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## Questioning Combatant's Privilege in Unjust Wars

Harry van der Linden

Except in cases of true self-defense, we commonly see the killing of human beings as a horrendous moral crime and generally deserving of the most severe legal punishment. Yet, we commonly accept that individuals have a legal right to kill persons once some legitimate authority, in particular the state, puts them in uniform, provides them with weapons, and commands them to execute a war. What is remarkable and morally questionable concerning this “combatant’s privilege” is that international law and custom grant it irrespective of the reasons behind the war. In other words, combatants have a legal right to kill whether their war is clearly unjust or an act of pure self-defense, say, against an enemy with genocidal intent. To be sure, the combatant’s legal right to kill is restricted in that it is a war crime to deliberately kill enemy noncombatants, notably civilians not directly engaged in defense and soldiers hors de combat. However, this still leaves combatants who are authorized by their governments to fight an unjust war with the legal right to kill enemy combatants whose only “fault” might be that they were conscripted and in the way of aggressive designs. Moreover, the war convention—the set of moral and legal norms, principles, and codes governing our judgments about war conduct—permits combatants who execute an unjust war to indirectly kill enemy civilians in pursuit of their military objectives as long as this “collateral damage” is proportional to the importance of these objectives.<sup>1</sup>

An example easily demonstrates that the notion of combatant’s privilege is indeed morally disconcerting rather than obviously in accordance with common moral sense. Consider a modified hypothetical “war story” recently provided by Christopher Kutz to raise the question of what legitimates combatant’s privilege.<sup>2</sup> A highly-trained and well-paid volunteer army of a powerful country attacks a much weaker country with the aim of guaranteeing corporate access

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<sup>1</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical illustrations*, 3rd ed. (New York: Basic Books, 2000), 44–46.

<sup>2</sup> Christopher Kutz, “The Difference Uniforms Make: Collective Violence in Criminal Law and War,” *Philosophy and Public Affairs* 33 (Spring 2005): 148–180.

to its abundant oil resources. Victory is swift, no (*jus in bello*) war crimes are committed, and the victorious combatants are widely honored at home for keeping the oil flowing cheaply. Some of the victorious combatants are captured, but, in accordance with their combatant's privilege, they are treated well as prisoners of war and released when the short armed conflict is concluded and the defeated country officially surrenders. A puppet regime is installed that no longer uses oil revenue to promote healthcare for all, with the result that the infant mortality rate rises considerably. Now, further assume that the victorious combatants are aware of the fact that they have executed an unjust war. Or, at least, assume that they are indifferent with regard to exploring the cause of war because their job is well-paid, rewarding in terms of public recognition, and carries a low casualty risk, thanks to their military superiority. It seems appropriate to call such combatants "thugs in uniform" in that they kill primarily for personal and monetary gain. To be sure, they kill discriminately and commit no war crimes (the war convention does not view the increased infant mortality rate as a *jus in bello* infraction), but even gangsters in civil society have their moral codes concerning appropriate targets. The war convention protects thugs in uniform in the same way as it protects their victims in uniform. Can the convention, in light of examples such as this one, be justified convincingly?

The scenario of thugs in uniform is an extreme case of combatants willingly and knowingly engaging in an unjust war. Following Jeff McMahan, I will call combatants who fight a war that lacks a just cause "unjust combatants," while those fighting a just war are "just combatants."<sup>3</sup> A war without a just cause may be defined as a war of aggression, and so I will refer to unjust combatants also as "aggressor combatants." The least controversial and paradigmatic cases of unjust wars are wars that lack a just cause. Accordingly, we should first and foremost question combatant's privilege in such wars. A war without a just cause may be unjustified on the basis of other *jus ad bellum* grounds, such as failing to be a last resort measure or having little chance of success. These other grounds may lead a war with a just cause to be unjust overall. This is an exceptional case and I will only occasionally address the combatant's privilege of those fighting unjust wars with a just cause.

My main reason for questioning combatant's privilege is that I hold that granting combatant's privilege to unjust combatants facilitates unjust resort to force and might do so increasingly in the future as traditional military modes of operation increasingly blend with modes of operation of private military contractors. I presume that denying combatant's privilege in situations where there is no just cause would have some deterrent impact on fighting because the unjust combatants may fear punishment or may even be held back by the mere illegality of their fighting. The degree to which denial of combatant's privilege would deter such fighting may also discourage political leaders from initiating unjust wars in the first place.

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<sup>3</sup> Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004): 693.

My questioning of combatant's privilege in unjust wars will develop in three steps. First, I will contest the doctrine made popular by Michael Walzer that unjust and just combatants should have the equal legal right to kill enemy combatants since they are morally equal. This doctrine comes in two versions: 1) unjust and just combatants are morally equal in that they both have an equal moral right to kill; and 2) only just combatants have a moral right to kill, but unjust and just combatants are morally equal in that neither is morally culpable for acts of killing enemy combatants. I will pay most attention to the doctrine in the second (more plausible) version, examining a variety of conditions for excusing culpability offered by Walzer and others. Next, I will consider some pragmatic objections to this idea of denying combatant's privilege to unjust combatants, finding them either to be unconvincing or of such limited validity that they can be met by carefully articulating the conditions under which combatant's privilege should be denied to unjust combatants. While fully granting that we should proceed very cautiously in changing the war convention, I will conclude that, for the sake of a more peaceful future world, unjust combatants under some conditions should be prosecuted. And I will suggest that this proposal should eventually be extended to combatants who fight unjust wars that are not wars of aggression.

