

Is Justice Relevant to the Law of War?*

George P. Fletcher⁺

I. INTRODUCTION

Intellectual work on the law of war suffers from chronic isolation. The commentators on the Rome Statute are international lawyers who pay no attention to the work either of theoretical criminal lawyers or of the philosophers.¹ The philosophers—Jeff McMahan² as an outstanding example—ignore the legal details that dominate the books of the international lawyers. Criminal lawyers have much to contribute to the discussion of international law, but they seem not to be interested. Writers with limited audiences, living in closed worlds, are unaware of what they have to learn from those with a different take on the field.

For a dramatic illustration of these differences in discourse, consider the way in which McMahan positions his new book, *The Morality and Law of War*,³ in the intellectual tradition. He thinks of his work as part of “just war theory”—a discipline that supposedly dates back to the Greeks, but found its finest expression in the Christian writers from Saint Augustine to Thomas Aquinas.⁴ After Michael

* This article first appeared in the *Israeli Law Review*, 40 ISR. L. REV. 684 (2007). All stylistic changes reflect the preferences of the editorial staff of the *Washburn Law Journal*.

+ Cardozo Professor of Jurisprudence, Columbia Law School. George P. Fletcher has published over 100 scholarly articles and eleven books. The latest is *Defending Humanity: When Force Is Used and Justified* (2008) (co-authored with Jens Ohlin). Other recent books include *The Grammar of Criminal Law: American, Comparative, and International* (2007) and *Our Secret Constitution: How Lincoln Redefined American Democracy* (2001), feted as the best book on law published that year. His earlier prize-winners include *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (1988), which received the ABA Silver Gavel Award and *Rethinking Criminal Law* (Oxford Univ. Press 2000) (1978), selected as one of the best books published on law in the late 1970s. Fletcher's work has been featured in special editions of the *Cardozo Law Review* (2007), the *Tulsa Law Review* (2004), and the *Notre Dame Law Review* (2003). In 2004 Fletcher was elected to the American Academy of Arts and Sciences. A new book on torts and a novel about academia is forthcoming.

1. See generally ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2d ed. 2008); ANTONIO CASSESE, INTERNATIONAL LAW (2005); OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE (2d ed. 2008).

2. Jeff McMahan (Ph.D. Cambridge University, M.A. Oxford University) is Professor of Philosophy at Rutgers University.

3. JEFF MCMAHAN, THE MORALITY AND LAW OF WAR: THE HOURANI LECTURES (forthcoming). McMahan recently published an article which provides a “brief summary of the main lines of [his] argument[s]” in his forthcoming work. See Jeff McMahan, *Précis: The Morality and Law of War*, 40 ISR. L. REV. 310, 310 (2007).

4. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS, at xx (3d ed. 2000).

Walzer revived the field with his book *Just and Unjust Wars*⁵ in 1977, a cottage industry grew up around the notion of “just war theory.” The writers are philosophers who seem to be unaware that the judges of the International Criminal Tribunal for the former Yugoslavia (ICTY) or the commentators on the International Criminal Court (ICC) would be wary of referring to “just war theory.” Even if the judges knew what this philosophical theory was, it would strike them as irrelevant to the legal analysis of *jus ad bellum*⁶ and *jus in bello*.⁷ Perhaps they would be right.

The thesis of this article is that while other principles of morality apply, such as reciprocity and the responsibility of commanders and soldiers for criminal acts, justice is not an appropriate consideration in the law of war. Justice does have a particular domain, but that domain does not intersect with the law of war.

II. THE PROBLEM OF DOUBLE EFFECT

Sometimes moral principles haunt the law without the day-to-day practitioners being aware of their source and influence. A good example is the principle of double effect—invented, so far as I know, by Aquinas to explain the structure of killing in self-defense.⁸ The basic idea, which I will explore in depth later, is that the defender should not intend to kill the aggressor but merely to avert the imminent and unlawful attack.⁹ If the aggressor is killed as a side-effect of self-defense—and the killing is not disproportionate to the gravity of the aggressor’s attack—the killing is justified and free from legal taint.¹⁰ The same idea underlies the principle of *distinction* in the international criminal law, namely that it is impermissible to target civilians intentionally, but civilians may be killed as the “collateral damage” of attacks against military targets.¹¹ The only restraint—rarely applied in practice—is that the loss of civilian life not be excessive or disproportionate to the military target.¹² In other words, commanders must *distinguish* between combatants and civilians and target only

5. See generally *id.*

6. *Jus ad bellum* is the law regarding the rights of states to go to war. See, e.g., GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL* VOL. 1, at 333 (2007).

7. *Jus in bello* is the law of war. See, e.g., *id.* at 333-34.

