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Chapter 1 : Just war theory - Wikipedia

symmetrical application of jus in bello proportionality to just and unjust combatants alike. 7 On their view, unjust combatants cannot conform to jus in bello proportionality.

References and Further Reading 1. Introduction Historically, the just war tradition--a set of mutually agreed rules of combat--may be said to commonly evolve between two culturally similar enemies. That is, when an array of values are shared between two warring peoples, we often find that they implicitly or explicitly agree upon limits to their warfare. It is only when the enemy is seen to be a people, sharing a moral identity with whom one will do business in the following peace, that tacit or explicit rules are formed for how wars should be fought and who they should involve and what kind of relations should apply in the aftermath of war. In part, the motivation for forming or agreeing to certain conventions, can be seen as mutually benefiting--preferable, for instance, to the deployment of any underhand tactics or weapons that may provoke an indefinite series of vengeance acts, or the kinds of action that have proved to be detrimental to the political or moral interests to both sides in the past. Regardless of the conventions that have historically formed, it has been the concern of the majority of just war theorists that the lack of rules to war or any asymmetrical morality between belligerents should be denounced, and that the rules of war should apply to all equally. That is, just war theory should be universal, binding on all and capable in turn of appraising the actions of all parties over and above any historically formed conventions. The just war tradition is indeed as old as warfare itself. Early records of collective fighting indicate that some moral considerations were used by warriors to limit the outbreak or to rein in the potential devastation of warfare. They may have involved consideration of women and children or the treatment of prisoners enslaving them rather than killing them, or ransoming or exchanging them. Commonly, the earlier traditions invoked considerations of honor: Robinson notes that honor conventions are also contextually slippery, giving way to pragmatic or military interest when required. The just war theory also has a long history. Parts of the Bible hint at ethical behavior in war and concepts of just cause, typically announcing the justice of war by divine intervention; the Greeks may have paid lip service to the gods, but, as with the Romans, practical and political issues tended to overwhelm any fledgling legal conventions: Augustine provided comments on the morality of war from the Christian perspective railing against the love of violence that war can engender as did several Arabic commentators in the intellectual flourishing from the 9th to 12th centuries, but the most systematic exposition in the Western tradition and one that still attracts attention was outlined by Saint Thomas Aquinas in the 13th century. In the *Summa Theologicae*, Aquinas presents the general outline of what becomes the traditional just war theory as discussed in modern universities. He discusses not only the justification of war but also the kinds of activity that are permissible for a Christian in war see below. The most important of these writers are: In the twentieth century, just war theory has undergone a revival mainly in response to the invention of nuclear weaponry and American involvement in the Vietnam war. Conference proceedings are regularly published, offering readers a breadth of issues that the topic stirs: What has been of great interest is that in the headline wars of the past decade, the dynamic interplay of the rules and conventions of warfare not only remain intact on the battlefield but their role and hence their explication have been awarded a higher level of scrutiny and debate. In the political circles, justification of war still requires even in the most critical analysis a superficial acknowledgement of justification. But, arguably, such acts do remain atrocities by virtue of the just war conventions that some things in war are deemed to be inexcusable, regardless of the righteousness of the cause or the noise and fog of battle. Yet increasingly, the rule of law - the need to hold violators and transgressors responsible for their actions in war and therefore after the battle - is making headway onto the battlefield. In chivalrous times, the Christian crusader could seek priestly absolution for atrocities committed in war, a stance supported by Augustine for example; today, the law courts are seemingly less forgiving: Nonetheless, the idealism of those who seek the imposition of law and responsibility on the battlefield cf. And in some cases,

