



## Can Wars Be Fought Justly? The Necessity Condition Put to the Test

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### Abstract

According to a widespread view, the same constraints that limit the use of otherwise immoral measures in individual self-defense apply to collective self-defense too. I try to show that this view has radical implications at the level of *jus in bello*, implications which have not been fully appreciated. In particular, if the necessity condition must be satisfied in all cases of killing in war, then most fighting would turn out to be unjust. One way to avoid this result is to adopt a contractualist view of killing in war, a view which interprets the necessity condition in a way that is more permissive with regard to killing combatants in war. At least in this respect, a contractualist view of killing in war has an advantage over other candidates in explaining how wars might be fought justly.

### Keywords

just war theory, self-defense, proportionality, contractualism

After years of disregard, questions regarding the meaning of the proportionality condition and its application to wars are finally attracting some philosophical attention.<sup>1</sup> Yet, as David Mellow noted a few years ago, “there continues to be a significant lack of clarity, precision and agreement about how the proportionality condition should be defined and applied in practice.”<sup>2</sup> The situation

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<sup>1</sup> See especially Thomas Hurka, “Proportionality in the Morality of War,” *Philosophy & Public Affairs* 33 (2005): 34–66; Idem, “Proportionality and Necessity” in Larry May (ed.), *War: Essays in Political Philosophy* (New York: Cambridge University Press, 2008), 127–144; Jeff McMahan, “The Ethics of Killing in War,” *Ethics* 114 (2004): 693–733; David Mellow, “Counterfactuals and the Proportionality Criterion,” *Ethics and International Affairs* 20 (2006): 439–454.

<sup>2</sup> Mellow, *ibid.*, 440. See also Michael Gross, “The Second Lebanon War: The Question of Proportionality and the Prospect of Non-Lethal Warfare,” *Journal of Military Ethics* 7 (2008), 2

is even worse with regard to the necessity condition,<sup>3</sup> especially insofar as it concerns (if indeed it does) *jus in bello*. This paper is an attempt to fill this gap. I seek to show that, properly understood, the necessity condition leads to very demanding constraints on the use of force in war, constraints which cast doubt on the possibility that wars can be fought justly. I then argue that this conclusion lends support to a recent interpretation of just war theory, one that emphasizes the contractual nature of the war convention.

## I. Necessity and Proportionality: Preliminaries

Let me start by exploring the meaning of the necessity condition and the proportionality condition in individual self-defense. Some writers seem to assume that the necessity condition is no different to the proportionality condition because choosing the least harmful course of action (which is what the necessity condition requires) is the same as choosing the proportionate one. This view, however, seems wrong. Think of an aggressor, A, posing a threat to a potential victim, V. Even if, as a matter of fact, the only way V can stop A from carrying out an unjust attack upon her is to carry out a self-defensive act, D, which would otherwise be immoral (or illegal), carrying out D might still be disproportionate to the unjust attack (=cause much more harm than the unjust attack would) and hence be ruled out by the proportionality condition. The distinction between the necessity condition and the proportionality condition can thus be expressed as follows: The necessity condition concerns the relation between some defensive act, D, and all alternative defensive acts D1, D2... Dn. It requires that D be less harmful than all these alternative acts. The relevant comparison is independent of the threat posed to V by A. Whatever its nature and magnitude, V is required to take the least harmful measure to

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(“Although the principle of proportionality enjoys widespread support, it is generally ill defined, misunderstood, wrongly applied, and without any feasible operational definition”). The legal notion of proportionality in international law fares no better, as shown by Abraham Bell, “Optimal Proportionality in the Law of War” (available at <http://www.law.northwestern.edu/colloquium/international/documents/Bell.pdf>), p. 3 (“Proportionality means different things in different contexts within the law of war, and the scope and application of the concept is far from clear in many cases”).

<sup>3</sup> See George Fletcher and Jens David Ohlin, *Defending Humanity: When Force is Justified and Why* (New York: Oxford University Press, 2008), 93 (“Very few scholars pay careful attention to the requirement of necessity, even though it is a universal requirement of self-defense... The literature of international law speaks of the requirement of necessity as well as of proportionality, but no real sustained attention is paid to either of these criteria”).

block it. In contrast, the proportionality condition contains no reference to alternative defensive acts, only to the relation between D and the unjust threat. If D is disproportionate to the threat, then it is ruled out by the proportionality condition regardless of the existence or the nature of alternative defensive actions that might prevent the threat from materialization.

To these two conditions, we should add a third which is usually overlooked, namely, the Success Condition.<sup>4</sup> The first question that V must ask herself is which actions are available to her that could reasonably be expected to block the threat. If the answer is none, then V has no right of self-defense against A (that is, no right to carry out otherwise immoral acts against A). If only one act, D, passes this primary test, then the necessity condition is satisfied by way of default. If more than one act passes the primary test, the act that is least harmful to A must be selected. D must then face the proportionality test. If D passes it, V is justified in carrying out the act. If not, V is doomed. She will have to suffer the aggression with no moral means of self-protection.

