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The moral foundations of the *jus ad bellum*/*jus* distinction

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1. Introduction

In this chapter, I examine a recent challenge to Just War Theory that concerns the commonly accepted moral separateness between the moral rules applicable to going to war, i.e. *jus ad bellum*, and the moral rules pertaining to how one should fight a war, i.e. *jus in bello*. More specifically, I inquire into why some contemporary Just War Theorists reject this moral separateness between these two sets of rules and a specific rule of war supported by this separateness often referred to as “the moral equality of soldiers.”¹

This chapter has three main sections. In [Section 2](#), I explicate this recent criticism. In [Section 3](#), I explain why two influential Just War Theorists, Hugo Grotius and Michael Walzer, accept this separateness and moral equality.² In [Section 4](#), using insights from [Section 3](#), I contend that the criticism fails to appreciate fully the collective moral perspective of war. This collective perspective is important for understanding some moral rules of war as not merely primary rules of justice like a right of self-defense. Rather, some, like this separateness and equality, aim at peace in addition to justice, and they can be viewed as being similar to a mixture of the primary and secondary rules of a legal system. They protect rights and aim at peace by helping to secure some fidelity to the rules of war and by helping to maintain war as a separate rule-governed activity with its own moral norms.

2. Rejecting the moral separateness and the moral equality of combatants

It is widely accepted that there is a separateness in the moral rules of war. There are moral rules regarding when a state may begin engaging in war, i.e. *jus ad bellum*, and moral rules applicable to the fighting of the war, i.e. *jus in bello*. Curiously, however, these rules, morally speaking, are considered unconnected. In other words, one does not utilize the determinations at the *jus ad bellum* level to devise the rules for how one is to fight, i.e. *jus in bello*.³ Also, combatants on the just side are not subject to a different set of moral rules or given any advantage over the combatants on the unjust side.⁴ In addition, it is generally agreed that a state could be engaged in an unjust, aggressive war, yet its combatants could fight justly, if they fight in accordance with the rules applicable to fighting. It is as if this common view clearly exempts combatants, i.e. those who kill in war, from important basic moral judgments related to the reason why they kill in the first place.

At first glance, this separateness and equality is perplexing due to its lack of concern for individual agency, rights and duties. In our lives outside of war, the fact that someone is about to kill you is not usually considered by itself enough information to conclude that you could justifiably kill that other person. More is needed. If she was a police officer and you were a bank robber attempting to kill someone while robbing a bank, the fact that she was about to kill you would not exculpate you from killing her, much less justify your killing her. At its worst, this separateness seems to say to combatants, "It does not morally matter why you are fighting or whether you kill those with a just cause. As long as you abide by these other moral rules when you kill, you act justly." At its best, it appears to say, "It would be too demanding to expect you to act differently or know if your state has a just cause and is engaged in a just war, so we can't hold you morally responsible for killing in war. If it turns out that you kill combatants with a just cause, any injustice related to their deaths will be attributed to your state not you." Both of these responses are troubling for they lessen the moral agency of combatants. Further, with this equality, combatants on the just side no longer possess a right not to be killed, a right that all others engaging in just actions possess.⁵ Arguably then, this moral separateness

and equality do not hold combatants, i.e. those who kill in war, responsible enough nor treat them as full moral agents.⁶

Not surprisingly, this separateness and equality has been rejected by recent criticism based on individual rights.⁷ More specifically, the criticism borrows from, and relies heavily on, an individual right of self-defense, a right having deontological foundations. In his book, *Killing in War*, Jeff McMahan, a leading proponent of the criticism who I rely heavily on to articulate the criticism, clearly makes this link between an individual right of self-defense and the criticism. He states, “Thus, for example, killing in self-defense is justified not when killing the attacker would be the lesser evil than allowing the potential victim to be killed, but when the attacker has acted in such a way that makes him morally liable to defensive violence. The strategy of argument – the methodology – in this book is to extend this form of justification from these areas in which it is familiar and well understood to the context of war.”⁸

The criticism can be seen as having the following two core premises:

- 1 Deadly force can only be used against persons who do something, or have done something, that makes them liable to such force, and
- 2 Being a member of a group, including a state, does not by itself exempt one from the first premise.

There are three aspects here to be highlighted. The first is that, as McMahan claims, the term “liable” in premise 1 functions as it would in a justified instance of individual self-defense. In self-defense, generally, what makes someone liable to have force used against them is that they are attempting to harm someone else who is innocent in all relevant respects. In keeping with this self-defense model for purposes of discerning liability, supporters of the criticism do not interpret “liability” in consequentialist or Utilitarian terms. In other words, for them, one is not liable to harm simply because such harm would bring about the best state of affairs or more happiness, or a swift end to the war. Rather, persons not liable to be killed are off-limits, and persons who have not done something (or have not failed to do something) that would make them morally responsible for a current or past wrong, e.g. attempting to harm an innocent person, are not liable to deadly force. The criticism can thus be seen as an absolutist position, for its prohibition on killing those not liable to deadly force.

The second aspect is the highly individualistic and interpersonal nature of this criticism, along with the epistemic demands and fine grain distinctions that come with its interpersonal nature.⁹ According to premise 2, one is not exempt from moral responsibility because one belongs to a group or state. Rather, to be justified in killing other persons, one is required to look at the person (and their actions) who one is attempting to kill to determine whether that person is liable to be killed. To be justified in killing, one must do enough and what she can do to find out if the person who she is about to kill is liable to be killed.

