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Unjust War and the Crime of Aggression

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The law governing the practice of war or armed conflict ought ideally to coincide with what morality implies about war to at least this extent: that seriously immoral or wrongful action ought to be criminalised, while morally permissible action ought not to be. For the present, however, this is an unattainable ideal. There are many reasons for this. One is that morality, to the extent that we understand it, is often complicated, subtle and nuanced. Its judgements of permissibility and impermissibility often depend not on whether an act respects or violates a single principle, but on how considerations of various sorts, many of which are matters of degree, combine with one another to determine the overall moral character of an act. These features of morality cannot easily be accommodated in rules, which must be sufficiently clear and comprehensible to be imposed as law and which will be either unambiguously violated or not violated by particular acts. Laws must also be formulated to take account of the likely effects of their promulgation and enforcement. This means that the *law* of *jus in bello* must be symmetrical between combatants whose war is legal and those whose war is illegal, whereas many just war theorists now believe that the *morality* of *jus in bello* is asymmetrical between combatants who fight in a just war and those who fight in an unjust war.[1] Finally, the consideration that is perhaps most germane to the topic of this chapter is the following: in international law and international criminal law, laws must be crafted to ensure their acceptability to the governments that consent to be bound by them, and these governments are more concerned to protect and advance their own interests than they are to codify and enforce moral principles.

It would be unrealistic, therefore, to expect the amendments to the Rome Statute concerning the crime of aggression to coincide perfectly with the moral principles of *jus ad bellum*. But it is nevertheless worth considering how these legal principles are related to the moral principles. Since congruence between law and morality is the ideal, the morality of *jus ad bellum* is one standard against which the

[1] For elaboration, see J. McMahan, 'War Crimes and Immoral Action in War', in A. Duff, L. Farmer, S. Marshall and V. Tadros (eds.), *The Constitution of Criminal Law* (Oxford University Press, 2013), 151–84.

amendments can be evaluated. We can ask, for example, whether the amendments classify uses of armed force that are unjust as aggression and criminalise them; and we can ask whether they exclude from the category of criminal aggression those uses of armed force that are just, or morally justified.

The morality of *jus ad bellum* is, of course, still highly controversial. Following the bad example of legal theorists, just war theorists in the nineteenth century generally ceased to think and debate about *jus ad bellum*, which in the law had become wholly permissive. In the twentieth century, after two cataclysmic world wars, the pendulum swung to the other, equally simplistic and implausible extreme – that is, to the view that while self-defence by one state against another is always a just cause for war, it is also the only just cause for war. Yet despite this neglect by philosophers of the morality of *jus ad bellum*, there are some matters about which we can be sufficiently confident to regard as fixed points in the evaluation of the amendments concerning the crime of aggression.

Before turning to more substantive matters, I should make two prefatory remarks. First, my area of expertise is moral philosophy and I have only minimal familiarity with international law and international criminal law. Many of my comments about the law may well be naive and those that are not may already have been anticipated in the extensive legal literature with which I am unacquainted. If so, I hope at least that it may be helpful to rehearse these issues explicitly in relation to the moral theory of the just war. Second, although some of what I say is critical, the criticism is intended to be constructive in offering suggestions about how the law might be reformed or refined in the future. And it would be unforgivable not to acknowledge that the formulation and acceptance of the 2010 Resolution on the Crime of Aggression in Kampala was a milestone in human history that put us on the path to being able to prosecute leaders of governments for instigating and initiating unjust wars; it may well be the single most important step that can be taken at this point in history towards preventing unjust wars from being fought.

In ordinary language, 'aggression' is pejorative, suggesting action that is both unjustified and unprovoked. 'Just aggression' is thus an oxymoron. In both law and common parlance, 'aggression' has come to refer, in its application to states, to uses of force that are unjustified, wrongful and illegal (though the amendments leave ample conceptual space for acts of aggression that are not criminal). In a rough and general way, therefore, the notion of aggression in law corresponds to the concept of unjust war in the theory of the just war. In traditional just war theory, there are various grounds on which war may be unjust: it may lack a just cause, or it may be unnecessary, disproportionate, unauthorised or wrongly intended. There is, however, considerable dispute about whether a war must be properly authorised and rightly intended to be just. I will therefore limit the discussion to those conditions

that are generally agreed to be necessary for a war to be just: just cause, necessity and proportionality. Of these, just cause restricts the aims or reasons for which a war may be justly fought. It is this requirement that bears closest resemblance to the legal notion of aggression.

