Jus in bello—
Just Conduct in War

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> "The greatest difficulty in the right of nations has to do precisely with right during war; it is difficult even to form a concept of this or to think of law in this lawless state without contradicting oneself."
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> Kant[1]

"*Jus in bello*" is the Latin term just war theorists use to refer to justice *in* war—to right conduct in the midst of battle, after the war has started. Most just war theorists insist that *jus in bello* is an ethical category separate, in some sense, from *jus ad bellum.* Why? We have not finished our task of evaluating warfare once we have determined whether a community has resorted to war justly, using the principles developed in the last two chapters. For even if a state has resorted to war justly, it may be prosecuting that war in an unjustified manner. It may be deploying perverse means in pursuit of its otherwise justified end. Just war theory insists on a *fundamental moral consistency between means and ends* with regard to wartime behaviour.

Concern with consistency, however, is not the only, or even the main, reason behind our endorsement of separate rules regulating wartime conduct. Such rules are also required to limit warfare, to prevent it from spilling over into an ever-escalating, and increasingly destructive, experiment in total warfare. If just wars are limited wars, designed to secure their just causes with only proportionate force, the need for rules on wartime restraint is clear.

All that being said, and sincerely endorsed, I wish to reiterate my conviction that the so-called "separation" between *jus ad bellum* and *jus in bello* is mainly for focusing attention on different issues. It does not denote a complete split between the two, as if they had nothing to do with each other. Indeed, I assert that the three just war categories *must* morally be linked, with *jus ad bellum* setting the tone for all that follows. There is nothing worse, conceptually, than to adopt the "check list" approach to just war theory, as if all the rules and criteria were simply separate "boxes" to be checked off during the war, like ticking off the items on your grocery list as you buy them. The rules and criteria all presuppose shared values, such as: rejecting aggression; restraining warfare; and protecting the state rights of legitimate communities and the human rights of their individual residents. We'll see that we literally cannot make moral sense of some *jus in bello* rules—notably, proportionality—and probably the entire *jus post bellum* category without considering the just cause of the war to begin with.

The best metaphor—regarding just war theory as not segregated but, rather, as united into one long procedure with different phases—is probably something like surgery. You have got, quite literally, an opening phase, an operational phase and a closing phase. Different phases raise different questions and concerns, and there need to be well-founded and well-understood rules governing each.

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*Ch 4, pp. 105–123 in *The Morality of War,* by Brian Orend (Peterboro, Ontario: Providian Press, 2006)

But everything is connected and substantially affected by what happened prior, and the ruling concern which started the whole process was why surgery was necessary in the first place.

As for the sewing up and the post-surgery rehabilitation, we have the future *jus post bellum* chapters. For now, we inaugurate the operational phase. We have diagnosed the need for surgery, have made our cut and gone in. We're in the thick of it: now what do we do? This is the topic of *jus in bello.*

Before examining and explaining these rules, it is worth stressing how responsibility for fulfilling *jus in bello* differs from the responsibility inhering in *jus ad bellum.* Responsibility for the justice of resorting to war, we saw, rests on those key members of the governing party most centrally involved in the decision to go to war, particularly the head of state or any body authorized to declare war. Responsibility for the conduct of war, by contrast, rests on the state's armed forces. In particular, responsibility for right conduct rests with those commanders, officers and soldiers who command and control the lethal force set in motion by the political hierarchy. In general, anyone involved in formulating and executing military strategy during wartime bears responsibility for any violation of *jus in bello* standards. In most cases, such violation will constitute a war crime.

I. Discrimination and Non-Combatant Immunity

The requirement of discrimination and non-combatant immunity is the most important *jus in bello* rule. It is also the most frequently, and stridently, codified rule within the international laws of armed conflict.[2] The substance of the rule is this: soldiers charged with the deployment of armed force may not do so indiscriminately; rather, they must exert every reasonable effort to discriminate between legitimate and illegitimate targets. How are soldiers to know which is which? *A legitimate target in wartime is anyone or anything engaged in harming.* All non-harming persons, or institutions, are thus ethically and legally immune from direct and intentional attack by soldiers and their weapons systems. Since the soldiers of the enemy nation, for instance, are clearly engaged in harming, they may be directly targeted, as may their equipment, their supply routes and even some of their civilian suppliers. Civilians not engaged in the military effort of their nation may not be targeted with lethal force. In general, as Michael Walzer asserts: "A legitimate act of war is one that does not violate the rights of the people against whom it is directed."[3] In response, we might ask: how is it that armed force directed against soldiers does not violate their rights, whereas that directed against civilians violates theirs? In the chaos of wartime, what exactly marks the difference?

One of the murkiest areas of Walzer's just war theory concerns the moral status of ordinary soldiers. His references to them exhibit, on the one hand, a humane sympathy for their "shared servitude" as "the pawns of war." On the other, his references occasionally display something like a glib callousness, as when he concurs with Napoleon's (in)famous remark that "soldiers are made to be killed."[4] How can soldiers be made to be killed when, as human beings, they enjoy human rights, to security amongst other things? The answer must be that soldiers do something which causes them to forfeit their rights, much as an outlaw country forfeits its state rights to non-interference when it commits aggression. One could be forgiven for inferring, from this principle, that *only soldiers of an aggressor nation* forfeit their rights, since they are the only ones engaged in the kind of rights-violating harm which grounds a violent, punitive response. Interestingly, and perhaps problematically, Walzer denies this. He believes that *all* soldiers forfeit their right not to be targeted with lethal force, whether they be of just or unjust nations, whether they be tools of aggression or instruments of defence.[5]

The Moral Equality of Soldiers?

