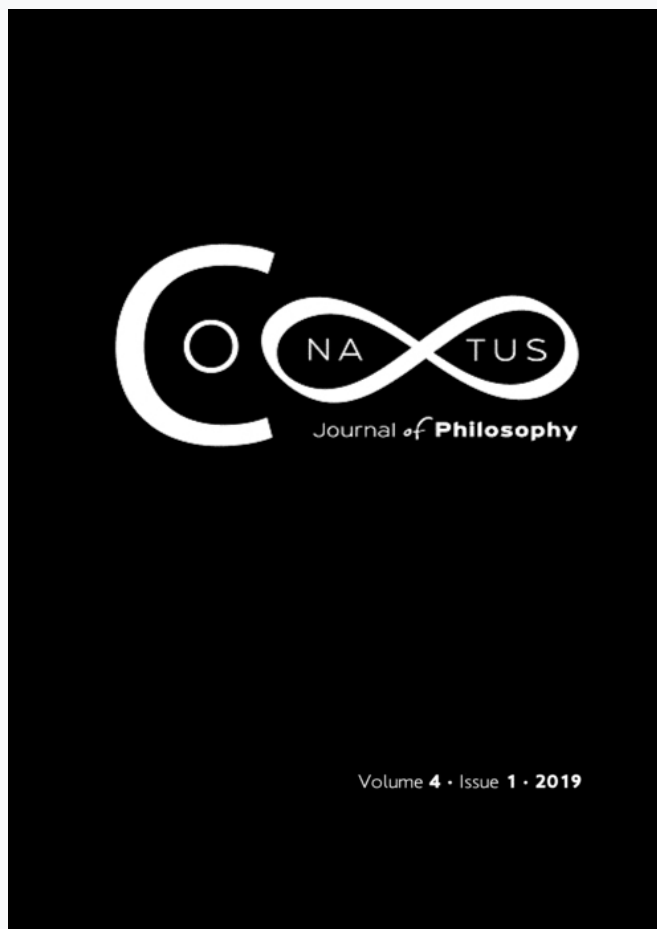


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### Ethics of War and Ethics in War

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# Ethics of War and Ethics in War

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## Abstract

*The paper examines the justification of warfare. The main thesis is that war is very difficult to justify, and justification by invoking “justice” is not the way to succeed it. Justification and justness (“justice”) are very different venues: while the first attempts to explain the nature of war and offer possible schemes of resolution (through adequate definitions), the second aims to endorse a specific type of warfare as correct and hence allowed – which is the crucial part of “just war theory.” However, “just war theory,” somewhat Manichean in its nature, has very deep flaws. Its final result is criminalization of war, which reduces warfare to police action, and finally implies a very strange proviso that one side has a right to win. All that endangers the distinction between *ius ad bellum* and *ius in bello*, and destroys the collective character of warfare (reducing it to an incomprehensible individual level, as if a group of people entered a battle in hopes of finding another group of people willing to respond). Justification of war is actually quite different – it starts from the definition of war as a kind of conflict which cannot be solved peacefully, but for which there is mutual understanding that it cannot remain unresolved. The aim of war is not justice, but peace, i.e. either a new articulation of peace, or a restoration of the *status quo ante*. Additionally, unlike police actions, the result of war cannot be known or assumed in advance, giving war its main feature: the lack of control over the future. Control over the future, predictability (obtained through laws), is a feature of peace. This might imply that war is a consequence of failed peace, or inability to maintain peace. The explanation of this inability (which could simply be incompetence, or because peace, as a specific articulation of distribution of social power, is not tenable anymore) forms the justification of war. Justice is always an important part of it, but justification cannot be reduced to it. The logic contained here refers to *ius ad bellum*, while *ius in bello* is relative to various parameters of sensitivity prevalent in a particular time (and expressed in customary and legal rules of warfare), with the purpose to make warfare more humane and less expensive.*

**Key-words:** war; peace; justification of war; *ius ad bellum*; *ius in bello*; justification vs. justness

Justifying war appears to be a hopeless task: at the same time necessary and impossible. Perhaps the first part – necessary – was the source of a need to establish “Just War Theory,” a theoretical tool to provide justificatory reasons for employing force in cases deemed needed. However, we

can ask: What do we really mean by the term “justifying?” What is there to be justified, what can be justified, and what do we want to justify? In his book *Arguing about the War*, Michael Walzer states:

The theory of just war began in the service of the powers. At least it is how I [i.e. Walzer] interpret Augustine’s achievement: He [Augustine] replaced the radical refusal of Christian pacifists with *the active ministry of the Christian soldier*.<sup>1</sup> And then he [i.e. Walzer] continues: “Now pious Christians could fight on behalf of the worldly city, *for the sake of imperial peace*.<sup>1</sup>

The word “ministry” here equals to “serving,” of course; and it is a legitimate, justified, and consecrated kind of serving for the sake of peace, a matter of duty. The rest is rather obvious and seemingly convincing; to quote again another piece of Michael Walzer: “How can it be wrong to do what is right?”<sup>2</sup>

But we can also reverse the phrasing of this question: “How can it be right to do what is wrong?”

In justifying or explaining war, there are two distinct lines (or levels) of issues, indicating two different sets of problems, overlapping but not concurrent with the distinction between *ius ad bellum* and *ius in bello*.<sup>3</sup> One of these lines deals with the specific *nature of war as a specific practice*; the other refers to *the purpose of it*. We shall analyze both these lines in the course of this text.

However, there is no need to consider *justice* as a sole and ultimate justification of war in either of these lines, in other words that war has to be *just* in order to be justified, in the sense, assumed within *just war theory*. Wars are fought for reasons that certainly could and should be evaluated for their justness, but justice is not the primary reason for starting a war. Due to that reason, there is a conflict which cannot be resolved otherwise, and with concurrent mutual consent the conflict cannot remain unresolved.

In this sense, beginning a war is entirely a matter of freedom, and it can be avoided by rejecting the second part of this clause (either by deciding not to attack, or to surrender immediately upon being attacked). Afterwards, it

<sup>1</sup> Michael Walzer, “The Triumph of Just War Theory (and the Dangers of Success),” in *Arguing about War*, ed. Michael Walzer (New Haven: Yale University Press, 2004), 3-22 [italics by the author].