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no just war conventions and hence no potential for legal acknowledgement of malfeasance, exist at all; in such cases, the ethic of war is considered, or is implicitly held to be, beyond the norms of peaceful ethics and therefore deserving a separate moral realm where "fair is foul and foul is fair" Shakespeare, Macbeth I. In such examples e. The continued brutality of war in the face of conventions and courts of international law lead some to maintain that the application of morality to war is a nonstarter: But there are those of a more skeptical persuasion who do not believe that morality can or should exist in war: But as there are several ethical viewpoints, there are also several common reasons laid against the need or the possibility of morality in war. Generally, consequentialists and act utilitarians may claim that if military victory is sought then all methods should be employed to ensure it is gained at a minimum of expense and time. However, intrinsicists who claim that there are certain acts that are good or bad in themselves may also decree that no morality can exist in the state of war: Alternatively, intrinsicists may claim that possessing a just cause the argument from righteousness is a sufficient condition for pursuing whatever means are necessary to gain a victory or to punish an enemy. A different skeptical argument, one advanced by Michael Walzer, is that the invention of nuclear weapons alters war so much that our notions of morality and hence just war theories become redundant. However, against Walzer, it can be reasonably argued that although such weapons change the nature of warfare for example, the timing, range, and potential devastation they do not dissolve the need to consider their use within a moral framework: Whilst skeptical positions may be derived from consequentialist and intrinsicist positions, they need not be. Consequentialists can argue that there are long-term benefits to having a war convention. For example, by fighting cleanly, both sides can be sure that the war does not escalate, thus reducing the probability of creating an incessant war of counter-revenges. Intrinsicists, on the other hand, can argue that certain spheres of life ought never to be targeted in war; for example, hospitals and densely populated suburbs. The inherent problem with both ethical models is that they become either vague or restrictive when it comes to war. Consequentialism is an open-ended model, highly vulnerable to pressing military or political needs to adhere to any code of conduct in war: In principle such a prescription is commendable, yet the nature of war is not so clean cut when military targets can be hidden amongst civilian centers. Against these two ethical positions, just war theory offers a series of principles that aim to retain a plausible moral framework for war. From the just war *justum bellum* tradition, theorists distinguish between the rules that govern the justice of war *jus ad bellum* from those that govern just and fair conduct in war *jus in bello* and the responsibility and accountability of warring parties after the war *jus post bellum*. The three aspects are by no means mutually exclusive, but they offer a set of moral guidelines for waging war that are neither unrestricted nor too restrictive. The problem for ethics involves expounding the guidelines in particular wars or situations. One can immediately detect that the principles are not wholly intrinsicist nor consequentialist they invoke the concerns of both models. Whilst this provides just war theory with the advantage of flexibility, the lack of a strict ethical framework means that the principles themselves are open to broad interpretations. Examining each in turn draws attention to the relevant problems. Possessing just cause is the first and arguably the most important condition of *jus ad bellum*. Most theorists hold that initiating acts of aggression is unjust and gives a group a just cause to defend itself. But unless "aggression" is defined, this proscription is rather open-ended. The onus is then on the just war theorist to provide a consistent and sound account of what is meant by just cause. Whilst not going into the reasons why the other explanations do not offer a useful condition of just cause, the consensus is that an initiation of physical force is wrong and may justly be resisted. Self-defense against physical aggression, therefore, is putatively the only sufficient reason for just cause. Nonetheless, the principle of self-defense can be extrapolated to anticipate probable acts of aggression, as well as in assisting others against an oppressive government or from another external threat interventionism. Therefore, it is commonly held that aggressive war is only permissible if its purpose is to retaliate against a wrong already committed for example, to pursue and punish an aggressor, or to pre-empt an anticipated attack. In recent years, the argument for preemption has gained supporters in the West: By acting decisively against a probable aggressor, a powerful message is sent that a nation will defend itself with armed

