

Washington University Global Studies Law Review

Volume 6

Issue 3 *Symposium—Judgment at Nuremberg*

January 2007

The Liability of Ordinary Soldiers for Crimes of Aggression

David Rodin

Follow this and additional works at: https://openscholarship.wustl.edu/law_globalstudies



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

David Rodin, *The Liability of Ordinary Soldiers for Crimes of Aggression*, 6 WASH. U. GLOBAL STUD. L. REV. 591 (2007), https://openscholarship.wustl.edu/law_globalstudies/vol6/iss3/11

This Symposium is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Global Studies Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

THE LIABILITY OF ORDINARY SOLDIERS FOR CRIMES OF AGGRESSION

DAVID RODIN*

Aggression has long been considered the preeminent international crime. Yet, the vast majority of agents involved in perpetrating this crime—the individual officers and soldiers who fight in aggressive wars—are never held to account either in law or in broader moral terms. At Nuremberg, a decision was made to concentrate prosecutions on only the most senior leadership of the Nazi party and military. There was no attempt to prosecute lower ranking officers, ordinary soldiers, sailors, and airmen who had not themselves committed atrocities nor breaches of *jus in bello*.

This “liability gap”—the fact that sovereigns and statesmen, but not subordinate officers and soldiers, are liable for *jus ad bellum* offences—is one of the great puzzles of international law and ethics. In this essay I examine the philosophical foundation of combatants’ war rights and the basis for liability for *ad bellum* offences. I conclude that there is at least a theoretical basis for extending liability for the crime of aggression to ordinary soldiers and lower ranking officers.

Traditional just war theory and the current Laws of Armed Conflict (LOAC) assume two principles or theses:

1. “the symmetry thesis” which states that the content of *jus in bello* rights and obligations are the same for combatants on both sides of any conflict.
2. “the independence thesis” which states that the *in bello* rights and obligations of a combatant in war are independent of the *ad bellum* justice of the war in which he or she fights.

Together, the symmetry and independence theses imply that ordinary soldiers who participate in an unjust war do no wrong so long as they do not violate the norms of *jus in bello*. But both claims can be subject to important theoretical criticisms as I will explain below. These criticisms suggest that the norms of war should instead be interpreted in a way that is *asymmetric* (meaning that *jus in bello* rights and obligations are not always the same for combatants on both sides a conflict) and *dependent*

* Program on the Changing Character War, Oxford University; Centre for Applied Philosophy and Public Ethics, Australian National University.

(suggesting that *jus in bello* rights are dependent on *ad bellum* justice). The most important of these arguments concern four main ideas: the role of self-defense in the justification of war; the nature of responsibility and excuse; the proper interpretation of *in bello* proportionality; and consequentialism. I will briefly review these four lines of argument and then suggest that they are partially, though not entirely, correct. Nonetheless, these arguments are sufficient to compel us to think seriously about extending liability for crimes of aggression beyond heads of state to include common soldiers and mid-ranking officers.¹

I. FOUR ARGUMENTS FOR ASYMMETRY

A. *The Self-Defense Argument*

Self-defense is today the single most important legal and ethical justification for war. If one interprets self-defense to include the defense of others, then it is also possible to view the emerging norm of humanitarian intervention as part of the extended right of self and other-defense.²

The basic challenge of the self-defense argument can be stated as follows: if legitimate acts of war are viewed as instances of, or analogous to, legitimate acts of self-defense, then this seems to entail the rejection of the symmetry and independence theses. This is because, unlike a right of self-preservation, a right of self-defense contains limitations on the permissible objects of defensive force. Legitimate defensive force may only be directed against persons who are morally or legally liable for it. Traditionally just war theory has attempted to explain the liability for force through a morally neutral specification of non-innocence: soldiers at war are deemed to be non-innocent, and therefore liable for force, because they are engaged in a harmful activity, irrespective of whether the harmful activity is justified or unjustified.³

But this account of liability is demonstrably false. One does not become liable to force by engaging in a harmful activity that is itself

1. The issues surrounding symmetry and independence in the norms of war are explored in greater detail in *JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF COMBATANTS* (David Rodin & Henry Shue eds., Oxford Univ. Press 2008) (forthcoming 2008).

2. I have recently raised doubts about the ability of self-defense to justify wars not authorized by a legitimate global authority, however self-defense remains the dominant paradigm of justified war within legal and ethical thought. See DAVID RODIN, *WAR AND SELF-DEFENSE* pt. 2 (Oxford Univ. Press 2002).