The order of conditions is, then, success->necessity->proportionality. V must first establish that D can block the unjust attack, then that it is the *least harmful* way to do so, and finally that it is *proportionate* to the attack. This order reflects an ascent in the severity of the moral constraint imposed on V. The success condition is the weakest constraint, because if some act is not expected to provide any defense at all, surely it cannot enjoy the protection of the right to self-defense. The necessity condition is more demanding, because it prohibits V from taking a course of action that *is* expected to block an unjust aggression – simply because there is a less harmful one which could do the same job. The proportionality condition is the most demanding constraint because it prohibits V from doing D in order to block an unjust attack, even when D *is* expected to block it, and even when it is expected to do so *in the least harmful way*.<sup>5</sup> That the proportionality condition poses a more demanding

<sup>4</sup> See my “The Success Condition for Legitimate Self-Defense,” *Ethics* 118 (2008): 659–686.

<sup>5</sup> Here and in the rest of the paper, I’ll be assuming a subjective reading of the conditions under discussion. What matters for the legitimacy of D is not whether D is *in fact* effective, necessary, or proportional, but that it is *reasonably believed* to be so by the agent. For the sake of simplicity, I shall often use objective language (e.g. “D is disproportionate to the threat”), but I’ll always be assuming a subjective one. On this point I am in disagreement with Mellow, who explicitly accepts an objectivist view of the justification for self-defense. See David Mellow, “Iraq: A Morally Justified Resort to War,” *Journal of Applied Philosophy* 23 (2006), 299–300 and note 18. Because he holds this view, he believes that the justification for war is essentially retroactive, which leads him to justify the war in Iraq by its actual results as he judges them. This retroactive viewpoint explains his worry about counterfactuals when it comes to the application of the proportionality condition; see Mellow, “Counterfactuals and the Proportionality Criterion.”

constraint on self-defense than the necessity condition explains the fact that while no modern legal system omits the necessity condition from the list of conditions for legitimate self-defense, some omit the proportionality condition or reserve it only for extreme cases. But it is not only the demanding nature of the proportionality condition that explains the lack of consensus surrounding it, but the apparent unfairness involved. It seems unfair that when a self-defensive act, D, is necessary but disproportionate, it is V who is doomed to suffer rather than A.

## II. The Necessity Condition and Warfare

The analysis of the previous section helps us to see how the application of the necessity condition leads to opposing conclusions regarding the morality of war – to weaker restrictions, on the one hand, and to stronger restrictions, on the other. Or so it seems.

Why might one think that correct application of the necessity condition should *relax* the constraints on warfare? The answer has to do with the essential future-oriented nature of self-defense. For an otherwise immoral/illegal act, D, to be justified under the right of self-defense, it must be reasonably expected to provide defense from some future aggression. If D cannot be thought to provide such a defense but is instead justified by reference to some past aggression, then though it might be justified on other grounds, such as retribution, it cannot find solace under the right to self-defense. Hurka shows that what follows with regard to the proportionality condition is that the proportionality sought is not between the self-defensive act and some past act of aggression, but between the self-defensive act and some potential aggression in the future.<sup>6</sup> Similarly, I should add, with the success and the necessity conditions. Insofar as acts of warfare are conceived as responses to enemy attacks in the past, there is a temptation to judge them according to their success or necessity in appropriately responding to such attacks. This means that if the original enemy attack was not that severe, the counter-attack ought not to be that severe either, a view assumingly in line with the necessity condition. The temptation exists in ordinary wars too, but it especially applies to low-intensity ones, which look like a series of attacks, counter-attacks, and counter-counter-attacks, each allegedly deriving its justification from the need to respond to the one preceding it. Once this temptation is resisted, as it should be, states might be allowed

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<sup>6</sup> Hurka, "Proportionality in the Morality of War."

to respond to a perceived unjust attack against them with an attack which is much harsher and more destructive than the one they themselves suffered if they have a reasonable basis for believing that such a response is necessary to block future attacks.

One might object by saying that harsh responses to unjust attacks presume a kind of foreknowledge that we humans don't have. Even retroactively we can only rarely determine whether such a response was necessary, but prospectively we almost never can. Hence, we must adjust the severity of our responses to that of the attacks against us, and refrain from striking back in a harsh manner just because such a strike is envisioned to prevent some attack, or series of attacks, in the future. However, such epistemic modesty regarding our capacity to assess what some enemy might do to us in case we don't act in a certain way leads to a prohibition against a less harsh response too. After all, the justification for this less harsh response must also be the prevention of future attacks, but to make such a claim, one would have to be reasonably sure (a) that the less harsh attack would deliver the goods, and (b) that there is no other way of doing so. Moreover, condition (a) seems actually *harder* to satisfy in the less harsh response than in the harsher one, for the simple reason that a less harsh response would usually have a weaker chance of either deterring the enemy or significantly undermining the enemy infrastructure. Let me explain why.

