



Shooting to Kill: The Ethics of Police and Military Use of Lethal Force

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Military Use of Lethal Force

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Abstract and Keywords

In this chapter, just war theory is outlined, including *jus ad bellum* and *jus in bello*, and a version provided that accommodates wars fought by and against nonstate actors (e.g., terrorist groups). The concept of war is framed in terms of such theoretical notions as joint actions, multilayered structures of joint action, and institutional roles. It is argued that (1) despite the moral difference between combatants fighting a just war and those fighting an unjust war, compliance with the doctrine of the moral equality of combatants is morally justified, but the institutional rights and duties constitutive of that doctrine are merely *prima facie* moral rights and duties; (2) the principle of military necessity is to be understood in terms of *nested collective ends* (e.g., the collective end of winning the war depends on winning various battles); and (3) the application of the principle of military necessity involves the rules of engagement.

Keywords: just war theory, *jus ad bellum*, *jus in bello*, military necessity, joint action, moral equality of combatants, *prima facie* rights, nested collective ends, rules of engagement

AS WE SAW in Chapter 3, the institutional role of the regular soldier can be defined in terms of (1) its collective end, namely, the collective good of national (external) security, and (2) the means by which this collective end is realized, namely, lethal force. Moreover, while there is a jointly held obligation on the part of all citizens to provide the collective good of external security, in contemporary liberal democracies this obligation is typically discharged by establishing, in accordance with a division of labor, a standing professional armed force(s) (sometimes supplemented in wartime by citizen conscripts). Further, it was noted that, unlike police services, military forces do not have a quasi-judicial

role, but instead are essentially instruments of governments in the service of national (external) security. In the case of democracies, both the government and the nation's military forces are accountable to the citizenry, albeit the military forces indirectly via the government. Finally, it was argued in Chapter 3 that the individual soldier, unlike a police officer (or, for that matter, an ordinary civilian), waives his natural right to decide whether or not he will use lethal force against enemy soldiers, and waives it in favour of his superior officers. Thus in circumstances in which a soldier receives a lawful order from his superiors to use lethal force (or not to use lethal force), the soldier is institutionally (and morally, other things being equal) required to do so (or to refrain from doing so). I note that it does not follow from this, and nor do I accept, that an individual soldier waives his right to decide whether or not to wage war in the first instance. I discuss this issue in section 6.3 below.

(p.159) In Chapter 3 I distinguished regular soldiers from irregular soldiers, such as mercenaries¹ and terrorist combatants.² I use the more general term "military combatant" to refer to both regular and irregular soldiers. Recall also that the term "regular soldier" refers to members of navies and air forces as well as land armies. Military combatants principally use lethal force in the context of ongoing armed conflicts between the armed forces of political entities, such as, but not restricted to, nation-states. Such armed conflicts between armed forces include wars between nation-states and wars involving nonstate actors. The latter include civil wars, wars of liberation, and nonconventional wars between state actors and terrorist groups. This is not to say that all insurrections or armed conflicts between state actors and nonstate actors, such as terrorists groups, are wars; perhaps most are not, but evidently some are.

Roughly speaking, an armed force in the sense in use here is an organization and, often, an institution (as defined in Chapter 3) comprising: (1) combatants with task-defined roles, notably the role of using lethal force against enemy combatants; (2) a command and control structure; and (3) a capacity to reproduce itself, (e.g., by means of recruitment and training processes), and, thereby, to continue to exist beyond the "life" (e.g., discontinued participation due to death) of the current membership.

Further, armed conflict in the sense in use here is a collective enterprise and, typically, a multilayered structure of joint action (as defined in Chapter 3), consisting of armed conflict on the part of an armed force against another armed force in order to realize some military purpose (a species of collective end), such as to incapacitate the enemy armed force, and ultimately to realize some political purpose (also a species of collective end), such as protecting the territorial integrity of the nation-state. In this latter respect military combatants are unlike, for example, Mafia "soldiers" and the like, who use lethal force ultimately to realize criminal purposes.

Given this organizational character of military combat, the use of lethal force by military combatants is importantly different from that of the **(p.160)** typically nonorganizational use of lethal force by individuals in personal self-defense or in defense of the lives of others (discussed in Chapters 1 and 2). Moreover, wars involving armed forces comprising regular soldiers, in particular, are institutional in character. For regular armies are institutions constituted by the institutional role of regular soldiers. Here I am invoking the distinction made in Chapter 3 between mere organizations and institutions, the latter being normatively understood in terms of organizations defined in terms of collective ends that are also collective goods.³

In this work I have been operating with a threefold distinction between the use of lethal force by individuals in personal self-defense (and noninstitutionally based defense of the lives of others), the use of lethal force by police officers, and the use of lethal force by regular soldiers. I have stressed that police officers and regular soldiers are institutional role occupants, and that this makes a difference to the morality of their use of lethal force. Accordingly, we need to distinguish between the morality of the use of lethal force by noninstitutional actors (as elaborated in Chapters 1 and 2), the use of lethal force by police (see Chapters 3, 4, and 5) and the use of lethal force by regular soldiers (see Chapters 3 and 6–10). Specifically, there are, I suggest, important differences in the application of the moral principles that govern the use of lethal force in these three different kinds of cases, notably the principles of imminence, necessity, proportionality, and discrimination. Moreover, these differences are not simply ones explicable in terms of the differential numbers of defenders and attackers typically involved in personal self-defense and other-person defense, policing, and military conflict (respectively); specifically, the very large numbers of attackers and defenders engaged in wars. My concern in this chapter is with military use of lethal force. However, where appropriate, I indicate some of the contrasts with the police use of lethal force and with the noninstitutional cases.

Normatively speaking, the conduct of war is regulated by so-called just war theory (JWT), or so I will assume here. JWT comprises *jus ad bellum* (JAB) and the *jus in bello* (JIB). JAB is a set of moral principles setting forth the conditions under which an armed force can go to war (e.g., in national self-defense). JIB is a set of principles under which an armed can prosecute a war (e.g., combatants ought only to use the quantum of lethal force that is militarily necessary). While, ideally, an armed force will wage war **(p.161)** in accordance with JWT, this does not provide a sufficient condition for the use of lethal force by combatants, at least in many contexts of war. What is required in addition is rules of engagement (ROE). A combatant's ROE provides further specification in relation to the use of lethal force. For example, an ROE might require that in a given area populated by civilians, combatants are not to fire their weapons unless first fired upon. In section 6.1 of this chapter I provide an outline of JWT and, in particular, JAB; in section 6.2 I discuss the controversial doctrine of the Moral

Equality of Combatants and in section 6.3 I address JIB and ROE and their relationship.