3. See G.E.M. Anscombe, *War and Murder*, in *ETHICS, RELIGION AND POLITICS* 51 (1981); G.E.M. Anscombe, *Mr. Truman's Degree*, in *ETHICS, RELIGION AND POLITICS* 62 (1981). Of note, *nocentes*, the Latin root of the modern word *innocent*, means "harmful."

justified. Thus, one is permitted to kill an unjustified aggressor in defense, but one is not permitted to kill a justified attacker, such as a police officer who is using lawful force in the course of official duties, nor a victim of aggression who is using lethal force in legitimate self-defense. For a person to become liable for force seems to entail, at the minimum, that he or she is currently engaged in the *unjustified* harming, threatening, or attacking of a person or that person's legitimate interests.⁴

But of course, according to just war theory, a soldier who is fighting in a justified war of defense and is abiding by the rules of *jus in bello* is precisely such a justified user of force: that soldier is not engaged in unjustified harming, threatening, or attacking of any other person or that other person's legitimate interests. Soldiers fighting in a just war therefore seem to lack liability for force being used against them. It would seem to follow that while soldiers fighting in a just war ("just combatants") are permitted to use force against the enemy, soldiers fighting in an unjust war ("unjust combatants") are not. Soldiers fighting in an unjust war do not enjoy a symmetrical privilege to kill, and they presumptively should be held liable for unjust killing after the conflict.

The philosopher who has done the most to develop this line of argument is Jeff McMahan.⁵ McMahan's account is premised on a very strident example of what I call in *War and Self-Defense* the "reductive" account of war.⁶ He attempts to provide an explanatory account of war that reduces the rights and responsibilities of combatants at war entirely to the rights and responsibilities of individual persons. McMahan says "justified warfare just *is* the collective exercise of individual rights of self and other-defense in a coordinated manner against a common threat."⁷ This reductive account is quite radical, and has revisionary implications in many areas of the ethics of war. But the self-defense problem arises for any view of war that sees self-defense as the primary locus of the justification for the violence of war, and holds that the tenets of normal interpersonal morality remain relevant to individuals at war.

Even if one holds that normative relations in war are necessarily mediated through super-personal entities such as the state or nation, one must still explain why individual soldiers in war no longer possess their

4. For a stronger view according to which liability to defensive force requires a degree of culpability for the unjustified act, see RODIN, *supra* note 2, pt. 1, ch. 4.

5. See Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693 (July 2004). For an earlier statement of his views, see Jeff McMahan, *Innocence, Self-Defense and Killing in War*, 2 J. POL. PHIL. 193 (1994).

6. See RODIN, *supra* note 2, pt. 2, ch. 6.

7. McMahan, *The Ethics of Killing in War*, *supra* note 5, at 717.

ordinary human right not to be killed. The problem with using the concept of self-defense in providing this explanation is that the liberty of self-defense is inherently and necessarily asymmetrical: identifying a class of justified defensive actors seems to logically entail identifying a class of unjustified actors. The argument from self-defense thus constitutes a significant challenge for mainstream just war theory, by suggesting that unjust combatants are not justified in using force against just combatants.

B. The Responsibility Argument

An obvious response to the self-defense argument is to concede that, while soldiers fighting in an unjust war are not justified in using force against the enemy, they are nonetheless excused. The symmetry thesis is false at the level of justification (only soldiers fighting in a just war are truly justified in their use of violence), but it is true at the level of culpability and impunity (soldiers on neither side are culpable and they are immune from blame and punishment—soldiers on the just side because their force is justified; soldiers on the unjust side because they are excused). This conclusion is less than Michael Walzer’s celebrated “equal right to kill,”⁸ for the excused unjust combatants do not possess a liberty or permission to kill, but it does ground a significant and wide-ranging impunity from blame and punishment.

Why might one think that soldiers fighting in an unjust war are excused for their use of force? The most common suggestions are that unjust combatants are excused by reason of duress or of non-culpable ignorance. However, these claims do not cohere with our normal standards of liability in criminal law nor in inter-personal ethics.⁹ Although soldiers at war do face significant coercive pressures, in many cases these pressures fall short of the threat of execution for those who refuse to fight. Even in cases in which a soldier faces death if that soldier does not fight, this may not excuse wrongful killing because duress is not recognized as an excuse for homicide in many jurisdictions. In domestic society we often expect a person to prefer death rather than commit wrongful killing, which seems just and appropriate.¹⁰ Furthermore, even if we were to recognize the

8. MICHAEL WALZER, *JUST AND UNJUST WARS* 41 (1977).

9. I develop this argument in RODIN, *supra* note 2, at 165–73. For a nuanced and more sympathetic discussion, see David R. Mapel, *Coerced Moral Agents? Individual Responsibility for Military Service*, 6 J. POL. PHIL. 171 (1998).

