6

How to Judge Soldiers Whose Cause is Unjust

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6.1. INTRODUCTION

Having learned my just war theory at Michael Walzer's figurative knee, for many years, I accepted the independence of *jus in bello* from *jus ad bellum* unthinkingly. Just war theory consists of two separate parts, one concerning the legitimate grounds for going to war and the other, the rules of engagement once war had begun. This two-part view, the 'independence thesis', went hand in hand with the 'symmetry thesis', or 'the moral equality of soldiers': soldiers whose cause is unjust have the same rights to fight and to kill as those whose cause is just. But troubling questions sometimes crowded in. Does not the justice of a country's cause affect what actions it can legitimately take? Cannot victims of aggression legitimately do things aggressors cannot? Most fundamentally, 'how can there be permissibly violent means of pursuing impermissible ends?'[1] Walzer casts glances at these problems when he proposes the idea of a 'sliding scale', in which the rules of war yield 'slowly to the moral urgency of the cause: the rights of the righteous are enhanced, and those of their enemies devalued'.[2] He rejects the sliding scale in favour of the weaker qualification, 'supreme emergency', in which the rules of war are overridden 'only in the face of an imminent catastrophe'.[3]

Yet, Walzer does not discuss the threat the ideas of the sliding scale and even supreme emergency pose for the foundational distinction between *jus ad bellum* and *jus in bello*. It is not hard to see why. To have probed further would have transformed Walzer's book from a thought-provoking yet highly accessible introduction to the main moral problems of war, as seen through the lens of traditional just war theory and international law, into a dense and difficult philosophical tract. For it is clear that once we challenge the distinction, we find ourselves in murky

[1] Kutz, Christopher, 'The Difference Uniforms Make: Collective Violence in Criminal Law and War', *Philosophy & Public Affairs*, 33/2 (Spring 2005), p. 157.

[2] *Just and Unjust Wars: A Moral Argument With Historical Illustrations*, 3rd edn. (New York: Basic Books, 2000), pp. 231–2. The ideas of a sliding scale and supreme emergency in Walzer's theory do not fully address the question, since they still allow unjust combatants rights to kill, even if these rights are less extensive than those of the just.

[3] Ibid. 232 and Chapter 16. Walzer's example is Britain vs the Nazis in World War II.

waters from which there is no easy escape. The wonder is only that most of those in the just war tradition have for so long taken the independence of *jus in bello* from *jus ad bellum* and the symmetry thesis for granted.

These views have now been challenged by Jeff McMahan and David Rodin, and their compelling arguments force us to take the plunge. Rodin poses the problem succinctly:

> If an aggressive war is fought within the bounds of *jus in bello*, then the just war theory is committed to the seemingly paradoxical position that the war taken as a whole is a crime, yet that each of the individual acts which together constitute the aggressive war are entirely lawful. Such a war, the just war theory seems to be saying, is both just and unjust at the same time.[4]

McMahan offers a detailed argument to show that 'unjust combatants'—those who fight for an unjust cause—will inevitably violate one of the fundamental rules of *jus in bello*, the requirement of proportionality. According to the proportionality requirement, 'for an act of war to be permissible, its bad effects must not be out of proportion to the good'.[5] The bad effects of an act of war—killing and injuring people, harming property—are clear enough. What are the good effects? Imagine an act of war contemplated by the Nazis during World War II. Increasing the chances of a Nazi victory is *not* a good effect. Good effects—those that would justify violence—must take into account the interests of all affected, not simply those of the group contemplating the act. No act of war by the Nazis could satisfy the proportionality requirement, it appears, because their aims were in no sense good. Although few wars pit good against evil as clearly as World War II did, the case clarifies the rationale for McMahan's conclusion that 'unjust combatants cannot participate in war without doing wrong'.[6] In general, the aims of aggressor nations cannot justify the violent means they employ, because their aims are themselves illegitimate.[7]

These arguments seem compelling. But the natural conclusions from them about unjust combatants are less so. Certainly, we do not think of the typical soldier on the wrong side of a war as a criminal, even when he or she kills soldiers with justice on their side. In this sense, the apparently scholastic distinction between *jus ad bellum* and *jus in bello*, which allows soldiers on each side to engage in attacks on the other, seems to track common sense.

[4] Rodin, David, *War and Self-Defense* (Oxford: Clarendon, 2002), p. 167.

[5] McMahan, Jeff, 'The Ethics of Killing in War', *Ethics*, 114 (2004), p. 709. The proportionality requirement is discussed in Walzer, Michael, *Just and Unjust Wars*, Chapter 8; according to Walzer, it was first articulated explicitly by Henry Sidgwick in *The Elements of Politics*.

[6] Ibid. 714. McMahan allows occasional exceptions. In addition to the example he provides, we can conceive of one state invading another, violating the latter's sovereignty and thus waging an unjust war, but still producing benefits that outweigh the costs. But such cases, like the one he describes, will be highly unusual.

[7] Of course, much depends on how the aims are described. It is possible that in some cases the aims of an aggressor nation can be described in ways that would render them legitimate. This is a complication that may eventually have to be taken into account; here I take for granted the standard description of an aggressor nation's aims that renders those aims illegitimate.

When an unjust combatant strikes out against his enemies, there are, I believe, three possible responses we might have. Either what the soldier does is justified (not wrong). Or what he does is wrong, but he is excused, in whole or in part. Or what he does is wrong and he is not excused, in which case there is a strong prima facie case that he should be punished. As Mill puts it, 'We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow-creatures; if not by opinion, by the reproaches of his own conscience.'[8] Blame or condemnation constitute the minimal expressions of punishment, so at the very least, it seems that we ought to make unjust combatants ashamed of what they have done.[9]

Of course, each of these responses might be appropriate to different soldiers in different circumstances. Here is my strategy in what follows. In the next section, I attempt to show that, while granting the arguments against the symmetry thesis, we might still hold that the violent actions of (some) unjust combatants are justified. In the following two sections, I examine excuses to which some unjust combatants might legitimately appeal. I then consider, and reject, the idea of punishing those unjust combatants whose actions are neither justified nor wholly excused. Finding the sum of these possibilities—justification, excuse, punishment—inadequate to account fully for our attitudes towards unjust combatants, in the last section of the chapter, I explore the possibility that we can explain these attitudes by unique features of war and special rights and obligations it might confer on combatants, just or unjust.