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force; thus preemption may provide a deterrent and a more peaceful world. Unfortunately, false flag operations tend to be quite common. Realists may defend them on grounds of a higher necessity but such moves are likely to fail as being smoke screens for political rather than moral interests. War should always be a last resort. This connects intimately with presenting a just cause – all other forms of solution must have been attempted prior to the declaration of war. The resulting damage that war wrecks tends to be very high for most economies and so theorists have advised that war should not be lightly accepted: Yet the just war theorist wishes to underline the need to attempt all other solutions but also to tie the justice of the war to the other principles of jus ad bellum too. The notion of proper authority seems to be resolved for most of the theorists, who claim it obviously resides in the sovereign power of the state. But the concept of sovereignty raises a plethora of issues to consider here. If a government is just, i. A historical example can elucidate the problem: What allegiance did the people of France under its rule owe to its precepts and rules? A Hobbesian rendition of almost absolute allegiance to the state entails that resistance is wrong so long as the state is not tyrannical and imposes war when it should be the guardian of peace ; whereas a Lockean or instrumentalist conception of the state entails that a poorly accountable, inept, or corrupt regime possesses no sovereignty, and the right of declaring war to defend themselves against the government or from a foreign power is wholly justifiable. The notion of proper authority therefore requires thinking about what is meant by sovereignty, what is meant by the state, and what is the proper relationship between a people and its government. The possession of right intention is ostensibly less problematic. The general thrust of the concept being that a nation waging a just war should be doing so for the cause of justice and not for reasons of self-interest or aggrandizement. Putatively, a just war cannot be considered to be just if reasons of national interest are paramount or overwhelm the pretext of fighting aggression. According to Kant, possessing good intent constitutes the only condition of moral activity, regardless of the consequences envisioned or caused, and regardless, or even in spite, of any self interest in the action the agent may have. The extreme intrinsicism of Kant can be criticized on various grounds, the most pertinent here being the value of self-interest itself. Acting with proper intent requires us to think about what is proper and it is not certain that not acting in self interest is necessarily the proper thing to do. On the other hand, a nation may possess just cause to defend an oppressed group, and may rightly argue that the proper intention is to secure their freedom, yet such a war may justly be deemed too expensive or too difficult to wage; i. On that account, the realist may counter that national interest is paramount: The issue of intention raises the concern of practicalities as well as consequences, both of which should be considered before declaring war. The next principle is that of reasonable success. This is another necessary condition for waging just war, but again is insufficient by itself. Given just cause and right intention, the just war theory asserts that there must be a reasonable probability of success. The principle of reasonable success is consequentialist in that the costs and benefits of a campaign must be calculated. However, the concept of weighing benefits poses moral as well as practical problems as evinced in the following questions. Should one not go to the aid of a people or declare war if there is no conceivable chance of success? Is it right to comply with aggression because the costs of not complying are too prohibitive? Would it be right to crush a weak enemy because it would be marginally costless? Is it not sometimes morally necessary to stand up to a bullying larger force, as the Finns did when Russia invaded in , for the sake of national self-esteem or simple interests of defending land? Historically, many nations have overcome the probability of defeat: Victory, victory at all costs, victory in spite of all terror; victory, however long and hard the road may be; for without victory, there is no survival. However, the thrust of the reasonable success principle emphasizes that human life and economic resources should not be wasted in what would obviously be an uneven match. For a nation threatened by invasion, other forms of retaliation or defense may be available, such as civil disobedience, or even forming alliances with other small nations to equalize the odds. The final guide of jus ad bellum is that the desired end should be proportional to the means used. This principle overlaps into the moral guidelines of how a war should be fought, namely the principles of jus in bello. With regards to just cause, a policy of war requires a goal, and that goal must be proportional to the other principles of just cause. For example, if nation

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A invades a land belonging to the people of nation B, then B has just cause to take the land back.

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Chapter 2 : War Crimes and Immoral Action in War | Jeff McMahan - www.nxgvision.com

o A person cannot be liable simpliciter Unjust combatants can rarely satisfy the condition of discrimination Two types of proportionality: 1. Ad bellum proportionality: the resort to war is impermissible if the bad effects of the war would outweigh the good 2.

