

Just Cause, Liability, and the Moral Inequality of Combatants

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Uwe Steinhoff makes three major claims in his essay: first, that Jeff McMahan's attack on the 'Moral Equality of Combatants' doctrine is true by definitional fiat; second, that combatants fighting for an unjust cause may, *pace* McMahan, successfully collect a moral justification for fighting, if they are doing so to defend the lives of non-combatants; and third, that most combatants in most actual wars have been morally unjustified in fighting. In this reply, all three claims are challenged. It is claimed that McMahan's argument against the Moral Equality of Combatants is substantive, not trivial; that unjust combatants cannot collect a justification for fighting as easily as Steinhoff imagines; and that Steinhoff has been too hasty in his condemnation of most combatants in most actual wars.

Uwe Steinhoff's characteristically bracing, insightful, and wide-ranging essay raises a number of important issues for Just War Theory. [1] His three leading theses, which will be discussed in detail below, can be summarized as follows:

(A) The influential attack on the 'Moral Equality of Combatants' doctrine adumbrated by Jeff McMahan is true by definitional fiat, or true by stipulation, and is thus, as it stands, unpersuasive.

(B) Any substantive attack on the Moral Equality of Combatants doctrine is (partly) undermined by the truth that there may be different justifications for fighting which are available no less to combatants fighting for an unjust cause than to combatants fighting for a just cause.

(C) The number of justified wars that have been fought is, in any case, vanishingly small, with the result that very few combatants can be claimed to have acted justly.

The three theses contain, or are significantly related to, a number of further sub-claims, some of which will be addressed as we go on.

This article will be structured as follows. First, I briefly outline the Moral Equality of Combatants doctrine, and report McMahan's arguments for its indefensibility. After that, I recount Steinhoff's reasons for thinking that McMahan's attack on the doctrine is true by definitional fiat, and I offer some criticisms of

Steinhoff's argument. These sections take care of (A). Next, I address Steinhoff's arguments for (B). Despite the criticisms I make of Steinhoff's argument, I believe nonetheless that he is getting at something deep and important, and I try to indicate what that is. Finally, I examine Steinhoff's reasons for holding (C), and I criticize the austerity of his conclusions.

McMahan's Attack on the Moral Equality of Combatants

Steinhoff provides a clear explanation of the Moral Equality of Combatants doctrine (or MEC for short): according to MEC, combatants on both sides of a war, regardless of whether their cause has been deemed just by *jus ad bellum*, have the liberty-right to kill enemy combatants, just as long as their conduct conforms to the rules of *jus in bello*. Following customary practice, I shall refer to combatants whose cause has been ratified by *jus as bellum* as "just combatants," and combatants whose cause has been condemned by *jus ad bellum* as "unjust combatants." McMahan has two main arguments against MEC (McMahan, 2009, ch. 1). Both of these fasten on the implications for unjust combatants' ability to meet the standards of *jus in bello*, given the failure of the cause for which they fight to have met the standards of *jus ad bellum*.

The first major complaint against MEC concerns

the "proportionality requirement," or the component of *jus in bello* which instructs combatants not to engage in military activity whose value is less than proportionate to the disvalue produced by that same activity. The fundamental problem with unjust combatants, according to McMahan, is that they have nothing to offer to the positive side of the moral ledger. As agents of an unjust cause, the outcomes they seek to bring about have already been condemned by *jus ad bellum*, and so should also be placed on the negative side of the moral ledger.

The second major complaint which McMahan advances against MEC concerns the "discrimination requirement," or the component of *jus in bello* which instructs combatants whom they may attack, and whom they must refrain from attacking. The traditional picture is that non-combatants are considered immune from attack, whilst combatants on the opposing side may be killed. But McMahan questions whether unjust combatants are permitted to attack just combatants. Just combatants are justified in what they do; they have, by assumption, been given a morally sufficient reason to repel unjust combatants. This much is established by their success in meeting the standards of *jus ad bellum*. But then it is unclear how unjust combatants can acquire any justification for attacking just combatants. For they lack the prior morally sufficient reasons for attacking just combatants which just combatants have for attacking them. In terms of both the proportionality requirement and the discrimination requirement, then, unjust combatants can collect no moral justification for fighting; they go home empty-handed.

