

## Civil War and Revolution<sup>1</sup>

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*Abstract:* The vast majority of work on the ethics of war focuses on traditional wars between states. In this chapter, I aim to show that this is an oversight worth rectifying. My strategy will be largely comparative, assessing whether certain claims often defended in discussions of interstate wars stand up in the context of civil conflicts, and whether there are principled moral differences between the two types of case. Firstly, I argue that thinking about intrastate wars can help us make progress on important theoretical debates in recent just war theory. Secondly, I consider whether certain kinds of civil wars are subject to a more demanding standard of just cause, compared to interstate wars of national-defence. Finally, I assess the extent to which having popular support is an independent requirement of permissible war, and whether this renders insurgencies harder to justify than wars fought by functioning states.

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### 1. Introduction

It is often claimed that war just isn't like it used to be.<sup>2</sup> Most strikingly, the majority of armed conflicts now occur *within* the borders of states, rather than *across* international borders (or combine the two). According to one study, of the 118 armed conflicts that have occurred between 1989 and 2004, only 7 were interstate wars.<sup>3</sup> More anecdotally, at the time of writing a horrific civil war has raged in Syria for over three years, Ukraine teeters on the brink of descending into internecine conflict, and the fledgling Iraqi state is facing violent opposition from powerful sub-state actors. In short, intrastate conflict is now very much the norm rather than the exception.

Interestingly, given these facts, there have been remarkably few sustained treatments of civil war within the recent resurgence in interest in the ethics of

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<sup>2</sup> For an influential example, see Mary Kaldor, *New and Old Wars: Organised Violence in a Global Era*, 2<sup>nd</sup> Edition, (Cambridge: Polity Press, 2007)

<sup>3</sup> Lotta Harbom and Peter Wallensteen, 'Armed Conflict and its International Dimensions', *Journal of Peace Research* 42, No.5 (2005), 623-635.

war.<sup>4</sup> Most discussions remained focused on traditional wars between states.<sup>5</sup> In this chapter, I aim to show that this is an oversight worth rectifying. My strategy will be largely comparative, assessing whether certain claims often defended in discussions of interstate wars stand up in the context of civil conflicts, and whether there are principled moral differences between the two types of case. In Section 2, I argue that thinking about intrastate wars can help us make progress on an important theoretical debate in recent just war theory. In Section 3, I consider whether certain kinds of civil wars are subject to a more demanding standard of just cause, compared to interstate wars of national-defence. Finally, in Section 4, I assess the extent to which having popular support is an independent requirement of permissible war, and whether this renders insurgencies harder to justify than wars fought by functioning states.

In order to provide a frame for our inquiry, I will, following Cecile Fabre, understand civil wars to be armed conflicts that: are fought between sub-state groups and their own government, or among non-state factions within a community; are fought over political goals; involve a level of violence that passes a threshold of severity; in which each belligerent party has the ability to impose significant casualties on the other.<sup>6</sup>

## **2. The Theoretical Significance of Non-Traditional Conflicts**

While the majority of my discussion will concern the substantive permissibility of resorting to civil war, I begin by discussing how the issue of intrastate war bears upon a central debate in contemporary just war theory at a more theoretical level.<sup>7</sup>

### *2.1 Two Approaches to the Morality of War*

A key fault line within current discussions concerns how we should understand the relationship between the moral principles that govern warfare and those that

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<sup>4</sup> As William V. O'Brien observed over thirty years ago, "Logically, there should be an elaborate *jus ad bellum* and *jus in bello* for revolutionary war, but development of such a doctrine has never been seriously attempted." William V. O'Brien, *The Conduct of Just and Limited War* (New York: Praeger, 1981), p.23.