8. ST. THOMAS AQUINAS, *ON LAW, MORALITY, AND POLITICS*, 225-27 (William P. Baumgarth & Richard J. Regan eds. 1988).

9. See *id.*

10. See *id.*

11. See *INTERNATIONAL CRIMINAL LAW*, *supra* note 1, at 88-94; see also Rome Statute of the International Criminal Court art. 8(2)(b)(i)-(v), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

12. Rome Statute, *supra* note 11, art. 8(2)(b)(i)-(v).

military targets and combatants.¹³ The damage to civilians may not be intentional.¹⁴

Without the principle of double effect, it would be difficult to articulate or indeed make sense of the principle of distinction. The underlying moral principle is that you are tainted, first and foremost, by direct intentional contact with evil. If you intend directly to kill a human being, you are guilty of murder. If the death occurs as a side effect, it is not charged to your account in the same way. Only if these side effects are disproportionate to your good intention—averting the attack or attacking military targets—are you guilty of wrongdoing.¹⁵

The following chart demonstrates the way in which the components of self-defense and the principle of distinction correspond:

Intention	War	Self-Defense
Good intention	Attacking military targets	Warding off the attack
Bad intention	Killing civilians	Killing a human being

This set of distinctions is fundamental both to the criminal law and the law of war, and yet it is rarely discussed. The entire structure of the Geneva Conventions is based on twin ideas: (1) that there are protected persons such as prisoners of war, the sick, civilians, and other *hors de combat*,¹⁶ and (2) that it is unlawful to target protected persons intentionally, but that they may be killed as the proportionate side-effect of legitimate military activities.¹⁷ The relevant provision of the Rome Statute makes it a crime to “[i]ntentionally launch[] an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”¹⁸ This

13. *See id.*

14. *See id.*

15. *Cf. id.*; THOMAS AQUINAS, *supra* note 8.

16. *See* Geneva Convention [No. I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 3, 4, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention [No. III] Relative to the Treatment of Prisoners of War arts. 3, 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention [No. IV] Relative to the Protection of Civilian Persons in Time of War arts. 3, 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

17. *See* Geneva Convention [No. IV] Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention [No. III] Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

18. Rome Statute, *supra* note 11, art. 8(2)(b)(iv). The deleted portion of this provision stipulates an additional form of harm, namely “damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.” *Id.*

provision obviously bears the imprint of the Thomistic doctrine of “double effect,” but I have never seen the general principle mentioned or evaluated in a legal work on the law of war.¹⁹ The principle of distinction is accepted as a bedrock premise of the system. Its moral justification does not seem to require discussion.

Interestingly, criminal lawyers generally accept the principle of double effect in the law of self-defense, but reject it in the law of homicide. For example, the German Penal Code Article 32(2) defines legitimate self-defense as a “defense which is required to avert an imminent unlawful attack against oneself or another.”²⁰ The defender must have a direct intention to thwart the attack; if so, it is permissible to act with knowledge of a high probability that the action will result in the death of the aggressor. The death of the aggressor would be, so to speak, collateral damage because it was not the primary purpose of the defensive act.

In contrast, killing with an oblique intention—as the side effect of your real intention—is as bad as killing with a specific focus on the victim. For example, if Oswald aims at Kennedy and hits and kills Connally, who is standing right next to Kennedy, Oswald is guilty of the intentional killing of Connally. However, there are some situations when a so-called specific intent is required. To commit larceny, you need a specific intent to deprive the possessor of his property.²¹ Therefore, one must focus on the theft as the primary goal of one’s action. The common law approach to attempted crimes is similar. One must have the specific intent to kill. For example, if Oswald, aiming and shooting at Kennedy, misses Connally, he would not be guilty of attempted homicide against Connally. German law is a little broader in its analysis of the intention required for attempted crimes. Under the principle of *dolus eventualis*,²² German courts would probably convict Oswald in the latter scenario if Oswald “took into consideration” and “made his personal peace” with the death of Connally before he pulled the trigger.²³

The only group of scholars whom we should expect explicitly and consciously to be committed to the principle of double effect are the philosophers—the “just war” theorists.²⁴ After all, the principle comes

19. See *supra* notes 8-10 and accompanying text.

20. Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, § 32(2).

21. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 36-37 (Oxford Univ. Press 2000) (1978).

22. *Id.* at 445-49. *Dolus eventualis* is a “particular subjective posture” toward a given result. *Id.* at 445. There are multiple tests for this particular posture which include “being ‘indifferent to the result’ [or] ‘being reconciled’ with the result as a possible cost of attaining one’s goal.” *Id.* at 445-46 (footnotes omitted).

