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1

Defensive rights and the laws of armed conflict

"Esos hijueputas no eran enemigos, eran asesinos."[1]

1. The traditionalist-revisionist debate

The philosophical reflection on the use of military force and on rules regulating armed conflicts has a long tradition in philosophical as well as legal thinking. The main contemporary divide is between so-called traditionalists and revisionists. The traditionalist camp has been most heavily identified with Michael Walzer's work, which sprouted from the Vietnam war in the 1970s.[2] Walzer has influentially defended a moral position which allegedly closely mirrors the legal rules under existing international law.[3] This essentially means, for our purposes, that *in bello* rules are separate or independent from *ad bellum* considerations. Soldiers in war are under a situation of mutual imposition of risk, Walzer argues, and thereby it is permissible for each side to kill the other. The standard implication of this position is that belligerents stand in a morally symmetrical position vis-à-vis one another, yet in a morally asymmetrical position vis-à-vis civilians or non-combatants. Whereas the former have lost their right not to be killed, the latter have not. This resulting framework captures important moral intuitions, and this in turn accounts for the popularity and persistent influence of this view.[4]

By contrast, in the revisionist camp, Jeff McMahan, Cécile Fabre and others reject a view that claims that "the killings committed by unjust combatants are morally permissible."[5] Their preferred moral framework stands on a critical methodological point. Namely, in order to sustain the moral equality of combatants, Walzer must assume that the morality of war is discrete from the morality of inter-personal self-defense.[6] I adopt a "reductivist"

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[1] "Those sons of bitches were not enemies; they were assassins" (translation by the author). Cited in Alfredo Molano, "La Justicia Guerrillera", in Boaventura de Sousa Santos and Mauricio García Villegas, *El Caleidoscopio de las justicias en Colombia. Análisis socio-jurídico* (Siglo del Hombre, 2001, 2nd Vol.), 340.
[2] Michael Walzer, *Just and Unjust Wars* (Basic Books), XX.
[3] He explicitly rejects the claim that the equality between soldiers is "merely conventional" (ibid, 229).
[4] See, eg, the symposium issue of the *European Journal of International Law* on the 35th Anniversary of the publication of Walzer's Just and Unjust Wars (Vol. 24(1), 2013).
[5] Yitzhak Benbaji, "The War Convention and the Moral Division of Labour", *The Philosophical Quarterly* vol 59(237), at 594. On this, see Jeff McMahan, *Killing in War* (Oxford University Press, 2009), Cécile Fabre, *Cosmopolitan War* (Oxford University Press, 2012), C.A.J. Coady, "The Status of Combatants" in, D. Rodin and H. Shue (eds), Just and Unjust Warriors: The moral and Legal Status of Soldiers (2008), David Rodin, "The Moral Inequality of Soldiers: Why Jus in Bello Asymmetry is Half Right", in id, among others.
[6] See, eg, M. Walzer, "Response to McMahan's Paper" *Philosophia* 34 (2006), 43.

position as a starting point for this enquiry.[7] Namely, I take it that situations of war are interpersonal situations writ large. They sit apart from interpersonal situations largely in terms of the number of participants and the coordination between them.[8]

This departure has important implications for the principle of separation and the resulting moral equality between belligerents. In interpersonal situations aggressors (A) and their victims (V) are in morally asymmetrical positions. We normally consider an aggressor's act of killing a moral wrong, whereas we recognize victims the right to defend themselves, even by killing their aggressor if necessary. There is no good reason, McMahan argues, not to translate this moral asymmetry to a situation in which the aggressors and victims are more numerous, and more coordinated among them.[9] Nevertheless, most revisionists claim that these rules apply at the level of "deep" moral" principles, and accept that we have independent instrumental considerations for defending the existing legal rules as they stand.[10] That is, although *ad bellum* just and unjust combatants stand in morally asymmetrical positions in that it is *pro tanto* morally permissible for the former to kill the latter, but impermissible for unjust combatants to kill just ones, the laws of war must put them under a symmetrical position.

In this chapter I shall argue that although mainstream revisionists got the starting point right, they err in inferring the specific implications of the continuity between the ethics of war and of interpersonal situations. Put briefly, although in some cases the respective position of *ad bellum* just and unjust combatants would be morally asymmetrical, I shall argue that in the majority of them we have plausible reasons to put them in morally symmetrical positions vis-à-vis one another. Furthermore, against what both traditionalists and revisionists generally assume, I will argue that allowing some room to asymmetric treatment is not only desirable *de lege ferenda*, but also compatible with at least some reading of the existing international law *de lex lata*. Accordingly, in Section 2 I shall present my general account of permissible defensive killings. In Sections 3 and 4, respectively, I shall defend it from two pressing objections. In Section 5 I shall argue that the proposed normative framework I advocate is generally more compatible with existing international law to a significantly greater extent than both standard orthodox or revisionist positions. Section 6 briefly concludes.

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[7] Lazar, "Just war theory: Revistionsts vs. Traditionalists," *Annual Review of Political Science* (forthcoming). Yet I do not believe that reductivist considerations exhaust the moral reasons relevant to the legal regulation of armed conflicts. Namely, I will argue at several junctures in the book that there are institutional considerations at play that may require law to distance itself from morality, even in the context of my far less revisionist moral stance.

[8] I do not necessarily commit myself to the claim that individuals are the sole locus of moral concern. That is, the argument developed in this book will be largely compatible –or at the very least it will seek to incorporate– the moral importance of political communities, other types of groups, and of collective action in general. I am ready to admit that individuals fight together, and not simply next to each other, and that this will have implications for both the morality and specially the laws of war. See, eg, M. Walzer, 'Terrorism and Just War,' *Philosophia* 34(1) (2006), 3-12 and S. Bazargan, 'Complicitous Liability in War,' *Philosophical Studies* 165(1) (2013), 177-95.

[9] McMahan, *Killing in War*.

[10] McMahan, "The morality of war and the laws of war"; Adil Haque, XXX.

2. An account of defensive killing

In accordance with the reductivist position, I favour here an argument for permissible killing in war that is based on a plausible account of interpersonal defensive killing. Admittedly, there are several positions within the existing literature on the necessary and sufficient conditions for permissible defensive killing, which heavily influence the prevailing accounts of permissible killing in war.[11] Most of them start from the assumptions that individuals have a right to life. The International Covenant on Civil and Political Rights defines it as a right against being arbitrarily deprived of one's life.[12] Accordingly, this right is first and foremost a Hohfeldian claim-right; it grounds a *pro tanto* duty to refrain from killing other individuals.[13] This right accounts, in turn, for why it is *pro tanto* impermissible to do so. But certainly this right has further elements. It standardly involves a *pro tanto* liberty to defend one's life, even at the cost of harming others, when doing so is both necessary and proportionate. It also grounds a liability of those violating -and even infringing- that right to compensate the victim, or her estate for the wrong, or at least the harm they have caused. Finally, the violation to this right to life underlies the attacker's liability to be punished.

Against this background, most contemporary understandings of permissible defensive killing are based on a given individual having forfeited or lost her right to life.[14] An aggressor, they claim, is liable to being killed. Furthermore, for someone to be liable to be killed, it is generally believed, she must be responsible in one way or another for an unjustified threat against an innocent victim. This type of account adequately captures our intuitions in certain standard cases. Consider:

> *Culpable attacker*: Amy is a murderer and attacks Victoria with a knife intending to kill her. Victoria is able to grab a gun that someone had left on a table nearby and, after a short struggle, shoots Amy in self-defense.

There is a first, conceptual feature of this account worth pausing upon. Following Thomson,[15] McMahan understands liability to defensive killing to mean that killing Amy

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[11] Elsewhere I have classified them, albeit a bit schematically, as the causal responsibility approach, the moral responsibility approach, and those approaches which give prominence to agent-relative considerations. See, Alejandro Chehtman, "Recalibrating defensive killing: liability, mere permissibility, and the problem of multiple threats", *Utilitas* (forthcoming).

[12] Art. 6(1). Furthermore, under article 4(2), the human right to life is not subject to any permissible derogation.

[13] For the standard Hohfeldian framework, see Wesley Hohfeld, *Fundamental Legal Conceptions* (Yale University Press, 1919).

[14] See, most influentially, J. J. Thomson, 'Self-Defence', *Philosophy and Public Affairs* 20(4) (1991), pp. 283-310, and J. McMahan, *Killing in War*, XX.

