THOMAS HURKA                    Proportionality in the
                               Morality of War

Just war theory, the most widely accepted theory of the morality of war,
contains two proportionality conditions that say a war or an act in war
is justified only if the damage it causes is not excessive. These conditions
have figured prominently in recent debates about the morality of par-
ticular wars, including the Gulf, Kosovo, and Iraq wars. But commenta-
tors often say the conditions are poorly understood, so it is unclear
exactly what they do and do not forbid. In this article I will try to clarify
the idea of proportionality in war, or explain what makes damage in war
excessive. I will not, however, arrive at simple conditions that can be
applied mechanically to acts in war. This is partly because judgments
about proportionality in war require empirical assessments that are
complex and controversial, but also because the conditions themselves
can be formulated in different ways that have different implications even
given an agreed-on set of facts. I will try to identify some of these differ-
ences and show how they affect specific judgments about war. But first
I must place the proportionality conditions in the larger context of just
war theory as a whole.

I. PROPORTIONALITY CONDITIONS

Just war theory lays down a series of conditions that a war must satisfy to be morally justified; if it violates any of the conditions it is wrong, although how wrong it is depends on how many conditions it violates, how important they are, and how seriously it violates them. These conditions are standardly divided into two groups. The *jus ad bellum* conditions concern the resort to war and are directed to political leaders deciding whether to initiate war or whether to respond to another state's doing so with military force of their own. The *jus in bello* conditions concern the means used to fight war. They are again directed at political leaders when they make tactical decisions such as Truman's decision to bomb Hiroshima, but also at soldiers as they fight from day to day. It is usually assumed that the two sets of conditions are independent, so a state can be justified in its resort to war but violate the *in bello* conditions in how it fights, or initiate war unjustly but use only tactics that are morally allowed.

The most important *ad bellum* condition says the resort to war is justified only given a just cause. The most widely accepted just cause for war is resisting aggression, or an armed attack on one's own or another state, but there can also be a just cause when one state sponsors or allows deadly attacks on another's citizens without threatening the other's territory; this was the trigger for the Afghanistan war of 2001. Many theorists now also allow humanitarian just causes, which protect the citizens of another state from rights-violations by their own government. Two less important *ad bellum* conditions say a war must be declared by a legitimate authority and fought with right intentions, and three final conditions concern the consequences of war. One says a just war must have a reasonable hope of success; if there is no probability of achieving the just causes, the war's destructiveness will be to no purpose. Another says war must be a last resort; if the just causes can be achieved by less violent means such as diplomacy, fighting is wrong. Last is the *ad bellum* proportionality condition, which says the destructiveness of war must not be out of proportion to the relevant good the war will do. Even if there is a just cause and no way of achieving it other than war, resort to war can be wrong if the damage it will cause is excessive. For example, the Soviet Union's invasion of Czechoslovakia in 1968 gave NATO a just cause for war, but most people think a military defense of that country

would have been horribly wrong because it risked starting a global nuclear war.

There are three *in bello* conditions, of which the first, the discrimination condition, distinguishes between those people who are and those who are not legitimate targets of military force. There is controversy about exactly who these people are, but the traditional view is that deadly force may be directed only at combatants, including soldiers and munitions factory workers, but not at noncombatants. The discrimination condition does not forbid all killing of civilians. It concerns only targeting and therefore allows the killing of noncombatants as a side effect of force directed at properly military targets, or as "collateral damage." In many versions of just war theory, the distinction here turns on the doctrine of double effect, which says it is more objectionable to intend evil as one's end or a means to one's end than merely to foresee that evil will result from what one does. On this reading, the discrimination condition forbids intending the deaths of noncombatants as an end or means, as in terror bombing that aims to demoralize an enemy by killing its civilians, but does not forbid acts that merely foresee the deaths of noncombatants, as when one bombs an arms factory knowing that some civilians nearby will be killed. Just war theory would be unacceptable if it said there is no objection at all to killing civilians collaterally, but two further conditions prevent this. The necessity condition, which parallels the *ad bellum* last-resort condition, says that killing soldiers and especially civilians is forbidden if it serves no military purpose; unnecessary force is wrong. And the *in bello* proportionality condition says the collateral killing of civilians is forbidden if the resulting civilian deaths are out of proportion to the relevant good one's act will do; excessive force is wrong. This proportionality condition is included in Additional Protocol I to the Geneva Conventions, which forbids attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[1] The condition allows bombing a vital munitions factory if that

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1. *1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, Art. 51 (5) (b), in *Documents on the Laws of War*, 3d ed., ed. Adam Roberts and Richard Guelff (Oxford: Oxford University Press, 2000), p. 449. This Protocol has not been ratified by the United States, but its military accepts very similar statements. Thus, the United States Army's Field Manual

will unavoidably kill a few civilians, but forbids killing thousands of civilians as a side effect of achieving some trivial military goal.

The proportionality conditions are actually more important than this initial account suggests, since, if formulated properly, they can incorporate the other just war conditions about consequences. Imagine that a war has no chance of achieving any relevant goods. This fact, which makes it violate the reasonable hope of success condition, surely also makes it disproportionate, since its destructiveness now serves no purpose whatever. The same is true if the war has only some small probability of achieving relevant goods, since then its expected harm is excessive compared to its expected good. If it takes account of probabilities in this way, as on any plausible view it must, the *ad bellum* proportionality condition incorporates hope-of-success considerations, and it can also incorporate last-resort considerations. Now imagine that a war will achieve certain goods at not too great a cost, but that the same goods could be achieved by diplomacy. Here the war may not be disproportionate in itself, but it is disproportionate compared to the alternative, since it causes additional destruction for no additional benefit. The same is true in the more realistic case where the war will achieve some minor relevant goods to a slightly higher degree. Here too it is disproportionate compared to diplomacy, since it imposes significant additional harms for the sake of insignificant benefits. Michael Walzer has said that, if taken literally, the last resort condition would make war morally impossible, since "we can never reach lastness . . . [t]here is always something more to do: another diplomatic note, another UN resolution, another meeting."[2] For precisely this reason the condition must not be read literally, but must assess the alternatives to war in the same way as it does war: for the relevant good they may produce, their probability of producing it, and any costs that will result if the alternatives are tried and fail, such as making an eventual war more bloody. But then the last resort condition is in effect a comparative version of the initial, simple proportionality condition. For war and each of its alternatives it does a

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27–10 says, about the bombing of defended places, that "loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage to be gained" (U.S. Department of the Army, *The Law of Land Warfare* [Field Manual 27–10, 1956], par. 41).

    2.  Michael Walzer, *Just and Unjust Wars*, 2d ed. (New York: Basic Books, 1992), p. xiv.

proportionality calculation, identifying the relevant goods and evils it will produce compared to a baseline of doing nothing, or continuing to act as one would have had there been no just cause.[3] This yields the net good or bad effects of each, and it then says war is permitted only if its net outcome is better than those of all alternatives. If the *ad bellum* proportionality condition is extended to makes these comparative judgments, it incorporates last-resort considerations, and the *in bello* condition can likewise incorporate necessity considerations if it compares the net effects of a particular tactic in war with those of alternatives that may be less harmful.

Each proportionality condition allows two formulations. An objective version assesses a war or act in light of its actual effects, that is, the relevant good it actually produces and its actual destructiveness; a subjective version does so considering only an item's likely effects given the evidence available to agents at the time. Both versions must make some probability estimates: of the likely effects of alternatives that are not chosen (for comparative conditions like last resort) and of the magnitude of evils the war does good by preventing. But given their different assumptions about a war's positive effects the two can yield different results, so a war can be objectively proportionate but subjectively disproportionate, or vice versa.

Despite their differences, the various proportionality conditions—*ad bellum* and *in bello*, simple and comparative, objective and subjective—all say a war or act in war is wrong if the relevant harm it will cause is out of proportion to its relevant good. This raises three questions: (1) What are the relevant goods that count in favor of a war's or act's proportionality? (2) What are the relevant evils that count against it? (3) How do these goods and evils weigh against each other? I will begin with the first question, about goods. But first a more general comment is in order.