23. See *id.* at 445-49.

24. Walzer accepts and strengthens this principle. See WALZER, *supra* note 4, at 152-54 (discussing double effect).

out of their tradition. Aquinas is the key figure in the emergence of both just war theory and the doctrine of double effect. It comes as a major surprise, therefore, that McMahan rejects the principle under discussion and opines that “most of the eminent philosophers” have also rejected it.²⁵

What is important for him—and supposedly for his “eminent colleagues”—is avoiding “the killing of the innocent, whether their deaths are intended or not.”²⁶ Formulating the issue in this way brings into focus the conflict between consequentialists and subjectivists in approaching the law of war. For consequentialist just war theorists, all that matters is how many “good people” die as the cost of achieving “the good” of going to war. The good people are those who are innocent, normally those identified as civilians, prisoners of war, or *hors de combat*.²⁷ The “benefit” achieved by the war is presumably the realization or pursuit of the cause that justifies the use of violent force. This is simply another version of cost/benefit analysis. The cost is the death of innocent people. The benefit is the possibility of realizing a just cause. Whether the military action is justified or not depends on this cost/benefit calculus.

The subjectivist skews the scale toward the killing of more civilians by introducing the factor of the commander’s intention. If that intention is sound, namely that the primary purpose is to kill combatants or to pursue a military target, then the action is justified so long as the costs to civilians are not disproportionate or excessive.²⁸ Consider, for example, the blowing up of a bridge located near a school. If the focus of the action is to prevent enemy troops from advancing, the death of school children is acceptable, provided there are not “too many” of them. Of course, no one knows how many is too many, but the number is clearly more than if we were to apply a straight cost/benefit analysis. In the latter case, the question would be twofold: (1) what is the military value of blowing up the bridge; and (2) what is the societal cost of the loss of innocent children? If this is the choice, and if we value human life in warfare as much as we do in ordinary domestic legal disputes, it is hard to imagine how we could justify even the death of a single child.

Let us think a little more in depth about how one evaluates the costs and the benefits of blowing up the bridge. To be sure, the relevant factors are inconvenience to the enemy army and whether the net result will be to save civilian lives on “our” side. Notice, I have not referred to the lives of combatants on either side of the cost/benefit calculus. This

25. MCMAHAN, HOURANI LECTURES, *supra* note 3.

26. *Id.*

27. *See supra* note 16.

28. *Cf.* Rome Statute, *supra* note 11, art. 8(2)(b)(iv).

is a troubling issue. Suppose the commander argued, “Look, I am sorry that we have to kill the children, but it saves a lot of our troops who otherwise would have had to storm the enemy lines and expose themselves to deadly fire.” This sounds like a relevant factor, but there is something amiss here. Would it make sense to value “our” troops on one side of the equation and not the enemy combatants on the other side? Yet the whole point of the war is to destroy the enemy army, so how could the high cost to enemy troops weigh against the military action?

There are other aspects of McMahan’s argument that would lead him—much to my dismay—to overvalue enemy troops in our cost/benefit analysis of military action. It would depend, in principle, he would argue, on whether they represent the just side or the unjust side of the war.²⁹ If our commander represents the just side, then our troops count for more than do the enemy troops. If we are the unjust side, then the “just” enemy troops should count more than ours should. This way of looking at war—as though it was a sporting competition and we were neutral observers—reveals a fundamental moral blindness about the nature of the deadly activity at stake.

I should add that, for epistemic rather than principled reasons, McMahan deviates from his strict commitment to “just war theory” and approaches the principles ordinarily accepted in the law of war.³⁰ In the heat of battle, he claims, it is too hard to know which side is just. Therefore, he is willing, in the situation of incomplete knowledge, to assume the moral equivalence of civilians on both sides.³¹ But these epistemic considerations hardly justify treating combatants on both sides as morally equivalent. We favor our own men and women in uniform, not because their side is just or unjust, but simply because they are our soldiers and they are acting in the name of our country. This is not a question of justice. It is an expression of loyalty, the breach of which can generate both moral and criminal liability for treason.³²

The difficulties of cost/benefit analysis in the law of war should make us appreciate the doctrine of double effect, which would dispense, at first blush, with the need to evaluate the military target. So long as the commander’s intention was to strike enemy troops or a military target, his actions would be presumptively legitimate. Only if the collateral damage is excessive and the commander knows that it is

29. MCMAHAN, HOURANI LECTURES, *supra* note 3. This follows from the nature of “just war.” *Cf.* WALZER, *supra* note 4, at 229.

30. MCMAHAN, HOURANI LECTURES, *supra* note 3.

31. *See id.*

32. On the morality of loyalty, see generally GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* (1993). On loyalty and treason, see generally George P. Fletcher, *Ambivalence About Treason*, 82 N.C. L. REV. 1611 (2004).

excessive could there be an issue of his personal criminal liability.³³

Under the relevant provision of the Rome Statute, criminal liability presupposes knowledge that the military action will cause “incidental loss of life or injury to civilians” and that the cost is “excessive.”³⁴ Indirectly, the value of the military target becomes relevant because the notion of excessive harm depends, in the final analysis, on balancing the value of the target and the damage to civilian life.

