false *moral* belief. Nazi soldiers, for example, may have believed that it was justifiable for members of a superior race to expel inferior races from their lands or to enslave or exterminate them. But harms caused to innocent bystanders as a side effect cannot coherently be weighed against the supposed good of expanding the homeland of a superior people in this way, or against the supposed good of eliminating an inferior people.

Perhaps the *in bello* proportionality constraint as currently stated in the law of armed conflict is the best we can do. Perhaps, that is, unintended harms to civilians must be weighed against military advantage, which is, after all, something that all combatants seek. There is a coherent way of understanding the proportionality constraint in this way, though so interpreted, the constraint does not state a genuine moral principle. The idea is that the military advantage yielded by an act of war would be interpreted to mean the objective contribution that the act makes to the achievement of victory. The military advantage of an act could be measured on a scale, with complete ineffectiveness or no contribution at all at one end and 100 per cent probability of victory at the other. This scale could then be aligned with another that would measure harm to civilians. At one end of the second scale there would be no harm to civilians and at the other would be the maximum harm to civilians (for example, the number of civilian deaths) that would be considered proportionate in relation to the achievement of victory. An act of war would then be disproportionate if the harm it would cause to civilians measures higher on the second scale than the contribution it would make to victory measures on the first scale. This way of assessing proportionality would be equally applicable to the acts of just and unjust combatants, as there is no presupposition that victory has any kind of value. Thus, if some act of war would be decisive in securing victory for the Nazis, it could cause a great deal of unintended harm to civilians and still be proportionate. Perhaps this,

¹⁴ I am indebted to Lara Buchak for suggesting to me a view of this sort.

or something quite similar, is what the authors of the proportionality restriction in the current law of armed conflict had in mind.

There are, however, two strong objections to this proposal. One is that if the scale measuring military advantage does not purport to measure anything of evaluative significance, the upper end of the scale measuring harm to civilians must be wholly arbitrary. For the end of that scale represents the maximum harm to civilians that can be proportionate in relation to the achievement of victory. But if victory is morally neutral, there is no way to determine how much harm to civilians is proportionate in relation to it.

The second objection is related to the first. It is that this measure of proportionality treats all victories equally. Suppose that an act of war by the British would have increased the probability of victory in the Falklands War by 50 per cent but that the harm it would have caused to civilians as a side effect nonetheless made it disproportionate. According to the method for determining proportionality we are now considering, if a different act of war by the British would have caused an equivalent amount of harm to civilians as a side effect but would have increased the probability of victory over the Nazis in the Second World War, it, too, would have been disproportionate.¹⁵

The three proposals I have canvassed are the best I can do, at least at present, in trying to formulate a workable law of *in bello* proportionality. All are inadequate. I hope that others can succeed where I have failed.¹⁶

¹⁵ Thomas Hurka makes a similar point in arguing that it is impossible wholly to divorce *in bello* proportionality from the ends that a war seeks to achieve. See his 'Proportionality in the Morality of War' (2005) *Philosophy and Public Affairs* 33, 34–66.

¹⁶ I am grateful to Massimo Renzo for very helpful written comments and to Victor Tadros for illuminating discussion.