[15] Thomson, ibid, at 303. For a similar position, see Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge University Press, 1994), chaps. 5 and 6.

would neither wrong her nor violate her rights.[16] Yet being liable to being killed entails more than Victoria being at a Hohfeldian liberty to kill Amy (not being under a duty not to do so), and as a result not being liable to be punished for doing so. For one, it also entails that Amy is under a duty not to fight back –she lacks the liberty to defend herself against Victoria's (counter)attack.[17] Furthermore, if Victoria kills (liable) Amy, she would neither owe compensation to her estate, nor she would owe her any type of apology or acknowledgement of the sacrifice Amy had to endure for Victoria's sake. Finally, the fact that culpable aggressors forfeit (or, by any means, lack) their right to life accounts for the fact that none of these implications would change if there were 5 or 10 (or even 50) culpable attackers attempting to wrongfully kill Victoria. This means, in short, that liability to defensive killing may be standardly characterized as a situation of radical moral asymmetry between individuals, and rightly so.[18]

These implications make sense in the case of a culpable, or even unculpable but manifestly unjust aggressor who attacks an innocent victim. It seems hard to resist the claims that Victoria is at liberty to kill Amy if this is necessary to save her own life, and that she would not be liable to be punished for having done so. By the same token, it would be mistaken to suggest that Amy would (also) be at liberty to kill Victoria in her own defense, after Victoria got a hold on the gun. Finally, I do not believe that Vitoria would owe Amy any type of apology, nor her estate would be entitled to any kind of compensation, for the harm Victoria may cause. There is no significant moral residue that Victoria owes for killing her aggressor. Ultimately, all these implications follow neatly from the claim that Amy lacks the right not to be killed by Victoria (most likely because she forfeited it).[19]

However, McMahan has advocated this type of framework not just vis-à-vis culpable, or manifestly unjust aggressors but in a wider set of circumstances. In particular, he claims that this radically asymmetrical framework applies to agents who are minimally responsible (ie, non-culpable) for objectively unjustified threats.[20] This understanding, I believe, leads to problematic implications. Consider:

> *Bus accident*: twenty friends buy a self-driving bus to go for a ride on Saturday mornings. Today, as the bus is cautiously driving in the city, due to some freak event it leaves the road going towards pedestrian Victor. Victor has a weapon that

[16] McMahan, 'The Basis of moral liability to Defensive Killing', 386. There are different understandings of liability in the literature. I use this one for ease of exposition. Furthermore, I use liability in this particular sense, and not as a correlative of a normative power, in Hohfeld's sense.
[17] See, eg, Fabre, *Cosmopolitan War*, 61.
[18] Admittedly, we may reach a point whereby the number of culpable killers is so great that lesser evil considerations would make it impermissible for Victoria to kill them. But I suggest we should say in that case it is impermissible to kill them despite them being liable, not that they have stopped being liable by merely being next to each other. I come back to this issue below.
[19] For a somewhat similarly high threshold of liability to defensive killing, in an otherwise more restrictive framework, see Lazar, *Sparing Civilians*, 63.
[20] J. McMahan, *Killing in War* (Oxford, 2009), 157. For a similar threshold of "agent responsibility, see Seth Lazar, "Responsibility, Risk, and Killing in Self-Defense" *Ethics* 119 (2009), 706.

> could disintegrate the bus. One of the passengers, in her turn, has a weapon and could strike Victor pre-emptively.

As I have argued at greater length elsewhere, the twenty passengers have knowingly created a minor risk for Victor, and due to a freak event they are now directly threatening Victor's life.[21] If Victor is to save himself, he would have to kill the twenty passengers in the bus. Yet I believe it would be impermissible for him to do so. Now, critically, it would be very hard to defend this proposition if we accept, as McMahan does, that the twenty passengers lack a right not to be killed. Furthermore, I believe the intuition that it is impermissible for Victor to blow up the bus is stronger than the intuition that the twenty passengers lack the right not to be killed. Accordingly, it seems reasonable to let go the claim that they are all liable to be killed.[22]

The claim that minimally responsible –albeit innocent- threats have not lost their right to life is further relevant to test defensive situations, which are more akin to armed conflicts. Let us now consider a version of the following classical example:

> *Resident*: The identical twin of a notorious mass murderer is driving in the middle of a stormy night in a remote area when his car breaks down. He gets out of the car and approaches a nearby house. He believes the house is empty, but for precaution he picks up a gun he takes in the trunk of his car. When he is approaching the house, Resident exits through the door on a hunting expedition. Mistaking Twin brother with Serial killer, and while Twin brother is raising his gun to put his hands up and show he means no harm (yet effectively seaming to aim at Resident) Resident shoots at him.[23]

Pace McMahan, I submit that *Resident* suggests that a "minimally responsible threat" (Resident) who does *everything* that is morally required from him before shooting at Twin brother does not support the intuition that he is liable to be killed, even if Resident is ultimately mistaken about his life being at risk.[24] For one, it seems odd, to say the least,

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[21] Chehtman, n XX above (*Utilitas*).

[22] Admittedly, there are additional "mixed" accounts of liability to defensive killing which rest partly on liability for some harm plus lesser evil considerations. (See, eg, McMahan, "What Rights may be Defended by means of War", in Lazar and Fabre, and Bazargan, "Killing Minimally Responsible Threats", Ethics 125(1) (2014), 114-36). I will not examine them here.

[23] This case has appeared many times in the relevant literature (see, eg, Bazargan, 'Killing Minimally Responsible Threats', 164). However, I believe it has often been portrayed in a way in which Resident did not do all it was required of her to do, in order to make sure she had reasonable grounds to kill Twin brother. For a more detailed explanation, see Chehtman, n XX above.

[24] S. Burri, 'The Toss-Up Between a Profiting, Innocent Threat and His Victim' *The Journal of Political Philosophy* 23(2) (2015), pp. 146-165. Lazar considers this position at least descriptively correct as to what commonsense morality supports (*Sparing Civilians*, 65). Dill characterizes war situations as "epistemically cloacked forced choices" and advocates the symmetry between combatants on this basis (Janina Dill, "Should International Law Ensure the moral Acceptability of War?" *Leiden Journal of International Law* (2013), 253-270). Yet she makes the exact opposite mistake that standard revisionist do. From the fact that "epistemically cloacked forced-choice situations cannot be avoided" (at 266) she assumes that every armed conflict constitutes one such epistemically cloacked forced-choice situation or at least should be treated as such (id). Admittedly, she does explicitly recognize that her argument is concerned with international armed conflicts and not with conflicts not of an international character. On this, see Section 4 below.

that such a fundamental right can be completely lost in these circumstances. If rights are these significantly important moral considerations, they can hardly be lost so easily. Furthermore, if Twin brother shoots first, simply because he is a more experienced shooter, some of us may argue that it would be permissible for Resident to defend herself against him. This consideration is strengthened if we argue, in line with many contemporary accounts of permissible defensive killing, that individuals have an agent-relative prerogative to give their interests greater weight than those of others.[25]

But decisively, even if one were to reject these two implications, and argue that it would be impermissible for Resident to kill Twin brother, this hardly means that Resident is liable to be killed. For if Twin brother killed Resident most people will likely acknowledge that there will be some form of moral residue, so to speak, that would translate in a duty by Twin brother to apologize to Resident's family, and most likely even compensate his estate. This moral residue is very hard to explain if we assume that Resident lacked the right not to be killed, insofar this means that he was not wronged at all. By contrast, it is fully compatible with the claim that Twin brother permissibly infringed Resident's rights (rights which he did not forfeit).

Accordingly, *Bus accident* and *Resident* suggest: a) that minimally responsible –albeit innocent– threats are not liable to being killed; and b) that it may be permissible, under certain circumstances, to kill non-liable threats. Admittedly, some people will remain unconvinced. Let me strengthen this position while at the same time bring our discussion closer to situations of war. Consider now:

> *Evil plan*: Police officer is sent to prevent an attack on ten innocent victims. He is provided by his superior with a picture of Terrorist, and the relevant time and place of the alleged attack. When Police officer reaches the designated location, he finds Terrorist holding a weapon against ten people who are standing against a wall. The only chance for police officer to prevent their execution is to kill Terrorist on the spot. Unbeknownst to him, Terrorist is in fact an Undercover agent conducting an arrest. Police officer has been misled by his superior.

I believe *Evil plan* captures, even better than *Resident*, a situation in which we would consider it implausible to claim that Police officer has forfeited his right to life, and is therefore liable to being killed. Admittedly, most people would consider that Undercover agent is at liberty to kill Police officer in self-defense. This intuition would be particularly strong if we assume that undercover agent was also misled by his superior into believing that some accomplice of those being arrested (dressed as a police officer) would attempt to kill him to prevent the arrests. By contrast, making Police officer liable to being killed is not only itself implausible. For one, it can hardly explain why there would be some significant moral residue if Undercover agent killed him. If Police officer lacked the right not to be killed, it would be very hard to explain the sacrifice that was imposed upon him, much as the grounds for compensating his estate. In fact, I believe that it would be morally wrong for police officer to walk away from the scene without attacking

[25] See, eg, Quong, Fabre, but also McMahan.