10. David Mapel makes the interesting point that, since fear of death (cowardice) is not recognized as an excuse for dereliction of duty in war, it is unclear why fear of death should be recognized for the more stringent requirement not to engage in wrongful killing. *Id.* at 178.

coercive measures of military discipline as sufficient to excuse wrongful killing in war, this would not necessarily establish the innocence of soldiers who kill in an unjust war. The excuse may be only partial, thereby leaving substantial room for criminal liability. Moreover, unjust combatants could still be liable if they volunteered or allowed themselves to be drafted when there was a reasonable likelihood that they would be required to engage in wrongful killing (in the same way that someone who wrongfully kills while voluntarily intoxicated can be held liable: not because he is responsible for the killing, but because he is responsible for becoming intoxicated when this can reasonably be foreseen to lead to wrongdoing).

Similar problems arise with the suggestion that wrongful killing in war may be excused by reason of ignorance. While it is true that military commanders and government officials restrict access to relevant information and routinely engage in deception of soldiers and citizens, there often exist other channels of relevant information—at least within democratic societies with an active free press. Indeed, a source of embarrassment to the proponent of the excuse response is that both the duress and the ignorance excuses seem more applicable to soldiers of authoritarian states than they do to those of democratic states. This leaves open the possibility that soldiers of authoritarian states may enjoy the privilege of impunity for killing in war, whereas those of democratic states do not, thus suggesting yet another way in which the norms of *jus in bello* might apply asymmetrically. But even within non-democratic societies, access to relevant information is at least increasing with technologies such as the Internet. This may be sufficient to a morally reflective person to make a reasonable assessment of the justice of war.

Francisco de Vitoria argued that ordinary soldiers are not obligated to investigate the justness of the wars in which they fight, but that they should not fight if they happen to discover that their war is not just (Walzer is reluctant to grant even this weak exception).¹¹ But such a position inverts the ordinary burdens of evidence in a remarkable way. In a normal case of self-defense, we prohibit the killing of other persons unless there is clear and compelling evidence that they are about to engage in an unjust attack; we do not permit the killing of other persons unless there is clear and compelling evidence that they are *not engaged* in an unjust attack.

11. Francisco de Vitoria, *De Indis Relectio Posterior, Sive de Jure Belle [On the Law of War]*, in 2.2 VITORIA: POLITICAL WRITINGS §§ 22, 25 (Jeremy Lawrence & Anthony Pagden eds., Cambridge Univ. Press 1991). See also WALZER, *supra* note 8, at 39.

In any case, the excuse response can be nothing more than a stop-gap in the argument. Even if some, or even the majority, of soldiers in an unjust war are innocent of wrongdoing by reason of excuse, it is highly implausible to suppose that all soldiers will be excused in all wars. If one believes that wrongful killing is a serious crime, this seems to entail advocating some kind of judicial investigation of particular cases with the possibility of criminal sanctions. As Robert Nozick aptly put it, “some bucks stop with each of us; and we reject the morally elitist view that some soldiers cannot be expected to think for themselves.”¹²

C. *The Proportionality Argument*

One of the most interesting arguments against the symmetry and independence theses is the argument from proportionality. The great difficulty with *in bello* proportionality is how to interpret the comparative value judgment that this norm requires us to make. In just war theory, the norm has generally been understood to require the collateral costs to non-combatants of a particular military action to not be disproportionate to its expected military utility. In legal terms, the norm prohibits any attack that “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹³

But how are we to balance the value of obtaining a certain degree of military utility against the harm to noncombatants? It seems clear that obtaining “concrete and direct military advantage” (e.g., capturing a bridge or halting the enemy’s advance) has no intrinsic moral value, but only instrumental value which it obtains from the broader project of which it is a part. This seems to imply that the value of achieving a military objective is determined by the *ad bellum* justice of the conflict of which it is a part: it is only a moral value to achieve a determinate military advantage if the war of which it is a part is itself morally just. If the war is unjust, then achieving a military outcome advantageous to its end has negative rather than positive moral value. This suggests an asymmetric and dependent interpretation of *jus in bello*: those fighting a just war may inflict harm (including foreseen but unintended harm on noncombatants) to a level

12. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 100 (1974).

13. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) art. 51, June 8, 1977 1125 U.N.T.S. 3.

which is a function of the goodness of their cause, and the contribution a given military action makes to the cause. But, those fighting an unjust war may not inflict any harm on non-combatants, for (their cause being unjust) there is no good which could render the harmful effects proportional.¹⁴

The proportionality argument also suggests that soldiers fighting in a just war may enjoy increased *in bello* privileges compared to those currently granted by *jus in bello* norms. An action yielding a given quantum of military advantage might justify different levels of collateral harm depending on the contextual justice of its cause. On this view, a combatant fighting a war of exceptional justness and importance might possess exceptional permissions to inflict high levels of collateral harm on non-combatants. Thus, this argument, as well as suggesting the reduction or removal of the combat privileges of unjust combatants, suggests an augmenting of privileges (or a reduction of prohibitions) for just combatants.