Regarding infrastructure, it seems that a limited response would have a merely negligible effect in preventing future attacks. The point about deterrence is more complex. Deterrence functions differently in different contexts. Particularly relevant to the present discussion is the distinction between the measures that might deter potential wrongdoers who are motivated by sheer self-interest and those that might deter wrongdoers who are ideologically motivated. For the former, a moderately higher cost than benefit would usually be sufficient to deter them. For the latter, a much higher cost would be required. The role of deterrence in international relations tends to be closer to its role in ideologically motivated wrongdoing. If the response which group A gets for its attack on group B is a moderate one, the response will hurt, but usually will not convince members of group A to refrain from further attacks in the future. It might even increase their motivation to do so by adding an element of revenge to their considerations. To deter them from further attacks, the response of group B must often be so painful that further attacks on the part of group A would be regarded as out of the question.<sup>7</sup> All the more so

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<sup>7</sup> How exactly deterrence works on the international level is a matter of dispute. See, for instance, Jeffrey Berejikian, "A Cognitive Theory of Deterrence," *Journal of Peace Research* 39

with strongly ideological organizations like Hamas or Al-Qaeda who are ready to sacrifice a lot in pursuit of their goals and who glorify martyrdom, extolling the virtues of those who die (or kill themselves) in the war against the enemy (*shaheeds*).<sup>8</sup>

However, some forms of deterrence are nevertheless available even vis-à-vis organizations like these. A well-known statement by the Hizbullah leader, Hassan Nasrallah, can serve as an example. In August 2006, shortly after the war with Israel had ended, Nasrallah announced that “he would not have ordered the capture of two Israeli soldiers had he known it would lead to such a response.”<sup>9</sup> It is hard to determine how sincere Nasrallah was in this declaration, and it is premature to predict whether, to what extent, and how long he will indeed be more restrained in the future.<sup>10</sup> (People tend to forget or to underestimate the losses and pain they suffered from their adversaries in the past and also to overestimate their ability to defeat them in the present without suffering similar losses.) It does, however, seem reasonable to assume that a less harsh response on the part of Israel would have failed to bring about such restraint.<sup>11</sup>

The reader should not get the impression that, in my view, as individuals and as groups, we must respond with full force to any unjust attack against us. Often a moderate “reasonable” response would suffice by virtue of the clear message it sends to the attacker, “Hey there, don’t mess with me.” Signaling to

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(2002), 165–183. In Berejikian’s own view, the most effective stance is a “firm-but-fair” one because excessive bullying diminishes deterrence. That sounds logical, but note that a “firm” response would often be “disproportionate” in the regular use of the term.

<sup>8</sup> With regard to terrorists there is a further reason why only especially harsh measures might achieve the required defense, namely, that terrorists are “unwilling to enter into trusting relationships with their enemies” (Matthew Noah Smith, “Terrorism, Shared Rules and Trust,” *Journal of Political Philosophy* 18 [2008] 216). Their contempt for the shared rules of war makes them “utterly untrustworthy” (ibid.), which means that the terrorists cannot be trusted to “learn the lesson” in the way other people, who *are* willing “to share a society with other human beings” (ibid. 215), would learn it. Hence, the lesson must be forced upon the terrorists—drilled forcefully into their minds, so to say—for them to be deterred from future acts of violence. This would involve sending an unequivocally clear message, one which can only be conveyed through the use of harsh measures.

<sup>9</sup> *Jerusalem Post* August 28, 2006.

<sup>10</sup> At least in the short run, deterrence seems to have worked in the case of Hizbullah. I refer to its refraining from firing rockets against Israel during the Israeli campaign in Gaza in January 2009.

<sup>11</sup> That odd attacks are inefficient against international terror has been pointed out by Michael Bonafede, “Here, There, And Everywhere: Assessing the Proportionality Doctrine and the US Uses of Force in Response to Terrorism After the September 11 Attacks,” *Cornell Law Review* 88 (2002), 212.

our rivals and enemies that we are “serious about it” and that we won’t be trodden upon is sometimes enough to break the cycle of violence. But, of course, deterrence of this kind can only work provided that when my enemy does strike again, I respond in a much harsher way; otherwise I’ll make a fool of myself and make myself easy prey after having proven that I can only bark, not bite.<sup>12</sup> To this one should add that countries and organizations fighting against liberal democracies often perceive them as spoiled, weak, and hedonistic<sup>13</sup> and hence short of the mental determination and fervor required to get involved in a real war. Against this background, restrained and (typically) low-risk attacks from the air or the sea might not only fail to deter such organizations, but in fact bring about the opposite effect by confirming the above perception.