Undercover agent. We would certainly criticize him and perhaps she should be prosecuted. Admittedly, he refrained from violating undercover officer's rights, but he did so accidentally. This type of disregard for the individuals standing there may be, to a large extent, a violation of *their* rights.[26]

These cases show that the account of permissible defensive killing based on the notion of liability or rights forfeiture is unduly rigid, and ultimately unpersuasive to capture the moral position of a significant number of individuals in situations of self- or other-defense.[27] By contrast, I propose a framework based on the conflict of *prima facie* rights.[28] Namely, it is often accepted that *prima facie* rights exist outside of particular circumstances and they are bound to conflict with other *prima facie* rights. This obtains in many different contexts, such as the possible conflict between the right to freedom of speech and the right to someone's integrity, or between the right of property over a particular good and the right of someone else to destroy that property to protect a particularly important good of hers.[29] Accordingly, once we examine the concrete situation we may assign one of the parties an all-things-considered right, liberty, and so on, but we would standardly claim that the other person's *prima facie* right is neither lost nor violated, but (permissibly) infringed.

This framework provides us with a more nuanced and appealing framework than the standard "all-or-nothing", liability-based account. In *Resident* above, it would allow us to argue that Twin brother is at liberty to kill Resident, even if we argue that Resident is not liable to being killed. This implication may be accounted for by the conflict of Twin brother and Resident's *prima facie* rights not to be killed. But more importantly, this framework could even make sense of the claim favoured by McMahan and others that under these circumstances, it would be impermissible for Resident to kill Twin brother. And more importantly, they would be able to easily make sense of the claim that a right of Resident was infringed, and that compensation or an acknowledgment of her sacrifice is morally appropriate. Similarly, in *Evil plan* the conflict of rights approach would easily fit the claim that both Police officer and Undercover agent (Terrorist) are under a morally symmetrical position, namely, that it would be permissible for each of them to kill the other. Again, this framework can easily account for the moral residue of such killing. That is, this type of account simply acknowledges that rights are being infringed in all these cases, and the moral relevance of these rights is what underpins the strong uneasiness with all these killings.

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[26] (Lazar, 125).

[27] I draw here on my "Recalibrating defensive killing: liability, mere permissibility, and the problem of multiple threats" *Utilitas* (forthcoming).

[28] For two plausible defences of this approach, see J. J. Thomson, *The Realm of Rights* (Cambridge, MA, 1990) and J. Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton, 1980). I have defended this understanding of conflicts of rights at greater length in A. Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford, 2010), chapter 2. For an alternative take on this issue, ie the 'specificationist' position on rights, see eg J. Oberdiek, 'Specifying Rights Out of Necessity', *Oxford Journal of Legal Studies*, 28 (2008), pp. 127–146.

[29] See, eg, J. Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life' *Philosophy and Public Affairs* 7 (1978), pp. 93-123, at 102.

Most defenders of the liability-based approach to permissible defensive killing would suggest that this framework is inappropriate. They will most likely argue that what is making the relevant difference is not, or not exclusively, the conflict of *prima facie* rights, but rather recourse to lesser evil considerations. I disagree. In short, I believe that simply resorting to lesser evil considerations to justify killing an individual who has not lost or forfeited her right to life fails to do justice to the stringent moral force of rights. To illustrate: if A needs to break the window of B's house to save her life, it is clear that she will be infringing B's property rights. Yet it seems clear to me that B is not liable, in the sense of having lost her property right over the window glass. More importantly, I believe that it would be misleading to say that the reason A is at liberty to break the glass is that it would be the lesser evil under the circumstances. A far better explanation of this normative consequence is to suggest that her right to life overrides B's property rights over the window. Accordingly, it seems to me that liability and lesser evil considerations do not exhaust the palate of relevant normative considerations we use to sort out this type of case.

Let me make this point more appealing. Consider:

> *Evil plan2*: the situation is similar to *Evil plan*, but now there are 99 Police officers and 100 Undercover agents. Each group has reliable information that the other group is there simply to execute them. Each group manages to corner the other one and the situation is such that the only way out for each of them is through killing the other.

I believe that in these particular circumstances it would be permissible for the members of each group to kill the members of the other. And yet, this conclusion can only be defended if we endorse, cumulatively, a) that the claims that Police officers are not liable to be killed; and b) that it is the moral weigh of the rights of the members of each group, together with their agent-relative personal prerogative, that justifies them holding a liberty to kill members of the other group. By contrast, lesser evil considerations would clearly not support this view. In fact, I believe that if there were 50 Police officers against 100 Undercover agents we would still refuse to claim that they are under a duty to let themselves be killed. This conclusion seems to stand on the separateness of individuals and the fact that they are not mere sites for the realization of value, of other individuals.[30] That is, they are based on the moral stringency of rights (rather than merely on lesser evil considerations).

These examples lead us to four important observations. First, the proposed explanation acknowledges that rights are not the ultimate source of moral value, but rather work as middle-level reasons which help us tackle difficult philosophical issues. In Raz's terms, they 'belong to the ground level of practical thought in which we use simple-to-apply rules'.[31] When we face a situation of conflict between *prima facie* rights we need to focus on the underlying moral considerations. Second, they show that

[30] Eg, Lazar, *Sparing Civilians*, 63.
[31] J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford, 1994), 48.

endorsing a high liability threshold does not necessarily lead to radical pacifism, insofar many combatants could still be permissibly targeted even if they have not lost or forfeited their right to life.[32] Third, these cases illustrate that it is possible that conflicts of rights lead to one of the parties being (merely) at liberty all-things-considered to kill the other(s) (*Evil plan*), while others lead to her being under a duty all-things-considered to let herself be killed (*Bus accident*). Each of these possibilities is compatible with none of them being liable to being killed. Finally, they show that conflicts of rights are not exhausted by lesser evil considerations. Or better put, lesser evil considerations may not play a relevant role in explaining why it is permissible to kill a non-liable individual. The justificatory work is to a significant extent performed by the strength of moral rights.

Of course, to argue for the distinctive advantage of the conflicts of rights framework I advocate must not be conflated with the implausible claim that lesser evil considerations play no role in this type of situations. A clear case may be the standard situation in which a person must switch a trolley from lane X to lane Y in order to save 5 strangers, despite the fact that she will kill an innocent person standing on Y. In this case, the conflict between one individual's right not to be killed and five people's rights to be rescued does not, I believe, throw a clear preference for the latter. By contrast, if we think in terms of lesser evil considerations, ie, somewhat obscuring the moral force of the rights involved, and paying more attention to outcomes, then most of us will believe it is permissible to press the switch.

To sum up, in this book I advocate a bifurcated account of the morality of defensive killing. In cases of culpable or manifestly unjust attackers, I subscribe a largely asymmetrical framework between belligerents, very much in line with the standard revisionist position in just war theory. By contrast, in cases of attackers holding reasonable or justified believes regarding the justness of their actions, and particularly in those cases where they are acting not merely permissibly but with positive justification, they would each be in a largely symmetrical (though, perhaps, not always totally symmetrical) position vis-à-vis one another. Their position, in turn, would be more closely related to the traditionalist position in the just war theory debate. Furthermore, each of these two overall frameworks must also make room to the moral importance of agent-relative considerations, such as the personal prerogative,[33] and to agent-neutral

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[32] For the claim that a high threshold of liability would commit us to an implausible form of radical pacifism, see, Seth Lazar, "The Responsibility Dilemma for Killing in War: a Review Essay", *Philosophy and Public Affairs* (2010), 188.

[33] See J. Quong, 'Killing in Self-Defence', pp. 520-521. For other agent-relative justifications for the permission to act in self-defence, see N. Davies, 'Abortion and Self-Defense', *Philosophy & Public Affairs* 11(3) (1982), pp. 232-245, and S. Levine 'The Moral Permissibility of Killing a Material Aggressor in Self-Defense', *Philosophical Studies* 45 (1984), pp. 69-78. Cécile Fabre has also defended a more differentiated account in her *Cosmopolitan War*, which is also based on the argument of partiality. More recently, Saba Bazargan has built a more symmetrical account based on lesser evil considerations (see his 'Killing Minimally Responsible Threats'), and S. Burri has argued for flipping a coin, in her 'The Toss-Up Between a Profiting, Innocent Threat and His Victim' *The Journal of Political Philosophy* 23(2) (2015), pp. 146-165. I will not be able to address their arguments here.

arguments, such as lesser evil considerations. But these further elements must be taken into account against a basic landscape of rights and duties, as fundamental deontological constraints.