On this view, would voluntarily wearing the uniform of the unjust side be enough to make one liable to be killed? It is not clear, probably not. Suppose that a person wearing the uniform on the unjust side were a lawyer whose main job was to prosecute members of her own military for committing sexual assaults. Clearly, there are persons who wear the uniform on the unjust side who prohibit or impede injustices by their fellow combatants and those acts could make them not liable to harm.¹⁰ To be sure, there are enough such real examples that combatants attempting to abide by the right(s) articulated in the premises above would have a difficult time knowing if they are about to kill someone liable to be killed. If liability to be killed is judged on an individual rather than a group basis, descriptions of killings in war for moral analysis become specific or unique. Removing the collective description that functions as a moral permission to kill people within the collective makes each case of two or more persons fighting subject to a moral analysis that has specific causal chains and intentions.

It is also the interpersonal nature of the criticism that leads to its rejection of the moral separateness of the *jus ad bellum*/*jus in bello* distinction. On the common view, fighting on behalf of a state exempts combatants from moral responsibility when they kill each other. According to the criticism, however, rather than relieve responsibility, fighting on behalf of a state is merely evidence that is often necessary to determine whether a killing is justified. The determination of what side a combatant is on is often important for understanding and describing what a combatant is doing when she acts. According to the criticism, it seems, initially, most combatants on the unjust side are like the hit men for the mafia, and combatants on the just side are like the police trying to stop them. The criticism demands that *jus ad bellum* determinations penetrate *jus in bello* judgments because *jus ad*

bellum determinations are needed for an accurate description of what a combatant is doing, a description necessary for determining whether she is engaged in committing an act that makes her liable to be killed.

The final aspect is how the criticism changes the common view of what a war is, i.e. how we understand it, the primary objectives and the primary players. On the common view, war is a rule-governed activity with three major players: states, combatants, and noncombatants (or “the innocent”). Also, one of the most important rules, if not the most important, is that combatants may target each other but not noncombatants (or “the innocent”).¹¹ The criticism, however, presents us with two major players: those liable to be killed and those not liable to be killed. Because rejecting the moral separateness also rejects the moral equality between combatants, it does away with the combatant/noncombatant distinction for purposes of the rule that combatants must not target noncombatants. Also, because of its interpersonal nature, this view greatly decreases the significance of the state as a major player. Instead, it presents a picture of war in which some persons are doing, or have done, something wrong that makes them liable to be killed and other persons are victims or are trying to stop them. The state on this view is not so much a major player as a mere delineator of rights to be consulted to discover if a harm has occurred that makes one liable to be killed. As Michael Walzer states, “without an equal right to kill, war as a rule-governed activity would disappear and be replaced by crime and punishment, by evil conspiracies and military law enforcement.”¹²

3. Support for the moral separateness and the moral equality of combatants

In the parts below, I offer two positions that, contrary to the view above, support the moral separateness associated with the *jus ad bellum/jus in bello* distinction and the moral equality of combatants. First, I examine Hugo Grotius's natural law view that pursues peace in addition to justice. Then, I set forth why Michael Walzer accepts this separateness and equality.

3.1 Peace versus justice? Grotius

In international law, there is a tension between peace and justice. For example, some worry that supporting the International Criminal Court and its pursuit of justice could upset international peace. Warrants for the arrest of state leaders can make those leaders more violent and reckless rather than bring them before the Court.¹³ Yet, some scholars argue that international laws should still seek to fulfill the demands of justice first, and only if justice is not possible, should the laws aim at peace. Others, however, point out the difficult if not dubious problem of seeking justice between states.¹⁴ Since, roughly, justice is usually conceived as giving each their due or what is owed them, global justice is considered dubious because as Thomas Hobbes makes clear there is no global sovereign to enforce international laws designed to ensure that all get or keep their due.¹⁵ Without this enforcement mechanism that makes justice a real and lasting possibility, it is thought that peace is the best that can be hoped for and the proper aim of international law.¹⁶

Like Hugo Grotius in *On the Law of War and Peace*, the criticism rejecting the moral equality of combatants struggles with this tension between peace and justice. In this struggle, Grotius's view and the criticism are remarkably similar.¹⁷ Not surprisingly, the criticism is reluctant to call rules of war moral if they do not adhere to the core right not to be killed when one is not liable to be killed, even if such rules bring about the best consequences given the circumstances. For example, McMahan, deems the "moral equality of combatants" morally unsupportable yet still believes that this equality should be legally recognized for pragmatic or consequentialist reasons.¹⁸ What the law should be then, for McMahan, does not fit with what justice or morality demands (or fully demands).¹⁹ While similar, Grotius's view looks more charitably on rules and laws that pursue peace, or conditions for peace.