Walzer's concept here, which is widely accepted, is of "the moral equality of soldiers." The first "war right" of all soldiers is to kill enemy soldiers: this is indeed part of international law. We do not, and should not, make soldiers pay the price for the injustice of the wars they may be ordered—perhaps even conscripted—to fight. That is the logically and morally separate issue of *jus ad bellum,* for which we have already elaborated a theory of justice, focusing on the responsibilities of political leaders. But lawyers like the chief British prosecutor during the Nuremberg trials, and philosophers like Thomas Pogge, ask: why shouldn't we hold soldiers responsible for the justice of the wars they fight? If we held soldiers responsible in this regard, wouldn't that constitute *an additional bar against aggressive war?* Wouldn't that account for the fact that, even though the war was set in motion by others,

soldiers remain its essential executors? Wouldn't such a move impose and highlight an important responsibility for soldiers, namely, to refuse to participate in the prosecution of aggressive war?[6]

Walzer experiences difficulty answering this argument fully. As an opening gambit, he contends that soldiers "are most likely to believe that their wars are just." But this alone cannot justify their actions, since their beliefs may not be well-grounded, especially considering the incentive they have to believe such justification in the first place. Walzer also says that soldiers rarely fail to fight, owing to "(t)heir routine habits of law-abidingness, their fear, their patriotism [and] their moral investment in the state."[7] But the fact that soldiers rarely fail to fight does not demonstrate that they are always justified in fighting, especially if the cause is unjust. Walzer next suggests that knowledge about the justice of the wars soldiers fight is "hard to come by." This is a truly surprising claim from a just war theorist who has tried to make such knowledge more accessible and comprehensible. Perhaps, then, this is a reference to the soldier's historical lack of education, as well as to government tendencies towards secrecy. Fair enough, but ignorance at best constitutes an excuse, and not a justification, for willfully fighting in an unjust war: it seems a stretch to assert that such ignorance can morally ground a "war right" to deliberately kill enemy soldiers. Walzer's subsequent move appeals to the authority of Vitoria, who suggested that if soldiers were allowed to pick and choose the wars they were willing to fight, the result would be "grave peril" for their country.[8] (This argument has recently been endorsed by the Israeli government, which has found itself in Israeli courts being sued by a handful of its own soldiers, who do not want to fight in the ongoing struggle with the Palestinians. Israel has a system of compulsory military service for all citizens.) But this empirical generalization is speculative: why wouldn't the result actually be the preferred one, namely, that states would be seriously hampered *only* in their efforts to prosecute an aggressive war, which they could not justify to their soldiery?

Walzer then claims it is a plain fact of sociology that we do not blame soldiers for killing other soldiers in the midst of war. We blame soldiers *only* when they deliberately kill either civilians or surrendered enemy soldiers kept by them as disarmed prisoners of war (POWs). We extend to all soldiers, in the midst of battle, the right to deploy armed force on behalf of their own country. This *is* a true legal contention—equal belligerent rights seem established by international law[9]—and while it is not an implausible moral one, the latter is not quite so obvious as Walzer suggests. Do we really believe that those soldiers who fought for Hitler, for example, were utterly blameless for their bit part in the execution of his mad aggression? No doubt, we tend to exonerate conscripts like the Hitler Youth in the closing days of the war, presuming they were far too young, gullible and propagandized to have made a morally responsible choice. But what about those mature German soldiers—many with prior war experience—who invaded Poland, or France, at the war's outset? It is not so clear to me that we do not blame them for fighting on behalf of their country. Indeed, today, ex-soldiers, living abroad, who played very small roles in Hitler's army can, if found out, be stripped of their citizenship and deported back to Germany—even in spite of their very advanced age.

Walzer stresses more generally the pervasive socialization of soldiers of *any* nation, their relative youth, their frequent conscription, and their usual background as members of underprivileged classes as grounds for not holding soldiers responsible for the wars they fight. While soldiers "are not . . . entirely without volition," he says, "(t)heir will is independent and effective only within a limited sphere." This sphere contains only those tactics and manœuvres soldiers are engaged in, like training, loading their weapons, engaging in particular live-fire skirmishes, handling prisoners, and so on. It would thus constitute unfair "class legislation" for us to hold soldiers like these responsible for the justice of the wars they fight. We should focus on those most to blame, the elite and powerful leaders who set the war in motion.[10] But from the fact that political leaders are, I admit, *mostly* to blame for the crime of aggression, does it follow that they are *solely* to blame, as Walzer here insists? In my view, the more compelling alternative would be to suggest that, for the many reasons Walzer mentions, there should be *a presumption against* holding soldiers responsible for the crime of violating *jus ad bellum.* But this presumption does *not* preclude us from concluding, in particular cases based on public evidence: that some soldiers of a particular aggressor state either *did* know, or *really should have* known, about the injustice of the war they were fighting; that they could have refused to participate in it; and thus that they may be held responsible, albeit with much lesser penalties than the elites. Such soldiers would be like minor accomplices to a major crime. This is one way in which I do not believe in the absolute separateness of *jus ad bellum* and *jus in bello.*

Soldiers who fight for an aggressor do not have strict moral equality with those who fight for a victim or defender. The former are not mainly to blame for the aggression but they still *are* to blame, in a smaller but material sense. Soldiers are not automatons. Their merely *professional function does not dislodge the ordinary human duty not to inflict severe, unjustifiable harm on others.* Soldiers must inform their beliefs regarding the justice of the wars they are ordered to fight. Exceptional ones, upon seeing injustice, will refuse service, or else surrender to the other (just) side at the first non-life-threatening opportunity. Ordinary soldiers, when confronted with the fact that the war they fight is unjust, will probably still go along with the crowd of their buddies and fight—the pressures to do so are very strong. For them, we reserve the moral right to criticize and castigate them at war's end. Perhaps we will finally excuse them, on the basis of these pressures, but perhaps also, in some well-documented cases, we will have to prosecute them as minor accomplices to the one large "crime against peace" which is aggression.[11]