3. Fact-relative, belief-relative, and evidence-relative considerations in defensive situations

There is a first difficulty with the symmetrical position just advocated. Namely, that in order to consider an attacker liable to being killed, it relies heavily on what he or she knew and had reason to know, and not ultimately on whether he or she got it right. This is a controversial stance in both the literature on self-defense and just war theory.[34] As a result, it is a position that requires defending at some length.

An accepted starting point for this discussion is Derek Parfit's influential distinction between fact-based, evidence-based, and belief-based senses of moral wrong.[35] Namely, he suggests that an act may be wrong on grounds of all the non-moral facts, or it may be wrong in light of the relevant evidence, or it may be wrong in light of the agent's beliefs. Each of these senses is morally relevant, but is often used for different purposes. For example, Parfit suggests that in order to assess issues of blameworthiness, the most important dimension is what people believe when acting.[36] By contrast, when people must decide what morally to do, they ought to try to do "what on the evidence, or given [their] beliefs, would make things go expectably-best".[37] Nevertheless, Parfit does not clarify what sense of wrong is most important to an account of liability or of forfeiture of rights. Against the major part of the relevant literature, I will argue that in order for someone to be liable to being killed, his act must be wrong in at least the evidence-relative or the belief-relative sense. Namely, I will argue that the fact that his act is wrong in the fact-relative sense is neither sufficient nor necessary for her to be liable to be killed.

In order to do this, and given the relevance of this issue for the argument in the book, I need to specify further some of the features of this distinction. First, it is worth noting that each of these dimensions admits being treated as a matter of degree. From a fact-relative perspective, a threat may have between 0 and 100% chances of materializing. From a belief-relative perspective an individual may have between 0 and 100% knowledge of the relevant facts, and the evidence of the relevant facts may also provide, objectively, a certainty 0 and 100%. For simplicity, I will take examples based on these two extreme cases (0 and 100%), but I admit that much more complex combinations could and would obtain in real life situations. I will tackle the issue of how to deal with different levels of uncertainty in the next chapters of this book.

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[34] For two authors that take this type of approach see B.J. Strawser and Bas van der Bosen. They suggest that this affects permissibility…. As I will explain below, my claim is rather different from theirs.
[35] Parfit, *On What Matters*, Vol 1, 150-1.
[36] ibid, 154.
[37] ibid, 161.

Second, and perhaps most importantly for present purposes, these three senses of wrong, are not merely disjunctive, but can also be cumulative. They allow for combinations between them. We may say of one particular act that is wrong in all three fact-relative, evidence-relative, and belief-relative senses, as the case of *Culpable attacker* above. But one particular act may be wrong in any two or only one of them. If A unjustly attacks V with a weapon he has reason to believe is loaded (but as a matter of fact it is not), then her action is wrong only in the evidence and belief-relative senses. I will use (F), (E), and (B) to indicate whether a particular act is wrong in a fact, evidence, or belief-relative sense, respectively.

Third, the sense in which an action is wrong may be different for each of the agents involved in a situation, at least vis-à-vis the evidence and belief-relative senses of the cat. For instance, A may be entirely oblivious to the fact that if she kills V, she will prevent V from killing 5 innocent bystanders. There may even be no evidence of this being the case available to her. Thus, in an evidence and belief-relative sense, A's action is wrong. But it is hardly wrong if one considers it from the evidence or belief-relative senses, from the perspective of V.

To recap, we may start by considering a defensive situation with two individuals: attacker A and victim V. If there is a facts-relative, causal threat we may characterize the situation as A(F)-V(F). If A has evidence that her act constitutes a threat we could add (E) to her position, and (B) if she believes that her act constitutes a threat. The same would need to be ascertained vis-à-vis V, and also with respect to any third party R involved. With this basic scheme in mind, let's go back to my point of contention. I have argued fact-relative considerations are neither sufficient nor necessary for A to be liable to being killed by V. To illustrate, let us consider first:

> *Mobile*: A is about to send a friend a text message on her mobile phone asking: "Wazup". As a matter of fact, if she presses the "W" key in her mobile phone A *will* kill V through an explosive charge Z has installed. Yet this is unbeknownst to both A and V (and they both lack any plausible evidence that this is the case). V is standing next to A and she is armed.

I believe most people will agree that A is not liable to being killed by V in this situation.[38] In fact, many would accept that if V, out of hatred or other spurious motive (she does not and cannot know that by pressing the W key A is creating a causal threat against her), were to attempt to kill A, she (V) would herself become liable to being killed by A. In short, *Mobile* illustrates that the fact that an action is wrong merely in the fact-relative sense is not a sufficient condition to render the agent liable to defensive harm.

Admittedly, this conclusion would be a problem for those who, like Thomson, claim that causal responsibility for an objectively unjustified threat suffices for liability to being killed.[39] By contrast, those who, like McMahan, require moral responsibility for such

[38] See, however, Tadros, *Ends of Harm.*
[39] n XX above.

liability, would have little difficulty in accounting for this conclusion.[40] Interestingly, though, it may be argued that the moral responsibility account would be committed to the exact opposite mistake, ie, to the claim that A believing (B) and having reason to believe (E) she is threatening V's life are (both necessary and) sufficient conditions for A being liable to being killed by V. This would obtain even though A is not, in a fact-relative sense, causally threatening V.[41] But consider:

> *Unloaded gun*: Suppose A is holding a gun against V that she –A– loaded a few minutes ago. Yet, unbeknownst to A, V has unloaded that gun just before A aims at her. We could formalize the situation as follows: ⌜A(B+E);V(0)⌝.

It seems clear to me that it would be impermissible for V to kill A under these circumstances.[42] In fact, if V were to kill A, I would argue that she would violate her rights. Accordingly, *Unloaded gun* shows that liability cannot be explained merely on grounds of A's act being wrong in an evidence and belief-relative senses. This conclusion seems to undermine the moral responsibility account of defensive rights.

McMahan would object that moral responsibility is a necessary but not a sufficient condition for liability to defensive killing; an objectively unjustified threat would be required in addition.[43] This response, however, would beg the relevant question given that what is at stake here is precisely what constitutes an objectively unjustified threat. The issue is whether it is the action that must be objectively unjustified, or it must be the case that the act is causally (objectively, or in a fact-relative sense) threatening V. In other words, the point is whether a fact-relative causal threat is required for A to be considered liable to be killed by V. McMahan seems committed to answering this question in the affirmative.

I believe this would be a mistake. Consider:

> *Unloaded gun 2*: Everything is like *Unloaded gun*, but suppose now it is R who unloaded A's gun unbeknownst to both A and V. We may formalize the case as follows: ⌜A(B+E);V(B+E)⌝.

Unlike the previous case, in this situation it seems that A would be liable to being killed by V even if A is not, in a fact-relative sense, threatening her. This seems to indicate that the fact that A is causally threatening V, in a fact-relative sense, is not a necessary condition for liability to defensive killing.[44] Thus we may conclude that an act being wrong in a fact relative sense is neither necessary nor sufficient for A being liable to be killed by V, as per *Mobile* and *Unloaded gun 2*, respectively.

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[40] n XX above.
[41] We may leave out here whether B or E would suffice for moral responsibility on their own.
[42] To my knowledge, only Uwe Steinhoff defends an account of liability to defensive killing which would be compatible with this conception of liability. See his, XXXX (forthcoming).
[43] Jeff McMahan, *Killing in War* (Oxford, 2009), 157.
[44] For a similar view see Ferzan, n XX above, 690.

Yet most contemporary scholars consider liability to defensive killing largely determined by fact-relative considerations.[45] Victor Tadros, for instance, has objected to this conclusion. He refers to the following situation:

> *Flowers*: If A doesn't divert a runway trolley it will hit five rare flowers. Because of her love of flowers, she diverts the trolley onto the second track where it will kill one person. Little does A know that there are five people further down the track with the flowers on it. There is no reason for her to believe that those five people are further down the track. Her turning the trolley saves those five people.[46]

Tadros argues that despite the fact that A is morally responsible for wronging the one person in the other track, it is impermissible to interfere with her. The reason for this, he claims, is that what A is doing is, although culpable (ie, wrong from a belief and evidence standpoint), permissible from a facts-relative point of view. Accordingly, the only reason why an observer in an epistemically superior position would not be entitled to interfere with A is that *as a matter of fact* A is saving five people.[47]

Nevertheless, his analysis of the situation seems to me mistaken. Tadros presents us a situation in which it would be impermissible for a third party R to interfere with A's behaviour not merely on fact-relative grounds, but also on evidence and belief-relative ones. In my preferred notation, the situation is not merely R(F) but it is, decisively, R(B+E+F). Tadros seems to identify this situation as one in which fact-relative considerations sort out the normative issue because he seems to be insensitive to the fact that belief, evidence, and fact-relative dimensions are not merely disjunctive, but that they also obtain cumulatively. Accordingly, he provides no argument as to why it is fact-relative considerations that make it impermissible for R to intervene with A in *Flowers*.