I think it would be fair to say that, under this standard, if there were some plausible military advantage in taking out the bridge, the “incidental” death of at least some children would be acceptable. The killing of children would not be acceptable, however, under a straightforward balancing scheme that places no added value on the lives and other interests of our own troops.

In the final analysis, without the doctrine of double effect, the use of deadly force in military campaigns would have to be ruled out any time it imposed a substantial danger to innocent lives. Perhaps that is the right result, but it is not a result we can live with in a world in which wars are sometimes considered legitimate.

III. JUSTIFYING THE CONVENTIONS OF WAR

The Conventions of War consist of a large number of rules that make sense largely within the ambit of armed conflict. The architectonic distinction is between *jus ad bellum* and *jus in bello*.³⁵ The former governs the right to go to war, and the latter regulates the conduct of war. Neither has influence on the other. The implication of this rigid classification is that if state A wrongfully attacks state B, the soldiers of state B must conform to *jus in bello* exactly as do the soldiers of state A. That is, the status of defending against an unjust aggressor does not change the rules of the game. If the use of poison is prohibited under *jus in bello*, it remains prohibited to both sides, regardless of who started the war.³⁶ Indeed, it could not be any other way. Even if the just side could derogate from the rules of *jus in bello*, we would have a problem determining how much they could derogate. Could they use a lot of poison or just a little? Just when they were in dire straits? Or all the time? It is obvious that no tenable law of war could make these kinds of distinctions. Perhaps the reasons are partly epistemic—that is,

33. See *supra* notes 8-10 and accompanying text; see also Rome Statute, *supra* note 11, art. 8(2)(b)(iv).

34. Rome Statute, *supra* note 11, art. 8(2)(b)(iv).

35. See *supra* text accompanying notes 6-7.

36. Cf., e.g., Hague Convention [No. II] with Respect to the Laws and Customs of War on Land art. 23, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 (stating it is prohibited “[t]o employ poison or poisoned arms”); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. 65, No. 2318. This follows from the nature of *jus in bello*. See, e.g., FLETCHER, *supra* note 6, at 333-34.

it is too hard to decide for sure whose cause is just, and if so, how great the deviations from equal application of the law should be.

The structural independence of *jus in bello* from *jus ad bellum* resembles the postulate that distributive justice should not influence corrective justice. The rich are entitled to the same treatment in particular cases as are the poor. The general point is that prior history does not control the analysis of the present transaction—in the theory of justice or in the theory of warfare.

The consequence of war conventions is that soldiers fight and civilians remain on the sidelines. Both sets of participants are equal but in different ways. Friendly and enemy combatants are equal in the sense that the lives of neither are protected under the law of war against conventional methods of killing.³⁷ Civilians on both sides are equal in the sense they are protected,³⁸ although they remain subject to considerable harm under the principle of double effect.³⁹ Thus, the law of war consists of a rigid system of classifications that are designed to keep the war between armed professionals. Of course, it does not work out this way in practice because modern military campaigns inevitably endanger the lives of large numbers of civilians.

Philosophers like McMahan have undertaken to question whether any of this killing in warfare is morally justified or whether it can be said to be an act of justice. The usual method of argument is to begin with justificatory techniques in domestic law and then try to extrapolate the same principles to group conflict expressed in the clash of opposing armies.⁴⁰ There are three possible lines of argument. Let us follow these lines of argument, systematically, with regard to the possible claims of justification available in domestic criminal law: first, that the conflict was between parties who consented; second, that the conflict arose out of necessity or that it was the lesser of evils; and third, that the conflict arose when at least one party acted in self-defense.

A. Consent

There might be some rare instances in which wars take place between consenting adults. In this case, one might argue that war is like a duel writ large. Willing participants enter the battlefield; some kill each other and some survive. They fight by the rules of the game.

37. See *supra* note 16.

38. See Geneva Convention [No. IV] Relative to the Protection of Civilian Persons in Time of War arts. 3, 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

39. See discussion of double effect *supra* Part II.

40. See McMahan, *Précis*, *supra* note 3, at 316 (“I believe that the morality of action in war is continuous with the morality of individual action outside the context of war, and in particular that killing in war has to be justified by reference to the same moral principles that govern individual acts of killing outside the context of war, especially the principles governing killing in self- or other-defense.”).

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Society has done a better job outlawing duels than it has controlling the impulse to go to war. I am not sure why. Perhaps the reason is that duels exist between citizens of the same polity; their government has an interest in avoiding unnecessary killings. Polities fight wars against aliens whose lives never seem to be equal to our own. There is no neutral polity with the prestige and power necessary to insist upon international litigation to settle disputes in place of a resort to arms.