Engaging in Harm

Even if we agree with my proposal that some soldiers may be held responsible for *jus ad bellum* violations, can we still concur with the idea that all soldiers *generally* remain legitimate targets during wartime? After several false starts, Walzer offers us a compelling reason to do so: soldiers, whether just or unjust, are "engaged in harm." Soldiers bear arms effectively, are trained to kill for political reasons, and are "dangerous men": they pose serious threats to the lives and interests of those they are deployed against, whether for a just cause or not. Walzer suggests that an armed man trying to kill me "alienates himself from me . . . and from our common humanity" and in so doing he forfeits his right to life. This establishes, I believe, a strong *prima facie* (i.e., "first glance") case that soldiers are justified in targeting other soldiers with lethal force. Soldiers, whether for just or unjust reasons, remain among the most serious and standard external threats to life and vital interests. Only public, compelling and accessible knowledge about the injustice of the cause of his own country can undermine a soldier's entitlement, in the face of such an opposing threat, to respond in kind.[12]

The converse of this general principle, of course, is that those who are not "engaged in harm" cannot be legitimate targets during wartime. *This is the clearest sense of who is "innocent" in wartime: all those not engaged in creating harm.* The first application of this converse rule regarding harm has to do with soldiers themselves: when soldiers no longer pose serious external threats—notably by laying down their weapons and surrendering—they may no longer be targeted with force and should, in fact, be extended what international law calls "benevolent quarantine" for the duration of the war.[13]

Benevolent Quarantine and Torturing Terrorists

"Benevolent quarantine" means that captured enemy soldiers can be stripped of their weapons, incarcerated with their fellows, and questioned verbally for information. But they cannot, for example, be tortured during questioning. Nor can they be beaten, starved or somehow medically experimented on. They cannot be used as shields between oneself and the opposing side; in fact the understanding is that captured enemy soldiers are to be incarcerated far away from the front lines. Very basic medical and hygienic treatment is supposed to be offered—things like aspirin, soap, water and toothbrushes—and, while making captives engage in work projects is permitted, the Geneva Conventions actually require that, in that event, captives be paid a modest salary. I have never heard of that actually happening—the incredible detail of the Geneva Conventions means they do not always get realized—but it is fairly common for combatants to disarm, house and feed their captives, keeping them out of harm's way and ensuring their basic needs are met until the war ends. When it is all over, they are then usually freed in exchange for POWs on the other side.[14]

Controversies here focus around when, or if, aggressive questioning becomes a form of torture, and also around when non-state actors, like terrorists, are taken prisoner. The latter issue concerns whether non-state captives deserve the same quality of treatment as state captives. There's a sense that a soldier fighting for his community deserves better than a terrorist fighting for his pet cause. I think this distinction can be difficult to sustain and that, generally, non-state actors brought into capture by soldiers should be accorded the same rights as captured enemy soldiers. If soldiers fighting for an *unjust* cause deserve this treatment, then surely so do terrorists—whose method, if not the cause, is

likewise unjust. In other words, if it is wrong to torture Nazi soldiers—whose cause was heinous and irredeemable—then it is wrong to torture radical Islamic terrorists (much less mere suspects). This topic has recently been highlighted regarding America's round-up of alleged terrorists, some of whom were held for intensive questioning in Guantanamo Bay, Cuba over a long period of time.[15]

The incidents in Abu Ghraib prison, in Iraq, also come to mind. In the late spring of 2004, the world saw some shocking photos of American troop conduct in that jail. Iraqi prisoners—captured during the war and the subsequent insurgency—were subjected to questionable treatment. Some of it—like deliberate, prolonged sleep deprivation, and using dogs to attack or threaten already prone and naked people—clearly violated the Geneva Conventions. Others might have been visually disturbing but do not obviously count as human rights violations, such as forcing the prisoners to wear dog collars, or having American women ridicule their private parts, or putting female panties on their faces temporarily. Combine it all, though, and you have a violation of both the letter and the spirit of the principle of benevolent quarantine. Some of the US soldiers involved have since been charged, tried and sentenced (which I would argue shows official American acceptance of the idea that non-state captives deserve the same treatment as state captives).

There is, at writing, an ongoing investigation as to whether any authorization of this treatment came from higher up the US chain of command. It does seem unlikely, after all, that some "mere" reservists would repeatedly conduct such flagrant prisoner abuse on their own, and apparently there was a vaguely-defined policy of "softening up" prisoners for subsequent anti-terrorist questioning by the CIA. Perhaps the very vagueness of such a policy was itself a moral error, even if direct orders did not explicitly authorize prisoner abuse.[16]

I suppose we might condone efforts at psychological pressure—mocking, aggressive cross-examination, ridiculing, criticizing, etc.— when the goal is getting information which might save innocent lives. Questioning is, after all, permitted under the Geneva Conventions. But the infliction of physical harm cannot be tolerated, even if it supposedly serves the questioning process and is glamourized by such TV shows as "24." Why? Because it is impossible to square the infliction of physical *harm* with the concept of *benevolent* quarantine. Benevolent quarantine may not mean actually being nice to your prisoners but it certainly cannot, logically, include things the Geneva Conventions define as torture: prolonged sleep deprivation; starvation; slapping, punching, biting or strangling; the breaking or severing of limbs or digits; urging or allowing an animal to attack; any kind of drowning-based, or electrocution-based, session; sexual assault or rape; poisoning or medical experimentation; shooting; and so on. These things are simply prohibited. Not even war—not even a *just* war—can justify the deliberate infliction of such things upon other human beings, even if such people are suspected, or even guilty, of terrible things themselves. *In domestic society, we do not permit prison guards to torture anyone—even those convicted of the very worst crimes. So why should we allow it in international society?* The thing to do with terrorist suspects is to question them within the rules, and then prosecute them for war crimes and, upon conviction, send them to jail—not to strip them, beat them and sick dogs after them. Dare I say, such activities are not only unjust but against the very self-perception of being "civilized" on the part of the forces and countries engaged in these activities. To speak more frankly, that's just not the American way. The forces of civilization must remain civilized even as they confront ruthless barbarism.[17]