As many writers have noted, the structure of just war theory closely parallels that of the morality of self-defense.[4] The latter too allows the use of force only for certain ends, namely to protect one's own or another's rights, and limits that force by proportionality and necessity conditions. An act of self-defense is wrong if the harm it causes the

3. For a lucid defense of this "do-nothing" baseline for proportionality judgments, see David Mellow, "A Critique of Just War Theory" (Ph.D. diss., University of Calgary, 2003).

4. See, e.g., the discussion of the "domestic analogy" in Walzer, pp. 58–59.

attacker is out of proportion to the harm he threatens, or if the threat could just as well have been averted by less violent means. These parallels suggest a promising line of argument. Since our intuitions about self-defense are often clearer than our intuitions about war, we can try to make progress with just war proportionality by considering parallel cases involving individuals: if we think certain uses of force are not permitted by individuals, we can reach parallel conclusions about force in war. This type of argument cannot be decisive, since there is no guarantee that what holds in the two domains is identical. But it is suggestive, and I will use it in that spirit.

## II. Relevant Goods

The simplest view of proportionality in war is a quasi-consequentialist one that counts all the goods and evils that result from a war or act in war and weighs them equally, so a choice is disproportionate if the total evil it causes is greater than its total good. James Turner Johnson defends this view about *ad bellum* proportionality, saying it requires the "total good" caused by war to outweigh the "total evil," or that "[t]he overall good achieved by the use of force . . . be greater than the harm done."[5] His view does not result in a completely consequentialist theory of war, for two reasons. First, even a war with overall optimal effects can be wrong if it violates other just war conditions, for example, by lacking a just cause. Second, his view does not require a war to have overall optimal effects, only ones that involve more good than evil. But Johnson's view does have consequentialist elements, since it counts all the goods and evils a war produces and weighs them equally against each other.

A related view retains the first of these elements but weighs good effects somewhat more heavily than bad ones, so a war can be proportionate even if it causes somewhat more harm than good. The United States Catholic bishops may take this line when they formulate *ad bellum* proportionality as saying, "the damage to be inflicted and the

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5. James Turner Johnson, *Morality and Contemporary Warfare* (New Haven, Conn.: Yale University Press, 1999), pp. 27–28; see also his *Just War Tradition and the Restraint of War* (Princeton, N.J.: Princeton University Press, 1981), p. 204, and *Can Modern War Be Just?* (New Haven, Conn.: Yale University Press, 1984), pp. 3, 25, 62.

costs to be incurred must be proportionate to the good expected by taking up arms."[6] By speaking simply of "costs" and "good expected" they seem to count all resulting goods and evils, but in requiring the evils only to be proportionate to, rather than no greater than, the goods, they may allow the goods to be somewhat smaller. This more permissive view is explicitly defended by Douglas Lackey, who likewise counts all resulting goods and evils but says it would be "too restrictive" to weigh them equally and concludes that "a war for a just cause passes the test of proportionality unless it produces a *great deal* more harm than good."[7]

I think both views are wrong to count all the goods a war will produce. Imagine that our nation has a just cause for war but is also in an economic recession, and that fighting the war will lift both our and the world's economies out of this recession, as World War II ended the depression of the 1930s. Although the economic benefits of war here are real, they surely cannot count toward its proportionality or make an otherwise disproportionate conflict proportionate. Killing cannot be justified by merely economic goods, and the same is true of many other goods. A war may boost scientific research and thereby speed the development of technologies such as nuclear power; it may also satisfy the desires of soldiers tired of training and eager for real combat. Neither of these goods seems relevant to proportionality or able to justify killing; an otherwise disproportionate war cannot become permissible because it has these effects.

Some restriction is needed on the goods that count toward proportionality, and it seems obvious what it should be: the relevant goods are only those contained in the just causes. If a war has certain just aims, the goods involved in achieving those aims count toward its proportionality but goods incidental to them, such as boosting the economy or science, do not. This restriction is included, even if implicitly, in many traditional formulations of *ad bellum* proportionality, which equate the just cause with the prevention of some injury and say the destructiveness of war must not be excessive compared to that injury. Thus, Joseph C. McKenna says that *ad bellum* proportionality requires "the seriousness of the

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6. U.S. Catholic Bishops, *The Challenge of Peace: God's Promise and Our Response*, reprinted in *Just War Theory*, ed. Jean Bethke Elshtain (New York: New York University Press, 1992), pp. 77–168, at p. 101.

7. Douglas Lackey, *The Ethics of War and Peace* (Englewood Cliffs, N.J.: Prentice-Hall, 1989), pp. 40–41.

injury [to] be proportionate to the damages that the war will cause," while Richard J. Regan calls the resort to war justified only if "the wrong to be prevented equals or surpasses the reasonably anticipated human and material costs of the war."[8] These statements concern simple proportionality, but a similar point applies to comparative proportionality, or the last resort condition. It too weighs the destructiveness of war and its alternatives against only their contribution to the just causes, and therefore counts as relevant only alternatives that pursue those causes. This is why the condition does not require a war to have overall optimal effects: a war can be proportionate even if it produces less good than some alternative that does not achieve the just causes. Thus, the Gulf War would have been disproportionate if there had been some less destructive way of evicting Iraq from Kuwait, but not simply if the money it cost would have done more good if spent on development aid to Africa.

In formulating this restriction we should distinguish, as traditional formulations do not, between two types of just cause that Jeff McMahan and Robert McKim call "sufficient" and "contributing" just causes.[9] Sufficient just causes suffice by themselves to fulfil the just cause condition; they include resisting aggression and preventing major humanitarian wrongs such as genocide and ethnic cleansing. Contributing just causes do not suffice to satisfy the just cause condition; given only these causes, one is not permitted to fight. But once there is a sufficient just cause, contributing causes can be further legitimate aims in war and can contribute to its justification. They include disarming an enemy and thereby incapacitating it for future aggression, as well as deterring aggression by showing this nation and others that aggression does not pay. If incapacitation is only a contributing cause, the fact that an enemy has armaments it may use aggressively in the future is not a sufficient justification for military action; there is no such far-reaching right of pre-emption. On this view Israel's 1981 raid on Iraq's Osirak reactor was wrong. But once Iraq supplied a sufficient just cause for war by invading Kuwait, disarming Iraq became a legitimate goal. The coalition forces were per-

8.  Joseph C. McKenna, "Ethics and War: A Catholic View," *American Political Science Review* 54 (1960): 647–58, at p. 651; Richard J. Regan, *Just War: Principles and Cases* (Washington, D.C.: Catholic University of America Press, 1996), p. 63. The need for this restriction is explicitly defended in Jeff McMahan and Robert McKim, "The Just War and the Gulf War," *Canadian Journal of Philosophy* 23 (1993): 501–41, at pp. 512–13.

9.  McMahan and McKim, pp. 502–06.

mitted to pursue that goal into Iraqi territory after liberating Kuwait, and also to include conditions about disarmament in the ceasefire agreement that ended the war. The benefits of incapacitation and deterrence also count toward the war's proportionality, and wars that are not proportionate in themselves, such as perhaps the Falklands War, can become so given their effects on international security. The situation exactly parallels that of criminal punishment. If a person has not yet committed a crime, the fact that he may or even is likely to do so in the future is not a sufficient ground for imprisoning him now. Once he has committed a crime, however, incapacitating him from committing further crimes and deterring other would-be criminals become legitimate aims of punishment, and his sentence can be adjusted to better achieve them.[10] The same holds for other contributing causes, such as lesser humanitarian aims. I think most people would say that the Taliban's repression of Afghan women was not a sufficient just cause; a war fought only to end that repression would have been wrong. But once there was a sufficient just cause in the Taliban's harboring of terrorists, the fact that the war would improve the lot of Afghan women became a factor that counted in its favor and helped make it proportionate.[11] There can also be economic contributing causes. Imagine that a war will not give the world's economy a boost but will prevent it from being harmed by being pushed into recession. If the harm will come from another country's exercise of its legal rights, such as shutting off its own oil exports, preventing that harm is neither a sufficient nor a contributing just cause. But imagine that in 1990 Iraq had occupied both Kuwait and Saudi Arabia and stopped all their oil production. In that case the economic harm would have resulted from an unjust act of aggression, and preventing it would have been a relevant benefit of war.

