The Prevention of Unjust Wars

1 The Doctrine of the Permissibility of Participation

War is a great moral evil. … The first great moral challenge of war, then, is: prevention. For most possible wars the best response is prevention. Occasionally, a war may be the least available evil among a bad lot of choices. Since war always involves the commission of so much wrongful killing and injuring, making war itself a supreme evil, a particular war can be the least available evil only if it prevents, or anyhow is likely to prevent, an alternative evil that is very great indeed.¹

This passage from a recent paper by Henry Shue and Janina Dill articulates a view of war that is hard to challenge, even for those who are antipathetic to pacifism. It is echoed in the succinct claim of Michael Walzer and Avishai Margalit that “the point of just war theory is to regulate warfare, to limit its occasions.”² These are, I take it, claims about war understood as a phenomenon comprising the belligerent acts of all the parties to a conflict. The Second World War was a war in this sense, one that was clearly a great evil, though if the only alternative to its occurrence was the unopposed conquest of Europe by the Nazis, it was an evil that Shue and Dill would presumably concede to have been the “least available evil” in the circumstances. Notice, however, that the Second World War was neither a just war nor an unjust war; rather, it comprised both just and unjust wars. It encompassed both Britain’s war against Germany, which was a just war, and Germany’s wars against Britain, the Soviet Union, and other states, which were unjust wars. “War,” therefore has two senses: a “wide” sense in which it refers to the acts of war by all sides, and a “narrow” sense in which it refers only to the acts of war by one side, which may of course include more than one state.

While wars in the wide sense are always great evils, it is not always wrong to bring them about, as Shue and Dill implicitly recognize. The Second World War need never have occurred if all the states that fought defensively had instead peacefully submitted to conquest or domination by the Axis powers. Similarly, it may not be wrong to initiate a just war of humanitarian intervention, which is a war in narrow sense, even though it will inevitably provoke a war in the wide sense. Wars in the narrow sense are therefore not always great moral evils and it is not always true that “the best response” to such wars is prevention.” Just wars, for example, ought seldom, if ever, to be prevented. Sometimes it is morally imperative that a just war be fought. There are even some wars in the narrow sense that are unjust that it might nevertheless be wrong to prevent – for example, a war that would achieve a just cause by necessary and proportionate means but that can be successfully fought only by one state, which will fight only if it also pursues an unjust aim that, though greatly outweighed by the just cause, is unnecessary for the achievement of that cause.³ (To avoid this complication, I will here use “unjust war” to refer only to those wars that are unjust because they lack a just cause.) In general, though, while wars in the narrow sense ought not to be prevented if they are just, they ought to be if they are unjust. Indeed, because most wars in the wide sense arise from a war that is unjust (for example, when a war of aggression prompts a just war of defense), the best way to prevent those wars in the wide sense that ought to be prevented is to prevent states from initiating unjust wars.
There are, of course, many reasons why unjust wars occur, and many factors that contribute to a war’s occurrence in any particular instance; and there are correspondingly many ways to try to prevent unjust wars from occurring. But there are certain essential conditions for any unjust war that are both obvious and potentially alterable. The impetus for an unjust war is seldom traceable to a state’s citizenry at large; rather, it generally comes from a small group of political leaders who stand to gain in power and prestige. But these people cannot fight a war on their own; indeed, few of them ever go near a battlefield. They must therefore rely on a vast number of other people to fight their unjust war for them. How do they manage to do that? How do they get tens or hundreds of thousands, or even millions of ordinary people to risk their lives in order to kill other people as a means of achieving aims that are unjust? When people are called upon to fight in an unjust war, why do virtually all of them do their leaders’ bidding without question?

Again, there are of course many reasons. Those who are already members of a standing army typically believe that it is their professional duty to obey an order to fight. They have, in any case, been conditioned to obey and may be eager to prove themselves in combat. Even conscripts generally accept that their government has the authority to order them to fight and they tend, like those already in the military, to fear the official penalties and social stigma consequent upon refusal or resistance more than they fear the dangers of war. To the extent that soldiers reflect about whether their war is morally justified, they usually defer to their government’s assurances that it is, at least in part because they assume that their government must know much more about the matter than they do.

Perhaps it seldom occurs to them that their adversaries, whom they assume to be in the wrong, have been prompted to fight by precisely the same considerations, which are independent of any substantive reasons why a war might be just or unjust. But if potential combatants do have doubts arising from this or some other source, they are readily assuaged by the view, which has been pervasive in virtually all cultures for many centuries, that combatants do no wrong, and are not blameworthy, if they fight in an unjust war, provided that they obey the moral, legal, and professional rules that govern the conduct of war. Call this the doctrine of the “Permissibility of Participation.” Early exponents of the theory of the just war tended to defend the Permissibility of Participation by arguing that responsibility for a war lies solely with the political authority that commands it rather than with those who fight it. Augustine, for example, writing early in the fifth century, argued that a combatant who kills in war does not violate the commandment, “Thou shalt not kill,” for “he to whom authority is delegated, and who is but the sword in the hand of him who uses it, is not himself responsible for the death he deals.” Similar claims were later made by Hobbes, Pufendorf, and others in the just war tradition. The Permissibility of Participation received its canonical expression in the twentieth century in Michael Walzer’s classic Just and Unjust Wars and he has recently reaffirmed it in an influential article coauthored with Avishai Margalit, as follows: “Combatants are accountable only for their conduct in war. … We can demand of soldiers that they react morally to concrete combat situations; we can’t demand that they judge correctly the moral merit of the reasons their political leaders give them for going to war.” This claim is part of the common sense understanding of the morality of
war and finds corresponding legal expression in the international law of war, which does not hold combatants legally liable for fighting and killing in an illegal war.

Jonathan Glover, who has written extensively and illuminatingly on the morality and psychology of war, recently had this exchange during an interview he was conducting to probe for the subject’s moral views.

Glover: Some people say that one problem with the army is that you have to obey orders, sometimes you kill people if there’s a war, and it may not be right to do that always.

Subject: To defend your country, yeah, too right it is.

Glover: In war, is it right?

Subject: Yeah, of course it is. You’re not just defending your homeland, you’re defending the women, the children, people in it. You’re defending their right to be free.

Glover: It takes two sides to make a war, and one side is defending and the other side is attacking. Can you always rely on our side to be the ones who are defending?

Subject: If you’re British, you stand for Britain, whether it’s right or wrong. You’re part of that country. If Britain says, “Right, I’m at war with this bunch”, you don’t argue. You just say, “Fair enough” and “Let’s go to do what we’ve got to do”.

The final passage in this exchange is a fair, if crude, paraphrase of the Permissibility of Participation. For according to that view, it becomes morally justifiable to kill people when one’s own political leaders, acting on behalf of the state, have declared war on those people’s state (“Right, I’m at war with this bunch”). The positive reason to fight (to “do what we’ve got to do”) is the duty of obedience to legitimate authority in the state of which one is a citizen (“You’re part of that country”). According to Hobbes, for example, “if I wage war at the commandment of my Prince, conceiving the war to be unjustly undertaken, I do not therefore do unjustly, but rather if I refuse to do it.” Glover’s interlocutor does, however, omit one crucial condition of justification: in order for it to be permissible to kill people against whom one’s leaders have declared war, they must be dressed in a certain way. But if we are at war with them and they are wearing one uniform while we are wearing another, that is thought to be sufficient to make it permissible for us to kill them. When, for example, Hitler ordered the invasion of Poland, that was sufficient, according to the Permissibility of Participation and the international law of war, to make it morally and legally permissible for Nazi soldiers to kill Polish soldiers. So formidable were Hitler’s alchemical powers that he could actually dissolve moral and legal constraints on killing by incantation alone. And the same is true, on this view, of any other political leader authorized to make a formal declaration of war. All such people have to do to strip military personnel in a peaceful country of their right not to be killed is to utter the words that initiate a state of war.

