

The Moral Equality of Combatants

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According to the Just War tradition a war can only be just if two sets of principles are satisfied.¹ First there is the *jus ad bellum*. These principles tell us when it is just to start a war. There has to be a good reason or a just cause in order for a war to be morally permissible (self-defense, defense of others, putting a stop to human rights violations). The decision to go to war has to be taken by a legitimate authority. Those who wage war need to be motivated by good intentions (desire to promote a more stable peace). War should not only be a last resort (necessity), it must also offer a reasonable chance of success. Moreover, the good the warring party hopes to obtain should outweigh the evil caused by the war (proportionality). The second set of principles, the *jus in bello* or the right in the war, focuses on the moral constraints that need to be observed during hostilities. Noncombatants must never be the intentional target of military actions (discrimination), and the military utility of a particular act of war has to outweigh the damage it will cause.

It is clear that combatants, whatever side they are on, have a moral and legal obligation to respect the *in bello* principles. This is what ethicists call their *in bello* responsibility. Can combatants be held responsible for participating in an unjust war? Do they, aside from their *in bello* responsibility, have an *ad bellum* responsibility? If so, this would mean that combatants have a duty to judge the justice of the war and refuse to participate in an immoral conflict. Those combatants who would not take such an *ad bellum* responsibility seriously, and simply follow orders, would risk being considered unjust combatants. Anyone who studies the moral and legal reality of warfare will quickly notice that this presumption of military *ad bellum* responsibility is firmly rejected.² At the core of the Just War tradition is the fundamental doctrine of the

moral equality of combatants. Basically this doctrine says that the realm of responsibility of combatants on all sides is equally limited to that of the *jus in bello*. Combatants cannot be held responsible for the just or unjust nature of the war in which they participate. The *ad bellum* responsibility belongs solely to the political decisionmakers.

Despite its basic role in the normative appreciation of war, the doctrine of moral equality of combatants is not beyond dispute. Even Michael Walzer, who is a strong defender of a strict separation between *jus ad bellum* and *jus in bello*, admits that this moral dualism can be somewhat puzzling.³ It is, after all, far from obvious that the moral status of a combatant in a defensive war is the same as that of a combatant participating in a war of aggression. The former is clearly engaged in a morally legitimate activity (self-defense), whereas the latter is contributing to what most would term a criminal act. So, how can these two be moral equals? Should we not add an *ad bellum* responsibility for combatants? If, as some philosophers and lawyers argue, we decide to hold soldiers responsible in this regard, wouldn't that stop them from participating in wars of aggression?⁴

The objective of this article is to shed light on this problem by answering two questions: (a) What arguments are there to support the traditional position that limits the responsibility of the military to the *jus in bello*? and (b) Can combatants ever be blamed for unjust wars, and if so, under what circumstances?

Military Subordination

Perhaps the most straightforward reason why the responsibility of the military is limited to the *jus in bello* has to do with the strict military subordination to political authority. Politicians decide to go to war, whereas the military is expected to execute this decision to the best of its ability. This subordinate role does not, however, reduce the military to a mere political instrument that obeys orders without question. Military officers, for instance, have a clear advisory responsibility to the political authority.⁵ They have to be able to inform the political decisionmakers on the military needs of the state. This may include information on the external security threats and the military options available.

Second, military subordination does not imply that those who operate within the military should stop exercising their moral autonomy. The execution

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of political orders which would almost certainly lead to war crimes requires refusal. This obligation to disobey illegal and immoral orders might in some cases even put the military in a position where it refuses to go to war. Suppose a government wants to start a war against a neighboring country with the sole objective of ethnically cleansing parts of that nation. The fact that this war cannot be fought without committing serious violations of the *jus in bello* makes it clear that those who are asked to fight the war have good reasons to refuse. Participating in such a war would most certainly turn participants—officers and soldiers—into war criminals. It would be a mistake, however, to deduce from this particular example that the military inherently possesses an *ad bellum* responsibility. The example is not about military judging the war based on the *ad bellum* principles. The right or even the duty not to go to war in this particular example is the direct consequence of the proper exercise of the *in bello* responsibility. In other words, an *in bello* judgment is applicable with some serious *ad bellum* implications. It should also be clear from the example that a similar *in bello* judgment will not automatically result in a total refusal to go to war. If, for instance, the ethnic cleansing is only a small part of the overall war objective, there can no longer be, so it would seem, a reason not to go to war. In this case only the orders that are specifically linked to the execution of the ethnic cleansing policy should be refused.