<sup>2</sup> Michael Walzer, “Political Action: The Problem of Dirty Hands,” *Philosophy & Public Affairs* 2, no. 2 (1973): 160-80.

<sup>3</sup> *Ius ad bellum* is the justification of starting or entering into a war, while *ius in bello* defines what is the acceptable or permissible conduct within a war.

becomes an event burdened by many kinds of necessities, many unpredicted, or not predictable at the starting point. In all possible combinations, the result might be unjust; but even if it is just, the justice there only comes afterwards, and even then it depends on the definition of what's taken as "peace" in any particular evaluation. The resolution of the conflict should be a restored or new peace, and its stipulation has decisive impact on what will be taken as the description of justice in any concrete case. If "peace" is the articulation of the accepted or recognized distribution of power in a particular society,<sup>4</sup> we may say that peace is the object of war for both sides, implying that a content-wise definition of justice depends on the definition of this articulation: what constitutes a matter of legitimate freedom depends on what is accepted as "peace."

It follows that there are no just wars as such (although war is usually perceived as such from both sides, in a similar manner as with perception of revenge). An attack, and even a defense, might be unjust, as well as any particular act or practice employed in a war, and some wars might contain more such unjust parts than some other wars. Moreover, taking into consideration that the definition of war contains acceptance of the risk and readiness to be killed and even to kill, war is obviously an unfortunate and bad state of affairs that should be avoided. The ultimate nature of that risk, unlike for example the risk to be killed in public transportation (nobody avoids going to work because of the actuality of such a risk), is an indicator that all wars are cases of political failure; and, regarding those who must face the choices they would rather avoid, we say that all wars are unjust. But this does not imply that they are necessarily unjustified.

To be "just" and to be "justified" is not the same. Everything we do is justified by some reasons, and most of them are morally neutral, i.e. morally permissible (matter of legitimate freedom as it is not being morally impermissible, i.e. is not either "just" or "unjust"). Talking about justice in such morally neutral situations is an indicator of unfounded assignation of blame to the side designated as "unjust." Moreover, on the motivational level, nothing we do, except that which is directly connected with what we must morally blame, is done for the sake of justice – our acts are based on ends (goals or purposes), which are in turn based on our desires and interests. The question of justice comes only retroactively, when something wrong has been done. And moral wrongness depends on the fact that something has been done with wrong intention. When others are at stake this *might mean the lack of consent*. However, *mutual con-*

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<sup>4</sup> Cf. Jovan Babić, "The Structure of Peace," in *World Governance. Do We Need It, Is It Possible, What Could It (All) Mean?*, ed. Jovan Babić, and Petar Bojanić, 200-212 (Newcastle upon Tyne: Cambridge Scholars Publishing, 2013).

sent, which is a part of definition of war, *is not lacking in this manner*.<sup>5</sup> Even in the case where justice is a triggering<sup>6</sup> reason for starting a war, i.e. for attacking,<sup>7</sup> its overall justness will depend on the evaluation of what has been done in the end. Unjust realization of perfectly just goals will be unjust. There is no way that justice can justify something in advance, or give an *imprimatur* to realize some ends by *any means*.

## I.

The first level of justification refers to the set of problems regarding the nature of warfare as a specific activity, which is connected with high risks regarding basic human values of life and bodily integrity. War comes with the risk of getting killed (which is not a very specific risk here, indeed, as it is characteristic of many, probably most or all, other human activities as well),<sup>8</sup>

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<sup>5</sup> This entails that some war actions, or even some wars, do not fit the normative definition of war given here. The part of that definition relevant here is the existence of some initial equality, i.e. some possibility of success for both sides (such prospect is a necessary condition for the rationality of any action; otherwise it will be indiscernible from mere conceiving, fantasizing and wishful thinking). Also, it entails that those actions that are not intended for *the resolution of the conflict* (which requires preservation of the existence of the sides in the conflict), like extermination or annihilation, also do not fit the normative definition of war. Conflict cannot be “solved” by destroying one side of it. Cf. Michael Walzer, “World War II: Why Was This War Different?” *Philosophy & Public Affairs* 1, no. 1 (1971): 3-21. [World War II produced a kind of conceptual confusion regarding the concept of war, which subsequently gave a strong support to crusade-like features of just war theory to evolve to the point where, self-contradictory, similar kind of logic as the one present in the constitution of World War II has been used as a tool of justification (e.g. in justifying foreign armed intervention or, even more, in the doctrine of “responsibility to protect”)].

<sup>6</sup> Many phenomena are designated as “wars” while they are not. For example, the “Korean war” was a military intervention, and was a *stricto sensu* war in part regarding only the conflict between USA and China. An armed conflict which *starts* for reasons of justice, and not of self-defense, would also belong in this kind of category. WW II, which might come to the mind, only *evolved* into a war where justice played such an important role (although that role also had its clear propagandistic and military purposes); in the beginning, it was a matter of defense of those who were attacked. That defense would be justified even if the attack was not as vicious as it subsequently proved to be.

<sup>7</sup> The most common reason for attacking is an *empirical* matter. It is a complex issue, much more than it is presumed to be in the theory of just war. For example, Thucydides suggested that the reason for the Peloponnesian War was Sparta’s fear for the growing power of its opponent, Athens. On the intuitive level the most probable triggering reason for attacking (as well as in the rest of nature) is the perception of the other as *weak* (or weaker). It should be corroborated empirically to see if most, or all, wars started with the belief that the attackers are stronger and the attacked side weaker.

<sup>8</sup> Risk of being killed in war is probably considerably higher than the risk of being killed in public traffic, and certainly much higher than being killed by taking medication, but the nature of that risk is pretty much the same – it is the result of previous decision-making and the uncertainty ingrained in realization of what’s decided despite the fact that there is such a risk.

but also *the risk of intentional killing*, which is a really peculiar feature of war with obvious moral importance.