<sup>5</sup> Though the tide does seem to be turning. See, Ned Dobos, *Insurrection and Intervention: The Two Faces of Sovereignty* (Cambridge: Cambridge University Press, 2012); Cecile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012), Ch.4; Christopher Finlay, 'Legitimacy and Non-State Political Violence', *Journal of Political Philosophy*, 18, No.3 (2010), 287-312; Allen Buchanan, 'The Ethics of Revolution and Its Implications for the Ethics of Intervention', *Philosophy and Public Affairs* 41, No.4 (2013), 292-323; Mattias Iser, 'Beyond the Paradigm of Self-Defense? On Revolutionary Violence', in Saba Bazargan and Sam Rickless (eds), *The Ethics of War* (Oxford: Oxford University Press, forthcoming). In addition, two monographs on this topic are forthcoming: Christopher Finlay, *Terrorism and the Right to Resist: A Theory of Just Revolutionary War* (Cambridge: Cambridge University Press); Michael Gross, *The Ethics of Insurgency: A Critical Guide to Just Guerrilla Warfare* (Cambridge: Cambridge University Press).

<sup>6</sup> Fabre, *Cosmopolitan War*, p.135.

<sup>7</sup> The following section draws on Jonathan Parry, 'Just War Theory, Legitimate Authority, and Irregular Belligerency', *Philosophia* (forthcoming).

apply to 'ordinary' acts of violence carried out in non-military contexts. Positions on this question can be divided into two broad camps.

A *reductivist* approach treats warfare as morally continuous with all other activities, its permissibility determined solely by familiar justifications for killing and injuring that we accept in all other circumstances.<sup>8</sup> On this view, for any act of justified killing in war, there are justified killings outside of war that are justified on precisely the same grounds. In terms of identifying these grounds, reductivists standardly hold that intentional killing in war is primarily justified in terms of individuals' rights of self- and other-defence, with collateral killing justified by considerations of lesser-evil. Justified war is simply an aggregation of violent acts, each of which is justified in one of these two ways.

In opposition, *exceptionalist* approaches deny that the morality of war is exhausted by ordinary interpersonal morality. In conditions of war, the standard moral principles governing harming are either replaced or (more plausibly) supplemented by additional moral considerations. On this view, for at least some acts of justified killing in war, there are no justified killings outside of war that are justified on the same grounds. An exceptionalist view is often motivated by arguing that there are classes of killing in war that are intuitively permissible or impermissible, but which cannot be justified or prohibited solely by appealing to individuals' defensive rights or to standard lesser-evil justifications.<sup>9</sup> If these judgements are to be vindicated, we must identify additional moral properties in war capable of generating additional permissions to kill, or restrictions on killing, beyond those identified by reductivists. What differentiates exceptionalists is the particular properties that they identify as playing this role. Here I outline four prominent versions, which need not be exclusive.<sup>10</sup>

## 2.2 Varieties of Exceptionalism

One important strand of exceptionalism locates the relevant properties in features of the belligerent groups participating in an armed conflict. On a *collectivist* version of this view, reductivism is incomplete because it ignores the fact that war is something that individuals do *together* as co-members in morally important kinds of association. More specifically, the claim is that the relationships between co-members in certain kinds of group are capable of altering the moral status of acts of violence carried out by members.<sup>11</sup> On one interpretation of this view, these relationships generate additional moral

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<sup>8</sup> For book length reductivist treatments of war, see Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009); Fabre, *Cosmopolitan War*; Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014).

<sup>9</sup> For both sides of the objection, see Seth Lazar, 'The Responsibility Dilemma for Killing in War: A Review Essay', *Philosophy and Public Affairs* 38, No.2 (2010), 180-213.

<sup>10</sup> For a more detailed discussion, see Seth Lazar's chapter in this handbook.

<sup>11</sup> See, for example, Christopher Kutz, 'The Difference Uniforms Make: Collective Violence in Criminal Law and War', *Philosophy and Public Affairs* 33, No.2 (2005), 148-180; George Fletcher, *Romantics at War: Glory and Guilt in the Age of Terrorism*, (Princeton: Princeton University Press, 2002).

reasons for or against killing in war, which defeat whatever reasons would otherwise determine their permissibility. On another, the relevant deontic alterations follow from the different ways in which participants in collective actions bear responsibility for their actions, compared to private actors.