Like McMahan, in *On the Law of War and Peace* Grotius appears to reject and accept the moral equality of combatants. Grotius rejects this equality in a number of places. He states that a defense by those who deserved that war be made upon them is unjustified and likens people who deserve to have war made upon them to criminals who do not "have a right to resist by force the representatives of the public authority."²⁰ Also, he says that those who clearly know that their cause is unjust have a duty not to

fight.²¹ In addition, Grotius says that all acts arising from an unjust cause, even if undertaken lawfully, are still unjust “from the point of view of moral injustice,” and those who knowingly perform such acts will not be able to enter “the Kingdom of Heaven without repentance.”²²

Grotius, however, also tells us that combatants on the unjust side are “permitted” to harm the enemy subject to the same limits as those with a just cause.²³ True, this permission, for Grotius, only grants immunity from punishment.²⁴ However, this permission still morally obligates others to not punish unjust combatants for fighting.²⁵ For Grotius, then, there is a kind of moral equality between combatants because all are morally obligated to treat combatants on either side as equals with regard to punishment.²⁶ For Grotius, this permission and corresponding moral obligation not to punish is a “law of nations,” meaning states agree on it, and, for Grotius, this mutual consent, morally speaking, places it on par with a law of nature.²⁷

Why would Grotius give moral standing to a law of nations that grants a permission that is in tension with the natural law forbidding combatants on the unjust side from fighting? The answer reveals how Grotius's natural law view pursues peace *and* justice. Note first that with this permission, i.e. immunity from punishment, Grotius does not allow the law of nations to command what the natural law forbids but only allows unjust acts to go unpunished.²⁸ This permission accords with the natural law. Grotius tells us explicitly that, for purposes of punishment, we are to distinguish those who are responsible for the war (which are the leaders or king of the unjust state) from those who are not, and those who are not responsible should be pardoned.²⁹ He also says that even those who are responsible, in accordance with the natural law and mercy, may be pardoned.³⁰ For Grotius, pardons and mercy are a part of the natural law, for they lead to peace and less bitterness during war.

This permission is also related to the pursuit of peace in another way. For Grotius, a law of nations has moral authority in part because it is a well-tempered judgment about what rule makes for the best life for us. The mutual consent of nations is evidence that a law is an important rule necessary for peace and necessary for establishing an international legal system, which itself is necessary for peace. Grotius tells us that this grant of

immunity from punishment came to be a law of nations because it was too difficult for states not a party to the war to determine which side was just, and even if this could be determined, it was too difficult to determine whether the just side had gone too far, attempted to recover too much or was attempting to exact too harsh a punishment.³¹ It is the difficult fact inquiries and the absence of a global sovereign then that resulted in a law of nations allowing combatants on either side to be subject to the same limits. For Grotius, an agreement between all states,³² like this one that is supported by common consent, is morally justified in part because it is evidence that it is something like a dictate of peace and in part because it helps establish, or acknowledges, an international rule of law, which, of course, is necessary for peace.³³

This conclusion is not shocking. Today, we similarly allow for injustices. The maintenance of a legal system is required for peace, and laws that people agree on or support are needed for that system. The laws cannot be perfect in the sense that they guarantee perfect justice. Innocent people are prosecuted and punished even when the laws are followed. This injustice is regretful but tolerated, and it does not lead to punishing judges who follow the rules that result in innocent persons being imprisoned. Also, it often does not lead us to think that the rules themselves are morally unjustified. Rather, some injustice cannot be helped and is permitted, and the rules are considered morally justifiable because a legal system with good rules and some fidelity to them are necessary for peace. For Grotius, the natural law tells us what justice requires, and it also supports agreements between nations that help establish an international legal system and pursue peace. According to Grotius, permitting some equality between combatants, even when only one side can be truly just,³⁴ is such an agreement.

3.2 Common moral perceptions and rights in war: Walzer

Michael Walzer's support for the moral separateness of the *jus ad bellum/jus in bello* distinction and the moral equality of combatants is a clear target of the recent criticism. Walzer believes that this separateness and equality are morally justified in part because they reflect “our understanding of states and soldiers, the protagonists of war, and of combat, its central experience.”³⁵ While, according to Walzer, the moral rules of war may not

be wholly coherent, they need not be, and we should not expect them to stand up to any rigorous legal or philosophical analysis.³⁶ Rather, the moral rules of war should align with the common and shared moral perceptions of the community of those who argue about war.

For Walzer, the moral rules of war aim at ensuring a limited war, and they must protect individual rights. At the heart of the morality of war, for Walzer, is the moral equality of combatants and the immunity thesis, i.e. not targeting noncombatants.³⁷ For Walzer, these conventions make peace possible and prevent battles from becoming massacres. Without these rules or with merely Utilitarian rules, Walzer believes that peace and war as a rule-governed activity would not be possible.³⁸ Without these rules protecting individual rights,³⁹ for Walzer, the tragedy of war would be worse. In sum, according to Walzer, the moral rules of war must be of the following kind: 1) protect individual rights, 2) reinforce for us a description of war as a rule-governed activity, 3) promote peace or help make peace possible, and 4) be properly fastened or secured by reflecting our current shared moral perceptions.

Let's see what Walzer says specifically about the moral equality of combatants. Walzer claims that combatants on both sides are "victims" or, better yet, they are perceived of as victims and perceive each other as victims.⁴⁰ While not mere "pawns," they are dragged into the fight because of pride, patriotism, and training.⁴¹ People perceive of leaders as being responsible for the war. They see combatants as doing what is told of them. People expect combatants and citizens to be loyal to their state and find it reasonable that they fight as commanded.⁴² Combatants also see the war as an act of state, and the combatants themselves, even the enemy, as instruments of the state. It is precisely because enemy combatants are viewed more in an instrumental rather than a criminal light that all combatants are grouped together as victims that can defend themselves against attack.⁴³ For Walzer, as victims, all combatants retain a right of self-defense.⁴⁴ What is important, for Walzer, is that this perception of combatants as victims has some basis in experience and in the common understanding of how wars are fought, including by those who fight. While it cannot be false, this perception need not be wholly true or coherent. For Walzer, conventions need only to fit close enough with a concept like self-

defense because their moral power is only in part derived from this concept. It is also derived from its usefulness as a commitment to individual rights and peace and the rejection of the savagery that war brings forth. The immunity thesis alongside the moral equality of combatants keeps war and those who fight from sinking further into this savagery, where rights are nonexistent and peace unattainable.