6.2. JUSTIFYING SELF-DEFENCE AGAINST THREATS

A natural response to the arguments against the symmetry thesis is to distinguish, as traditional just war theory does, between the aims of the collective entity—the nation or the state—and those of the individual soldier. True, the Nazis' aims were illegitimate and so their actions could not satisfy the proportionality requirement. But whatever else he or she was doing, the individual soldier fighting for the Nazis might have been defending his or her own life.

Consider this conversation between novelist and Vietnam War veteran Tim O'Brien and his 10-year-old daughter when they visited Vietnam twenty years after the war:

'This whole war . . . why was everybody so mad at everybody else?'

I shook my head. 'They weren't mad, exactly. Some people wanted one thing, other people wanted another thing.'

[8] Mill, John Stuart, 'Utilitarianism', in John Gray (ed.), *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991), p. 184.

[9] The serious psychological problems many soldiers suffered after returning from Vietnam constitute some evidence that they internalized this kind of moral disapproval.

'What did *you* want?'

'Nothing,' I said. 'To stay alive.'

'That's all?'

'Yes.'[10]

Even if the United States was fighting an unjust war, the violent actions of individuals in the jungles of Southeast Asia might be justified in terms of their own self-defence. Likewise for many soldiers in many wars.

This line of thought is reflected in the arguments offered by some just war theorists to distinguish legitimate from illegitimate targets—in the usual terminology, combatants from non-combatants. People often speak in the same breath of 'combatants and noncombatants' and 'the guilty and the innocent', as if the pairs were equivalent: combatants are guilty and non-combatants are innocent. 'Guilty' and 'innocent' are loaded and ambiguous words that allow for much confusion, and deep philosophical disagreements underlie the ambiguities. Robert Fullinwider argues that the reason soldiers may kill combatants but not non-combatants is that the former pose a *threat* to the soldier's life while the latter do not. 'The distinction between combatants and noncombatants derives from the operation of the Principle of Self-Defence', he states, and 'only those are justifiably liable to be killed who pose the immediate and direct jeopardy.'[11] Unless we *define* guilt in terms of an agent's threateningness, the two concepts are distinct. A person can be a threat without being guilty.[12]

If threateningness, rather than guilt, is the property that legitimizes soldiers in attacking others, then a person may defend himself or herself against so-called innocent threats. The baby shot out of the cannon hurtling towards you, the fat man blocking your exit out of the cave and into breathable air—to take two examples from the contemporary philosophical literature—may jeopardize your life even though they possess no harmful intentions nor are in any other way morally responsible for the threat they pose. On this view, that someone poses a threat to one's life is a sufficient condition—perhaps also a necessary one—to justify defensive action.

The view reflects a concession to the 'real world' and a belief about what is reasonable to expect of a person whose life is in danger: a person may defend himself or herself against threats to his or her life even if those threats are not conjoined with morally questionable motives or intentions. But some believe it concedes too much. Rodin, for example, argues that

[10] O'Brien, Tim, *The Things They Carried* (New York: Broadway Books, 1998), originally published 1990, 183.

[11] Fullinwider, Robert K., 'War and Innocence', *Philosophy and Public Affairs*, 5 (1975), reprinted in Beitz, Charles et al. (eds.), *International Ethics* (Princeton: Princeton University Press, 1985), p. 95.

[12] Whether one can be guilty without being a threat is a more complicated question. The simple answer seems to be yes, in the sense that a person can intend to harm another and even take steps to do so without in fact threatening the other. One who sticks pins into a voodoo doll aiming to kill his enemy is, we may agree, morally guilty even though he poses no threat to the other. To succeed in posing a threat one must possess a certain degree of competence; holding to preposterous theories of how the world works can be incapacitating. Yet, having harmful intentions is generally an important step along the way to producing harm.

> If one is to be justified in inflicting harm in an act of defence, then there must be an appropriate normative connection between the wrongfulness of the threat one is seeking to avert and the person one harms; the threat must derive from him as a moral subject, not just as a physical entity.[13]

The plausibility of this position derives from considering the case of unsuccessful aggressors. As Rodin argues, when an individual aggressor fails to disable his victim, he or she is not justified in defending himself or herself if the victim retaliates in self-defence. The point is illustrated in the following sequence:

1. Aggressor attacks victim. By hypothesis, Aggressor has no right to attack Victim.
2. Victim is justified in retaliating by attacking Aggressor in self-defence.
3. When Victim defends himself or herself by attacking Aggressor, Aggressor is not justified in defending himself or herself against Victim.

Self-defence is not permitted against innocent threats but only against 'guilty' ones—those whose threats 'derive from him as a moral subject, not just as a physical entity'.[14]

Is Rodin right? This may be one of those places where we hit moral bedrock, where we come up against brute differences in people's intuitions that cannot be resolved by argument. Some believe it is justifiable to defend oneself against innocent threats[15]; others, like Rodin, insist there must be an 'appropriate normative connection' between the threat and the person who poses it.

Rodin's conclusion rests partly on the conundrum of the innocent bystander. Suppose that I can save my life only by grabbing a stranger from a crowd and using him or her as a shield against an enemy shooting at me.[16] Even those who allow self-defence against innocent threats reject the use of violence against innocent bystanders, even if attacking them is necessary to save one's own life. Finding no morally significant difference between innocent threats and innocent bystanders, Rodin concludes that we must reject self-defence against innocent threats.