In assessing these contributing causes we must continue to compare them with the do-nothing baseline of having a just cause but not pursuing it. This is vital because often acquiescing in aggression not only

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10. I borrow this analogy from McMahan and McKim, pp. 504–05.

11. It may be argued that lesser humanitarian aims are in fact sufficient just causes, just not ones that on their own satisfy proportionality; this is especially plausible if we think of the just cause condition as specifying *types* of goal that can justify war, whether or not every instance of them does. Even so, the point remains that goals that would not by themselves justify war can contribute to a war's proportionality when joined with other, weightier goals.

fails to deter future aggression but positively encourages it, by allowing a precedent of successful aggression. In the lead-up to the Gulf War many commentators called for a negotiated Iraqi withdrawal from Kuwait, but it was evident that any such outcome would require concessions to Iraq, for example, about some disputed islands on the Iraq–Kuwait border.[12] And these concessions would have encouraged future aggression by showing that one can invade a neighbor and come out ahead. The United States and its closest allies strenuously resisted this approach, insisting that there be "no rewards for aggression." Whatever its overall merits, their stance recognized that once aggression has occurred, the status quo before the aggression may no longer be an option. One can resist the aggression, which will deter future aggression, or not resist, which will encourage it, and the benefits of the first choice must include avoiding the harms of the second.

The view I am proposing about *ad bellum* proportionality is intermediate between the quasi-consequentialist and traditional views. It does not count all the goods a war will produce nor only those in the sufficient just causes, but supplements the latter with a finite number of contributing just causes. This raises the question whether there is some unifying feature that gives these contributing causes their status. So far as I can see, there is not; like the sufficient just causes, they are just the items on a list. But there are intuitive limits on what can go on this list. Shortly after its end, it looked as if the Gulf War would help resolve the Israeli–Palestinian conflict, through the Oslo Accords it made possible. The effects here were of the right kind to be contributing causes, since they involved preventing violence and reducing international tension. But I do not think that, even if realized, they would have counted toward the war's proportionality, because they would not have been connected to it in the right way. They would not have resulted directly from the war's sufficient just causes but would have been side effects of the process of achieving them, namely the building of a UN-sponsored coalition combining Western and Arab states. But similar effects that do arise directly from a war's sufficient just causes can count. If the Iraq War, by eliminating Iraq's payments to the families of Palestinian suicide bombers, had reduced Palestinian terrorism and thereby encouraged an

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12. Lawrence Freedman and Efraim Karsh, *The Gulf War 1990–91: Diplomacy and War in the New World Order* (London: Faber & Faber, 1993), ch. 11, 19.

Israeli–Palestinian settlement, that would have been relevant to the war's proportionality because eliminating support for terrorism is a legitimate aim.

If *ad bellum* proportionality counts only the goods in a war's just causes, something similar must be true of *in bello* proportionality. When a particular act in war is justified it is primarily because it contributes to the just causes, by increasing either the likelihood or the degree of their achievement. That the act will boost scientific research by testing some new weapons system or please soldiers who enjoy testing weapons is irrelevant. Here again contributing just causes must be counted. If disarming an aggressor is a legitimate war aim, particular acts leading to disarmament will be proportionate only if that contributing cause is relevant; the same goes for lesser humanitarian aims. But in the *in bello* case there is another consideration. Sometimes an act that will foreseeably kill more civilians than some alternative will, while not contributing more to the just causes, reduce either the number of our military casualties or our economic costs, perhaps because it uses less expensive and therefore less accurate weapons. Often this fact will not make the act proportionate; we must accept the greater casualties or expense. But the demand here cannot be unlimited: we cannot be required to sacrifice hundreds of soldiers or spend billions of dollars to save a few enemy civilians. If so, *in bello* proportionality must consider as relevant goods an act's contribution not only to the war's just causes but also to reducing the costs of achieving them.

If *in bello* proportionality looks even partly at the just causes for war, it cannot be assessed independently of *ad bellum* considerations, and especially of the moral importance of those causes. Intuitively this seems right. The level of destruction permitted in a war against a genocidal enemy such as Nazi Germany is surely greater than in the Falklands War. But this claim contradicts the dominant view in the just war tradition, which treats the *jus in bello* as entirely independent of the *jus ad bellum*, so the same *in bello* rules apply to both sides of a conflict whatever the justice of their aims. This independence is affirmed in the Preamble to Additional Protocol I, which says its provisions apply to all persons "without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused or attributed to the Parties to the conflicts." It is also reflected in the Protocol's statement of *in bello* proportionality, which says damage to civilians must not be excessive "in

relation to the direct military advantage anticipated," with no reference to the further goods such advantage will promote.[13] Now, the independence of *in bello* considerations is plausible for the discrimination condition as traditionally understood, since, whatever their war aims, both sides can refrain from targeting noncombatants. But it does not fit the *in bello* conditions about consequences, namely proportionality and necessity. If "military advantage" justifies killing civilians, it does so only because of the further goods such advantage will lead to, and how much it justifies depends on what those goods are. Compelling though it is, this view has the radical implication that no act by soldiers on a side without a just cause can satisfy proportionality: if their acts produce no relevant goods, they can never be just. It does not follow that these soldiers should be punished. Since soldiers normally cannot be expected to evaluate their nations' war aims, they are not to blame for acting wrongly, and international law is probably best formulated as it is, with no "adverse distinction" against soldiers on an unjust side. The alternative approach might even lead to more destructive wars since, notoriously, often both sides in a conflict believe their cause is just.[14] Nonetheless, if we consider the morality of war rather than its legality, the independence of its two branches cannot be maintained. Whether an act in war is *in bello* proportionate depends on the relevant good it does, which in turn depends on its *ad bellum* just causes.[15]

## III. Relevant Evils

When we turn to the evils relevant to proportionality, we seem to find no restriction on their content parallel to the one on relevant goods. That a war will boost the world's economy does not count in its favor, but that

13. *Additional Protocol I*, Preamble and Art. 51 (5) (b), in Roberts and Guelff, pp. 422–23, 449.

14. This worry is expressed in Judith Gail Gardam, "Proportionality and Force in International Law," *American Journal of International Law* 87 (1993): 391–413, at pp. 392–94.

15. The most prominent recent defender of the independence of the *jus ad bellum* and *jus in bello* has been Walzer, but his *Just and Unjust Wars* also downplays the importance of the proportionality conditions. These features of his view may be connected. While the discrimination condition Walzer concentrates on is indeed, on his reading, independent of the *jus ad bellum*, the *in bello* proportionality condition depends on it. More general attacks on the independence of the *jus in bello*, extending to the discrimination condition, are mounted in Jeff McMahan, "Innocence, Self-Defense and Killing in War," *Journal of Political Philosophy* 2 (1994): 193–221, and Mellow, "A Critique of Just War Theory."

it will harm the economy surely counts against it. Whereas economic benefits are not relevant goods for proportionality, economic harms are relevant evils. It is also relevant that a war will hamper scientific research or cause pain to the soldiers who fight; these effects too can make a war disproportionate. In assessing a war for proportionality, it seems we count evils of all the kinds it will cause, with no limits on their content. There is therefore a thumb pressed down on one side of the proportionality scale, with more counting on the negative than on the positive side. But there may be another, compensating thumb on the positive side.