B. Necessity or Lesser Evils

Modern legal systems generally accept the principle that to avoid an imminent risk of harm, it is permissible to violate criminal prohibitions. The necessary condition is that the expected benefit of the violation exceeds its expected costs. This is called necessity as a justification or lesser evils.⁴¹ There is great reluctance to recognize this principle in cases of homicide. However, assuming the principle applies to causing death, it would be permissible to kill one person to save two. Therefore, it might be possible that fighting wars ultimately saves lives. This is a little hard to believe because as litigation replaced dueling, international arbitration could settle international conflicts without the loss of life.

Yet, the argument of saving lives might work in the case of specific attacks in the course of a war. For example, the argument for using the atomic bomb in Hiroshima is that it ended the war without an invasion of the mainland—a campaign that would have cost many more lives. Again, the problem in wartime is deciding the appropriate weight to be assigned to various groups of persons. In the Hiroshima case, there are four relevant groups: (1) American soldiers; (2) American civilians; (3) Japanese soldiers; and (4) Japanese civilians. The gross calculus of saving lives should pay attention to which of these groups would be affected by dropping the bomb instead of invading the mainland.

41. MODEL PENAL CODE § 3.02 (1962); FLETCHER, *supra* note 21, at 818-19. Necessity is also an excuse. *See id.*

Suppose the casualties are as follows:

1. American civilians		
	Bomb	0
	Invasion	0
2. American soldiers		
	Bomb	0
	Invasion	40,000
3. Japanese civilians		
	Bomb	74,000
	Invasion	5,000
4. Japanese soldiers		
	Bomb	1,000
	Invasion	30,000

Based on these figures, the bomb and the invasion each result in a total cost of 75,000 lives. This, however, would not be the right calculation under the law of war. Damage to civilians should be minimized as a matter of principle, which makes the invasion the correct option. Nevertheless, if President Roosevelt's adviser reported these figures, the President would note that the cost of the bomb to Americans would be zero, while the cost of the invasion would be 40,000 American lives. There is little doubt that the President would discount the foreign lives, whether civilian or combatant, and overvalue the lives of Americans. I am not sure that this would be morally wrong. After all, the president is commander-in-chief of the United States military forces; his primary duty is to protect American lives.

Using the principle of lesser evils requires a neutral point of view on the conflicting interests at stake. In a case of armed conflict, neither side is neutral. It would be absurd to expect them to be. Yet it is hard to avoid the application of lesser evils in the law governing the use of force. Most commentators accept the legitimacy of humanitarian intervention.⁴² What was the justification for America sending troops into Somalia or NATO's bombing of Bosnia? The argument had to be that the benefits exceeded the cost. The intervention saved lives, preserved stability, and contributed to the welfare of the affected countries. However, that argument is a bit problematic under the United Nations Charter Article 51, which recognizes self-defense as the only legitimate ground for using military force.⁴³ Whatever the legal

42. See GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* 129-54 (2008).

43. U.N. Charter art. 51; see FLETCHER & OHLIN, *supra* note 42, at 129-54. (offering what I believe is the first serious argument about reconciling humanitarian intervention with the United Nations Charter).

documents may say, international lawyers instinctively accept the principle of lesser evils.

The question remains, however, whether the principle of lesser evils can justify killing in warfare. In the end, the following considerations count against it. First, for good reason, domestic legal systems balk at justifying homicide by appealing to lesser evils. To justify killing in this way is to use the victim as a means to an end, thus violating our duty to respect all persons as ends in themselves. Second, even if homicide were justifiable, there would be no neutral way in cases of armed conflict to decide the relative weight of lives in the embattled nations. Third, if there were a neutral point of view about conflicting nations, there is still a supervening principle in the case of armed conflict that requires that soldiers be sacrificed before civilians.

C. Self-Defense

In light of the difficulties that arise in the appeal to consent and lesser evils, it is not surprising that self-defense is the most popular principle of domestic law invoked to justify international armed conflict. As noted, the U.N. Charter recognized the “inherent right” of all member states to “individual or collective self-defense if an armed attack occurs.”⁴⁴ McMahan also appeals to the analogy between cases of self-defense between individuals and self-defense as a rationale for killing in international armed conflict.⁴⁵ Although I have written at length about this analogy,⁴⁶ I wish to argue here that the analogy has serious limitations and that even if it holds, defensive wars cannot be understood as instances of justice or cases of “just war.”

In order to be clear about the analogy, it is helpful to review some basic features of self-defense, considered either as a moral or a legal doctrine. For starters, self-defense is a justification and not an excuse.⁴⁷ There is a long history on this issue, which is not worth repeating here.⁴⁸ The implication of the justification is twofold. First, the defender is acquitted and there is no residual civil liability, though the difference in the burden of proof might permit civil liability after an acquittal.⁴⁹ Second, if the defender is justified, the other side cannot respond with the justifiable use of force.

Both of these principles are accepted in international law as

44. U.N. Charter art. 51.

45. See McMahan, *Précis*, *supra* note 3, at 316.

46. See generally FLETCHER & OHLIN, *supra* note 42, at 129-54.

47. For my first and probably most influential article in this area, see generally George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 *ISR. L. REV.* 367 (1973).