6.1 Just War Theory

In recent years, JWT has been receiving considerable attention by philosophers both in respect of the question of its viability as a theory and as a means for determining the justifiability of particular armed conflicts.⁴ Traditionally, JWT principally concerns itself with wars between states, as opposed to armed conflicts involving nonstate actors, and has as a condition that the war be conducted under lawful authority, and therefore in effect under the authority of the state. Clearly such a condition would automatically rule out any internal war against the state (e.g., a revolutionary war) or other armed conflict involving a nonstate actor (e.g., armed conflicts against international terrorist groups), and for this reason ought not to be made a necessary condition of a *general* theory of just war.⁵ This is not to say that wars waged by nonstate actors against nation-states may not, for a variety of reasons, be especially difficult to justify, nor is it to deny that some suitably adjusted notion of legitimate authority might not be required for (morally legitimate) armed conflicts involving nonstate actors. It is to say, however, that, in principle, armed conflict conducted by a nonstate actor could be morally justified (e.g., the armed struggle of the African National Congress [ANC]⁶), and that therefore it cannot be a **(p.162)** necessary condition for a just war that it be fought under the authority of the state. In fact, historically many just war theorists allowed for the possibility of a just rebellion and for the possibility of removing a tyrant. Indeed political theory in general, including liberalism, admits of the moral possibility of a just internal war, and this is because there are limits to the obligation to obey the state, and because the state itself has obligations the discharging of which is part of the ground of its legitimacy.

Before presenting a version of JWT appropriate to armed conflict between nation-states as well as between nation-states and nonstate actors, there are a number of preliminary definitions and distinctions that need to be introduced. First, let us assume that wars are large-scale, ongoing, armed conflicts involving the use of violence and waged between collective entities. The violence in question would consist of destroying and damaging property (as well as perhaps the physical environment) and the injuring and killing by members of one collective entity of members of the other collective entity or entities—normally by the use of arms, armaments, and so on. Hereafter I will simplify matters and refer to the use of lethal force rather than the wider notion of violence.⁷

Second, assume that the collective entities in question are organized political entities. More specifically, a collective entity is a group of individuals such that: (a) they have a structure of practices, including convention, social norm, and law-governed practices, and a network of *political* beliefs held in common; (b) there is a set of interlocking *political* collective ends to which these practices are

directed; (c) the individuals see themselves as owing allegiance to the group and its political ends as a whole, and perhaps they actually belong to the group—or, if not, they at least view themselves as having to comply with the dictates of the leaders of the group.

Further, these political entities have armed forces, each of which consists of a differentiated and hierarchically ordered set of roles for the constitutive individual combatants and their leaders. These armed forces have been organized for the purpose of coordinated, ongoing, and (in principle) reciprocated acts of lethal force against the members of some other (at least notional) armed force of some political entity. Note that in the case of certain terrorist organizations with armed forces, the political and the military leadership may not be separate. Moreover, the organization of the armed force might be relatively loosely structured; indeed, it might be a network rather than an organization, as is the case with those terrorist **(p.163)** organizations affiliated with al-Qaeda or ISIS, such as Boko Haram or al-Shabab. A network, in this sense, comprises individuals or organizations and is defined in part, as is the case with organizations and joint actions, by reference to collective ends. But in the case of a network, the individual elements including sub-groups of the network have their own individual or collective ends, and these are primary, whereas the collective ends of the network per se are secondary. Here primary ends override secondary ones, supposing they conflict. Moreover, these (secondary) collective ends of the network are somewhat unspecified relative to the (primary) ones of the elements of the network.⁸ Further, the individual persons who make up the network do not have task-defined organizational roles qua members of the network, and, unlike organizations, the network does not reproduce itself, such as by recruiting and training individuals qua members of the network (as opposed to qua members of one or other of the constitutive organizations).

Third, assume that for two (or more) collective political entities to be at war is for the armed forces of one collective entity to be actually performing acts of lethal force against the members of another collective entity; so war, in my sense, is de facto as opposed to being merely de jure. And in so acting these armed forces are (a) instruments of the leadership of the collective entity to which they belong, (b) performing their actions on behalf of this collective entity, and (c) using lethal force against members of the opposing collective entity qua members of that opposing collective entity (and, typically, using lethal force predominantly, even exclusively, against the members of the armed forces of the opposing collective entity). On this account, the mob violence perpetrated by soccer hooligans is not war, since such violence, even if organized and lethal, is not political in character; on the other hand, an armed revolution may well be war, notwithstanding that one of the protagonists is not a state.

Fourth, it seems that many wars are waged under a claim of legal right, and are fought in accordance with some (perhaps quite minimal) set of laws and conventions. But it is not necessary that conflict be conducted under such a claim of right for it to be war, in my sense, nor is it necessary that one or both protagonists accept that there be at least some laws and conventions governing the conflict. Armed conflict conducted by warriors who accepted that they were acting illegally and who refused to abide by any conventions governing the conduct of war (e.g., **(p.164)** the convention or law not intentionally to kill innocent civilians) could still be war on this account. Consider, for example, the manner in which ISIS has waged war in Iraq and Syria. As a matter of policy, ISIS combatants torture and kill (including by beheading) captured enemy combatants and innocent civilians (both Christian and Muslim). On this account of war, an internal armed conflict (e.g., the English Civil War) could be a war, as could a revolutionary war (e.g., the American Revolution). Again, on this account, an armed conflict between a liberal democratic state and an international terrorist group, such as Al Qaeda, could be a war, and against ISIS, undoubtedly is a war.⁹

Let us then turn to the matter of constructing our generic account of JWT suitable for application to wars between nation-states as well as those between nation-states and nonstate actors. I provide an account that consists of a set of conditions that are jointly (morally) sufficient for engaging in armed conflict; I do not offer a set that is jointly (morally) necessary. Moreover, my account only provides a set of conditions under which it is morally permissible for a collective entity to engage in armed conflict, as opposed to a set of conditions under which it is morally justified or morally obliged to do so.

The definition is as follows:¹⁰ It is morally permissible for a collective political entity, A (a liberal democratic state, let us assume) to engage in war (and thus use lethal force) against another collective political entity, B (a nation state or nonstate actor) in a context C—if (though not necessarily, if and *only if*):

1. B is seriously violating the moral rights of citizens of A on a large scale and using lethal force or the credible threat thereof in so doing (e.g. by engaging in a war of aggression).
2. There is no alternative nonlethal method by which A could prevent this violation.
3. A has a reasonable chance of ending this violation by using lethal force.
4. It is probable that if A uses lethal force, the consequences, all things considered, will be better than if A does not. **(p.165)**
5. A uses lethal force only to the end of bringing about the cessation of B's violation of the rights of citizens of A, meaning that A acts in collective self-defense (of the moral rights of citizens of A).

6. A only uses lethal force: (a) of a type that is morally legitimate, (b) that is necessary to the end in question, (c) that is proportionate, and (d) against members of B who are combatants or the leaders of combatants.