Although restricted in their content, the goods relevant to proportionality seem not to be restricted by their remoteness from a war or act either in time or causally. If defending a nation will ensure that its citizens are self-determining a century from now, that helps to make the defense proportionate, and the same holds if defending them will deter wars a century from now. If some war really would end all war forever, that would count massively in its favor, and it would do so even if the good effects required intervening good decisions by other agents, namely decisions not to go to war. The same view can in principle be taken of relevant evils. One objection raised before both the Gulf and Iraq wars was that they would increase instability in the Middle East and so lead to further violence in the region. This objection counts encouraging war as a relevant evil and seems to do so without any restriction about remoteness. But the objection is much more persuasive for third-party interveners than for a nation that is itself under attack. Imagine that we face aggression from our eastern neighbor. We may know what if we defend ourselves successfully this will encourage our western neighbor to expand its military, once it sees how useful a military can be. And that will cause its further western neighbor, with whom it has various disputes, to expand its military, leading to an arms race and eventually to war between them. Now, war between our neighbors is the right type of evil for proportionality calculations, but it is not clear that it is one we must weigh heavily in our decision or that can take away our right of national defense. Surely we would not be condemned if, despite knowing the consequences, we chose to resist the aggression. The parallel certainly holds in individual self-defense. If my defending myself against an attacker will lead to increased attacks on others, perhaps because my attacker will vent his frustration on weaker victims, this fact,

though regrettable, does not make my defending myself wrong. Many will say the reason is that, even if the later attacks would not have occurred but for my defense, the responsibility for them belongs not to me but to the attacker who launches them. Similarly, in the international case many will say that if defending ourselves from our eastern neighbor leads to war between our western neighbors, that is their responsibility, not ours. Although the right type of effect for proportionality, that war is too remote from our choice to weigh heavily against it.

The suggestion here is that the intervention of another's wrongful choice can reduce our responsibility for a bad outcome, and in fact this possibility arises frequently in war. Imagine that we have a just cause but know that if we pursue it some fanatics on the other side will with no moral excuse launch suicide attacks on our civilians. In deciding whether to fight we may have to weigh the potential deaths of our civilians, but what about those of the suicide bombers? Is the fact that they will die in unjust attacks one that could make our choice of war disproportionate? That is hard to believe. Nor must the relevant wrong choice come after our act. Imagine that in the same war enemy civilians with likewise no moral excuse act as voluntary shields, placing themselves around the enemy's military installations in the hope of deterring us from attacking those installations. Here the fact that our attack will foreseeably kill noncombatants is not morally irrelevant; if we have a choice between attacking two installations of equal military importance only one of which has shields, we should prefer attacking the other. But by placing themselves near the installations the shields arguably take upon themselves some responsibility for their deaths and remove it from us, so their deaths count less against our attack's proportionality.

In these examples the intervening choices are by the individuals who will suffer the harms, but this too is not necessary. Consider, first, involuntary shields, who are placed near military targets against their will or, more commonly, have military personnel and equipment located in their neighborhoods, again in the hope of deterring attack. Additional Protocol I forbids all use of civilians as shields but immediately adds that the violation by one party of its obligations under the Protocol does not release other parties from their obligations, suggesting that the protections for involuntary shields are in no way reduced.[16] Not everyone takes

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16. *Additional Protocol I*, Art. 51, (7–8), in Roberts and Guelff, p. 449.

this view, however. Discussing the Vietnam War, in which Viet Cong guerrillas hid among the Vietnamese peasantry, Paul Ramsey says, "the onus for having placed multitudes of peasants within range" of fire belongs to the guerrillas and not the United States, since "[t]o draw any other conclusion would be like, at the nuclear level, granting an enemy immunity from attack because he had the shrewdness to locate his missile bases in the heart of his cities."[17] William V. O'Brien concurs: "it seems fair to assign the major responsibility to the Communist forces for the civilian losses, destruction, and displacement caused by turning the population centres into battlefields."[18] A similar view may have been taken by the U.S. military in the Iraq War. Early in that war a fight outside Nasiriyah moved into the city when Iraqi forces retreated there, with resulting civilian casualties. The commander of a U.S. artillery battalion firing on Nasiriyah "placed responsibility for any civilian deaths on the Iraqi soldiers who drew the marines into the populated areas," saying, "We will engage the enemy wherever he is."[19]

Or consider the coalition bombing campaign in the Gulf War. It initially caused around 2,000 Iraqi civilian deaths, but many more followed from its aftereffects, especially the damage to Iraq's water filtration plants. Some of these later deaths were unavoidable, but others could have been prevented had the Iraqi government repaired the country's infrastructure more quickly, as it arguably had a moral duty to do. In assessing the bombing for proportionality, then, do we count all the civilian deaths that resulted given the Iraqi government's actual behavior, or only those that would have resulted had that government acted as it should? A similar issue arises about the economic sanctions that followed the war. Critics say they caused the deaths of 500,000 Iraqi children; defenders reply that the deaths were Saddam Hussein's responsibility rather than the UN's, since he could have prevented many

17. Paul Ramsey, *The Just War: Force and Political Responsibility* (New York: Scribner's, 1968), p. 437.

18. William V. O'Brien, *The Conduct of a Just and Limited War* (New York: Praeger, 1981), p. 100. Johnson takes a similar view of Israel's response to the PLO in the early 1980s; see *Can Modern War Be Just?* pp. 57, 59. I take it there is no point in assigning the "major" responsibility for civilian deaths to the side that uses them as involuntary shields unless this reduces the other side's responsibility.

19. "Marines Wade into Dreaded Urban Battle," *The Globe and Mail*, March 25, 2003 (New York Times Service).

of them by making fuller use of the UN's oil-for-food program, and could have prevented all of them by openly abandoning his pursuit of weapons of mass destruction, as he had promised in the ceasefire agreement to do. Since these failures of his were necessary for the sanctions to cause the deaths, those deaths are properly charged to him and not to the sanctioning nations.[20]

The question of whether others' wrongful choices can reduce our responsibility for bad outcomes is vital for the analysis of just war proportionality, but it is very difficult to answer decisively. One extreme view says another's wrong choice always completely removes our responsibility for resulting evils, but this in effect eliminates proportionality as an independent just war condition. Any time we have a just cause, an enemy's resisting us is wrong, and any evils that follow from his resisting, namely all the evils of the war, are his responsibility, not ours. On this view, if NATO had challenged the Soviet invasion of Czechoslovakia in 1968 despite knowing that nuclear war would result, there would have been nothing objectionable about its choice. That is very hard to accept.[21] A contrary extreme view ignores others' agency completely and counts all resulting evils whatever other causal conditions they may have. It is not so decisively objectionable and may even be correct, but it is at least questionable when it gives the deaths of suicide bombers and voluntary shields completely unreduced weight. And there are further views intermediate between these extremes.

First, a view can give evils that depend on others' agency only diminished rather than zero weight, holding only that others' cooperation in producing a bad outcome reduces our responsibility for it somewhat. Second, a view can make this reduction only in some cases and not others. One possibility is to discount evils only when the intervening

20. Kenneth Pollack, *The Threatening Storm: The Case for Invading Iraq* (New York: Random House, 2002), pp. 133–37, 139–40; Marcus Gee, "Stick to your Poetry and Pianos," *The Globe and Mail*, Sept. 27, 2002, p. A17; and Margaret Wente, "Who's Killing the Children of Iraq?" *The Globe and Mail*, Oct. 8, 2002, p. A23.

21.  Paul Christopher comes close to adopting this view. To the charge that the first Gulf War was disproportionate because it caused the deaths of 40,000 Iraqi soldiers, he replies that "the responsibility for the deaths of Iraqi soldiers must rest with the Iraqi government," since "Iraq could have prevented or ended the war at any time by complying with the mandate of the United Nations Security Council" (*The Ethics of War and Peace: An Introduction to Legal and Moral Issues*, 2d ed. [Upper Saddle River, N.J.: Prentice-Hall, 1999], pp. 84–85).

choice is by the very person who will suffer the evil; this view discounts for suicide bombers and voluntary shields but in few other cases.[22] This view may again be correct, but it will not be attractive to those who want to discount even a little for involuntary shields, when an enemy fails to rebuild after a bombing, or for economic sanctions. And there are several ways of capturing these cases short of adopting the extreme view that discounts for all intervening agency. For example, a view can reduce our responsibility for resulting evils only when the intervening choice either (1) is by the person who will suffer the evil, or (2) only affects the amount of harm *our* act will cause without introducing new causal processes leading to new harms.[23] This view's second clause applies to the three cases just mentioned, since in all of them the enemy's choice affects only how much harm our bombing or sanctions cause. But it does not apply to the case of Czechoslovakia in 1968, since then the nuclear war would have resulted from a Soviet military response to NATO that created new harmful processes. There is in fact a whole range of intermediate views about intervening agency, depending on how much they reduce responsibility (a lot or only a little) and in how many cases (almost all or only a few). It is difficult to choose between these views, as well as between them and the simpler view that counts all resulting evils. I cannot find any abstract argument that favors one view over the rest, nor do intuitive judgments about particular cases yield a decisive result. On the contrary, there are sharp disagreements about, for example, the U.S. treatment of Vietnamese peasants and the sanctions against Iraq. I will therefore have to leave this issue unresolved, despite its vital importance for just war proportionality. The more the proportionality conditions discount resulting evils for others' wrongful agency, the more permissive those conditions are; the less the conditions discount, the more wars and acts they forbid. On the one view, the sanctions against Iraq may have been entirely unobjectionable; on the other, grossly disproportionate.