48. See generally *id.*

49. See George P. Fletcher, *Justice for All, Twice*, *N.Y. TIMES*, Apr. 24, 1996, at A21 (discussing the trials of Bernhard Goetz).

applied to states and as applied to individuals under the Rome Statute. Specifically, Article 31(1)(c) seems to recognize self-defense as a justification for committing war crimes.⁵⁰ This point is subject to some doubt, however, because the language of the Rome Statute does not recognize the distinction between justification and excuse, and Article 31(1) itself includes a *mélange* of considerations called “grounds for excluding criminal responsibility.”⁵¹

In analyzing the justification of self-defense, there are always two sides to consider: (1) the criteria bearing on the attack; and (2) the criteria justifying the defensive use of force. Consider the relevant issues, one by one.

1. The Attack

In order to use the self-defense justification, the attack must be overt, imminent, and unlawful. Each of these criteria is analyzed below.

a. The Attack Must Be Overt

As the U.N. Charter stipulates, “if an armed attack occurs,” the member states may exercise their inherent right of self-defense.⁵² It is not enough that the defender believe that an armed attack is underway.⁵³ It must actually be underway. It is not entirely clear why this is so. I think the best reason is that justification for the use of force must be visible to the international community as a whole. It should not be enough for the defending nation to claim that it “believes” the other side has weapons of mass destruction, as the United States claimed about Iraq, and that it was about to use them, which the U.S did not claim.⁵⁴ The claim of “belief” is too easy to manufacture. As a matter of principle, there should be hard evidence, visible to all.

b. The Attack Must Be Imminent

The attack must threaten immediate harm and the defense must follow hard on the threat. A good example is Israel’s response to the threat of Arab invasion in June 1967. In contrast, there is something odd about the relationship between the United States congressional authorization to use force against Iraq in October 2002 and the President’s decision to take action in March 2003.⁵⁵ Congress

50. Rome Statute, *supra* note 11, art. 31(1)(c).

51. *Id.* art. 31(1).

52. U.N. Charter art. 51.

53. *But see* MODEL PENAL CODE § 3.04 (1962). A reading of the Model Penal Code § 3.04 suggests it is enough that the defender believe that the attack is occurring. *See id.*

54. S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

55. Authorization for the Use of Military Force Against Iraq, H.R.J. Res. 114, 107th Cong., 116

authorized the use of force, in part, to “defend the national security of the United States against the continuing threat posed by Iraq.”⁵⁶ The threat could not have been so serious if the U.S could wait another five months before acting.

c. The Attack Must Be Unlawful

All domestic legal systems assume that the attack must be unlawful. This is the reason that in any particular domestic conflict only one side can be justified. Simultaneous cases of reciprocal aggression are logically possible, but very unlikely. Typically, one side attacks first. The first aggressor acts unlawfully and the defender’s response is justified.

The same is assumed to be true of international conflict. Even if we leave aside the issue of collective self-defense under treaties of mutual assistance, one country could attack in the south and the other in the north. They would both be aggressors. In this situation, the application of the “unlawful attack” criterion would be inappropriate.

For good or for ill, Article 51 does not mention the requirement of unlawful attack.⁵⁷ Any attack will trigger the inherent right of self-defense. This is a problematic feature of the U.N. Charter, but perhaps it conforms properly to the law of war. Under the principles of *jus ad bellum*, the question of who attacked first has some relevance, but once the war is launched and the principles of *jus in bello* come into play, it does not matter whether the original attack was lawful or not. The analogy to the domestic law of self-defense breaks down at this point.

When the “state of war” applies, it confounds the attempt to use the model of self-defense as a guide to legitimate action in warfare. For example, Israel defends its attack on Iraq’s Osirak reactor in 1980 on the ground that there was an ongoing state of war between the countries.⁵⁸ Therefore, there was arguably no Israeli aggression against Iraq, just another battle in the ongoing war. A version of this argument is offered on behalf of the American invasion of Iraq in 2002, namely, the ongoing state of war initiated in the First Gulf War.⁵⁹ These claims do not seem very plausible, but at the other extreme one might argue that every battle should be considered on its own terms. In analyzing the battle of Gettysburg, for example, it arguably does not matter what happened in

Stat. 1498, 1501 (2002).

56. *Id.*

57. U.N. Charter art. 51.

58. See Anthony D’Amato, *Israel’s Air Strike Against the Osirak Reactor: A Retrospective*, 10 TEMP. INT’L & COMP. L.J. 259, 259-64 (1996); see also The Osirak Attack: Israeli Statement of 8 June 1981, <http://www.iilj.org/courses/documents/TheOsirakAttack.pdf> (last visited Jan. 17, 2009); S.C. Res. 487, U.N. Doc. S/RES/487 (June 19, 1981).