It is not obvious to me that this is the case. Suppose now R is not in an epistemically superior position than A, but rather in the same epistemic position. R lacks any evidence that A will as a matter of fact save the lives of five people. By contrast, R believes, and has reason to believe that A is about to kill one person to save five flowers. Accordingly, for R interfering with A would save the life of an innocent person, whereas refraining to interfere will allow A to kill this person, to save five flowers. Would we still hold that it is impermissible for R to interfere with A? Or more to the point still, would A still be considered nonliable to be interfered with by R? I believe most people will think it permissible for R to interfere with A in these circumstances. If it is impermissible for A to act on those epistemic grounds -and I assume it is-, and R is bound to act on that particular information, then it seems to me that it is permissible for him to interfere with A.

Yet, if R now has conclusive evidence (and believes) that the trolley is going to kill five people if A did not divert it, would R now not be under a duty to interfere with A? Most

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[45] See McMahan, n XX above, Fabre, n XX above, and Lazar, *Sparing Civilians*, 88, among others. For a few exceptions, see Dill n XX above, and Strawser, XX.
[46] Tadros, *The Ends of Harm*, 236.
[47] ibid, XXX.

importantly, I believe this would be the case even if, as a matter of fact this was not true, say because there is an unperceptively tiny rock in the track that would have derailed the trolley ultimately saving the five individuals. I believe that most people would consider it permissible for R to intervene, and most importantly A liable to being intervened with by R. Accordingly, Tadros wants to argue that the fact that A is acting wrongfully from a belief-relative and an evidence-relative perspective is hardly conclusive for the purposes of determining whether she is liable to be interfered with by R. This much seems correct. The problem with his position is that he wants to infer from this proposition that what accounts for it being permissible for R to interfere with A is whether A's act is wrong from a fact-relative perspective. As I have shown, this is hardly the case. Whether A is liable to be interfered with by R is largely determined by what A believed and had reason to believe, but also, and crucially, by what R believed and had reason to believe, that is, by belief-relative and evidence-relative considerations. To that extent, his objection hardly undermines the position advocated here.

In sum, it seems to me that fact-relative considerations are neither necessary nor sufficient for A to be liable to being killed. This proposition goes a long way to strengthening my previous account of liability to defensive killing, which is largely based on evidence and belief-relative considerations. Although I do not wish suggest that fact-relative considerations are entirely irrelevant for the purposes of the moral evaluation of certain actions in war, they will be largely beside the point for the arguments in this book, concerned with morally and legally right behavior in asymmetrical conflicts. This is the case for essentially two reasons. First, because it may be argued that a concern for what is wrong in the fact-relative sense is best served by requiring to agents to base their behavior on evidence-relative considerations, while putting them on a stringent duty to get the best available information.[48] Second, this approach based on a preoccupation for human agency in conditions of uncertainty. For one, IHL adopts this type of approach to the regulation of conduct in war, most notably through the principle of precaution. But also, just war theorists (including the most prominent revisionists) have argued that their work is essentially directed to soldiers, who should seek information and think carefully before killing and maiming in war.[49] As suggested in the general introduction to this book, the enterprise that both the law and just war theory ought to perform in war is that of providing action-guiding principles for those agents involved in armed conflict.[50] To that extent, I believe that evidence-relative considerations are at the core of this enquiry.

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[48] Interestingly, a recent empirical study has shown that terrorist differed from non-criminals essentially for an outcome-oriented moral cognition, by contrast to one more concerned with intentions (Baez et al, "Outcome-oriented moral evaluation in terrorists," *Nature Human Behaviour* (1) (2017), 1-8). Put differently, focusing too much on wrongness in the fact-relative sense may be the kind of approach more consistent with intentionally targeting innocent civilians.

[49] See, McMahan, Fabre.

[50] For a similar approach, see Dill (2013), 264. See also, Shue, "Do We Need a "Morality of War"?, in Rodin and Shue, n XXX above, 96 and Jeremy Waldron, "Are Sovereigns Entitled to the Benefit of the International Rule of Law" EJIL 22 (2011), 8.

4. A second difficulty: accounting for civilians

There is a further difficulty with the account of defensive killing I advocate that we must consider here. Namely, it has been suggested that if we endorse a framework that recognizes a significant majority of combatants a right not to be killed, this would put them on a par with civilians.[51] That is, the argument for defensive killing I advocate would be committed, at least at the level of moral principles, to doing away with the principle of distinction between combatants and civilians. This challenge is particularly pressing for four reasons. First, because this alleged moral symmetry between combatants and civilians would apply, under the argument hereby advocated, to a vast majority of combatants. Only manifestly unjust combatants would lose their right to life. All the others retain such right, very much like civilians. Second, this implication seems particularly difficult to escape given that I am prepared to acknowledge the existence of a personal prerogative that would confer upon individuals –including, in principle, non-liable combatants- a personal prerogative to give their interests greater normative weigh than the interests of others. Third, this symmetry is particularly problematic given the existing incentives of belligerents to give greater priority to their own combatants than to enemy civilians. The Asa Kasher doctrine -stating that this priority is akin to a lexical priority- is perhaps the most brutal illustration of this.[52] Finally, one of the intuitively appealing implications of the standard orthodox account is precisely that it is able to draw a normative wedge between combatants (liable) and civilians (non-liable).

One way to go about this criticism is to bite the bullet and claim that it is still preferable, on the whole, to most orthodox accounts. After all, these too have very significant problems, such as the unaccounted for gap between interpersonal and collective situations, as well as its commitment to the moral symmetry between combatants fighting a morally just war and those belonging to heinous criminal groups. But this would hardly do. The principle of distinction between civilians and combatants in war is among the most fundamental features of the existing moral and legal regulation of armed conflicts. I therefore believe that this charge needs to be met more fully.

The moral asymmetry between just combatants and civilians seems firmly based on our intuitions. To illustrate: if we take the situation in *Evil plan 2* above, and we assume the position of a third party R with perfect information, we would most likely believe that if in order to stop the impending bloodbath R could either kill a police officer or an innocent individual who got accidentally trapped in that situation (ie, a teacher), the morally appropriate thing to do would be to kill the former, not the latter. Incidentally, I think the same would apply if we compare this innocent teacher with three Undercover agents. Accordingly, even if we accept that either the Police officers or the Undercover agents (or both) have a right not to be killed (ie, they did not forfeit it), this hardly entails that they are morally on a par with non-liable bystanders. The remainder of this section will seek to account for this intuitive conclusion.

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[51] See Lazar, *Sparing Civilians.*
[52] Sheer, EJIL, XX.

There are several arguments that we could use to advocate for the principle of distinction between non-liable combatants and non-liable civilians.[53] I will start by accounting for the core intuition behind *Evil plan 2*, as just described. The issue is whether we may distinguish between non-liable threats and non-liable bystanders. As indicated above, I suggest we must sort out this question on grounds of the conflict of *prima facie* rights. Per hypothesis, each of these groups has a *prima facie* right to life, which includes a claim right not to be killed. Admittedly, I have argued above that it would be permissible for an Undercover agent and a Police officer to kill the other to save their respective life. Furthermore, I have suggested that their respective liberty to kill the other is grounded on their right to life.

By contrast, I now suggest that it would be impermissible for either of them to kill an innocent teacher to save their own life. The reason for this is quite simple. When we have two non-liable mutual threats, that is, a situation in which each would kill the other, we face a conflict of rights situation. Yet in this case, it is a conflict of each one's right not to be killed by the other. Each of them claims the liberty to kill the other in order to prevent the other from killing them. By contrast, the conflict of rights between a threat and a bystander is altogether different. That is, while the bystander has a claim not to be killed by the threat, the threat can only invoke a right to be saved by the bystander. This is analogous to comparing the stringency of the duty not to kill someone and the duty to save someone's life. Arguably, this difference in the specific right involved accounts for the significant moral difference between the position of the bystander and the threatening individual, or for our purposes between Undercover agents and Police forces, and any teacher in the school.[54]

Additionally, it has been argued that we may also distinguish between non-liable combatants and non-liable noncombatants on the basis of the moral risk they assume.[55] In *Evil plan 2*, both police forces and undercover forces have information which is sufficiently reliable for each of them to act upon it by attacking the other group. However, as that particular case illustrates, even in what may seem the clearest of circumstances, there is always some risk that they ultimately got the facts wrong, or that their superior got them wrong. Although this risk does not arguably suffice to make it impermissible for them to act, it does seem to affect their moral standing vis-à-vis innocent, non-threatening teachers. Insofar there is always the chance that threats are ultimately acting impermissibly from a facts-relative perspective, this should suffice for them not to be able to claim a moral parity with non-threatening individuals.