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22. The intuitive conclusion about suicide bombers and voluntary shields can also be reached in another way, by a view that discounts all deaths on the enemy side by their victims' moral culpability with respect to the war or to acts in it. But this view raises issues beyond the scope of this article and departs, as I am trying not to, from the assumptions about legitimate targets found in international law.

23. The first disjunct is needed because the second disjunct, while discounting for voluntary shields, does not do so for suicide bombers.

IV. Weighing Goods and Evils: Defending Sovereignty

Having identified their relevant goods and evils, the proportionality conditions must then weigh them against each other. To isolate the distinctive issues here I will assume that resulting evils are not discounted for others' agency, but instead count fully against relevant goods. Even so, the task of weighing is complex, with as many aspects as there are pairs of relevant goods and evils. Thus, a full account of just war proportionality must weigh the defense of a nation's sovereignty against environmental harms, the benefit of liberating women against economic costs, and more. I cannot discuss all these comparisons, but will instead focus on two issues I take to be central: whether defending sovereignty against aggression ever justifies killing, and how a nation should weigh its own citizens' lives against lives on the other side.

Resisting aggression is usually considered the paradigm just cause for war and one that almost always satisfies proportionality. Immediately after introducing the *ad bellum* condition, McKenna adds that "Self-defense . . . almost always justifies resistance."[24] On this view there may be special circumstances, such as those of Czechoslovakia in 1968, where the consequences of national self-defense are so catastrophic as to make it wrong, but where resisting aggression will lead only to conventional war it is normally proportional. This view makes sense given a traditional understanding of just war theory, on which the entities with rights in the international realm are states, understood as indivisible entities with a status parallel to that of individuals in the morality of self-defense. Then a state facing aggression faces a threat to its existence, just as an individual does whose life is attacked; and just as the individual may kill an attacker to protect his existence, so may the state kill. But this "statist" view has been persuasively criticized on the ground that all rights belong ultimately to individuals. It is individuals who at bottom matter morally, and any rights states have must derive from and concern the rights of their citizens.[25] This "individualist" view has important practical implications, but it also tightens the relation between just war theory and the morality of self-defense, making the former not just parallel to

24. McKenna, "Ethics and War," p. 651.
25. See, e.g., David Luban, "Just War and Human Rights," *Philosophy & Public Affairs* 9 (1979/80): 160–81.

but derivative from the latter. If the only just cause for war is to protect the rights of individuals, then legitimate military action always is an instance of defending individuals. And if the state acts legitimately only when it acts on authority given it by its citizens, as many liberal theories hold, then any limitations on their enforcement rights must extend to its own. The morality of individual self-defense permits a person to defend not only himself or one other person but also a group; if a hundred people are attacked on the street, he may try to defend them all. It also permits people to coordinate their defensive acts, so a hundred act jointly to defend one. The individualist view makes it natural to see legitimate military action as extending these two possibilities, so in it 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.[26] Then cases of individual defense are not just analogous to cases in war; they concern the same topic.

The most-noticed practical implication of the individualist view has been for humanitarian intervention. Whereas the statist view forbids armed interference by one state in the internal affairs of another, the individualist alternative allows such intervention to prevent serious violations of citizens' rights by their own government, as in Rwanda or Kosovo. But this view also has implications for national defense, which it says satisfies proportionality only if it protects rights of citizens that are important enough to justify killing. This condition is satisfied if the aggressor plans genocide or other serious crimes against the nation's citizens, such as rape, but often an aggressor has no such aim. It seeks only to absorb the nation's territory and replace its government, changing the citizens' political status but not much else about their lives. The aggressor will kill the nation's citizens if they resist its attack, but not if they do not. The unavoidable threat it poses is therefore only to the citizens' political rights, such as their rights to participate in collective political self-determination. Two writers, Richard Norman and David Rodin, have argued that these rights are not important enough to justify killing. If someone tries to prevent me from voting, for example, I am not permitted to kill him in response. Norman and Rodin conclude that if a

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26. I owe this last argument to Jeff McMahan.

nation faces aggression that does not threaten further rights of its citizens, it is not permitted to defend itself with lethal military force.[27]

Some may find this a philosophers' argument in the pejorative sense, one completely divorced from reality. In the real world of international relations there is no debate about the right of national self-defense, which is firmly entrenched in the UN Charter. But if this consensus is correct it must be possible to show why, and I will now attempt this. While granting that the rights relevant to *ad bellum* proportionality belong only to individuals, I will argue that they have three features that differentiate the situation of a nation facing aggression from that of an individual protecting his right to vote. I will not claim that any of these features alone justifies killing, only that they do so together.

The first and most obvious feature is the number of people whose rights are threatened. Whereas the voting example involves just one person, aggression threatens the political rights of all a nation's citizens, who can number tens or even hundreds of millions. In addition, if resisting the threat will deter future aggression, it protects the rights of many other nations' citizens, and in each case the protection is for an extended time, since a successful invasion violates rights not momentarily but for many years. The question then is whether this factor of greater numbers affects the amount of defensive force a victim is permitted to use. In some aspects of the morality of self-defense it does not. If a person is attacked by a group of aggressors and can save his life only by killing them all, he is permitted to do so no matter how large the group. So numbers do not count on the side of aggressors, and in some cases they do not make a difference on the side of victims. Not only may one person not kill to prevent himself from being tickled, but a group may not kill to stop themselves all from being tickled. Not even a million people may kill to save themselves from that trivial a threat.[28] But it seems that in other cases the number of victims does make a difference. More

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27. Richard Norman, *Ethics, Killing and War* (Cambridge: Cambridge University Press, 1995), ch. 4; David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002), ch. 6.

28. In F. M. Kamm's terminology, the benefit of not being tickled is here an "irrelevant utility"; in Samantha Brennan's, it does not satisfy the "universal constraint" a benefit must satisfy if it is to help justify killing. See Kamm, *Morality, Mortality, Vol. I: Death and Whom to Save from It* (New York: Oxford University Press, 1993), p. 146; and Brennan, "Thresholds for Rights," *Southern Journal of Philosophy* 32 (1995): 143–68, at pp. 149–53.

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specifically, I think the number of victims can boost the amount of force permitted in response to a threat to some degree even if not always to the point of killing. Thus, although one person is not permitted to break an assailant's arm to prevent himself from being tickled, a large enough group may be permitted to break an arm to prevent themselves from being tickled. Similarly for duration: while a person may not be permitted to break an arm to prevent himself from being confined in a room for five minutes, he is surely permitted to do that and more to prevent himself from being confined for fifty years. Parallel claims are certainly plausible for other cases in war: surely more force is permitted to prevent 100,000 Kosovar Albanians from being expelled from their homes than to prevent one from being expelled. So while granting that there is a limit on the extra defensive force a large number of victims permits against a threat, one can hold that it boosts that force somewhat. When a nation faces aggression, the threat is to an immense number of people's rights for an immense period of time. Even if this does not by itself justify killing, it justifies more force than is permitted to protect one person's one-time exercise of his right to vote.