Pre-Christian[edit] The Indian Hindu epic, the Mahabharata , offers one of the first written discussions of a "just war" dharma-yuddha or "righteous war". In it, one of five ruling brothers asks if the suffering caused by war can ever be justified, and then a long discussion ensues between the siblings, establishing criteria like proportionality chariots cannot attack cavalry, only other chariots; no attacking people in distress , just means no poisoned or barbed arrows , just cause no attacking out of rage , and fair treatment of captives and the wounded. At the beginning of the war, there is the discussion of "just conduct" appropriate to the context of war. A study found that the just war tradition can be traced as far back as to Ancient Egypt, "demonstrating that just war thought developed beyond the boundaries of Europe and existed many centuries earlier than the advent of Christianity or even the emergence of Greco-Roman doctrine. In Contra Faustum Manichaeum book 22 sections 69â€”76, Augustine argues that Christians, as part of a government, need not be ashamed of protecting peace and punishing wickedness when forced to do so by a government. Augustine asserted that this was a personal, philosophical stance: The sacred seat of virtue is the heart. They who have waged war in obedience to the divine command, or in conformity with His laws, have represented in their persons the public justice or the wisdom of government, and in this capacity have put to death wicked men; such persons have by no means violated the commandment, "Thou shalt not kill. But, say they, the wise man will wage Just Wars. As if he would not all the rather lament the necessity of just wars, if he remembers that he is a man; for if they were not just he would not wage them, and would therefore be delivered from all wars. Mark Mattox writes that, for the individual Christian under the rule of a government engaged in an immoral war, Augustine admonished that Christians, "by divine edict, have no choice but to subject themselves to their political masters and [should] seek to ensure that they execute their war-fighting duty as justly as possible. Proper Authority is first: Third, peace must be a central motive even in the midst of violence. Soldiers must also fight for this intention. Both are fountains of knowledge; both come from God. Please help improve this section by adding citations to reliable sources. Unsourced material may be challenged and removed. February Learn how and when to remove this template message The School of Salamanca expanded on Thomistic understanding of natural law and just war. It stated that war is one of the worst evils suffered by mankind. Diplomatic resolution is always preferable, even for the more powerful party, before a war is started. Examples of "just war" are: In self-defense, as long as there is a reasonable possibility of success. Preventive war against a tyrant who is about to attack. War to punish a guilty enemy. A war is not legitimate or illegitimate simply based on its original motivation: It is necessary that the response be commensurate with the evil; use of more violence than is strictly necessary would constitute an unjust war. Governing authorities declare war, but their decision is not sufficient cause to begin a war. If the people oppose a war, then it is illegitimate. The people have a right to depose a government that is waging, or is about to wage, an unjust war. Once war has begun, there remain moral limits to action. For example, one may not attack innocents or kill hostages. It is obligatory to take advantage of all options for dialogue and negotiations before undertaking a war; war is only legitimate as a last resort. Under this doctrine expansionist wars, wars of pillage, wars to convert infidels or pagans , and wars for glory are all inherently unjust. Doctrine[edit] The just war doctrine of the Catholic Church â€”sometimes mistaken as the "just war theory" [23] [24] â€”found in the Catechism of the Catholic Church , in paragraph , lists four strict conditions for "legitimate defense by military force": It is important to remember that "it is one thing to wage a war of self-defence; it is quite another to seek to impose domination on another nation. The possession of war potential does not justify the use of force for political or military objectives. Nor does the mere fact that war has unfortunately broken out mean that all is fair between the warring parties". The Charter

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of the United Nations intends to preserve future generations from war with a prohibition against force to resolve disputes between States. Like most philosophy, it permits legitimate defence and measures to maintain peace. In every case, the charter requires that self-defence must respect the traditional limits of necessity and proportionality. Therefore, engaging in a preventive war without clear proof that an attack is imminent cannot fail to raise serious moral and juridical questions. International legitimacy for the use of armed force, on the basis of rigorous assessment and with well-founded motivations, can only be given by the decision of a competent body that identifies specific situations as threats to peace and authorizes an intrusion into the sphere of autonomy usually reserved to a State. Although the criticism can be made that the application of just war theory is relativistic, one of the fundamental bases of the tradition is the Ethic of Reciprocity, particularly when it comes to in bello considerations of deportment during battle. If one set of combatants promise to treat their enemies with a modicum of restraint and respect, then the hope is that other sets of combatants will do similarly in reciprocation, a concept not unrelated to the considerations of Game Theory. Just war theorists combine a moral abhorrence towards war with a readiness to accept that war may sometimes be necessary. The criteria of the just war tradition act as an aid to determining whether resorting to arms is morally permissible. Just war theories are attempts "to distinguish between justifiable and unjustifiable uses of organized armed forces"; they attempt "to conceive of how the use of arms might be restrained, made more humane, and ultimately directed towards the aim of establishing lasting peace and justice". Soviet leader Vladimir Lenin defined only three types of just war [31], all of which share the central trait of being revolutionary in character. In that manner, Lenin shunned the more common interpretation of a defensive war as a just one -- often summarized as "who fired the first shot? Which side initiated aggressions or had a grievance or any other commonly considered factor of jus ad bellum mattered not at all, he claimed; if one side was being oppressed by the other, the war against the oppressor would always be, by definition, a defensive war anyway. Any war lacking this duality of oppressed and oppressor was, in contradistinction, always a reactionary, unjust war, in which the oppressed effectively fight in order to protect their own oppressors: Clearly, the application of the term "defensive" war, or war "for the defence of the fatherland" in such a case would be historically false, and in practice would be sheer deception of the common people, of philistines, of ignorant people, by the astute slaveowners. Precisely in this way are the present-day imperialist bourgeoisie deceiving the peoples by means of "national ideology" and the term "defence of the fatherland" in the present war between slave-owners for fortifying and strengthening slavery. A war is unjust, on the other hand, when a people try to impose domination on another people, or try to retain an already existing coercive rule over them. The just war theory prevailing for most of the last two centuries -- "that violence is an evil that can, in certain situations, be condoned as the lesser of evils" -- is relatively young. Although it has inherited some elements the criteria of legitimate authority, just cause, right intention from the older war theory that first evolved around AD, it has rejected two premises that underpinned all medieval just wars, including crusades:

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Chapter 3 : Jeff McMahan: Killin in War by Bori Greskovics on Prezi

Unjust combatants—combatants on the side that violated the principles of *jus ad bellum*—act permissibly, so long as they satisfy the principles of *jus in bello*. 3.

Fighting Well and Limited War The rules of *jus in bello* aim to confine the destructiveness of war, rule out certain kinds of weapons, protect civilians, and limit the area and range of fighting. Many note that the methods of contemporary war, nuclear warfare in particular, are inescapably in violation of the principles of proportionality and non-combatant immunity. Must such warfare be rejected as a moral possibility on just war grounds? The rules of *jus in bello* or justice in war serve as guidelines for fighting well once war has begun. Some maintain that morality does not exist in warfare, and therefore object to just war theory. Just war theory, on the other hand, sets forth a moral framework for warfare and rejects the notion that "anything goes" during times of war. Belligerent armies are entitled to try to win, but they cannot do anything that is, or seems, necessary to achieve victory. The principles of humanitarian law are thought to apply in conflict, and to regulate the conduct of military forces. Total war, where neither discrimination nor proportionality serve as mitigating considerations, is to be avoided. When soldiers attack non-combatants, pursue their enemy beyond what is reasonable, or violate other rules of fair conduct, they commit not acts of war, but acts of murder. War crimes tribunals are meant to address such crimes. Note that the guidelines governing justice in war are distinct from those of *jus ad bellum*, or justice of war. Even if a nation lacks just cause for war, it may fight justly once war has begun. Conversely, a nation with just cause may fight unjustly. The two central principles of *jus in bello*, discrimination and proportionality, establish rules of just and fair conduct during warfare. The principle of discrimination concerns who are legitimate targets in war, while the principle of proportionality concerns how much force is morally appropriate. Discrimination and Non-Combatant Immunity The principle of discrimination recognizes that individuals have a moral standing "independent of and resistant to the exigencies of war. Civilians, on the other hand, have not forfeited these rights, and are never permissible targets of war. Houses, places of worship, and schools should be immune from attack as well. Thus, the principle of non-combatant immunity suggests that war is a fight between combatants, and that only military objectives are legitimate targets of attack. Many believe that noncombatants may never be subject to direct, intentional attack, even if one is fighting on the just side of the war. The term "collateral damage" refers to destruction unavoidably incurred in the act of destroying a target deemed to be of military significance. The doctrine of double effect suggests that civilian casualties are justifiable so long as their deaths are not intended and merely accidental. This is a way of "reconciling the absolute prohibition against attacking noncombatants with the legitimate conduct of military activity. Thus, munitions workers, or others employed in industries associated with the war effort, are legitimate targets while at work in the factory. But they are not liable to attack when in their homes. However, others believe that noncombatants do not require such extreme protection if the war is just. The question of how to balance military objectives and civilian casualties is no doubt a difficult one. Yet another difficult question is how to define who is a combatant and who is not. While combatants usually carry arms openly, guerillas disguise themselves as civilians. International law suggests that the inhabitants of non-occupied territory, who take up arms on the approach of the enemy and resist the invading troops, even if they have not had time to organize themselves, count as armed forces. Some have maintained that in these cases, the burden is on the government to identify combatants, while others argue that "the nature of modern warfare dissolves the possibility of discrimination. It suggests that the injury caused should be proportional to the objective desired, and that the extent and violence of warfare must be tempered to minimize destruction and casualties. In addition, "the evil produced by the war must not be greater than the good done or the evil averted by it. Just as the *jus ad bellum* principle of right intention suggests that wars must be fought for limited objectives, the notion of limited war suggests that there must be restraint with regard to the quantity and quality of weaponry used during warfare. The use of asphyxiating or poisonous