D. The Consequentialist Argument

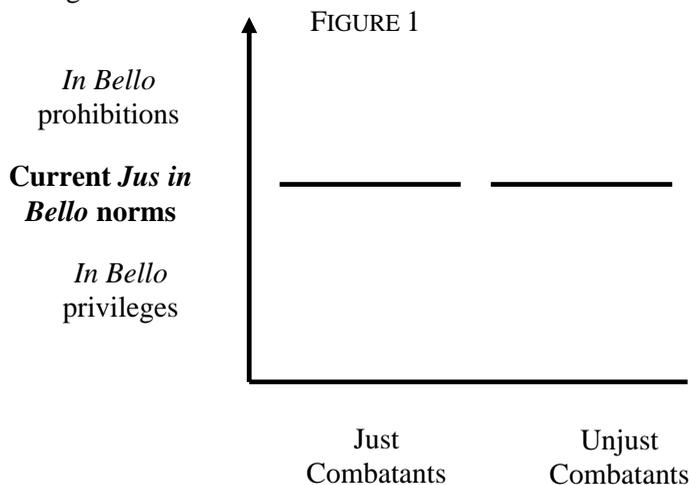
The proportionality norm involves comparing harms and benefits within the constraints of a deontological prohibition on the intentional harming of non-combatants. The consequentialist argument extends the reasoning of the proportionality argument to all acts of war. If the aims of a particular war are just and important, then, from a consequentialist perspective, it is mysterious why the just combatants should be bound by any *in bello* prohibitions at all in cases where the risk-adjusted expected outcome of violating them is morally preferable to the risk-adjusted outcome of not violating them. Similarly, it is mysterious why the unjust combatants should possess any *in bello* privileges. For such privileges assist in the achievement of unjust war aims, which are *ex hypothesi* a moral evil.¹⁵

14. Variants of this argument are discussed by Thomas Hurka and Jeff McMahan. See generally Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34, 45 (2004); McMahan, *The Ethics of Killing in War*, *supra* note 5. McMahan argues that the general claim that military acts of an unjust combatant can never fulfill the proportionality requirement must be qualified. McMahan, *The Ethics of Killing in War*, *supra* note 5. The reason is military actions by a soldier fighting an unjust war can be proportionate if it is directed solely against wrongful acts of soldiers on the just side (e.g., action that is itself disproportionate or is in pursuit of unjust aims within an otherwise just war). But, as he himself notes, this kind of case is “anomalous,” *id.* at 715, and its impact on the general anti-symmetry argument will be negligible. *Id.* at 704.

15. Obviously, thoroughgoing consequentialists would provide a very different account of the *jus ad bellum* from that found in traditional just war theory.

II. TWO FORMS OF ASYMMETRY

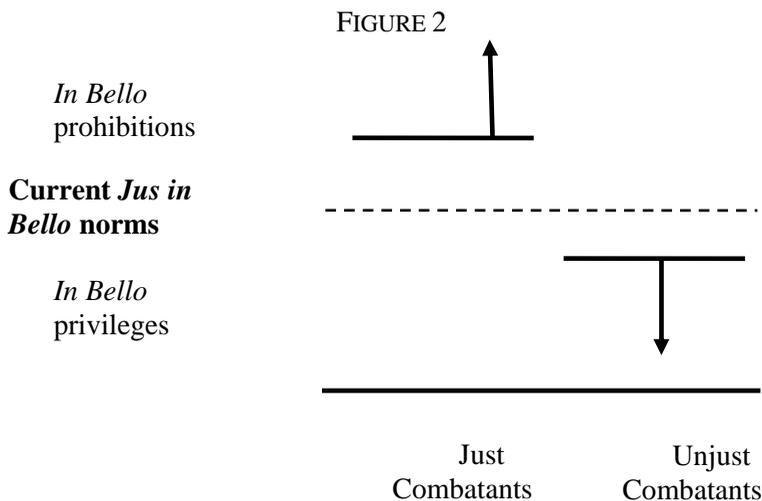
These four arguments constitute a strong philosophical case against symmetry and independence. Yet it must be accepted that the conclusion of these arguments strike many people as deeply implausible. They certainly contradict the mainstream of just war theory and international legal theory. In this section I will argue that the key to reconciling the strong theoretical arguments for asymmetry with their apparently implausible conclusions lies in making, and correctly applying, the following distinction. While there is only one way to formulate the symmetry thesis there are two different forms of asymmetry which may yield numerous distinguishable formulations of the asymmetry theses. To see this, consider the following diagrammatic representation of *jus in bello* norms. See Figure 1.