Is McMahan's Argument Trivial?

I turn now to (A). How, on Steinhoff's view, does McMahan manage to deliver only a trivial truth? It is because he appears to define the notion of a just cause in terms of liability. This is the offending passage:

As I understand it, a just cause is an aim that satisfies two conditions: (1) that it may permissibly be pursued by means of war, and (2) that the reason why this is so is at least in part that those against whom the war is fought have made themselves morally liable to military

attack. (McMahan, 2009, p. 5)

By "liable," McMahan is referring to that property of an individual, whatever it is, which entails that attacking him would not wrong him (McMahan, 2009, p. 8). (McMahan's answer, roughly speaking, to what *makes* an individual liable is that he or she is responsible for an objectively unjust threat. [2])

Steinhoff's essential concern with this argument is that it is explanatorily impoverished. His complaint might be put as follows: if McMahan is going to define a just cause in terms of the liability of individuals against whom one is fighting, and an unjust cause in terms of the non-liability of the individuals against whom one is fighting, then there may indeed be grounds for denying MEC, but the worry which arises at this point is that McMahan will have provided no real explanation of *why* MEC is false. What we wanted to know, Steinhoff will insist, was *why* fighting for a just cause makes combatants non-liable, and *why* fighting for an unjust cause makes combatants liable, but the definitional connections McMahan is relying upon will plainly obstruct the execution of that explanatory project.

What are we to make of Steinhoff's complaint? His dismissal of McMahan's argument strikes me as uncharitable. After all, and as we already know from the previous section, McMahan *does* give substantive arguments for the falsity of MEC, which draw upon the proportionality requirement and the discrimination requirement. It would be deeply uncharitable to suppose that these arguments have nothing to do with McMahan's hostility to MEC, since he goes to the trouble of spelling them out in some detail. So, if some of McMahan's argumentation smells of triviality, it is reasonable to suspect that the offence is a venial one: some infelicitous formulation may have crept into his argumentation. But, in this particular case, we do not even have to rely on that trump card. Three further remarks are in order.

First, the connections between the justice/injustice of the cause and the non-liability/liability of the combatant who is fighting for that cause are looser than Steinhoff acknowledges. Here the words "is at least in part" are important. If we are prepared to take these

words seriously, then we should be prepared to entertain the thought that there may be more to having a just cause than being non-labile to being killed, and there may be more to having an unjust cause than being liable to be killed. Of course, we would have to speculate about what these further conditions might be, but even so, a just cause is not being *defined* in terms of non-liability any more. But perhaps, the Steinhoff-flavored complaint will continue, the non-liability of combatants still counts as a *necessary* condition, if not a necessary and sufficient condition, for the justice of the cause for which they are fighting. And the insistence on even a necessary condition will inhibit the provision of a satisfying explanation for *why* just combatants are non-labile, while unjust combatants are liable.

This worry takes me to my second and more decisive point, which is that McMahan's characterization of a just cause does not, in any case, freeze out normative explanation, precisely because it makes room for a specification of the relevant *liability-making* and *liability-excluding* conditions of the combatants. The fact that combatants are liable or non-labile to military attack cannot be simply a brute fact about them. Combatants are liable, or non-labile, in virtue of certain other facts about them. And we know what these facts are, because McMahan has spelled them out for us. On McMahan's view, a just cause is a cause which has been approved by *jus ad bellum*, from which it follows that the ("just") combatants fighting for that cause have morally sufficient reasons for fighting; this means, in turn, that they are non-labile. An unjust cause, by contrast, is a cause which has been condemned by *jus ad bellum*, from which it follows that the ("unjust") combatants fighting for that cause lack morally sufficient reasons for fighting; this means, in turn, that they are liable. According to this picture, combatants who fight for a just cause cannot fail to be non-labile (as long as they conform to the rules of *jus in bello*), and combatants who fight for an unjust cause cannot fail to be liable, yet the connections are secured by substantive arguments which purport to be explanatory. McMahan's substantive arguments concerning the proportionality requirement and the discrimination

requirement still need to be consulted in order to show us *why* certain combatants are liable, while other combatants are non-labile. Thus, while McMahan's understanding of what a just cause is cannot ultimately escape association with the non-liability of the combatants who fight for it, he is not boringly *stipulating* that just causes are those causes for which just combatants are non-labile, while unjust causes are those causes for which unjust combatants are liable.