In the amendments to the Rome Statute, article 8 *bis*(2) defines an 'act of aggression' as 'the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'. In one respect, this seems very close to classifying as aggression any use of armed force by one state against another, since it is difficult to imagine a way of using armed force against a state that is compatible with respect for its sovereignty, territorial integrity and political independence. But lawyers will, of course, be aware that there are exemptions implicit in the reference to the UN Charter in the final clause of the definition. A reader unaware of the significance of that final clause might naturally infer from the definition that if state A attacks state B, and B then returns fire to strike A's territory in self-defence, B's action must be an instance of aggression – which, of course, seems implausible. But the UN Charter recognises two exceptions to the prohibition of the use of armed force set out in its own article 2(4). One is the use of armed force with the authorisation of the Security Council; the other, stated in article 51, is the use of armed force by a state for 'individual or collective self-defense if an armed attack occurs'. Since these two uses of armed force are consistent with the Charter, article 8 *bis* does not classify them as aggression.[2]

The exception of armed force used with the authorisation of the Security Council is purely procedural; that is, it provides no substantive criteria by which a use of armed force might be exempted from inclusion in the category of aggression. Authorisation by the Security Council is not itself a *reason* for fighting. It is merely the removal of a legal barrier to fighting. The use of force may be authorised for any number of reasons or purposes, provided that the Security Council asserts that the use of force for that reason is necessary for the preservation of international peace and security.

There is nothing in just war theory that corresponds to this legal justification for the resort to war; nor could there be, for no infliction of harm that is objectively

[2] The phrasing of the passage quoted from article 8 *bis*(2) seems not to say what it is both intended to say and interpreted as saying. What it seems literally to say is that an act of aggression is the use of armed force in any of the three ways listed (against the sovereignty, territorial integrity or political independence of a state) *or* the use of armed force in any other ways that are inconsistent with the Charter. Read in this way, it does not imply that the first three uses of armed force must be inconsistent with the Charter to count as aggression. The exception for self-defence is thus lost. To have avoided this problem, the sentence could have been written more cumbersomely to say that '"act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State in a manner inconsistent with the Charter of the United Nations, or any other use of armed force by a State in a manner inconsistent with the Charter'. A briefer, though perhaps less explicit, way of amending the sentence would be to change the final clause to 'or in any other ways that are also inconsistent with the Charter of the United Nations'.

impermissible (that is, impermissible relative to the facts rather than to people's beliefs or to the evidence they have) can be rendered objectively permissible by mere declaration or pronouncement, no matter how authoritative.[3]

We should turn, therefore, to the one substantive condition for the non-aggressive use of force; namely, that the force be a defensive response to an attack that has occurred. Defence of one state from attack by another is the only *aim* of war, or *reason* for fighting, that is legal independently of any authorisation. It is, in the UN Charter, the only aim or end that can make the use of armed force legal. Individual or collective self-defence seems, then, the only aim or reason for a state's use of armed force or resort to war that is recognised – and then only implicitly – as non-aggressive and therefore legally permissible by international criminal law. It may be that there are other uses of armed force by one state against another that are compatible with respect for the target state's sovereignty, territorial integrity and political independence, but if there are they are unlikely to be extensive or significant.

The idea that the only legally legitimate aim of war is defence against attack corresponds to the view of many just war theorists in the aftermath of the Second World War that the only just cause for war is individual or collective defence. But to classical just war theorists, such as Francisco de Vitoria and Hugo Grotius, this would have seemed an impoverished understanding of just cause. Many of the classical theorists argued that not only the prevention of wrongdoing through defence, but also the punishment of wrongdoers, the recovery of rights lost to prior wrongdoing, the deterrence of future wrongdoing and a variety of other aims could be just causes for war. These are among the most plausible of the aims that have been cited. Some just war theorists have offered lengthy lists of just causes that have contained a variety of highly implausible entries, such as the conversion of people from one religion to another. In the just war tradition there has been much debate about which aims constitute just causes for war, but little discussion of what exactly it is for an aim to be just, or why it is that only aims of this sort can justify the resort to war. I know of no good discussion in the traditional literature of the criteria by which a just cause can be distinguished from other good aims that might be achieved by means of war.