Imagine that country A starts an unjust war—a war of aggression—against country B. Suppose also that this unjust war can be fought according to the *jus in bello*. The realization of A's war objectives does not require its combatants to commit war crimes or crimes against humanity. What prevents us from considering A's soldiers as unjust combatants is the idea that they, just as B's soldiers, follow political orders. They do what they have to do as public agents responsible for the defense of their political community. But, one might ask, why is this the case? The focus of this article will be on one particular argument responding to that question, political legitimacy.

The military obligation to obey political orders derives from the fact that those who give the orders are the ones with the legitimate authority to do so. In pre-modern societies the question of political legitimacy was often based on the principle of the Divine Right of Kings. The king or prince was seen as the representative of God on earth and therefore possessed the authority to rule. In modern societies the political legitimacy is no longer based on the Divine Right of Kings, but on the sovereignty of the people. Governments obtain, based on some social contract, the authority to organize society. Citizens promise to obey the rules of the political community in exchange for a life in a secure and just society. So when, in a liberal democracy, a government wants to take the nation to war, it cannot do so on its own, but requires democratic approval. This specific condition of democratic control is even more essential when it comes

to the use of military force, given the far-reaching consequences of warfare. From that same perspective, a government will be held accountable for the way it manages the war. If the military were permitted to question the legitimacy of a duly executed decision to go to war, it would be engaged in an activity for which it has no authority. Instead of a purely advisory function, the military would in this case acquire a final say on the matter of the use of military force. Needless to say this is not a legitimate role for the military.

The argument so far goes as follows: In a war the combatants on both sides are to be considered as moral equals because they are both subordinate to their respective political authorities. The military has a duty to execute political orders—always operating under the assumption that these orders do not entail violations of the *jus in bello*—because the politicians who issue these orders have the authority to do so. What happens then if, for one reason or other, the necessary condition of political legitimacy is not satisfied? How would this influence the moral equality of combatants? In an attempt to analyze this specific example, we have presented two distinct scenarios: one in which the combatants have to deal with an unjust government, and another where the combatants are asked to serve a just government in its initiation of an unjust war.

Serving an Unjust Government

In the first scenario, the political regime of one of the parties enjoys little or no legitimacy. Let's say this party is a dictatorial regime that acts in a very oppressive manner toward its population (Nazi Germany). All wars, offensive or defensive, that this kind of regime initiates would be considered unjust. The military ordered to fight these wars will have to engage in clearly immoral activities. Those who knowingly and willingly participate in the planning or execution of the unjust regime's immoral policies are without doubt unjust combatants. Think about some high-ranking officers, soldiers who may serve in the protection forces of the regime (SS troops in Nazi Germany or Saddam's Republican Guard), or members of the secret services.

The same conclusion is perhaps less obvious when alluding to the category of the military who knowingly fight for an unjust regime, because they lack the moral courage to refuse out of fear. It can be argued that the individual military members in this category also have to be considered unjust combatants. The doctrine of the "double effect" illustrates why this is the case. This doctrine says that it is justified to execute an action the performance of which is known to have good and bad consequence, if and only if: (a) the good consequence is the desired objective, and the bad one is a regrettable side-effect, (b) the good consequence outweighs the bad one (proportionality), (c) the good consequence cannot be obtained without the bad one (necessity), and (d) the bringing about of the bad consequence is not a means in order to obtain the good one.

How does this doctrine demonstrate combatants are in fact unjust combatants? We are examining the actions of individuals who know that participating in a war of an unjust regime has a double consequence: one good and one bad. The good consequence relates to the fact that the military members are minimizing the risk to their life and the lives of their families. As long as they follow orders, they and their families will not be threatened or harmed. The bad consequence is that they are: (a) contributing to the survival of an immoral regime, and (b) contributing to the suffering and death of those who justly fight or resist this regime. If one were to assume that the persons belonging to this category participate in such wars because they are under severe duress, we can safely say that the first requirement of the double effect doctrine is satisfied. Indeed, what these individuals desire to obtain is the good consequence, not the bad one.