As this mocking but accurate characterization of the Permissibility of Participation suggests, I find that doctrine wholly incredible. I have elsewhere argued at length against it and will not rehearse my objections here. For present purposes, I will simply assume that it is false. Yet its appeal is almost universal, from learned theorists of the just war all the way to the man Glover interviewed, who is (I now mischievously reveal) currently confined at Broadmoor, Britain’s highest-security hospital for dangerous offenders who
have either been convicted but exempted from criminal punishment on grounds of insanity or judged unfit to stand trial. Because I find the Permissibility of Participation so obviously false, I suspect that its appeal is traceable less to any reasons that might be adduced in support of its being true than to concerns about what the consequences would be if it were to be generally repudiated. We recoil from condemning as wrongdoers those combatants who fight by the rules but in a war that is unjust, especially when they are our own fellow citizens. Many Americans, for example, believe that the US war in Vietnam was an unjust war but reject the suggestion that American combatants who obeyed the rules of engagement were criminals. More importantly, we may also fear that if it came to be generally accepted that it is morally wrong to fight in a war that lacks a just cause, soldiers would begin to question whether they should obey an order to go to war, thereby jeopardizing or altogether undermining the military chain of command and thus the state’s ability to defend itself effectively.

These are reasonable concerns but they are insufficient to justify our continued acceptance of a doctrine that, as a matter of morality, is simply false. We can, as may often be appropriate, excuse those who fight and kill in support of unjust aims without pretending that they have acted with moral justification. There are typically a variety of excusing or mitigating conditions present when combatants fight in unjust wars. Indeed, combatants on both sides in a war usually act in conditions of considerable uncertainty, both factual and normative, and are also subject to duress insofar as they would face harsh penalties if they were to refuse to fight. Those who fight in such conditions may not be blameworthy, or may be blameworthy to only a relatively slight degree, and in consequence may rarely deserve punishment, provided that they have adhered to the legal and customary rules of war. And we should also recognize that those who have fought in an unjust war may, particularly if they are largely excused, deserve praise for the exercise of such virtues as courage, fortitude, and self-sacrifice in the achievement of their proximate aims, even though the ultimate aims their action supported were unjust.

We ought, moreover, to consider whether the worrisome effect that rejecting the Permissibility of Participation might have – namely, weakening military efficiency by increasing the probability of disobedience – might be outweighed by potential good effects. The first point to notice is that weakening military efficiency is not always bad. It is bad if it compromises a state’s ability to fight a just war, but from an impartial point of view it is actually good if it diminishes a state’s ability to fight an unjust war. It would have been good, for example, if Nazi soldiers had weakened Germany’s military efficiency in the Second World War by refusing on moral grounds to fight in Hitler’s unjust wars. The most important question, therefore, is whether, if the Permissibility of Participation were widely repudiated, soldiers would be more likely to disobey when ordered to fight in a war that was in fact just or when ordered to fight in an unjust war.

Since in all wars that have occurred, or virtually all wars, at least one side has fought unjustly, the number of people throughout history who have fought in unjust wars is vast. There is little evidence to indicate that more than a tiny minority of these combatants believed that their war was unjust; rather, the vast majority appear to have believed that their war was just. If that is right, it is the norm for people to mistake an unjust war fought by their own state for a just war. But it is also clear that at least an equally high proportion of those who fight in wars that are objectively just believe that their war is just. In short, people are strongly disposed to believe that any war fought by
their own country must be just, and this disposition is probably even stronger among those who must do the fighting. This tendency of people to assume that their country’s war is just is difficult to overcome even in cases in which it ought to be luminously obvious that the war is unjust – for example, in the various wars of Nazi aggression. When a war is in fact just, there are typically few apparent reasons to believe that it is unjust and few people on the just side are motivated to appeal to those apparent reasons in arguing that the war is unjust. This is particularly obvious in the case of just wars of national self-defense. It is, therefore, highly unlikely that the general rejection of the Permissibility of Participation would lead soldiers to refuse on genuinely moral grounds to fight in just wars of national self-defense. And the same is true, though to a lesser degree, of just wars of humanitarian intervention. Yet in wars that are objectively unjust, there are typically facts, even of a quite general nature, that are difficult or impossible to conceal and that ought to prompt skepticism about the justness of the war – for example, that the war is being fought in a distant country that does not and perhaps cannot pose any military threat to one’s own country, and that the forces one is fighting against manifestly enjoy the support and cooperation of a substantial proportion of the civilian population (as was the case in the American war in Vietnam). It seems clear, therefore, that the general repudiation of the Permissibility of Participation would be considerably more likely to lead to doubts about the morality of wars that are in fact unjust than to provoke skepticism about the morality of wars that are just. If rejection of the doctrine would increase the probability of conscientious refusal to fight, it would be much more likely to do so in unjust wars than in just wars. On balance, that seems highly desirable.

For the sake of comparison, consider that at present US law requires a combatant, even during combat, to disobey a “manifestly unlawful” order from a superior officer. One assumption behind this requirement of disobedience is that a manifestly unlawful order is an order to act in a way that would be morally impermissible. A hundred years ago such a requirement would have been inconceivable; everyone would have agreed that even to permit disobedience, much less require it, would fatally undermine the chain of command. Yet it has not. The rejection of the Permissibility of Participation would, in effect, extend into the area of jus ad bellum (the principles governing the resort to war) a permission that we already accept and have translated into law in the area of jus in bello (the principles governing the conduct of war). One might argue that what is acceptable in the area of jus in bello would be unacceptable in the area of jus ad bellum, since there is much greater uncertainty about whether a war is unjust than there is about whether an in bello command is unlawful. I think this overstates the confidence that a combatant can have that an order is unlawful – for example, when an officer commands him to fire on people who appear to be civilians but who the officer insists are guerrillas with concealed weapons on the verge of launching an attack. The important question, however, is whether the unlawfulness, or wrongness, of an ad bellum order could ever be sufficiently certain to justify disobedience. The main purpose of this essay is to suggest a mechanism by which the unlawfulness of ad bellum orders could make manifest. I will develop this suggestion shortly.

The focus of concern of those who worry about the potential consequences of the rejection of the Permissibility of Participation ought not to be the possibility of genuine conscientious objection to participation in wars that are in fact just. It ought instead to be the possibility that soldiers might use feigned moral scruples as a pretext for refusing to
fight in just wars in which, for reasons of self-interest, they do not wish to fight. This is, however, unlikely to be a serious problem in just wars of national self-defense, since people who are directly threatened tend to fight rather than submit – a fact that I think explains why Israel tends to be more tolerant of conscientious disobedience in its military forces than other states are. Since the state’s foundation, Israelis have lived continuously with grave external threats to their security (threats that successive Israeli governments have done much to exacerbate). They know that they can tolerate a certain level of disobedience in military operations that are not really essential to their security, such as patrols in the occupied territories, since they also know that if they have to fight a war in which the state and its people are seriously and imminently threatened, everyone capable of fighting will do so cohesively and without dissent.

A more serious concern is that insofar as the general rejection of the Permissibility of Participation would lead governments to accept more liberal provisions for conscientious objection or conscientious refusal, there would be a significant risk that soldiers might pretend to have moral scruples as a means of trying to evade service in just wars other than those of national self-defense – for example, in wars of humanitarian intervention or collective defense. This concern could be addressed at least in part in the traditional way: by imposing costs, such as compulsory community service, on conscientious objectors. But for such costs to be an adequate deterrent, they might have to be disproportionately harsh. It seems, therefore, that some unavoidable risk of reduced military efficiency in just wars, particularly those that are not self-defensive, has to be weighed against the expected good effect of emboldening conscripts and soldiers to resist participation in unjust wars.