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[53] Seth Lazar has provided a book-length treatment of this issue, for which he draws on five overlapping justifications. (see Lazar, Spari*ng Civilians*). I draw on some of his views here, though ultimately I believe his defense of the principle of distinction is insufficiently stringent. Namely, he defends the proposition that killing civilians is morally worse than killing combatants, whereas I believe that what we actually need is a defense of the proposition that killing civilians is morally *much* worse than killing combatants. I have made this argument in XXX.

[54] Interestingly, the personal prerogative hardly suffices to override this difference, as it is often acknowledge in the literature.

[55] For this argument, see Eduardo Rivera López, "Proportionality" (draft on file with author). See also Lazar, *Sparring Civilians*, chapter 4.

Arguably, this second argument does not seem to make the moral difference between non-liable combatants and non-liable civilians particularly weighty, at least not compared to the first argument I provided. However, it may allow me to expand the scope of my initial argument. That is, it would explain why there is a moral difference between civilians and combatants even when the latter are not directly threatening anyone. Moreover, it also points to a further important distinction between combatants and civilians that as status-based categories.[56] In short, from an evidence-relative perspective it seems reasonable to assume that each of the members of the Police force or those acting as Undercover agents constitute a threat, whereas from an evidence-relative perspective it is safe to assume that the innocent teacher is not. Similarly, it seems plausible to assume that combatants in armed conflict constitute threats, whereas civilians do not. Accordingly, adopting a largely evidence-relative understanding of permissible or impermissible conduct in war is important for the purposes of rejecting the objection that considering certain combatants not liable to be killed would put them on a par, morally, with innocent civilians.

Admittedly, these three arguments have two important limitations. First, they apply neither to all types of combatants nor to all civilians in war. Some soldiers do not directly threaten civilians (nor they seem to do so, such as cooks, etc.) whereas some civilians do threaten enemy soldiers. Some civilians contribute to the armed conflict indirectly, and to very different degrees. In Chapter 2 of this book I will explicitly address the issue of the civilianization of the armed forces as well as that of the different forms and types of participation of civilians in armed conflicts. At that point I will considerably fine-tune the rough distinction I have hereby defended.

Second, the moral asymmetry between killing civilians and killing combatants that results from the arguments I have put forward does not yet support the principle of distinction as understood in IHL. This principle does not merely claim that it is morally much worse to kill civilians than soldiers; rather, it states that it is impermissible to directly target civilians in armed conflict.[57] Admittedly, I am skeptical that one can justify such a rigid rule as a matter of deep moral principles. By contrast, I believe one has a far better chance to account for it as a matter of how we should translate this moral argument into the institutional practice of law. Let me explain. In the general introduction to this book, I have sought to precise the way in which international law models behavior in war. Following James Morrow's seminal account,[58] I argued that it does so by shaping belligerent's expectations, both at a collective and at an individual level. Put very succinctly, international law (and international treaty law in particular) help identify appropriate behavior both by individual soldiers and by belligerents in a context of prevalent "noise". In this context, bright lines serve the critical purpose of shaping shared expectations by significantly reducing this noise. Accordingly, this may account for the principle of distinction as a legal rule. That is, a rule simply prohibiting the targeting of civilians is much easier to administer than a rule requiring judgment of when the number

[56] The contemporary legal conceptions of combatants and civilians are status-based, not conduct based. On this issue, see Chapter 2 below.
[57] See general introduction to this book.
[58] J. Morrow, *Order within Anarchy* (Cambridge University Press, 2014), XXX.

of non-liable combatants suffices to override the number of non-liable civilians in a way that it makes it permissible to target the latter. Crucially, the enactment of such a rule allows the enemy to more easily assess when this standard of behavior has been broken, it facilitates training and monitoring, and thereby rises the costs of violations by individual soldiers and by whole belligerents.

5. International law and the bifurcated account of defensive killing

The vast majority of international lawyers and just war theorists believe that it is currently impossible for international humanitarian law (IHL or LOAC) to regulate killing in war in accordance with basic principles of permissible killing as construed in interpersonal situations.[59] However, I suggest that this is essentially because they assume that interpersonal situations can only result in morally asymmetrical positions between an attacker and an individual defending herself (or others), and automatically transpose that framework to the situation in armed conflict. In this chapter I have argued that although in cases such as *Culpable attacker* this may be a persuasive framework, it need not follow for every defensive situation. In fact, *Evil Plan 1* and *Evil Plan 2* suggest that there may be interpersonal situations in which it would be permissible for members of each group to kill the members of the other group defensively.[60] In this Section I shall argue that my preferred account of defensive killing fits with a plausible reconstruction of the existing legal framework much more comfortably than both the orthodox and the standard revisionist accounts.[61]

As indicated in 1.1., the orthodox account advocates the moral equality of soldiers on both sides. This, their advocates argue, fits the existing international laws of armed conflict. Revisionists, by contrast, concede that the law should treat belligerents symmetrically, but do so only on instrumental or consequentialist grounds. Although they disagree on what individuals ought morally to do at the level of deep moral principles, these two frameworks share two critical claims. First, they assume that the laws of armed conflict treat (just and unjust) belligerents symmetrically. Second, they argue that this is the morally sound way of regulating the conduct of individuals within armed conflicts as a matter of law. In this section I challenge each of these two propositions. I submit that both traditionalist and revisionist just war theorists both pay insufficient attention to how the law is designed in this area. In short, I shall argue that the law treats some belligerents symmetrically, whereas it treats others asymmetrically. Also, I argue that this bifurcated legal regulation is, in fact, superior at the bar of justice, than one which treats all belligerents alike.

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[59] Eg, Dill, n XX above (2013), 253.

[60] *Resident* seems to suggest that the underlying moral reality is even more complex, insofar there may be a case in which it is permissible for A to kill V and impermissible for V to kill A even if neither A nor V have forfeited their right to life.

[61] I would also note the fact that legal rules are also construed as *ex ante* assessments, largely based on evidence-relative and belief-relative considerations, supports the framework I advocate.

Before we can examine these issues, a preliminary conceptual point is in order. It is often assumed that IHL permits killing of enemy combatants.[62] By contrast, I believe a more accurate understanding of the LOAC is that they do not regulate individual behavior in war by making killing in war permissible as such.[63] Rather, they provide participants in armed conflict with a privileged status of combatant.[64] This entails that they are conferred a *prima facie* immunity against being prosecuted for lawful acts of war.[65] It is therefore on this particular issue that we must assess whether combatants are treated symmetrically or asymmetrically in the law.

The starting point to examine this issue is generally the principle of separation between *ad bellum* and *in bello* considerations. According to this principle, *in bello* regulations must treat belligerents symmetrically irrespective of the lawfulness or unlawfulness of their resort to military force.[66] Indeed, this is to a large extent the case in the Laws of International Armed Conflicts (IAC). Under this framework, enemy belligerents are considered privileged combatants and are not liable to being punished (as prisoners of war) as long as they neither breach the specific rules of a "fair" fight, nor perpetrate war crimes.[67] This includes State combatants as well as non-state combatants fighting as *de facto* organs of the state or acting under its effective control.[68]

However, international law provides for a relevantly different framework in the case of armed conflicts not of an international character (NIAC). In the regulation of NIAC, combatants fighting for non-state armed groups are typically not protected from being punished by the belligerent State for otherwise lawful acts of war. In this context, although international law does not, itself, forbid members of non-international armed groups to fight, it fails to provide them with a legal protection against prosecution. Accordingly, although it does not itself crystalize an asymmetrical legal treatment, it allows for domestic law doing so. Moreover, as a matter of law individuals taking part in a non-international armed conflict as members of the relevant non-state armed group are liable to being punished under the domestic criminal law of the state concerned for the mere act of fighting. [69]

Furthermore, there are two (admittedly controversial) qualifications to this legal framework, which arguably bring it closer to my proposed normative framework. First, certain participants in what we would normally consider NIACs have been conferred an immunity for participating in hostilities. Under Additional Protocol I (hereinafter API),