There is a very peculiar feature of both of these risks in the context of war, reciprocity: the risk to be killed is reciprocally transferred from one war ringside to the other side as a mutual threat; the risk to kill is also distributed reciprocally in the same way. That's why killing in war *might not be* morally impermissible. Two aspects seem to be relevant here. First, although killing is an inherent part of war, it is not its aim: the aim is the victory or, in Clausewitzian terms, compelling the adversary to fulfill our will.<sup>9</sup> Killing might come as a result of this process, either accidentally or, specifically, in a (mutually reciprocal) blackmailing scheme: a *preparedness* to be killed and kill is crucial part of the *means to convince* the opponent of the seriousness of our intent to compel them to give up their will and accept ours. Second, reciprocity secures mutual consent, a kind of contractarian transfer of obligation to treat the other side as an enemy, but not as a criminal. Both sides accepted the war as a decision-making rule; they agreed that a conflict that cannot be resolved otherwise *should not remain unresolved* and so took and accepted not only the risk to be killed, as a universal risk present virtually in all human activities (the fact of vulnerability), but also the risk to kill if that proves to be necessary to accomplish the goal.

Both of these risks are distributed symmetrically and reciprocally. Being killed in such a scheme is not something unjust, something that, as such, should be prosecuted and punished, or avenged (or retaliated against). This shows that killing in war is not an ordinary killing which contains an offense, but it is a kind of legitimate, mutually agreed, collective act. It is not an act of an individual as such, a soldier as a particular person with his own private interests and concerns, but an act of the warring army, wherein an individual is doing what is defined by the rules of war as a specific decision-making rule. What a particular soldier is doing is considered part of collective endeavor, in a very complex scheme in which the responsibility is articulated as a function of the individual within collective: responsibility is constrained *and defined* by that function.<sup>10</sup> A soldier, or a military unit, is a part of an army as a collective

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<sup>9</sup> Cf. Carl von Clausewitz, *On War*, trans. James John Graham (London: Penguin Books, 1968), 101: "War therefore is an act of violence intended to compel our opponent to fulfill our will."

<sup>10</sup> If not, if a soldier is doing something not articulated within the function performed in a collective scheme, then his responsibility will be purely individual, probably a war crime, or possibly an act of heroism beyond any military task or duty. Although all responsibilities are individual, individual responsibility, defined as independent of the military function that an individual performs, is outside the scheme of reciprocity and does not belong to war as a war activity; it is a private enterprise of the individual for which she is directly responsible. If reciprocity cannot apply (like in e.g. war crimes) it should not be considered to be part of war as the activity to resolve a conflict over what should be recognized as "peace" (and, accordingly, should be punished).

entity whose identity is irreducible to a set of individuals. Soldiers who kill in war are not doing so as individuals, but exclusively as members of a warring side, otherwise it would not be a part of war but would be a criminal act.<sup>11</sup>

It is quite obvious that battles are symmetrical: both sides pose mortal threat to each other, and the situation resembles to Kant's picture of a shipwreck, where "there can be no *penal law* that would assign the death penalty to someone in a shipwreck who, in order to save his own life, shoves another, whose life is equally in danger, off a plank on which he had saved himself."<sup>12</sup> According to this picture, war is certainly a very bad, ugly and undesirable situation, something that nobody would prefer. At the same time, it is a situation anyone can find themselves in, especially if one is not vigilant enough, but also sometimes despite all possible vigilance.

Additionally, as a matter of fact, this is not all we mean by the word "war." It might be a description of a most typical situation in which participants in a war may find themselves in, but there is a part of the concept of war which is entirely missing here: how did this situation occur in the first place (how did it happen that they found themselves in such a situation)? Soldiers in the middle of the battle may epitomize the war and be our first association of it, but we are searching for a serious and responsible analysis of an important phenomenon, and thus we cannot take a typical, even central part of the picture and confuse it with the whole. In Kant's picture, there was a shipwreck happening *prior* to the situation. The two actors fell in the water, swam and saw the log in the distance, and recognized the log as a place where they could find their salvation.

The point of the story begins only *after* all of that. Similarly, in the context of our question about participants in a war, *the war had already started*. This war is part of existing (actual) reality around them, with all relevant ingredients: the changed circumstances (the presence of actual, not only possible, threats), the suspension of many rules of ordinary life (including some important laws, or their parts), changed premises and criteria of evaluation in whatever one is doing, etc. The question of whether this war *should* have started (first question) is different from the question what to do now *after* it has started (the second question). The reason why it started is only of a delayed importance to those finding themselves within a war. They have to fight first, and investigate later, if there is a chance for it. I used to have students who served in the Gulf war, and later in Iraq and

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<sup>11</sup> This description opens a room for a good delineation between warfare and war crimes, the latter being all those acts which have no specific military purpose: although both kinds of acts are bad and negative, as killings, killing in war is not considered as a murder unless it is militarily senseless or not militarily needed.

<sup>12</sup> Cf. Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), 28 [standard pagination by the edition of Preussischen Akademie, Berlin: Bd. VI, S. 235].

Afghanistan, and they describe their experiences in a way in which a survivor of a shipwreck might do: *him or me*, quite independently of the fact that “he” is *a total stranger*, someone about whom they didn’t know anything at all, including anything of their being justified, or “justified” in being there, on the opposite side.

You may respond that in many situations this picture is not accurate. The soldiers are not shipwreck castaways who just happened to find themselves in a bad situation. They can calculate the risks, and avoid entering the situation in the first place. Igor Primoratz gives a detailed depiction of such a *calculation* in one of his articles.<sup>13</sup> The point he makes could, in a certain sense, be right; there should always be an option to avoid any risk (nothing we do is in advance necessary and for that matter unavoidable). The shipwrecked people could simply never go on the journey, and if they didn’t, they certainly would never find themselves in such an ugly and humiliating situation like fighting for a log in cold open water. But the price for that would be to abandon everything connected with the journey in any real terms. In a way, it is equivalent to a capitulation in advance, and soon we will come to this matter. It would be better for those who suffered in a car accident that they had stayed home, of course, but it seems unfair to say that their calculation to do otherwise was not correct and hence blamable.