As important as it is to prevent future terrorist attacks and to protect innocent lives, torture is universally agreed to be one of the very worst things a person can do. Torture is everywhere banned in the laws of war and human rights law.[18] The methods cause revulsion and disgust—as we saw in the worldwide reaction to the Abu Ghraib photos. Torture also hardens the heart and corrupts the character of the torturer. It inflicts absolutely devastating pain upon the tortured—who must endure not only the raw pain of the act(s) but also the experience and knowledge of being utterly enslaved to the whims of another. Torture inflicts severe pain, combines slavery with violence, disregards human autonomy and even renders the torturer worse off. It is, as a method, intrinsically corrupt and even evil. Moreover, torture is extremely questionable as an information-gathering device because evidence shows that people will say *anything*—even deny things they know are true, and assert things they know are false—just to get the torture to stop. Torture is not the answer to terrorism; it is a surrender to a world of brutality and barbarism—a world where the terrorist already resides. I'm not saying torture and terrorism are morally equivalent—presumably torture is more discriminating and localized than

terrorism. What I am saying is that, as methods, they are both wrong—*always*—and ultimately indefensible regardless of the cause they supposedly serve.[19]

Civilian Immunity

The second application of the harm principle deals with civilians. Even though some civilians may inwardly approve, or even have voted in favour of, an unjust war effort, they nevertheless remain externally non-threatening. They do not bear arms effectively, nor have they been trained to kill, nor have they been deployed against the lives and vital interests of the opposing side. Civilians, whatever their *internal* attitude, are not in any *external* sense dangerous people. So they may not be made the direct and intentional objects of military attack.[20] Although I endorse this conclusion, it remains controversial with others.

Some people—including Osama bin Laden[21]—argue that the fact that civilians' taxes fund the military renders null and void any pretense of their being "innocent." Civilians are *causally involved* in financing the harm soldiers do. Others view nationality as shared destiny, or suggest that modern warfare is totalizing anyway and so wonder what the point of discrimination really is in our age. If you're at all in the enemy country, you're fair game.[22] These are not trivial arguments but they fail to persuade. It is hard to see, for example, how infants and young children could be anything other than innocent during wartime. Only the most dogmatic believer in collective responsibility could deny this, and then at the cost of his credibility. Just because a baby—through no fault of her own—happens to live in the enemy country, she's fair game? Even though she's not even old enough to be morally responsible for anything? It makes no sense, and amounts to stupidity for the sake of simplicity.

And the relationship between paying one's taxes and the execution of military acts remains, on an individual level anyway: 1) *coerced,* since taxes are everywhere mandatory; and 2) *extremely indirect,* with manifold agents, transfers and responsibilities intervening in-between. The degree to which the state is centrally involved in this coercion and transfer process—of taxes-to-warfare—renders *it* clearly the vastly larger, indeed the only, concrete permissible target. The state—its agents and appendages—is the main organizer and focal point of warfare. It always has been and always will be. It is thus *the* legitimate target and no attempt to "fuzzify" the difference between a government and its people can overcome this. Belligerents target civilians in warfare *not* because they think the people deserve it but, rather, because they think this will give them leverage against the state, which remains the armed, potent threat—the true adversary and target. It is sort of like kidnapping a rich man's family to force *him* to pay you blackmail: give in, or your favourite innocents get it! Just war theory and international law command, by contrast, that you may only attack the true adversary in warfare (i.e., that entity directly engaged in physical harm).

There is, moreover, little evidence that modern warfare is intrinsically totalizing: the 1991 Persian Gulf War, for instance, or the 2001–03 take-downs of the regimes in Afghanistan and Iraq, did not escalate into indiscriminate slaughters. Indeed, what seems more the recipe for ever-increasing slaughter is the idea that civilians may be targeted as readily as soldiers. No doubt there are some questions about the exact specification of "innocents" in wartime but I follow just war theory and international law in believing that it remains a crucial just war category, needed *not only to restrain violence* but also to express our strong, almost foundational, moral commitment to *punish only those who deserve it.* In the midst of "the fog of war," one of the most concrete and verifiable ways to cash out this concept is to define it in terms of external engagement in serious harm. In the midst of war, we cannot peer into the hearts of every civilian; we can only look sweepingly at external behaviour. When we do so, we notice a large and obvious difference between those engaged in harm (i.e., those in the mechanism of war) and those not. Since harm is an important concept for justice and morality, it makes sense to say that it establishes a dividing line between those who may, and those others who may not, be targeted with force.[23]

Difficulties arise, of course, when we consider those people who seem, simultaneously, to be *both* civilians *and* engaged in harming, such as civilian suppliers of military hardware. What is the status of such people? Walzer suggests that "the relevant distinction is . . . between those who make what the soldiers need to fight and those who make what they need to live like all the rest of us." So targeting farms, schools and hospitals is illegitimate, whereas targeting munitions factories is legitimate. Walzer

stresses, however, that civilians engaged in the military supply effort are legitimate targets *only when they are engaged in that effort,* so to target them while at home in residential areas would be illegitimate: "Rights to life are forfeit only when particular men and women are actually engaged in war-making or national defence." Consider Thomas Nagel's further explanation that "hostile treatment of any person must be justified in terms of something *about that person* [his italics] which makes the treatment appropriate." We distinguish combatants from non-combatants "on the basis of their immediate threat or harmfulness." And our response to such threats and harms must be governed by relations of directness and relevance. It is only military—and military-related—targets which pose a *direct* and *relevant* threat of serious harm; thus, it is only they which may be resisted with lethal force.[24]

Walzer's overall judgment on targeting—which is very helpful, and essentially condenses international law—is this: soldiers may target other soldiers, their equipment, their barracks and training areas, their supply and communications lines and the industrial sites which produce their supply. Presumably, core political and bureaucratic institutions are also legitimate objects of attack, in particular things like the Defence Ministry. Illegitimate targets include residential areas, schools, hospitals, farms, churches, cultural institutions and non-military industrial sites. *In general, anyone or anything not demonstrably engaged in military supply or military activity is immune from direct attack.* Walzer is especially critical of targeting basic infrastructure, particularly food, water, medical and power supplies. He criticizes American conduct during the 1991 Persian Gulf War on this basis, since very heavy damage was inflicted on Iraq's water treatment system, and presumably would also frown upon NATO's targeting the Serbian electric power grid during its 1999 armed intervention on behalf of the ethnic Albanian Kosovars. The aim there had very little to do with bona fide military tactics; it was a raw demonstration of sheer power designed to "shock and awe" the enemy into submission with an overwhelming display of capability. And that it did: the Serbs could not turn on a toaster, watch TV, heat their homes, run their businesses, etc., unless NATO said so. You can see how this would give the Serbs rather strong incentive to please NATO.[25] While it is true that soldiers cannot fight well without food, water, medicine and electricity, those are things they—and everyone else in their society, including innocents—require *as human beings* and not more narrowly as externally threatening instruments of war. Thus, the moral need for a direct and relevant response only to the source of serious harm renders these things ethically immune from attack.