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gases, the starvation of civilians as a method of warfare, and the destruction of objects that are indispensable to the civilian population are prohibited. Finally, the law of armed conflict forbids acts that go beyond the purpose of defeating the enemy party and cause unnecessary injury. If a choice is possible among military objectives, the one selected should be that likely to cause the least destruction and casualties. Once a soldier has laid down his arms and surrendered, he assumes the status of a non-combatant and cannot be killed or attacked. His property must not be destroyed or seized, unless this is imperatively demanded by the necessities of war. In addition, it is forbidden to steal from prisoners of war or the sick and wounded, or to mutilate or steal from corpses. Combatants that are captured in battle must be humanely treated. Prisoners of war are entitled to basic human respect and are to be protected against any acts of violence or intimidation. Basic Books, , *A Moral and Historical Inquiry*. Princeton University Press, , xxiii. Manchester University Press, , Updated edition available here. The Responsibility to Protect: International Development Research Centre, , Use the following to cite this article: Guy Burgess and Heidi Burgess.

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Chapter 4 : jus in bello » International Law Journal | Boston University

Jus ad bellum permits a nation to conceal its real reasons for going to war in order to gain an advantage over its enemy. False While the moral burden of jus in bello falls primarily on military leaders, political leaders often play a key role in establishing targeting policy, approving specific targets, and developing rules of engagement.

It defines standards by which a country can conduct war and the actions during the war should be just and fair. It is a group of principles intended as guidelines for the just prosecution of war. This term includes two principles of discrimination and proportionality. Discrimination defines legitimate targets and proportionality defines how much force could be used US Legal, The American Civil war did not have any illegal targets that were attacked or harmed, this would give the indication that this war may be just in this regard at least. There were no occasions such as battles or skirmishes that any disproportional force was used in the American Civil war. That a soldier fighting a just war, a just combatant McMahan, J , can fight unjustly seems obvious; however the claim that a soldier fighting an unjust war, an unjust combatant, can fight justly is controversial. According to Antony Lamb legitimate combatants of war are those who meet the following criteria; if a person carries arms openly in a during each military engagement b during each time as he is visible to the adversary while he is engaged in a military deployment. In the American Civil war there are no noted instances where non-combatants and or civilians were indiscriminately attacked. The main objective of the American Civil war was for the Union states of America under the rule of President Lincoln to overturn the uprising of the Confederates in the South. The proportionality of violence during the war was not really proportional to the objective as there were approximately , soldiers killed, and in total due to violence and disease was approximately 1., This war accounted for as many deaths as all other American wars combined. There were as many as eight battles in the American Civil war that could be classified as massacres. There can be no real justification for a massacre occurring in any battle. During the American Civil war was what is probably one of the most infamous assassinations of all time, the assassination of President Abraham Lincoln, by John Wilkes Booth in Booths ambition to murder Lincoln was to aid the Confederates, which had just surrendered to Union forces. This assassination may be justifiable in the perspective of the Confederates, but not by the Union States of America. Traditional just war theory was inclined to prohibit assassination of political and military leaders on two grounds. Armed personnel were permitted to attack only other armed personnel The National Catholic Review, The sixth commandment prohibits taking innocent human life. If the sixth commandment mainly and all of the Ten Commandments generally were followed, then we would not have wars. In such a setting, the sixth commandment actually helps to reinforce a biblical view of participating in a just war, for it shows us the value of human life. Human life must be defended and protected. If it becomes necessary for legitimate authority to take up arms to defend human life, then Christians ought to do so. It appears that some Advent groups attempted to buy exemption from the draft for their male members. The April 23, issue contained a quote from the Harbinger expressing sorrow at the death of President Lincoln, thanking God that Lincoln made laws to deliver Christians from participating in war. Therefore due to the laws Christians did not participate in the American Civil War. In the American Civil War there was no individuals that were held responsible for their actions as they participated in war activities. In the American Civil War there was 10 main crimes that occurred, the most heinous crime was the Camp Sumter which was a prisoner of war camp. The prison covered 25 and a half acres. Inside the camp there was a total of eight buildings which could house men. The reason for this is by the end of the war there was approximately 45, men, 13, men died after seven months of being in the camp from heat stroke, starvation, or a disease. There was also at least another nine crimes that happened in the American Civil War. Powered by Create your own unique website with customizable templates.