All this seems to imply that the necessity condition imposes weaker constraints on self-defense than commonly thought. However, as indicated above, the application of the necessity condition to warfare also seems to lead to stronger restrictions. The reason for this is the following. If killing human beings in war is justified in terms of self-defense, then all the standard conditions for self-defense must serve as constraints on waging war too. This is most obvious for those who subscribe to what I shall call ‘The Individualistic View of Justified Killing in War [IJW]’, according to which to fight justly is to be able to explain, as it were, to each enemy individual who is about to be killed in war, how his or her fate is justified according to the standard conditions of self-defense. This is so because, as McMahan puts it,

[T]he morality of defense in war is continuous with the morality of individual self-defense. Indeed, justified warfare just *is* the collective of individual rights of self- and other-defense in a coordinated manner against a common threat.<sup>14</sup>

On IJW, the same moral limits on killing that apply to the coordinated defense of three people against one apply also to three against three, or to 10,000 vs. 10,000. If the killing of Bob cannot be grounded in the right to self-defense when Bob alone poses an illegitimate threat, it cannot be so grounded just because he poses such a threat together with 10,000 other people, i.e. an

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<sup>12</sup> For a similar approach, see Bell, “Optimal Proportionality in the Law of War,” Part II, who argues that the common understanding of the proportionality condition makes it counterproductive. To achieve deterrence, states must convey a clear message “that *sufficiently high* penalties will be imposed on aggressors” (p. 23, italics added).

<sup>13</sup> See Ian Buruma and Avishai Margalit, *Occidentalism* (New York: Penguin, 2004).

<sup>14</sup> McMahan, “The Ethics of Killing in War,” 717, who also refers (in fn. 40) to his “War as Self-Defense,” *Ethics & International Affairs* 18 (2004): 75-80.

entire army. Thus, as far as “the deep morality of war” is concerned, to borrow McMahan’s expression,<sup>15</sup> the necessity condition must be fulfilled in each case of killing in war. The same holds true for the success condition because, as we saw above, the success condition precedes the necessity condition in order of justification, and must be satisfied before moving on to the necessity condition. An act of killing in war that makes no contribution to blocking the threats imposed by the enemy (to the collective as a whole or to individual members of it) cannot find solace in the right to self-defense.<sup>16</sup>

The problem is that if the necessity condition and the success condition apply to *jus in bello*, we seem to be on the safe road to pacifism<sup>17</sup> because clearly much of the killing taking place in war is either non-effective or unnecessary for victory. This means that wars inevitably involve impermissible killing and hence cannot be morally justified.

To further clarify this point, consider a domestic analogy. Suppose I refuse to pay protection money to the local mafia. The mafia members threaten to burn down my business, a common tactic against stubborn non-payers. Everybody knows that these guys are serious. Suppose further that the local police are at best impotent and at worst controlled by the mafia, so that I can expect no help there. In these circumstances, I have a right to protect myself and my property from mafia aggression, even if this involves the use of lethal measures. However, I don’t have a right to go around and kill any member of the mafia in the country (or even in the county) just because I want to defend myself from the above threat. I must make sure that such killing can reasonably be thought to be both effective and necessary in providing the required defense; otherwise it could not be justified under the right of self-defense. Similarly in war, the fact that an unjust enemy threatens me does not in itself justify the killing of each and all members of the enemy side. I must first make sure that each act of killing is both effective and necessary.

To this I should add that the constraint posed by the necessity condition is stronger the less culpable the aggressor is for the threat he poses. It is bad enough to kill somebody unnecessarily when the person killed is fully culpable for an unjust attack. It is much worse to kill him unnecessarily if he is less than fully culpable – which is precisely the case with most soldiers, especially conscripts, who are at most only partially culpable for the threat they pose.

<sup>15</sup> McMahan, “The Ethics of Killing in War,” 730.

<sup>16</sup> For the purpose of the present argument, I bracket the paradox raised by the success condition on which I elaborate in “The Success Condition for Legitimate Self-Defense” (*supra* note 4)

<sup>17</sup> I use ‘pacifism’ in a weak sense, by which I mean a view that perceives most wars in the actual world as morally indefensible, not in the strong sense of an in-principle objection to all wars (typically based on an assumed unconditional prohibition to kill human beings).



In these circumstances, asking the fighting parties to make sure that each act of warfare is both effective and necessary makes a lot of sense – yet, in practice, it is a request that is almost impossible to fulfill.

How could friends of IJW respond to this challenge?

The first response would be to emphasize the subjective nature of the conditions under discussion. In introducing the problem under discussion, I said that the problem for IJW is that much of the killing taking place in war is either non-effective or unnecessary for victory. However, as I myself noted earlier,<sup>18</sup> these constraints on self-defense should be understood subjectively. This means that what matters is not the *ex post* estimate that much of the killing (and wounding and harm) in wars is non-effective or unnecessary, but the *ex ante* estimate about the effectiveness and necessity of individual acts of warfare. And once this shift to the subjective point of view is made, it becomes clear – or so this response suggests – that, in most cases, the killing, wounding and harm involved in war do meet the success and the necessity conditions. In most cases, when soldiers open fire on their enemies, attack their bases, and bomb their posts, they act under the reasonable belief that doing so *will* make a contribution to the defeat of the enemy and that this contribution is *necessary*.