In my view, a just cause for war is the prevention or rectification of a wrong or set of wrongs, which can be achieved by intentionally attacking only those who, by virtue of their responsibility for the commission or continuation of the wrongs,

[3] There are certain views of authority, such as Joseph Raz's well-known 'service conception', according to which authoritative commands can make acts permissible that would otherwise be impermissible. My view is that, although such a command may give an agent a reason to act that, because of his or her epistemic limitations, is decisive in the circumstances, it cannot make the act that she or he has decisive reason to do permissible in the objective or fact-relative sense if it would otherwise be impermissible. The agent would thus have decisive reason, given his or her epistemic condition, to do what was impermissible in the fact-relative sense.

have made themselves morally liable to military attack.[4] This understanding distinguishes a just cause from other good aims in two ways. First, a just cause is not just any good effect, such as the prevention of harm or the provision of a benefit, however great. It must be concerned with the prevention or correction of a moral *wrong*. Second, the prevention or correction of a wrong is a just cause for war only if those whom it is causally necessary to attack as a means of preventing or correcting the wrong would not themselves be wronged by being attacked. That will be true when they are responsible for the wrong to a degree sufficient to make them liable to attack as a means of preventing or correcting it. Thus, when there is a just cause for war, its pursuit by means of war does not require wronging people as a means (though it will inevitably wrong people by harming them as a side effect).[5] Whereas just war theorists in the past tended to offer lists of certain *types of aim* that could be just causes for war (and usually with little indication of what the items on the list had in common), I suggest instead that what makes an aim a just cause for war is the *type of justification* there is for pursuing it by means of war. An aim may be a just cause for war if the justification for harming or killing people as a means of achieving it is a *liability justification*.

One might wonder whether this claim implies that whenever any person in a state makes him- or herself morally liable to be attacked, there is then a just cause for war against that state. If the claim does have this implication, that would seem to be a *reductio ad absurdum* of the claim. But several points can be made in reply. First, armed conflict involves potentially lethal attack. So for there to be a just cause for war, people must have made themselves morally liable to be *killed*. Yet there are many serious forms of wrongdoing that are insufficient to make the wrongdoers liable to be killed. If, for example, the leaders of a state repeatedly refuse to pay the state's debts to another state, that may be insufficient to make them liable to be killed even if killing them would succeed in coercing the state to pay its debts.

On the other hand, there may be instances in which numerous acts of wrongdoing, each of which makes the wrongdoer liable only to a non-lethal harm, nevertheless combine to make the wrongdoer liable to be killed. For example, a thug may not be liable to be killed to prevent him from non-lethally assaulting a single innocent victim, but he may be liable to be killed if the number of innocent victims he will otherwise assault becomes substantial and killing him is the only means of preventing the assaults. Similarly, if certain people within a state would otherwise engage in numerous acts of wrongdoing – none of which would on its

[4] For a more precise and nuanced elucidation of this claim, which also tries to explain the relation between the just cause condition and the conditions of necessity and proportionality, see J. McMahan, 'Proportionality and Just Cause: A Comment on Kamm', *Journal of Moral Philosophy*, 11 (2014), 428–53.

[5] M. Neu, 'Why McMahan's *Just* Wars are only *Justified* and Why that Matters', *Ethical Perspectives*, 19 (2012), 235–55.

own make them liable to be killed – the many wrongs might together be sufficient to make those people (along with those who attempt to shield them) morally liable to be killed. In this way, a number of just aims that are individually insufficient to constitute a just cause for war might combine to form what might be called a 'plural just cause'.

Finally, one should acknowledge that there can be comparatively minor just causes for comparatively minor wars. Suppose, for example, that a tyrannical regime is known to be torturing a small number of innocent political opponents in a certain facility within its own territory. A commando raid conducted by agents of another state could liberate those captives without risk of escalation, but it would require the killing of the guards at the facility and perhaps the torturers as well. Such a raid would be an act of war. But assuming that the guards and torturers are liable to be killed as a means or side effect of freeing the torture victims, there is, in my view, a just cause for war – albeit only a small war – in such a case.

According to this understanding of the notion of a just cause, there are just causes for war other than the defence of one state against another when 'an armed attack occurs'. If this implication is correct, the definition of aggression that appears in article 8 *bis* of the Rome Statute is bound to be over-inclusive; that is, it is bound to count as aggression some wars or uses of armed force that are just although they are not defensive in the sense intended in article 51 of the UN Charter. The examples I will cite will be no surprise to those familiar with recent debates about *jus ad bellum* in either morality or law.