Furthermore, assume that the state or political authority we are examining is an all-knowing and all-seeing Big Brother-like regime; the necessity condition will have also been satisfied because it will not be possible to obtain the good consequence without the bad one. One cannot refuse to participate in this regime's wars without seriously jeopardizing one's life and family. Refusal would be possible, however, when operating within an unjust regime having less control. Members of the military might in that case try to escape in order to avoid participating in the regime's war. Or they might participate without completely fulfilling their combatant duties, thereby undermining combat effectiveness. So, the weaker the regime, the more likely it is to achieve the good consequence without the bad. This can also mean that under these circumstances the necessity requirement will not be satisfied.

The final two double effect conditions are even more problematic. Reducing the risks for combatants and their families can never outweigh the harm that will be caused by the continuing existence of the unjust regime (proportionality). Even more troubling is the fact that the combatants belonging to the previously mentioned category may be willing to engage in unjust wars resulting in death and destruction, in an attempt to avoid jeopardizing their lives or the lives of their families. In an effort to obtain a good outcome (minimizing their own risks), they are prepared to perform a bad act (participating in an unjust war). The double effect doctrine explicitly forbids this type of behavior. There is of course a fundamental difference between these unjust combatants and those who willingly participate in the wars of an unjust regime. Actions of the former are immoral, but the latter are not to be blamed because of the specific circumstances associated with severe duress.⁶

Imagine the members of the military were subjected to extreme indoctrination to the point they could no longer be considered responsible moral agents. They have then been turned into some kind of military automaton comparable to moral philosopher Jeff McMahan's "implacable pursuer."⁷

As the implacable pursuer, soldiers are programmed to act as relentless and ruthless killing machines. They will stop at nothing in the pursuit of their objective, the elimination of their opponents. Political and military orders are executed without hesitation or reservation. This not only means that it will be impossible for the individual combatant to acquire an *ad bellum* responsibility. It will also not be possible for those individuals to act responsibly in the domain of the *jus in bello*. Because these military members cannot exercise their moral autonomy, it no longer makes sense to categorize them as just or unjust combatants. They have simply become amoral combatants.

We have considered three categories of military participants: the conscious and willing accomplices of the unjust regime, the soldier who is under extreme duress, and the military automaton. In each case we examined whether we were dealing with a just or unjust combatant. Is it then possible to formulate a situation where combatants who are not reduced to military automatons cannot be held responsible for taking part in the regime's unjust wars, and where it is no longer meaningful to talk about just and unjust combatants? The obvious answer to this rhetorical query is yes. Think of a totalitarian society where young children are selected and trained to be soldiers. A society where the military is never permitted to interact with civilians. During their education and training in this isolated environment the children are taught the virtues of the society that they will serve. One may assume that some kind of false consciousness is being forced upon them regarding the true nature of the political context in which they will be expected to serve. Because these children have no access to other sources of information, they have no way of knowing the truth about the regime. Due to the fact that they are convinced of the just nature of their society, they will not have any reason to doubt the legitimacy of its wars. In such an instance their invincible ignorance prevents them from acquiring a military *ad bellum* responsibility and from being labeled as just or unjust combatants.

In reality such a scenario is not very likely. No unjust regime is so powerful or inventive that it can hide its true nature all of the time. Of course, there will inevitably be citizens who will turn a blind eye when confronted with a regime's immoral policies. These individuals pretend not to notice or care. There are several explanations for this attitude of denial. There is the fear of becoming one of the regime's victims, the anxiety associated with losing certain advantages (power, wealth, opportunities, and positions). There is no reason to believe that members of the military would be immune to this kind of logic. It goes without saying that those who are unable to invoke invincible ignorance cannot escape their military *ad bellum* responsibility. We have already examined the case of military members acting under severe duress. Those who turn a blind eye out of fear of losing their privileges also revert to the status of unjust combatants. They knowingly—although they may

pretend otherwise—contribute to the continuing existence of an immoral regime by their participation in its unjust war.