The alternative of permitting killing bystanders to save oneself is not an appealing way out. More plausible is to show that the two kinds of cases differ. The innocent threat is a causal (Rodin uses the term 'material') element in the threat to your life in a way that the bystander is not. We might describe this as the 'never been born' factor.[17] Your life would not be endangered if the innocent threat had never been born, but it would be even if the bystander had never been born.

[13] *War and Self-Defense*, p. 88.

[14] Rodin discusses innocent aggressors as well as innocent threats, but the distinction is unimportant for our purposes.

[15] Robert Nozick, for example, despite his deontological emphasis on rights and 'side constraints', suggests that defending oneself against innocent threats is permissible. See *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 34–5.

[16] The example comes from Rodin, *War and Self-Defense*, 81.

[17] For the phrase, I thank Tom Grey.

Whether this difference is truly morally relevant is difficult to determine—thus the sense that it takes us down to moral bedrock—but the causal or material element has certainly exerted a powerful effect on philosophical and legal analysis. The innocent threat is *responsible* for your plight—not morally responsible, by hypothesis, yet still responsible—in a way the bystander is not. It is this same idea that underlies holding people responsible for their acts but not, in the same way or to the same degree, for their omissions.

But the question concerns not only the innocence or guilt of the *threat* but also the moral status of the *one threatened*—a crucial factor that Rodin overlooks. Thus, although an innocent person might be permitted to defend himself or herself against a baby shot out of the cannon and hurtling towards him or her, a person responsible for the baby becoming a projectile would not be so entitled. In becoming an aggressor, a person forfeits his or her right of self-defence against his or her victim.

So, we must distinguish between two categories of defenders against innocent threats: self-defence by those who are themselves innocent and self-defence by those who are not. I understand 'innocent' here in Rodin's terms; the question is whether the threat against which a person is defending derives ultimately from him or her as a moral subject, as it does in the case of the aggressor. When the answer is yes—because he or she initiated aggression, which prompted self-defence by the victim of the aggression, which is the cause of the threat to the aggressor—then the instigator of aggression is not morally permitted to defend himself or herself.

In my view, then, the innocent may defend themselves against innocent threats, but the non-innocent (i.e. those non-innocently responsible for creating the threats) may not. Now the question is what this position implies for unjust combatants. On the face of it, if *jus in bello* depends on *jus ad bellum* and unjust combatants do wrong, it seems to follow that they resemble individual aggressors, who forfeit the right to defend themselves because they are themselves non-innocently responsible for the threats against them. But few people believe (I assert) that ordinary unjust combatants closely resemble individual aggressors. The unjust combatant is not guilty to the same degree or in the same way that the individual aggressor is. The individual aggressor we have imagined is wholly responsible for creating the threat against which he or she now tries to defend himself or herself. By contrast, the unjust combatant did not decide to make war in the first place; even if he or she unjustifiably believed the war was just, his or her belief played little or no part in bringing about the war. At most, his or her willingness to fight played a small part in making the threat real. Often, the soldier he would be attacking would be attacking him even if he laid down his arms. So the typical unjust combatant, unlike the ordinary individual aggressor, is not non-innocent in the way that would forbid him or her from defending himself or herself against innocent threats. If we understand the ordinary soldier's aim to be Tim O'Brien's—'to stay alive'—then, contra McMahan, the bad effects of his or her action (say, killing an enemy soldier) will not necessarily be greater than its good effects (saving himself).

At best, of course, only some soldiers in a given war could justify their violent acts as self-defence against innocent threats. How many, what proportion of combatants fall into this category? That depends on several factors. First, how remote or partial is a particular unjust combatant's responsibility for the war or for more specific threats to the enemy? Second, how broadly should we understand the risks and dangers soldiers face? How should we interpret terms such as 'imminent' and 'pre-emptive'? Finally, our judgements will depend on empirical evidence about the nature and degree of the threats that soldiers confront.

6.3. EXCUSES: DURESS

If the foregoing arguments are right, the violent acts of some unjust combatants—those whose lives are in danger, albeit as a result of innocent threats—could be justified even if *jus in bello* depends on *jus ad bellum*. What about the rest? Prima facie, either they should be excused or they should be punished. In this and the next section, I consider the view that we should excuse some acts of unjust combatants, although they have done wrong.

The distinction between justification and excuse is familiar in the criminal law. To *justify* an action is to show that although ordinarily it would be wrong, in the case at hand it is not; the apparent wrongness is illusory. When we *excuse* an action, by contrast, the wrongness remains but the agent's responsibility is diminished or erased.[18] To successfully plead self-defence to a charge of murder is to justify homicide, not to excuse it. To successfully plead insanity to a charge of murder is to excuse the act, not to justify it.

Excuses can be partial or complete. If I miss our lunch date because on the way to the restaurant I see a man in cardiac arrest and rush him to the hospital, I have a complete excuse for standing you up: no blame at all is appropriate. If I miss our lunch date because I oversleep, my excuse is at best partial.

In general, the most plausible excuses unjust combatants can muster seem to fall into three categories. The first is some variant of duress—that they have been compelled, coerced, manipulated, pressured, or pushed to join the military and/or engage in killing. The second is ignorance or mistake—that they did not know the war in which they were fighting was unjust or that they believed it was just. Combinations of the two are also possible. The third category is insanity or temporary insanity. I shall not discuss this excuse, which probably applies to relatively few combatants, here. I first examine duress and then ignorance/mistake.

If duress is an excuse, even a partial excuse, its legitimacy varies greatly from war to war, country to country, soldier to soldier. Soldiers in authoritarian, and especially totalitarian, regimes have better excuses for fighting than soldiers in democracies. Citizens subject to conscription have better excuses than those living

[18] See, for example, Rodin's discussion, *War and Self-Defense*, pp. 26–34.

under volunteer armies. Because they have fewer choices about how to earn a living, less privileged members of a society have better excuses than the more privileged.