It is compatible with the account of just cause I have sketched that there can be a just cause for a war of pre-emptive defence, initiated when no armed attack has yet occurred. There could be a just cause because people could make themselves liable to pre-emptive attack by having planned and prepared to act in a way that would cause wrongful harm. They could be liable because, by engaging in the preparatory actions, they have increased the objective probability that they will cause wrongful harm to others. They would thus have made it unavoidable either that they be exposed to defensive harm or that the others remain at risk of being wrongly harmed. In such a situation, it may be unjust to allow innocent people to remain at risk when the risk can be eliminated by harming those who have wrongly placed them at risk.

What is true of pre-emptive war can also be true of preventive war.[6] People can make themselves liable to attack by planning and preparing to cause wrongful

[6] Although I gather that the law does not consistently use 'pre-emptive' to refer to a war fought in response to a threat of imminent attack, my impression is that in general the law has relied on Webster's words in the *Caroline* incident to distinguish pre-emptive defence from both plain defence and preventive defence. To someone outside the field, this seems bizarre. According to Webster, pre-emptive defence is possible when a threat is imminent to the extent that it is 'instant, overwhelming, leaving no choice of means, and no moment of deliberation'. Applied to individual self-defence, that is a description of a situation in which the aggressor's arm

harm to others, even when the threat they pose is not imminent. The only morally significant difference between pre-emptive war and preventive war is that the former is in general more likely than the latter to satisfy the necessity condition. There can therefore be a just cause for preventive war just as there can be for pre-emptive war.[7]

Suppose there were a case in which there was a just cause for pre-emptive or preventive war. Although the war would satisfy the descriptive conditions of aggression stated in article 8 *bis*(2) of the Rome Statute, it would not constitute aggression if it were authorised by the Security Council. One might think that the possibility of authorisation mitigates the problem that this just war meets the article's descriptive conditions for aggression. But anyone familiar with the way the Security Council works will be aware that, even if it is luminously obvious that there is a just cause for war, there is a substantial probability that authorisation for the war will be vetoed by one of the permanent members that is allied to the state against which the war would be fought. And during the interval in which the possibility of authorisation would be debated, the opportunity for effective pre-emptive or preventive defence might pass.

It is also a feature of the analysis of a just cause for war that I have presented that, when some people are wrongly harming others, it makes no difference to their liability to defensive action of what state their victims may be citizens. If, for example, a government and its armed forces are wrongly killing people, they thereby make themselves liable to attack as a means of defending their victims irrespective of whether those victims are citizens of another state or citizens of their own state, and irrespective of the citizenship of the defenders. This means that preventing the government of another state from wrongly harming its own citizens can be a just cause for war; that is, that there can be just cause for humanitarian intervention. Consider, for example, the Hutus in Rwanda who in 1994 butchered an estimated 800,000 of their Tutsi fellow citizens over a period of a few months. It is beyond dispute that they were morally liable to be harmed as a means of preventing them from killing their victims. And it is equally clear that they were morally liable to defensive action by anyone capable of stopping them, irrespective of citizenship. No Hutu *genocidaire* poised to kill a Tutsi would have been wronged by being killed by an agent of an intervening state. That would be true even if the intervention had not been authorised by the Security Council. Authorisation is irrelevant to the issue of moral liability and thus to the issue of just cause.

is raised to strike. Applied to national self-defence, it describes a situation that in practice is indistinguishable from one in which an attack has just commenced.

[7] For elaboration, see J. McMahan, 'The Conditions of Liability to Preventive Attack', in D. K. Chatterjee (ed.), *The Ethics of Preventive War* (Cambridge University Press, 2013), 121–44.

But, of course, humanitarian intervention satisfies the descriptive conditions of aggression in article 8 *bis* and there is nothing in the UN Charter to exempt unauthorised humanitarian intervention from classification as aggression, as it is not a defensive response to an attack by one state against another. Rather, it is what article 2 of the Definition of Aggression annexed to 1974 GA Resolution 3314 refers to as a 'first use of armed force by a State', which, according to that definition, 'shall constitute *prima facie* evidence of an act of aggression'. Even so, the General Assembly definition is more receptive than the Rome Statute definition to the idea that humanitarian intervention need not constitute aggression. Its article 7 states that nothing in the definition 'could in any way prejudice the right of self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right', and goes on to cite in particular the right of 'peoples under colonial or racist regimes . . . to struggle to that end and to seek and receive support'.