## 1. Michael Walzer on the Moral Equality of Combatants

In *Just and Unjust Wars*, Walzer summarizes his doctrine of the moral equality of just and unjust combatants as follows:

I have ... argued that [the] duties are precisely the same for ... soldiers fighting wars of aggression and wars of defense. In our judgments of the fighting, we abstract from all consideration of the justice of the cause. We do this because the moral status of individual soldiers on both sides is very much the same: they are led to fight by their loyalty to their own states and by their lawful obedience. They are likely to believe that their wars are just, and while the basis of that belief is not necessarily rational inquiry but, more often, a kind of unquestioning acceptance of official propaganda, nevertheless they are not criminals; they face one another as moral equals.<sup>4</sup>

It is clear that Walzer is claiming here that it would be an error to hold unjust combatants culpable for killing enemy combatants as such. It is unclear whether he also believes that the combatants fighting a war of aggression are not committing a moral wrong in their acts of killing. Walzer, however, suggests this when he argues that killing in an aggressive war is

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<sup>4</sup> Walzer, *Just and Unjust Wars*, 127.

altogether different morally from killing in a domestic criminal act, such as a bank robbery. On his account, a bank robber has no (moral) right to kill a guard pulling his gun, while a combatant in an aggressive war has a (moral) right to kill a combatant defending his country. Walzer adds: “The case is in fact no different from what it would be if the second soldier shot the first. Neither man is a criminal, and so both can be said to act in self-defense. ... [S]o long as they fight in accordance with the rules of war, no condemnation is possible.”<sup>5</sup>

Contrary to Walzer, the thugs-in-uniform scenario illustrates that the acts of unjust combatants are morally similar to the criminal acts of bank robbers. In either case, the people protecting their lives and property are seriously morally wronged. They did nothing to deserve the harm coming their way and are undeniably victims. Victims who seek to defend themselves against their attackers do not bestow upon their attackers a right to kill them. In other words, the very fact that someone might become a threat to an aggressor by resorting to force in self-defense does not morally justify the aggressor to kill this person.<sup>6</sup> Moreover, Walzer’s argument fails in that many military acts of killing by unjust or aggressor combatants cannot be described along the lines of “defending” themselves against “counterattacks” by their victims. Thugs in uniform are bound to perform killings that resemble a bank robber who shoots a guard taking a nap, blows up bank clients in the process of dynamiting the safe, or runs over a child with the getaway car. What further underlines the implausibility of the view that aggressors in uniform do not act wrongly is that this view commits one to holding the paradoxical position that a war of aggression is a moral crime even though none of the individual acts done to its victims count as such.<sup>7</sup>

It should be noted that wrongful killing of combatants is not restricted to the killing of just combatants alone. Combatants who execute an unjust war that is not a war of aggression may also commit a serious moral wrong by killing enemy (aggressor) combatants. Suppose a country with a conscripted army quickly conquers a few small islands, say, guided by a mistaken sense that it has a historical claim to the islands. The islands are sparsely inhabited, few troops are present, and no serious casualties result from the conquest. Under global public outcry and political pressure of some traditional allies, the aggressor nation offers to negotiate a quick withdrawal. The country whose territorial integrity has been violated neglects the offer and attacks suddenly and massively, killing numerous combatants of the aggressor nation. Now to be sure the aggressor combatants who were killed had committed a wrong and are not mere victims, but the acts of killing them were nonetheless wrong since such acts were unnecessary to restore justice and the aggressor combatants were no longer an immediate threat. What adds to the

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<sup>5</sup> Ibid., 128.

<sup>6</sup> McMahan, “The Ethics of Killing in War,” *Ethics*, 699.

<sup>7</sup> David Rodin, *War & Self-Defense* (Oxford: Oxford University Press, 2002), 167.

wrongness of the killing is that the aggressor combatants are conscripted (and therefore unlike bank robbers). Still, it also seems that the combatants of the aggressor nation cannot rightfully defend themselves against their attackers; and so on the assumption that the aggressor defenders would have killed some of their attackers, these killings would be wrong as well. In short, in a war that is unjust on all sides, all killings are morally wrong.

A more plausible version of Walzer's doctrine of the moral equality of combatants is that combatants in just and unjust wars are morally equal only in the sense that neither should be blamed for killing enemy combatants. On this account unjust combatants do wrong, but their wrong is not a culpable wrong because it results from indoctrination, conscription, and other coercive mechanisms. Walzer writes:

[M]ost men will be persuaded ... to fight. Their routine habits of law-abidingness, their fear, their patriotism, their moral investment in the state, all favor that course. Or, alternatively, they are so terribly young when the disciplinary system of the state catches them up and sends them into war that they can hardly be said to make a moral decision at all. ... And then how can we blame them for (what we perceive to be) the wrong character of their war?<sup>8</sup>

For Walzer, joining the military voluntarily during war instead of being conscripted does not change culpability, for the persuasive powers of the state are so dominant that, in the words of the philosopher T.H. Green cited by Walzer, "the state compels" in equal degree, whether "the army is raised by voluntary enlistment or by conscription."<sup>9</sup> What further undermines culpability is that once combatants are fighting, "the battles are no longer theirs." Rather, "they are political instruments, they obey orders, and the practice of war is shaped at a higher level."<sup>10</sup>

Walzer's defense of the moral equality of combatants is based on a somewhat exaggerated and arbitrary description of the moral situation of conscripts and volunteer combatants in times of war. Combatants are portrayed as morally helpless in the face of the coercive powers of states in making them execute wars; yet, in his view, they have just enough choice and moral competence to be held accountable for (*in bello*) war crimes.<sup>11</sup> Another problem is that Walzer includes even high-ranking officers in his moral equality thesis, stating that "by and large we don't blame a soldier, even a general, who fights for his government [because] he is not ... a willful

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<sup>8</sup> Walzer, *Just and Unjust Wars*, 39–40.

<sup>9</sup> *Ibid.*, 28.

<sup>10</sup> *Ibid.*, 29.