Serving a Just Government in an Unjust War

In our second scenario, the conflict party enjoys an important degree of political legitimacy. Its institutions are just in the sense they reflect the basic political values shared by its citizens (a constitutional democracy). Given the degree of moral authority, the military members of this regime have a strict obligation to follow orders. This also means that the soldiers' responsibility is limited to the *jus in bello*. As they have no reason to question the legitimacy of the regime they serve, there can be no presumption of military *ad bellum* responsibility. Imagine a situation where a just government decides to initiate an unjust war. What impact will this have on the soldiers' moral status? Can soldiers be held responsible for taking part in such a war, or will they continue to enjoy the protection offered by the duty to obey a legitimate authority? In an attempt to resolve this conundrum we need to answer two questions: (a) How does the initiation of an unjust war affect the legitimate nature of a government? and (b) How would such a war affect the moral status of the government's military?

According to the Just War theory, the initiation of a war is unjust when at least one of the *ad bellum* principles is not respected. If someone wants to understand how failure to meet the *jus ad bellum* can affect the legitimacy of a just government, they need to analyze the basic philosophy underpinning the Just War theory. Within the tradition of Just War the use of force is considered an evil to be avoided whenever possible. The duty to "do no harm" can only be overridden in specific circumstances.⁸ The *jus ad bellum* theory offers the political decisionmakers a deliberation instrument to be utilized in determining when the use of force is morally appropriate.⁹ Disregard for the moral wisdom inherent in *jus ad bellum* will not only lead to unnecessary harm for the opponent, but also may result in unnecessary harm for one's own political community. It is this unwarranted risk to citizens and their liberties presented by unjust wars that may also result in the loss of the just government's legitimacy. Citizens in a liberal society, for instance, may only engage in war when its object is to protect their basic freedoms and democratic institutions. Wars initiated for other purposes, such as the gaining of economic wealth or natural resources or to garner power and empire, will be labeled unjust.¹⁰ The same goes for wars that may become disproportionate or that have no real prospect for success. Politicians who rush to war without any attempt to utilize less harmful means are not serving their society's common good. An even greater threat to the legitimacy of a particular government is the decision to go to war without initiating proper procedures.

Establishing how the decision to initiate an unjust war impacts the political legitimacy of a just government is one thing, but it is quite another to

assess how this act might impact the moral status of combatants. One might argue that the loss of political legitimacy as the result of initiating an unjust war exempts the military from their duty to obey political orders. In reality, however, the situation is a bit more complicated. In the unjust regime scenario, the presumption of military *ad bellum* responsibility was plausible because of the blatant nature of the political regime's immorality. It was, except for the rather theoretical case of the indoctrinated and isolated soldiers, hard not to be aware of the government's injustice. This second scenario is not as clear cut. In this particular instance it is not necessarily true that those participating in the war are aware of its immoral nature. Combatants will only acquire a military *ad bellum* responsibility when it can be reasonably assumed they are aware of the unjust character of the war. But how reasonable is this assumption?

One could theoretically imagine a legitimate government rushing into a war that is so blatantly unjust that it is impossible for anyone, including the soldiers who fight it, to ignore its immoral nature. In reality this "naked aggression" scenario is highly unlikely in a democratic society. This does not mean that democratic regimes never start unjust wars. When a war is initiated for reasons other than the immediate and necessary response to a foreign aggression, democratic governments will attempt to emphasize the defensive or humanitarian nature of the conflict. Often, government officials will use Just War terminology in an effort to assure democratic support. Is it reasonable to assume that the military can see through this facade? Many would argue that, excepting those military members involved in the *ad bellum* decisionmaking process, such an expectation of awareness is not reasonable.

Most of the military has little access to the information necessary for assessing the justice of a war. How would it be possible for soldiers to be certain whether or not their government is conducting a war for purely defensive reasons or executing some hidden agenda? Can combatants ever be certain that all reasonable nonmilitary means have been exhausted, or if the use of force is proportional? Because the majority of military members can never be certain of the just or unjust nature of a war, they cannot be held responsible.