The Doctrine of Double Effect

Another serious perplexity about wartime targeting concerns the close real-world proximity of illegitimate civilian targets to legitimate military and political ones: munitions factories, after all, are often side-by-side with non-military factories, and at times just around the corner from schools and residential areas. This raises the complex issue of the Doctrine of Double Effect (DDE).[26] The core moral problem is this: even if soldiers intentionally aim *only* at legitimate targets, they can often *foresee* that taking out some of these targets will still involve *collateral* civilian casualties. And if civilians do nothing to lose their human rights, doesn't it follow that such acts will be unjust, since civilians will predictably suffer some harm or even death?

The DDE stipulates that an agent A may perform an action X, even though A foresees that X will result in *both* good (G) and bad (B) effects, *provided all* of the following criteria are met: 1) X is an otherwise morally permissible action; 2) A only intends G and not B; 3) B is not a means to G; and 4) the goodness of G is worth, or is proportionately greater than, the badness of B. The DDE, at first, can seem overly technical, and thus for some people "fishy." But it is an idea rendered complex by the complexity of the situation it deals with. Since it is a common wartime situation, however, we cannot avoid it. Let's break it down. It is a doctrine of "double effect" since it deals with actions which are going to have two effects, one good and one bad. It seeks to respond to the question: "Can one ever perform such an action?" It answers "yes," provided the criteria just listed are *all* satisfied; if even one criterion fails to be satisfied, the doctrine forbids the performance of the action. Assume now, using these criteria, that A is an army and X is an otherwise permissible act of war, like taking aim with a weapon at a military target. The good effect G would be destroying the target, the bad effect B any collateral civilian casualties. The DDE stipulates that A may still do X, provided that A only intends to destroy the military target and not to kill civilians; that A is not using the civilian casualties as means to the end

of destroying the military target; and that the importance of hitting the target is worth the collateral dead.

The first objection commonly raised against the DDE concerns its controversial distinction between *intending* Z's death (or harm) and *merely foreseeing* that one's actions will result in Z's death (or harm). Some have argued that the DDE is so elastic as to justify anything: all an agent has to do, to employ its protective moral cloak, is to assert: "Well, I did not intend *that;* my aim, rather, was this. . ." It is clear, however, that agents are not free to claim whatever good intention they want in order to justify their actions, however heinous. Intentions must meet minimal criteria of *logical coherence* and, moreover, must be *connected to patterns of action* which are publicly accessible. The criminal justice system of most countries is based on these ideas: for such serious crimes as murder, the case must be made by the prosecution that the accused had *mens rea,* or the intent to kill. This is done by offering publicly-accessible evidence which is tied to the accused's actions, behaviour and assertions leading up to the time of the murder. Also needed is a consideration of whether the accused had both incentive and motive to commit the crime. Juries, as reasonable and experienced persons, are then invited to infer the accused's state of mind. The plausibility of this procedure undermines the popular academic claim that the DDE can be used to justify *any* heinous action, whether in war or peace. Walzer agrees, suggesting that *we know the intentions of agents through their actions:* "(T)he surest sign of good intentions in war is restraint in its conduct." In other words, when armies fight in strict adherence to *jus in bello*—taking aim only at legitimate targets, using only proportionate force, not employing intrinsically heinous means—they cannot meaningfully be said to intend the deaths of civilians killed collaterally. Their actions, focusing on military targets and taking due care that civilians not be killed, reveals their intentions.[27]

What exactly constitutes "due care" by armies that civilians not be killed during the prosecution of otherwise legitimate military campaigns? For Walzer, it involves soldiers accepting more risks *to themselves* to ensure that they hit only the proper targets: "We draw a circle of rights around civilians, and soldiers are supposed to accept (some) risks in order to save civilian lives." Walzer suggests we locate the limits of additional risk-taking—that soldiers can and should shoulder on behalf of those civilians they endanger—at that point where "any further risk-taking would almost certainly doom the military venture or make it so costly that it could not be repeated."[28] This principle might entail, for instance, that soldiers use only certain kinds of weapons and avoid others. America has recently pioneered the use of so-called "smart bombs" that use satellite technology to improve drastically the "hit rate" on desired targets. America also employs laser- and satellite-guided cruise missiles, which can be exceptionally precise (and are exceptionally expensive). Compare these advances with the older method of simply flying over a target, dumping one's bomb load, and beating a hasty retreat before getting shot down.

The due care principle might also mean moving in more closely on the military target to increase the likelihood of hitting it, and avoiding collateral civilian damage. America encountered criticism, in this regard, during the armed intervention in Serbia over Kosovo in 1999. Some, such as Michael Ignatieff, contended that the extensive bombing was not really that "smart," and that too much of it came from too high a distance. In other words, the participating American pilots were *willing to kill but not willing to risk dying*—and in opposition to the due care principle they actually went out of their way to increase the distance between themselves and their targets. This is permissible activity, in my view, only if one's bombing payload is not conventional explosives—with their disturbingly high rate of collateral damage—but, rather, reliable smart technology. If one's payload is otherwise, Ignatieff's criticism is both sound and scathing: it is a violation of the warrior ethos itself.[29]