This, however, is in the General Assembly definition, not the definition that is now an amendment to the Rome Statute. It is true, of course, that in many ways the latter was derived from the former. The list of sample instances of aggression in article 8 *bis*(2), for example, was imported without alteration from article 3 of the General Assembly definition. But that does not mean that other elements of the General Assembly definition were imported implicitly. Rather, the fact that article 7 was not imported in the way that article 3 was suggests that the provisions of article 7 were deliberately rejected at the Review Conference in Kampala as inapplicable in the criminal context.

One possibility here is that even though unauthorised humanitarian intervention ineluctably counts as an act of aggression, it need not be a crime. In article 8 *bis*, the definition of the crime of aggression is distinct from the definition of an act of aggression and says explicitly that an act of aggression is a crime only if it constitutes a 'manifest' violation of the UN Charter. Both in paragraph 1 and in Understanding 7 attached to the 2010 Resolution on the Crime of Aggression, whether an act of aggression is a 'manifest' violation is said to be a matter of its 'character, gravity and scale'. This suggests a way in which instances of humanitarian intervention with a just cause might be exempted from criminality even though they constitute acts of aggression. As I noted, the General Assembly definition of aggression seems to provide support for the claim that not all instances of humanitarian intervention are criminal. Article 7, in particular, suggests that humanitarian intervention that provides requested support for a people struggling for independence from a colonialist or racist regime need not be within the scope of the definition. There is also increasing recognition in customary international law of the legitimacy of some instances of humanitarian intervention. The NATO intervention in Kosovo in 1999, for example, was not widely condemned for its

aims, even though it was condemned for its methods. Perhaps most notably, the United Nations did not condemn it. It is perhaps arguable that these facts are relevant, as a matter of law, to the 'character' of an instance of humanitarian intervention. In particular, if an instance of humanitarian intervention is of a type that is identified in article 7 of the General Assembly definition and has been approved by the practice of states, that intervention may not be a 'manifest' violation of the Charter. In that case it would not be criminal.

I am not competent to assess how plausible this reasoning might be as a legal argument. It is mere speculation by a philosopher. But even if it might be plausible as a legal argument, it is a strained form of argument for the conclusion that an instance of humanitarian intervention for which there is a just cause is not a crime by those who have planned, prepared, initiated and executed it. Since such an argument – or any other argument of a similar nature – is so indirect, it would be a gamble for members of a government to rely on it in proceeding with a just humanitarian intervention if the Security Council had denied authorisation for the intervention (perhaps because of a veto exercised by an ally of the proposed target of intervention).

One might argue that even if the International Criminal Court (Court) eventually becomes far more active and effective than it is now, it will be unlikely to prosecute leaders who have conducted a humanitarian intervention for which there was clearly a just cause. That may be true, but it does not eliminate the potential costs of having a statute that seems to criminalise unauthorised humanitarian intervention even when there is a just cause. For example, one can imagine cases in which leaders in a small, weak state with a poor record of respect for human rights would be tempted (for various reasons, some entirely self-interested) to intervene in a neighbouring state in a way that would stop a continuing series of atrocities there, but are deterred by the risk of being prosecuted at the Court – particularly if they had grounds for fear because of their earlier human rights violations. Previous cases that meet this description include the Vietnamese invasion of Kampuchea at the end of 1978 that ended the genocidal reign of the Khmer Rouge, and the Tanzanian invasion of Uganda in 1979 that deposed Idi Amin, whose regime had killed between 100,000 and half a million Ugandans. Neither of these cases is an ideal illustration, as each intervention could be claimed to have been a defensive response to a prior incursion by the state whose government was overthrown. However, they do indicate conditions in which government leaders might be averse to attracting greater attention by the Court. While, again, it might be argued that the Court would be unlikely to prosecute in cases that actually succeed in ending great atrocities, it seems undesirable for the prospects of a just humanitarian intervention to depend on an expectation by potential interveners that the Court could be relied upon not to enforce the letter of its mandate.

It is also inadequate for potential just interveners to have to rely on Security Council authorisation. This is in part for the obvious reason given earlier: that authorisation can be blocked by the veto of a permanent member allied with the state against which the intervention would be conducted. But it is also because article 42 of the UN Charter restricts the Security Council in its power to authorise taking 'such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'. But in many cases, the conditions that create the just cause for humanitarian intervention have no effect on international peace and security. They are instead a matter of *domestic* peace and security within a single state. (The massacre in Rwanda, for example, posed no significant threat to the security of other states, though refugees were, of course, a *problem* for neighbouring states.) In these cases, humanitarian intervention would be a *breach* of *international* peace as a means of providing domestic security. Authorisation of intervention in these cases seems to require a deliberate misdescription of the circumstances.