Note that collective self-defense, as I use the term, refers to using lethal force on the part of the members of some collective entity to protect the moral rights—including but not restricted to the rights to life—of the members of that collective entity. In the case of wars waged by collective political entities, we can discern three related levels of collective self-defense. At the highest level, there is the collective self-defense of the collective political entity itself (e.g., the liberal democratic state). The members of the armed forces use lethal force to defend the moral rights (both natural and institutional) of the citizenry. Call this *national self-defense*. At a level below this there is the collective self-defense of the armed forces (e.g., the army, air force, and navy). Here the combatants of the armed forces and their leaders use lethal force to defend their own moral rights, notably their right to life, against the lethal force being deployed against them by enemy armed forces. Call this *armed forces self-defense*. At the lowest level there is the collective self-defense of the unit (e.g., a battalion or a platoon or a mortar squad). Here the members of some unit within the armed forces defend their own moral rights, notably their rights to life, against the lethal force being deployed against them by some unit of the enemy's armed forces. Call this *unit self-defense*.

Collective self-defense of the lives of an armed force as whole or of a unit is conceptually different from a one-off, individual self-contained act of personal self-defense or an aggregate thereof. This is so for the following reasons: Unlike a discrete, self-contained individual act of personal self-defense, the lethal action of a combatant on an occasion in the context of a war is typically performed jointly with the actions of other combatants at various levels (e.g., members of mortar squad, members of a platoon, members of a battalion). Taken in conjunction, these various joint actions constitute what I described above as a multilayered structure of joint actions. By virtue of consisting in interdependent layers of joint action, these macro joint lethal actions of, for example, fighting a battle, have a complex *synchronic* dimension.

(p.166) Moreover, the lethal action of a combatant on an occasion in the context of a war is but one element of a causally and means/end-connected, dynamic, and unpredictable unfolding series, indeed set of series, of lethal joint actions—including, but obviously not restricted to, the series of lethal actions performed by the combatant in question—directed at short-term, mid-term and long-term collective ends (e.g., winning this firefight, this battle, the war). By virtue of being a causally and means/end-connected series of joint actions, these sets of lethal actions of, for example, fighting a battle, have a complex *diachronic*

dimension, and each of these lethal action elements is a *phase-element* of the war.

Finally, the lethal action of a combatant on an occasion in the context of a war is performed qua organizational role occupant (i.e., qua combatant meeting organizational standards, serving organizational goals, etc.). Moreover, by the lights of my normative teleological account, military institutions have as their *raison d'être* the provision of the collective good of external security. Further, as argued in Chapter 3, the institutional role of the regular soldier can be defined in terms of (1) the collective end of protecting the moral (natural and institutional) rights of fellow citizens from violation by persons from external communities or nations, (2) by means of the use of lethal force, and (3) the prior jointly held obligation of all citizens to protect fellow citizens from external threats.¹¹ This institutional role is defined in terms of various institutional rights and duties that are also moral rights and duties, including ones that do not necessarily mirror prior natural moral rights and duties. I note that the natural rights in question are (at the very least) moral rights to properties constitutive of the selfhood of the citizens. The institutional moral rights in question are, at the very least, ones constitutive of the institutions that are necessary to ensure that the natural rights just mentioned are respected. For example, the exercise of basic subsistence rights requires viable economic institutions, and the exercise of various rights to freedom requires appropriate political institutions.

As a consequence of the above features of their institutional role, the lethal actions of combatants are performed in order to realize the defense of multiple members of their unit, their armed force, and, ultimately, their citizenry. As such, these lethal actions of combatants are not necessarily done in *personal* self-defense although, of course, they often are done in personal self-defense as well as in defense of their unit, armed **(p.167)** force and citizenry. Consider, for example, a drone operator firing missiles from somewhere in the United States that strike enemy combatants in Afghanistan; this lethal action was not performed in personal self-defense. Nor are these lethal actions necessarily in defense of an *imminent* threat to oneself or other individual person. For example, combatants in a war routinely ambush enemy combatants. Ambushes are allowable in war in part because the threat from enemy combatants is a standing threat. Accordingly, preemptive strikes, such as ambushes of unsuspecting, perhaps even unarmed, enemy combatants who do not pose an imminent threat, are morally permissible in war.¹²

The above described synchronic and diachronic features of war also have implications for the application of the principles of necessity and proportionality (of which more below.) For example, since threat from enemy combatants is typically a *joint* lethal threat (i.e., the action of any single enemy combatant, such as that of a single crew-member on a battleship might not be either necessary or sufficient for one's own death or the death of any single comrade in

arms), it is morally permissible to kill an enemy combatant, notwithstanding that it is not necessary to do so to protect any lives (see chapter 1 sections 1.2.1 and 1.2.2).

Let us now distinguish between three different contexts (based on context C in the above definition): (C1) a theater of war; (C2) a liberal democracy under a state of emergency by virtue of an organized violent political threat, such as a terrorist group or a secessionist movement; (C3) a well-ordered liberal democracy enjoying peacetime conditions within its borders but confronting an organized violent political threat.¹³ I take it the JWT applies to C1 and perhaps C2, but not to C3. For the appropriate security response to C3 is that of the law enforcement framework; that is, it is a matter for the police. On the other hand, the appropriate security response to C1 is the application of the military framework; that is, it is a matter for the armed forces.

C2 is problematic in that while the application of a law enforcement framework is desirable, at a certain point it may not be sufficient to contain the security problem, in which case the use of the armed forces may **(p.168)** be justified. However, if the law enforcement framework does justifiably give way to the JWT-governed military framework in C2 then the military framework ought to be applied only to an extent (e.g., with respect to a specific de facto theater of war), and over a period of time that is necessary. Moreover, it is likely that even in such a theater of war, a highly restrictive ROE would be in place. These points are to a degree reflective of the intent of clause 2 in the above definition.

Further, the consequences mentioned in clause 4 are the overall consequences of waging war—as opposed to the consequences attached to the option(s) of not doing so—and would include the loss of life, restrictions on freedoms, economic impact, and institutional damage. Arguably, for example, in the light of the rise of ISIS, the overall consequences would have been better if Iraq had not been invaded by US-led forces in the second Iraq War, notwithstanding that it removed Saddam Hussein’s murderous regime.

In addition, clause 6 refers to the standard conditions of the *jus in bello*, the principles of military necessity, proportionality, use of legitimate methods (e.g., not biological warfare), and restriction of targets in war (e.g., not innocent children—the principle of discrimination).

Finally, notice that on the basis of clause 1, and the assumption that a political authority must enforce and not violate rights if it is to be legitimate, B is not a legitimate political authority. But we need to assume in respect of the above account that: (a) there is no additional corporate entity A1 which could count as the legitimate political authority of the citizens or other constituent members of A; and (b) A, or at least its political leadership, is not itself illegitimate, as it

would be if, for instance, it consistently violated the rights of its constituency, or if its constituency did not (at least tacitly) consent to this leadership.