Although this might sound silly at first, the due care principle might also, under certain conditions, require some kind of advance warning to nearby civilians. Consider, for example, that the Israeli military occasionally does this. Say it decides to destroy a building which it believes serves as a haven for pro-Palestinian terrorists. If this building is in a residential area, the Israeli military has sometimes been known to announce publicly its intent to destroy this target, declaring that civilians left in the area at the declared time will not be its responsibility. This warning might, admittedly, allow terrorists to escape with valuable equipment, but the Israelis still believe it important to destroy military-use targets while showing clear respect for civilians.[30]

What the due care principle implies, above all else, is this: *offensive tactics and manœuvres must be carefully planned, in advance, with a keen eye towards minimizing civilian casualties.* This demands compe-

tent and well-trained officers and soldiers, as well as the need to gather and analyze quality intelligence on the precise nature of suspected targets. While Kant thought spying morally decrepit since it involves deception, I argue that: a) with advances in technology, intelligence gathering need not involve deception; and b) in any event, intelligence gathering can serve the vital ethical need of being more precise in targeting, knowing what to hit and what is out of bounds.[31]

So Walzer, in the end, maintains that civilians are *not* entitled to some implausible kind of fail-safe, or absolute, immunity from attack; rather, they are owed neither more nor less than this "due care" from belligerent armies. Providing due care is, in fact, equivalent to "recognizing their rights as best we can within the context of war." These exact conclusions are also contained in the laws of armed conflict.[32]

We have seen explanations of the first two, of the four, criteria of the DDE. What about the third, regarding the prohibition on the use of the bad effects (like civilian casualties) to produce the good ones (like eliminating the military target)? An example of such a violation would be deliberately bombing the residential area around a munitions factory on grounds you're probably killing the workers in that factory, hence using civilian targeting to effectively eliminate a military target. It seems possible to discern whether a belligerent, such as country C, is employing civilian casualties as a means both to its immediate end of hitting the legitimate target and to its final end of victory over rival country D. If there are systemic patterns—as opposed to unavoidable, isolated cases—of civilian bombardment by C on the civilians of D, it is compelling to conclude that C is directly targeting the civilian population of D. Conversely, if the systemic pattern of C's war-fighting indicates its targeting of D's military capabilities, with only incidental and occasional civilian casualties resulting, then it is reasonable to infer that C is not trying to use civilian casualties as a pressure tactic to force D to retreat and admit defeat.

The truly difficult aspect of the DDE, in my view, is the final criterion: contending that the goodness of hitting the legitimate military target is "worth," or proportional to, the badness of the collateral civilian casualties. A pacifist, for example, will always deny this. Is the need to hit a source of military harm *sufficient* to justify killing people whom just war theory admits have done nothing to deserve death? Does the source of harm have to pass some threshold of threat before one can speak of the need for its destruction outweighing civilian claims? If so, how do we locate that threshold? More sharply, can one refer to the ultimate "worth" of hitting the military target to justify collateral civilian casualties *without* referring to the substantive justice of one's involvement in the war to begin with? Personally, I fail to grasp how it can be morally justified to foreseeably kill innocent civilians in order to hit a target which only serves the final end of an aggressive war. The *only* justification sufficient, in my mind, for the collateral civilian casualties would be that the target is materially connected to victory in an otherwise *just* war. This suggests, importantly, that aggressors not only violate *jus ad bellum,* but *in so doing* face grave difficulties meeting the requirements of *jus in bello* as well. To be as clear as possible: to satisfy the *jus in bello* requirement of discrimination, a country when fighting must satisfy all elements of the DDE. But it seems that only a country fighting a just war can fulfil the proportionality requirement in the DDE. Thus, an aggressor nation fighting an unjust war, *for that very reason,* also violates the rules of right conduct. Here too we see that the traditional insistence on the separateness of *jus ad bellum* and *jus in bello* is not sustainable. Kant was more correct when he remarked on the need for a consistent normative thread that runs through all conduct during the three phases of war: beginning, middle and end.[33]

II. Proportionality

The *jus in bello* version of proportionality mandates that soldiers deploy only proportionate force against legitimate targets. The rule is not about the war as a whole; it is about tactics within the war. Make sure, the rule commands, that the destruction needed to fulfil the goal is proportional to the good of achieving it. The crude version of this rule is: do not squash a squirrel with a tank, or swat a fly with a cannon. *Use force appropriate to the target.* Walzer is as uncertain about this requirement as he was about its *jus ad bellum* cousin, and there is reason to follow him in this regard. He notes that while the rule is rightly designed to prohibit "excessive harm" and "purposeless or wanton violence" during war, "there is [nevertheless] no ready way to establish an independent or stable view of the values"

against which we can definitively measure the costs and benefits of a tactic. One case where he talks about, and endorses, a form of proportionality involves the Persian Gulf War. During the War's final days in early 1991, there was a headlong retreat of Iraqi troops from Kuwait along a road, subsequently dubbed "The Highway of Death." So congested did that highway become that, when American forces descended upon it, it was a bloodbath whose aftermath was much photographed and publicized. Although the Iraqi soldiers did not surrender, and thus remained legitimate targets, Walzer suggests that the killing was "too easy." The battle degenerated into a "turkey shoot," and thus the force deployed was disproportionate. Perhaps another example, from the other side of the same war, would be Saddam Hussein's very damaging use of oil spills and oil fires as putative means of defence against a feared amphibious invasion of Kuwait by the Allies.[34] As with the *jus ad bellum* case, we note that it is much easier to diagnose a *disproportionate* use of force than a merely proportionate one. The common sense of the abstract need for balance and moderation is clearly there, but it remains very difficult to define precisely, especially under battlefield conditions. Here, too, it may turn out that proportionality is more of a limiting factor, a negative condition, so to speak—setting outside constraints on force—than it is a positive condition which adds new content to the just war equation.