In practice, the Security Council has assumed the right to authorise humanitarian intervention in cases of purely domestic violence.[8] Lawyers debate whether this amounts to a revision of article 39 and subsequent articles of Chapter VII of the UN Charter (including article 42), or whether large-scale violations of internationally recognised human rights within a single state should be understood to constitute a breach of international peace in a specifically legal sense. Either way, it is open to question whether the law ought to operate by indirection in this way. More importantly, to the extent that the legality of humanitarian intervention depends on a vote of the Security Council (whose members are agents of states with political agendas), the practice of humanitarian intervention will be governed by political considerations rather than by the rule of law. I conclude from these various considerations that international criminal law should ideally specify objective conditions in which humanitarian intervention would not count as an act of aggression.

I have thus far discussed the claim that the crime of aggression, as defined in the amendments to the Rome Statute, is over-inclusive in relation to the morality of *jus ad bellum*; that is, it includes some instances of the use of armed force for which there is a just cause. I will conclude with a brief discussion of the opposite, though compatible, claim that the Rome Statute definition of an act of aggression is also under-inclusive; that is, it fails to classify some instances of unjust war as aggression. Again, the most significant problem arises with unauthorised but just

[8] For an illuminating account both of current legal thought about humanitarian intervention and of international reactions to state practice, see C. Kreß, 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force', *Journal on the Use of Force and International Law*, 1 (2014), 11–54, esp. at 31–37.

humanitarian intervention. When an instance of humanitarian intervention is just, the use of armed force in defence against it must be unjust. Those who participate in a morally just intervention do nothing thereby to make themselves morally liable to attack. Thus, just as an individual who is wrongly and culpably assaulting another person has no right of self-defence against those who use proportionate force to stop him or her, so forces committing or shielding the commission of domestic atrocities have no right of defence against those who would stop the atrocities. Yet it seems that the use of armed force in defence against a just humanitarian intervention is excluded from the category of aggression as defined in the Rome Statute, due to the UN Charter's recognition of an 'inherent right of individual or collective self-defence if an armed attack occurs'. Whether it would make a difference if the intervention had been authorised by the Security Council is a question to which I do not know the answer. The Charter does not say that the right of self-defence is forfeited when the Security Council has authorised the attack against which a state might otherwise defend itself. It therefore seems that the presumption is that self-defence against an authorised and morally just humanitarian intervention is legally permitted.

There are other ways in which defensive uses of armed force that the amendments to the Rome Statute do not classify as aggression might be unjust. The two most obvious are that a war that has individual or collective self-defence as its just cause might nevertheless be unnecessary or disproportionate. Such a war could be unjust in the sense that at least some of those attacked as a means are not liable to attack. This is perhaps clearest in a case in which a war of defence is unnecessary, since no one can be morally liable to be harmed or killed unnecessarily.[9] But there can also be cases in which a war's disproportionate character means that it kills people as a means when they are not liable to be killed. Suppose, hypothetically, that Britain could not have defeated Argentina in the Falklands War without killing more than 100,000 Argentine combatants. Assuming that Argentina's attempt to annex the islands was unjust, it would nevertheless have been disproportionate for Britain to kill that many combatants as a means of preserving its sovereignty over distant islands with a tiny population and little strategic or economic value. And it follows from this, for reasons too complicated to rehearse here, that not all of those combatants could have been morally liable to be killed.[10]

Although this may not be feasible at present, it seems that international criminal law ought ultimately to prohibit, and in some cases to criminalise, wars of self-defence that are unjust, unnecessary or disproportionate. But because such wars

[9] I defend this claim at length in 'The Limits of Self-Defense', in C. Coons and M. E. Weber (eds.), *The Ethics of Self-Defence* (Oxford University Press, forthcoming).

[10] The complicated reasons are given in J. McMahan, 'Liability, Proportionality, and the Number of Aggressors', in S. Bazargan and S. Rickless (eds.), *The Ethics of War* (Oxford University Press, forthcoming).

would be purely defensive, it would be inappropriate (at least for linguistic reasons and perhaps for other reasons as well) to condemn them as 'aggression'. What this suggests is that ultimately, international criminal law will require a further category of the unlawful use of force in addition to those it already has.[11]

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