4. The moral rules of war and the collective perspective

The contrast between the recent criticism and the views in [Section 3](#) is stark. The criticism asks “Did this person do anything to make him or her liable to harm?” An important question for Grotius and Walzer is “how can we make this tragic event better or less evil?”⁴⁵ Their “we” is a global “we” confronted with war. Their view is more forward-looking. It deems conventions moral that help bring about the best consequences, including peace. The criticism is importantly backward looking; the morality of future acts depend on whether, and to what degree, an immoral act was done. It is *quid pro quo* in that a person may engage in a violent action if done in return for, or as a result of, a previous wrongful action by another. In addition, Grotius and Walzer's views are amenable to seeing war as a separate rule-governed activity with its own moral norms. The criticism, on the other hand, supports applying the moral norms applicable to individuals in peacetime to war.⁴⁶ Finally, Grotius and Walzer give significant moral weight to norms and legal rules that pursue peace in addition to justice.⁴⁷ For them, such rules are morally on par with basic norms of justice, and arguably, the moral norm “seek peace” is stronger than some basic moral norms of justice, for it dictates whether some norms of justice should be adhered to or modified. Because the criticism sees rules that make the best of a bad situation as not belonging to the “deep morality of war,”⁴⁸ such rules if morally justifiable, are only reluctantly so.

How might we choose between these views? Any ultimate adjudication between them calls for nothing less than an international theory of justice. I cannot, of course, provide such a theory here. However, using Grotius and Walzer's insights, it appears that the answer lies in the strength that one's theory of justice attributes to the collective goal of peace, as well as

whether the concept of war as a separate rule-governed activity with this separateness and moral equality likely contributes to this goal. Unlike the criticism, Grotius and Walzer's "deep morality of war" contains a significant element of peace that helps them formulate their moral rules of war, e.g. Grotius's law of nations granting immunity from punishment to all combatants. In what follows, I provide three reasons supporting their view that incorporates the pursuit of peace into "the deep morality of war."

First, the fact that peace is a foundational moral element in the rules of justice between disputes within a community is evidence that peace works similarly in international conflicts, where there is no global sovereign and the attainment of justice is more difficult. At the domestic level, the moral significance of peace is seen in the creation and maintenance of a legal system, including its laws. Clearly, most agree that a legal system is necessary for peace, and similarly, many agree that the fundamental moral norm "seek peace" forces communities to establish and maintain a legal system, even if it (its judges and rules) inevitably will not fulfill justice in every instance and basic norms of justice will be modified.⁴⁹ The need for a legal system in the pursuit of peace is that great.

Also, importantly, if they cohere with the moral purpose for the legal system, the laws pursue peace in addition to justice. Some laws hold a society together acknowledging a kind of joint venture for peace and the betterment of the community. For example, laws that require drivers to drive on the right side of the road are aimed at the collective goal of bringing about a safer, more peaceful community. Also, the fairness incorporated into such laws ("all" drivers are to be treated similarly) aids in the pursuit of peace. "Treating like cases alike" is not merely a claim about justice. It is a goal in the pursuit of peace. When one thinks others will be treated similarly, one is more likely to support that legal system. Basic norms of justice, e.g. one should be compensated for harms done, in a legal system designed for peace and justice become something like the following: one should be compensated for harms done, if those harms did not occur too long ago (statute of limitations), if the claim for compensation is filed in the proper court (jurisdictional claims), if evidence of the kind permissible in court shows that it is more likely than not that the harm occurred (evidentiary rules), and if the harm is one of a certain degree or kind (e.g. it is not merely offensive speech) that that community generally, for the

betterment of the community or the protection of rights, desires to prohibit. These contingencies or contingent rules, which are also laws, that morph basic norms of justice do not always ensure that such basic norms of justice are fulfilled. On the contrary, they can impede them.

These laws or rules that morph basic norms of justice do not always ensure that such norms of justice are fulfilled. On the contrary, they can impede them. Nonetheless, they are morally justified for their role in seeking impartial judgments and adding order and fairness in the pursuit of settling disputes peacefully. Often, when basic norms of justice are modified in a forward-looking way by secondary laws or rules in a legal system, i.e. with future cases, fairness and the betterment of the community in mind, it is peace, not simply justice, at work in those modifications.