A different version of group-based exceptionalism focuses on the idea that the leaders or governing institutions of certain organisations possess legitimate authority over their members. This authority consists in the moral power to issue commands and, by doing so, place the subjects of those commands under obligations to act as directed.<sup>12</sup> *Authority-based* exceptionalism holds that, under certain conditions, individuals may be all-things-considered required to obey commands to cause (or refrain from causing) harm in war. Importantly, this may include cases where harming would be impermissible (or permissible) on the basis of the command-independent reasons.<sup>13</sup> Authoritative commands may thus provide an independent source of permissions and constraints.

An alternative strand of exceptionalism emphasises the fact that warfare is a highly structured and convention-bound practice. The central claim is that the existence of conventional norms makes an important difference to the moral permissibility of killing in war, compared to killing in the absence of these conventions. This view is most at home within a broader contractualist moral theory, according to which the moral status of (at least some) actions are (at least partly) the product of agreement, either actual or idealised, among a relevant class of contractors. For *contractualist* exceptionalists the moral permissibility of certain actions in war is determined by whether a norm permitting or prohibiting those actions would be accepted as binding by belligerents. For example, on Yitzhak Benbaji's development of this view, a class of killing in war is morally permissible if it is sanctioned by a convention that is (i) mutually advantageous to opposing parties, (ii) fair, and (iii) accepted (at least tacitly) by participants.<sup>14</sup> This may include killings that would be prohibited by pre-contractual moral principles.

A different convention-based view does not ground exceptional norms in the transformative power of agreement, but instead in the moral importance of the outcomes promoted by conventions containing those norms, such as reducing

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<sup>12</sup> For useful introductions, see Joseph Raz, 'Introduction' in Joseph Raz (ed), *Authority* (Oxford: Oxford University Press, 1990), 1-19; Scott Shapiro, 'Authority' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002), 382-439.

<sup>13</sup> For discussion, see David Estlund 'On Following Orders in an Unjust War', *Journal of Political Philosophy* 15, No.2 (2007), 213-234; Jonathan Parry 'Authority and Harm' (unpublished ms); Massimo Renzo, 'Democratic Authority and the Duty to Fight in Unjust Wars', *Analysis* 73, No.4, (2013), 668-676; Massimo Renzo, 'Duties of Citizenship and Just War' (unpublished ms); Cheyney Ryan, 'Democratic Duty and the Moral Dilemmas of Soldiers', *Ethics* 122, No.1 (2011), 10-42.

<sup>14</sup> Yitzhak Benbaji, 'The Moral Power of Soldiers to Undertake the Duty of Obedience', *Ethics* 122, no. 1 (2011), 43-73; 'The War Convention and the Moral Division of Labour', *The Philosophical Quarterly* 59, No.237 (2009), 593-617.

suffering in war. This view - which I term *pragmatic humanitarian exceptionalism* - is typically motivated by the thought that norms for war must be implementable and action-guiding in real-world scenarios. Since (by hypothesis) combatants will be unable or unwilling to act in accordance with the moral principles identified by reductivists, and institutionalising these principles in law would be counter-productive, they are practically irrelevant. Instead, war ethicists should be concerned with identifying rules for war whose implementation would do as much good as realistically possible, taking the abilities and motivations of actual participants in war into account.<sup>15</sup>

### 2.3 *The Relevance of Non-Traditional Conflicts*

We can begin to appreciate how intrastate conflicts bear on the reductivist/exceptionalist debate by noting a key difference between these two approaches. Whereas reductivism is universal in scope, evaluating all acts of killing and injuring in terms of two invariant principles, exceptionalist approaches are necessarily scope-restricted. On these views, the moral status of (at least some) acts of killing depends on whether those acts take place within a conflict that has the particular properties that exceptionalists identify as generating additional moral permissions and/or restrictions.<sup>16</sup> For example, it may depend on whether the conflict it is fought by certain kinds of collective or political authority, or whether it falls within the scope of a binding agreement or pragmatically justified convention.

With this in mind, the key feature of modern conflict I want to emphasise is its sheer diversity. In particular, compared to the traditional Westphalian paradigm of warfare between sovereign states, today's conflicts are fought by a wide range of 'irregular' belligerents. This diversity poses three related challenges for exceptionalist views, though the extent to which each bites will depend on the particular form of exceptionalism under consideration. By contrast, none of these challenges arises for reductivism given its universality.