Moral philosophers such as Jeff McMahan and David Rodin do not share this view. According to both McMahan and Rodin it should be obvious to any combatant that the chance of participating in an unjust war is much more likely than that of fighting in a just war.¹¹ As a war can only be just for one side, the individual soldier has less than a 50 percent chance of taking part in a just war. McMahan further argues that a combatant doesn't need reams of classified information to determine the just or unjust nature of a conflict. If a combatant is ordered to fight in a country that hasn't invaded another, this may well be an indication of an unjust war. Or, if the enemy combatants against whom a soldier

is fighting clearly enjoy the support of the local populace, McMahan believes this constitutes prima facie evidence that the combatant's cause is unjust.¹²

Both arguments are not convincing enough, however, to justify an *ad bellum* responsibility for the combatant. The "less than 50 percent" rule certainly possesses the possibility of making the soldier aware of the probability that the war is not just. This general awareness of the war's (in)justice is not sufficient enough to hold the combatants accountable for the unjust war. One can only hope that a combatant's sensitivity regarding the relative justice of the war will generate some positive consequences for the manner in which the conflict is fought. The same holds true for McMahan's prima facie evidence. The examples he provides are simply indicators. A war against a nation that hasn't committed any aggression is perhaps the best indication of an unjust war, but this is not always the case (think Kosovo in 1999 or Afghanistan in 2001).

According to Paul Christopher it is not necessary for individual combatants to attempt to factually assess whether a war is just or unjust. If the decision to go to war is the result of a democratic process following formal procedures, then the war has to be considered just.¹³ This is in fact all the combatant needs to know. It is often very difficult, if not impossible, to objectively assess which side justice favors. Christopher uses the analogy of a murder trial to make this point. In most murder cases there is no way of knowing whether the person who stands trial is actually guilty. The procedures of a criminal trial are designed to ensure a just outcome. One cannot exclude, however, that sometimes an innocent person may be found guilty and the guilty set free. This is what John Rawls calls an example of imperfect procedural justice: "While there is an independent criterion for the correct outcome, there is no feasible procedure which is certain to lead to it."¹⁴ An essential element of such a criminal procedure is that both sides (defense lawyer and prosecutor) have an obligation to present their case as convincingly as possible. The judge or jury will then, based on the evidence presented, determine guilt or innocence. According to Christopher an analogous process takes place within a democratic society whenever a decision on the use of military force is made. Within constitutional bodies debates will be organized and decisions finalized in accordance with formal procedures. As in the criminal trial, respect for these procedures will not necessarily yield an objectively just outcome.

Although Christopher, like Walzer, is a partisan to limiting a soldier's responsibility to that of *jus in bello*, his procedural justice argument doesn't necessarily exclude the possibility of a military *ad bellum* responsibility. It could be argued that those who execute the decision of a government that didn't properly execute the formal procedures required to go to war may be held responsible for the war. In the murder trial analogy that would be akin to an executioner being held responsible for executing a death sentence resul-

tant of a flawed trial.¹⁵ Again, there is the problem of presumed awareness. Except in instances where the disrespect for the formal procedures is so flagrant or so obvious, most combatants would not have the necessary legal knowledge to determine whether a decision is formally just.

There are other issues associated with Christopher's analogy.¹⁶ Essential in obtaining a just outcome in a criminal trial is the adversarial nature of the process. The fact that both sides defend their case to the best of their ability permits the judge to render a decision in the full knowledge of the argument and counterargument process. One can only wonder if there is a similar adversarial aspect present in the decisionmaking process related to war. Of course, within a given country there will be those who are in favor and those who oppose the war. The opposition that really matters, however, is the potential combatants, not the political factions within each country. If the internal political debate is to attain the same adversarial level as that of a criminal trial, then we will need someone to enthusiastically defend the cause of the opposing country. Times of conflict and war are often characterized by patriotic fervor, nationalistic feelings, and intense propaganda. No politician in their right mind will feel the urge to defend the enemy's cause simply to ensure a fair debate. Such an act would probably be interpreted as downright treason. Another key fact is that within the internal debates related to going to war there is no impartial judge. In the end, the political faction that succeeds in obtaining a majority will have its way.¹⁷

One might regret the fact that because of these various factors a formally just war is probably not as just as we believe. This is, however, how democratic societies function. Christopher is certainly correct when he says that it would be profoundly arrogant for the military to question the morality of a decision to go to war when that decision has been made in a democratic fashion.¹⁸ According *ad bellum* responsibility to the military in such a scenario would amount to saying that the military man is morally superior to the political man.