Here we may have a feeling of moral absurdity: both people involved know that the survivor won’t be able to avoid looking in the mirror and wondering what is there after the success (i.e. survival); and this is, at least in my impression, the main issue with survivors and the moral risks connected with survival: did I deserve to be the one who made it? And they would take “me” (themselves) in the context of whatever they think they deserve in their whole life before, and prospectively after that point in time, not only the specifics of that particular situation. They may then feel that they should be grateful; but to – what? Destiny? It is necessarily humiliating to be dependent on such an accidental set of circumstances in a situation that is not determined by natural causes. It seems to me that this is why survivors may feel a need to be able to say that it was *necessary despite being seemingly impossible*. They ask themselves the Walzerian question: “How can it be wrong to do what is right?”

## II.

A quite different line of argumentation, indicating a different set of problems, is the other characteristic of war: in reality, it functions as *a decision-making rule*; a very peculiar one, which is not, based on the strengths of reasons used

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<sup>13</sup> Igor Primoratz, “Michael Walzer’s Just War Theory: Some Issues of Responsibility,” *Ethical Theory and Moral Practice* 5, no. 2 (2002): 221-43.



in arguments, like polemics and debates, but on the strength of pure force as such.<sup>14</sup> Based on this rule, the purpose of the institution of war is to reach a decision in matters where other means of reaching the decision have failed; and the *constitutive rule of this institution is victory*.

In principle there are two points of special interest here: the starting point, and the point of resolution. Both these points have a property extremely important for a serious analysis of war: they change the reality and the framework, scope and context in which everything that follows will unfold – and also necessarily change the most relevant criteria of applicable evaluations of all decisions and acts performed. The scope of possible decisions changes cardinally after each of these irreversible points. Many things, which could have been decided upon before such a point is reached, will no longer be an option afterwards. The time before and the time after each of these points, in both what is the reality and what are the criteria of evaluation of what counts as legitimate and valid, are different. This is the line of thought on which I want to focus more on in this paper.

### III.

What does it mean that the constitutive rule of war is victory? Isn't war only a matter of fighting and killing? If we look more closely, we may notice that in the beginning of war both sides show, and not only on a declaratory level, signs of desiring or hoping to avoid the coming conflict: the attacked side hopes not to be attacked, and the attacker hopes that victory will come in a fast and easy manner.<sup>15</sup>

We may have difficulties with the second hope – which would be realized if the attacked side surrenders quickly, presumably instantaneously – except if we consider the attacked side to be deserving the attack, and the attacker justified; but such a case would not fit into what we consider to be a war, and such an event should not even be called war. It would be police action, an act of punishment, or maybe an act of revenge or retaliation, perhaps too small and one-sided to be designated as a war. We can however say that one crucial feature of war as a decision-making procedure is absent in this case, and that

<sup>14</sup> However, strength of reasons as a way to solve disagreement in an argument functions only as a *regulative* rule; such strength does not produce a new reality, one independent of the already existing factuality in which the reasons find their strength (the truth of the facts). Contrary to this, war understood as a decision-making rule includes a rule which is not only regulative, but also constitutive, opening a room to a new reality upon employment of that rule (victory defines what the laws will be after the war).

<sup>15</sup> There is an interesting difference between possible desiring and (always present) hoping: it is possible that the attacker might desire not to have to attack in the first place, but there is no sense in saying that they hoped not to have to attack at all – except in cases in which the attack is a form of defense.

is a presumed initial equality of adversaries. This means that the victory is not the right word to describe what happens: we cannot say that police was *victorious* in a specific clash with criminals, except in a metaphorical sense. It seems more appropriate to say that police was *successful*. It seems that initial equality is part of the definition of war, or pre-supposition of its possibility, as it is also part of the definition of justice.

In Thucydides we read: “Justice is enforced only among those who can be equally constrained by it;” or, in another translation: “The standard of justice depends on the equality of power to compel.”<sup>16</sup> However, equality is not as easy a concept as it may seem to be. In Hobbes we read that even the weakest, and not necessarily the brightest one, can kill the strongest and brightest through cunning.<sup>17</sup> It seems that determination plays greater role than actual magnitude of available force. Finns succeeded to defend themselves against the Soviets in 1939-40, despite the huge inequality of strength; only a few years later, the Soviets defeated the strongest military power of that time, Germany, in a battle much bigger than the Finish episode. Moreover, the US lost in Vietnam. So, while we may feel some optimism that reducing equality might reduce the risk of war, this approach is not very promising. I will return to the issue of this inequality later, as it designates what we call “peace,” as a clear and conclusive demarcation of two parts of our freedom, the legitimate one and the part which is forbidden. An unjust peace will always have the tendency and sometimes the capacity to produce war.

Then there is the first hope, the hope not to be attacked in the first place. If that was the case, there would be no war. Unfortunately, one cannot be sure that such an outcome will still happen regardless of the strength of the wish (or the hope). How can you be sure? It seems that the only viable strategy is to prepare for defense and attempt to deter a possible attack. And here is the crux of our issue. War could be easily avoided if the attacked side capitulated instantly. That seems to be the only way to avoid any war without any further constraint.

We can easily imagine such an option in any particular situation, whereas it seems impossible to conceive that attacks simply cannot occur, that they somehow won't ever happen. We cannot conceive the impossibility of attacking.

But if we cannot conceive the impossibility of attacking, why cannot we conceive universal instantaneous capitulation as a spontaneous answer to any attack? It is still possible in any particular case. Why cannot it be uni-

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<sup>16</sup> Thucydides, *The Peloponnesian War*, trans. Walter Blanco (New York: W. W. Norton & Company, 1998), 227, [5:89]. For another translation see Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (London: Penguin Books, 1985), 402.

<sup>17</sup> Thomas Hobbes, *Leviathan* (Indianapolis: Hackett Publishing Company, 1994), 74.

versalized? What is it so precious in defense or victory that prevents us to do this? What is the worth of victory?