6.2 Jus ad Bellum

Consistent with JAB, there will presumably be wars in which one side is morally justified in waging war and the other is not; wars in which both sides have a good, but not decisive, moral justification for waging war; and wars in which neither side has any moral justification for waging war. Moreover, the notion of a just or unjust war admits of degrees, depending in part on how many of the JAB conditions it fails and the extent of its failure in respect of any given condition. Further, if a war is unjust by virtue **(p.169)** of failing one or more JAB conditions, then evidently this has implications for the morality of the actions of the combatants fighting this unjust war. Specifically, other things being equal, combatants fighting an unjust war of, say, aggression, morally ought not to be killing anyone.¹⁴ For example, there is a clear moral difference between combatants fighting a just war against aggressors and the aggressors that they are fighting. Combatants fighting a just war may well have a decisive moral justification for killing their unjust aggressors. The aggressors, by contrast, do not have a decisive moral justification for killing the combatants fighting a just war against them. This is so notwithstanding the fact that once a war is under way, even the aggressors may at times find themselves in a situation in which they are justifiably (at least according to some theories of self-defense—see Chapter 2, section 2.3, on the Hobbesian rights-based approach), or at least excusably, killing in self-defense. For example, they might be in a situation in which they have no option of surrender, and must either kill or be killed.

The above claim regarding the moral difference between combatants fighting a just war and those fighting an unjust war is consistent with it being the case that the lethal actions of the combatants fighting an unjust war might be excusable in the light of, say, their reasonable, albeit false, belief that they are in fact fighting a just war. That there is this important moral difference between soldiers fighting a just war and those on the other side fighting an unjust war is apparently inconsistent with the legalist paradigm associated with Michael Walzer and, specifically, the doctrine of the Moral Equality of Combatants.¹⁵ Here we need to distinguish between law and convention, on the one hand, and morality, on the other hand. Arguably, the laws and conventions governing the treatment of combatants in war are, and morally ought to be, such that combatants are treated *as if* they were morally equal, notwithstanding that they sometimes are not. Thus, as is the case with combatants who fight a just war, combatants who fight an unjust war, morally ought not to be criminally **(p.170)** charged for so fighting, and if captured, morally ought to be released upon the termination of hostilities.

We also need to invoke the distinction I introduced in Chapter 1 Section 1.2.1 between the individual and the collective levels. The collective level (or, in fact, levels) pertains to joint action, including organizational action. Thus, other things being equal, in so far as all (or most) of the soldiers in an army are jointly fighting a manifestly unjust war having as a collective to win that war, they are collectively i.e. jointly, morally responsible for so doing and (again, other things being equal) are collectively, i.e. jointly, blameworthy. (Other things might not be equal if, for example, some of the soldiers were threatened with death if they refused to fight in the war, or many were deceived in respect of the causes of, and justification for, the war.) At the collective level the ascription of moral responsibility and culpability may well be relatively unproblematic. (Note that on my account the collective level remains at the level of the joint actions, or in some cases aggregates of individual actions, of individual human actors; it does not refer to the 'doings' of collective entities per se¹⁶.) By contrast, the individual level pertains to the individual actions of single soldiers, e.g. the individual actions of Private Jones during the course of the war. We can assume that, as a typical soldier, Jones' individual actions while they may well have been literally life-changing in themselves were, nevertheless, a very small contribution to the overall successful (let us assume) joint enterprise of winning the war.¹⁷ Nevertheless, it is the fact that Jones made this contribution in the service of the collective end, however insignificant his contribution was in the scale of things, that is the primary determinant of Jones' moral responsibility in the war in question at the collective level. Thus the moral calibration of Jones' degree of moral responsibility based on his actions at the individual level is typically of limited importance in this context. Perhaps, for example, during the course of the war Jones only fired his weapon on one occasion and did so in personal self-defense, whereas by contrast Private Smith shot dead numerous enemy soldiers and did so in defense of the members of his platoon. This is, of course, not to suggest that Jones' actions at the individual level are not morally significant in themselves or in some other more limited collective context (e.g. **(p.171)** at the level of Jones' platoon). Far from it. Rather it is simply to make the claim that at the collective level of the armed forces of a polity fighting a war there is a moral equality of sorts among all (or most) of the soldiers in those armed forces i.e. qua members of those armed forces fighting that war (whether it be a just or unjust war, or neither).

Moreover, there is another kind of moral equality among the soldiers fighting a war on one side by virtue of having waived their right to use lethal force in favor of their superior officers. Indeed, in this respect the soldiers on one side in a war are the moral equals of the soldiers fighting that war on the other side. However, the point remains that the soldiers fighting a manifestly just war are evidently not morally equal to the soldiers on the other side fighting a manifestly unjust war. That is, the doctrine of the Moral Equality of Combatants conceived as an

inherently moral principle appears to be false. What of moral justification for the doctrine of the Moral Equality of Combatants conceived as a convention or law?

The moral justification for the Moral Equality of Combatants conceived as a convention or law is ultimately based, I suggest, on a number of considerations. The considerations in question are as follows:

1. Determining whether or not waging war is morally justified is often—though by no means always—an inherently complex matter, even for those with access to the requisite information and possessed of a well-developed capacity to make morally informed judgments in relation to security policy, let alone for regular soldiers. Even if we assume that the principles of the *jus ad bellum* are both clear and correct—a highly controversial assumption—there remain prodigious difficulties in respect of their application, such as determining whether the consequences, all things considered, will be better if war is embarked on than if it is not. (For more on this point see below.) Accordingly, the situation of a regular soldier deciding to participate in a war of, say, self-defense is quite unlike that of an ordinary citizen deciding to kill an attacker in self-defense. For one thing, the principle of self-defense is often unclear as it applies to nation-states confronting terrorist groups, such as al-Qaeda, or aggressive nation-states making claims in respect of disputed territory occupied in large part by members of the aggressor nation (e.g., Ukraine confronting Russia in relation to Crimea). For another, an ordinary citizen confronting an attacker is typically *epistemically well placed* to determine the nature of the threat and the likely **(p.172)** consequences of a lethal, as opposed to a nonlethal, response, which is not the case for an individual soldier deciding on whether or not to go to war.

2. Military combatants are members of organizations and, as such, engaged in multilayered structures of (morally significant) joint action. Therefore, as we have seen, they can (at least in principle), be held collectively, or jointly, morally responsible for engaging in the large-scale collective enterprise of waging war, and praised or blamed depending on whether it was a just or unjust war. Nevertheless, in such contexts, decision making is necessarily joint,¹⁸ and therefore required to be binding on all or most if it is to be effective. For example, no single Australian citizen, whether that person be a prime minister, a chief of the armed forces, or merely a low-ranking regular soldier or civilian, can unilaterally decide whether Australia will wage war or refrain from doing so. Thus, a prime minister seeking to go to war can be thwarted by the other members of the government or by popular opposition.¹⁹ Likewise, disengaging from a war that is underway requires a joint decision. Accordingly, there is a presumption in favor of an individual citizen in a liberal democracy who disagrees with a generally accepted joint decision nevertheless going along with that decision.²⁰ In the case of a military

combatant, going along with the joint decision typically implies participating in actual war-fighting (or, in the case of a joint decision not to wage war, refraining from doing so). Moreover, individual nonparticipation in a collective enterprise such as war in respect of which there is joint commitment on the part of most, may be extremely costly, (e.g., social ostracism), and exiting from the community in question may not be a realistic option.