As long as we continue to accept the Permissibility of Participation, we will deprive ourselves of an important resource for the prevention of unjust wars – namely, the ability to appeal to the conscience of the individual soldier. In any state that is fighting or preparing to fight an unjust war, on what basis can those who rightly oppose the war try to persuade soldiers to refuse to fight in it? More generally, how might a soldier rationally reach the conclusion that he ought not to fight? If the Permissibility of Participation were correct, that might be impossible. For if soldiers have a presumptive duty as part of their professional role to obey legitimate orders, and if they will face harsh penalties if they refuse to fight, and if, finally, they would do no wrong by fighting provided they obeyed the rules of engagement, it seems that they would simply be foolish to refuse to fight on the ground that the war is unjust. Why condemn oneself to imprisonment in order to avoid doing what would not only be permissible but also one’s prima facie duty? The Permissibility of Participation is not an instance of the familiar “right to do wrong.” It seems instead to exclude the possibility that soldiers could have a moral reason not to fight based on the fact that the aims for which they would be fighting would be unjust.

The general rejection of the Permissibility of Participation would be a radical change in the way that people think about the morality of war. The effect that this change might have in promoting resistance to participation in unjust wars could certainly be substantial enough to outweigh the risk that it would also reduce military efficiency in just wars, particularly in wars of humanitarian intervention and collective defense. But in order for the potential good effects of the rejection of the doctrine to outweigh the bad, it is essential that soldiers be able to discriminate between just and unjust wars with
considerably greater accuracy and confidence than they are able to do at present. For even if soldiers were to believe that it is seriously wrong to fight in an unjust war and were strongly motivated not to engage in serious wrongdoing, they would nevertheless continue to fight in unjust wars as long as they were able to believe, as they generally have in the past, that the war in which they have been ordered to fight is just. Indeed, the universal rejection of the Permissibility of Participation would have no practical effect at all if both those who fight in just wars (“just combatants”) and those who fight in unjust wars (“unjust combatants”) always believed that their war was just. And the situation would be similar if soldiers in general felt unable to judge the moral status of their war; for in that case they would think it appropriate, or even imperative, to defer to the judgment of their leaders.

I am assuming – for a variety of reasons, some given above and other developed elsewhere – that the doctrine of the Permissibility of Participation is false as a matter of morality and that widespread recognition of this falsity could make a significant contribution to the prevention of unjust wars. But to achieve this effect, it will be necessary not only to persuade people that the Permissibility of Participation is false but also to provide people, especially soldiers, with reliable and authoritative guidance in discriminating between just and unjust wars. My aim in this essay is to suggest a general strategy for providing this guidance.

2 A Practical Proposal

In order to provide people with knowledge of which wars are just and which are unjust, one must of course possess the relevant knowledge. At present, our understanding of the morality of *jus ad bellum* is rudimentary. Just war theorists have traditionally offered a list of conditions, all of which must be satisfied in order for the resort to war to be permissible: for example, just cause, last resort or necessity, proportionality, reasonable hope of success, right intention, legitimate authority, and so on. Yet, although these conditions have been invoked for centuries, they have never been carefully or rigorously analyzed.¹¹ When just war theorists have discussed the requirement of just cause, for example, they have tended to offer a short but ad hoc list of aims that count as just causes for war, but they have typically failed either to explain what the items on the list have in common or to defend a principled criterion for determining what should appear on the list. The comparative neglect of *jus ad bellum*, both in the history of just war theory and in the development of the law of war, can be explained to a considerable degree by the fact that, at least until recently, it has been considerably easier in practice to constrain the conduct of war than it has been to prevent wars from occurring. At least until after the First World War, people were in general reconciled to the idea that there was little that could be done to prevent wars from occurring; indeed, during the nineteenth century, the acceptance of the inevitability of war had led, in law, to the view that states possessed the sovereign right to resort to war for any reason. Both just war theorists and legal theorists concentrated their efforts on finding practicable ways to regulate and restrain the conduct of war. Their guiding aims were to identify constraints that it would be in everyone’s interests for all belligerent parties in a war to obey and then to promote recognition and acceptance of those constraints through custom or treaties. By the middle of the twentieth century, however, after two catastrophic worlds wars, the aim of preventing unjust wars, and therefore wars in the wide sense, became paramount. But both in law and in mainstream just war theory, the customary list of just causes for
war was shortened to a single item: self-defense by a state in response to an actual attack. The UN Charter made that the sole legal justification for the unilateral resort to war, though it did recognize one other way in which a war could be legal – namely, if it were authorized by the Security Council for the purpose of preserving international peace and security. This latter provision, however, offers virtually no substantive guidance in distinguishing just from unjust wars; it simply makes the legality of war a matter of contestation and voting among the representatives of fifteen states.

Since the establishment of the UN, a small body of customary international law concerning *ad bellum* matters has evolved and has made some allowance for wars of preemptive self-defense and perhaps for certain wars of humanitarian intervention. Yet the law of *jus ad bellum* remains remarkably crude and simplistic. And just war theorists, while having made some progress in recent years, have so far failed to articulate a rigorous, detailed, theoretically unified, and plausible account of the morality of the resort to war.

The first task, then, in any effort to provide soldiers, political leaders, and the global public generally with authoritative guidance in matters of *jus ad bellum* is to advance our comprehension of these matters far beyond the highest level of understanding we have hitherto attained. This is a task for moral philosophers. Yet throughout history, the major philosophers have largely ignored the morality of war. There are brief passages in Augustine, Aquinas, Locke, and Rousseau, and slightly more extensive discussions in Hobbes and Kant, but nothing even remotely comparable to the work of juridical writers such as Grotius and Pufendorf. In the past hundred years or more, the only major philosopher who has devoted sustained attention to war is Michael Walzer. Yet in recent decades a number of distinguished philosophers have substantially deepened our understanding of matters of normative theory that are relevant to the morality of war, such as the foundations of the rights of individual self-defense and third-party defense of others, and the nature and significance of the distinction between doing harm and allowing harm to occur and of that between intending harm and merely foreseeing that harm will occur as a side effect of one’s action. Thus, if philosophers can overcome their reluctance to work on such a lowbrow issue as the morality of war, they now have a better understanding than their predecessors of the underlying issues of moral theory, as well as a wider range of analytic tools. There are, therefore, grounds for optimism about our ability to achieve a greatly enhanced understanding of the morality of *jus ad bellum*, despite the topic’s evident lack of cachet within the domain of philosophy.

After the philosophical work has been done to the best of our ability, the next step should be to codify the enhanced understanding of *jus ad bellum* in a body of deontic principles stating prohibitions, permissions, and perhaps requirements concerning the resort to war and the continuation of war. These principles should be formulated as guides to action; hence they must satisfy the highest standards of clarity and precision. The ultimate aim is for these principles to become rules of international law, rules that would be maximally congruent with the morality of *jus ad bellum*, while nevertheless making due allowance for the ways in which laws must sometimes diverge from the moral principles on which they are based – for example, because laws sometimes require a sharp threshold where morality recognizes only matters of degree, or must be crafted to avoid creating morally counterproductive incentives, and so on. But, while it would be ideal for these principles to have the authority of law, it might be unavoidable, at least for
an interim period, for them to lack the status of law while nevertheless being more than merely hortatory. I will return to the question of their status shortly.

Assuming that we were able to formulate a set of ad bellum principles that were sensitive to pragmatic considerations but otherwise maximally congruent with morality, it would then be necessary to establish a juridical or court-like institution whose mandate would be to interpret and apply the principles to particular cases. Its central task should be to deliver authoritative judgments on whether particular wars in the narrow sense are just or unjust, legal or illegal. The ideal form that this juridical institution could take would be a formally recognized court of law. Yet, again, that may not be possible, at least in the near future, so that initially one might have to settle for something less. I will, nevertheless, employ terminology that presupposes the ideal. I will, throughout, refer to an “ad bellum court” rather than to a more vaguely specified quasi-juridical institution.