#### IV.

Before answering that question, we may notice that the very concept of victory depends on the fact that victory is not secured *in advance*: without at least some uncertainty of the outcome, there is no real sense in speaking of “victory.” The main, essential, point here lies in what “in advance” means. In time-related sense, the phrase “in advance” means that we can predict what will, or at least what should, happen. But there is an important difference between the two (between what will happen, and what should happen). As we shall see, both are uncertain, as the future is uncertain in both factual and normative sense. It is not certain what will happen, and neither is what should happen. This is the essence of victory: that it brings up for debate the definition of the legitimate state of affairs, *the peace*. Also, that definition also is not given *in advance*. It is the object of conflict and fighting. In war there is no factual control of what will happen in the future time.

However, there is a sense in which what should happen is, and has to be, the matter of a consensus in advance, actually two such consensuses – for each side, a *consensus* that “our side” *should* win. This consensus has a huge mobilizing impact. The determination to believe what should happen enforces the deciders to enter war at all, whether to attack or to attempt defense. Both sides have symmetrical position in this regard. If it is not the case that either side *could* win, what is happening is not war but something else (police action, robbery, etc.). Again, war is a state of affairs in which we have no *normative control* of our future time.

So, the lack of control over the future seems to be an essential feature of war, both in factual and normative sense.

The first, factual sense implies temporariness of war. War is a temporary state of affairs, a state that should pass and end with the victory of one side, therefore establishing peace as a permanent state of affairs. Peace will be a state of affairs where we have both the factual and normative control of our future time, and this is something that victory can bring. Factual control of the future in the state of peace is based in normative control of the future contained in the definition of that particular peace: what should not be done, as defined by accepted laws. Peace will be, as it is, a specific articulation of the distribution of power, where laws will be established, demarcating precisely which part of our freedom has been legitimized and which not. It will still fit into the scheme which differentiates war from peace, analogously to the difference between death (or, as a matter of fact, the risk of death) and

life; and it will be in accordance with an operative definition of life as an activity of *free and unhindered* process of setting goals and attempting to realize them, which means that life requires peace for this prospect of unhindered free living. In this scheme, war looks like a dangerous and hazardous road which eventually leads to peace. By attaining peace the job is done, and victory determines what is right and what is not. The legitimate distribution of power has been established; *it has become valid through the act of its acceptance*. The result is consensus on what the laws and ways of life will look like.

The second sense of lack of control of the future, the normative one, is more interesting, politically and morally. It cannot be described simply by pointing to its temporariness, by saying that it will pass. It is a *deep disagreement about what should be the outcome of the war*. This looks like a redundant thing to say, but it is somehow very frequently left out from the logic of reasoning about war. The complex story of moral equality of soldiers belongs here. Here is the terrain where the uncertainty of victory plays a very special role. In essence, it is the same role that consensus plays in the act of establishing laws and their validity: consensus must be free to be valid, which means that there has to be a possibility of rejection. Having in mind the question posed in the beginning of the paper, how to justify what seems to be unjustifiable, here we encounter that possibility: what could be a stronger argument for the justification of a conflict than the absence or lack of consent? It seems really obvious: if there is no consent in cases where consent is necessary, it seems that the only possible response must be to restore or establish it.

*Victory has the logical structure of consent*, which is not visible at first and is frequently overlooked.<sup>18</sup> The uncertainty in victory contains the possibility that either side in the conflict could lose, which is a part of the fact that before victory both sides are aspirants to being in the right. Winning is the focus, but without accepting the possibility of losing there can be no victory, and no war. This, importantly, establishes a normative reciprocity of expectations: each side expects that the other side will be defeated.

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<sup>18</sup> It may be objected that defeat is not something *accepted voluntarily*, but the constitutive rule of war says just the opposite: the fact that you accepted to play that game should show that *there is a point* at which you are prepared to *accept* capitulation. Capitulation is the last means of defense, and it has to be ingrained in the rule: it means that there are some limits to victors. The articulation of these limits is very important part of how wars should settle the disputes for which both sides decided to be solved despite the fact that they cannot be solved peacefully. According to Kant, for example (and this seems to me to be the very best definition, or articulation, of capitulation), there are three conditions for a valid capitulation (Kant, *The Metaphysics of Morals* VI, §57-58): the defeated cannot be annihilated, humiliated or punished. These are the conditions that make the acceptance of capitulation a form of consent, based in original acceptance to settle the dispute by war. This preserves the freedom to enter war in the first place even in its possibly non-victorious end, keeping the possibility to lose open, and implying that victory is not, as it cannot be, necessary.

There are two logical features of this that are important to emphasize. First, it is the nature of freedom (and also its price) to proclaim the aspiration to propose and attempt to determine a different definition of right without this being defined as a criminal activity (at least not in a legal sense – otherwise what one side is doing would have to be designated as criminal). Second, this story is strictly within the *ius ad bellum* scheme, and has not yet anything to do with what we may find, or anything resembling arguments belonging to *ius in bello*. Both of these aspects could easily be overlooked in the just war theory. Regarding the first aspect, if validity of a normative structure of a state of affairs depends on consent, it implies a choice, i.e. freedom. Regarding the second aspect, the content of *ius in bello* will depend on various beliefs, customs, habits, sensitivities, and established expectations.

This is a specific feature which reflects the nature of *ius ad bellum*. This feature is *reciprocity*, a type of a mutual relationship which safeguards both sides from those actions that would destroy the relationship. This is one of those points where influence goes from *ius ad bellum* to *ius in bello*, which is not reducible to the final outcome, victory. Both sides recognize the same or similar set of prohibitions, requiring that the adversary won't be destroyed, annihilated or humiliated to the point at which it would not be capable of restoring its identity and nature. This aspect is very often absent from the contemporary, as well as old, interpretations of just war theory, which usually denies the rights necessary to establish this reciprocity and minimal respect to the other side. A part of the problem in interpreting terrorism, or antiterrorism, lies in shortcomings like these.

