A PRAGMATIC OBJECTION TO MORAL DISTINCTIONS: A COMMENT ON THE MORALITY AND LAW OF WAR

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I. Introduction

This comment to Jeff McMahan’s thought-provoking contribution does not aim to take issue with the interesting and rather compelling philosophical arguments he raises in support of moral-based norms. In the same vein, the comment does not criticize the way in which McMahan describes the international law doctrines governing war situations—a description which is generally accurate. Instead, I comment on the policy reasons that have led international law-maker to move away from some of the morality-based distinctions and normative choices expounded by McMahan. Hence, my focus in this comment is on the pragmatic constraints that limit the influence of moral ideas on the laws of war. Of course, the resort to pragmatism may be in itself morally justifiable, as the insistence on the application of pragmatic consideration is often linked to the promotion of laudable goals—aversion of war and reduction of casualties and damage.2 Hopefully, a better understanding of the reasons underlying the rejection of “pure morality” in the context of the regulation of war would contribute to a critical assessment of the desirability of McMahan’s ideas and to identification of the institutional conditions that could facilitate their application.

This comment is divided into three parts. Part one examines the applicability of morally-based norms in the context of jus ad bellum—the laws governing resorting to military force in the first place. Part two undertakes a comparable examination of some aspects of the law governing the conduct of hostilities (jus in bello), focusing in particular on decisions to target individuals belonging to the adversary. Finally, Part

three critically looks at the moral case in favor of normatively linking the two branches of the law of war—that is, McMahan’s position that the justification for the original decision to resort to force under *jus ad bellum* should impact the permissibility of specific acts under *jus in bello*.

II. **Self-defense as a Form of Punishment**

A. **Historical Overview**

Under classic international law, war was conceived as primarily punitive in nature. Indeed, at a time in which the use of force was not generally prohibited as a *legal* matter, wars often played an important law-enforcement function. Furthermore, pursuant to the “just war” doctrine—which prevailed throughout the 16th-18th centuries—states were required to identify the wrong they were seeking to redress through resorting to force in order to establish a moral justification for their conduct. Hence, under classic international law, states had—in McMahan’s terms—to establish the liability of the targeted state before resorting to force against it.

However, throughout the 19th century the “just war” doctrine and the invocation of retributive justifications there-under fell out of legal and political favor. Whereas positivists exposed the fallacy of the doctrine and its failure to meaningfully restrict warfare, advocating, in effect, a limitless right to go to war, supporters of the nascent “peace movements” have sought to introduce strict limits on the previously self-declared and amenable-to-abuse right to go to war in order to remedy wrongs.

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3 For a similar argument, see McMahan, supra note 1, at 679 (“there is a just cause for war only when those against whom the war is directed—that is, those who are intentionally attacked and killed by military means—have made themselves liable to be attacked or killed”).


6 McMahan, supra note 1, at 670.


8 Dinstein, supra note 5, at 878.

Although both policy trends appear to conflict with one another, they both represent the repudiation of retribution as the main rationale for the use of force.

Indeed, the famous *Caroline* incident of 1837 between the U.S. and Great Britain is indicative of the move away from retribution. In the aftermath of the incident, which involved a border incursion by British forces into U.S. territory and the sinking of a ship used by American individuals to provide Canadian rebels with weapons, the two countries agreed on the "Webster formula," according to which resorting to military should be deemed justified only if it were to meet the requirements of immediate necessity and proportionality. The insistence on the immediate nature of the threat in the "Webster formula" suggests that retribution was not a primary rationale for the new law on the use of force: While punishment, like self-defense, should be necessary and proportional, it needs not be applied immediately. In addition, the facts of the Caroline incident do not reveal any acknowledgment of moral liability or guilt on the part of the U.S., which could have justified the British incursion. Hence, a "preventive" rationale—the need to avert a greater catastrophe—provides a better explanation than the "liability" rationale for the contours of the Webster formula.

The movement in the 20th century towards the outlawing of war—culminating in the adoption of Article 2(4) of the UN Charter—provides, in my view, another strong indication of the rejection of the liability rationale by the international community as a justification for the use of force. Under the law of the Charter, the use of force is subject to a number of legal restrictions: (a) Force can be exercised in self-defense *only* if an armed attack occurs—i.e., in conditions of immediate threat; (b) the right

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11 DANIEL WEBSTER, THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 104-110 (1848).