The aim of an ad bellum court, as I envision it, would not be the enforcement of the law. Even if it were a genuine court of law, it would not be charged with determining whether individuals, either political leaders or combatants, deserve punishment for violations of the law of jus ad bellum. One might think, of course, that the aim that motivates the proposal for such a court – namely, the encouragement of soldiers to refuse to fight in unjust wars – provides a reason for empowering the court to punish individual combatants. For deterrence through the threat of punishment might be the most effective way to motivate soldiers to refuse to fight. Yet it would be a mistake to threaten ordinary soldiers with punishment for fighting in an unjust war. This is clearly true at present but would remain so even if there were an ad bellum court that would be able to distinguish just from unjust wars more reliably than any existing institution. At present, various mitigating conditions normally apply to those who fight in unjust wars – for example, that they act in understandable ignorance and often under duress. As a result, they are generally so little culpable as to be undeserving of institutional punishment, and even those who might deserve punishment would deserve so little that the threat of its infliction would be unlikely to have a significant effect in deterring participation in an unjust war. But even if a threat of punishment would have a deterrent effect, uncertainty about which wars are just and which are unjust is so pervasive that such a threat might deter participation in just wars that were not clearly self-defense almost as effectively as it would deter participation in unjust wars.

The existence of an ad bellum court would alter some of these conditions. If the court had correctly declared that a war in progress was unjust and illegal, and if this fact were widely disseminated, that would weaken the excuses available to those fighting in the war. Their ability to plead nonculpable ignorance of the moral or legal character of their war would be diminished. And to the extent that the court’s judgment would generate international pressure on the state fighting the unjust war to treat dissenters leniently, it could also have the effect of reducing the level of duress to which soldiers in that state would be subject. The weakening of these mitigating conditions would make unjust combatants more culpable for their participation, so that they might deserve forms of punishment that would be sufficiently aversive that the threat of such punishment could be at least a modestly effective deterrent to participation in the war. Even so, there would still be many reasons why punishing ordinary combatants merely for participation in an unjust war would be objectionable, and these reasons together would seem to outweigh the potential good effect of enhanced deterrence.
One such reason is that the attempt to punish unjust combatants would be impracticable. Each combatant would be entitled to a trial, if only to investigate theexcusing conditions that might have been present in his case. Yet if we imagine thecostly and time-consuming procedures characteristic of a fair criminal trial multipliedtens or hundreds of thousands of times, it becomes obvious that no court system couldpossibly cope with even a tiny fraction of the cases. Even a process by which only a certain proportion of the combatants, chosen by lottery, would be tried would be a wasteder of resources that would be better devoted to post bellum reconstruction. Criminal trialsmight also be unfair to the combatants themselves. What ought a soldier to do if he isthreatened with punishment under international law if he fights in a war and yet is alsothreatened with punishment under domestic law if he refuses to fight? Even if it is true that in such conditions he ought, all things considered, not to fight, holding those who do decide to fight liable to punishment would be widely perceived as unjust and would thusexacerbate and prolong the animosities of those, citizens and soldiers alike, whose statehad fought unjustly, thereby making the reconciliation of enemies and the restoration ofpeaceful relations more difficult. It would be better simply to allow combatants whoseonly wrong had been to fight in an unjust war to return home, preferably to civilian life,where they could contribute to both economic recovery and the rebuilding of the physicalinfrastructure that may have been damaged during the war. There is, finally, thepossibility that the court could be mistaken in its judgment. If punishment were allowedon the basis of the court’s decisions, then in any cases in which the court’s judgment wasmistaken, the combatants punished would be innocent. If the principal function of thecourt could be carried out without creating a risk of unjust punishment, that wouldobviously be preferable to taking so grave a risk.

That risk is in fact unnecessary. For the principal function of the court – theintended function that is the reason for my proposing such a court – would be epistemic.It would be to provide epistemically reliable and authoritative judgments about whetherparticular wars in the narrow sense are just or unjust. Just as criminal trials are designed toyield judgments about whether individuals are guilty or innocent that are more likely tobe correct than any private judgment, and are for that reason (among others) authoritative,so an ad bellum court would be designed to yield judgments about whether wars are just or unjust that would be more reliable than any private judgment and thus,for that reason and others, authoritative.

Unlike judgments in a criminal trial, however, the judgments of an ad bellum courtwould not need to be enforceable or even legally binding in order to have importantpractical effects. Consider, for example, the 1986 ruling against the US by theInternational Court of Justice (ICJ) in Nicaragua v. United States. The Court concludedthat the US was acting illegally in providing various forms of support for the Contras and inmining Nicaragua’s harbors and ordered the US both to stop its attacks againstNicaragua through the agency of the Contras and to pay reparations for the harm that theyhad done. Although the ruling was meant to be binding, the US rejected the Court’sjurisdiction, refused to comply with its demands, and vetoed the UN’s efforts to enforce theCourt’s decision through action in the Security Council. Thus the judgment was, de facto,neither binding nor enforceable. Yet it further damaged whatever legitimacy theContras may have had internationally, provided a justification for the US’s allies to resist its demands for support, and greatly strengthened the opposition in the US to the Reagan
administration’s efforts to overthrow the Sandinista government. After having been forced to veto the attempted enforcement of the Court’s ruling in the Security Council, the US was further humiliated by the vote in the General Assembly on a non-binding resolution urging the US to comply with the ruling. Ninety four states voted in favor of the resolution, while the US was joined in voting against it only by El Salvador and Israel.\textsuperscript{12}

There are already judgments in international law that are legally authoritative and influential in practice but neither enforceable nor even legally binding: namely, the advisory opinions of the ICJ. The ICJ has the authority to render judgments on questions of international law submitted to it by one of the agencies or organs of the UN. As one international lawyer has noted, their

non-binding character does not mean that advisory opinions are without legal effect, because the legal reasoning embodied in them reflects the Court’s authoritative views on important issues of international law and in arriving at them, the Court follows essentially the same rules and procedures that govern its binding judgments delivered in contentious cases submitted to it by sovereign states. An advisory opinion derives its status and authority from the fact that it is the official pronouncement of the principal judicial organ of the United Nations.\textsuperscript{13}

If, indeed, a special \textit{ad bellum} court could find an institutional home within the ICJ, that would automatically imbue its judgments with the status and authority that characterize the ICJ’s advisory opinions. One possibility would be that such a court could be established as a permanent special chamber of the ICJ, comparable to the special chamber on environmental issues that was created in 1993. Yet in order to ensure that the court would not have to operate on an ad hoc basis but could rule on all wars as they occurred, the special \textit{ad bellum} chamber would have to possess the legal authority to initiate its own proceedings rather than having to wait for a case to be referred to it by an agency of the UN. It might also need to have a larger number of judges than is customary for a special chamber.

One objection to locating an \textit{ad bellum} court within the ICJ is that this would require changes in the charter and functions of the International Criminal Court (ICC), which in principle has jurisdiction over what is now the central crime of \textit{jus ad bellum}: the crime of aggression. At present, however, the ICC’s founding treaty, the Rome Statute, has no definition of aggression and denies the Court the liberty to exercise its jurisdiction over this crime until the states that are signatories to the treaty can agree on a definition.