The first holds that exceptionalism, even if correct in principle, fails to have much practical significance, because the relevant exceptionalist properties are far less likely to obtain in irregular conflicts than in traditional interstate wars. Given the infrequency of interstate wars, exceptionalist approaches will not offer much guidance in the majority of real-life conflicts. This objection is perhaps most clear in the case of contractualist exceptionalism, which almost always takes states (or perhaps only 'decent' states<sup>17</sup>) to be the relevant parties to the agreement. Hence, in conflicts in which at least one party is not a (decent) state, exceptional norms will not arise. But a similar point can be made, *mutatis*

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<sup>15</sup> See, for example, Henry Shue, 'Do We Need a 'Morality of War'?' in David Rodin and Henry Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford: Oxford University Press, 2008), 87-111.

<sup>16</sup> Thanks to Seth Lazar for helping me formulate this thought more clearly.

<sup>17</sup> Benbaji, 'The Moral Power of Soldiers to Undertake the Duty of Obedience', p. 45.

*mutandis*, against group-based versions of exceptionalism. Since it is no easy task to show that even functioning states possess the kind of collective agency or political authority required to bring exceptionalist norms into play, we may be sceptical that more loosely structured sub-state groups will be able to do so.

A second challenge begins by noting an important adequacy requirement for exceptionalist approaches: If one holds that the permissibility of harming depends on whether it takes place within a conflict that has specific properties, then one must be able to draw a clear boundary between the conflicts which exhibit those properties and those which do not. Call this the *demarcation requirement*.<sup>18</sup> Without demarcation, exceptionalism will assign an indeterminate moral status to many acts of harming - being neither permissible nor impermissible - which is a serious defect in any normative theory. Given this, a potential challenge for exceptionalism (and group-based exceptionalism in particular) is that modern wars hugely complicate the task of demarcation. In a world in which the *de facto* ability to employ large-scale organised violence is restricted to clearly identifiable state-actors, demarcation may appear relatively straightforward. But this is not our world. Instead, the empirical messiness of contemporary conflicts presents a spectrum of cases - ranging from regular interstate wars down to mere large-scale banditry - that exhibit exceptionalist properties to greater and lesser degrees. To satisfy the demarcation requirement, exceptionalists must venture into the untidy range of cases between these two poles and provide non-arbitrary criteria which both clearly identify the relevant thresholds at which exceptionalist norms are activated, and do so without generating unintuitive results in particular cases (more on this below). This is a pretty demanding task.

A third challenge questions whether exceptionalism can make good on its promise to vindicate certain intuitive judgements about the permissibility of killing in war, when applied to non-traditional conflicts. These cases may reveal a lack of alignment between our judgements and the properties that exceptionalists invoke to explain them. More specifically, irregular conflicts may provide cases in which (i) the intuitive judgements persist, but the putative explanatory properties are absent, or (ii) the properties remain, but our judgements of permissibility shift dramatically. Such counter-examples would suggest that the exceptionalist has either failed to identify the relevant properties that explain the judgements, or that the original judgements ought to be jettisoned, in which case the appeal to exceptionalism lacks motivation.

For example, contractualist exceptionalism is often invoked to support the intuition that combatants are permitted to kill their armed opponents in war, independently of whether their wars are just or unjust. However, if this

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<sup>18</sup> For a discussion of demarcation in the context of the laws of war, see David Luban, 'War Crimes: The Laws of Hell' in Larry May (ed), *War: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2008), 266-288.

permission is grounded in a contract between states, then presumably it will not apply to soldiers who fight in unjust wars against non-state belligerents. These individuals therefore commit serious moral wrongs by fighting. But I doubt that defenders of the equal permission think that its scope is restricted in this way. If so, we will have cases in which the target judgement persists in the absence of the putative explanatory properties. A similar problem emerges if one takes the prohibition on targeting non-combatants to be grounded in contractual considerations, even if the class of contractors is somehow broadened to include non-state parties. For it is unlikely that a contract prohibiting these tactics would satisfy the mutual advantage, fairness and actual acceptance conditions in conflicts involving militarily weak sub-state actors, who may be significantly disadvantaged by the ban.<sup>19</sup> If we think that the prohibition still holds strong in these cases, it is not clear that contractualism can account for our judgements.