59. See Authorization for the Use of Military Force Against Iraq, Joint Resolution of Congress, H.R.J. Res. 114, 107th Cong., 116 Stat. 1498, 1498-99 (2002).

Charleston Harbor two years before. Yet this standpoint is also controversial. Battles within wars do not raise issues of *jus ad bellum*; that is, if the battle occurs within an ongoing war, either side may attack the other without breaching the laws of war.

2. The Defense

In order to use the self-defense justification, the defensive use of force must be analyzed according to whether the defense is an intentional or knowing response to an attack, whether the defense is necessary, and whether it is proportionate to the provoking attack.

a. The Defense Must Be an Intentional or Knowing Response to the Attack

The requirement that the defense be an intentional or knowing response to the attack is controverted in the theory of criminal law. Paul Robinson made his career by arguing for “objective” self-defense, based on the theory that if the defender happens to use force against an aggressor, there is no relevant social harm.⁶⁰ In fact, most legal systems require that the defensive force be knowingly responsive to the attack.

Some people subscribe to Robinson’s theory in international conflict, as exemplified in the search for weapons of mass destruction after the invasion of Iraq. Many people believed that finding the weapons, regardless of whether the invading forces knew they existed before the attack, could justify the invasion retrospectively. The better view, and one in line with the requirement of public evidence of the attack, would be that only a knowing response could qualify as a defensive war under the United Nations Charter.

b. The Defense Must Be Necessary

The paradigm case of necessity is a person’s use of judo to block a kick or a punch. To say that the judo throw is necessary is actually to make three interrelated claims: (1) the defensive means are preventing the realization of the attack; (2) the defensive means will succeed; and (3) the defensive means appear to be the least costly method or at least one of less costly methods of preventing the attack.

All three of these factors become problematic in the law of war. First, in the days in which the infantry began the war by marching across the enemy’s border, the foreign army could stop them with physical force that would resemble the judo throw. However, that kind of war

60. See generally Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266 (1975); see also George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293 (1975).

has not occurred in centuries. Wars begin today with the shelling of enemy targets. They result in death even before there is a chance for a defensive response. In what sense, then, is the response necessary?

The response cannot prevent the first attack. The most it can do is prevent a second attack, but the second attack—say, after Pearl Harbor—may be very remote in time. If remote, the second attack hardly qualifies as an imminent attack. Even if this were not a problem, the mentality of warfare permits actions that are in fact tit for tat, not necessarily defensive in nature. The way to explain this, perhaps, is that after the first attack, the “state of war” applies and the criteria of self-defense become irrelevant.

Second, the relevance of possible success is a hotly debated issue in the law of war. The strategy of reciprocal nuclear deterrence would not keep the peace unless both sides were willing, in effect, to engage in pointless retaliation. This makes very little sense as self-defense.

Finally, the requirement of necessity implies that the means chosen are the least costly alternative. For this factor to make sense after the first attack is completed, it would have to be adapted to the purposes of warfare. When war is declared, the purpose is to defeat the enemy, and arguably, the victorious army should use the least costly means of accomplishing that objective. However, by delving into the details of “least costly” alternatives, problems arise in considering the cost/benefit analysis, as demonstrated above in the Hiroshima example.⁶¹

c. The Defense Must Be Proportionate

This factor is readily misunderstood in both domestic and international law. In domestic law, the requirement of proportionality implies that there are some attacks that one must suffer, rather than respond in a way that is too costly to the aggressor. For example, if a thief is running away with my laptop computer, including all of my files, without backup, it might be necessary to shoot him to protect my interests. But shooting to kill would arguably be disproportionate to the attack. Whether proportionality should ever be considered as a limitation of self-defense is hotly contested in domestic law, particularly in the German legal system.⁶²

In international law, the problem arises in various ways. If the issue is submission to foreign conquest, there is arguably no restraint of proportionality. This is the problem that Walzer and others call “dire” or “supreme emergency.”⁶³ But this is a matter on which reasonable people disagree. Whether it is better to be red than dead, most states in

61. See discussion *supra* Part III.B.

62. Fletcher, *supra* note 47, at 381-87.

63. WALZER, *supra* note 4, at 251-68.

the contemporary legal order would use any means at their disposal to prevent conquest and occupation by foreign powers.

Yet, assume the issue is not ultimate victory or defeat but rather the response to the first attack. A good example is Israel's response to Hezbollah's shelling in the Second Lebanese War. In the summer of 2006, some accused Israel of engaging in a disproportionate response by bombing various military targets in Northern Lebanon.⁶⁴ The better question would have been whether the bombing was necessary, and if so, for what military objective.

Much confusion arises because the requirements of necessity and proportionality are used interchangeably. The unfortunate consequence of this confusion is that there seems to be something like an anti-escalation requirement in local wars. A certain amount of shooting and killing is permissible, but only so long as it conforms roughly to the level set by the other side. This notion of proportionality has its origin not in the model of self-defense but in the theory of punishment and the requirements of "just desert." The enemy should not face more of a counter-threat than it "deserves" based on its aggressive actions.