<sup>11</sup> *Ibid.*, 40.

wrongdoer, but a loyal and obedient subject.”<sup>12</sup> Career officers, however, have more opportunity for decision-making than conscripts and enlisted combatants. They tend to be better educated and more familiar with the terrible costs of war and their country’s track record in resorting to force. They also have more freedom to counter policies and orders of aggression. So even if we follow Walzer in taking as our model the moral predicament of combatants who functioned in such conventional interstate wars as the First and Second World Wars, it must be said that he sketches a too-narrow sphere of responsibility of combatants. The model was articulated in 1977 in the first edition of *Just and Unjust Wars* and has become increasingly historically dated in that it fits poorly with the emergence of the modern professional volunteer army in democratic societies and the moral predicament of its soldiers in time of war.

Recent U.S. wars, for example, do not fit Walzer’s picture of young men swept up in patriotism and marching off to the trenches to become helpless pieces on the political chess board. Many U.S. soldiers enlist as a matter of job choice or career opportunity. This might have its own coercive moment (economic necessity), but this type of coercion leaves more room for moral responsibility than is the case for indoctrination. To be sure, the power of the state to indoctrinate has not disappeared, especially with regard to convincing soldiers that their war is a just war, but access to global communication networks and the existence and public dissemination of dissenting voices in democratic societies have lessened the impact. Walzer’s picture of hapless young men in harm’s way is also negated by U.S. soldiers commonly re-enlisting even in times of war. In short, once we concluded that, for example, the second Iraq war was unjust and that the subsequent ongoing occupation of Iraq was also unjust (the two claims are normatively related, but require separate defense), we should not limit moral blame for this war and the occupation to the political and military leadership alone. Many soldiers, and certainly most higher ranking officers, should then be held culpable to some degree as well.<sup>13</sup> Ironically, the best argument against holding most combatants, and especially lower-ranking military personnel, significantly culpable is that society widely embraces the view that combatants are not morally responsible for unjust wars and so discourages combatants to question their own participation in unjust wars. Within the United States, even the strongest opponents of the second Iraq war typically adhered to this view under the motto “support our troops, bring them home.” To be sure, this posture was often adopted for political reasons rather than based on moral conviction, but the impact of discouraging critical moral reflection among unjust combatants concerning their own culpability is the same.

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<sup>11</sup> Ibid., 40.

<sup>12</sup> Ibid, 39.

<sup>13</sup> J. Joseph Miller, “*Jus ad Bellum* and an Officer’s Moral Obligations: Invincible Ignorance, the Constitution, and Iraq,” *Social Theory and Practice* 30 (October 2004): 477–484.

The scenario of thugs in uniform clearly illustrates that combatants may be culpable for unjust wars, but it might be objected that this is only a theoretical and hypothetical claim without much practical significance since the scenario does not fit with the way in which real armies are constituted and operate. In my view, this objection has some merit, but it fails to acknowledge that the future might bring us closer to the occurrence of armies as thugs in uniform. Arguably, we have in recent years become more tolerant of the idea of using combatants whose main motivation is monetary gain. The number of private contractors working in Iraq in support of the U.S. Army almost equaled the number of military personnel on the ground, and it is not uncommon in recent years for regular armed forces and contractors to work side by side in security operations.<sup>14</sup> Some political commentators, impatient with the pace of international response to the Darfur crisis, have called upon wealthy individuals or nations to hire private military security firms, such as the former Blackwater, to stop the genocide.<sup>15</sup> Moreover, Ted Koppel mused in a recent op-ed piece, saying, “If ... an insurrection in Nigeria threatens that nation’s ability to export oil ... why not have Chevron or Exxon Mobil underwrite the dispatch of a battalion or two of mercenaries?”<sup>16</sup> Other countries (besides the United States) have employed or shown considerable interest in private military contractors. Accordingly, it is not far-fetched to see a future in which the ethos of military sacrifice and duty to the community have been replaced by a corporate ethos, or one in which soldiers of private firms are temporarily and contractually placed under the military command of the regular army, sharing the nationality of their commanders and fighting alone or side by side with the regular armed forces. Thus the scenario of thugs in uniform, or some variant of it, might easily become an historical reality.

In the concluding comments of his defense of the moral equality of combatants, Walzer makes a striking observation: “The argument that I have made on behalf of soldiers was first made ... on behalf of their leaders, who, we were told, are never willful criminals, whatever the character of the wars they begin, but statesmen serving the national interest as best as they can.”<sup>17</sup> Walzer goes on to correctly reject this view and argue that leaders can be held responsible for wars of

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<sup>14</sup> Jeremy Scahill, *Blackwater: The Rise of the World’s Most Powerful Mercenary Army* (New York: Nation Books, 2007), xvii.

<sup>15</sup> *Ibid.*, 353–354.

<sup>16</sup> *Ibid.*, 354–355. The op-ed was by Ted Koppel, “These Guns for Hire,” *New York Times*, May 22, 2006.

<sup>17</sup> Walzer, *Just and Unjust Wars*, 40.



aggression, noting that the view has long since lost legal standing. Similarly, one would expect Walzer at least to question whether we should continue the practice of holding combatants accountable for *jus in bello* infractions only, not for killing in unjust wars as such. Even if one grants Walzer's view that under the present conditions unjust warriors are fully excused (and, again, the culture and institutionalization of the moral equality of combatants provides the strongest rationale for lack of culpability), the issue still is whether or not we should seek to move away from this situation. For example, we may seek to change the moral education and training of soldiers so they are well trained and encouraged to make more informed choices about their participation in wars. Again, one would expect Walzer at least to question the division of moral labor embedded in traditional just war theory of making *jus ad bellum* questions the concern of political leaders only, while combatants are only responsible for applying *jus in bello* norms.