12 For discussion of two possible types of proportionality, see McMahan, *supra* note 1, at 681.


14 Charter of the United Nations, art. 2(4). ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"). Another important legal milestone is the 1928 Kellogg-Briand Pact outlawing wars. Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57.

to self-defense is also temporarily limited—"until the Security Council has taken measures necessary to maintain international peace and security"—much like the right under domestic law of an individual victim of an attack to repel an attacker expires when the police arrive on the scene (of course, the individual may not "punish" the attacker),16 (c) according to the ICJ's consistent jurisprudence on the matter, the use of force must comply with the requirements of immediate necessity and proportionality as laid down in the Webster formula;17 (d) in addition, the ICJ has opined that self-defense can only be exercised if the provocative armed attack crosses a threshold of a certain magnitude of violence.18

These conditions serve as indicators of the dominance of the objective necessity (or preventive) rationale as the principal justification for use of force in self-defense under the Charter and the limited relevance of the aggressor state's moral liability. Force may be used only in response to wrongful acts of immediate consequences; in addition, force may be applied only in response to one particular form of wrongful acts, involving violence, but not to other—potentially no less serious immoral acts (human rights violations, harm to shared natural resources, violation of the self-determination principle).19

Indeed, it is widely believed that armed reprisals, which represent punitive, not preventive resort to force, are no longer lawful under contemporary international law.20 Further, even humanitarian intervention (a doctrine of dubious legality)21 is

16 Id.
19 Additional support to this contention can be found in UN Docs. S/Res/1368 (2001) and S/Res/1373 (2001) which appear to affirm the right to self-defense against an armed attack originating from the territory of a foreign state, notwithstanding its lack of legal responsibility for the attack. But see, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9), at para. 194; Nicaragua v. U.S., supra note 17, at para. 146-147 (armed attacks not imputable to a state do not give rise to a right of self-defense).
hardly punitive in nature: Since it is designed to save civilians from immanent threat, its main policy impetus is preventive in nature.

B. Analysis

Why did positive _jus ad bellum_ develop in ways that reject, by and large, morality as the basis for decision-making relating to the application of military force, opting instead for a limited “necessity-type” exception to the prohibition against the use of force? To my mind, the rejection of a liability-based justification for using force derives first, and foremost, from the risk of its abuse by state.22

Identification of a punishable wrongful act or determination of moral liability requires an act of judging; in the same vein, selection of the proper sanction to be employed against the morally or legally liable state (e.g., selection between military, economic, diplomatic, political, and legal sanctions), also depends on a discretionary judgment. While classic international law invested individual states with self-judging power over these and other matters, experience had shown that states cannot be trusted to faithfully exercise such subjective and broad discretionary powers. In fact, the demise of the “just war” doctrine was closely related to the perceived subjugation of judgments on liability and sanction to overriding parochial national interests,23 and the ensuing lack of credibility of moral assertions supporting many military operations.

Hence, second order considerations of an institutional nature may require that a central decision-making body, such as the Security Council, would normally authorize resort to force.24 The collective nature of decision-making in the Security Council guarantees some detachment from the idiosyncratic national interests of any single state, thus increasing the prospects of generating principled outcomes responding to moral imperatives.


23 See, e.g., John F. Coverdale, _An Introduction to the Just War Traditions_, 16 PACE INT'L L. REV. 221, 235 (2004).


Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.
Analogous second order considerations dictate the narrowing of the scope of exceptions to the rule prohibiting the use of force. Since states cannot be trusted to identify "unjust" situations or to choose a sanction commensurate with the unjustness of the situation, use of force ought to be restricted to "objectively" identifiable emergency situations, which are characterized by the immediate necessity and violence (an armed attack). This is because a broad right to use of force, triggered by self-judgment, is expected, on the whole, to create more injustice than remedy wrongs.25

So, non-immediate and non-violent threats are to be handled by central decision-making institutions, such as the Security Council. Still, the aversion to violence loses much of its strength if violence was already initiated by another party to the conflict. Here, allowing a state to defend itself by applying force against force could constitute a lesser evil than a rule barring self-defense altogether; in addition, acknowledging a right to self-defense (which includes the right to seek military help from other countries)26 might prevent, through deterrence, the aggressor's resort to violence in the first place.

So, under the Charter's scheme for regulating wars, pragmatic reasons relating to the need for stronger institutional oversight suppress the influence of retributive rationales and channel the use of force by individual states to preventive ends. Still, one should note that even under Charter law there is no full detachment between jus ad bellum and notions of liability. For example, collective self-defense (the right of states to come to the aid of a state that had fallen victim to aggression, but not to the aid of the perpetrator),27 can be viewed as a form of sanction against aggressor states.28 Another example may be the duty not to suppress wars of self-determination and the right to provide assistance to self-liberating peoples introduced by a number of UN Resolutions.29

28 This is particularly in light of the inclination to view aggression as an international crime. Rome Statute of the International Criminal Court, July 17, 1998, art. 5, 2187 U.N.T.S. 90.
III. Jus in bello—Punishing Combatants?