Third, and given his argumentative purposes, it makes sense for McMahan to lay particular emphasis on the importance of combatants' liability and non-liability. It would be dialectically unsatisfying for him to advert simply to the justice, or injustice, of the causes for which those individuals fight, since defenders of MEC are fully aware that combatants differ in this particular respect. What ultimately exposes MEC to error, for McMahan, is the collection of facts about liability and non-liability which underlies combatants' allegiance to the causes for which they fight. Given these underlying facts, MEC simply cannot be upheld.

Individual Combatants and Collective Causes

Now I consider (B). Here Steinhoff restates and enlarges a forceful challenge which he had described in an earlier article. [3] In that earlier article, Steinhoff argues that unjust combatants may be justified in fighting, and killing, just combatants in order to protect non-combatants who are in danger of being killed as a side-effect of the military activity of just combatants which is deemed to be justified all things considered. (Double effect reasoning will tend to be recruited into this justificatory story; I lack the space to enter into the relevant details.) Steinhoff insists that innocent civilians are *wronged* if they are killed by just combatants, and that this fact licenses those civilians to defend themselves against just combatants. This fact also, more relevantly, licenses the right of other-defense which, due to civilians' typical defencelessness, can only be legitimately fulfilled by unjust combatants. But if unjust



combatants are acting in other-defense of civilians who would be wronged by being killed by just combatants, then they are justified in fighting, and this restores a degree of moral symmetry between just and unjust combatants. Or so Steinhoff maintains.

Steinhoff does not think that the liberty-right of unjust combatants to defend non-combatants can result in any comprehensive restoration of MEC, and concedes that McMahan's attack on it is "right in principle" (Steinhoff, 2008, p. 220). But in the new essay, he argues more explicitly for the point, implicitly advanced in the earlier essay, that the combatants fighting for an unjust cause do not necessarily share a common moral denominator. They are not, that is, *merely* unjust combatants in virtue of fighting for an unjust cause. If they are defending the lives of their innocent non-combatant co-nationals, then they have a morally worthy reason for fighting, which may not be true of some of their fellow unjust combatants. As Steinhoff suggests:

One must not tar all combatants with the same brush. There are *different* unjustified soldiers, not an amorphous mass called "the unjustified combatants"... [T]here will always *be* a just cause even in an unjustified war. Moreover, many combatants who fight in an unjustified war will actually fight *for* a just cause. (p. 36, original emphases)

One of the points McMahan made in his reply to Steinhoff's earlier article is that, even if non-combatants are wronged by being killed by just combatants, it does not follow that unjust combatants are permitted to fight the just combatants, as opposed to being required to refuse to fight, or to surrender (McMahan, 2008, pp. 242-3). After all, the reason why the lives of non-combatants are endangered lies ultimately in the fact that the just combatants are engaged in warfare against the unjust combatants. And, to explain *that* fact, we must surely go beyond citation of the narrowly defensive aims of those unjust combatants who are acting in other-defense of non-combatants. These other-defensive aims cannot explain why there is any fighting in the first place. It must therefore be the larger *non-defensive* ambitions of the unjust combatants which explain why this fighting is taking place, and we already know that these larger non-

defensive ambitions have failed to satisfy *jus ad bellum*.

Steinhoff responds to McMahan's challenge by appealing to collective action problems among unjust combatants. If *every* unjust combatant surrendered, or refused to fight, then there would indeed be no war, and the lives of non-combatants would no longer be endangered. But individual unjust combatants, or small groups of them, cannot count on any such outcome. Selective individual surrender cannot be relied upon to inspire any wider surrender among unjust combatants. It may therefore be defensible for these particular unjust combatants, Steinhoff claims, to continue fighting in order to protect non-combatants from harm inflicted by just combatants.