Yet, Rodin and others note that 'duress is not generally thought to provide a legal or moral excuse for wrongful killing', and that English law 'holds that a man ought rather to die himself, than escape by performing a wrongful act of killing'.[19]

But the matter is more complicated than this view suggests. Consider the case of Drazen Erdemovic. Erdemovic, a young ethnic Croat living in Bosnia-Herzegovina, was a soldier in the Yugoslav National Army beginning in 1990. In 1994, he resisted the order to slaughter civilians at Srebenica, but when faced with the threat of death if he refused to comply, he obeyed the order. When the war in Bosnia ended, Erdemovic told his story to a journalist for *Le Figaro*, explaining that he wanted to go to the Hague to tell it. Shortly thereafter, he was arrested by Yugoslav authorities and transferred to the Hague. Erdemovic was sentenced to ten years in prison by the trial court at the Hague Tribunal. The Appeals Tribunal upheld his sentence, citing the traditional common law rule disallowing duress as a defence to murder.[20]

Clearly, Erdemovic's case differs from that of most unjust combatants. On the one hand, he was ordered to kill civilians (and many of them, including children), so the harms he inflicted far exceeded those of the typical unjust combatant. On the other hand, Erdemovic confronted duress of the harshest kind: kill or be killed. He boldly came forward to confess what he had done. And, unlike other such cases we can imagine, no lives would have been saved had he refused to act; indeed one more—his own—would have been lost.[21] If duress ever provided an excuse for homicide, it would seem to do so here.

Among other things, this case demonstrates the fuzziness of the distinction between justification and excuse. The claim that duress is not a defence against murder is ambiguous as between justification and excuse. Consider again self-defence against innocent threats, which has generally been treated as a candidate (whether successful or not) for justified action. It might plausibly be argued instead that to *excuse* (but not justify) self-defence against innocent threats is a good compromise between the 'hard justice' of denying its moral force altogether

[19] Ibid. 171, and William Blackstone, *Commentaries on the Law of England*, 1st edn. (originally published 1765–9), Book IV, Chapter 2, at http://www.yale.edu/lawweb/avalon/blackstone/bk4ch2.htm (accessed 20 May 2005) on 'duress per minas' (duress by threats, as opposed to duress by circumstances)—'threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanors'. Blackstone asserts that 'though a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person; this fear shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent'. See also *U.S. v. LaFleur*, 971 F.2d 200 (9th Cir. 1991), cert. denied, 507 U.S. 924 (1993) (cited in Rosa Ehrenreich Brooks, 'Law in the Heart of Darkness: Atrocity & Duress', *Virginal Journal of International La*, 43 (2003), note 23. Civil law systems do not have the same strict requirements.

[20] For an account of the case and an excellent analysis, see Brooks, 'Law in the Heart of Darkness'.

[21] A point made by Brooks, 'Law in the Heart of Darkness', p. 874.

and reasonable concerns about appearing to condone it.[22] Even more true in cases like Erdemovic's, where justification more obviously seems out of place but excuse does not. Those with non-violent leanings will be reluctant ever to say that killing is justified rather than (completely) excused. Killing is always a last resort, a lesser of evils.[23]

This point leads to another: despite assertions that in the common law duress never excuses homicide, I am sceptical. Duress is among the mitigating circumstances judges and juries consider that reduce a defendant's punishment. Whatever we call it, and whether it plays a role during the trial or only in the penalty phase, what else are such mitigating factors as duress but excuses—factors that reduces culpability. Allowing such considerations to enter into the judgement of a person's culpability reflects our views about the sacrifices it is reasonable to expect ordinary people to make and the pressures to which we may expect them to succumb.

One source of confusion is that although excuse, unlike justification, admits of degrees, this is not always apparent from ordinary usage. To say that duress does not excuse homicide might be true if it means that duress does not *completely exonerate* one who commits homicide, but it is false if it means that duress does not *reduce culpability*.

Whatever the facts about duress as an excuse to homicide in the common law, the Model Penal Code (MPC), promulgated by the American Law Institute in 1980s, proposes permitting duress as a defence to all crimes, including homicide.[24] It reasons that

> law is ineffective in the deepest sense, indeed . . . hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such a case is bound to be an ineffective threat; what is, however, more significant is that it is divorced from any moral base and is unjust.[25]

Thirteen states soon after adopted the MPC's definition of duress. In addition to allowing duress as a defence to homicide, the MPC abandons the common law requirement of deadly force and imminency:

> It is an affirmative defence that the actor engaged in the conduct charged . . . because he was coerced to do so by the use of, or threat to use, unlawful force against his person or the

[22] 'Hard justice' is Rodin's term. He agrees that it is hard justice to hold a person guilty for striking an innocent threat to save his life, suggesting we excuse him; but the discussion takes place in the context of his examination of self-defence against innocent threats as justified. *War and Self-Defense*, 97.

[23] The question is perhaps whether the consequentialist language of evils translates into the deontological language of wrongs. It does not have to—on the standard view of consequentialism it does not—but it can.

[24] Brooks, 'Law in the Heart of Darkness', p. 874.

[25] Model Penal Code, Section 2.09, explanatory note at 374–5 (American Law Institute, 1985), cited in Brooks, p. 874.

person of another, *which a person of reasonable firmness in his situation would have been unable to resist.*[26]

This is a very broad criterion that opens several cans of worms. Joshua Dressler understands 'would have been unable to resist' to mean 'would not have resisted'. The two are not obviously equivalent. Furthermore, as Rosa Brooks notes, the reasonableness standard prevalent in the law is ambiguous between a weak empirical and a strong normative interpretation: between what a 'normal' or typical person *would* have done and what such a person *should* have done.[27] When it refers to condemnation that is 'divorced from any moral base and is unjust', the MPC seems to imply the stronger, normative interpretation; when it speaks of force that a person 'of reasonable firmness . . . would have been unable to resist', it implies the weaker view. Although the latter might seem less prone to interpretation and subjectivity, I doubt that there is much more agreement about what the ordinary person *would* do than about what she *should* do.