There is an important difference between soldiers and policemen, between an army and the police, and consequently between war and police action. Assumption that there is no such difference would lead to a morally risky practice of labeling wars as “just” and “unjust” on a regular basis.<sup>19</sup> The attacking army must be confronted with a defense, which is necessarily a counter-attack. However, the soldiers of the attacking army are not an aggregate of individuals, like a gang of robbers, which has decided on its own to move and attack. This does not make their attack just, of course, but the causes of war are normally very far from them, as the decisions are also very far from them. In the battlefield the unpredictability of the outcome, acceptance of the rules of the game, and the reciprocity which follows make the

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<sup>19</sup> Cf. e.g. Jeff McMahan, “The Morality of War and the Law of War,” in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin, and Henry Shue (Oxford: Oxford University Press, 2008), 19. Also Jeff McMahan, “The Ethics of Killing in War,” *Philosophia* 34, no. 1 (2006): 23-41, 23. However, Michael Walzer dissents: cf. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), 41: “Without the equal right to kill, war as a rule-governed activity would disappear and be replaced by crime and punishment, by evil conspiracies and military law enforcement.”

“cause” of both sides *prima facie* right. This is contrary to what for example Primoratz would say: “For there are wars in which one side is fighting for a just and the other for an unjust cause; there are wars in which both sides are fighting for an unjust cause; but there are no wars in which both sides’ causes are just.”<sup>20</sup> On the contrary, most wars are precisely such that both sides have some *prima facie* good reasons on their side. There is a valid dispute, but they are not able to resolve the dispute by other means, and they are not prepared to leave it unsolved.

The lack of the ability to resolve a dispute by arguments does not imply anything regarding the causes of the dispute. Of course, it is possible that both sides have unjust causes for starting the conflict, but to the extent of that being the case, it is not very interesting. If both sides have, or one side has, only bad reasons for the action, there would not be a moral *problem* there. The case in which one side has only wrong reasons, based on unjust causes, would be tragic if this side wins. The humiliation contained in helplessness and despair may last for generations. The vanquished side might never be able to accept the result, and peace could not be truly attained – the result would be a prolonged truce without a valid closing. The case in which both sides have only wrong reasons is more than tragic, it is morally absurd. In both of these cases war is a crime, and just an ordinary one, morally simple and not worthy of much discussion. In both of these two cases foreign military intervention, if possible, would be fully justified or even obligatory. Should we, in fact, even call these cases wars? In the case where only one side is just as to the right of defense, this would create a clear right to employ warfare as a means in countering the attack, but the crucial part of the definition of war would be lacking: the consent to accept the result of war as just and as the basis of a new peace, which is the lawful state of affairs. Some wars certainly are of this kind, even big ones, like World War II.

The really interesting and morally relevant cases are those where both sides have a legitimate right in what they are fighting for. Most civil wars are such, they are just “normal,” regular<sup>21</sup> wars, which fill in the gap of the capacity to make the important decision.

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<sup>20</sup> Cf. Primoratz, “Michael Walzer’s Just War Theory,” 228.

<sup>21</sup> Cf. Raphaël Fulgosius, “In primam Pandectarum partem Commentaria,” ad Dig., 1, 1, 5, trans. Peter Haggemacher, quoted in *The Ethics of War, Classic and Contemporary Readings*, ed. Gregory Reichberg, Henrik Syse, and Endre Begby (Oxford: Blackwell Publishing, 2006), 228; cf. also Gregory Reichberg, “Just War and Regular War: Competing Paradigms,” in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin, and Henry Shue, 193-213 (Oxford: Oxford University Press, 2008); Peter Haggemacher, “Just War and Regular War in Sixteenth Century Spanish Doctrine,” *International Review of the Red Cross* 32, no. 290 (1992): 434-45.

## V.

The thesis that one side *must* be wrong is obscure.<sup>22</sup> In one sense the war should end, and one side should be defeated, and according to the rule,<sup>23</sup> this side should be found to be wrong. On the other hand, the victorious side in a war cannot be determined ahead of time; and if victory has been accepted as the constitutive rule of the game, this also means that it is impossible to determine who is right in advance. If *that, i.e.* in advance determining who is right, was possible, it would reduce war to police action. Let me forgo this argumentation and focus on two other issues of direct importance. One is the issue of why it is not possible to capitulate in advance, based on the right of defense, the other is the relationship between *ius ad bellum* and *ius in bello*, regarding the causes of war and the question if *ius in bello* depends on *ius ad bellum* in this way.

Capitulation is especially interesting. As I have said before, both sides hope to avoid war, but neither of them would give up and abandon what they are fighting for. As Thucydides points out, hope requires resources. These are resources which enable to avoid the war, or to win it. One way to avoid it would be not to have or not to produce reasons to be attacked. But how can you provide for that? *Hope* is not enough, and *hope* might be self-deceiving. Thucydides states that: “In times of danger hope is a comfort that can hurt you, but won’t destroy you if you have plenty of other resources.”<sup>24</sup> One such resource could be becoming a member of a club consisting of those who are powerful enough; this is the famous “Doyle’s Law:”<sup>25</sup> that “democratic states don’t war against each other.”<sup>26</sup> This means not only that “democratic states” are strong, but also that they are *the strongest* ones, as Pericles suggested – according to Thucydides – in the famous “Funeral Oration.”<sup>27</sup>

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<sup>22</sup> The question is: why is it not enough to say that one, or both, side(s) *might* be wrong? Why is it necessary to say that one side *must* be wrong (with the hidden implication that it is, on careful scrutiny, knowable in advance)?

<sup>23</sup> “According to the rule” implies that it *cannot* be known in advance who will win, which implies quite different meaning of the word “wrong” from the hypothesis presumed in just war theory, which is that war is the activity of re-establishing impaired *status quo ante* (and where “wrongness” has been defined, legalistically, as the violation of the then present, existing, law).

<sup>24</sup> Thucydides, *The Peloponnesian War*, 5:103.

<sup>25</sup> As named by late Burleigh Wilkins in one of his papers.

<sup>26</sup> Michael Doyle, “Liberalism and World Politics,” *The American Political Science Review* 80, no. 4 (1986): 1151-1169.

<sup>27</sup> Thucydides, *The Peloponnesian War*, 2:39.

## VI.

*The other, and most common, resource of this hope is preparation for defense.* Seriousness in determination in this is part of legislative structure: a matter of authorization to enforce laws. If a state has no intention to defend its constitution and laws, its authorization to enforce them is no longer evident. So, it seems that capitulation in advance is not possible based on rather procedural and logical reasons. It is not possible to be logical because giving up in advance wouldn't be capitulation; and it is not possible to be procedural, because the decision to defend the legal *status quo* is part of the *status quo*.