3. Both regular and conscripted soldiers in liberal democracies are not only legally but also (*pro tanto*) morally required to obey a directive of their military commanders and, ultimately, their legitimate political leaders to wage war, unless doing so would be self-evidently a breach of **(p.173)** their domestic law or of international law. As stated above, this is not to say that they have transferred their natural right to decide whether or not to use lethal force. Rather their decision to wage war by joining or remaining in the armed forces constitutes the waiving of that natural right. Moreover, any refusal to obey a lawful directive to go to war is likely to, and indeed should (other things being equal), lead to legal sanctions. So individual noncompliance with such a directive is likely to be extremely costly (e.g., result in incarceration).

4. The actions of nation-states and, specifically, the nationally (or more narrowly sectional) self-interested decisions of political leaders to wage war, are not *effectively* regulated by *enforceable* international law adjudicated by an authority with sufficient power and legitimacy to ensure that its adjudications are consistently adhered to by all, and especially by all of the powerful nation-states. The UN Security Council is an attempt to establish such an authority but, at least thus far, it is far from being an entirely successful attempt, given the willingness of powerful nation-states to ignore its determinations when it suits them. Thus whether or not waging a particular war is morally justified is not comprehensively specified and concretized in law in the manner in which, for example, commercial conflicts between rival firms engaged in attempted takeovers in a domestic economic setting or fights between rival street gangs are. Crucially, there is no independent supranational *legal* authority to which rival armies or individual military combatants might appeal in circumstances in which waging war is not obviously in breach of domestic or international law. Accordingly, there is no *de facto* higher authority than their national governments for citizens, including military personnel, to turn to in the decision-making in respect of waging war. Moreover, in these circumstances the potentially malign influence of narrow and partisan political interests is likely to be very much greater than it ought to be.

5. Once hostilities have commenced, it is morally problematic, absent defeat on the battlefield, for individual combatants engaged in an unjust war (let alone a morally ambiguous war or, obviously, a just war) to refuse

to comply with lawful orders from their superiors to kill enemy combatants. For, as we have seen, in embarking on a war individual military combatants have waived their right to decide to use lethal force against enemy combatants and done so in favor of their superior officers and, ultimately, the political leadership of the polity on behalf of which they are waging war. This is, of course, not to say that **(p.174)** circumstances could not arise that would override their obligation to use lethal force as directed by their superiors. I know of no moral rights or obligations that are absolute and certainly obligations based on a waiver of this natural right are not absolute. Moreover, the waiver of this natural right is revocable; military combatants can and, under certain conditions, may abandon their armies even in wartime. However, there is a strong moral presumption against revoking one's waiver of a right. An additional consideration is that desertion is typically a very serious legal offence to which severe penalties are attached. In short, individual combatants fighting an unjust war are in a moral bind not typically encountered by individuals engaged in non-institutional, interpersonal, unjust conflict. For unlike the latter individuals, military combatants have, in effect, waived their moral right to stop fighting. Accordingly, if we assume, as in many cases we should, that the injustice of the war that they fighting overrides the (lawful) command of their superiors to continue fighting, nevertheless, military combatants typically have a moral excuse if they continue to fight.

6. Other things being equal, it is morally permissible for military combatants (say, members of A) to deliberately use lethal force against enemy combatants (members of B) in circumstances in which these enemy combatants are deliberately using lethal force against them. (For my purposes here, I take it that the military leaders of combatants can be understood to be combatants, even if they do not actually do any direct killing themselves.) Naturally, other things might not be equal. In particular, the enemy combatants (members of B) might be the ones fighting a just war, and the members of A may be fighting an unjust war. Nevertheless, there is a moral difference between these enemy combatants fighting a just war and innocent civilians. For innocent civilians are not a lethal threat to anyone, whereas the enemy combatants are an intentional lethal threat to members of A, even if justifiably so. In short, the fact that combatants are an intentional lethal threat and innocent civilians are not is grounds for granting immunity to the latter, but not the former. It does not follow from this that members of A are morally justified in killing members of B, for members of A are fighting an unjust war and members of B a just war; rather, only the lethal actions of members of B are morally justified. Nevertheless, members of A might be excused for killing members of B, since members of B are deliberately trying to kill members of A, and members of **(p.175)** A, let us assume,

believe—and have good reasons for believing—that they are fighting a just war (and thus may retain their right not to be killed).

In this context the doctrine of the Moral Equality of combatants is evidently morally justified. Considerations 1, 2, 3, and 4, taken jointly, create a presumption in favor of regular soldiers waging war, if directed to do so by their own (legitimate) political leaders, and if doing so is not manifestly unlawful (either in terms of domestic or international law). Considerations 5 and 6 demonstrate the moral difficulties confronting combatants already engaged in fighting an unjust war who might contemplate refraining from using lethal force against enemy combatants. Consideration 6 also restricts combatants' intentional use of lethal force to enemy combatants; noncombatants have immunity. In doing so, it eliminates a fundamental moral objection to combatants' use of lethal force. There remains the moral issue of the justification of waging a particular war. However, in light of the above four considerations, for the regular soldiers there is a moral and legal presumption to be overridden. Moreover, since the doctrine of the Moral Equality of Combatants is morally justified, albeit not as an inherent moral principle, the institutional role of a military combatant will comprise the institutional rights and duties constitutive of that doctrine, including the institutional right to use lethal force against an enemy combatant in a theater of war. But since these institutional rights and duties are morally significant and morally justified, they are also *special moral* rights and duties. However, these institutional rights and duties are only *prima facie* (special) moral rights and duties. A *prima facie* moral right or duty is only presumptively an actual moral right or duty. Thus *prima facie* moral rights and duties contrast with *pro tanto* moral rights and duties. The latter are actual moral rights and duties, albeit ones that can be overridden.

In short, regular soldiers have an institutionally based, *prima facie* (special) moral right to use lethal force against enemy combatants in a theater of war, and they have that *prima facie* moral right even if they are fighting an unjust war. I emphasize here, as elsewhere, that special moral rights and duties are to be distinguished from natural rights and duties. So the special right of a military combatant to use lethal force against an enemy combatant is not to be confused with the natural right of personal self-defense, the natural right to defend the lives of others or even the natural right to decide whether or not to use lethal force, although these **(p.176)** natural rights are implicated (in the manner described in this chapter and in Chapter 3).