What makes this division deeply problematic is that the very purpose of just war theory is to morally constrain (unjust) resort to force.<sup>18</sup> Combatants who view themselves as mere instruments of states or accept that their political leaders view them as such, do not serve this goal very well because they make the resort to military force easier. Morally informed combatants, to the contrary, are more likely to question, and may even prevent, the wrongful choice for war by their political leaders. A morally informed army is also conducive to the task of deciding on the basis of *jus ad bellum* principles whether to continue a war. The continuation of any war must constantly be reviewed because changed political and military conditions might make what once was a just cause for resort to force an inadequate ground for continued fighting, or what once was a last resort measure might no longer be so.<sup>19</sup> Arguably, the Afghanistan war initiated in 2001 is a case in point. Critical feedback from the frontline seems essential to arrive at an informed decision whether to continue war, and this feedback is less likely to be forthcoming if combatants view themselves as merely loyal and obedient subjects. In short, it seems that just war theory actually requires combatants to be concerned with *jus ad bellum* matters. And so we should move toward a future that abolishes the conditions still in place that provide unjust combatants with an excuse for their wrongful killings.

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<sup>18</sup> John W. Lango, "Generalizing and Temporalizing Just War Principles: Illustrated by the Principle of Just Cause," in *Rethinking the Just War Tradition*, ed. Michael W. Brough, John W. Lango, and Harry van der Linden (Albany: SUNY Press, 2007), 76.

<sup>19</sup> *Ibid.*, 77.

## 2. Non-Culpable Ignorance

This proposal assumes that combatants are capable of arriving at well-formed *jus ad bellum* judgments. There is, however, a long history of claiming that combatants cannot be held morally responsible for unjust wars because of their non-culpable “ignorance” or non-blameworthy lack of relevant knowledge concerning the reasons behind military conflicts. Francisco de Vitoria (ca. 1485–1546), for example, argued that since “lesser subjects” are not part of the deliberations leading to war, they need not ponder the causes of their wars and may trust their superiors.<sup>20</sup> But this argument assumes an autocratic society, not a democracy. Even so, Vitoria rejected blind obedience and added that “there may nevertheless be arguments and proofs of the injustice of war so powerful that even citizens and subjects of the lower class may not use ignorance as an excuse for serving as soldiers.”<sup>21</sup>

Presumably in reference to soldiering in modern democracies, Dan Zupan has recently argued that a soldier should “probably not” fight if he knows that his war is unjust, but this is “a sort of knowledge which is typically unavailable to the soldier.”<sup>22</sup> Zupan explains:

We must be careful not to underestimate how difficult it is for a combatant properly to consider and know the moral status of his country’s wars. Consider the debate about the current Iraq war. Many well-intentioned, intelligent people disagree about its moral status. How can we hold combatants responsible for “knowing” the justice of their cause when those with time and formal training, etc., can’t agree? ... Being under orders, trusting in his superiors, focusing on the mission at hand are such a part of the ordinary experience of being a soldier that “knowing” his war to be unjust turns out to be something he literally cannot do. ... In practice, [a combatant’s] actual ability to know in the relevant sense is so constrained ... that in theory MEC [the Moral Equality of Combatants] is the only reasonable position to adopt.<sup>23</sup>

Zupan offers here two rather different arguments for the very restricted ability of combatants to know the justice of their wars. The first one is that the culture and institutionalization of the idea

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<sup>20</sup> Francisco de Vitoria, “On the Law of War,” in *Vitoria: Political Writings*, ed. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), 308 (Question 2, Article 2).

<sup>21</sup> *Ibid.*, 308.

<sup>22</sup> Dan Zupan, “The Logic of Community, Ignorance, and the Presumption of Moral Equality: A Soldier’s Story,” *Journal of Military Ethics* 4, no. 1 (2007): 44.

<sup>23</sup> *Ibid.*, 45.

that combatants need not question the justice of their wars makes it difficult for them to find the will to question wars in which they are participants. I have granted that the argument has some merit in terms of stating an excusing condition for unjust combatants, but, of course, the argument is begging the question with regard to the issue of whether it is desirable to make institutional changes so that combatants will be encouraged to question in informed ways the justice of their wars. Zupan's second argument seems to deny the tenability of this, claiming that since the experts disagree about the justice of such a war as the Iraq war, we cannot assume that common combatants can arrive at informed opinions.

Larry May, among others, offers a similar, but in a way more sweeping, argument about the incapability of combatants to make informed *jus ad bellum* judgments: "If it is difficult for theorists, *many years after the fact*, to determine whether a State had just cause to wage war, we cannot reasonably expect soldiers during wartime to make such a determination."<sup>24</sup> And Kutz, even though he does not accept the notion of the moral equality of just and unjust combatants, provides a final supportive argument for the non-culpable ignorance of all combatants: On his account, it is very difficult or even impossible for combatants to objectively determine the justice of a war at the time of the onset of the war because "many belligerent acts, like many violent revolutions, are easily condemned at the time but become praiseworthy in retrospect."<sup>25</sup>

Zupan's observation that it is not uncommon for "experts" to disagree about the justice of a given war has value as a warning against hasty moral judgments and facile moral certainty about *jus ad bellum* matters, while the arguments of May and Kutz have the merit of reminding us that we should be prepared to revise our moral judgments in light of new empirical evidence, unanticipated consequences, overlooked moral concerns, and the like. However, once their arguments are given a centrality and weight so that they make a strong case for non-culpable ignorance of combatants in democratic societies and how this condition cannot really be changed, they imply a variety of positions that are widely rejected, including, presumably, by the authors of the arguments themselves. Most importantly, the claim that combatants in democratic, open societies are not capable of arriving at informed opinions concerning their country's intention to go to war implies the untenable view that the same is true of citizens generally. After all, combatants are drawn from the body of citizens and return often to civilian life, and even though the military may negatively impact the willingness of combatants to reflect on the justice of their wars, it does not impact their capability to do so. Indeed, it is generally assumed that army personnel should retain full political rights. Accordingly, the more we embrace the position

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<sup>24</sup> Larry May, *War Crimes and Just War* (New York: Cambridge University Press, 2007), 30. Emphasis added.