Let me strengthen this response by connecting it to Kim Ferzan's account of self-defense.<sup>19</sup> According to Ferzan, the right to kill in self-defense requires the existence of an objective "triggering condition," namely that A culpably intends to kill V, as well as a subjective condition to the effect that V predicts that harm will occur if she doesn't act. If the triggering condition is not met, V can, at most, have an excuse for carrying out D, but no justification. If it is met, then "*any* likelihood of harm should be sufficient for self-defense."<sup>20</sup> Though Ferzan's emphasis is on the likelihood of harm, the same should apply to the likelihood of the effectiveness and of the necessity of D in blocking it. According to Ferzan, if A culpably intends to harm V, then even if the means he uses are only 1% likely to succeed, V has a right to carry out D against him in order to prevent the threat from materializing. The same seems to hold if the probability of the threat materializing is very high (close to 100%) but the probability of D blocking it is only 1%. Ferzan says that if V knows that defensive force is not necessary, she may not kill A,<sup>21</sup> which seems

<sup>18</sup> *Supra* note 5.

<sup>19</sup> Kimberly Kessler Ferzan, "Justifying Self-Defense," *Law and Philosophy* 24 (2005): 711-749.

<sup>20</sup> *Ibid.*, 744, italics added.

<sup>21</sup> *Ibid.*, 748.

to imply that so long as she doesn't *know* this, and furthermore holds the contrary belief, then even if the belief (that D is necessary) is a weak one, she still has a right to kill A.

This, however, seems to make the necessity condition mute as a constraint on self-defense. If any likelihood of success and necessity is enough, then there would hardly be any self-defensive acts that would be ruled out by the conditions under discussion. This would mean that almost all killing in war would meet these conditions – but so would almost all killing of mafia members in the above example, and, more generally, the killing of almost anybody connected to V's attackers in a way that gives her *some* reason to think that the planned aggression would be blocked as a result. In other words, the response just outlined does not really show how IJW can *accommodate* the necessity condition, but rather how in practice this condition poses no real constraint on self-defense. This seems too big a price to pay to salvage IJW. This high price is especially troubling given the less-than-full culpability of most soldiers.

Note that although the *ex post* judgment cannot by itself undermine the moral status of the self-defensive act, it does shift the burden of proof onto the shoulders of soldiers in the *ex ante* situation in the following sense: given the experience in past wars, soldiers have a good reason to doubt whether their attacks will be both effective and necessary. Hence they may not carry them out before first establishing that, notwithstanding this lesson from past wars, some particular attacks can nonetheless be reasonably thought to succeed in defeating the enemy *and* to do so in the least harmful manner. It is pretty hard to establish that some particular act of warfare – a sniper killing some individual enemy soldier, an aircraft bombing some distant military base – can succeed in making a significant contribution to the defeat of the enemy. It is even harder to establish that there is no less harmful way of doing so.

Finally, if the success and the necessity conditions can be satisfied by “any likelihood” (once the triggering condition has been satisfied), this should apply to *jus ad bellum* too, with the implication that waging war might be justified even if the probabilities of success and of necessity were very low indeed. The two conditions (“last resort” and “reasonable hope of success”) would then be satisfied in almost all wars and hence, in practice, stop serving as *constraints*. One might be tempted to say that the moral status of states is different from that of individuals; therefore the conditions for legitimate self-defense function differently when the defense of states is concerned. But this route is unavailable to friends of IJW because for them, “warfare just *is* the collective of individual rights of self- and other-defense in a coordinated

manner against a common threat;<sup>22</sup> hence, if the above interpretation of these conditions is accepted for individual self-defense, it must apply to wars too. Thus, the price of avoiding an ethic of war which is too demanding at the *jus in bello* level is to end up with an ethic of war which is too permissive at the *jus ad bellum* level.

To further clarify this point, let's make the same argument the other way round, from *jus ad bellum* to *jus in bello*. According to the accepted understanding of the conditions for *jus ad bellum*, launching war might be justified only after making sure that the war has a reasonable likelihood of success and only after all alternatives to war – diplomatic measures, economic measures, etc. – have been exhausted. Applying this reading of the success and necessity conditions to *jus in bello* implies that each individual act of warfare might be justified only after making sure that it has a reasonable likelihood of success and only after all alternatives to it have been exhausted. Yet conducting warfare within such constraints would be virtually impossible.

In response, one might suggest that the necessity condition should be interpreted differently in *jus ad bellum* and in *jus in bello*. But this move is *ad hoc* and – once again – runs against the fundamental idea of IJW which assumes that the *same* conditions guide all forms of self-defense, individual and national alike.