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Chapter 5 : Jus in Bello - Was the American Civil War a Just War?

Unjust combatants can seldom satisfy the jus in bello requirement of discrimination, since just combatants seldom make themselves liable to attack and thus are in general illegitimate targets.

Tragically, the issue I will discuss is, once again, as timely as it is significant to the evolving law of war in the twenty-first century. For the third time in six years, a brutal armed conflict has afflicted the Gaza Strip, killing or injuring thousands. As in the past, the term proportionality permeates both legal commentary and media coverage of the conflict. And as in the past, the term gets bandied about but rarely defined precisely and often misused, rhetorically and otherwise. Not only can these dimensions of proportionality be difficult to distinguish in theory and a fortiori in practice ; participants in armed conflicts also may have propagandistic incentives to obscure them. The unfortunate rhetorical use of the term disproportionate contributes to a relatively commonplace but mistaken view: While plainly hyperbolic, there is undoubtedly some truth to this view: There are many and diverse reasons for this. But perhaps the chief problem is that the core of the principle is a directive to weigh incommensurables. This leads to exasperated statements such as that of former U. Ambassador to the United Nations John Bolton, speaking to the press at the outset of the war between Israel and Hezbollah: What Hezbollah has done is kidnap Israeli soldiers and rain rockets and mortar shells on innocent Israeli civilians. What Israel has done in response is act in self-defense. Is Israel entitled only to kidnap two Hezbollah operatives and fire a couple of rockets aimlessly into Lebanon? We need not, in my view, throw up our hands in the face of this question. But neither is it susceptible to a formulaic answer. I stress at the outset that I do not suggest that this thesis lacks value; only that it does not suffice, and at times, it may affirmatively mislead. For purposes of proportionality, a civilian is a civilian, period. A military commander should therefore determine the acceptable level of expected collateral damage relative to the anticipated military advantage as if the civilians put at risk by a particular attack were citizens of his own state. Michael Walzer and Avishai Margalit sparked a continuing debate about the as-if thesis by advancing it in the context of the first Gaza War. In the final variation, Manara had been evacuated before capture, but Hezbollah forcibly brings in South Lebanese villagers to occupy the kibbutz and to use them as human shields. With these variations in mind, the authors further assume that the IDF decides to retake Manara, which would be a legitimate, ad bellum proportionate, military response. Walzer and Margalit deliberately avoid the devils lurking in the details of their four-variation hypothetical. Conduct your war in the presence of noncombatants on the other side with the same care as if your citizens were the noncombatants. To say that force must be proportionate naturally invites the question: But does the as-if thesis help? Its apparent merit is twofold. First, by definition, it respects the dualistic axiom. If all civilians must be treated identically, there can be no danger of injecting perceptions of which party is the just or lawful belligerent into proportionality decisions. Second, the as-if thesis seems to offer a uniform way to handle the multiple subjectivities and indeterminacies that afflict the principle of proportionality. First, the as-if thesis is question-begging—or, to state the objection less categorically given its value as one way to inform judgments of in bello proportionality—“excessively variable. It makes the answers to in bello proportionality questions depend on intuitions that vary widely from state to state and commander to commander. But recall that one of the putative virtues of the as-if thesis is precisely that it purports to reduce and ideally eliminate the degree of that variability. It is unclear that the as-if thesis may justifiably claim this virtue. Consider a hyperbolic example, which nonetheless starkly illustrates the problem. Is the in bello proportionality constraint for North Korea therefore far less demanding than that for liberal states that place a much higher value on the welfare of their own civilians? I do not doubt that Walzer and Margalit, too, would reject this notion. Because this example is admittedly hyperbolic, one might object that in most cases—in particular, where a LOAC-abiding state considers the as-if thesis in good faith relative to its own civilians—it produces a laudable result. As explained below, the truth is that even the armed forces of states that strive to respect LOAC do not treat enemy civilians and their own equally. What