IV. CONCLUSION: THE RATIONALE OF WAR AND THE PROBLEM OF JUSTICE

The question of desert gives rise to the task of assessing "just war theory" in general, namely to justify killing in warfare as a matter of justice. The invocation of justice in this context is wrong, largely because the argument misconceives the nature of self-defense as a justification for going to war.

The classic position in "just war theory" is that a war may be fought to rectify a wrong. Rectifying a wrong is a well-known form of justice—corrective justice. If the purpose is to punish a wrongdoer, then one might say that it is an application of retributive justice. The desire to link justice with warfare and reliance on the model of self-defense leads to statements typical of the principles articulated in "just war theory," such as: "A just war can only be fought to redress a wrong suffered. For example, self-defense against an armed attack is always considered to be a just cause."⁶⁵

64. See AMNESTY INTERNATIONAL, ISRAEL/LEBANON UNDER FIRE: HIZBULLAH'S ATTACKS ON NORTHERN ISRAEL 8 (2006), <http://www.amnesty.org/en/library/asset/MDE02/025/2006/en/dom-MDE020252006en.pdf>; AMNESTY INTERNATIONAL, ISRAEL/LEBANON: DELIBERATE DESTRUCTION OR "COLLATERAL DAMAGE"? ISRAELI ATTACKS ON CIVILIAN INFRASTRUCTURE 3-6 (2006), <http://www.amnesty.org/en/library/asset/MDE18/007/2006/en/dom-MDE180072006en.pdf>; see also Kevin Sullivan, *Rights Group Accuses Hezbollah of 'Indiscriminate' Killing*, WASH. POST, Sept. 15, 2006, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/14/AR2006091401542.html>.

65. Principles of the Just War, <http://www.mtholyoke.edu/acad/intrel/pol116/justwar.htm> (last visited Jan. 21, 2009).

Yet, as argued in the preceding analysis of the six factors bearing on self-defense, the purpose of self-defense in domestic law is neither to rectify a wrong nor to punish the aggressor. Its purpose is exclusively to resist the attack. That is the reason why the factor of time becomes so important. If the defensive force is too early or too late it cannot satisfy the requirement of a necessary response to an imminent attack.

The proof that self-defense is not a form of corrective justice is that a successful act of defense has no bearing whatsoever on the deserved punishment of the aggressor. Some philosophers have claimed to the contrary, largely because they have insisted on the confusion of self-defense and punishment. Robert Nozick once claimed, for example, that if the defender successfully resists the aggressor, the act of resistance should be considered something like a “down payment” on the deserved punishment.⁶⁶ But this represents a deep misunderstanding of self-defense. The defender does not act in place of a court imposing punishment. The criteria of proportionality is different. In self-defense, proportionality is a limiting criterion for the use of necessary force. In cases of punishment, the sanction should fit the crime and in this sense be proportional. Just desert has no bearing on self-defense, as evidenced by the general recognition of self-defense against excused aggressors who should not be punished at law for their acts.

The fundamental and recurrent mistake of “just war theory” is to assume that wars can rectify wrongs or punish wrongdoers. This is a necessary assumption in the structure of the theory in order to provide a nexus for the criteria of corrective and retributive justice. This is a terrible misconception and an unfortunate invitation to the reckless use of arms, such as the invitation of Iraq to punish Sadaam Hussein for having conquered Kuwait some years before. At a philosophical level, the definitive rebuff to this conception of war was delivered in 1797 by Immanuel Kant in his great work on legal theory.⁶⁷ Kant states, “No war of independent states against each other can be a *punitive war* (*bellum punitivum*). For punishment occurs only in the relation of a superior (*imperantis*) to those subject to him (*subditum*), and states do not stand in that relation to each other.”⁶⁸

Kant is absolutely right on the nature of punishment, as the leading theorists of punishment now recognize.⁶⁹ The starting point for thinking

66. See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 364 (1981). For a response to this claim, see FLETCHER, *supra* note 6, at 239-40.

67. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 153 (Mary Gregor trans., Cambridge Univ. Press 1993) (1797).

68. *Id.*

69. See, e.g., H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 4-5 (2d ed. 2008) (recognizing the necessity of having authority in order to punish).

about international law is the equality of all states. They are not created equal but they are constituted equal by the legal system. If that is true, then no state can impose punishment or any other instrument of justice on another state. Justice requires a neutral hierarchically superior judge.

“Just war theory” derives from an earlier time; one more influenced by the notion that some states are on the side of God and others are not. There may be justice in the wars by the Hebrews in the Old Testament, and there may be justice in the wars fought by the Catholic Church to spread their religion. However, to reveal the debt of “just war theory” to this outdated vision of international order is enough to refute it.