The second reason supporting Grotius and Walzer's view is that it is likely that a conception of war as a separate rule-governed activity with this moral separateness between the *jus ad bellum/jus in bello* distinction and the moral equality of combatants aids the pursuit of peace.⁵⁰ It likely aids the pursuit of peace in a number of ways. It makes it easier to forgive the violence that occurs in war. It allows a kind of acceptance between participants that helps them move forward out of, and after, war. It helps them see some acts in war, e.g. the killings of just combatants, as belonging to the war itself, and it helps those involved see some killings by unjust combatants, in a sense, as reasonable, meaning understandable and forgivable in that context. In some ways, this conception of war makes war similar to a violent game between two teams, e.g. an American football game. The violence is often attributed to the game itself, and the players' actions, if within the rules, are part of the game. Because the violence is expected and is part of the activity, the players on opposite teams, after and during the game, are more likely to show each other respect despite the violence.⁵¹ Without this conception of war, it is more difficult to see an end to the numerous demands for justice arising from every instance of violence; it would be more difficult to forgive or forget. This concept of war helps combatants see their enemy not merely as killers but also as people like themselves, with whom they could again have peaceful relationships.

As Walzer claims, a concept of war as a separate rule-governed activity is a concept that preserves the idea of individual rights during war (even if these rights are not the rights of peacetime). This alone helps bring peace

during and after war. When the violence escalates, it is easy for participants to lose sight of individual rights altogether. While Walzer is correct, it should be specifically noted how this separateness and equal right to kill focuses culpability for the war and its injustices on those who are in charge of the war, i.e. those who decide to go to war, execute the war, have the most knowledge about why the war is fought, and could stop the war. The moral equality of combatants supported by this separateness between the *jus ad bellum/jus in bello* distinction are two rules that turn our moral attention regarding responsibility for war, and the acts occurring in it, on an important few, i.e. those at the top. This focus is seen as morally acceptable certainly in part because of the power they wield, but it can also be seen as morally supportable because it aids in the possibility of peace. When those at the top are seen as holding a high degree of responsibility, those in the middle and the bottom are freer to comport with each other again as equals. It is not just that combatants on both sides have a third-party to join against and blame, it is also that these rules help them see each other as similarly situated in relation to those at the top. People in the middle and bottom, on no matter which side, share a special tie or connection. They can all appreciate the difference in power and knowledge held by those at the top, and they can relate to the difference in responsibility that should flow from such power and knowledge. This shared connection encouraged by this separateness and equality of combatants helps make peace possible.

The final reason that this separateness and equality can be considered part of the moral rules of war is that they help maintain some fidelity to this concept of war as a separate rule-governed activity, which aids in peace. This last reason builds on the other two. If we should expect peace to moderate international disputes and justice as it does in the domestic sphere and there is a concept of war that does just this, i.e. bring peace and justice to such disputes, arguably the moral norm “seek peace” informs us to maintain that concept of war. Such maintenance or fidelity comes from rules that people believe in.

An analogy with a legal system is helpful. Legal systems are morally required in part because they are necessary for peace, and a legal system is only maintained if it has enough fidelity to its laws. Its existence relies on such fidelity. Similarly, a concept of war that promotes peace is only maintained if there is enough fidelity to it, and as a result, it needs rules that

people are willing to support. The third and final reason then is that the moral separateness between the *jus ad bellum/jus in bello* distinction and the equality between combatants are two such rules. People support these rules, which creates the required fidelity to this concept of war, because of the reasons related to peace stated above and because, following Walzer, they are rules that are deeply rooted in the experience of war.

This analogy with a legal system can be taken a step further. Rather than criticize this separateness and equality for not being, or conforming to, basic norms of justice, e.g. a right of self-defense, it is best to see these rules as being like a mixture of the primary and secondary rules of a legal system, hybrid rules. Like primary rules, they protect rights. Like secondary rules, e.g. a statute of limitations or an evidentiary threshold, they have communal aims, e.g. treating persons similarly, setting reasonable fact inquiries, and controlling for the lack of an appeal to a judge, which aid in the settling of disputes peacefully. As noted above, in legal systems, there are primary rules of justice, e.g. persons should be compensated for harms, and secondary rules that concern the implementation of those rules. This separateness and equality can be seen as hybrids of these two kinds of rules.⁵² The recent criticism omits this adjudicative and collective, forward-looking quality found in some secondary rules from its view. Like secondary rules in legal systems that can morally obligate us (even if at times they allow those who have committed injustices to go free) because of their collective, forward-looking perspective, some moral rules of war, which are also about conduct and the settling of disputes, contain a similar moral quality.⁵³ The moral force then of these two rules is not simply their shaping of a certain concept of war but also their ability to create some fidelity to that concept, which makes peace possible.

The moral rules of war are often compared to the rules of crime and punishment. But, this comparison should not merely be to primary rules or principles. It should also include the secondary rules, which can have a collective, forward-looking perspective in their ability to create fairness in the administration of the primary rules. In war, this consequential, administrative quality, found in some rules of war, helps keep the notion of individual rights secure and create some fidelity to the rules in the pursuit of peace and containing the tragedy of war.

5. Conclusion

The recent criticism tells us that the moral rules of war should conform to a basic rule of justice like that of self-defense. Not surprisingly, a moral view that includes the collective goal of peace will find this criticism misguided because incomplete. As Grotius allows, the moral rules of war can have the twin moral aims of peace and justice. As Walzer advises, they should articulate rights, yet not be morally justified simply because they protect rights. They are also about fairness and importantly about how communities without a global sovereign can best maintain war as a separate rule-governed activity to keep from falling further into the savagery of war and instead find peace.