Let me examine two other suggestions to avoid the all too restrictive implications of the necessity condition for warfare. The first is to rely on the doctrine of double effect ['Double Effect'] and permit the unnecessary killing of enemy combatants under the title of collateral damage. This suggestion concedes that many enemy soldiers are killed unnecessarily, but says that since many are killed *necessarily* and since the killing of the former is not intended, it is covered by Double Effect. But I doubt whether Double Effect can do the required justificatory work. The enemy soldiers whose killing is unnecessary for victory are not killed incidentally, as a *side-effect*, but are directly targeted and killed – by bullets, bombs, and rockets – together with those soldiers whose deaths are necessary. One cannot seriously claim that in bombing the enemy headquarters, one intends to kill only those soldiers the killing of whom meets the requirements of the success condition and the necessity condition, while all the other soldiers are killed incidentally.<sup>23</sup> This seems more like a reduction of Double Effect than like a helpful reliance on it.

<sup>22</sup> See text near note 14 above.

<sup>23</sup> For a similar reason, Double Effect cannot solve the problem of how it might be justified to kill enemy soldiers given that many (probably most) of them are not morally culpable for the war in which they are participating. One cannot seriously say that the non-culpable enemy

The second suggestion is that the necessity condition does not require that each individual act of killing in war be necessary, only that the total number of enemy soldiers who are killed be necessary. From the point of view of the right to self-defense, given that all enemy soldiers are legitimate targets, it makes no moral difference which soldier exactly is killed. Therefore, if the attacked side needs to kill no less than, say, 10% of the enemy force in order to defend itself, it is allowed to do so without having to establish that each individual act of killing is necessary. If, to defeat the unjust side, the just side has to kill approximately one thousand soldiers out of soldiers  $S_1, S_2 \dots S_n$ , then it satisfies the necessity condition if it kills *any* of  $(S_1 \vee S_2 \dots \vee S_n)$ , provided that the number does not exceed one thousand. (Nor should the number go too much *below* one thousand; otherwise it would fail to meet the success condition.) And while establishing the necessity for each individual killing is a mission impossible, establishing the necessity for some number of killings which is necessary for victory is not.

This is a tempting solution to our puzzle, but I doubt if it will work. It relies on two dubious premises: (a) That we have a fair idea about the number of enemy soldiers who must be killed in all wars (or in some specific war), and (b) that, in terms of defeating the enemy, it makes no difference which enemy soldiers are targeted (hence the above disjunction). But there is no way of making serious and responsible estimates in advance regarding the number (or the percentage) of enemy soldiers the killing of whom would be necessary for victory, and there is no basis for thinking that killing one soldier (a senior officer, for example) is just as effective as killing another (a military truck driver) in order to defeat the enemy.

If none of these solutions is convincing, we are left with the puzzle with which we started, namely, that the necessity condition can't be satisfied at the level of *jus in bello*, which implies that wars can't be fought justly. And if wars can't be fought justly, they must be morally prohibited, which means that pacifism is the only decent response to wars.<sup>24</sup>

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soldiers may be killed as a side-effect of killing the culpable ones. See recently Seth Lazar, "The Responsibility Dilemma for *Killing in War*. A Review Essay," *Philosophy & Public Affairs* 38 (2010), pp. 210-211 who argues that since modern warfare has no way to sort out the enemy soldiers that are liable to attack from those who are not, in practice "killing in war... will involve widespread and serious rights violations" (211).

<sup>24</sup> This conclusion does not preclude the possibility that states, or individual soldiers fighting on their behalf, might be *excused* for participating in war (and violating the necessity condition), though one would have to show what the excuse is based on. But just war theory as well as commonsense morality assumes that some wars are not only excusable but just.

That a consistent application of IJW leads to pacifism or to a position very close to it is already not a new idea. Benbaji makes the same point in his critique of McMahan, the central figure at the IJW camp,<sup>25</sup> and I try to show that Rodin, another figure in that camp, is much more committed to pacifism than he himself realizes.<sup>26</sup> The argument of this section further substantiates this connection between IJW and pacifism by suggesting a certain understanding of the necessity condition and by showing the implications of applying it to jus in bello.

Some readers might be more convinced than I am by one of the above attempts to show that IJW is compatible with the necessity condition for justified self-defense. To such readers, I plead that they at least be open to the possibility that some other account of just war theory can do a better job than IJW in explaining the nature and justification of the limits posed by it. In the next section I point to such an account.

### **III. The Necessity Condition and Non-Individualist Justifications for War**

In Section II, I argued that since the individualistic view of justified killing in war [IJW] requires the consistent application of the standard conditions for individual self-defense to the domain of war, and since a consistent application of the necessity condition in this domain renders much of the killing in war impermissible, IJW leads to the conclusion that much of the killing in war is not permissible. And this means that IJW must oppose most wars, or, in other words, it must accept pacifism.