So, there is no need for a particular decision regarding defense, whereas such a decision is required for capitulation. The reasons in these two situations are of very different kind: reasons for defense are principled reasons, based on the existence of some rights and they are independent of the prospect of success. (These reasons are very peculiar and perhaps couldn't be conclusive as such, but still they are different from all so called *prudential reasons*). Reasons to capitulate are different, they *are* prudential, they are dependent on the prospects of success (in defense), and might imply a moral duty to capitulate, as a matter of political and moral responsibility. Both capitulation and rejection of capitulation are among those irreversible points after which the reality is changed, along with all the relevant parameters for evaluation in our search for justification.

Before we proceed further, let us see what I mean by saying that capitulation in advance is not possible. Logically, there are only two options for conceiving a world without war. One is the absence of freedom, in which case everything would be necessarily determined by absolute, hard determinism, automatically or mechanically. The other is a scheme within which every attack would be followed by an immediate capitulation. We may rule out the first as not interesting for the topic under discussion, as we cannot conceive of ourselves as not being free.

The second provokes a question: how immediate would this capitulation in advance be? It could be conceived as a scheme in which the attacked party has lived peacefully in the hope not to be attacked, but with a preparedness to surrender immediately if the attack occurred. This readiness and preparedness would go *before immediacy*: it would be a capitulation *in advance*. This could be conceived only in a world in which *pacifism* (a very strong version of it) is a truly universal world religion accepted by everyone.

It would be a strange world: forbidding defense and allowing attacks. You may protest: why not forbid attacks too? Yes, why not? But they have been *forbidden* already, haven't they? If the attack happens, this isn't because it is allowed; on the contrary, if allowed this wouldn't bear any normative significance, but would be like the act of arresting a criminal, or "attacking"



a river to make a bridge over it. But an attack is possible even if it is not “allowed,” as an act of aggression, an unjustified attack. *Things that are not necessarily allowed are possible to occur.* If such an attack was not possible, it would not have happened in the first place, and the question of defense would not need to be raised at all. But obviously, as a matter of fact, it is possible, and in a way the “proof” of this possibility (a very efficient kind of proof) is its sporadic but real occurrence. And only then, only *if and when* it occurs, we have a chance to resist *or not to resist*. The existence of this possibility is a matter of freedom: we may attack, justifiably or not, “allowed” or not. There is no point in “not allowing” or “forbidding” attacking. The attack is an accomplished fact, not something that defenders get to decide upon – it is something they find as a decision already made: the attacked side is not a participant in that decision-making process. Of course, it would be best not to be attacked in the first place – and certainly there are many possibilities to at least attempt avoid being attacked. However, there is no possibility to limit the scope of reasons to be attacked only to those which could be excluded by cooperative or conciliatory behavior of prospected targets, and to some extent that scope is entirely independent of anything in the domain of what the targeted side can do. Despite the fact that many things before the attack might be a matter of negotiation or consensus, many are not.

Defense is different: factually it is a matter of decision.<sup>28</sup> To presume that we must not even try to defend ourselves implies a mechanical obedience to the clause of forbidding defense, not a decision to surrender: if it was a decision, an opposite possibility should have been real (even if it isn’t necessarily chosen in the end). If we remember that the only way to “abolish” war (in the sense of making it impossible) is that everybody attacked capitulates in advance (which is equivalent to forbidding defense), we come to a strange place: war is no longer really possible since defense is forbidden, and attacks are not addressed, or mentioned, even if they occur.

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<sup>28</sup> This is complex: the attack is directly a matter of decision, the defense however is necessitated by the attack and even normatively it is not the matter of decision: it is obligatory (there is an official obligation to attempt it). But in the context of the ongoing war, i.e. after the point at which a war started to unfold, the attack, along with the decision on which it is based on, has to be taken as a brute fact. The defense is still a matter of consideration: how far to go in attempting to accomplish it. The situation is now reverse: the defenders decide what will be the price of war, through determining how much they are prepared to sacrifice in the course of defense. The attackers, although they also consider the price they are ready to pay, have to accommodate to the determination of the defenders, and even to the point of losing the war (as happened to Soviet Union in their war with Finns in 1939-40). Of course, the attackers might *hope* that the defenders will not be very determined – but that is not a matter of their choice. They might withdraw (as Americans did in Vietnam), but in a way they are slaves of their decision to attack in the first place.

So, we face a peculiar dialectic here: war is *per definitionem* a temporary state of affairs which should end, peace is a state of affairs that should last – this is on the normative level. On the ontological level, however, the positions are reverse: peace is a temporary articulation of power, its distribution and structure (articulated through laws, as schemes of long term “crystallized or frozen” collective will), which will become, sooner or later, unjust and unbearable, or otherwise endangered through accumulation of differences and changes within or outside that structure. Peace is necessarily fragile and *it has to be actively defended*, by force if necessary. Peace requires effort in order to be preserved. However, *the prospects of defense are uncertain and varying*. The effort to preserve peace is not natural, inertial or spontaneous, it is arbitrary, for two reasons which are opposite to each other: first, because of the choice ingrained in laws (the fact that the laws could have been different) and, second, because the laws are to be taken as “eternal” (*sub specie aeternitatis*), or “frozen” and normatively constant, not the matter of any current decision-making (the laws are the result of past decisions, and have to aspire to be valid indefinitely in time, otherwise they could not be enforced). So, preservation of peace, and all the efforts to achieve it, necessarily becomes unconvincing and implausible at some point. Therefore, peace is, ontologically, from inside, temporary. Changes will accumulate until a new and different peace is made, which has to be realized through conflicts, so the only matter is whether these conflicts will be resolved in a more or less peaceful manner.