Collectivist versions of exceptionalism may also be susceptible to counter-examples. Again, one application of this view is that it helps support common views about killing in war that are difficult to subsume within ordinary morality, such as the permission to fight in wars that lack a just cause. But, as David Rodin has pointed out, appealing to the moral significance of collective action risks extending the scope of these permissions to conflicts in which they intuitively do not apply, since "Football violence, warring criminal gangs, mafia vendettas, family feuds, and most forms of ethnic and racially motivated violence are also mediated through group relations."<sup>20</sup> To avoid this implication, the relevant collectivist properties need to be refined. One plausible response restricts exceptional permissions to *political* belligerent collectives, defined as groups "engaged in violence in support of political goals, in the sense of aiming at creating (or restoring) a new collective ordering"<sup>21</sup>. This certainly excludes many groups, but it still seems controversially inclusive. For example, ISIS surely counts as a political collective on this conception, but I think most just war theorists would be reluctant to attribute any special permissions to ISIS combatants, even if, counter-factually, they restricted their attacks to military targets.<sup>22</sup> However, once we start tightening up the collectivist conditions even further it is hard to see how we can avoid excluding many states from the scope of exceptionalist permissions. For example, one obvious way of excluding organisations like ISIS is to appeal to the moral undesirability of the group's aim. However, once we employ such a moralised conception of what counts as a

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<sup>19</sup> Benbaji comes close to conceding this, but attempts to show, on empirical grounds, that weak parties would consent to a revised version of the prohibition. Yitzhak Benbaji, 'Justice in Asymmetric Wars: A Contractarian Analysis', *Law and Ethics of Human Rights* 6, No.2 (2012), 172-200. For further discussion of the moral force of agreements in the context of asymmetric wars, see Fabre, *Cosmopolitan War*, Ch.7.

<sup>20</sup> David Rodin, 'The Moral Inequality of Combatants: Why *jus in bello* Asymmetry is Half-Right' in Rodin and Shue (eds), *Just and Unjust Warriors*, 44-68 at p.65.

<sup>21</sup> Kutz, 'The Difference Uniforms Make', p.176.

<sup>22</sup> On this point, see Robert E. Goodin, *What's Wrong With Terrorism?* (Malden, MA: Polity Press, 2006), Ch.1.

political collective, then it looks like states fighting unjust wars will also be excluded.<sup>23</sup> Non-traditional conflicts thus provide a rich source of tricky cases in which to test our intuitions, which in turn impose additional constraints on the task of demarcation outlined above.

Pragmatic humanitarianism may also have rather revisionary implications when extended beyond core cases of interstate conflict. This is surprising, since the view is typically deployed in support of certain legal orthodoxies, such as the equal impunity granted to all combatants in war provided they attack only military targets. The claimed justification for this neutrality is that it incentivises restraint, thereby reducing the suffering that war causes. However, consistency would seem to demand that the same pragmatic rationale for determining the *content* of rules for conduct in war should also determine their *scope*. If a set of rules is justified in virtue of the valuable outcomes their implementation promotes, then we should recommend their application to any conflict in which doing so has a sufficiently good chance of achieving this result. To demonstrate, consider a non-traditional conflict such as the Mexican drug 'wars', which cause huge amounts of suffering, especially to civilians. Furthermore, imagine that it were possible to impose a neutral system of rules on this conflict, which granted equal impunity to state soldiers and to armed cartel members, and that doing so would significantly reduce harm to civilians. Under these conditions, practical humanitarianism should recommend doing so.<sup>24</sup> If we find this intuitively unacceptable, or at least troubling, this casts doubt on whether practical humanitarianism successfully justifies these practices in the standard, interstate cases.<sup>25</sup>

The challenges sketched above clearly do not suffice to settle the reductivism/exceptionalism debate. As mentioned, much will depend on the particular brand of exceptionalism and the specific substantive judgements that it is invoked to support. But I hope to have shown that thinking about cases of non-traditional conflict provides a useful standpoint from which to make progress on this issue.