The ICJ administers international law, which has states as its subjects. The ICC, by contrast, administers international criminal law, which is derived from international law but has individual persons as its subjects. A new philosophically and morally informed body of \textit{ad bellum} law would, it seems, have to apply to states and thus would have to be a part of international law and so within the jurisdiction of the ICJ. Yet, assuming that the new law would not treat all instances of aggression as commonly understood as criminal (for example, an instance of humanitarian intervention might not be criminal even though it involved a military assault against a state that had not attacked any other state), and assuming that it would not treat aggression as the sole \textit{ad bellum} crime, the rewriting of the international law of \textit{jus ad bellum} would necessitate a corresponding
rewriting of the elements of the Rome Statute concerned with *ad bellum* matters. But the fact that the parties to the Rome Statute have been unable to reach agreement on a definition of aggression in the twelve years since the treaty was adopted demonstrates that the obstacles to developing a new body of *ad bellum* law are formidable, perhaps even insurmountable for the foreseeable future. Of these obstacles, perhaps the most intractable is that statutory international law requires acceptance by states, which tend to sign or ratify a proposed law not so much because they recognize that it coincides with morality or would be morally desirable for the regulation of action but because they expect that it would serve their interests. Powerful states, in particular, may have little incentive to accept a set of laws that would restrict their ability to go to war given that they would have little to gain from the reciprocal restraint the law would impose on weaker states incapable of threatening them. Hence the US, China, and Russia are not parties to the Rome Statute and the Bush administration, in an effort to exempt the US altogether from the jurisdiction of the ICC, negotiated bilateral immunity agreements with over 100 states in which those states agreed to refuse to deliver any US citizen who might be called before the court.

If the prospect of resistance from states makes it impossible in the near future to have a reformed *ad bellum* law with a special court to administer it, there are possible alternatives that, while lacking the authority of law, might nevertheless serve the intended epistemic function. It might, for example, be possible to organize a congress of eminent and respected authorities on international law and just war theory that would have as its purpose the formulation of an *ad bellum* code of the sort I have described and the establishment of a court-like institution that would judge whether wars in the narrow sense were just or unjust by reference to the provisions of the code. The members of the congress could include international lawyers, scholars of international law, including representatives of the various national societies for international law, such as the American Society of International Law, veteran prosecutors, defenders, and judges from the criminal tribunals for Rwanda and Yugoslavia, as well as just war theorists, political theorists, retired military officials, particularly former Judge Advocate Generals and their counterparts in other countries, and perhaps even some serving military personnel with training in law or ethics who might be seconded to the congress in an advisory capacity. An *ad bellum* code drafted and approved by a professionally and nationally diverse group of recognized experts on war, morality, and law could have considerable de facto authority, as could a quasi-juridical institution designed by the same group whose purpose would be to determine what the code implied about the justice or injustice of particular wars in the narrow sense. The authority of the code would derive both from its inherent plausibility and from the knowledge, expertise, experience, diversity, and impartiality of those who had drafted it. Its authority could be further enhanced if it were endorsed by many of the non-governmental organizations throughout the world devoted to the analysis and promotion of international law.

The authority of the judgments of what I will refer to as the *ad bellum* “court,” even though it would not have the status of a court of law, could have many sources in addition to the credibility of the code itself. Its judgments would derive some authority from being constrained by the necessity of conformity with a body of determinate, publicly accessible doctrine that had been widely endorsed by experts in the areas of international law and morality. Another source of authority would be the procedural constraints on the
functioning of the court that would have been designed to secure the highest degree of impartiality and epistemic reliability – for example, generous provisions for belligerents to present their case to the court, as well as liberal provisions for the admission of *amici curiae*, along with procedural rules characteristic of courts of law, such as rules of evidence, voting procedures, a requirement of public justification, and so on. Judges would have to be appointed to the court on the basis of their expertise, experience, and impartiality, and their standing in law. They should be of diverse national and religious (including nonreligious) backgrounds and be required to recuse themselves from cases in which one of the belligerents is the state of which they are a citizen.

It is undeniable, however, that the consent of states is a potent source of the legitimacy and authority of international law and international courts – arguably the single most important source. The judges of an unofficial *ad bellum* court of the sort I am envisioning would lack this basis of legitimacy and jurisdictional authority. Yet the consent of states to be bound by a body of law and by the rulings of the court that administers it tends to be obtainable only at the cost of allowing states a role in the appointment of judges. Judges of the ICJ, for example, are selected through voting in the UN General Assembly and the Security Council, while the judges of the ICC are chosen by representatives of the states that are parties to the Rome Statute. When the representatives of states choose judges, there must always be a suspicion that their criteria of selection may favor qualities other than those that enable and motivate judges to make wise and impartial decisions. If, therefore, the judges of an informal *ad bellum* court were selected *without* the consent of states, that would give them an alternative basis of authority – namely, a presumptive status as impartial and disinterested, which it would be less plausible to attribute to judges appointed by the representatives of states.

States would, of course, reject the jurisdiction of a “court” to whose authority they had not voluntarily submitted. Their claim that the court would have no authority over them would, however, be more plausible if the court were to assert that its rulings were legally binding and provided a basis for punitive sanctions. But since the aim of an unofficial *ad bellum* court would be primarily epistemic, it would not assert that its judgments were either binding or a basis for punishment. It would not be in the business of assigning responsibility either to states or to individuals; it would merely say what the code implied about whether certain wars in the narrow sense were just or unjust. This fact about the function of the court would greatly diminish the significance of the repudiation of its authority by states. States would have to challenge its *epistemic* authority. A state whose war the court had condemned as unjust would have to contend that the court’s judgment was no more objective or likely to be correct than its own, or that of its paid legal advisors. In the circumstances, there would be an obvious presumption that the claims of the court would have greater credibility. The authority of the court, then, would be fundamentally epistemic rather than legal. If after it had rendered a series of judgments, those judgments were widely perceived to have been unbiased, well grounded, well informed, and well reasoned, the court’s de facto authority would be increasingly recognized and therefore increasingly difficult for states to deny or defy.

The court’s claims to objectivity and epistemic reliability would, however, inevitably be widely challenged and even ridiculed. Its judgments would be dismissed with contempt by those, especially among the powerful, who would support the wars it
would judge to be unjust. This would not, however, be indicative of or tantamount to failure. The same is true at present, though no doubt to a lesser degree, of both the ICJ and the ICC as well as of many of their rulings. At this stage in the evolution of international institutions, our ambitions must be modest. If the existence and functioning of an unofficial *ad bellum* court would constitute an improvement over the status quo, that would be sufficient justification for trying to establish one, perhaps with the eventual aim of housing a successor institution within the ICJ, whose rulings might or might not remain merely advisory.

Again, the main purpose of an *ad bellum* court would be to provide authoritative guidance about whether wars in the narrow sense are just or unjust. Its judgments would be addressed not only to states and their governments, but also to soldiers and citizens. Its most important practical role would not be in its direct influence on the decisions that governments would make concerning the resort to or continuation of war. It is hard to imagine that political leaders who believed that it was in their interest to go to war might be restrained from doing so solely by being presented with compelling arguments that the war would be unjust. But it is not at all unlikely that many soldiers could be persuaded to refuse to fight by the judgment of an *ad bellum* court that the war in which they had been commanded to fight was unjust, particularly if the doctrine of the Permissibility of Participation had been discredited in their culture. Many civilian citizens might also be persuaded to withdraw their support for a war that the court had declared unjust. Some might be driven to active opposition. The central practical effect of the court and the code on which its judgments would be based would thus be to appeal to the consciences of individuals, including soldiers, civilians, and even government officials. If the code encapsulated our best understanding of *jus ad bellum* and the court were designed and structured to yield objective, impartial judgments in accordance with the code, those judgments could have significant practical effects even though neither the code nor the court would have been endorsed or consented to by states. If states could anticipate that a ruling against them by the court could provoke resistance to their unjust war from both their citizens and their soldiers, thereby putting their domestic legitimacy at risk, the existence of the court could exercise a deterrent effect on governments that are tempted to pursue an unjust war.