To summarize, the MPC departs from the common law in its treatment of duress in two crucial respects: one concerning the crimes for which it is permitted as an excuse; the other the forces acting upon a person that constitute duress. First, the MPC allows duress as a defence to homicide. Second, it abandons the requirements of deadly force and imminency, permitting excuses when a defendant responds to force or threats as a reasonable person would have done. Remember, again, that excuses may mitigate blame even if they do not altogether excuse a person.

To adopt the MPC's view of duress, as opposed to the traditional common law approach, could obviously have profound consequences for our attitudes towards and treatment of unjust combatants. The question, of course, is whether we *ought* to adopt it.

Earlier I suggested several criteria relevant to assessing the degree of duress to which a soldier or potential soldier is subject. Putting totalitarian regimes at one end of the spectrum and liberal democratic governments at the other provides one dimension along which to judge duress. Certainly, Drazen Erdemovic faced one of the most difficult choices a person can confront, and many would agree that individuals of 'reasonable firmness' would not have resisted the order he was given to shoot innocent civilians. What would have happened to Iraqi soldiers during the first Gulf War or German soldiers in World War II if they had resisted orders from their superiors to fire on their enemy? At least as important, what did these soldiers think would have happened to them? Drafted soldiers have better excuses than volunteers; by definition they act under duress. In any society, the poor have better excuses than their more privileged compatriots for participating in unjust

[26] MPC, Section 2.09, cited in Joshua Dressler, 'Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits', *Southern California Law Review* 62 (1989), Section I.B.1. Emphasis added.

[27] Brooks, 'Law in the Heart of Darkness', pp. 870–3. See also Dressler, 'Exegesis of the Law of Duress' Section III.B.3.

wars, because they have fewer alternatives for making ends meet. It is probably not controversial that duress should at least partly excuse poor young men (who may very well form the greater part of armies) living under harsh dictatorships for participating in unjust wars their countries wage, because it is not reasonable to expect them to endure the consequences of disobedience or to know that the consequences will not be dire (if that is indeed the case).

But the repercussions of disobedience might be significant even for soldiers in democratic countries. Assume that the Iraq War now being waged by the United States and its allies is unjust. Since the United States has an all-volunteer army, no one who believes the war is unjust need volunteer. But some soldiers joined the army before the prospect of war was on the horizon, and they would presumably have suffered serious consequences were they to resist the order to go to Iraq. If they complied with the order to go, they could still choose not to fire on the enemy once there. If the argument in the previous section is right, given the dangers American soldiers face in Iraq today, firing might be justified, and not merely excused, as self-defence.[28] But even those who reject those arguments are likely to agree that such soldiers should be at least partly excused for firing in these circumstances. Thus, some soldiers even in all-volunteer armies in democratic countries could plausibly appeal to duress as a partial excuse for their participation in an unjust war.

Partial, perhaps. But, as McMahan points out, a person would need a *very* good excuse to be completely exonerated from killing, and only some soldiers, in Iraq or elsewhere, will have such good excuses. I doubt, moreover, that we can hope for widespread agreement on the conditions under which such excuses excuse. We saw earlier an ambiguity, in assessing excuses, between what a reasonable or normal person *would* have done and what such a person *should* have done. Because the ultimate question is a normative one—what standards *should* we hold people to—purely empirical considerations about what human beings are like or what they tend to do in given circumstances, however relevant, will only take us so far. We cannot escape distinctively normative questions about the stringency of the standards to which we should hold people. And, as I argued earlier, I think there will be irreconcilable differences in the answers different people give to these questions. Some will be more demanding and less forgiving than others, and beyond a certain point, arguments will not resolve such disputes.

6.4. EXCUSES: IGNORANCE

Similar questions arise about the other defence that unjust combatants might offer: mistake or ignorance. For the sake of argument, let us assume that many soldiers either do not know the war they participate in is unjust or, more strongly, that they believe it is just.

[28] Here, the story gets more complicated. Even if the US invasion of Iraq was wrong or unjust, it is clear that the combatants American soldiers are attacking these days are not *innocent* threats.

Here again, the defence might be conceived as either a justification or an excuse. As McMahan argues, 'If it were reasonable for an unjust combatant to believe that his war was just—if, for example, it were impossible for him to know certain facts that make his country's war unjust—he could be justified in fighting.'[29] But for his belief to be reasonable he would have to do what he ought "to ensure that [his] beliefs are justified'. McMahan concludes that

> Most unjust combatants fail in this responsibility . . . But while the fact that this negligence is ubiquitous and widely tolerated may suggest that most unjust combatants are not culpable in falsely believing that their war is just, it does not make their beliefs reasonable if a more conscientious person could, in their circumstances, find his or her way to the truth.[30]

McMahan makes two crucial assumptions. The first is that a person's belief is unreasonable if a more conscientious person could 'find his or her way to the truth'. The inference does not follow: that a more conscientious person would act differently does not prove the less conscientious person negligent; the former might be heroic even though the behaviour of the latter is still acceptable. The reasonable person is not identical with the ideal person. McMahan's stringent standards for justifying beliefs may partly explain his second assumption: his apparent willingness to concede that if negligence is 'ubiquitous and widely tolerated' unjust combatants are not culpable. It would be awkward and impractical to condemn or punish so many.

McMahan is probably right that in most countries throughout history most soldiers, and probably even most citizens, have believed their nation's wars were just. We can also agree that often, perhaps mostly, they have been wrong. The question then is whether any given person is nevertheless either justified or excused in holding this false belief. Let us say that he is justified if his belief is reasonable, even if false. On one (empirical) interpretation of 'reasonable', his belief is reasonable if it is the belief of the normal or ordinary person.[31] On this interpretation, statistics showing what most people do in fact believe are decisive in establishing reasonableness; if most believe their country's wars are just, these beliefs are reasonable. I suspect that many will find this interpretation inadequate. Reasonableness has to do with what one has *good reason to believe* rather than what most people do believe. In this normative sense of 'reasonable', the mere fact that most people believe a war is just, although probably relevant, is not sufficient to prove reasonableness.