### **3. Insurgencies, Interstate Wars, and Just Cause**

I now turn to the moral justification of resorting to civil war, focussing on an important sub-set of these cases, in which members of a sub-state group resort to war against their own state. Term these *insurgencies*. This include cases of

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<sup>23</sup> Rodin, 'The Moral Inequality of Combatants'.

<sup>24</sup> For an argument that elements of the laws of war should be extended to this conflict, see Carina Bergal, 'The Mexican Drug War: The Case for a Non-international Armed Conflict Classification', *Fordham International Law Journal* 34 (2011), 1042-1088.

<sup>25</sup> For a more detailed version of this objection, see Kutz, 'The Difference Uniforms Make'. For further discussion, see Finlay, 'Legitimacy and Non-State Political Violence'. David Rodin pursues a structurally similar line of objection regarding the *content* of pragmatic humanitarian norms, as opposed to their *scope*. David Rodin, 'The Morality and Law of War', in Huw Strachan and Sibylle Scheipers (eds), *The Changing Character of War* (Oxford: Oxford University Press, 2011), 446-463.



*revolution* (in which insurgents aim to replace the government of their state), *secession* (in which insurgents aim to annex and govern a portion of their state's territory, leaving the state's sovereignty over the remainder of its territory unchallenged), and *rebellion* (in which insurgents aim to force specific policy changes or concessions, without challenging the regime's general claim to govern.)

Despite several prominent figures in the history of political philosophy denying that violently opposing the state is ever permitted – Kant most notoriously – few, if any, contemporary theorists accept this extreme view. While it is uncontroversial that insurgencies *could* be justified under certain circumstances, the specific question I will consider is whether insurgencies are subject to a different justificatory burden at the bar of *jus ad bellum*, compared to traditional interstate wars of national-defence.

There are several fairly obvious respects in which insurgents may be morally disadvantaged. Firstly, sub-state actors typically lack the military and material resources that states possess, and so may find it more difficult to satisfy the requirement that war have a reasonable chance of success. However, the mere fact that insurgents cannot achieve their aims by conventional military means does not licence the conclusion that they fail the success condition, since non-conventional warfare could still be effective.

This reveals a second possible justificatory asymmetry, since non-conventional methods may be additionally morally objectionable, even if effective. For example, in certain cases effectively waging an insurgency may require intentionally targeting non-combatants, either to weaken the enemy or to coerce support for the insurgents.<sup>26</sup> Assuming that attacking non-combatants is particularly difficult to justify, wars that require such methods inherit this additional justificatory burden.

Thirdly, insurgencies may be more difficult to justify in terms of the requirement that war be the last resort, since sub-state groups may be able to press their claims by legal means, or by non-violent resistance.<sup>27</sup> This is particularly likely to be true within broadly liberal-democratic societies.<sup>28</sup> By contrast, these options may not be available for states facing outside aggression. However, this cuts both ways, since sub-state groups often lack access to international arbitration procedures that are available to states.<sup>29</sup>

Fourthly, the fact that sub-state groups generally have fewer members than states is not only relevant to their ability to satisfy the success condition, but also to whether insurgencies fought on their behalf are proportionate. This is because

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<sup>26</sup> For detailed discussion of the latter, see Buchanan, 'The Ethics of Revolution and its Implications for the Ethics of Intervention'.

<sup>27</sup> Fabre, *Cosmopolitan War*, p.150.

<sup>28</sup> Jeff McMahan criticises Palestinian terrorist attacks for this reason (among others). Jeff McMahan, 'Just Cause for War', *Ethics and International Affairs* 19, No.3 (2005), 1-21 at p.12.