Second, a military aggressor backs up its attack on another nation with the threat to kill its citizens if they resist. Although no citizens will be harmed if they surrender, they will be killed if they do not. McMahan has argued that this conditional threat by itself licenses a victim to kill in self-defense: by threatening one's life an attacker brings one's right to life into play and permits whatever degree of force defense of that right allows.[29] Norman and Rodin reply persuasively that this is not so: if a thief threatens to kill you if you do not give him a dollar, you may not kill him to protect your dollar. But it does not follow, as Norman and Rodin seem to assume, that the threat has no effect on the amount of force one may use; on the contrary, the threat again seems to boost this amount somewhat. A victim is presumably not permitted to break a thief's arm to prevent him from taking a dollar, but he may be permitted to do so if the thief backs up his attempt with the threat to kill. It is instructive to consider Norman's and Rodin's analysis of this case. Both say the thief's action has two components: the direct attempt on the victim's dollar and the conditional threat to the victim's life should he resist that attempt. The first element on its own does not justify killing, since that would be

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29. McMahan, p. 196.

a disproportionate response to a threat to one's dollar. Nor does the second element, since killing is unnecessary when one can escape the threat by handing over the dollar. If neither component on its own justifies killing, Norman and Rodin conclude, the thief's action as a whole cannot.[30] But this analysis implies that from the thief's point of view threatening the victim's life provides benefits at no cost, since it increases his chance of getting the dollar while not increasing the force his victim may use against him. One does not have to be a consequentialist to find this troubling. I think it is it more plausible to see an attempt at a victim's dollar backed by a threat to kill as a single violation that is more serious than a simple attempt at the dollar and less serious than a direct attempt to kill, so it justifies more defensive force than the former but less than the latter. This is exactly the view I suggested above: that a threat to kill boosts the amount of force permitted in self-defense, but only somewhat. And it applies naturally to the case of aggression, where the threat to kill citizens who resist an assault on their political rights can likewise boost the amount of force they may use in response.

Finally, aggression threatens more than only citizens' right of political self-determination. To see how, consider the law of individual self-defense. Most jurisdictions limit the right of self-defense by proportionality conditions, and these usually allow less force in defense of one's property than in defense of one's person. Whereas a victim may kill to prevent himself from being killed or badly injured, he may not kill to protect his property. But the law often makes a partial exception of a person's home. On the ground that "a man's house is his castle," it allows more force to be used in protecting one's home than in protecting other forms of property, in some jurisdictions even allowing killing to prevent mere forcible entry into one's home.[31] It also allows a person to stand and resist an attack in his home that he would be required to retreat from elsewhere. This view has an intuitive rationale. If rape is a serious crime, it is not only because of the bodily harm it causes; it is also and more importantly because it violates what should be most intimate and private to a person. Similarly though to a lesser degree, forcible entry into

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30. Norman, pp. 130–31; Rodin, pp. 132–38.

31. See Stuart P. Green, "Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles," *University of Illinois Law Review* 1999 (1999): 1–41. In endorsing the general idea that more defensive force is permitted in one's home I do not endorse these extreme "make my day" laws.

a person's home invades space that should be personal; this is why its victims feel violated. While the parallel with rape must not be exaggerated, it seems that just as in that case the violation of intimate space increases the seriousness of the crime and the amount of force permitted to prevent it, so invasion of one's home justifies more defensive force than other crimes against property.

A similar idea applies to international aggression. As the recent literature on nationalism has underscored, a nation's citizens typically regard it as a kind of home. They feel emotionally attached to its landscape, architecture, and cultural life, some of which are threatened by aggression. They also feel attached to its political institutions, seeing them as another aspect of their national home and resenting interferences with them. The culture of English-speaking Canada does not differ radically from that of the United States, yet most Canadians would find the armed incorporation of Canada into the United States and the replacement of Canadian political institutions by those of the United States a violation similar in kind to intrusion by a burglar into their home. For them, a U.S. attack would be an invasion not only literally but also metaphorically. But then it is a mistake to see the only rights of citizens threatened by aggression as rights of political self-determination; they also include the right to be secure in a political and cultural home. Just as in individual defense the protection of a home justifies some additional force, so protecting a political home does so in the morality of war.

Three features, then, differentiate aggression against a nation from interference with one person's right to vote: the large number of people whose rights are threatened, the fact that aggression is backed by a conditional threat to kill, and the fact that the attack is not only on rights of political participation but also invades a national home. Even if no one of these features by itself justifies killing, together they surely do. Given everything that aggression threatens, killing to prevent it need not be disproportionate.

One would like to go further and say more precisely when defending sovereignty justifies war. If the prospect of global nuclear war makes resisting aggression wrong, are there less catastrophic effects that do the same? And what if the benefits of resisting are not so great? The nation attacked can be small, like Kuwait, so not many citizens' rights are threatened; undemocratic, again like Kuwait, so self-determination is not at issue; or not one whose citizens feel emotionally attached to its institu-

tions. Do these factors reduce the justification for war? Or what if the aggressor seeks not to supplant the entire government but only to occupy a small, sparsely inhabited territory like the Falklands? In many of these cases the contributing cause of deterrence may favor fighting; the best way to prevent future, more serious aggression may be to resist even comparatively trivial aggressions now. But one would like to know what is intrinsically proportionate in these cases, and that is difficult to decide. Philosophy is most help in weighing competing moral considerations when it can find some more abstract value that underlies them and see how far each instantiates that value. But the considerations in play here seem irreducibly diverse: political self-determination and the protection of a national home on the one side, death and suffering on the other. This leaves their comparison to direct intuition, and, although that yields definite results in some cases, such as Czechoslovakia in 1968 or the invasion of a large democracy, it does not do so in the intermediate cases described above. It is therefore difficult to pin down more exactly how much force the defense of sovereignty allows. Nonetheless, I hope to have vindicated the common-sense view that at least sometimes, and certainly when a large, popular democracy faces total political absorption, national self-defense can justify lethal military force.

## V. Weighing Goods and Evils: Comparing Lives

My second issue concerns how a nation should weigh lives when it kills some enemy citizens in order to save citizens of its own. This can be an *ad bellum* issue when a just cause for war is to prevent terrorist attacks like those of September 11, 2001; it also arises in the *jus in bello*, where soldiers must often choose between tactics that will cause more or fewer enemy casualties at the cost of more or fewer casualties for themselves. There is obviously no precise formula for making these choices, such as that 2.7 enemy lives equal one of ours. But we can try to describe the general parameters within which they should be made. Since there are two main categories of personnel on each side, combatants and non-combatants, there are four relevant comparisons: our soldiers against their soldiers, our civilians against their soldiers, our civilians against their civilians, and our soldiers against their civilians.[32]

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32. Further relevant categories are those of allied soldiers and civilians, and neutral soldiers and civilians. I leave these aside in this article.

*In bello* proportionality as standardly understood seems to allow a nation to kill virtually any number of enemy soldiers to save just one of its own soldiers. Once a war has begun, enemy soldiers are essentially free targets that one may attack at any time.[33] The *in bello* necessity condition forbids killing them wantonly, or for no military purpose. But if killing enemy soldiers now will prevent them from killing one of our soldiers in the future, it seems we may kill almost any number to achieve that end. Radical though it seems, this claim mirrors one from the morality of self-defense, where a person may kill any number of attackers if that is necessary to save his own or another's life. It also fits the charges of disproportionality levelled against the Gulf War, which concerned only the number of Iraqi civilians killed and not the number of Iraqi soldiers.[34] Or consider the movie "Saving Private Ryan," in which a troop of U.S. soldiers rescue a fellow soldier caught behind enemy lines. There is no suggestion in the movie or in the common response to it that there is some number of German soldiers such that the troop must be careful not to kill more than that number while saving Ryan. Some theorists have argued that the traditional distinction between combatants and noncombatants should be rejected, on the ground that morally innocent conscript soldiers are less legitimate targets of force than civilians who culpably contributed to the start of an unjust war.[35] Although important, this argument raises issues beyond the scope of this article; and if we assume the traditional distinction or consider only volunteer enemy soldiers, it seems we may kill virtually any number to save one of our soldiers.[36]

If so, however, we may also kill virtually any number of enemy soldiers to save one of our civilians. A government's duty to protect its civilians is surely as great as its duty to protect its soldiers; any preference it shows the latter it may also show the former. In addition, civilians have not, by

33. See Walzer, pp. 138–51.

34. After the war Gen. Norman Schwarzkopf expressed contempt for Saddam Hussein's willingness to squander Iraqi soldiers' lives. But he thought the responsibility to protect those soldiers belonged only to Saddam; Schwarzkopf's own duty was only to U.S. soldiers. See Jack Anderson and Dale Van Atta, *Stormin' Norman: An American Hero* (New York: Zebra Books, 1991), p. 164, cited in A. J. Coates, *The Ethics of War* (Manchester: Manchester University Press, 1997), p. 221.