Earlier I mentioned the possibility that the widespread rejection of the Permissibility of Participation might lead some soldiers who have been commanded to fight in a just war to pretend to believe that the war is unjust in an effort to avoid having to fight. Concern about this possibility might lead some people to argue for preserving the doctrine of the Permissibility of Participation on pragmatic grounds even if it is in fact untrue. But the proposed *ad bellum* court could allay this concern. For if a war was genuinely just and the court had publicly declared it to be so and given reasons for its judgment, it would be very difficult to maintain a credible or convincing pretense of believing that it was in fact unjust.

It is perhaps worth noting one implication of these claims about the potential utility of an *ad bellum* court. Progress in various areas of science has led to increasing controversy about the use of robots and other autonomous technologies for military purposes. Those who advocate the use of robotic weaponry often claim that advances in both sensor technology and programming have made it possible to design robots that would be better able to discriminate between enemy combatants and noncombatants than
human combatants are. This may be true and is of significance to the extent that the distinction between combatants and noncombatants coincides with the distinction between legitimate and illegitimate targets. But no one, to my knowledge, claims that robots could be better at discriminating between just and unjust wars than an individual person might be; and if robots will be less adept at distinguishing between just and unjust wars than individual persons, it seems to follow, a fortiori, that they would be less adept than an \textit{ad bellum} court. Nor has anyone proposed a way of making robots that would be usable in just wars but not in unjust wars. The development of robots for military uses in war therefore threatens to subvert the aims that an \textit{ad bellum} court would be intended to serve. The immediate aim of the court would be to guide the consciences of soldiers and citizens by providing them with an epistemically reliable and authoritative judgment of the morality of their country’s war. To the extent that soldiers might be motivated to resist a command to fight in a war that the court had judged to be unjust, the court could function to constrain the initiation of unjust wars by raising the costs to states of fighting them. But if a state can reduce its reliance on soldiers with consciences by deploying robots in their place, the practical effect of the court would be diminished. More generally, even if the use of robots could facilitate conformity with the requirements of \textit{jus in bello}, the replacement of morally autonomous agents in war with robots is inimical to the \textit{ad bellum} aim of preventing unjust wars.

3 Details of the Functioning of the Court

In order for the court to provide moral guidance to people deliberating about whether to participate in or otherwise support a war, it obviously cannot wait to deliver its judgment until after the war is over. It must instead conduct its own deliberations and deliver its judgment while the war is in progress. In this respect, as in many others, it would be quite unlike a criminal court, which begins its investigations and delivers its judgment only after a crime, or an attempted criminal act, has been completed. But unlike most domestic crimes, which are either of short duration or can be stopped by law enforcement agents, wars may be protracted and can seldom be terminated except by the belligerent parties themselves. In many cases, therefore, the court would be able to rule in the relatively early stages of a war. In cases in which there was a long build-up to war, when war had been threatened and was clearly in the offing for considerable time, it might even be possible for the court to rule in advance of a war’s initiation.

That the court would have to rule while war was in progress poses various problems. Trying to stop an unjust war is an urgent matter and the court would therefore be under considerable pressure to deliver a judgment quickly, in the hope of exerting its influence as early as possible. This creates a dilemma. Hasty deliberation would diminish the reliability and hence the epistemic authority of the court’s judgment. Yet thorough deliberation would entail delay, during which the forces fighting unjustly might advance toward victory, causing ever-greater harm in the process. Indeed, a state fighting an unjust war might deliberately seek to retard the activities of the court by claiming, for example, that it needed more time to prepare the material it had been invited to submit in defense of its action. The exigency here is unavoidable and the dilemma can be resolved only by a compromise between the two values: rapidity and soundness of judgment. Yet we acknowledge that this kind of compromise can be responsibly made when we hold political leaders legally accountable for a decision to resort to war, even when that decision has to be made in conditions that urgently demand action of some sort.
It is possible, of course, that a state might seek an advisory opinion from the court in advance of going to war. But since the court would have no formal legal standing, this would be very unlikely to happen, except perhaps as a means of publicly threatening war and thus bringing pressure to bear on the state that was the object of the threat. As I cynically but accurately remarked earlier, states and their leaders are seldom sufficiently concerned about morality to allow a decision about the resort to war to hinge on whether the war would be just or unjust.

Given that the court’s principal function would be epistemic and that it would therefore be essential to its purpose that it render its judgments as quickly as possible, it would have to be able to initiate its own cases. Again, if its standing would be unofficial, this would pose no problem, for anyone is free to offer a moral judgment about a war. But the authority to initiate its own cases would also be a necessary feature of any official successor court that might be established within the ICJ or some other international legal institution. Such a court would be ineffective in fulfilling its epistemic function if it had to wait for a petition from a belligerent party or even for a request for an advisory opinion from a UN agency before beginning its deliberations about the justice of a particular war.

Another obvious problem that the court would face is that it might lack access to information that would be critical to its ability to evaluate a war with confidence. The epistemic authority of its judgments would depend just as much on its access to factual information as on the soundness of its principles and reasoning. But just as states often deliberately present misleading or false representations of the facts both to their own citizens and to the world at large, so they could be expected to do the same if they were willing to cooperate with the court to the extent of presenting their case to it. States may also claim, occasionally with justification, that revealing information that is essential to their justification for going to war would compromise their intelligence services and thus imperil their ability to gather further information that is vital to their security. (It has, for example, happened at the ICJ that a state has refused to submit sensitive information on the ground that it could not trust one of the judges not to reveal that information to its adversary in the dispute before the court.) Given that the epistemic authority of the court would depend on its being always required to make its deliberations public and thus open to scrutiny and challenge, this problem could not be addressed by allowing states to submit evidence that the court would pledge not to reveal. There are, therefore, unavoidable obstacles to obtaining empirical information necessary for a fully informed judgment. This is, however, a problem faced by all criminal courts. The credibility of testimony is always subject to doubt and some degree of uncertainty is unavoidable in any moral or legal judgment. If there could eventually be an official ad bellum court within the ICJ or some other international legal institution, it could conceivably have its own small but independent intelligence service. This could mitigate though not eliminate the difficulties the court would face in acquiring trustworthy empirical information. But whether or not this possibility is ever realized, the most important question in all cases is not whether the court would be infallible but whether its judgments could reasonably be expected to be more reliable than those of any single state or individual. The answer to that question might be “yes” even if there were obvious sources of fallibility in its judgments.

Another concern one might have is how an unofficial court, or even an official one, could ensure that its judgments would be conveyed to those most in need of epistemic
guidance – namely, soldiers fighting, or on the verge of fighting, in an unjust war and their civilian fellow citizens. This is a much less serious problem than it would have been in the past. The Internet, email, and other decentralized communications systems such as Twitter make it possible for information to be disseminated throughout the world almost instantaneously, as the totalitarian regime in Iran discovered in the process of suppressing popular uprisings during the summer of 2009. Given that armies are critically reliant on communications technologies, and tend in any case to operate in areas in which individual combatants can have independent access to such technologies, it is virtually impossible for a government to deny its forces access to information that is readily accessible to other individuals throughout the world.