War on the other side, despite being normatively defined as a temporary state of affairs, is latently always there: as a kind of energy to resolve conflicts in whichever way needed to reach a resolution. In this sense, war is always an indicator of weakness: there is not enough strength to avoid conflict in the first place, and, in the second place, to resolve it quickly and efficiently in a peaceful way. War is a failure of the effort to maintain peace. If peace is not strong enough, war is always there, latently waiting to “erupt.” However, it is also possible that practically some conflicts cannot be resolved at all in accordance with the principles forming a particular peace, or, even more importantly, that those very principles are at stake and cannot help. In such a situation it is possible that a new perception (or just a different perception within that particular situation) of what is just and fair will produce the idea of affordable means to resolve the conflict. We can suppose that many conflicts in fact are resolved in this way, not on the basis of reasons, but on the basis of strength, the physical strength or the plausibility of threat of some kind. Prejudices and ideologies work that way, and work very efficiently – by silencing, suppressing, absorbing or amortizing the conflicts. But it is also possible that there are no such means, or that they are not efficient enough,

and that conflict will start *and continue*. This is the point of starting a war, as the process in which there is no control of future time, but uncertainty and cunning, luck and accidental combinations of circumstances would create the network, or context, within which an end would be reached in foreseeable time.

In such a case the crucial part is the *irreversible point after which conflicts would go outside of any or adequate control of the instruments for resolving conflicts*, instruments which contain the most important parts of peace (laws, customs, established expectations, everything taken for granted like the sense of decency, fashion, etc.), most notably, instruments which enable us to make conflicts localized and limited, confined to a definite period of time. This is the crucial point: *after such an irreversible point, in war, there are no deadlines*. The presence of this “irreversible point,” a point of no return, is what defines war: after that point we have no peace anymore, and war, or some such conflict, is the means to either restore the old peace or create a new one, but within indefinite time-frame and without definite prospect of who will be the victor. In this sense, war is clearly a temporary state of affairs, and it has to end at some point. Even in the period of the utmost uncertainty of its duration and outcome, it is not presumed to last forever. But no deadlines exist. And, as I said, it is latently always there, waiting to erupt.

## VII.

Those who win will enjoy their victory (or believe they are enjoying it), and those who lose will have to accommodate, if they survive. But they wouldn't survive intact, which was the reason why they defended the *status quo ante* in the first place. The result of the defeat is that the defeated have to change. The change might be for their own good, or not (certainly not the same kind of good as for the victors), but for them it will be experienced as a loss (in addition to the loss they paid already). However, as Max Weber says in “Politics as Vocation:”

Instead of searching like old women for the ‘guilty one’ after the war – in a situation in which the structure of society produced the war – everyone with manly and controlled attitude would tell the enemy: ‘We lost the war. You have won it. That is now all over. Now let us discuss what conclusions must be drawn according to the *objective* interests that came into play, and what is the main thing in view of the responsibility towards the *future*

which above all burdens the victor.’ Anything else is undignified and will become a boomerang.<sup>29</sup>

And then continues:

A nation forgives if its interests have been damaged, but no nation forgives if its honor has been offended, especially by bigoted self-righteousness. Every new document that comes to light after decades revives the undignified lamentations, the hatred and scorn, instead of allowing the war at its end to be buried, at least morally.<sup>30</sup>

Every peace is time limited and should be corrected and amended from time to time. Most of these emendations occur through defined procedures within the structure of peace, but there is always a pure and raw freedom as final remedy, as it is the final source of rational life, life as an enterprise of setting goals and attempting to realize them. So, war is a latent but real possibility, a very expensive and often also unnecessary, immoral, even absurd possibility, like so many of such kind we always have within our reach, in the domain of our freedom. However, virtually all of these options can in some extraordinary circumstances become feasible (like, for example, to cry and shout aloud: it would be very improper for me to do that here and now, in the middle of my talk for example, but if I am falling from a cliff it would suddenly become very proper and feasible). And this shows the power of these irreversible points in the course of time: what was in our power before such a point, it is no longer there afterwards.

This is important, because the *existence and articulation of responsibility* depend on it. The scope of possible decision-making is cardinally limited after the irreversible point, actually it turns something that was an action into a partly pure phenomenon. The irreversible point is a consequence determined by the events and actions that happened before: the history of expressing opinions, giving declarations, making commitments, the history of political activities etc. The final decision might come like a natural event: unavoidable and practically necessary. The scope of what can be decided upon is drastically narrowed gradually up to the point after which the decision cannot realistically be avoided.

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<sup>29</sup> Max Weber, “Politics as Vocation,” in *From Max Weber: Essays in Sociology*, trans. and ed. Hans Heinrich Gerth, and Charles Wright Mills (New York: Oxford University Press, 1958), 77-128.

<sup>30</sup> Ibid.

This means that the decision to be reached had been articulated and, as a matter of fact, became a *fait accompli* at some prior point, before it has been declared. This has obviously important impact on the issue of the responsibility for all subsequent acts and practices, becoming a kind of a context or factual premise for them, which is then something that necessarily must be taken into account in any attempt to evaluate them.

This is the reason why it is much easier to start a war than to stop it. War can be shortened, or prolonged, but stopping it is no longer an option – as it isn't within the scope of our free decision-making anymore.

The unpleasant conclusion is that war cannot be morally justified, that just war theory cannot give the justification for it [as it cannot justify changing or broadening the concept of "(self) defense" by including in it many attractive, ideologically appealing, seemingly compelling, value ingredients by excluding the "self" part] – but on the other hand, the participation in war is not covered by this judgment. Or taken in a simplified form, we might say that *morality forbids war, but not necessarily participation in it*. Which means that *ius ad bellum* and *ius in bello* have to be distinguished. Regarding the *ius ad bellum*, which is philosophically far more interesting, my opinion is that, morally, the most important matter here is *producing causes of future wars*. However, this is not an easy matter at all, as we *cannot* know in advance what these causes may be – it depends on what *will happen afterwards*, on accumulation of many small ingredients of the social fabric of values and interests, and the structure of beliefs, prejudices, norms, customs, and laws based upon them. This is extremely uncomfortable because it implies that we do not and cannot know when we produce causes of future wars, future conflicts, or adding energy to processes, which can prevent resolution of these conflicts by peaceful means. Peace is unstable, it is precious, it requires vigilance, and a kind of epistemological modesty and wisdom, contrary to epistemological arrogance which characterizes a great part of the contemporary debate on these extremely important and sensitive matters.

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