The above (complex) argument is offered to morally justify the doctrine of the Moral Equality of Combatants and the associated *prima facie* (special) moral rights and duties of military combatants. However, I now need to present a number of caveats. First, the argument is offered in a particular historical and institutional context—namely, that of regular soldiers acting on behalf of nation-states in an international context in which there is no reliably enforceable

international law. In a different institutional context, such as that in which there was a world government, these conventions and laws might not be justified and combatants might not have the associated *prima facie* (special) moral rights and duties. Rather, they might have special moral rights and duties akin to those currently attaching to the role of a police officer (see Chapter 4). Second, the argument does not remove the moral difference between combatants fighting a just war and those fighting an unjust one. Combatants fighting an unjust war have a *prima facie* (special) moral right to use lethal force against enemy combatants, but not an *actual* one; indeed, all things considered, they should not be fighting in an unjust war. Nevertheless, as argued above, they may well be morally excused for fighting an unjust war. On the other hand, it may well be that in the case of a manifestly, egregiously unjust war, combatants not only morally ought not to be fighting in it, but their doing so may also be morally blameworthy (i.e., they have no acceptable excuse). Third, as argued in Chapter 4, the moral right to use lethal force is an inalienable right, albeit one waived by regular soldiers in favor of their superiors in theatres of war. Accordingly, while there is a presumption in favor of military combatants using lethal force in a theater of war, if they are given a lawful command to do so by a superior officer in the context of a lawful (democratically supported) war, this presumption can be overridden if the war is unjust, and such a command does not absolve individual combatants from moral responsibility for their lethal actions. Nevertheless, if subordinate combatants comply with lawful commands to use lethal force in an unjust war, they may well have diminished moral responsibility for their actions.

The important moral difference between combatants fighting a just war and those fighting an unjust one is reflected in their respective collective moral responsibilities. As argued above, armed forces engaged in war are best understood as multilayered structures of morally significant joint action. Therefore, the individual members of these armed forces are **(p.177)** collectively (i.e., jointly), morally responsible for fighting, respectively, a just and an unjust war. As argued above, in such morally significant, layered structures of joint action, each individual organizational actor is morally responsible for his or her own actions, yet each also has a share, jointly with the others, of the moral responsibility for the larger organizational goals (collective ends, in my parlance) and their outcomes. So if Corporal Jones shoots dead an enemy combatant, he is morally responsible for this, albeit, as noted above, he may have diminished responsibility. In addition, Jones has a share in the collective moral responsibility of the members of his unit for winning (or losing) the battle in the context of which he killed the enemy combatant, and, ultimately, in the collective moral responsibility of the members of his army for winning (or losing) the war (just or unjust) war. Naturally, the contributions of different military personnel will be variable. Perhaps the contribution, for better or worse, of

military leaders will be greater than their subordinates, and therefore their share of collective moral responsibility will be correspondingly larger.

A further point is that the fundamental moral difference between combatants fighting a just war and those fighting an unjust war is consistent with important moral differences between combatants fighting one unjust war and combatants fighting a second unjust war. Clearly, combatants fighting an unjust war who, for instance, respect civilian immunity and do not torture enemy combatants are morally superior—other things being equal—than combatants fighting an unjust war who do not respect civilian immunity and who follow the practice of torturing enemy combatants. Consider in this connection the combatants fighting on behalf of ISIS in Iraq who regularly torture and kill, including by beheading, war prisoners and civilians alike. Clearly, the moral acceptability or unacceptability of actions within a war is not fully determined by the overall justice of the war (i.e., by JAB alone and without recourse to the JIB considerations). Indeed, it is appropriate simply to build the JIB requirement into the definition of JAB, as I have done.

As things stand in this definition, each condition must be met, and thus each condition is given, in effect, equal weight. To require that each condition be *more or less* met is a stringent, and perhaps ultimately problematic, requirement. But to require that each condition be *fully* met, generates immediate and obvious problems. What if, for example, there is the probability of enormous good following on waging a successful war, yet success hinges on torturing certain key personnel—actions **(p.178)** ruled out by clause 7? Would such a war be obviously less just than one that met all the conditions, but in which a marginal amount of good was the outcome? Or what of cases in which nonviolent strategies are completely ineffectual, but in which violent strategies are not likely to bring about cessation of rights violations, except in the very long term and with very considerable cost in terms of lives; and yet the rights violations taking place are massive? It is difficult to see how prior theoretical conditions could be articulated that would entirely and satisfactorily determine all such cases.

Such cases point to an area in which judgments that outrun prior theory will have to be made. In short, just war theory cannot settle all such cases one way or another, although it offers general guidelines. Moreover, they also point to the gradations of moral rightness and wrongness, the pervasive presence of lose-lose situations in war, and the consequent need to make judgments based on a balance of moral considerations. In these respects, war is no different from many other areas of human decision, save that the moral stakes in relation to war are typically higher than elsewhere. So much for JAB, let us now turn to JIB and ROE.

6.3 *Jus in Bello* and Rules of Engagement

As noted above, JIB pertains to the use of lethal force within a war and, most importantly, of three principles: military necessity, proportionality, and discrimination. The principle of discrimination provides for the immunity against lethal attack by combatants of noncombatant innocent civilians.²¹ I discuss this principle in the next chapter. Here my discussion of JIB will focus only on the principles of military necessity and, to a much lesser extent, the principle of proportionality (and in doing so I take the principle of discrimination as a given—and also as straightforward in its application—which, of course, in reality it is not). Moreover, I provide a moral rather than a legal rendering of these principles. My discussion will also focus on ROE and its relation to JIB.

I note that the principles of necessity and proportionality are part of JAB as well as JIB. A nation ought not to go to war unless it is necessary, and it ought not do so if doing so will involve engaging in a war in which the quantum of lives lost will be disproportionately large relative to the **(p.179)** rights violations it is seeking to defend itself against. Thus my treatment of these principles will reflect this.

The principle of military necessity implicitly invokes a number of nested collective ends. Ultimately, the use of lethal force by a combatant or by a unit of the armed forces or by the armed forces as a whole is justified by whether or not it contributes to the realization of the collective end of winning the war. This military end is itself justified by recourse to the JAB collective end of the cessation of the rights violations of the citizenry (i.e., successful national self-defense). However, the collective end of winning the war depends on the realisation of various other middle-level collective ends (e.g., winning various battles), and the latter in turn depend on the realization of various low level collective ends, e.g. winning various firefights. As we saw above, there is a multilayered structure of joint actions. Moreover, at each of these levels we can usefully distinguish between a military unit's collective self-defense and its realization of the collective end (notably so-called mission accomplishment) that ultimately contributes to winning the war. Thus the members of a platoon might successfully defend themselves against an enemy attack without necessarily achieving their military objective of (say) taking and holding a hill-top. Naturally, if the members of a unit of an armed force, or the entire armed force itself, fail to successfully defend themselves, then they will not be able to achieve their other military objectives. So the collective end of unit and force-wide self-defense is both an end in itself and typically, albeit not invariably in the case of units, a means to the ultimate collective end of winning the war.