I have noted that the epistemic function of the court requires that it render its judgment not only while war is in progress but also as early in course of the war as possible. As long as the ad bellum court would remain unofficial, there would obviously be no higher court of appeal to which the belligerent party whose war in progress had been ruled unjust could apply in the hope of having the judgment overturned. I suspect that this would have to remain the case even if there were to be an official ad bellum court whose rulings would have the status of law. But the absence of an appeals process does not mean that an ad bellum court would never revisit or reconsider a ruling it had made. On the contrary, it would be necessary for such a court to continue to monitor a war on which it had ruled in case the circumstances of the war were to change in a way that would require a new ruling. For jus ad bellum is concerned not only with the resort to war but with the continuation of war as well, since the moral character of a war can change over time. A just war may become unjust if, for example, it achieves its just cause and yet continues in order to achieve further aims that cannot be permissibly pursued by means of war. And an unjust war may be transformed into a just war, or into a war that is, if not just, at least morally justified. Arguably the war in Iraq satisfied this latter description. It may be that even though the initial invasion was unjust, the destruction of all political authority by US forces necessitated an occupation that only the US was willing and able to impose. In that case, even though the occupation wronged most of those burdened by it, and so was unjust, it may have been morally justified, and better even for those wronged by it, in the conditions created by the unjust invasion. If the moral status of a war in the narrow sense changes in one of these ways, it would be important for the ad bellum court to change its initial ruling to reflect the altered circumstances. A judgment made before a war had been concluded might not be open to appeal with respect to the segment of the war to which it explicitly applies – that is, most or all of the period prior to the time at which the judgment was issued – but that judgment would not necessarily hold with respect to later stages of the same war. (This assumes, of course, that the identity conditions of a war in the narrow sense are not a matter solely of the war’s aims. One and the same war can have a just cause at one time but not another, or be necessary at its inception for the achievement of the just cause but later, in different conditions, cease to be necessary.)

Not only can the moral character of a war change over time but it can also be internally complex at any given time. A war may have a just cause and be both necessary for the achievement of that cause and proportionate in relation to its importance and yet also have other aims that are wrong or unjust. Or a war may have as its main aim a goal that is clearly unjust but also have as a subsidiary aim a goal that is just, though not
sufficiently important to justify the resort to war. In either case the war as a whole may be unjust yet the acts of war by some of the combatants fighting in it might contribute to the achievement of a just aim only. For example, in a war whose main aim is the annexation of land containing oilfields, some combatants might be deployed for the sole aim of releasing political dissidents from unjust imprisonment. What might the court say to these combatants? If the court were to deliver only one of two possible judgments – either the war is just or it is unjust – it might fail to provide them sufficiently nuanced epistemic guidance. It would fail to do so if, for example, it can be morally permissible to fight in certain ways in a war that is unjust overall but may nevertheless achieve an aim that is just. This is an important issue but I will not discuss it here, as it is more a matter of the content of the code than of the functioning of the court.15

Presumably an ad bellum court would, like other courts, render a single judgment (or, if necessary, a sequence of judgments) on each war it would consider rather than issuing separate opinions by individual judges. The judgment of the court would be determined by the votes of the various judges – presumably by a simple majority. But given that the purpose of the court would be epistemic, the degree of agreement or disagreement among the judges would have greater significance than it does in other courts. The voting could serve as a measure of the degree of certainty or uncertainty about the morality of a particular war. Soldiers would be warranted in having a high degree of credence in a unanimous judgment of the judges. But a case in which the judges were almost evenly divided, with the particular judgment winning by only one vote, would be one in which the degree of credence in that judgment that a soldier would be justified in having would be significantly lower. Even in such a case the court would succeed in providing epistemic guidance of a sort: that is, a divided court would suggest that the case was one involving deep moral uncertainty. In such conditions, soldiers on both sides might reasonably conclude that it was permissible, in what Parfit calls the “evidence-relative sense,” to continue to fight.16 If it later became clear that one side had been objectively in the wrong, combatants who had fought on that side would be fully excused for fighting on grounds of nonculpable ignorance, and the judgment of the court could be cited as confirmation that their ignorance was nonculpable.

4 The Relevance of the Court to the Law of Jus in Bello

Suppose, as I have been assuming, that the ad bellum court would be unofficial. Its rulings would not have the status of law – though in any given case the UN Security Council might vote to affirm the court’s decision, in which case it could have the status of law. This, however, would be unlikely, especially early in the history of the court; so the rulings of the court would have to be regarded not as legal judgments but only as epistemically highly authoritative moral judgments. If, as I believe, the doctrine of the Permissibility of Participation is false, those judgments would have important implications for the permissibility of individual action by combatants in war. If the court were to rule that a war in the narrow sense was unjust, and especially if the ruling were unanimous or near-unanimous, combatants fighting in that war would have good reason to defer to the judgment of the court rather than to rely on the claims of their government or on their own private moral judgment. They should accept that their war was unjust. And from that they should conclude that virtually all of their acts of war would be impermissible. This is because, in the absence of a just cause for war, their acts of war cannot satisfy the requirements of jus in bello, properly interpreted.
The Prevention of Unjust Wars

For example, in its generic form, the requirement of discrimination holds that combatants must not intentionally attack those who are innocent in the relevant sense. At present, this is most commonly taken to mean that combatants must not intentionally attack noncombatants, though they may attack anyone who is an enemy combatant. But while this may be the correct articulation of a convention, it is not a principle of basic morality. Understood as a principle of basic morality, the requirement of discrimination holds that combatants must not intentionally attack those who have done nothing to make themselves morally liable to attack. And those who are not morally liable to attack include combatants who fight by permissible means in a just war. For such combatants merely defend themselves and others from a threat of wrongful harm, and this cannot be a source of liability to attack. The requirement of discrimination, therefore, prohibits attacks against just combatants, except when such an attack is necessary to prevent a just combatant from pursuing his just cause by impermissible means. Unjust combatants, therefore, cannot fight without violating the requirement of discrimination, except perhaps in isolated instances in a war that consists mostly of attacks against the innocent.

Unjust combatants are also unable to satisfy either the requirement of proportionality or the requirement of necessity, or minimal force. The central problem of proportionality in war is the problem is justifying harms caused to the innocent as a side effect of military action. These harms might be outweighed by the intended good effects of this action or by the intended good effects in conjunction with the action’s good side effects. But if the war is morally unjustified, many or all of its intended effects will, from an impartial point of view, be bad rather than good. And the good side effects of an act cannot morally outweigh its bad side effects if the bad side effects cannot be justified as unavoidable concomitants of the achievement of a just aim. Suppose, for example, that I am seized by a whim to create a loud explosion. The explosion will have as a bad side effect the killing of an innocent bystander. But it will also have another side effect that is good: it will frighten off a man who would otherwise have murdered another innocent bystander. Does the good side effect counterbalance the bad, making it permissible for me to create the explosion? Intuitively, it seems that it does not. It is not enough that the bad side effect is counterbalanced by a proportionately good side effect. In order to be able to justify the killing of an innocent person as a side effect, my act must be intended to achieve an end that is good to at least the extent that the killing is bad.

Finally, the in bello requirement of necessity presupposes a just aim. That is what a harmful act must be necessary for. When there is no just aim, the minimal force necessary to achieve it is no force at all.

A judgment of the ad bellum court that a war was unjust would therefore put those fighting in that war on notice that virtually all of their acts of war were morally wrong. The court’s main appeal would be to individual conscience: its ruling would imply that those fighting in the war it had condemned ought morally to cease to fight. At present, however, the law of war diverges quite sharply from this understanding of the morality of war. The law presupposes a legal analogue of the doctrine of the Permissibility of Participation – namely, that it is not illegal to fight in an illegal war. This view is, however, of questionable coherence, since it is hard to make sense of the idea that a war in the narrow sense is, as a whole, illegal when all the acts that together compose or constitute it are individually legal. One response to this objection is to rephrase the view as a claim about the application of the law. On this understanding, the principles of jus
ad bellum apply to political leaders but not to combatants, while the principles of jus in bello apply to both, in the sense that both combatants and their leaders may be answerable for an in bello crime perpetrated only by the former. Since ad bellum law does not apply directly to the acts of combatants, in bello law can be and is neutral between just combatants and unjust combatants. Its prohibitions are equally satisfiable by both. Combatants on both sides are capable of refraining from, for example, intentionally attacking noncombatants, mistreating prisoners of war, causing unintended harm to noncombatants that is excessive in relation to the expected military advantage, causing greater harm than is necessary to achieve the military objective, and so on.