<sup>25</sup> Kutz, "The Difference Uniforms Make," 174.

that combatants cannot make informed war judgments, the more we have to conclude that the same is true of citizens in general and that democracy is a sham with regard to matters of war and peace.<sup>26</sup>

Now, to some extent democracy is a sham in this regard, but for rather different reasons than the ones presented thus far; notably, it is hard for citizens (including soldiers) to unmask the deception, plain lies, and secrecy that their political leaders often display with regard to military matters. Still, in the process of forming their opinions, citizens can take this propensity into account and reflect on their country's past history with regard to resort to armed force. They can also seek to broaden their horizons by participating in the global public sphere that has gradually evolved over the last two decades. This step would have been particularly significant with regard to the second Iraq war in light of the widespread and nearly unanimous global opposition to this war. Soldiers in democratic societies should be especially concerned with taking such steps toward forming a competent opinion in that they are not only citizens sharing responsibility for any given war, but also, and morally weightier, executioners of armed violence.

The arguments in support of the non-culpable ignorance of unjust combatants also undermine the tenability of such *jus post bellum* measures as reparations and the prosecution of political leaders for crimes of aggression. If citizens cannot be held morally accountable due to their inevitable *jus ad bellum* ignorance, the case for reparations is weakened. And if it takes years after the fact to decide whether a given war might have been just or not, then prosecutions of political leaders for crimes of aggression during this time period are impossible. And if we accept the notion that a reevaluation of the justice of wars many years after their conclusion is common and appropriate (and this means that we would set aside just war theory for a more purely consequentialist approach), then we would have to forego reparations and prosecutions altogether or be prepared to reverse them. More broadly, the arguments for the moral epistemic ignorance of unjust combatants generally weaken in various degrees the core notion of just war theory that its *jus ad bellum* principles constitute a meaningful moral decision procedure.

Assume, however, that it is indeed the case that it is nearly impossible for most combatants to arrive at a well-supported decision about whether their war is just or unjust. What would follow? Zupan and May assume that since soldiers can seldom be certain that their war is unjust, they should presume that it is just, and, so, they should fight. Considering the consequences of war, this presumption is misguided. As Jeff McMahan argues, it is morally indefensible for combatants to kill enemy soldiers with the understanding that there might be a considerable risk that one kills wrongly because one's war is unjust.<sup>27</sup> One should only follow the command to kill

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<sup>26</sup> Miller, "Jus ad Bellum and an Officer's Moral Obligations," 463–465.

<sup>27</sup> Jeff McMahan, "Collectivist Defenses of the Moral Equality of Combatants," *Journal of Military Ethics* 6, no. 1 (2007): 56–57.

if one is quite certain and confident that this is the right course of action. When in doubt about the justice of a military conflict, one ought not to fight. After all, the vast majority of past wars have been unjust, and so the odds are that this particular armed conflict is unjust as well. Of course, there is also some risk that one's decision not to fight is wrong and will enable the enemy to kill wrongly. But even if the odds of fighting an unjust war or a just war are about the same or veer somewhat toward just war, the presumption should be that one ought not to fight, because, as McMahan notes, "most of us accept that, in general, one's reason not to kill the innocent is significantly stronger than one's reason to prevent, or not to allow, the killing of the innocent by others."<sup>28</sup> This presumption fits with just war theory's purpose of placing moral constraints on the use of military force. The burden of proof is on those who counsel resort to military force and this burden should be difficult to meet. However, what differentiates just war theory (as expounded here) from pacifism is the conviction that this burden at times has been met in the past and we cannot exclude a priori the possibility that it will be met in the future.

At this juncture, the defender of the notion that unjust combatants should not be held morally responsible for killing enemy combatants might reply: It is to be conceded that combatants might be able to form competent judgments about resort to force or its continuation, but it would be an error to encourage individual combatants to engage in moral reflection that might lead them to conclude their war is unjust, because it may cause them to refuse to fight, and this would undermine the purpose of the military. Overall, it is best that the military presses upon soldiers the conviction that they should only worry about not committing war crimes, while *jus ad bellum* matters fall outside the scope of their proper moral concerns, for only in this way can the military fight efficiently in response to decisions made by the political leadership. Additionally, it benefits combatants to avoid pondering just war matters because avoidance protects them from the burden of moral doubts while fulfilling the difficult task of killing.<sup>29</sup> A third and final payoff of discouraging just war reflection among combatants, or so the argument continues, is that it reduces the risk of dehumanizing the enemy and, with it, the risk of war crimes.<sup>30</sup> When combatants on both sides think of each other as mere instruments of the policies of the state

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<sup>28</sup> *Ibid.*,” 57.

<sup>29</sup> Roger Wertheimer, “Reconnoitering Combatant Moral Equality,” *Journal of Military Ethics* 6, no. 1 (2007): 67–68.

<sup>30</sup> Michael W. Brough, “Dehumanization of the Enemy and the Moral Equality of Soldiers,” in *Rethinking the Just War Tradition*, ed. Michael W. Brough, John W. Lango, and Harry van der Linden (Albany: SUNY Press, 2007).

rather than as culpable for the execution of wars, they will be less likely to transfer their perception of the inhumanity of the policies of the enemy state to the enemy combatants themselves. More positively, they will honor one another as warriors instead of viewing each other as moral criminals.