The current *in bello* norms are represented here by two equal lines at the centre of the diagram. These norms create both privileges and prohibitions. Thus, action that falls into the zone above the line is prohibited (broadly, this consists in the intentional harming of non-combatants, the unnecessary harming of combatants, and the disproportionate or unnecessary, unintentional harming of non-combatants). Military action that falls into the zone below the line is privileged (broadly, this consists of the intentional harming of combatants and the proportionate and necessary, unintentional harming of non-combatants). We might understand the privilege in two different ways. It might consist of a justification for action that falls below the line, or it

might simply consist of an excuse leading to impunity from moral blame or legal punishment for such action.

There are, however, several distinguishable ways in which we could formulate an asymmetry thesis. We could deny *in bello* privileges to the unjust side, or we could grant superior *in bello* privileges to the just side. Or, we could do both as in the diagram below. See Figure 2.



I shall refer to the claim that just combatants have *increased in bello* privileges compared to the current interpretation of *jus in bello* as “permissive asymmetry,” and I shall refer to the claim that unjust combatants have *reduced or no in bello* privileges as “restrictive asymmetry.” As with the symmetry thesis, we may distinguish between *in bello* privileges, which amount to a justification, and privileges, which amount only to an excuse leading to impunity from moral blame and legal punishment.

Clearly there is no logically necessary reason why permissive and restrictive asymmetry should be asserted or denied together. Indeed, the two forms of asymmetry are suggested in different ways by the four arguments discussed above. The self-defense argument and the responsibility argument suggest that soldiers fighting in an unjust war should not be granted the *in bello* privilege of killing with impunity. But, these arguments do not suggest that just combatants should enjoy increased *in bello* privileges. On the other hand, the proportionality and the consequentialist arguments support increased privileges for the just, and reduced or eliminated privileges for the unjust.

With the distinction between permissive and restrictive asymmetry in place, how should we respond to the arguments against the symmetry and independence theses? My own view is that the symmetry thesis should be rejected, but the doctrine of asymmetry is only half right. Specifically, my hypothesis is that permissive asymmetry is false, but restrictive asymmetry is true.

III. A CONTRACTARIAN ARGUMENT

In order to support this hypothesis, I will develop a simple contractarian argument. This argument draws conclusions about the appropriate configuration of moral rules by enquiring how rational agents, choosing under ideal conditions of impartiality, would configure them.

Contractarian arguments are an attractive way of approaching problems like the rules of war for a number of reasons. As an ethical thought experiment, they provide a structured way to generate concrete moral conclusions on specific issues. Moreover, when properly constructed, a contractarian thought experiment can integrate deontological and consequentialist aspects of our moral experience. With its emphasis on impartiality and the rational consent of free agents, a contractarian approach captures key aspects of the concept of justice.¹⁶ At the same time, because the hypothetical contractors in the original position are influenced by a concern for their own future welfare, contractarian arguments can also be utilized to generate rule-consequentialist conclusions. Richard Brandt, for example, uses a contractarian argument to explore a rule utilitarian approach to war in his classic article, *Utilitarianism and the Rules of War*.¹⁷

We are to imagine all potential parties to war in an original position from which they have full factual knowledge about the world but no knowledge of how they will be situated within it. Thus the parties know about the political, sociological, psychological, and technical aspects of war and conflict, and they know that, on occasion, their own state will be involved in war, but they do not know whether they will be soldiers or civilians, whether they will be members of the winning or the losing side, or whether they will be members of the just or the unjust side of a given

16. Since the publication of Rawls's *A Theory of Justice*, the contractarian approach has been strongly linked to arguments about the nature of justice. JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard Univ. Press 1999) (1971).

17. Richard Brandt, *Utilitarianism and the Rules of War*, in *ABSOLUTISM AND ITS CONSEQUENTIALIST CRITICS* (Joram G. Haber ed., Rowman & Littlefield 1994) (1972).

conflict.¹⁸ We need not make the implausible assumption that the contractors are pure rational hedonists, who are concerned solely with their own future happiness or welfare. Instead, it is more helpful to conceive of agents in the original position as possessing a reasonable desire that their own behavior comply with important and well established pre-existing moral commitments and requirements.

Thus, I will suppose that the contractors in my thought experiment are motivated both by a self-interested concern for their own future welfare and by a desire to respect important rights. For the sake of simplicity, I will also assume that my contractors have already reached a consensus on the basic content of both the *jus ad bellum* and *jus in bello*, and that these norms are generally in conformity with standard current interpretations.

What remains for the original contractors to decide is how the *jus in bello* component of the laws of war relates to the *jus ad bellum* component. Would ideal rational agents adopt a symmetry interpretation of *jus in bello*, or would they opt for permissive or restrictive asymmetry, or both?