As we also saw above, the realization of the lowest level collective ends (i.e., the successful performance of the lowest level joint actions) depends on the realization of various individual actions of individual combatants, albeit typically taken in aggregate, such as combatant Smith's lethal shooting of enemy

combatant E1, combatant Jones's lethal shooting of enemy combatant E2, and so on. Moreover, whereas these single lethal acts of individual combatants are severely spatially and temporally circumscribed, (e.g., assume combatant John Smith of the US Marine Corps fired a round killing an enemy German combatant at 12 noon on June 6th, 1944, on the beach at Normandy in France), as we ascend the various levels of joint activity, the temporal and spatial parameters of the joint actions in question expand. Thus a firefight might take place over a couple of square kilometers and last for a number of hours; a battle might rage over an entire large sprawling city over many weeks; a war might have a **(p. 180)** number of theaters in different countries and last for years. Accordingly, to determine whether or not the use of lethal force complies with the principle of military necessity a number of prior determinations must be made with respect to: (i) (nested) collective ends, (ii) lethal force as a means, and (iii) the costs of lethal force in terms of lives lost.

With respect to nested collective ends: In the overall context of the necessity to realise the collective end of winning the war and, therefore, of winning particular battles, the winning of which is necessary to win the war, and so on, it must be determined whether or not the collective end being contemplated (e.g., to destroy an enemy gun emplacement in order to win a firefight, to win the battle of Stalingrad in order to defeat the invading German army) is in fact a collective end that must be realized. In short, is realizing the collective end in question a military necessity? Here the notion of necessity in play is somewhat fluid; in probabilistic terms, there might be (say) a 60 or a 90 percent chance that if the enemy gun emplacement is not destroyed the firefight will be lost. I note that judgments regarding military necessity in the context of nested collective ends are not ones likely to be able to be competently made by individual lower-echelon combatants. Typically lower-echelon combatants do not have the necessary information or the tactical and strategic competence and, in any case, they are inevitably focused on their own highly localized encounters. This feature of military conflict provides an important justification for the requirement that military combatants waive their discretionary right to use lethal force. This is not to say that individual combatants do not at times have to make their own discretionary judgments based on the principle of necessity in, for instance, one-off, localized, actual or potential lethal encounters. This is perhaps especially the case in waging war against terrorist armed forces, such as ISIS. Is a woman in long robes approaching a military checkpoint without permission a suicide bomber or merely a confused, innocent civilian? There being no time to consult a superior, Private Jones must make the decision to shoot or not and take full responsibility for his decision.²²

With respect to the use of lethal force as a means: It must be determined whether or not the contemplated lethal force is an effective means, or part thereof, to achieve its proximate collective end and, thereby, its **(p.181)** further collective ends. Moreover, it must be determined whether or not there is some

other more effective or more efficient lethal (or, preferably, nonlethal) means to achieve the collective end in question. For example, firing mortars at a small camouflaged enemy gun emplacement in order to destroy it might be the most effective and efficient means available; perhaps a bomber strike might miss the target and be hugely expensive both in terms of resources expended and in terms of the opportunity cost vis-a-vis some other more appropriate target. Further the rules of engagement or ROE are relevant here in so far as they are dictated by mission accomplishment considerations (collective ends, in my parlance). Under some circumstances, it may be judged efficacious to permit the use of certain weapons systems or tactics rather than alternatives in a given theater of war.

With respect to the costs of lethal force in terms of lives lost: It must be determined whether or not the use of lethal force being contemplated is *minimally* necessary to achieve the proximate end of, say, winning a battle in terms of overall costs as measured by lives lost on one's own side, civilian lives lost, and perhaps even enemy lives lost (supposing there to be, for instance, the possibility of capturing rather than killing enemy combatants). For example—and assuming it was a military necessity in terms of defeating the German army in the First World War that the British, French, and their allies win the Battle of the Somme—was the loss of most of the hundreds of thousands of lives lost in this battle minimally necessary to win it?

The principle of proportionality pertains to the relative quantum of harm done, and also to the relative seriousness of the wrong done. Here, as elsewhere, we need to distinguish between these two notions of harming someone and wronging them. For example, I might violate a billionaire's property rights by defrauding him of, say, \$1,000. Having violated his property right, I have wronged him; however, the amount in question might be too small to cause him any harm. Moreover, in war there are multiple forms of both harm and other wrongdoing, and multiple categories of persons harmed or wronged. To simplify, I shall restrict myself in what follows to intentional and unintentional killings by combatants of other combatants and of noncombatant civilians. Naturally, there will be a distinction in play between, for example, killing someone who has a moral right not to be killed (the person is both harmed and wronged) and killing someone in justified self-defense (the person is harmed but arguably not wronged).

(p.182) As we have seen with the principle of necessity, the principle of proportionality operates at a number of levels; namely, national self-defense, defense of the armed forces, unit self-defense, and individual self-defense (and defense of the life of another). At the level of national self-defense, a central question to be asked is whether the cost in terms of the loss of human life among armed forces and civilian populations on both sides incurred by waging this war is disproportionately large relative to the cessation of rights violations winning

the war will bring about. Here the value of some lives might be discounted relative to others, such as the lives of the rights violators (including the enemy combatants), relative to the lives of the noncombatant citizenry whose rights have been violated. I return to this issue in the next chapter.

At the level of armed forces self-defense, some central questions to be asked are: Is the cost in terms of the loss of human life of members of the defending armed forces in question disproportionately large relative to the cessation of rights violations winning the war will bring about? Is the killing by means of concentrated aerial bombing of most of the members of the attacking armed force—and thereby winning the battle—with no reciprocal loss of life among the defending armed forces disproportionate, given the alternative of winning the battle by using a mix of aerial bombing and ground troops, with the consequence that while most of the enemy troops will surrender and be captured, there will be a small number of casualties among the defending ground troops?

At the level of unit self-defense, some questions to be asked are: Is the cost in terms of the loss of human life of all members of the defending unit in question disproportionately large relative to the contribution the unit makes to the cessation of rights violations winning the war will bring about? Is it disproportionate for the unit to be denied aerial support in order to minimize civilian casualties, if it has the consequence that all or most of the members of the unit will likely be killed by enemy fire?

At the level of individual self-defense, and individual defense of the life of another, some questions are as follows: Is the cost in terms of the loss of my human life disproportionately large relative to the contribution I make to the cessation of rights violations winning the war will bring about? Is the cost in terms of the loss of my human life disproportionately large relative to saving the life of my comrade in arms? Is my firing of a rocket from a hand-held launcher at a large number of enemy combatants disproportionate, if there is a good chance a small number of nearby civilians will be killed by the blast?