This reply can stand on its own as an argument for the moral equality of combatants, or it may be presented as supplemental to the previous claim that combatants in fact are not capable of forming competent just war judgments. The choice should depend on how willing one is to concede that this epistemic inability is exaggerated. At any rate, the reply is not completely without merit, but it must be said that it is also partly morally pernicious. It is certainly very convenient for political regimes with aggressive designs to promote the policy that combatants should not morally question their duty to fight. Wars are more easily initiated and executed in this way. Efficiency in this context serves not only aggression; it is also harmful to the combatants themselves. The veil of combatants' ignorance will inevitably be torn apart. While some combatants will die with the erroneous belief that they sacrificed themselves for a just cause, others will be left with a damaged conscience and live in the knowledge that they killed wrongly, which is more likely to happen if they are defeated in an unjust war. But, then, corrupt political regimes care little about the long term well-being of their combatants. On the other hand, what would be the interest of well-functioning democratic states committed to fighting only just wars in trying to keep their soldiers ignorant about just war decisions? Such a course of action is antithetical to democracy as it seeks to exclude soldiers as citizens from meaningful participation in democratic debate about the resort to armed force. Moreover, a morally informed and politically engaged military reduces the danger that democracies with professional volunteer armies will opt more easily for resort to force due to the fact that the bulk of the population no longer worries that loved ones might go off to fight in wars. Besides, we have noted that morally competent soldiers are indispensable in helping to decide whether a given war should continue in light of changed military or political conditions. The military itself also has some interest in the full moral competency of its soldiers in that protracted, unjust wars tend to undermine the institution of the military.

Admittedly, encouraging full moral competency of soldiers within democratic societies and allowing selective conscientious refusal as its corollary might not only increase the number of refusals by soldiers to fight in unjust wars, it might also lead more soldiers who fail to see that justice is in fact on their side to protest or refuse to fight. This cost, however, appears small compared to the noted benefits of full moral competency, such as enriching democracy and reducing the risk of beginning unjust wars and continuing wars when they are no longer just. More decisively, it is fundamentally wrong to force combatants to kill against their conscience, and contractual obligations cease to have moral force when soldiers perceive their acts of killing as murder. Perhaps a case could be made that this wrong could be overridden when the issue at stake is the threat of genocide or massive extermination of citizens, but then it seems improbable

that, when the threat is real and immediate, many professional soldiers would seek selective conscientious refusal.<sup>31</sup>

This leaves us with the concern that viewing enemy combatants as morally culpable increases the risk of their dehumanization and, with it, the risk of their mistreatment. In response, it should first of all be noted that my view does not imply that war is a punitive enterprise. War as punitive action may increase the risk of dehumanization and mistreatment, but my view reserves punishment of unjust combatants only after they cease to be combatants. Second, a policy of viewing all combatants as non-culpable and even as honorable warriors (as long as they do not commit traditional war crimes) is bound to fail because such practice often contradicts the moral facts, especially in cases where enemy soldiers are undeniably aggressor combatants. Furthermore, there are many strong passions that guide combatants in their acts of killing and in the way they treat enemy soldiers after combat, such as showing intense hatred for the enemy, lashing out in anger for the deaths of fellow combatants, and getting exhilaration from shooting and killing. Perception of the enemy's guilt may play a role in how these passions play out, but the main barrier standing between legitimate and illegitimate killing and proper and improper treatment of soldiers hors de combat is discipline and training. We train and expect police officers to resist being affected by the moral status of the people they arrest; the same should be feasible for combatants. To be sure, appeal to the conception of war as a battle between honorable warriors might prevent some dehumanization and mistreatment, but the conception has for a long been time been a distortion, and recently even more so. It is hard to see what is honorable about turning one's enemy into dust through long-range killing, say through artillery or aerial bombing, and the emergence of virtual warfare has only further depersonalized killing. Besides, the notion of honorable warriors has its own price because it may lead war to be seen as a glorious enterprise. Finally, it may again be noted that a shift toward approaching soldiers as fully competent moral agents may have some costs, but these costs are small compared to the gains that will be realized most easily (but not only) in well-functioning democratic societies, for the military, soldiers, and the population at large.

### **3. Modifying Combatant's Privilege: A Cautious Proposal**

I have argued that combatants, especially in democratic societies with professional, volunteer armies, can—to some extent and in varying degrees, depending on their rank—be held morally culpable for participation in a war of aggression. More importantly, I have argued that there are good reasons for encouraging soldiers to reflect on whether their political leaders are justly

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<sup>31</sup> C.A.J. Coady, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2008), 238–240.

calling upon them to resort to force and that institutional changes, such as selective conscientious objection and improved moral education of soldiers in support of this reflection, are desirable. Now, granted these points, what would follow in terms of combatant's privilege as a legal right? The argument for moral culpability of combatants establishes a necessary condition for modifying combatant's privilege, but not a sufficient condition. Indeed, recent critics of the moral equality of combatants, such as Jeff McMahan and J. Joseph Miller, have argued against modifying this privilege.<sup>32</sup> For them, the argument for moral guilt has other—in a way, less far-reaching—pay-offs, such as that it may lead more soldiers on an individual basis to refuse to fight in wars of aggression. What holds these critics back from challenging the current laws of war?

McMahan offers in synoptic fashion three arguments against the notion that combatant's privilege might be denied to aggressor combatants so that they become appropriate subjects for some form of punishment:

First, it is simply impossible for one country, or even an international body, to provide fair trials for all the members of an army. Second, there is the problem of “victor's justice”: the winning side will declare its war to have been just and will be tempted to seek vengeance against vanquished soldiers under the guise of punishment. Finally, if all combatants have to fear this fate, they may be deterred from surrendering; and it is irrational to establish incentives to protract wars rather than to terminate them.<sup>33</sup>

A fourth objection is a variant of the last one: once combatants fear prosecution for fighting an unjust war, they may have a reduced interest in avoiding traditional war crimes. Their reasoning might be that since their capture might lead them to be convicted in any case, the added charge of violating *jus in bello* might not make much difference.