Let us think about this argument in more detail. *Because* individual unjust combatants cannot rely on their individual defection inspiring any wider defection among unjust combatants, Steinhoff thinks that they may enjoy a justification for continuing to fight. But Steinhoff's line of argument is problematic, because the point he establishes surely cuts both ways. Even if these unjust combatants have *local* just causes to pursue, such as the protection of innocent civilians, they cannot count on the fact that their continuing to fight is not also contributing to the success of the *non-local* unjust causes which explained their recruitment into the armed services in the first place. (Steinhoff's repeated references to the "unjustified combatants," despite his attempts to divide them into different moral categories, appear to me to inadvertently confirm this point.) After all, these unjust combatants will be killing, or attempting to kill, just combatants, thus frustrating the just cause which those just combatants are fighting for. This fact will surely sap the unjust combatants' involvement in local just causes of justificatory power.

With these points in mind, it is possible to construct an alternative picture of the moral plight of unjust combatants which relieves some of the pressure that McMahan has brought to bear on MEC. This picture brings combatants, whether just or unjust, morally closer to each other. The resulting picture is broadly in line with Steinhoff's purposes, though it will also require some

concessions from him. According to this picture, we should think of combatants' allegiance to causes in terms of a moral lottery. Both just and unjust combatants have some *ex ante* non-trivial probability of serving just local causes, as well as the wider non-local causes which ultimately explains their enrolment into military service. The fact that unjust combatants unavoidably promote causes which have already been condemned by *jus ad bellum* prevents them from arriving at any full-strength justification for what they do. Yet their contribution to local just causes, or the non-trivial *ex ante* probability that they may be called upon to contribute to such causes, may help to provide them with an excuse for what they do. Similarly, just combatants' promotion of a just cause facilitates a full-strength justification for what they do. Yet their contribution to activity which wrongs non-combatants, or the non-trivial *ex ante* probability that they may be called upon to engage in such activity, may either weaken their justification for fighting, or else explain why, despite being justified, unjust combatants may be excused for attacking them.

Steinhoff has argued for an approach to combatant liability which insists upon attention to only their local involvements and activities. That approach cannot be sustained. But he is right to suppose that the moral complexion of unjust combatants is typically brighter than McMahan is prepared to admit.[4]

Degrees of Justification for Wars

I turn, finally, to (C). Steinhoff's claim that defenders of Just War Theory have tended to think that many actual wars have, in fact, been comfortably justified may well be correct. But it is no part of Just War *Theory* that justifications for actual wars are easy to come by. Presumably, the application of such theory to different actual wars will yield different results, depending on how the relevant facts are interpreted, and on the stringency of their interpretation. (In connection to this point, Steinhoff points to some particular difficulties with handling the notion of proportionality in its *jus ad bellum* role. I am inclined to agree with him that this area of Just War Theory is, at present, only weakly understood.)

The various conditions, distributed between *jus ad bellum* and *jus in bello*, which Just War Theory insists upon for the justifiability of warfare are clearly complex and difficult to satisfy. Steinhoff concludes that very few wars can survive this array of moral obstacles, with the implied result that MEC may win by default: most combatants, regardless of the cause for which they fight, will turn out to be equally *unjustified* in fighting. Though I agree with Steinhoff that it is more difficult than is commonly realized for wars to collect any robust justification, I suspect that he overplays his hand. To see why, let us fasten on a particular example which Steinhoff enrols into his discussion. Consider Britain's involvement in the Second World War, which is routinely offered as a relatively unproblematic case of justified warfare. Steinhoff challenges this cosy consensus, pointing, in particular, to deficiencies in the "right intention" condition of *jus ad bellum* displayed by the Churchill government. This carries the consequence, for Steinhoff, that the actual war fought by the British army has to be deemed unjustified.