35. McMahan, passim; Mellow, passim.

36. I say "virtually" because there may be some number (1,000? 10,000?) such that it is wrong to kill that many enemy soldiers to save one of ours. My point is simply that even if there is such a number, it is very high.

volunteering for military service, accepted any risk of dying in war, so the government's responsibility to them is if anything greater. There may be limits on the priority a government may give its civilians' lives in the *jus ad bellum*. While it is permissible to initiate a war that will kill enemy soldiers to prevent large-scale attacks on our civilians, this may not be permissible to save one or two civilians. Once war has begun, however, it seems the priority is virtually absolute. If we can prevent an attack that will kill one of our civilians by killing a number of enemy soldiers, it seems we may do so almost whatever that number is.

The more difficult issues concern weighing enemy civilian lives, first against our civilians' lives. Whereas enemy soldiers have, in becoming soldiers, given up certain protections and become legitimate targets of force, enemy civilians retain those protections, and one conclusion is that their lives must be weighed equally against those of our civilians. In 2001 many watched the death toll of Afghan civilians with the hope that it would not exceed the 3,000 Americans killed on September 11; similarly, some critics condemn Israel's attacks on suicide bombers in the occupied territories for killing more Palestinian civilians than the bombers have killed Israelis. Both these claims get one term of the moral comparison wrong. In the Afghan case the relevant U.S. number is not that of civilians killed on September 11; their lives were already lost. It is the number of U.S. civilians saved by the war, or the number of additional lives that would have been lost to terrorism had the war not been fought. In the Israeli case it is likewise the number of additional terrorist victims there would have been without the counterattacks. Setting this aside, however, both views assume that civilian lives on the two sides must be weighed equally.

The idea of equal weighting is familiar from moral views such as utilitarianism, which require equal consideration of all people's interests. But these views are sharply at odds with common-sense morality, which does not tell a father to care no more about his daughter than about a stranger. On the contrary, it says he may and should give his daughter's welfare considerably greater weight, so if he has a choice between saving his daughter's life and those of several strangers, he may and should do the former.[37] The relations among citizens of a nation are not as close as

37. Common-sense morality therefore incorporates what C. D. Broad called "self-referential altruism"; see his "Self and Others," in *Broad's Critical Essays in Moral Philosophy,* ed. David Cheney (London: George Allen & Unwin, 1971), pp. 262–82.

between parents and children, and the partiality they justify is not as
strong. But common sense still calls for some partiality toward fellow
citizens and certainly demands that partiality of governments. Although
they have some duty to relieve poverty in other countries, they have a
stronger duty to do so in their own; in formulating trade, immigration,
and other policies governments should consider primarily the effects on
their citizens.[38] Applied to just war theory, this view says a government
should weigh its own civilians' lives more heavily than enemy civilians',
and may therefore kill more of the latter if that is necessary to save some-
what fewer of the former.

It may be objected that this view mistakes the proper limits of justi-
fied partiality. Common sense permits us to prefer those closer to us
when we are giving benefits, but not when the issue is causing harm. On
the contrary, it gives everyone equal rights against such harm and
requires those rights to be equally respected. A father may and even
should prefer saving his daughter's life to saving five strangers, but he
may not kill those strangers in order to save his daughter. The same
goes for governments. They may prefer their citizens' interests when
giving benefits like those of poverty relief or trade policy, but not when
killing.

Despite its appeal to equality, this argument would have very restric-
tive implications in the context of war. After all, a father is not only for-
bidden to kill five strangers to save his daughter; he is also forbidden to
kill one stranger to save five daughters. To adapt a familiar example, if
he has five daughters who need different organ transplants and no
organs are available, he is not permitted to kill one innocent person in
order to divide up her organs among his daughters. Applied to war, then,
the argument would make it disproportionate to kill a much smaller
number of enemy civilians in the course of saving a much larger number
of one's own. This is counterintuitive, and the reason is that it mistakes
the important distinction in just war theory. This is not the distinction
between causing harm and failing to prevent it; it is the distinction
between targeting people for harm and harming them collaterally, which
is a distinction within the category of causing. This latter distinction is

38. I defend a moderate degree of national partiality in "The Justification of National
Partiality," in *The Morality of Nationalism*, ed. Robert McKim and Jeff McMahan (New York:
Oxford University Press, 1997), pp. 139–57.

usually understood using the doctrine of double effect, so it becomes the distinction between intending harm as an end or means and merely foreseeing that harm will result. But whatever its exact basis, and others have been proposed,[39] the targeted/collateral distinction is central to just war theory, so to test our view about weighing civilians' lives we need a non-military example that involves it. Imagine that a victim is being attacked by an aggressor and that the only way a third party can save the victim's life is by throwing a grenade that will kill the attacker and also, unavoidably, an innocent bystander. It is arguable that if the third party is unrelated to any of the other participants he may not throw the grenade, and in particular may not prefer the victim's innocent life to the bystander's. But now imagine that the defender is the victim's father. It seems to me that he may throw the grenade, and may do so even if this will kill some number of bystanders greater than one. If he is not aiming at the bystanders but killing them collaterally, he may show some preference for his daughter. This claim will be contested by some. Thus, Judith Jarvis Thomson has denied that one may kill a bystander while defending not only a loved one but also oneself.[40] But she may feel forced to this conclusion by her rejection of the double effect distinction, and if we accept either that distinction or some other between targeted and collateral harms, as both just war theory and international law do, we can use it to justify the more permissive claim that the father may kill some bystanders if that is unavoidable in saving his daughter. And I think most will find this claim more intuitive than Thomson's; surely few in the father's position would fail to save their daughter. The fact that he is killing rather than failing to save is not irrelevant; it still plays a significant moral role, and in particular reduces the degree of partiality he may show below what would be permitted if he were merely distributing benefits. To put it a little technically, there is some number such that he

39. F. M. Kamm has proposed grounding the distinction in a more complex causal condition; see her "Justifications for Killing Noncombatants in War," *Midwest Studies in Philosophy* 24 (2000): 219–28. But her condition implies that if we drop a bomb on a factory and a piece of the bomb flies through the air and kills a civilian, this is forbidden; whereas if we drop a bomb and a piece of the factory flies through the air and kills a civilian, that is not. I take it this is absurd. In my view double effect gives the best grounding for the targeted/collateral distinction, but I cannot rule out a priori the possibility of alternative groundings.

40. Judith Jarvis Thomson, "Self-Defense," *Philosophy & Public Affairs* 20 (1991): 283–310, at pp. 289–90, 296, 307–08.

would be permitted to save his daughter rather than save that number of strangers but may not kill that number of strangers as a side effect of saving his daughter. Given that limit, however, he is permitted to show some partiality toward his daughter even when he does kill bystanders.

The situation of a nation weighing its own against enemy civilians' lives is analogous. The nation is, say, attacking a government that has sponsored terrorist attacks against its citizens and finds that, while directing force only at that government's agents, it will unavoidably kill some enemy civilians. I think that in this case the nation's government is permitted to give somewhat greater weight to its own civilians' lives, and the case for partiality here may even be stronger than in that of individual defense. Even Thomson, who rejects the targeted/collateral distinction in individual cases, acknowledges that it has considerable intuitive force in the context of war, force that she needs to but cannot explain away.[41] In fact the distinction is implicit in the very idea of *in bello* proportionality. The point of the *in bello* condition, recall, is to determine when acts that are not forbidden in themselves, for example, just as killings of noncombatants, are forbidden because they cause excessive harm. But this issue would not arise unless some acts of killing were *not* forbidden in themselves, that is, unless there was something like a targeted/collateral distinction. So any discussion of *in bello* proportionality must assume the distinction, and once it is in place there is room for a government to give somewhat greater weight to its own civilians' lives. The fact that the government's acts will kill enemy civilians remains important, and in particular permits less partiality than is appropriate in trade or immigration policy. I wish I could say more precisely what this degree is, or how many enemy civilian deaths are proportionate side effects of saving one of our civilians. But I do think that when weighing its own civilians' lives against those of enemy civilians it will merely collaterally kill, a nation may give some preference to the former: more than zero preference, but not as much as is permitted when no killing is involved. If the nation is trying to prevent terrorist attacks like those of September 11, 2001, then tragic though the result will be, and assuming the nation makes serious efforts to minimize collat-

41. Thomson, pp. 292–98.

eral harm, it may kill somewhat more enemy civilians if that is unavoidable in saving a smaller number of its own.