Let us consider the question of permissive asymmetry first by examining the suggestion that just combatants, because of the justice of their cause, have increased *in bello* privileges. Contractors in an original position would have decisive reasons for rejecting permissive asymmetry. Why is this? The conclusion stems from two facts accessible to contractors within the original position. First, across the universe of possible wars, most combatants at most times will be engaged in wars that are unjust. Second, when engaged in an unjust war, most combatants will mistakenly believe their war to be just.

How are these two claims substantiated? The first claim would seem to be a simple logical consequence of just war theory itself. It may be derived from the observation that, under standard interpretations of *jus ad bellum*, it is not possible for a war to be just on both sides simultaneously, but that it *is* possible (and indeed relatively common) for a war to be unjust on

18. There is an important question as to whether the contractors in the original position are to be conceived as individuals or as the representative of states or peoples. In *A Theory of Justice* and *The Law of Peoples*, Rawls supposes that the norms of international justice are to be determined by ideal agreement between the representatives of peoples and collective political and ethnic entities, rather than individual persons. RAWLS, *supra* note 16.

I am skeptical of this interpretation of social contract theory in international relations. It appears to me to be inconsistent with the individualistic underpinnings of social contract theory. However, for our present purposes, we need not settle this issue because I believe that the same interpretation of *jus in bello* would result whether we conceive of the original contract as made by individuals or the representatives of peoples.

both sides.¹⁹ Contractors in the original position can therefore know *a priori* that, at most, fifty percent of all wars (understood as the prosecution of a war by one party) can be just. If all wars are just on one side and unjust on the other side, then the percentage of just wars will be fifty percent; if some wars are unjust on both sides then the percentage will be less than fifty percent. Therefore, if at least one conflict in the universe of possible wars is fought unjustly on both sides, then the majority of all possible wars are fought unjustly, and the majority of combatants across the total class of wars will be unjust combatants.²⁰

Despite the predominance of unjust over just war, most combatants believe their wars to be just whether they are in fact just or not. This claim is supported by three observations available to the original contractors: one historical, one psychological, and one about the moral structure of war.

It seems to be true that, historically, the majority of wars have been claimed to be just on both sides. Many twentieth century wars were claimed to be wars of self-defense by both sides. Some of these claims may simply represent bad faith and propaganda on the part of war-leaders. But, there is good reason to believe that soldiers and statesmen often sincerely believe their wars to be just, whether or not they are in fact just. This is because of an important fact about the psychology of war. War is so difficult, so dangerous, and so costly, that it is exceptionally difficult for ordinary humans to undertake it without believing that they are in pursuit of a cause that is noble and just.²¹ This psychological observation is linked to a fact about the moral structure of war; namely, in most wars, justice is one of the matters at issue between the competing sides. That is to say, war typically occurs when rational forms of discourse and conflict

19. This is a consequence of basic principles of just war theory, and it is a feature of modern international law. Classical statements of this doctrine can be found in the writings of Grotius and Vitoria. See HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* [THE LAW OF WAR AND PEACE THREE BOOKS] Book II (1646), reprinted in *THE CLASSICS OF INTERNATIONAL LAW* 565 (Francis W. Kelsey trans., James B. Scott ed., Oxford Univ. Press 1925); Francisco de Vitoria, *De Indis Relectio Posterior, Sive de Jure Belle [on the Law of War]*, in 2.4 VITORIA: POLITICAL WRITINGS 313 (Jeremy Lawrence & Anthony Pagden eds., Cambridge Univ. Press 1991). For the position of modern international law, see generally YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 168 (1988).

20. This last claim contains an implicit assumption concerning numbers. The assumption is that just wars are not on average fought with more combatants than unjust wars. This does not seem an unreasonable assumption to make.

21. Of course, there have always been mercenaries—soldiers motivated in part or in whole by the material rewards of war—as well as simple marauders, who raid and kill for nothing more than booty. But, at least since the French Revolution, the great wars have not been sustained primarily by mercenary motives, but by mass ideologies with concomitant beliefs about the justice of war.

resolution (e.g., negotiation, arbitration, legal adjudication) have failed. If combatants agreed with respect to which party had justice on their side, they would not need to have recourse to war. War begins where moral consensus ends. Typically the breakdown of rational moral discourse and agreement is one of the factors that precipitate war. Because most conflicts arise from competing interpretations of circumstances relating to justice, it is to be expected that most combatants in most wars will believe themselves to be fighting a just war.²²

Suppose, then, it is true that: (1) most wars in which combatants may potentially fight will be unjust; and, (2) when engaged in an unjust war, most combatants will mistakenly believe their war to be just. Given this, contractors would have decisive reasons to reject permissive asymmetry. Accepting it would expose them and their compatriots to two significant forms of risk on the battlefield: one is a form of moral risk and the other is a form of physical risk.