Two routes to dodge this result suggest themselves. The first, still within the framework of self-defense, replaces the individualistic view of justified killing in war (IJW) with a collectivist one (The Collectivist View of Justified Killing in War [CJW]). The second relies on a different normative framework altogether, viewing the war convention as a tacitly accepted social norm. It is beyond the scope of the present paper to examine the details of these alternatives to IJW. I will limit myself to examining how they account for the

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<sup>25</sup> See Yitzhak Benbaji, "The Responsibility of Soldiers and the Ethics of Killing in War," *Philosophical Quarterly* 57 (2007): 558-73 in which he shows that McMahan's justice-based conception of self-defense yields a nearly pacifistic ethics of killing in war.

<sup>26</sup> Daniel Statman, "Moral Tragedies, Supreme Emergencies and National-Defense," *Journal of Applied Philosophy* 23 (2006): 311-322.

necessity condition and whether they do a better job than IJW in blocking the route from this condition to pacifism.

### A. *The necessity condition and CJW*

According to CJW, part of the justification for killing people in war lies in their very membership of the aggressive collective. A war is a conflict between collectives which are metaphysically distinct from individuals,<sup>27</sup> and hence warrant a morality of their own – a collective morality – which is different from and irreducible to the morality that governs the relations between individuals. Within such a collectivist morality, soldiers lose their individual faces and become, as far as the war is concerned, just part of the collective.

As indicated at the end of the previous section, CJW, like IJW, functions within the framework of self-defense, which means that the standard conditions for legitimate self-defense apply to it too. Why, then, might one think that the necessity condition poses a weaker constraint on conducting war according to CJW than it does according to IJW? Here is one possible answer. On CJW, when two collectives are engaged in war against one another, the individuals fighting in the war lose their identity qua individuals and are completely swallowed up by their respective collectives. It is as if when one collective fights against another, all it sees in front of it is the enemy collective, not individual members of it. This seems to imply that the constraints on self-defense apply only at the level of collectives, which in turn seems to imply that the necessity condition applies only to the measures taken against the enemy collective, not to the measures taken against individual soldiers. And this – finally – seems to be the same as saying that the necessity condition applies only at the level of *jus ad bellum*, not at the level of *jus in bello*. What the necessity condition requires is that the war against the enemy collective be necessary, not that each attack against any enemy soldier or enemy post be necessary. What the necessity condition requires is that *the war* be a last resort (as required by the standard formulation of just war theory), not that *individual acts of warfare* be so.

To further substantiate this line of defense, consider the following analogy. When an individual is attacked by a culpably unjust aggressor, she is allowed to use force in order to defend herself from the attack. But this surely doesn't

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<sup>27</sup> See Fletcher and Ohlin, *Defending Humanity*, 178 (“When the collective acts, the whole is greater than the sum of its parts. The nation and its army enjoy an existence of their own”). This formulation stands in stark contrast to McMahan’s view cited above near note 14.

mean that she needs to show that each individual hit or kick is necessary to block the attack. In a similar way, one might argue that when a collective – which, under CJW, is a kind of agent irreducible to the individuals it comprises – is fighting to defend itself, it does not need to justify each act of warfare it engages in, or each case of killing or wounding an enemy soldier. It needs to care about necessity only at the level of *jus ad bellum*, not at the level of *jus in bello*.

However, this reading of CJW takes the analogy between individuals and collective entities too far. It is one thing to say that wars have an irreducible collective dimension. It is a different thing to say that the collective dimension is all that exists, that the individual faces are completely lost in them. Zohar's suggestion that the morality of war is a dual one, comprising both collectivist and individualist dimensions, sounds much more plausible.<sup>28</sup> But within such a morality, there is no reason why the necessity condition should apply only to defensive acts against the enemy collective, at the level of *jus ad bellum*, and not to defensive acts against enemy individuals, at the level of *jus in bello*.

A different reading of CJW would see it as a theory about the conditions for being *liable* to self-defensive attack, not as a theory about the constraints on mounting such attacks. While on IJW, a necessary condition for such liability is posing a threat to a potential victim, namely, being an *aggressor*, on CJW, membership in the aggressive collective is sufficient. But on this reading, CJW does not affect the standard constraints on self-defense, namely, the success condition, the necessity condition, and the proportionality condition. It explains how individuals might be targeted even though they are not aggressors (nor threats) in the usual sense of the word. It fails to explain how they might be targeted even if doing so is not necessary to provide the desired defense from the threat posed by the enemy collective.