But to say that a person's belief is unreasonable implies that he could have avoided holding it, that he could have found his way to the truth—for example, that one who believes a war is just could have come to believe that it is unjust. So the question in a given case is how plausible the counterfactual is. How much thinking, talking, research would the typical American soldier or would-be recruit have had to do to learn that the Bush administration's purported justification, before the war, for invading Iraq—the presence of weapons of mass

[29] 'The Ethics of Killing in War', p. 701. [30] Ibid. [31] See earlier discussion, pp. 15–16.

destruction—was in fact false and unfounded?[32] Is this a realistic demand given his intelligence, his education, the environment in which he found himself, and the behaviour of the news media? What about the Iraqi conscript in the first Gulf War or the German soldier in World War II? How much in the lives of soldiers, would-be soldiers, and ordinary citizens would have had to be different for them to have recognized the injustice of the wars in which their countries were engaged?

The empirical interpretation of reasonableness seems to license the false and harmful beliefs of millions of people. A strong version of the normative interpretation of reasonableness seems to entail condemning them, even those who have inadequate opportunities to get at the truth. A more moderate view might deny that such people are justified in holding these beliefs, but allow that they have (good) excuses for holding them. When it is not reasonable to expect people to believe the truth, then even if their beliefs are false and possibly harmful, we excuse them.[33]

Do we excuse them all? No. Do we excuse those we excuse completely? Only sometimes. How we answer these questions will depend on facts about the society a person lives in, the war in question, and the circumstances in which a person finds himself—his sophistication, intelligence, and access to information. It is probably safe to assume that some unjust combatants will be excused completely, some partly, and some not at all.

6.5. SHOULD WE PUNISH UNJUST COMBATANTS?

I began with the assumption that *jus in bello* depends on *jus ad bellum*, and therefore that unjust combatants do wrong in fighting. I then followed Mill in arguing that if unjust combatants do wrong, there is a prima facie case that they ought to be punished. Yet, this conclusion seems highly counterintuitive, and so the question is how we can avoid it. It would have to be shown, it seems, that the actions of unjust combatants are either justified or excused. I have tried to show how the actions of some soldiers might be justified, and those of others excused, in whole or in part. The excuse route is more natural.

McMahan concedes that 'It is true of most unjust combatants that their conduct is excused to varying degrees by the sorts of consideration Walzer mentions in arguing that they are not criminals and that these excuses diminish their liability to varying degrees'.[34]

Yet, it is hard to fit unjust combatants comfortably under the excuse rubric. The main problem is that it seems odd, given the seriousness of the harms unjust

[32] Other justifications were also offered for the war, mostly later. But I think the example illustrates the point.

[33] If their beliefs are reasonable, however, then they are justified and not merely excused in holding them. But I think these two assertions are not equivalent: 'It is not reasonable to expect A to believe the war is unjust'; 'A's belief that the war is just is reasonable'.

[34] 'The Ethics of Killing in War', p. 725.

combatants cause, to exonerate them as a class, wholesale. But if we do not exonerate them as a class, then we will have to look into the facts of their particular cases. We will have to engage in the laborious fact-gathering characteristic of proceedings to determine guilt and punishment. On the basis of such proceedings, we would almost certainly decide that not all unjust combatants should be excused and that some should be punished.

What sort of punishment should unexcused (or partially excused) unjust combatants suffer? Do these soldiers violate the law? Clearly, not the laws of the country they serve. Nations do not make laws forbidding citizens to fight in their own unjust wars! So the violations must contravene either international law or natural law. International bodies would have to prosecute wrongdoers.

It would be problematic to prosecute past or present soldiers who fought under the traditional rules of *jus in bello*, according to which their actions were legal. The rules could of course be changed in light of our new understanding of the responsibilities of unjust combatants. Even so, the prospect of evidence-gathering and legal proceedings against tens or hundreds of thousands of soldiers makes legal prosecution out of the question.

Perhaps we should settle for moral condemnation and blame. These too, to be justified, require information and evidence, much of which will be difficult to gather and interpret. We might have to content ourselves with a kind of conditional blame: a person whose actions are neither justified nor excused (you know who you are!—no, actually, in light of what we know about the human capacity for self-deception, you probably do not) deserves our deep disapproval, even if we cannot identify the relevant individuals.

6.6. TWO-LEVEL EXPLANATIONS

So, punishment of unjust combatants will at best be indirect and attenuated—not the kind and degree of suffering befitting acts as serious as unjust killing. It is natural to conclude that, in thinking about how to treat unjust combatants, the usual ways we have of evaluating people's actions—to decide if they are justified or excused or deserve punishment—do not operate, at least not straightforwardly, and that other standards must be employed.

McMahan does not disagree. The reader may be taken aback when, despite his arguments against the symmetry thesis, he concludes that 'it would be counterproductive and indeed disastrous to permit the punishment of ordinary soldiers merely for their participation in an unjust war'.[35] Merely? McMahan suggests that

[35] 'The Ethics of Killing in War', pp. 730–1. In addition to the sheer impracticality of trying thousands or hundreds of thousands of soldiers, McMahan cites two other reasons against punishing unjust combatants. First, under 'victor's justice', the winning side will claim its war just and may seek reprisals against enemy soldiers 'under the guise of punishment'. Second, combatants may be deterred from surrendering, and this would be an unfortunate incentive.

their participation is a very grave wrong: unjust combatants have killed people they had no right to kill. Can we simply let it pass?

The practical obstacles and disadvantages of prosecuting soldiers on the wrong side of a war do not fully explain what I think is the common belief that the typical unjust combatant does not resemble the individual aggressor, even after taking into account the excuses to which each might appeal.