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the example of North Korea shows hyperbolically is true of all states to some extent. Outer-boundary cardinal constraints on collateral damage, even if they cannot be specified precisely, must be part of the proportionality standard. Yet the as-if thesis cannot supply them. It only seems to do so because we tend to assume that other peoples and military cultures would make the relevant judgments roughly as we do. Second, as a matter of ethics, the as-if thesis is in considerable tension with broadly shared intuitions. The typical response to this argument, as Hurka points out, is to stress the distinction between attacking and defending: And legally, a soldier must take precautions to minimize harm to enemy civilians. Insofar as the as-if thesis suggests otherwise, it is unlikely to be accepted by states as a means to give more precise legal content to in bello proportionality. Finally, the as-if thesis, as a legal standard rather than only an ethical ideal, is at odds with state practice. Even belligerents that have made a serious effort to respect the law of war have historically, and unsurprisingly, privileged the lives of their own civilians over those of enemy civilians. So whatever may be said for the as-if thesis as an ethical ideal, it is implausible as law. It would render the vast majority of strikes that cause collateral damage supposedly disproportionate, even in circumstances in which the attacker sought in good faith to respect LOAC. Of course, the perceived political acceptability of a military operation is not the measure of its legality. They would almost surely have sought to minimize the risks to their civilians by an assault with ground troops, [33] an alternative that many analysts suggest would have posed a lesser risk to Serb and Albanian civilians. The Report found, to the contrary, that military elites could reasonably disagree about the proportionality of the aerial strikes in Yet application of the as-if standard would apparently yield the contrary conclusion. A similar analysis applies to the first Persian Gulf War. It is regarded as one of the most legally sanitized armed conflicts in history; figurative armies of lawyers advised literal armies before almost every strike. In the final analysis, the as-if thesis offers scant guidance to military elites seeking to abide by in bello proportionality, and at times its application may be affirmatively misguided. But because of technological advances in warfare, it is much more widespread than it was a century—or even a few decades—ago. That is a question I cannot pursue here, but one that will, I believe, be critical to the resilience of the principle of proportionality in future, especially asymmetric, armed conflicts. I take no position here on the broader arguments in either contribution; this piece is limited to critiquing several flaws in the as-if thesis in the form defended by Walzer and Margalit. Civilians and Combatants, 56 N. An Exchange, 56 N. The Code of Combat, 56 N. Civilians and Combatants, supra note 9, at Subsequent quotations and citations in this paragraph are to the same NYRB article. It is understandable, but regrettable, that Walzer and Margalit choose the IDF, Hezbollah, disputed land adjacent to Lebanon, and so forth to frame their argument—rather than relying on a conflict elsewhere or a fictional military scenario. In the first place, the conflict is of course not at all hypothetical for Israelis and Lebanese nationals as well as for Palestinians and other neighboring peoples. But more to the point, this hypothetical almost surely loads the dice based on the likely partiality of the reader toward the broader Arab-Israeli conflict. Ironically, that is presumably what Walzer and Margalit seek to avoid in the interest of moral clarity. That is, only by abstracting from our jus ad bellum predispositions, viz. Sloane, The Cost of Conflation: Proportionality, in both its in bello and ad bellum senses, may well be the paramount area of the modern law of war in which, as I have argued elsewhere, erosion of the dualistic axiom, which requires a strict analytic separation of the jus ad bellum and the jus in bello, is evident. See Sloane, supra note 13, at , Whitman, The Verdict of Battle: Benvenisti, supra note 18, at An Exchange, supra note 9, at A Military Perspective vii, viii-ix ; Michael N. Preserving the Delicate Balance, 50 Va. Allen, Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity, 86 Am. Red Cross ,

Chapter 6 : Just War Theory | Internet Encyclopedia of Philosophy

An account of jus in bello proportionality must satisfy two apparently conflicting demands. First, such an account must explain how we can rationally compare civilian losses with military advantages. At the same time, such an account must apply symmetrically to all parties to every conflict and independently of the jus ad bellum legality or.

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Chapter 7 : Jus in Bello | Beyond Intractability

Jeff McMahan: Killin in War. jus ad bellum and jus in bello just combatants and unjust combatants Unjust combatant cannot satisfy the central principle of jus.