Let me first address the last two objections since they have less weight. It is correct to avoid providing any incentives that would lengthen wars by discouraging surrender, but it is even more important, in terms of reducing human suffering, to discourage (by incentives) wars of aggression in the first place. The prosecution of unjust combatants will reduce the willingness of combatants to participate in wars of aggression, especially in the case of professional, volunteer armies.<sup>34</sup> Of course, the prosecution of the leaders of wars of aggression also has this impact, but the two are not exclusive, and the prosecution of combatants may be more effective in the long run. After all, it is more difficult for aggressor combatants (with their immediate exposure to the enemy) to escape prosecution than it is for political leaders. Admittedly, deterrence varies with

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<sup>32</sup> Jeff McMahan, “The Ethics of Killing in War,” *Philosophia* 34 (2006): 38; and Miller, “*Jus ad Bellum* and an Officer's Moral Obligations,” 484, n. 73.

<sup>33</sup> McMahan, “The Ethics of Killing in War,” *Philosophia*, 38.

<sup>34</sup> Kutz, “The Difference Uniforms Make,” 167–168.



the risk of prosecution, and in large-scale conflicts the risk of prosecution for unjust combatants might be small. This objection is less weighty as it may initially appear because it is to be expected that the most common unjust wars in the future will not be massive conflicts but rather more “surgical” interventions as described in the scenario of the thugs in uniform. It also must not be forgotten that the legal prohibition itself of some intervention may discourage soldiers from executing it irrespective of any worries of prosecution. Moreover, political leaders who anticipate increased opposition among combatants to executing an unjust war may be more hesitant to unleash it in the first place.

The problem of a reduced incentive for surrender in aggressor combatants who fear prosecution can also be rebutted directly by a stipulation that surrender, depending on the details, is grounds for dropping prosecution charges of aggressor combatancy or for reducing the penalty. The disincentive for not committing traditional war crimes, such as the direct or intentional killing of noncombatants, can be removed in a similar way—by making the penalty for aggressor combatancy a much less severe one. This is also morally imperative because in general there are more extenuating circumstances for committing the wrong of fighting in a war of aggression than in committing traditional war crimes. In short, the gains of legal prosecution of unjust combatants outweigh its costs, and the costs can be minimized by designing proper penalties. The first two objections to changing combatant’s privilege involving the problems of feasibility and “victor’s justice” can best be met by articulating fair and feasible procedures for determining and prosecuting aggressor combatancy. What follows is a cautious and preliminary proposal in this direction, mindful of the fact that we should avoid taking a step backward toward a vision of war as a punitive enterprise.

Suppose that a country prepares to go to war and publicly declares that it will begin hostilities within forty-eight hours unless some set of unreasonable demands is met. This aggressor country is not under imminent threat and does not seek to assist another country under attack. Suppose, further, that the United Nations Security Council condemns the war preparation and declaration of war as steps toward an unjust war against another sovereign state. Under the current composition and voting procedures of the Security Council, this collective determination of an act of war as an unjust act is bound to be a selective judgment: the judgment is often not forthcoming because one or more Security Council member with veto power is friendly to the unjust state and obstructs it. So, assume that the Security Council surrenders its veto system, increases its membership, becomes more representative of the global community, and operates through a voting system that requires a two-thirds majority. Now if this Security Council declares, both before and after the outbreak of hostilities, that a given country’s non-reactive act of war is against its ruling (and so unjust) and divulges this decision as widely as possible, the soldiers of this country will lack combatant’s privilege. Their killing becomes a war crime from the beginning and should be prosecuted at the conclusion of the conflict with the same protections in place as the prosecution of traditional war crimes. Excusing conditions include duress and lack of knowledge, making the successful prosecution of soldiers from closed

societies less likely than the conviction of soldiers from democratic societies with professional, volunteer armies. But caution should be taken not to excuse unjust warriors from closed societies too easily, since this would partly defeat one of the purposes of prosecution, to wit, to create combatants more concerned with *jus ad bellum* matters. Prosecution should take place by an international judicial body similar to the International Criminal Court, or, at least, such a body should supervise the prosecution. Both feasibility and moral considerations demand that penalties generally be modest. True thugs in uniform should receive harsh penalties, as should repeat offenders. Rank could also be taken into account, and it might be practically necessary in some cases to pursue only officers. Conceivably, feasibility and moral considerations might necessitate that alternatives to traditional penalties be pursued, such as that aggressor combatants in custody participate in truth and reconciliation hearings prior to returning to their home country.

Something that would strengthen the case for letting the Security Council determine which acts of war are unjust and when combatant's privilege may be denied would be an effort on the part of the council to adopt a clearer understanding of what counts as a war that lacks a just cause. Currently, the council may be too permissive in authorizing or endorsing force.<sup>35</sup> Notably, it is problematic that the council may approve of force when it "determine[s] the existence of any threat to the peace, breach of the peace, or act of aggression" (Article 39 of the Charter of the United Nations; my emphasis). Accordingly, the council may approve of resort to force that lacks a just cause, at least, on the assumption (accepted by many just war theorists) that there are only three just causes for resort to force: national self-defense, assisting a nation in its self-defense, and protecting citizens from genocidal attacks if their governments fail to do so (or authorize the attacks themselves).