First, contractors would be exposed to a moral risk. If permissive asymmetry were adopted as an interpretation of *jus in bello*, contractors would run a high risk of fighting in a war that they believe to be just, but which was in fact unjust. In such a circumstance, they would inflict incidental harm on non-combatants in accordance with a mistakenly liberal interpretation of proportionality, which was not in fact morally justified (e.g., they would ascribe to themselves an increased liberty to inflict collateral damage on enemy non-combatants). Thus, they would be exposed to a high moral risk of committing serious injustice in war.²³

Second, contractors would be exposed to a physical risk. Suppose that the contractors found themselves fighting a just war, and it was their opponents who were fighting an unjust war they believed to be just. Then, the contractors would be exposed to a risk of increased physical harm, because their enemies would inflict upon them unjust and excessive collateral harm due to a mistakenly liberal interpretation of the proportionality requirement.

Would these significant risks, entailed by accepting permissive asymmetry, be balanced by any countervailing advantages? It does not appear so. Even in a case in which the contractors found themselves

22. To say that the mistaken belief in the justice of one's war is common is not to say that it is morally justified or even excusable. It is, instead, simply to say that there are strong psychological and sociological forces motivating self-deception. Wars are often motivated by real disagreements as to justice or right, but it does not mean that these disagreements are reasonable.

23. As I explained above, I take my original contractors to be motivated not only by egoistic self-interest, but also by a desire to respect important moral commitments such as basic human rights.

fighting a genuinely just war, permissive asymmetry would not yield any significant military advantage in achieving the just war aims. It is likely that the unjust enemy, believing themselves to be just, would simply ascribe to themselves equal *in bello* privileges. Hence, the total destructiveness of the war would be increased without yielding either side any decisive military advantage.

Permissive asymmetry is not sustainable as an ethic of war because of the radical unreliability of the *ad bellum* judgements that combatants can be expected to make in the course of a war. Permitting a combatant to apply a norm of permissive asymmetric privilege would be like permitting a criminal defendant to try and sentence his or her own case, or like permitting a party to mediate his or her own dispute. No plausible principle of justice would allow such practices.

What then of restrictive asymmetry—the claim that unjust combatants should be denied *in bello* privileges? Would contractors in the original position accept or reject this thesis? Unlike permissive asymmetry, restrictive asymmetry is a conservative moral principle in the sense that it limits rather than augments military privileges. Because of this, it does not bring moral and physical risks of the form we have just discussed, even assuming that *ad bellum* judgements are often unreliably made in the context of war. Indeed, one of its most attractive features is that it contracts rather than expands the scope for permissible harm in war.

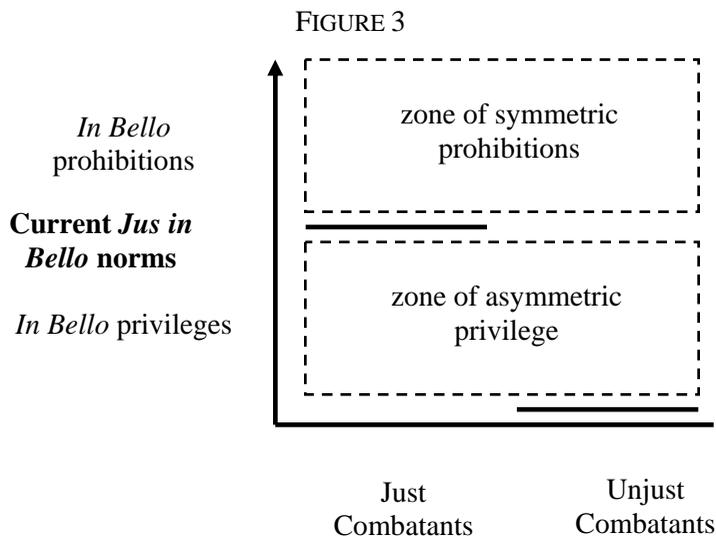
But the risks of restrictive asymmetry may be of a different kind. For example, it might be thought that holding soldiers liable for participation in an unjust war would adversely affect the ability of states to organize and maintain effective military defense forces. Restrictive asymmetry may carry the risk of making just states vulnerable to aggression.

However, it is unclear that restrictive asymmetry would endanger just states. First, there is no strong empirical evidence linking individual responsibility to reduced military effectiveness. Second, even if there is such a link, the security of a just state depends on two factors: its ability to organize and maintain effective defensive forces, and the ability of any potential aggressor to organize and maintain effective offensive forces. Given that the norm prohibiting offensive war is tolerably clear, the potential corrosive effects of individual responsibility on military effectiveness would be felt most strongly by a potential aggressor rather than a defender. Restrictive asymmetry would therefore likely increase the net security of just states, even if it does reduce the effectiveness of individual fighting forces.