<sup>29</sup> On this point, see Anna Moltchanova, 'Stateless National Groups, International Justice and Asymmetric Warfare', *Journal of Political Philosophy* 13, No.2 (2005), 194-215.

the amount of collateral harm that it is permissible to cause in pursuit of a war-aim is sensitive to the number of individuals who will benefit from its achievement. Holding the amount of collateral harm constant, the smaller the group contemplating resorting to insurgency, the harder it will be to satisfy the proportionality criterion.<sup>30</sup>

However, while practically important, the foregoing asymmetries are of limited philosophical interest, since they can be viewed as simply tracking contingent differences in the non-normative facts, rather than any deep moral distinction between the two types of conflict. By contrast, as Cecile Fabre has emphasised, two factors are genuinely distinctive about insurgencies: They involve the use of organised violence (i) by *non-state* actors (ii) against *their own* state and its officials.<sup>31</sup> Our topic, then, is whether the *political status* of the insurgents, and the *special relationship between them and their state*, can ground a deeper justificatory asymmetry between insurgencies and interstate conflicts. I return to political status in the next section. Here I discuss the moral significance of insurgents' relationship to their state.

One natural way of appealing to the special relationship between insurgents and their states concerns the requirement of just cause. More precisely, it may be argued that this relationship affects the threshold of severity at which rights violations become candidates for remedy by military means. Perhaps the relationship places an additional constraint on resorting to war against one's own state, thereby raising the threshold of injustice required to generate a just cause for insurgency, compared to a war against outside aggressors.<sup>32</sup> On this view, there is a *restrictive asymmetry* between insurgencies and interstate wars.

This line of argument has recently been forcefully opposed by Cecile Fabre. For Fabre, the fact that belligerents in civil wars stand in a state-subject relationship is irrelevant to whether or not the insurgents possess a just cause for war, and so "what counts as a just cause for an interstate war also counts as a just cause for a civil war, and *vice versa*."<sup>33</sup> Term this the *equivalence thesis*. An important part of assessing the comparative permissibility of insurgencies will thus depend on the truth of the equivalence thesis. In what follows I set out three possible challenges.

### 3.1 National Partiality

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<sup>30</sup> Some have found it unintuitive that whether a political community may resort to war depends on the size of its population (for example, Seth Lazar, 'National Defence, Self-Defence, and the Problem of Political Aggression', in Cecile Fabre and Seth Lazar (eds), *The Morality of Defensive War* (Oxford: Oxford University Press, 2014), 11-39 at p.33). However, it seems to me far more implausible to claim that the numbers don't matter.

<sup>31</sup> Fabre, *Cosmopolitan War*, Ch.4.

<sup>32</sup> It is worth pointing out that potential just causes for insurgency need not involve the target state violating the rights of *its own* citizens. Injustices committed by a state against non-members could also generate a just cause for insurgency, even if it is internally benevolent.

<sup>33</sup> Fabre, *Cosmopolitan War*, p.165.

The first, which forms Fabre's main target in defending the equivalence thesis, appeals to our having special obligations towards co-nationals in order to justify a restrictive asymmetry. On this view, considerations of partiality impose a higher threshold of injustice in order to justify resorting to war against one's own state, compared to external aggressors, since doing so requires killing and injuring one's co-nationals.

However, the normative claim underpinning this view is more controversial than one might think. Firstly, one cannot simply appeal to the widely shared anti-cosmopolitan intuition that partiality to co-nationals is *permissible* in order to show that co-nationality makes insurgencies harder to justify. For this is compatible with the permissibility of weighing the interests of co-nationals and outsiders equally. Instead, it must be claimed, more strongly, that partiality towards co-nationals is *obligatory*. Secondly, it is questionable whether these obligations are able to do the moral work required. For example, the view seems to imply that if a gang of thugs threaten to inflict a certain level of harm on me, the amount of harm it is permissible for me to cause in self-defence (either to the attackers or to bystanders) depends on whether I am attacked by co-nationals within my home territory, or by foreigners while abroad. This seems highly counter-intuitive.

Furthermore, even if defensible, the normative claim may not in fact support the desired conclusion. For when a community has fissured to the point where civil war is a genuine possibility, often along ethnic or cultural lines, it seems doubtful that there exist particularly strong bonds of co-nationality between members of the belligerent groups capable of grounding special obligations. Hence, it is unclear that the distinction between those to whom we have special obligations and those to whom we do not will reliably track the distinction between those we must kill in order to wage an insurgency and those we must kill in order to resist external aggression.