If the Security Council would adopt a more definite and limited understanding of what counts as a war that lacks a just cause, and if the Council would accumulate experience in testing this conception and find approval among the community of states with regard to its record in this regard, the Council might for the sake of reducing the number of unjust wars in the world expand its conception of unjust wars to include wars with just causes that fail to meet other *jus ad bellum* criteria. In this context, it is interesting to note that the 2004 report of the United Nations High-level Panel on Threats, Challenges and Change, commissioned at the time by U.N. Secretary General Kofi Annan in response to America's unilateral war against Iraq, recommends that the Security Council adopt for its deliberations about just resort to military force "five basic criteria of legitimacy," including "seriousness of threat," "proper purpose," "last resort," "proportional

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<sup>35</sup> John W. Lango, "The Responsibility for Security: How a Reformed Security Council Ought to Counter Threats to the Peace," in *Building Cultures of Peace: Transdisciplinary Voices of Hope and Action*, ed. Elavie Ndura-Quédraogo and Randall Amster (Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2009), 212–226.

means,” and “balance of consequences.”<sup>36</sup> These criteria overlap with traditional *jus ad bellum* principles, and even though just cause is defined too broadly,<sup>37</sup> the criteria offer a step in the right direction. However, under pressure of the United States (among others), the Security Council has not yet adopted the criteria.<sup>38</sup>

Filling out additional details of this proposal of when to deny combatant’s privilege falls outside my competency as a political philosopher concerned with issues of war and peace; it is a task that should be taken up by international law scholars. It might turn out that there are legal obstacles that are difficult and perhaps even too costly to overcome. So let me end with a modest, yet important, conclusion. The preamble of the Charter of the United Nations states that the organization was created with the intent “to save succeeding generations from the scourge of war” (emphasis added). The laws of war predate the United Nations even though their formalization in various conventions has mostly taken place in later years. The laws of war are based on a more realist premise, seeking only to restrict the scourge of war.<sup>39</sup> There is no doubt that the laws of war have greatly contributed to this aim, ending a long history of callous neglect of wounded enemy soldiers and mistreatment of captured enemy soldiers.<sup>40</sup> At the same time, we should not give up on the more ambitious goal of the United Nations. In my view, we face a future in which unrestricted combatant’s privilege might increasingly be an obstacle to enduring global peace because, for one thing, we face a future in which fewer combatants with more effective weapons can be paid to pursue (and win) wars of aggression. More generally, the current laws of war create a zone of legally permitted killing by combatants even in cases where this is undeniably morally reprehensible. In practice, this influences the moral assessment of aggressor combatants in the wrong direction, just as its legal condemnation and prosecution

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<sup>36</sup> United Nations Report of the Secretary General’s High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (New York: United Nations, 2004), pars. 207–209.

<sup>37</sup> Harry van der Linden, “Would the United States Doctrine of Preventive War Be Justified as a United Nations Doctrine?” in *Philosophical Perspectives on the “War on Terrorism*, ed. Gail M. Presbey (Amsterdam: Rodopi, 2007), 156–157.

<sup>38</sup> Brough, Lango, and van der Linden, *Rethinking the Just War Tradition*, 3–5.

<sup>39</sup> Francois Bugnion, “Just Wars, Wars of Aggression, and International Humanitarian Law,” *International Review of the Red Cross* 84, no. 847 (September 2002): 523–546. Translated from French and posted on the website of the icrc, [www.icrc.org](http://www.icrc.org).

<sup>40</sup> Wertheimer, “Reconnoitering Combatant Moral Equality,” 65; and Michael Ignatieff, *The Warrior’s Honor* (New York: Henry Holt, 1997).

would have the reverse moral impact, even if punishment would remain largely symbolic. More importantly, holding unjust combatants liable in principle will induce combatants to become better informed and more reflective moral agents with regard to the decision of their countries to resort to force. Prosecution of aggressor combatants would also eliminate the not-altogether erroneous perception that the laws of war reflect a double standard because the laws protect thugs in uniform while (rightly) pursuing terrorists as thugs out of uniform. It would be unwise to modify the laws of war and set aside the legal principle of the equality of combatants if it would increase the suffering caused by war, but the case for this happening is not clear and shut. So, for the sake of global peace, we should at least be willing to reconsider unrestricted combatant's privilege, rather than treat it as a humanitarian dogma.<sup>41</sup>

#### 4. Postscript

In his most recent work (published after the bulk of this essay had been written), Jeff McMahan seems more nuanced about the tenability and desirability of the legal prohibition of combatant's privilege for unjust warriors. In an essay of 2008, he grants in accordance with the argument that I have developed here that we may "abandon the legal equality of combatants" once we would have in place "an international court empowered to administer a richer, more detailed and more nuanced law of *jus ad bellum*."<sup>42</sup> McMahan's sketch of this court and its rationale somewhat overlaps with my own proposal. Yet, in his 2009 book *Killing in War*, McMahan argues that even with a "just and impartial international court" there remain "powerful objections to any attempt to punish unjust combatants merely for fighting in an unjust war."<sup>43</sup> McMahan adds some new objections, underlining that the philosophical debate about combatant's privilege as a legal doctrine, unlike the debate about the moral culpability of unjust combatants, has hardly begun. My paper has served its purpose when it has succeeded in convincing the reader that this debate should be continued and widened.

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<sup>41</sup> Earlier versions (or selections) of this paper were read at the World IVR Congress of Philosophy of Law and Social Philosophy, Krakow, Poland, 2007, the Annual Meeting of Concerned Philosophers for Peace, Manchester College, 2007, and the World Congress of Philosophy, 2008, Seoul, Korea. This paper has especially profited from detailed comments by Michael Brown and Jordy Rocheleau.

<sup>42</sup> Jeff McMahan, "The Morality of War and the Law of War," in *Just and Unjust Warriors*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 43.

<sup>43</sup> Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), 191.

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