The final case of weighing, of our soldiers against their civilians, may have the most practical importance. Since Vietnam, U.S. military tactics have had as a central aim keeping U.S. casualties to a minimum. In the Gulf War this led to the massive bombing of Iraq's infrastructure that preceded the ground war; in Kosovo it caused NATO to fly its planes above 15,000 feet, where they were beyond the reach of Yugoslav anti-aircraft fire but where their bombing was inevitably less accurate. Many critics charge that this desire to minimize U.S. military casualties has led to excessive civilian casualties on the other side. To assess this complaint we must know what an acceptable trade-off between our military and enemy civilian lives would be.

I believe a nation may again give some extra weight to its soldiers' lives because they are its own. Like its civilians, its soldiers are citizens and may be given some preference on that basis. In addition, military commanders typically do and should feel special responsibility for the troops under their command. This is not just a matter of preferring their lives to enemy soldiers', but extends to protecting them from natural dangers, friendly fire, and, perhaps most important, having their lives wasted in ill-planned campaigns. It is no exaggeration to say that for a responsible military commander his troops have something like the status of family. But in this final weighing there is a competing consideration. Although our soldiers are ours, they are also soldiers, which means they are legitimate targets of military force and their deaths are an expected consequence of war as civilians' deaths are not. Paul Christopher has emphasized this point, saying that "risking one's life is part of what it means to be a soldier," and concluding that our soldiers' lives weigh less in the moral balance than do enemy civilians'.[42] His argument is especially telling in a nation with a volunteer military, since its soldiers chose military service and so voluntarily accepted a risk of death as enemy civilians did not. This is an especially clear reason to prefer the lives of enemy civilians to those of our soldiers: while they are not ours and

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42. Christopher, *The Ethics of War and Peace*, p. 165; see also p. 95. Christopher rejects the idea of national partiality, holding that enemy civilians' lives must be weighed equally against our civilians' (pp. 95, 97, 165–66, 172–73).

therefore count for less, they did not choose to become soldiers and therefore count for more. To resolve our final issue about weighing we must balance these competing considerations against each other.

This would again be easiest if we could find some more abstract value underlying the two, but they seem too diverse. One involves the special relationship of co-nationality, the other, at its most compelling, the voluntary acceptance of risk. So there seems no alternative to a direct intuitive assessment of their weights, and this is again difficult to make. I do not see either consideration as clearly tipping the scales in favor of one category of lives. I therefore feel forced to treat them as of approximatey equal weight, so our soldiers' and enemy civilians' lives count roughly equally. While a nation may prefer its own civilians' lives to those of enemy civilians, it may not do the same with its soldiers' lives. Instead, it must trade those off against enemy civilians' lives at roughly one to one. This is not to say that an act that kills 101 civilians as a side effect of saving 100 soldiers is necessarily disproportionate; the comparisons cannot be that precise. But it does imply that any act that kills significantly more civilians than it saves soldiers is morally impermissible.

This view does not yield as restrictive a version of *in bello* proportionality as some may wish, but it still raises serious moral questions about recent military campaigns. In assessing the Gulf War bombing, we may have to discount the resulting deaths for Saddam's failure to repair his country's infrastructure; we must also compare these deaths not with the actual number of coalition casualties but with the additional casualties there would have been without the bombing, and in making a subjective assessment we must consider how matters appeared to coalition commanders at the time, when the expected casualties from the ground war were greater than actually resulted. Even so, it is difficult to see the bombing campaign as proportionate. In particular, it is hard to believe that a reduction in the bombing resulting in, say, 30 percent fewer civilian deaths would have had much effect on coalition casualties. A report to the International Criminal Tribunal for the Former Yugoslavia, investigating whether NATO should be prosecuted for its conduct of the Kosovo war, concluded that flying above 15,000 feet is not a war crime. Given the vagueness of the legal definitions of proportionality, that is probably true, but there remain serious moral concerns. In particular, it is hard to believe that occasionally flying below 15,000 feet, especially when identifying targets by the naked eye, would have cost more NATO

military lives than it saved Yugoslav civilians.[43] Again, even a one-to-one trade-off between our military and enemy civilian lives raises questions about the conduct of this war.

For individual government officials in these cases there may be a mitigating factor. If U.S. leaders have tried to minimize U.S. military casualties, it is partly for fear that otherwise U.S. public opinion will oppose war and make it harder to fight. Henry Kissinger urged this type of point in response to proposals that the Gulf War be delayed to give sanctions more time to work; if one waited, he said, "a credible military option probably would no longer exist," because public support would have eroded to the point where war was no longer politically possible.[44] When politicians say a particular way of fighting is "politically impossible" they sometimes mean only that it will reduce their popularity and chance of reelection. But at other times what they say is literally true: too many casualties for their side will spark public and political opposition to the war that makes it impossible to win. In that case what weighs against enemy civilians' lives in the politicians' deliberations is not just their own soldiers' lives but any chance of achieving the war's just causes, that is, the whole positive point of the war. If winning the war with less collateral damage is not possible, the politicians' choice may actually be proportionate, achieving the goods of war at the least possible cost.[45] But the same is not true of the nation as a whole, comprising the

43. In a much-publicized incident, NATO aircraft bombed a convoy of Albanian refugees, killing 70 to 75 of them, in the mistaken belief that they were Serb military forces. The pilots were flying at 15,000 feet and viewing their target with the naked eye; see International Criminal Tribunal for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, sec. 63–70, available at http://www.un.org/icty/pressreal/nato061300.htm.

44. Henry Kissinger, testimony to U.S. Senate Armed Services Committee, quoted in Coates, p. 197.

45. There is an issue about intervening causes here. If a state's leaders spare enemy civilians and therefore lose the war, that result follows only because of a response by their public that is morally wrong, because it involves excessive partiality to their own soldiers. If there is discounting for others' wrongful choices, the leaders are not fully responsible for the loss of the war and may have to accept it rather than kill the civilians; if all resulting evils count, the leaders may be justified in doing what is necessary to win. This is ironic, since in our earlier discussion the view that discounts for intervening causes had more hawkish implications, for example, allowing more collateral damage from bombing than if one counted all actual harms. Here the view that discounts has more dovish implications, requiring a state's leaders not to fight when the alternative may allow them to do so.

government and the public for whom it acts. Since a nation is not constrained by others' reactions, when it kills more enemy civilians to save a smaller number of its soldiers it acts on suspect nationalist preferences and violates proportionality.

## VI. Conclusion

Judgments about proportionality in war cannot be made simply or mechanically. Even if we have specified the types of good and evil relevant to these judgments, we must identify the specific effects of a given war or act, which requires comparing that war or act with alternatives that are merely hypothetical and can only be estimated given our available evidence. In addition, once the relevant effects are identified they must be weighed against each other, which often involves some indeterminacy because they are of irreducibly different types. But that proportionality judgments involve some indeterminacy does not mean they can never be made. The common argument that what cannot be measured precisely cannot be measured at all is as fallacious here as elsewhere. And we surely can make some determinate proportionality judgments. Thus, we can say that a conventional war fought to defend a nation's sovereignty against aggression is normally proportional, while a tactic that kills many enemy civilians rather than sacrifice a few soldiers is not. In the first case the relevant goods clearly outweigh the relevant evils; in the second they do not.