Some moral rules of war, like this separateness and equality, can be seen as a mixture of the primary and secondary rules of legal system. They are about justice, yet also have a collective, forward-looking moral quality that is found in some secondary rules of a legal system. In addition to preserving rights, they seek to contain the tragedy of war and make peace possible. It is from these important moral concerns that the separation of the *jus ad bellum/jus in bello* distinction and the moral equality of combatants are moral rules of war. In her writings on Adolf Eichmann's trial for transporting millions of Jews to death camps, Hannah Arendt reveals the banality of evil in war. Eichmann is tragic because he is ordinary. Some rules of war are morally justifiable because they are in part commitments, protecting us from this ordinary evil.

Notes

- 1 This phrase is used by Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd edn, New York: Basic Books, 2000, p. 136. Currently, it is commonplace for the term “soldier” to denote someone in the army rather than say in the navy or air force. As a result, hereinafter, I use the more inclusive phrase “the moral equality of combatants.”
- 2 As will be shown later, in a sense, one can say that Grotius both accepts and rejects this equality.

- 3 See D. Rodin and H. Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, Oxford: Oxford University Press, 2008.
- 4 Jeff McMahan and David Rodin, J. McMahan, “The Ethics of Killing in War,” *Ethics: An International Journal of Social, Political, and Legal Philosophy*, 114:4, 2004, pp. 693–733; D. Rodin, “The Moral Equality of Soldiers: Why *jus in bello* Asymmetry is Half Right,” in D. Rodin and H. Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, Oxford: Oxford University Press, 2008, argue that different obligations arise for soldiers depending on whether they are fighting on the just or unjust side.
- 5 See “The Morality of War and the Law of War,” in D. Rodin and H. Shue (eds), *Just and Unjust Warriors*, pp. 21–22 and Coady “The Status of Combatants,” in D. Rodin and H. Shue (eds), *Just and Unjust Warriors*, pp. 157–158.
- 6 But see T. Hurka “Liability and Just Cause,” *Ethics and International Affairs*, 20, 2007, p. 210, where he claims that combatants “freely accept” that they may be permissibly killed by enemy combatants. If this argument is successful, then combatants are exercising their agency and are full moral agents like volunteer gladiators. For discussion on this point, see J. McMahan *Killing in War*, Oxford: Clarendon Press, 2009, pp. 52–65.
- 7 Some of the recent Just War Theorists that agree on, or share some version of, the “recent criticism” depicted here are Jeff McMahan, David Rodin, James Pattison, Uwe Steinhoff, Lionel McPherson, and C.A.J. “Tony” Coady.
- 8 J. McMahan, *Killing in War*, p. 157.
- 9 See J. Pattison, “When Is It Right to Fight? Just War Theory and the Individual-Centric Approach,” *Ethical Theory and Moral Practice*, 26 November, 2011 pp. 1–20.
- 10 *Ibid.*, Section 6.3.
- 11 Of course, defining the innocent or a noncombatant for purposes of immunity from being targeted is no easy task. For insightful definitions or attempts and replies, see E. Anscombe, “War and Murder,” in W. Stein (ed.), *Nuclear Weapons: A Catholic Response*,

London, Sheed & Ward, 1961, pp. 44–52, T. Nagel, “War and Massacre,” *Philosophy and Public Affairs*, 1:2, 1972, pp. 123–144, R.K. Fullinwider, “War and Innocence,” *Philosophy and Public Affairs*, 5:1, 1975, pp. 90–97, and L.A. Alexander, “Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider,” *Philosophy and Public Affairs*, 5:4, 1975, pp. 408–415.

- 12 See M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd edn, New York: Basic Books, 2000, p. 410. I do not here argue that this new description of war is morally speaking worse than the old description, only that I agree with Walzer that the recent criticism changes how we view war. However, clearly, war as mostly a police action brings moral difficulties or worries. Without a strong enough global state with a global police force, communities engaging in war, on their own or even some of them together, as police actions could be viewed as similar to vigilantes, and they are susceptible to, in practice, not fulfilling justice, e.g. going too far or seeking too harsh a punishment or seeking goals other than justice, as well as sparking and continuing more violence rather than achieving and ensuring peace.
- 13 On this point, using the example of Omar al-Bashir, the President of Sudan, see L. May, *After War Ends: A Philosophical Perspective*, Cambridge: Cambridge University Press, 2012, pp. 29–43.
- 14 This tension is seen in Allen Buchanan's proposal and Chris Naticchia's response to what should be the international laws applicable to recognizing a state as legitimate, See A. Buchanan, “Recognitional Legitimacy and the State System,” *Philosophy and Public Affairs*, 28:1, 1999a, pp. 46–78. A. Buchanan, “Rule-Governed Institutions Versus Act-Consequentialism: A Rejoinder to Naticchia,” *Philosophy and Public Affairs*, 28:3, 1999b, pp. 258–270, A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, New York: Oxford University Press, 2004, C. Naticchia, “Recognizing States and Governments,” *Canadian Journal of Philosophy*, 35:1, 2005, pp. 27–82, and C. Naticchia, “Recognition and Legitimacy: A Reply to Buchanan,” *Philosophy and Public Affairs*, 28:3, 1999, pp. 242–25.