### B. The necessity condition and CONTRACT

The challenges posed by IJW to traditional just war theory, especially those developed by McMahan, have led some thinkers to suggest a different ground for this theory, according to which concepts other than self-defense do the main work in explaining the moral status of killing in war. Central to this endeavor is the reciprocal<sup>29</sup> or the contractual understanding of the morality

<sup>28</sup> See Noam Zohar, "Collective War and Individualistic Ethics," [\*Political Theory\* 21 \(1993\): 606-622.](#)

<sup>29</sup> See Fletcher and Ohlin, *Defending Humanity*, chapter 8, who argue that "the principle of reciprocity governs the entire law of armed conflict" (180).

of war. Let's call this 'The Contractual View of the War Convention' or 'CONTRACT.'<sup>30</sup> Benbaji explains it as follows: states have a strong interest in being able to defend themselves from unjust attacks against them; since they cannot be sure that they will always be the stronger party in such conflicts, they have an interest in limited, rule-governed wars over unlimited, "total" ones; since deciding on such rules would be impossible once a war breaks out, they have an interest in agreeing on such rules *ex ante*. Such an agreement would be guided by a desire to minimize the harm of war, on the one hand, without making it impractical to win it, on the other. In Benbaji's view, then:

[T]he objective of the contracting parties is minimizing the harm inflicted on morally innocent people within wars, without limiting the rights states have to use force in protecting their just claims.<sup>31</sup>

How would the necessity condition figure in this view? The objective of minimizing the harm inflicted by war while still being able to fight seems to be precisely what the necessity condition requires – bringing about no more harm than necessary. But following the argument in Section II, if the necessity condition required that each individual act of warfare be shown to be necessary, that would make war practically impossible. Hence, this understanding of the necessity condition is inconsistent with CONTRACT, according to which the conventions of war must be such that they do not preclude effective self-defense.

This is all the more so with regard to the proportionality condition, insofar as it is interpreted, like in theories of self-defense, as a constraint on the measures that might be taken against an attacker (rather than against third parties

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<sup>30</sup> In "Proportionality in the Morality of War," Hurka seems to hold a view close to, if not identical with IJW. He says that "the structure of just war theory closely parallels that of the morality of self-defense" (38) and later says in terms reminiscent of McMahan (see citation near note 14 above) that in a legitimate military action "a large group of individuals act collectively, through their political institutions to protect the rights of another large group of individuals, who may be themselves." In "Proportionality and Necessity," 136, however, he seems to shift to a contractual view of war, at least insofar as the moral status of soldiers is concerned. He uses the analogy of boxing to illustrate how people can permit each other to do to them what would be forbidden outside of the ring. See also his Thomas Hurka, "Liability and Just Cause," *Ethics and International Affairs* 21 (2007), 210. The boxing analogy is popular among contractualists, see e.g. Benbaji, "A Defense of the Traditional War Convention," 487. It is rejected by IJW supporters, see Jeff McMahan, "On the Moral Equality of Combatants," *Journal of Political Philosophy* 14 (2006), 381.

<sup>31</sup> Yitzhak Benbaji, "The War Convention and the Moral Division of Labor," *Philosophical Quarterly* 59 (2009): 593–618. See also idem., "A Defense of the Traditional War Convention," *Ethics* 118 (2008), Section III.



or innocent bystanders). Thus understood, the proportionality condition is even more demanding than the necessity condition; hence if CONTRACT finds the necessity condition too demanding (again, in *jus in bello*), then surely it would find the proportionality condition too demanding as well. A war convention that included the proportionality condition would impose too strong a constraint on the ability of states to use force in protecting their just claims.

If the loosening of these two conditions, necessity and proportionality, on the conduct of warfare sounds too permissive, they are no more permissive than other features of CONTRACT, mainly the permission they grant to unjust combatants (=combatants of the unjust side) to kill just combatants (=combatants of the just side) who, by definition, are morally innocent in the relevant sense. If, under CONTRACT, it is permissible to kill combatants in war even if they pose *no illegitimate threat*, then it is not unreasonable to assume that it might be permissible to kill combatants even if such killing is not necessary (in the sense prevalent in moral and legal theories of individual self-defense) to achieve the goals of the war.

The difference between IJW and CONTRACT with respect to the necessity condition has to do with the different role of self-defense in each of these theories. In IJW, the ultimate justification for all killing in war lies in the right to self-defense, which means that each act of killing in war must ultimately meet all the conditions for legitimate self-defense. By contrast, in CONTRACT, the ultimate justification lies in the assumed contract between the fighting parties, self-defense coming into play only as the rationale that underlies the parties' decision to undertake the contract.

To sum up, according to The Individualist View of Justified Killing in War, the same constraints that limit the use of otherwise immoral measures in individual self-defense apply to collective self-defense too, which means that the necessity condition (as well as the other conditions for justified self-defense) must be met in all cases of killing in war. I expressed doubt as to whether this condition could be met, and I argued that, if it cannot, we are on a road – a dangerous one, in my view – to pacifism. I then suggested that the contractual view of killing in war offers a better way of dealing with this issue, a way that, on the one hand, grants the necessity condition a role in moral reasoning about war, while, on the other, does not lead to pacifism. At least in this respect, CONTRACT has an advantage over other candidates in explaining how wars might be fought justly.