A distinct, yet intellectually-related argument presented by McMahan goes to the justification of targeting combatants in time of war. According to McMahan: "A person can be liable to be killed, in my view, only by bearing a significant degree of responsibility for a serious wrong that can be prevented or corrected at an acceptable cost only by killing some or all of those who are responsible for it." This approach too seems to base the jus in bello governing targeting of individuals on the latter’s moral culpability: Hence, morally-liable combatants, but not innocent civilians, could be targeted. However, this approach too is far removed from the existing laws of war, which have never adopted this type of justification—probably for good reasons. The following paragraphs explain why the liability rationale is incongruent with basic principles and assumptions underlying classic and modern international humanitarian law (IHL).

First, the basic principle requiring armies to direct their attacks against enemy military targets (introduced as early as in 1868) was formed at a time when resorting to war was generally permissible, as a legal matter; hence, the impermissibility of participation in war did not play a major part in the shaping of the older rules on targeting—especially not in the more positivist 19th century. To the contrary, the norms requiring humane treatment of enemy prisoners of war (POWs), the wounded and even soldiers in the field during combat (through restrictions on weaponry likely to inflict unnecessary suffering or superfluous injury) derived from ancient notions of chivalry and fair play. According to such notions, being a soldier was being engaged an honorable professional; war was not a personal matter but rather in an inter-state affair. Hence, throughout IHL’s formative years, participation in war was not deemed immoral and this

30 McMahan, supra note 1, at 679.
32 See, e.g., Hague Regulations on the Laws and Customs of War on Land: October 18, 1907, art. 23(e), 205 Consol. T.S. 277.
34 This idea was captured by Rousseau, who wrote that:

War is not between individuals, it is between States. In war, the accidental enmity among individuals that occurs is not because they are acting in their capacity of an individual, but in that of a citizen. They are not acting as elements of their State but rather as its protectors.
could not have served as the justification for targeting decisions.\textsuperscript{35}

Second, the immunity from targeting granted to persons who find themselves \textit{hors de combat}—i.e., POWs, wounded soldiers—is not compatible with a liability-based rationale. Surely, individuals who have just stepped out of the battlefield, perhaps involuntarily, might be no less guilty from a moral perspective than persons still taking an active part in hostilities.\textsuperscript{36} Thus, it is more logical to understand the immunity from harm granted to individuals who are \textit{hors de combat} as derived from a preventive rationale and not a liability-based one: since these individuals no longer constitute a military threat that ought to be prevented, it is unjustifiable to harm them.

Finally, the dichotomy between combatants and civilians is not necessarily based on moral guilt: A war mongering politician is most probably more “guilty” of leading the country to war, than a low-ranking soldier. Still, positive law permits in most cases the targeting of the latter but not of the former.\textsuperscript{37}

Now, why does this arguably represent a reasonable state of affairs? Again, it would seem that second order institutional considerations militate against the introduction of liability-based standards into IHL, since they too would be open to abuse in times of war. Since warring parties often demonize their opponents and regard them as morally culpable and law-breakers—both with relation to \textit{jus in bello} and \textit{jus ad bellum} norms—liability-based targeting decisions may result in excessive “punishment” without trial of enemy civilians and combatants (who may not present an immediate military threat; hence, in theory, at least their legal liability or moral culpability could have been reviewed in proper judicial proceedings). This could entail, in effect, the imposition of the death penalty on enemy soldiers or civilians who allegedly took a direct part in an “unjust” war—an outcome that raises significant proportionality concerns.


\textsuperscript{35} Some have believed that significant moral virtue is associated with the bravery that participating in war requires. \textit{See}, e.g., Henry W. Wells, \textit{A Philosophy of War: The Outlook of Robinson Jeffers}, 6 \textit{College English} 81 (1944).

\textsuperscript{36} Note that under Article 44 of the First Additional Protocol, even a combatant that has perpetrated war crimes retains his POW status upon capture (although she may be tried for such crimes). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 44(2), 1125 U.N.T.S. 3.