One reason why the law of jus in bello is neutral in this way is, as I have stressed throughout, that it is usually difficult to determine which side, if any, is fighting a just war, and which is fighting an unjust war – an issue on which the law itself offers insufficient guidance to make it acceptable for the law of jus in bello to distinguish between just and unjust combatants. It cannot reasonably hold unjust combatants to a different standard if it does not provide adequate guidance to combatants in determining whether they are just or unjust combatants. To distinguish between them legally might be not only unfair but also pointless, since most unjust combatants believe that they are just combatants and the law at present has no method of authoritatively contravening that belief. This situation would remain unchanged even if there were an ad bellum court, as long as the court was unofficial. For its rulings would have no legal authority and thus could not provide an adequate basis for discriminating between combatants who were fighting legally and those who were fighting illegally.

If, by contrast, there were ever to be an ad bellum court whose rulings would be legally authoritative, that could make it possible for the law of jus in bello to distinguish between just and unjust combatants. This possibility raises various questions, such as whether it would be desirable to treat unjust combatants differently under the law from just combatants and if so in what ways. Since acts of war by unjust combatants are almost always morally wrong while a wide range of permissible acts of war are open to just combatants, it seems, prima facie, that acts of war by unjust combatants ought to be treated differently in the law of jus in bello. Because in conducting military attacks against just combatants, they would be intentionally killing people who are innocent in the morally relevant sense, it cannot be claimed that the acts of unjust combatants are not of the sort in which the law must take an interest. Yet I have given reasons why it would be a mistake to hold unjust combatants liable to criminal punishment merely for fighting in an unjust war. Thus it would be reasonable for the law to hold that while mere participation in an unjust war would be illegal, it would not be criminal – that is, that it would be condemned by the law but not be punishable.

But it would of course still be necessary to have a range of in bello crimes that would be punishable. There are moral limits to what may permissibly be done even in a just war and legal war and it is important for those limits to be recognized and enforced by law. And even if all acts of war done by unjust combatants are morally wrong and even if this were widely acknowledged, people would nevertheless continue to fight in unjust wars and it would be necessary to deter them from engaging in the most egregious forms of wrongdoing by threatening them with punishment. The law of jus in bello would therefore have to distinguish between acts of war by unjust combatants that would be illegal but not punishable and those that would be criminal and therefore punishable.
It would also have to distinguish between acts of war by just combatants that would be legal and those that would be criminal.

In conditions in which an official ad bellum court could distinguish between just and unjust combatants in a legally authoritative way, ought the law of jus in bello to remain as it is or ought it to be revised? And if it ought to be revised, ought it to impose constraints on unjust combatants that would be more restrictive than those it would impose on just combatants, so that unjust combatants would be punishable for a wider range of offenses?

I will not attempt to answer this question here, though it is an important one. I will merely note that in addition to possibility that the law could be asymmetrical between just and unjust combatants, imposing stricter constraints on those who had been identified by the court as unjust combatants, there are two main ways in which a revised law might remain symmetrical – that is, might impose identical criminal prohibitions on just and unjust combatants alike. One way would be for the law to permit both just and unjust combatants to do all and only those act-types that are objectively morally permissible for just combatants. If, for example, just combatants are morally permitted to kill enemy combatants but not enemy noncombatants, the law would permit both just and unjust combatants to kill enemy combatants but would forbid both to kill enemy noncombatants. Such an arrangement might, however, turn out to be excessively permissive for unjust combatants. Suppose, for example, that just combatants are morally permitted on certain rare occasions to attack enemy noncombatants. According to this first way of making the law of jus in bello symmetrical, “intentionally attack noncombatants” would then be an act-type that would in principle be permissible for both just and unjust combatants. It might be, however, that if the law were to grant that there were some instances, however rare, in which it would not be criminal for unjust combatants intentionally to kill noncombatants, unjust combatants would exploit that provision as a legal justification for killing noncombatants on almost any occasion on which it seemed advantageous to them to do so. This might be a decisive reason why the law ought to criminalize all intentional attacks by unjust combatants against noncombatants. But if the law were to remain symmetrical, it would have to impose the same criminal prohibition on just combatants. Given that the range of cases in which it might be permissible for just combatants intentionally to attack noncombatants would be quite narrow, it might be far more important to deter unjust combatants from wrongfully attacking noncombatants than to permit just combatants to attack them on those relatively few occasions on which it would be morally permissible.

It seems to me that the proper aim of the law of jus in bello is not, as has generally been supposed, to minimize the overall harm caused by war, but is instead to minimize the wrongful harms done in war. And it seems likely that the set of symmetrical in bello laws that would be most effective in achieving this aim is one that would diverge from morality in the following ways. Because it would be a mistake to hold unjust combatants liable to punishment for mere participation in an unjust war, the law would not criminalize many acts of war by unjust combatants that were in fact morally impermissible and for which (if they continued to fight in defiance of the court’s official ruling) they might deserve punishment. Suppose, moreover, that there are some acts that are morally permissible for just combatants but that it is more important to prevent unjust combatants from doing them than it is to allow just combatants to do them. In that case,
the law ought to criminalize those acts, making it criminal for just combatants to act in ways that, for them, are morally permissible. A symmetrical law of *jus in bello* would, in effect, be a compromise between the aim of permitting just combatants to do enough to ensure victory and the aim of restricting unjust combatants enough to keep their action within the boundaries of the tolerable.

### 5 Conclusion

In the many variations of the traditional just war doctrine of *jus ad bellum*, one fairly constant element has been a requirement of “legitimate authority.” While there is a cynical explanation of its appearance on some of the early lists of *ad bellum* requirements – namely, that it appealed to leaders of states because it seemed effectively to rule out domestic revolution – there are also reasons why such a requirement can be important. It can, for example, help to ensure that a society is not taken to war against the will of its members. But those who have insisted on a requirement of proper authorization for the resort to war have also been concerned to prevent war from being undertaken without adequate justification. On this view, the role of the authority is primarily epistemic. But if this is the purpose of the requirement, it has not been well served by the bodies that are typically cited when people want to show that a war has satisfied the requirement: for example, the UN Security Council or, in the US, the Congress, which according to the Constitution is the only entity with the authority to declare war. An international *ad bellum* court, especially one whose rulings would have the status of law, would finally give some teeth to this traditional just war requirement. If such a court, whether official or unofficial, could accomplish even some of the aims I have suggested it could, it would be an institution that would be well worth having.¹⁷

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³ For discussion of this kind of case and its implications, see Saba Bazargan, “The Permissibility of Aiding and Abetting Unjust Wars,” unpublished manuscript on file with the author.

⁴ If there can be justified wars in which it is permissible to fight, the Permissibility of Participation is implicit in the doctrine of the “moral equality of combatants,” which holds that combatants on all sides in a war have the same moral status – that is, the same rights, permissions, immunities, and liabilities. But the Permissibility of Participation is not equivalent to the moral equality of combatants.


⁸ Quoted from draft material for a book in progress.

⁹ Thomas Hobbes, *De Cive*, chapter XII, paragraph II. This book may be found on line at [http://www.constitution.org/th/decive.htm](http://www.constitution.org/th/decive.htm).

¹⁰ *Killing in War*, chapters 1 and 2.

Thanks to Mattias Kumm for suggesting the *Nicaragua* case as an example of an unenforceable legal judgment that nevertheless had significant practical effects.


In this paragraph I am indebted to Bazargan’s important article, “The Permissibility of Aiding and Abetting Unjust Wars,” which concludes that the unit of evaluation in *jus ad bellum* should not, at least in some instances, be wars in the narrow sense but the aims or goals of such wars.


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