Now one possible explanation for our lenient attitudes is that they formed, as have the practices of war, against the background of the symmetry thesis. Soldiers have believed they were justified in engaging in hostile acts, no doubt partly because soldiers and citizens generally support their country's wars, but perhaps also because they knew they were not expected or required to make judgements about the justice of their cause. Since these were the rules they lived under, it is not fair to judge them by other rules, even if the latter are superior or more just.

Still, I do not think this is the whole story. We seem to judge soldiers—just or unjust—by different standards than we do ordinary people in domestic life. Why and how would that be? I can think of two ways of explaining it, which are probably related. One refers to the idea of a special 'role morality' attaching to soldiers. The other appeals to the fact that wars are simultaneously acts of collectives and of individuals; deciding on rights and duties of each requires sorting out the complex relationships and responsibilities between them. In the remainder of this chapter, I briefly examine how arguments along these lines might go.

According to the idea of role morality, special rights and obligations attach to certain social roles, and these differ from the rights and obligations of 'common morality' governing the behaviour of people not inhabiting such roles.[36] Lawyer, physician, journalist, clergyperson are roles; so is soldier. Lawyers, for example, are thought to have the right (or even the duty) of zealous advocacy, even if that means brutally cross-examining innocent witnesses for the other side; journalists are thought to have the duty of confidentiality, even if their refusal to divulge sources results in harm. According to a simplified version of David Luban's view, the rights and obligations of a particular role are justified when the institution they serve is a morally good one—or at least a morally necessary one—and these rights and obligations are essential to fulfilling the role.[37] For example, zealous advocacy among lawyers is justified because the institution they serve, the adversary system, works to ensure justice.[38]

Our question is whether role morality could justify a special right of unjust combatants to kill other combatants without regard to their innocence or lack of

[36] For an important discussion, see David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988), Chapters 6 and 7.

[37] On the unsimplified version, the institutional excuse requires four steps: 'the agent (1) justifies the institution by demonstrating its moral goodness; (2) justifies the role by appealing to the structure of the institution; (3) justifies the role obligations by showing that they are essential to the role; and (4) justifies the role act by showing that the obligations require it' (*Lawyers and Justice*, 131). But I think the simplified version suffices for our purposes.

[38] In fact, Luban believes the adversary system is only weakly justified because other systems can do the job equally well.

it—a right not possessed by ordinary citizens. To do so, we would have to show that the institution served by this practice is a morally good one or at least a necessary one and that the practice is essential to maintaining the institution. Two difficulties present themselves: first, identifying the institution; second, deciding whether the right or duty in question is essential to maintaining it.

Is the institution the armed forces? Not all armies are morally good or necessary institutions; so, that cannot be right. The army in a legitimate or moderately just or decent society? The international system of states each with its own military? It is hard to see how we can settle on a way of identifying the appropriate institution without already having answers to some of the hard questions with which we began. It would not be convincing to assert that special rights and obligations are automatically conferred on soldiers in a legitimate or moderately just society; that is just the question before us, and we need a substantive argument for it. And how can we decide whether the practice in question (i.e. killing combatants without regard to their innocence or the innocence of the killer) is essential to maintaining the institution? Not only will the answer depend on which institution we identify as the appropriate one, but it will also demand answers to pragmatic questions about the means–end relationship between practice and institution.[39]

The most persuasive justification for a special role morality for soldiers that does not beg important questions is that the existence of armies requires a degree of obedience inconsistent with the demands of ordinary morality—certainly ordinary morality as conceived by idealistic philosophers who demand that individuals continually evaluate the situations in which they find themselves and consult their consciences before deciding how to act. If armies are necessary and justified, then so is this level of obedience, which rules out the kind of questioning of authority and of the justification of war that underlies the critique of the symmetry thesis.

Another way to explain soldiers' special rights and obligations rests on the fact that war takes place on two different levels, the collective and the individual. Wars are relations between states—collective entities—but they are carried out by individual human beings. Even when the United States is at war with Iraq, Ms. A of Dubuque is not at war with Mr. B of Fallujah. To think otherwise is, in Ryle's term, a category mistake. The hard part is spelling out the relationships between the two levels or categories and what they entail.

As Kutz explains, on the early modern conception of sovereignty typified by Bodin, the subject or citizen was merely an instrument, a piece of technology belonging to the state. The distinctness of state and subject in this view 'opens up a logical space for a distinct code of ethics for soldiers'.[40] On the more democratic

[39] Critics of the symmetry thesis often object to consequentialist arguments, among other reasons because they believe such arguments are always indeterminate. See, for example, Rodin, *War and Self-Defense*, 116–7; Kutz, 'The Difference Uniforms Make', pp. 166–70. But it is difficult to see how anyone thinking about these problems can altogether avoid them. Thus, even if the answers are hard to come by, is not it appropriate to ask about, and try as best we can to ascertain, the likely consequences of holding soldiers responsible for determining the justice of their cause, and, alternatively, of not holding them responsible?

[40] Kutz, 'The Difference Uniforms Make', pp. 159–60.

conception of sovereignty that replaced the earlier one, however, the sovereign is *essentially dependent* on the individuals who constitute it. The difficulty is to make this relationship less metaphorical and more concrete.

What does the complex relationship imply for the question of the rights and obligations of combatants? At first sight, it seems to cut both ways. On the one hand, the two levels of war, collective and individual, 'would seem to deliver an account of the normative autonomy of the battlefield'.[41] Soldiers do not make war, nations do. If my earlier argument is right, sometimes what soldiers do can be viewed as individual self-defence and nothing more. On the other hand, the conceptual and normative dependence of the sovereign on its citizens suggests that there can be no strict separation. The citizen bears partial responsibility for the wars its country wages; presumably, the more democratic the country, the greater the citizen's responsibility.[42]

But the responsibility at issue here is the citizen's, not the soldier's. The two roles inhabit one person, of course, but it is not in his role as soldier that he is responsible, to whatever extent he is responsible, for the war's occurrence. If punishment of the country is appropriate because of its participation in the war, the soldier/citizen will suffer his or her share, but not because he or she is a soldier.