- 15 See T. Nagel “The Problem of Global Justice,” *Philosophy and Public Affairs*, 33:2, 2005, pp. 113–147. But see also, A. Julius, “Nagel's Atlas,” *Philosophy and Public Affairs*, 34:2, 2006, pp. 176–192, and J. Cohen, and C. Sabel, “Extra rempublicam nulla justitia?” *Philosophy and Public Affairs*, 34:2, 2006, pp. 147–175.
- 16 This tension between peace and justice is most often found within a deontological, rights-based view like the recent criticism. Justice is a deontological notion or is at least constitutive of nonconsequentialist moral obligations, and peace is a goal to be pursued in an imperfect world. Justice is about the natural or human rights of each person, and peace should be pursued to bring about the best possible circumstances when the world is such that obtaining justice, or protecting all such rights, is not possible or pursuing it is counterproductive.
- 17 As Uwe Steinhoff claims, looking closely at Grotius's *Law of War and Peace*, the recent criticism and rejection of the moral equality of combatants in some ways does not look recent or new at all, U. Steinhoff, “Rights, Liability, and the Moral Equality of Combatants,” *The Journal of Ethics*, 26 February, 2012, Section 2. McMahan also acknowledges a general similarity between Grotius's view and his own view, J. McMahan, “The Morality of War and the Law of War,” in D. Rodin and H. Shue (eds), *Just and Unjust Warriors*, p. 34.
- 18 J. McMahan, *Killing in War*, p. 95, pp. 107–110.
- 19 J. McMahan, “The Morality of War and the Law of War,” in D. Rodin and H. Shue (eds), *Just and Unjust Warriors*, pp. 32–43.
- 20 H. Grotius, *De Jure Belli ac Pacis Libri Tres*, in J. Brown Scott (ed.), trans. F. W. Kelsey, Vol. 2 of *The Classics of International Law*, Oxford: Clarendon Press, 1925. p. 184, Book II, Chap. I, XVIII.1 [108] (here and hereinafter, the numbers in brackets refer to the *Law of War and Peace* edition published in Amsterdam in 1646, the final edition revised by Grotius, as these page numbers are provided in the Francis W. Kelsey translation published in 1925).
- 21 Ibid., p. 587, Book II, Chap. XXVI, III [417].
- 22 Ibid., pp. 718–719, Book III, Chap. X, III [510].
- 23 Ibid., pp. 643–644, Book III, Chap. IV, IV [457].

- 24 Ibid., pp. 641–644, Book III, Chap. IV, II-IV [456–458], p. 645, Book III, Chap. IV, V.2 [458].
- 25 Ibid., p. 15, *Prol.*, 15–16 [ix–x] (for our obligations to the municipal law and the law of nations generally) and Grotius, p. 38, Book I, Chap. I, IX.1 [3] (on the obligation of permissions).
- 26 I have written elsewhere on this topic, agreeing with Grotius's conclusion that unjust combatants ought not to be liable to punishment for mere participation in an unjust war, see S. Viner, “Self-Defense, Punishing Unjust Combatants, and Justice in War,” *Criminal Law and Philosophy*, 4:3, 2010, pp. 297–319.
- 27 For Grotius, “to abide by pacts” is a law of nature that supports the moral authority of the laws of nations, for they are rules supported by the mutual consent of nations. While Grotius, unlike past scholars, chooses to distinguish between a law of nature and a law of nations, this distinction does not remove any moral authority from a law of nations. The distinction is a difference in kind. Laws of nature and laws of nations spring both from the source of all law: the maintenance of the social order. The laws of nature are those that can be discerned “from certain principles by a sure process of reasoning,” and the laws of nations are those that have their origin “in the free will of man” and human intelligence and are rules that are well-tempered judgments that secure the advantage not of any particular state but “of the great society of states.” Grotius, *De Jure Belli ac Pacis Libri Tres* p.12–15, *Prol.* 8–17 [viii–xi]; Grotius, *De Jure Belli ac Pacis Libri Tres* p. 17, 20, *Prol.*, 23 [xi], 28 [xii]; Grotius, *De Jure Belli ac Pacis Libri Tres* p. 23–24, *Prol.*, 39–41[xiv–xv]; Grotius, *De Jure Belli ac Pacis Libri Tres* p. 651–652, Book III, Chap. IV, XV [461].
- 28 For Grotius, more generally, the law of nations cannot command what the law of nature forbids, but it can permit, i.e. grant an immunity from punishment, what the law of nature forbids. Grotius, *De Jure Belli ac Pacis Libri Tres* p. 641–646, Book III, Chap. IV, II–V [456–459] and *De Jure Belli ac Pacis Libri Tres* p. 651–652, Chap. IV, XV [461]. (See also, S. Forde “Hugo Grotius on Ethics and War,” *The American Political Science Review*, 92:3, 1998, pp. 644–645.