Conclusion

Can combatants ever be blamed for unjust wars in which they participate? This question reflects the complexity of the moral duality of war. Philosophers such as Walzer and Christopher argue that soldiers can never be held responsible for the justice of the war. The war in which they participate is not their war, but is, as Jean-Jacques Rousseau remarked, a relationship between the political entities to which they belong.¹⁹ Combatants are, in this view, moral equals. Others will argue against this traditional position. For those like McMahan, combatants cannot escape the moral consequences of their participation in an unjust war. His view is straightforward: Those who fight in a just war are just combatants, while those who fight in a war that is unjust are unjust combatants.²⁰ For that reason alone they cannot be moral equals.

This article did not go quite that far in determining a combatant's responsibility. It was argued that soldiers only become unjust combatants when they are aware of their involvement in the illegitimate activity associated with an unjust war. There is little doubt when dealing with regimes that blatantly lack any form of political legitimacy as to the justice of the war. The fact is that all such regime's wars are unjust, and those who willingly participate cannot escape responsibility. However, blaming soldiers who fight in an unjust war that was initiated by a legitimate government raises a number of issues. Except for those who may have knowledge of the *ad bellum* decisionmaking process, it is not reasonable to assume an *ad bellum* responsibility for the military members conducting the conflict. It may well be argued that the principle of the moral equality of combatants is presumptively correct. In other words, the moral equality of combatants is not an absolute but rather a prima facie position. Based on this line of reasoning, questioning the moral equality of the soldier on the ground is much harder than alluding to the complicity of senior leaders.

NOTES

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1. For a more detailed discussion on the Just War tradition, see also Bruno Coppieters and Nick Fotion, eds., *Moral Constraints on War: Principles and Cases* (Lanham, Md.: Lexington Books, 2002).

2. For the legal point of view, see for instance, Yehuda Melzer, *Concepts of Just War* (Leyden, The Netherlands: A. W. Sijthoff, 1975), 83-88.

3. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2000), 21.

4. Brian Orend, *The Morality of War* (Orchard Park, N.Y.: Broadview Press, 2006), 107.

5. Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Cambridge, Mass.: The Belknap Press, 1972), 70, and Carl Ceulemans and Guy Van Damme, "The Soldier and the State: An Analysis of Samuel Huntington's View on Military Obedience Toward Political Authority," *Professional Ethics*, 10 (Summer, Fall, and Winter 2002), 7-22.

6. Jeff McMahan, "The Ethics of Killing in War," *Ethics*, 114 (July 2004), 700.

7. *Ibid.*, 719-20.

8. James Childress, *Moral Responsibility in Conflicts: Essays on Nonviolence, War, and Conscience* (Baton Rouge: Louisiana State Univ. Press, 1982), 63-94.

9. Carl Ceulemans, *Reluctant Justice: A Just-War Analysis of the International Use of Force in the Former Yugoslavia (1991-1995)* (Brussels: Brussels Univ. Press, 2005), 27.

10. John Rawls, *A Theory of Justice* (New York: Oxford Univ. Press, 1971), 379, and John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard Univ. Press, 1999), 91.

11. Jeff McMahan, "On the Moral Equality of Combatants," *Journal of Political Philosophy*, 14 (December 2006), 391, and David Rodin, *War and Self-Defense* (Oxford, U.K.: Oxford Univ. Press, 2002), 170.

12. McMahan, "On the Moral Equality of Combatants," 391.

13. Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* (2d ed.; Upper Saddle River, N.J.: Prentice Hall Press, 1999), 211-12.

14. Rawls, *A Theory of Justice*, 86.

15. See also Rodin, 170.

16. For a more detailed discussion of Christopher's analogy, see 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), 457-84.

17. See also McMahan, "On the Moral Equality of Combatants," 388.

18. Christopher, 212.

19. Jean-Jacques Rousseau, *The Social Contract* (New York: Penguin Press, 2006), 10.

20. McMahan, "The Ethics of Killing in War," 693.