For the purposes of argument, I will not dispute this historical assertion, or the evidence Steinhoff adduces for it. I want instead to focus on two further lessons he draws from these considerations. The first is this: though the *actual* war as fought by the British army was unjustified, Steinhoff suggests that *another* war *would* have been justified. This other war is a merely *possible* war, which was not actually fought. In this merely possible war, the just cause for war would be supplemented by satisfaction of the further *jus ad bellum* conditions for legitimate warfare, and therefore the war as whole would have been justified. The second lesson Steinhoff wishes to draw from these considerations is a negative one: it is not the case, on Steinhoff's view, that individual British combatants were acting impermissibly in fighting for the Allied cause. This follows from the falsity of the claim that "the *individual* participation in or support of an unjustified *collective* action is necessarily unjustified itself" (p. 40, original emphases). Presumably, each individual may have a good enough justification for fighting in a collectively unjustified war where the value

of his contribution to a specific just local cause (for example, the defense of non-combatants) outweighs the costs inflicted by his fighting.

What should we make of this argument? Let me start with the second lesson, concerning individual permissibility for fighting in collectively unjustified wars. If, as Steinhoff maintains, they were fighting for a cause which was collectively unjustified, it is far from clear that individual British soldiers could have successfully appealed to this particular consideration to justify their involvement in the Second World War. For these soldiers were just as likely to endanger non-combatants as to protect non-combatants from acts of aggression performed by the Axis armies. Moreover, the subtraction of any given individual just combatant from Allied forces was unlikely to make any decisive practical difference to the successful pursuit of the just causes pursued by the Allies. So if Steinhoff wants there to be a justification for the involvement of individual British combatants, the first lesson he draws needs to be reviewed.

The first lesson seems implausible, even taken on its own merits. As we have seen, Steinhoff is suggesting, in effect, that our moral appraisals of the British war should be restricted, austere, to only two wars: the *actual* war which was *wholly unjustified*, and a *possible* war which would have been *fully justified*. But to restrict the number of appraisable wars in this way is surely *too* austere, for it overlooks a plausible middle way. If the actual war fought by the British, morally imperfect as it might have been, can be regarded as being more justified than mere capitulation to the Axis powers, then it appears to follow that the actual war, in virtue of its satisfaction of the just cause condition, was *partly* justified, or justified *to some degree*.

Let us take a closer look at this proposal. It should not be surprising that justification for war should come in degrees, since there are several *jus ad bellum*

conditions: just cause, right intention, proportionality, legitimate authority, formal declaration, reasonable prospect of success, and last resort. Moreover, these conditions are largely independent; they have to be satisfied, if they are satisfied, one at a time. (They are not wholly independent: the reasonable prospect of success condition and last resort condition can arguably be absorbed into a more complex form of the proportionality condition. [5]) Some of these conditions, but not all of them, might be satisfied in any given war. Supposing we agree that all of these conditions are relevant to the moral appraisal of war, non-satisfaction of any one of them will generate a moral blemish which will prevent the war from being fully justified. But some wars are more blemished than others, just in case a great number of the *jus ad bellum* conditions are not satisfied, and we will lose that graded type of moral appraisability if we insist that justification is always all-or-nothing. Reflective common-sense will find it easy to acknowledge that wars can be *broadly justified* without being *unblemished*. The actual Allied war was certainly blemished, or imperfect, but it does not follow from the evidence Steinhoff cites that it was not fundamentally justified.

One further and final lesson should be drawn: if the actual war was justified to some degree, then the moral asymmetry between combatants who fought on the Allied side and combatants who fought on the Axis side must also, to some degree, be reinstated. As we saw earlier, combatants cannot plausibly escape a deep association from the justice or the injustice of the non-local cause for which they fight. To some degree, and despite Steinhoff's strenuous denials, unjust combatants must indeed be tarred with the same brush.

Notes

1. Uwe Steinhoff, 'The Moral Equality of Modern Combatants and the Myth of Justified War', this issue. Page references in the main text will be to this essay.

2. For details, see McMahan (2005).

3. See Steinhoff, 2008; for McMahan's reply, see McMahan (2008 and 2009, pp. 39 ff.)
4. A complementary line of argument for the excusability of unjust combatants, though one which carries slightly different emphases, is advanced in Lang (2011).
5. For one way of spelling out the details, which needn't detain us here, see Hurka (2005).

References

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