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[62] Eg, Dill (2013), 264.
[63] Eser, CL&P, forthcoming.
[64] Eg, Dinstein.
[65] Eg, Adil Haque, *Law and Morality at War* (OUP, 2017), 28.
[66] CITE.
[67] Although they can be detained for the duration of the hostilities, this detention is exclusively to prevent them from further participating in the armed conflict. It cannot and should not be construed as a criminal sanction. For further details, see Geneva Convention III.
[68] See the International Law Commission's Draft Articles on International Responsibility, art. 4 and 8.
[69] This is true even if APII encourages belligerents to dictate the broadest possible amnesty to persons who have participated in the armed conflict (art. 6(5)). This provision in fact presuposes that they lack any such protection against prosecution in accordance with international law.

the privilege enjoyed by State combatants was extended to members of certain non-state armed groups, namely, those fighting "against colonial domination, alien occupation or racist regimes".[70] Although this particular provision has been criticized and actively resisted by certain States (and, in fact, has never been effectively invoked), it has been ratified by the majority of States in the International community.[71] Interestingly, the underlying reason for their protection against prosecution was precisely that their fight was increasingly considered lawful, or at least justified. The Commentary to API by the ICRC states that "the struggle of [these] peoples … is legitimate [and] any attempt to suppress such a struggle is incompatible with the Charter, the friendly Relations Declaration, the Universal Declaration of Human Rights, and the Declaration on the Granting of Independence, and constitutes a threat to international peace and security".[72] Accordingly, these non-state fighters can also to be considered privileged under the laws of armed conflict, and therefore are not liable to being punished for participating in the war.

The second qualification has to do with the case of so-called "unprivileged" combatants in IACs. [73] Some international law scholars and some courts have argued that by abusing the laws of armed conflict certain combatants become liable to prosecution.[74] I refer to combatants who have forfeited their right to combatant status or to the status of prisoner of war, as well as to those civilians who have lost or forfeited their civilian status, often identified as "unprivileged belligerents".[75] As a result, they enjoy neither the privilege of combatancy nor the right to be considered a prisoner of war. In the famous *Quirin* case of 1942, the US Supreme Court decided that unlawful German combatants could be

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[70] Additional Protocol I to the Geneva Conventions, art. 1(4). The way in which the law has rendered this outcome is by claiming that conflicts of this particular type are "international armed conflicts".

[71] This was one of the reasons the US declined ratifying Additional Protocol I. See, eg, Letter of Transmittal from Ronald Reagan, President of the United States, to United States Senate (January 29, 1987), reprinted in 81 AJIL 910 (1987). This provision has also been included in relevant reservations by several countries, including, France, the UK, Belgium, the Republic of Korea, Ireland and Canada. On its lack of effective use, see Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts", in Elizabeth Whilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2002), 49). Yet a rational reconstruction of the law certainly allows for considering this provision binding, at least as a matter of treaty law.

[72] ICRC, Commentary to the Additional Protocol I, at 46 and Robert Sloane, "The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War", *Yale Journal of International Law* 34 (2009), 65 and references therein. Admittedly, other people invoke other grounds for this particular extension. Corn, eg, suggests that the rationale for their different treatment was that these particular groups were generally not perceived as committing treason, and therefore did not clearly violate the sovereign right of states. (Geoffrey Corn, "Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?", *Stanford Law & Policy Review*, 22(1) (2011), 281).

[73] A first case is that of civilians who directly participate in the hostilities. They clearly lack combatant privilege and they are therefore liable to be prosecuted for what would otherwise be lawful acts of war. I will examine their position in Chapter 2.

[74] See, Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), 29; L. Oppenheim, *International Law: Disputes, War and Neutrality* (H. Lauterpacht ed., 7th ed. 1952), 256; and Georg Schwarzenberger, *International Law as Applied by International Courts and tribunals: The Law of Armed Conflict* (1968), 115-7, among others.

[75] See, eg, Charles Garraway, "Interoperability and the Atlantic Divide – A Bridge over Troubled Waters", ILM (80), 344 and Richard Baxter's seminal "So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs", BYIL (1951), 323-345.

prosecuted and punished by military tribunals, not for specific war crimes, but for mere participation in World War 2.[76]

This qualification stands on fairly firm grounds under international law, even if its precise implications are deeply contested. Under the 1899 and 1907 Hague Regulations, subsequently incorporated into Article 4 of Geneva Convention III, combatants are considered privileged only if they distinguish themselves from the civilian population (if they carry arms openly and wear a fixed distinctive symbol recognizable from a distance), operate under responsible command, and are part of an organization that respects the laws and customs of war.[77] Thus, belligerents who fail to comply with these conditions would lose their shield against prosecution, and become liable to being punished for participating in such a war.[78] As indicated in the general introduction to this book, this is one of the necessary conditions to being an *ad bellum* just belligerent, and often epistemically the easiest to establish.

A plausible reconstruction of this legal framework seems indeed to bring it closer to the normative position I advocate. For one thing, although we could construe the distinction between liable and non-liable soldiers along the lines of state/non-state fighters, this would hardly reflect the more nuanced framework available in international law. Indeed, beside those groups acting *de facto* as State organs,[79] the law regulates at least three cases of non-state armed groups as privileged combatants, ie, not liable to being punished for participating in an armed conflict. These are cases of groups which may plausibly be assumed as acting *prima facie* with just cause, as per Art. 27 API.[80]

Furthermore, the second qualification introduced above –that of unprivileged combatants– allows for certain in principle privileged combatants (both state and non-state) to be prosecuted for participating in a manifestly unlawful war. Namely, insofar as not systematically violating the *jus in bello* is part of the requirements for a lawful war, as well as a condition for privileged belligerency, considering these soldiers as acting impermissibly (and therefore being liable to being punished) would be entirely compatible with the particular revisionist position I am advocating. In short, it somewhat allows for

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[76] *Ex parte Quirin et al* (1942), 317 US, 30-1. See, similarly, the decision of the Judicial Committee of the Privy Council in Mohammed Ali v Public Prosecutor [1968] 3 All E R 488.

[77] Geneva Convention III (1949). For a comprehensive list of the legal requirements, see Dinstein, n 78 above, 37-40.

[78] Art. 44(3) of Additional Protocol I. API not only allowed for combatants in certain non-state armed groups being considered privileged; it also controversially narrowed the category of unlawful combatants. In short, it establishes that it sufficed for immunity from prosecution that they carry arms openly "within each individual engagement", and they are "made visible to the adversary while engaged in a military deployment preceding the launching of an attack" in which they would participate. Not surprisingly, this was heavily criticized by part of the international community, as well as by many prominent international law scholars. Yet, the main criticism of this extension was not that it was normatively flawed, but rather that it was "diluting one of the most important *quid pro quos* of humanitarian law." Corn, n XX above, 274, and references in note 81.

[79] See, Akande, n XX above, XX. See, in particular, ICJ, *Nicaragua*, and *Armed Activities*.

[80] It would be plausible to suggest that there may be further non-state armed groups which should be analogized to the three explicitly provided for here. Arguably, this would be the position most clearly compatible with a strong commitment with the respect and protection of fundamental human rights.

treating certain combatants much like we would treat *Culpable attacker*, whereas treat several others like in *Evil plan* (and still others very much like *Resident*). The British Prosecutor at Nuremberg, Sir Hartley Shawcross, captured this intuition, when he argued in his closing statement, that the "killing of combatants in war is justifiable, both in international and national law, only where the war is legal. But where the war is illegal … these murders are not to be distinguished from those of any other lawless robber band."[81]

Finally, several advocates of the principle of equality between combatants seem more committed to the view I advocate than they have acknowledged. For one, Michael Walzer's orthodox account posits that the crucial difference between a criminal and a soldiers is "that there are rules of war" that constrain the behavior of the latter.[82] Yet this difference –by definition- would not apply to unprivileged combatants as conceptualized under international law. By the same token, Benbaji argues that the equality between combatants is justified by conventions, if not by morality alone. Yet crucially, this equality depends on the "fairness" of the convention and "the mutual advantage which its acceptance secures".[83] Again this war convention would not apply to unprivileged combatants insofar the fairness argument only covers "decent" societies[84] whereas many manifestly unlawful belligerents fighting in contemporary asymmetrical conflicts seek to exploit these rules, undermining the proposition that the rules work for the mutual advantage of the parties involved.[85] Finally, Dill, an otherwise strict proponent of the moral equality between combatants, circumscribes her argument to IACs.[86]

Admittedly, the fit is not perfect. There is, at least, one important inconsistency between the international legal framework as hereby construed and the normative account I advocate. Namely, the criteria utilized to identify an unprivileged combatant in the laws regulating international armed conflicts overlook the fact that a combatant fighting manifestly in violation of the rules on the use of force (ie, *jus ad bellum*) should be considered to be acting impermissibly, and not only liable to being killed, but also liable to be punished for participating in this endeavor. Put differently, an individual fighting manifestly without just cause, but doing so in accordance with IHL rules, would not be considered unprivileged under international law. As a matter of law, she would not be treated like the aggressor in *Culpable attacker* but rather like a police officer in *Evil plan*. Yet, according to the account of defensive killing I advocate this would be morally wrong.[87]

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[81] *Proceedings of the Tribunal* (H.M. Sationary Office), Vol. 19, at 423, cited in Arthur Ripstein, In Bello Symmetry (typescript on file with author).
[82] Walzer, n XX above, at 127.
[83] Benbaji, "The War Convention and the Moral Division of Labour", 601.
[84] ibid.
[85] See the general introduction to this volume.
[86] On her position, see n XX above.
[87] Another possible inconsistency concerns the situation of a belligerent fighting with just cause but failiing to comply with the LOAC requirements for the privilege of combatancy. I will discuss the situation of this type of fighter in Chapter 4 below.