III. Prohibited Weapons

Walzer insists that the "chief concern" in wartime is the question of *who* may be targeted with lethal force. Thus, separating out civilian from military targets is all important. The question of *what means* may be employed in the targeting is, in his view, "circumstantial." He suggests that the elaborate legal rules—contained in the Hague and Geneva Conventions—defining what means may, and what others may not, be employed during war is beside the point. These rules—such as those prohibiting the use of chemical weapons on the battlefield—may be desirable, he says, but are not morally obligatory. After all, if solders may be killed, how can it matter by what means they are killed? While that is a persuasive way of putting the matter, Walzer should not be flippant about setting these rules aside, or assigning them second-place status in *jus in bello,* behind discrimination and the DDE. For the robust and elaborate set of legal rules banning the use of certain weapons in wartime seems to indicate a high level of international consensus. There is a vast number of relevant conventions and legal treaties on this issue, aside from the canonical Hague and Geneva Conventions, such as those banning the use of chemical (1925 and second protocol 1996), biological (1972) and "excessively injurious weapons" (1980). Also relevant are the conventions against genocide (1948) and against methods of warfare which alter the natural environment (1977). Prohibiting weapons also puts an added restriction upon belligerents and, as such, is consistent with the deepest aim of *jus in bello,* namely, to limit war's destruction. It is simply not enough, in my view, to let weapons development proliferate, as if to say: "Develop and deploy whatever weapon you want, just do not aim it at the suburbs." So I think international law corrects a weakness in Walzer by adding this further rule regarding weapons prohibition.[35]

The legal conventions regarding *jus in bello* are much more detailed, specific and thickly textured than those mentioning *jus ad bellum.* It is interesting to reflect on the disparity. I suggest it has to do with two factors. First, usually those with the war power—like the executive branch—also negotiate international treaties, and they want maximum latitude in connection with reasons for going to war. Second, *jus in bello* seems to have developed first,[36] coming out of ancient and medieval conventions regarding chivalrous ways of battling, rules for knights' fighting tournaments, and so on. Indeed, even the Old Testament talks about not laying waste to fruit trees when attacking enemy cities.[37] So *jus in bello* has had more development than *jus ad bellum,* and so we should expect more detail. Just to sample the flavour of a *jus in bello* rule in international law, consider the following snippet on "booby traps" from the convention banning excessively injurious weapons:

1. Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all circumstances to use:
   (a) Any booby trap in the form of an apparently harmless portable object which is specifically designed and constructed to contain explosive material and to detonate when it is disturbed or approached, or
   (b) Booby-traps which are in any way attached to or associated with:
      (i) Internationally recognized protective emblems, signs or signals;

(ii) Sick, wounded or dead persons;
(iii) Burial or cremation sites or graves;
(iv) Medical facilities, medical equipment, medical supplies or medical transportation;
(v) Children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
(vi) Food or drink;
(vii) Kitchen utensils or appliances except in military establishments, military locations or military supply depots;
(viii) Objects clearly of a religious nature;
(ix) Historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
(x) Animals or carcasses.

2. It is prohibited in all circumstances to use any booby trap which is designed to cause superfluous injury or unnecessary suffering.[38]

In addition to these remarkably detailed legal conventions, one might suggest that there is a widely shared moral convention which stipulates that even though soldiers may be targeted with lethal force, some kinds of lethal force—such as burning them to death with flame-throwers, or asphyxiating them with nerve gas—inflict so much suffering, and involve such cruelty, that they are properly condemned. Moreover, the reasoning which distinguishes between legitimate and illegitimate weapons is very similar to the reasoning which generates the combatant/non-combatant distinction. For example, there is a legal ban on using bullets which contain glass shards. These shards are essentially impossible to detect. If the soldier survives the shot, and the bullet is removed by surgery, odds are that some glass shards will still remain in his body. These shards can produce massive internal injuries long after the soldier has ceased being "a dangerous man" to the other side. Parallel reasoning was behind the 1999 passing into law of the International Treaty Banning Land Mines: land mines, too frequently, remain weapons of destruction long after the conflict is over. Finally, restrictions on weapons can play a causal role in reducing destruction and suffering in wartime, something which *jus in bello* as a whole is designed to secure.

Walzer does not even explicitly object to particular weapons on grounds that they are more likely than not to have serious spillover effects on civilians, and thus run afoul of discrimination. Biological weapons would fall under this category, as would many land mines. Such a stance is consistent with the fact that one does not hear from him any criticism of America's extensive use of napalm and Agent Orange in Vietnam, which inflicted long-term damage to Vietnamese agriculture. The aim, at the time, was to defoliate all the jungle vegetation which was providing such effective cover for the Viet Cong. The consequences include abnormally low soil fertility for staple crops like rice and continue to the present. Walzer is curiously unreflective about these considerations, and I cannot agree in this regard: in addition to the general *jus in bello* principles, all belligerents must adhere to the applicable international laws regarding weaponry.[39]

Walzer recovers his reflectiveness about weaponry only when he considers nuclear arms, which for a number of reasons have not been declared illegal by ratified international treaty. The main reason, of course, is that the major powers are all nuclear powers, and they would never agree to such a treaty, as it would eliminate a major military advantage they all share. "Nuclear weapons explode the theory of just war," Walzer famously declares.[40] This is a graphic and gripping, but unfortunate, formulation since it seems to endorse the popular academic view that just war theory is out of date in the post-Hiroshima world. But Walzer cannot believe this, for he believes that the atomic bombing of Japan was unjust. Thus, what his dramatic declaration must really mean is that nuclear weapons can never be employed justly. Why not? First, and most crucially for Walzer, they are radically *indiscriminate* weapons. Perhaps only a handful of the most volatile biological weapons are more uncontrollable in their effects. Second, nuclear weapons are unimaginably destructive, not just in terms of short-term obliteration but also longterm radiation poisoning and climate change, so that their use will always run afoul of *proportionality.* Finally, there is the hint in Walzer that, owing to these two factors combined, deliberate use of nuclear weapons—and emphatically an all-out nuclear war—is an act evil in itself.[41]