A second form of risk concerns the possibility that restrictive asymmetry might reduce the likelihood that unjust combatants would

comply with important current *in bello* prohibitions, such as the norms of non-combatant immunity, necessity, and proportionality. It has been suggested that noncombatant immunity is simply the flip side of combatant nonimmunity, so that you cannot have one without the other.²⁴ But, an analysis of the structure of moral obligations disproves this; combatant nonimmunity is not a correlate of noncombatant nonimmunity.

This can be seen in the diagram below which represents the view of *jus in bello* in which permissive asymmetry is rejected and restrictive symmetry is accepted. See Figure 3. This represents what I believe to be the correct interpretation of *jus in bello*. Currently accepted *in bello* restrictions, based as they are on basic human rights, apply equally to both parties; however, currently accepted *in bello* privileges apply only to the just combatants. There are certainly no conceptual difficulties with such a deontic scheme.



However, the objection may be rephrased in another way: the real issue is not that the combatant privileges and prohibitions cannot be conceptually distinguished, but that unjust combatants will have no *incentive* to comply with currently accepted *in bello* prohibitions if they are not granted equal war privileges. If there is no moral distinction between harming just combatants and harming non-combatants, then there

24. Lene Bomann-Larsen suggests this in her helpful article on symmetrical war rights. Lene Bomann-Larsen, *Licence to Kill? The Question of Just vs. Unjust Combatants*, 3 J. MIL. ETHICS 142, 145–46 (2004).

is little incentive for unjust combatants to abstain from the latter given that they are already committed to attacking the former.

However, it is simply not the case that restrictive asymmetry is committed to the proposition that there is no moral distinction between harming just combatants and harming non-combatants. The correct interpretation of restrictive asymmetry is that while harming just combatants in an unjust war is wrong, harming non-combatants is *worse*. The currently accepted *in bello* prohibitions can be understood as aggravating conditions of the broader crime of participating in an unjust war.²⁵ This is of course the way we deal with the punishment of criminal action in domestic criminal law. For example a bank robber who kills an armed guard attempting to stop the robbery is guilty of murder, but a robber who capriciously kills an unarmed customer may be guilty of murder with aggravating circumstances. For this reason, there are few legitimate worries about perverse incentives in adopting restrictive asymmetry.

A final and important area of concern with the proposal of restrictive asymmetry is the issue of victor's justice. While the trials at Nuremberg met very high standards of procedural justice, there are compelling reasons for contractors in the original position not to grant war victors the right to try and punish enemy combatants for acts of war that comply with current *in bello* norms. The primary reason is that states and combatants cannot be expected to reliably determine the justice of their own cause. We expect that any victors in war will declare themselves just and their enemy unjust. In such a context, victor's justice would merely become a euphemism for revenge and retaliation with little meaningful correspondence between the "punishments" inflicted on soldiers and their individual or even collective liability.

Concern about victor's justice is therefore warranted. But, it must be noted, this concern is not an objection to restrictive asymmetry. We must distinguish between liability to punishment in the agent of crime and the authority to punish in the agent of justice. Restrictive asymmetry is a claim about the former, whereas victor's justice is a problem with the latter. Thus, a criminal may be culpable of infamous crimes and be liable for punishment, even if, because of corruption, partiality, and illegitimacy, there is no court with the authority to punish that criminal. Soldiers who fight in an unjust war, and who are not excused by reason of duress or

25. Jeff McMahan makes this point. McMahan, *The Ethics of Killing in War*, *supra* note 5, at 702.

nonculpable ignorance, are liable to punishment—just not at the hands of an unreliable process of victor’s justice. Legitimate punishment of war crimes requires (as does the punishment of any crime) a legitimate punitive authority that must, minimally, display independence, neutrality, and impartiality.

One might respond that such a conclusion robs restrictive asymmetry of most of its practical impact. At present, victors are, by and large, the only bodies capable of punishing unjust combatants. If victors are not justified in punishing them, then unjust combatants in all practical respects enjoy legal impunity.

Yet, it is not true that the restrictive asymmetry has no meaningful implications for international law. Soldiers who fight in an unjust war may have moral liability for *ad bellum* offences as well as a latent legal liability. It is latent in that the liability cannot result in legitimate prosecution and punishment in the absence of a properly authorized punitive body. But, this latent liability may later become actualized.

Though not currently constituted to prosecute individual soldiers for *ad bellum* violations, the International Criminal Court (ICC) has the form of authority that would be required to punish unjust combatants. One practical legal implication of the present argument could be that the jurisdiction of the ICC (or a potential successor) should be developed to include the liability of individual soldiers for *ad bellum* crimes, just as today it has jurisdiction over soldiers for *in bello* crimes. There would be enormous political, institutional, and legal challenges to developing such a proposal in the real world. But the asymmetry arguments explored here counsel that this should become a long-term ethical objective of international politics.