This suggests that my preferred normative account would require some amount of legal reform. That is, it would advocate restricting the principle of separation between *ad bellum* and *in bello* considerations in light of the manifest illegality of the armed conflict. Interestingly, certain influential international law scholars seem to defend a similar position in this type of asymmetrical conflict.[88] Nevertheless, I believe that even if legal reform would be normatively defensible (albeit not necessarily forthcoming) in this type of case, it is not such an urgent matter. In most contemporary circumstances, I would suggest, the formal operation of the principle of separation will most likely lead us to the morally appropriate response. The reason for this is simply that it will be extremely unlikely that a particular belligerent fighting a manifestly unlawful war from an *ad bellum* perspective will likely respect the majority of the *in bello* rules.[89]

Finally, the account I advocate seems also more attuned with the requirements of International Human Rights Law (IHRL) as applied during armed conflict. Although at some point it may have been commonly understood that the laws of war displaced the laws of peace, the majoritarian position today in international law is that IHRL continues to apply during armed conflict.[90] The case law of several tribunals confirms this claim.[91] Furthermore, as I indicated at the outset, article 6(1) of the ICCPR provides every individual with a right against being arbitrarily deprived of their life. It is often suggested in this context that "arbitrarily" should be defined by the standards in IHL, as *lex specialis*.[92] But this could also mean that IHRL would favour my proposed interpretation of IHL. That is, if under this interpretation IHL is more consistent with a convincing

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[88] See, notably, Eyal Benvenisti, "Rethinking the Divide Between *Jus ad Bellum* and *Jus in Bello* in Warfare Against Nonstate Actors," The Yale Journal of International Law Vol 34. (2009), at 541 and ff.

[89] Examples of this kind of belligerent abound. For exceptions to this type of argument, see the soviet military action in Hungary in 1956 may be a plausible example. See Charles Gati, *Failed Illusions. Moscow, Washington, Budapest, and the 1956 Hungarian Revolt* (Stanford University Press, 2006).

[90] See, eg, A. Roberts, "Transformative Military Occupation: Applying the Law of War and Human Rihgts" , in M. Schmitt and J. Pejic (eds), International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein (2007), at 438; Derek Jinks, "International Human Rights Law in Time of Armed Conflict" in Andrew Clapham and Paola Gaeta, *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2015), 656-674

[91] See, eg, ICJ, Advisory Opinion on Nuclear Weapons, at para 240, and Armed Activities, at 318-9. See General Commentary 35 of the UN Human Rights Committee, at para 64; see also ECtHRs, Markovic and Others v. Italy, Judgment, 14 December 2006; Isayeva and Others v Russia, Judgment, 24 February 2005; Özkan v Turkey, Judgment, 6 April 2004, Loizidou v. Turkey, Judgment, 18 December 1996, and see also Georgia v. Russia…. (CITE). And see IACtHR, Las Palmeras v. Colombia, Judgment (Preliminary Objections), 4 February 2000 (particularly the opinion of Judge Cançado Trindade); IACtHR, *Bámaca Velásquez v. Guatemala*, Judgment (Merits) 25 November 2000, and IACtHR, *Case of the Serrano Cruz Sisters v. El Salvador*, Judgment (Preliminary Objections), 23 November 2004 (hereinafter the *Serrano Cruz* case), among others. Finally, see Inter-American Commission on Human Rights, *Abella v. Argentina (Tablada)*, Case No. 11.137, Report No. 55/97, 18 November 1997, para. 178.

[92] See, eg, Marco Sassòli and Laura Olson, "The relationship between international humanitarian and international human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts," IRRC vol. 90 (871) (2008), at 613-4.

understanding of the basis and scope of the individual human right to life, then my interpretation certainly gains traction from this fact.[93]

6. Conclusion

In this chapter I have presented my preferred account of defensive rights. I have adopted the reductivist starting point of most contemporary revisionist arguments. In short, I find it theoretically unconvincing to merely assume that collective violence situations, such as war, are regulated by different moral principles than interpersonal situations. Yet, adopting this type of reductivist position need not commit me to considering every armed conflict situation as a clash between morally asymmetrical combatants, where one of them is fighting justly, or at least justifiedly, and the other lacks the right not to be killed. By contrast, I have admitted that this situation may in fact arise in some circumstances (as when one side is fighting a manifestly unlawful or unjust war), but that there may be situations in which neither belligerent is liable to be killed. In this type of context, the permissibility of killing enemy belligerents is determined largely by conflicts of *prima facie* rights. In this context, it may ultimately be that whereas it is permissible for members of belligerent A to kill members of belligerent B, while it is impermissible for members of belligerent B to fight back, there may be other situations in which each side fights the other permissibly.

I have defended this (bifurcated) framework against two potentially harmful objections. First, I have acknowledged that this starting point means rejecting that the permissibility of defensive killing rests exclusively, or necessarily on fact-relative considerations, as most moral philosophers maintain. I have argued that fact-relative considerations are neither sufficient nor necessary for permissible defensive killing. In fact, drawing on evidence-relative and belief-relative considerations as the main determinants of permissible defensive killing not only fits our intuitions, but also allows morality to serve a critical agent-guiding function in interpersonal defensive situations as well as in war. Second, I rejected the objection that acknowledging that certain combatants hold a right to life puts them on a par with civilians thereby undermining the principle of distinction. Finally, I have argued that this account of defensive rights is most compatible with the existing legal framework, once we acknowledge its bifurcated nature and its key nuances, both as a matter of the laws of armed conflict and as a matter of international human rights law.

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[93] One important difference in scope between defensive killing in times of peace and during armed conflict is that, in the latter scenario, soldiers are not required to give their enemies any warning or offer an opportunity to surrender; by contrast, we require this type of treatment in times of peace, in situations of law enforcement. See, eg, ECtHR, McCann v. United Kingdom, Application No. 18984/91, Judgment, 5 September 1995, Series A No. 324, paras. 200–205. Yet I suggest this difference can and should be accounted for on reductivist grounds, ie, by reference to the relevant individual rights of each person involved in a situation of armed conflict. It does not suffice to merely assume that different normative frameworks apply in each context. For an attempt to bridge these two realms, see Cécile Fabre, 'War, Police and Killing', in I. Loader, et al. (eds), *The Sage Handbook of Global Policing* (London: Sage, 2016). Much more work is needed on this thorny question, though it is way beyond the scope of this book.

Ultimately I suggest neither that the regulation of war should exactly mirror the regulation of interpersonal situations, nor that the laws of armed conflict should exactly mirror the moral rules or principles governing permissible conduct in war. Many types of adjustments may be required by going from one realm to the other. Yet the main proposition I have advocated is that they are based on the same underlying considerations. Furthermore, I would add that such underling consideration is respect for fundamental human rights (and to the right to life in particular). This means there is continuity between interpersonal and collective situations, and between morality and law as most revisionist claim, but also that we may be entitled to treat certain participants in armed conflict as moral and legal equals and as morally separate from civilians, as orthodox theorists argue. At the same time, this continuity allows for treating certain monstrous groups or combatants asymmetrically, as revisionist plausibly suggest, while at the same time allows us to resist an unpersuasive endorsement of radical pacifism. Admittedly, this sounds too good to be true. In the next four chapters I will try to put some flesh onto this bones to see whether this framework can accommodate the specific challenges of asymmetrical conflicts.