Some people, perhaps first starting with Henry Kissinger, believe it might be possible to use nuclear weapons in a discriminate way. Their notion is to use very low-yield nuclear bombs directly on a battlefield against the enemy. I suppose in theory that might be possible, but then: 1) there's still the question of proportionality; and 2) what would be the real difference between such bombs and conventional explosives? Perhaps it would just be the expense and strategy of five low-yield nukes versus 50 very high-yield conventional bombs. But I suspect the real strategy behind having nukes in the first place is the massive intimidation factor, in which case the low-yield nukes are useless. Low-yield nukes might be more discriminating—though it would be comforting to hear nuclear scientists say this rather than foreign policy strategists—but then their deterrent and intimidation factors would be undercut. The most useful aspect of nuclear weapons is precisely the deterrent and intimidation properties brought about by their highly destructive yield. Yet it is that exact yield which is morally objectionable, owing to the incredible destruction and lack of discrimination. In other words, if nukes can be made discriminate they will not be much different from conventional missiles—they might save a few bucks on transportation. The really useful nukes, so to speak and by contrast, are precisely the ones it is never morally permissible to use—wildly powerful and indiscriminately destructive.[42]

What about building, testing and threatening to use such nukes but never actually using them (except twice on Japan)? Generally, moral thinkers agree that it is wrong to *threaten* to do something which it is *actually* wrong to do (e.g., threaten to murder someone), and so there are deep moral questions to be raised even about this. (Our legal systems reflect this: it is a separate crime merely to utter a death threat.) On the other hand, some politicians and historians credit America's nuclear deterrence with having stopped Soviet expansion and with having won the Cold War. These latter are sweeping claims, and probably untrue. Communism still expanded massively in the 1945–85 era after all, so what exactly did American nuclear deterrence stop? Thus, I think that, from a just war point of view, nuclear weapons are going to be dimly viewed no matter how they are interpreted.

Notes

1. I. Kant, *The Metaphysics of Morals,* trans. and ed. M. Gregor (Cambridge: Cambridge University Press, 1995), 117.
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3. M. Walzer, *Just and Unjust Wars* (New York: Basic Books, 3rd ed., 2000), hereafter "*Wars,*" 42–3, 135.
4. Walzer, *Wars,* 37, 40, 136; J. Dubik, "Human Rights, Command Responsibility and Walzer's Just War Theory," *Philosophy and Public Affairs* (1982), 354–71.
5. Walzer, *Wars,* 135.
6. Walzer notes the British prosecutor's arguments in his *Wars,* 38. For the trials, see Chapter 6.
7. Walzer, *Wars,* 127, 39.
8. Walzer, *Wars,* 39.
9. Walzer, *Wars,* 128; Reisman and Antoniou, eds. *The Laws of War,* 41–57.
10. Walzer, *Wars,* 40, 138.
11. J. MacMahan, "Preventive War," a chapter in a forthcoming collection on just war theory to be edited by David Rodin and published by Oxford University Press. Thanks to the Press for the advance reading.
12. Walzer, *Wars,* 142.
13. Walzer, *Wars,* 142, 46.
14. Reisman and Antoniou, eds. *The Laws of War,* 35–230.
15. E. Saar, *Inside the Wire* (New York: Penguin, 2005); M. Ratner and E. Ray, *Guantanamo: What The World Should Know* (New York: Chelsea Green, 2004).

16. S. Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: Harper Collins, 2004); M. Danner, *Torture and Truth: America, Abu Ghraib and The War on Terror* (New York: New York Review of Books, 2004). In late 2005, allegations surfaced about the CIA running secret prisons in various locations, off American soil, for the sole purpose of aggressive anti-terrorist detainment and questioning.
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18. Reisman and Antoniou, eds., *Laws,* 153–393; I. Brownlie, ed. *Basic Documents in International Law* (Oxford: Oxford University Press, 4th ed., 1995), 255–388.
19. B. Innes, *The History of Torture* (New York: St. Martin's, 1998); J. Glover, *Humanity* (New Haven, CT: Yale University Press, 2001).
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22. M. Gelven, *War and Existence* (Philadelphia: Penn State University Press, 1994).
23. R.K. Fullinwinder, "War and Innocence," *Philosophy and Public Affairs* (1976), 90–7.
24. Walzer, *Wars,* 146, 219; T. Nagel, "War and Massacre," *Philosophy and Public Affairs* (1971/72), 123.
25. Walzer, *Wars,* xx.
26. P. Woodward, ed. *The Doctrine of Double Effect* (Notre Dame: University of Notre Dame Press, 2001).
27. Walzer, *Wars,* 106.
28. Walzer, *Wars,* 151, 157.
29. M. Ignatieff, *Virtual War: Kosovo and Beyond* (Toronto: Viking, 2000).
30. Journalists of Reuters, *The Israeli-Palestinian Conflict* (New York: Reuters Books, 2002).
31. T. Erskine, "Moral Agents and Intelligence," *Intelligence and National Security* (Spring 2004), 38–54.
32. Walzer, *Wars,* 152 and 156, in the note; Reisman and Antoniou, eds. *The Laws of War,* 80–4.
33. B. Orend, *War and International Justice: A Kantian Perspective* (Waterloo, ON: Wilfrid Laurier University Press, 2000).
34. Walzer, *Wars,* 129; xxi.
35. Walzer, *Wars,* 42 and 215; Reisman and Antoniou, eds. *The Laws of War,* 35–132.
36. James T. Johnson, *Ideology, Reason and The Limitation of War* (Princeton, NJ: Princeton University Press, 1975).
37. *Deuteronomy* 20:19.
38. Convention II, Article 6, of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects. This Convention was ratified in 1980. See Reisman and Antoniou, eds. *The Laws of War,* 53.
39. R. Regan, *Just War: Principles and Cases* (Washington, DC: Catholic University of America Press, 1996), 87–99, 136–50.
40. Walzer, *Wars,* 282. While there have been two UN General Assembly resolutions, in 1961 and 1972, banning the use of nuclear weapons (see Reisman and Antoniou, eds. *The Laws of War,* 66–7), and a 2004 one calling for the ultimate dismantling of them all, these do not carry the binding force of a ratified international treaty.
41. Walzer, *Wars,* 263–83.
42. Regan, *Just War,* 100–22; H. Kissinger, *Diplomacy* (New York: Harper Collins, 1995).