Kutz is, I think, confused on this point. He argues that

> Rousseauean sovereignty poses a major problem for the independence of *jus in bello* from *jus ad bellum* . . . because the conceptual isolation of the identity of soldier from that of citizen cannot be maintained. After all, under the victor's sword there is but one person . . . [43]

The question is whether we punish the soldier because he or she fought in the war or whether we punish the citizen, who may also be a soldier, because he or she had a role in authorizing the war. The answer to the latter question may be yes—although I imagine such punishment would take the form of fines or reparations or loss of collective rights, and not of individual penalties—without implying anything about the former.[44]

The further question is why we should not punish soldiers over and above any penalties they suffer as citizens. After all, they killed people or inflicted serious damage on property or persons. They did something more to contribute to the war than ordinary citizens did. And here, we find ourselves confronting once more the question with which we began. I have suggested some answers: some of these soldiers may be justified, and some may be excused to one degree or another. But

[41] Ibid. 164. [42] Except, perhaps, for those citizens who actively oppose the war.

[43] Ibid. 165.

[44] Cheyney Ryan attempts a synthesis of the two questions when he asserts the Principle of Personal Integrity, according to which 'You should only endorse those military actions of your country in which you yourself would be willing to give your life (tomorrow)'. We might add: not only must you be willing to give your life but you must also be willing to take lives. (The synthesis will not be complete, of course, because not everyone who is willing to be a soldier will in fact be a soldier.) See 'War Without Sacrifice?: The Loss of Personal Responsibility', *The Responsive Community* (Winter 2002/03), pp. 14–15. Available at *http://www.gwu.edu/~ccps/rcq/Ryan.pdf*.

I do not see how the fact that war takes place simultaneously at two levels provides us with special resources to answer the question without begging it.

6.7. CONCLUSIONS

What progress have we made in deciding how to judge unjust combatants if we believe that *jus in bello* depends on *jus ad bellum*? On the basis of the arguments I have made and examined, I conclude the following:

1. The violent actions of some unjust combatants may be justified as legitimate instances of self-defence against threats to their lives. This conclusion depends on my account of the legitimacy of attacking innocent threats, according to which one may be justified in attacking innocent threats in self-defence when one has not non-innocently threatened them in the first place. We thus preserve the common sense view that an aggressor may not defend himself or herself against the person he or she has unsuccessfully attacked.

2. The violent actions of many unjust combatants will be excused to one degree or another because of duress, mistake or ignorance, and (occasionally) insanity, temporary or otherwise. This conclusion is not controversial in principle, although people will disagree about its scope. In any case, it would seem that some unjust combatants will be completely excused, but others (probably many more) will be excused only in part.

3. Although presumably the actions of some unjust combatants will be neither justifiable nor fully excusable, legal punishment does not seem feasible. (a) First, such soldiers are unlikely to have violated any laws. This problem could, however, be solved by passing appropriate laws. (b) But to know if they are deserving of punishment, we would have to try them. Of course, we would have to try not only those who turn out to be guilty but also many others as well, including some who will be found innocent and others who will be partially excused. The costs in time, money, and effort of trying many thousands of soldiers in many countries would be prohibitive. (c) Guilty combatants could still be deserving of moral punishment—blame and condemnation—when they were identifiable. Often we will not know who they are; and they themselves may not know either.

4. It appears, then, that we are driven by considerations of feasibility, if nothing else, to grant soldiers, including those who fight for an unjust cause, a kind of blanket immunity to prosecution. The symmetry thesis rises again! But some puzzling questions remain. Is it *only* considerations of feasibility that lead to this conclusion? To decide, I think we would have to examine many unjust combatants and ask ourselves 'Would we want to punish this soldier if it *were* feasible?' (Remember that we are not talking about war criminals.) I suspect that we would not. If that is right, we are either forcing their stories into the excuse mould even if that seems to be a stretch—even if the criteria differ markedly from those that

would apply to domestic crimes—or the standards for soldiers differ from those that govern civilian behaviour.[45]

5. There is reason over and above the impracticality of prosecution for thinking the standards differ. To name the most obvious: the existence of armies requires a degree of obedience that, to many at least, would be unacceptable in ordinary life. If we grant that armies are necessary and justified institutions, then we have to accept this degree of obedience, which is incompatible with the kinds of challenges to authority that the critique of the symmetry thesis demands.

6. I have been assuming throughout this chapter that the recent challenges to traditional just war theory's two-part structure are persuasive, and I have explored their implications for how we judge and ought to judge soldiers whose cause is unjust. My conclusion is that we cannot really do without something like the traditional theory with its distinction between *jus ad bellum* and *jus in bello*. Surprisingly, critics of the traditional approach do not necessarily disagree. McMahan seems to acknowledge the point when he distinguishes 'the deep morality of war' from 'the laws of war'.[46] If this is right, the question is whether criticism of the traditional approach is appropriate. Did the proponents of the theory think they were describing 'the deep morality of war'? Or were they merely attempting to guide the conduct of those who make war, and of those who must judge them?

[45] Tony Pfaff, a lieutenant colonel in the US Army, explains the different standards governing the conduct of soldiers and domestic police officers. 'Soldiers may act in such a way that noncombatants may be harmed or even killed', but police may not. Police look to use 'the least force possible', soldiers 'the most force permissible'. See 'Military Ethics in Complex Contingencies: Adapting the Warrior Ethic', in Snider, Don M. and Matthews, Lloyd M. (eds.), *The Future of the Army Profession*, 2nd edn. (New York: McGraw-Hill, 2005). Of course, police officers are not civilians either; the criteria for civilians might be even more restrictive.

[46] 'The Ethics of Killing in War', p. 730. Kutz also vacillates on the question; see 'The Difference Uniforms Make', pp. 164–74.