- 29 Grotius, *De Jure Belli ac Pacis Libri Tres* p. 729–734, Book III, Chap. XI, V–VIII [517–520], p. 742, Book III, Chap. XI, XVII [524].
- 30 Ibid., p. 730, 733, Book III, Chap. XI, VI, VII.4 [517–519].
- 31 Ibid., p. 644, Book III, Chap. IV, IV [457].
- 32 Or, as Grotius also claims, “a great many states.” Ibid., p. 15, *Prol.* 17 [x].
- 33 See Forde “Hugo Grotius on Ethics and War,” pp. 646–647, for a similar conclusion.
- 34 Grotius, *De Jure Belli ac Pacis Libri Tres* p. 565, Book II, Chap. XXIII, XIII.2 [398].
- 35 Walzer, *Just and Unjust Wars*, p. 22.
- 36 Ibid., pp. xix, xxi, 21–22, 43, 325–327.
- 37 Ibid., pp. 41, 136–137.
- 38 Walzer, *Just and Unjust Wars*, pp. 129–133. But see, R. Brandt “Utilitarianism and the Rules of War,” *Philosophy and Public Affairs*, 1:2, 1972, pp. 145–165.
- 39 Walzer, *Just and Unjust Wars*, pp. xxi–xxii, 136–137.
- 40 Ibid., pp. 30, 35–37, 45.
- 41 Ibid., pp. 39–40.
- 42 Ibid., pp. 15, 40, 127.
- 43 Ibid., p. 136.
- 44 Ibid., p. 128.
- 45 This is not their only “important question,” but as will be argued, it is an important question for them that works alongside, or with, justice.
- 46 See “Do We Need a ‘Morality of War’?” in D. Rodin and H. Shue (eds), *Just and Unjust Warriors*, claiming that McMahan mistakenly attempts to utilize moral rules from ordinary life and apply them to war.

- 47 Though beyond the scope of this chapter, one could even say that their views make less of a distinction between peace and justice.
- 48 Jeff McMahan and James Pattison claim that they are defending “the deep morality of war” compared to legal rules of war that can be morally justified for merely pragmatic or consequentialist reasons, McMahan, “The Morality of War and the Law of War,” in D. Rodin and H. Shue (eds), *Just and Unjust Warriors*, Pattison, “When Is It Right to Fight? Just War Theory and the Individual-Centric Approach,” *Ethical Theory and Moral Practice*, 26 November, 2011, Section I. Likewise, Fabre in her paper on civilian immunity or civilian liability to attack claims that she is defending the “deep morality of war,” “Guns, Food and Liability to Attack in War,” *Ethics*, 120:1, 2009, p. 39. For an argument rejecting this distinction between “the deep morality of war” and more consequentialist norms that are morally justifiable, see Shue “Do We Need a ‘Morality of War’?” in D. Rodin and H. Shue (eds), *Just and Unjust Warriors*.
- 49 This view of course agrees with Thomas Hobbes's natural laws, including the first law of nature, in *Leviathan*. Hobbes's natural laws and peace do not simply call for a sovereign and a legal system, they tell us how the laws are to be adjudicated, importantly with equity and impartial arbitrators, to ensure peace.
- 50 Because it is likely, one could argue that supporting this concept of war is morally required similar to moral arguments pertaining to “supreme emergencies” in war. Here, war itself is a “supreme emergency,” and as such, it demands that some individual rights that apply in peacetime may not be adhered to or are modified or held in abeyance, making room for other rules that best help a community emerge from that supreme emergency.
- 51 Of course, it can be argued, as McMahan does, that this separateness and moral equality actually leads to more acceptance of war (and thus not peace) than if there is a rule that all individuals are morally responsible for killing those who have a just cause, see McMahan, *Killing in War*, pp. 6–7. I'm not certain that this is the case, meaning I'm not sure that one or the other view actually leads to, or allows, more war overall. There are simply too many other factors why

individuals become combatants. Also, this question about which rule best prevents war may not even directly change which view best captures the moral rules of war. For rules that help communities best prevent war could be seen as separate from what rules are applicable while in war. In addition, we might just think that it is not *jus in bello* rules that play a significant factor in starting and preventing war at all but rather *jus ad bellum* rules and a culture that does not hold leaders morally responsible enough for engaging in war or unjust aggression. See also, Coates, on a related claim that this separateness and moral equality does not lead to more restraint in war, Coates, A., "Is the Independent Application of *jus in bello* the Way to Limit War?" in D. Rodin and H. Shue (eds), *Just and Unjust Warriors*.

- 52 I have in mind here H.L.A. Hart's distinction between primary and secondary rules. The secondary rules are about the primary rules. The secondary rules that I refer to are examples of Hart's rules of adjudication, see H.L.A. Hart, *The Concept of Law*, 2nd edn, Oxford: Oxford University Press, 1994, p. 97. The thought here is that if war is recognized as a rule-governed activity, it needs rules that are supported by those for whom it is a rule-governed activity. In Hart's terms, for war to exist as such, there need to be enough states and persons that are "obliged" not merely "obligated" to those rules. This "obliging" happens in part when states (and persons) believe that all will likely be treated fairly and similarly with regard to their future actions. The secondary rules play an important role in securing this sufficient assurance of fairness in the adjudication of any facts to get the requisite fidelity to the rules, for it properly to be said that the rules are the rules of this rule-governed activity.
- 53 I am not claiming that all secondary rules are necessarily moral. Rather, I am claiming that there is something moral that only secondary rules can do: they can aim at the best, or a fair, implementation of the primary rules. Rules of justice are morally important. Rules about how to best implement those rules for a collective are also morally important, especially since it is the second type that can create (or destroy) any fidelity to the first type of rule, as well as fidelity more generally to the rules being a part of the activity. When this moral quality, which looks to future implementation, mixes

with a primary rule, what results is a hybrid rule that is not moral in the exact same way (or for the exact same reason) as a primary rule, nonetheless it can be a moral, or morally justifiable, rule. Also, contrary to what McMahan may claim and due to its mixed status or character, its moral force is not derived “entirely from its utility,” J. McMahan, “The Sources and Status of Just War Principles,” *The Journal of Military Ethics*, 6:2, 2007, p. 102.

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