(p.183) In the light of these various different, but interdependent, levels (the synchronic structure of war), and of the unfolding, dynamic, and largely unpredictable series of causally and means/end connected lethal actions over an extended period of time (the diachronic structure of war)—as well as distinctions between combatants and noncombatants, and between defenders and rights violators—we can immediately see that the application of the principle of proportionality is a complex affair. Moreover, the principle of proportionality interacts with the principle of military necessity such that, at times, one cannot determine what is proportionate unless one knows what is necessary, and vice versa. Obviously, if it is not necessary to take out a gun emplacement and there will be a large loss of life—including among one's own ranks—if one does so, then one ought not to do so. On the other hand, if there is a high probability that

destruction of the gun emplacement will cause the (unintended) deaths of a large number of civilians, then the destruction of the gun emplacement might be ruled out, notwithstanding that it would otherwise be necessary. Perhaps it is necessary for the small unit to destroy the gun emplacement, if it is to avoid very high casualties, but not necessary for the unit to avoid high casualties for the battle to be won by the larger force of which the unit is a component.

This complexity of decision making in relation to the JIB (i.e., in respect of the application of the principles of military necessity and proportionality, not to mention discrimination) in the context of the synchronic and diachronic structure of war could not be managed in the absence of more specific, precise, and detailed rules: the rules of engagement. The ROE are, at least in theory, consistent with the more general principles of JIB. However, they relativize the JIB to specific contexts of war, and in so doing provide further specification of the JIB in those contexts. Accordingly, the ROE can be more restrictive in certain respects, and perhaps even more permissive in other respects (or other contexts), than a context-independent or pre-ROE interpretation of JIB might allow. For example, the ROE in a theater of war in which there are many civilians at risk might be very restrictive (e.g., “Do not shoot unless shot at.” On the other hand, in a theater of war in which there is no capacity to hold prisoners of war, and enemy combatants pose an immediate and grave threat if released unarmed (perhaps other weaponry and their fellow combatants are near at hand), the ROE might be more permissive (e.g., “Use maximum firepower when engaging the enemy”).

(p.184) 6.4 Conclusion

In this chapter I have outlined just war theory, including *jus ad bellum* and *jus in bello*, and offered a version of this theory—a version that accommodates wars fought by and against nonstate actors, as well as between state actors. I have framed the concept of war in terms of theoretical notions developed in earlier chapters, such as joint actions, multilayered structures of joint action, institutional roles, and so on. Some more specific claims argued for include the following: (1) Notwithstanding the moral difference between combatants fighting a just war and those fighting an unjust war, compliance with the doctrine of the Moral Equality of Combatants is morally justified and, as a consequence, military combatants not only have the institutional rights and duties constitutive of that doctrine, but these rights and duties are *prima facie* (special) moral rights and duties. (2) The principle of military necessity is to be understood in terms of nested collective ends; thus the collective end of winning the war depends on the realization of various other middle level collective ends (e.g., winning various battles), and the latter in turn depend on the realization of various low level collective ends (e.g., winning various fire-fights). (3) The application of the principles of military necessity (and proportionality and

discrimination) involves in turn the application of more specific, precise, and detailed rules: the rules of engagement.

Notes:

(1.) Mercenaries are military combatants defined in terms of the institution of the market. See Miller, "Police, Citizen-Soldiers and Mercenaries."

(2.) Terrorist-combatants are terrorists who are members of an armed force fighting a war, as distinct from members of a terrorist organization that, while performing terrorist acts, is not actually fighting a war (irrespective of its claims to the contrary). For the distinction see Miller, *Terrorism and Counter-Terrorism*, Chapter 5.

(3.) Miller, *Moral Foundations of Social Institutions*, Chapter 2.

(4.) A good deal of the impetus for this was initially provided by Walzer, *Just and Unjust Wars*. See also Hugo Grotius, *The Rights of War and Peace* (any edition); F. H. Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975); J. T. Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton, N.J.: Princeton University Press), 1981; Rodin, *War and Self-Defense*; McMahan, *Killing in War*; Frances Kamm, *The Moral Target: Aiming at Right Conduct in War and Other Conflicts* (Oxford: Oxford University Press, 2012).

(5.) Miller, "On the Morality of Waging War against the State."

(6.) Miller, "Just War Theory."

(7.) Coady, *Morality and Political Violence*, Chapter 2.

(8.) Miller, "Joint Actions, Organisations and Networks."

(9.) Jay Sekulow, *Rise of ISIS* (New York: Howard Books, 2014).

(10.) Seumas Miller, "Just War Theory and Counter-Terrorism," in Fritz Allhoff, Nicholas Evans, and Adam Henschke, eds., *Routledge Handbook of Ethics and War* (London and New York: Routledge, 2013), 226–235.

(11.) Miller, "Police, Citizen-Soldiers and Mercenaries."

(12.) I am assuming that the unarmed combatants in question are merely unnamed at the specific time in question (e.g., they are asleep or resting and their weapons are not immediately available to them). I am also assuming that the unarmed combatants in question have not surrendered.

(13.) Miller, *Terrorism and Counter-Terrorism* Chapters 4 and 5

(14.) There is a longstanding tradition of argument on this issue which is often framed in terms of the doctrine of the Moral Equality of Combatants. See, for example, Igor Primoratz, "Michael Walzer's Just War Theory: Some Issues of Responsibility," *Ethical Theory and Moral Practice* 5 (2002): 221-243, and a variety of essays relevant to this issue in (eds.) D. Rodin and H. Shue *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, (Oxford: Oxford University Press, 2008) Chapter 10.

(15.) Walzer, *Just and Unjust Wars*, Chapter 3. For criticisms see Coady, *Morality and Political Violence*, Chapter 9; and McMahan, *Killing in War*, Chapter 2.

(16.) Such collective entities include an aggregate of actions conceived as a single entity as opposed to a plurality of individual actions.

(17.) In order to avoid unnecessary complications let us also assume that Jones was morally responsible for his actions and that he did not commit any war crimes.

(18.) Such a joint "decision" is both explicit and implicit. Moreover, in democracies it involves not simply the joint assent of members of the political and military leadership, but also of other influential members of the community, and probably of substantial sections of the general population (at least implicitly).

(19.) I don't mean to imply that all the various individuals, individually or jointly, influencing the decision to go to war can be thought as participating in a joint decision. Nor am I disputing the existence in some cases of an *institutional* joint decision-making body.

(20.) Miller, "Joint Epistemic Action."

(21.) Walzer, *Just and Unjust Wars*, Chapters 8 and 9.

(22.) As discussed below, the ROE specify further the *ius in bello* principles. However, even quite specific rules cannot eliminate the requirement for discretionary judgments on some occasions.

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