In addition, if states were encouraged to regard enemy combatants as immoral agents—and not “honorable” men and women in uniform, then it is likely that the humanitarian protections afforded to them after capture, would be compromised; this in turn, may adversely affect the willingness of the “unjust” party to afford full protections to service members of the “just” party to the same conflict.

Given the subjective nature of determinations of “liability” and “punishment” by the parties to the conflict themselves—one would expect each party to castigate enemy combatants as unjust combatants—it would seem that a move to a liability-based rationale would mean that fewer IHL protections would be afforded. Furthermore, the—“defection dynamics” created by a rule providing for contingent application of IHL norms—the punishment of allegedly “unjust” combatants (and, perhaps, also civilians) on the one side would encourage similar treatment of combatants and civilians of the other side—might lead eventually to the collapse of IHL as we know it.

The better view would thus seem to be that a more objective “risk-based” criteria encompassing only active combatants, would provide better humanitarian protections to all soldiers and civilians. Here too, pragmatic considerations relating to the unreliability of self-judgments on liability would militate in favor of a narrower and less open-to-abuse formula for targeting enemy combatants, which could be viewed as, ultimately, more moral.

Still, I would accept that moral considerations might be relevant in some cases in targeting decisions. For example, it has been suggested in the recent targeted killing decision issued by the Israeli Supreme Court that a legal distinction should exist between voluntary and non-voluntary human shields:38 Whereas the latter group of civilians is entitled to protection (but might sustain collateral damage as a result of its proximity to a legitimate military target), the other group constitutes a lawful target. Although the Court’s conclusion appears to be controversial, many would probably accept that a different formula of proportionality should govern a military attack entailing collateral damage to voluntary and non-voluntary human shields.

38 HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel (not yet published)(given December 11, 2006), at para. 36.
IV. Jus ad bellum and Jus in bello

My last point relates to the link between the two branches of the laws of war—jus ad bellum and jus in bello. According to McMahan, the characterization of a specific war as lawful or unlawful is critical to assessing the permissibility of targeting combatants (executing a just or unjust war).\(^\text{39}\)

Of course, this precise proposition was raised and rejected explicitly in the Hostages case in Nuremberg,\(^\text{40}\) where the prosecutors tried in vein to argue that the unlawfulness of Hitler's occupation of territories should color in illegality all military activities taken by the Wehrmacht in occupied territories. According to the military court:

> International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.\(^\text{41}\)

More generally, the prevailing doctrine insists that legality of the war does not affect the lawfulness of particular acts of warfare undertaken in its midst.\(^\text{42}\) Again, this de-linkage is also indicative of the dominance of the preventive rationale—the laws of war are designed to offer a pragmatic way to reduce human suffering—over the moral liability rationale. Here too, this second order considerations—fear of abuse and reciprocal violations—justify a move away from a liability-based rule, which links between personal guilt and humanitarian protections, to a broader rule which provides humanitarian protection to all individuals who do not constitute a direct military threat (regardless of their moral guilt or innocence in the eyes of the adversary).

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\(^{39}\) McMahan, supra note 1, at 678-679.

\(^{40}\) U.S. v. List (Hostages case), VIII Law Reports of Trials of Major War Criminals 38, 59 (1949).

\(^{41}\) Id.

\(^{42}\) Dinstein, supra note 37, at 4-5.
Of course, the question of moral and legal liability may be very relevant for a host of other legal and moral issues: It may determine the "civil liability" of the states involved (for example, the UN Compensation Commission required Iraq to pay for all damages its soldiers inflicted upon Kuwait and other countries in the region regardless of the lawfulness of these acts under *jus in bello*—a conclusion justified by the unlawfulness of the Iraqi invasion of Kuwait under *jus ad bellum*), the individual criminal responsibility of the war’s planners and instigators and the moral responsibility of the soldiers participating therein. It should not, however, as a pragmatic, and ultimately moral matter, determine the very of applicability of the laws of war themselves.

V. Conclusion

In sum, second order considerations have led the laws of war, as they have developed under positive international law, to stay away from liability and retribution and to focus, instead, on the prevention of direct threats. This is in large part due to the fact that notions of justice are complex and often subjective. While military threats may also be portrayed differently by different decision makers, their identification and treatment still appear be more objectively verifiable and less prone to abuse than the far more abstract justice considerations.

The greater effectiveness of the existing prevention-oriented legal framework leads to preferable moral outcomes than those expected to derive from an alternative liability-based framework. Hence, a very strong moral case has to be made, in my view, in order to justify deviation from this existing legal framework. While McMahan’s interesting article certainly raises some strong moral arguments, he fails to establish a case for a legal reform.