### 3.2 *The Obligation to Obey*

A different argument in defence of a restrictive asymmetry focuses on the fact that states claim a right to rule, correlated with an obligation to obey on the part of their subjects. The central idea is that these political obligations impose an additional constraint on waging war against one's own state. Given this, a greater injustice is required in order to generate a just cause for insurgencies, since these obligations must be overridden.

However, the defender of the equivalence thesis is unlikely to be moved by this. Modern consensus holds that states have legitimate authority in virtue of serving or benefitting their subjects in some relevant respect. When a state fails to carry out its legitimating functions, it forfeits its right to rule, thus relieving its subjects of any obligation to obey. If we understand a just cause for war as consisting, roughly, in threatened rights violations of sufficient gravity to warrant remedy by large-scale lethal force, then it seems uncontroversial that if

a state is committing wrongs of this magnitude against its own citizens, it must thereby have forfeited its authority. In other words, if a rights violation is of sufficient seriousness to warrant remedy by means of war when imposed by an external aggressor, then it is also of sufficient seriousness to void a state's right to rule.<sup>34</sup> Hence, political obligations cannot constrain just causes for insurgency.

Interestingly, however, the conjunction of two common views regarding, respectively, the limits of political authority and the permissibility of national defence casts some doubt on the obviousness of this claim. Firstly, it is generally accepted that states don't have to be maximally just or infallible in order to successfully perform their legitimating functions. States may retain a right to rule while still committing 'tolerable' injustices.<sup>35</sup> Secondly, common intuitions about permissible national defence suggest that the threshold at which injustices generate a just cause for war is considerably lower than that of serious violations of basic human rights, such as genocide and severe oppression. For example, many believe that it is permissible to wage war against 'bloodless aggressors', who aim to violate only 'lesser' rights, such as those to political self-determination, territory, property, or certain social and political goods.<sup>36</sup>

The equivalence view is most plausible if we set a high threshold for just causes for war, in terms of grievous breaches of human rights. It is very doubtful that a state could commit such wrongs against its citizens while retaining its legitimacy.<sup>37</sup> However, the lower we set the just cause threshold, in line with common views about bloodless aggression, the weaker the equivalence thesis becomes. For if wars are permissible in defence of comparatively minor interests, then it is not obviously implausible that states could retain their authority while committing injustices comparable to bloodless aggression. If so, political obligations could potentially constrain just causes, thus supporting a restrictive asymmetry between insurgencies and interstate wars.

Of course, this brief argument does not suffice to show that the equivalence thesis is mistaken. It remains open to a defender of the thesis to argue that we reject one of the two views with which is in tension. Most plausibly, they may argue that we should jettison intuitions about permissible national-defence and instead adopt a higher just cause threshold. In fact, one may invoke intuitions about the permissibility of insurgency directly in support of doing so. A quick glance around the world reveals a fairly large number of non-state groups suffering what may be called 'bloodless injustice' at the hands of their state, such as a frustration of rights to political self-determination. But I doubt that many of

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<sup>34</sup> Fabre, *Cosmopolitan War*, p.137.

<sup>35</sup> For a defence of the claim that unjust states may still be legitimate, see David Copp, 'The Idea of a Legitimate State', *Philosophy and Public Affairs* 28, No.1 (1999), 3-45.

<sup>36</sup> For extensive discussion of bloodless aggression, see the collection of essays in Fabre and Lazar (eds), *The Morality of Defensive War*.

<sup>37</sup> In defending the equivalence thesis, Fabre invokes precisely this type of violation. Similarly, Buchanan discussion of permissible revolution is explicitly limited to those waged against 'Resolute Severe Tyrannies'. 'The Ethics of Revolution and its Implications for Intervention'.

us think that such groups have a straightforward just cause for lethal resistance, in the same way that we are inclined to in the case of states facing bloodless aggression.<sup>38</sup> Unless there is some principled explanation for the intuitive asymmetry between killing in *defence* of rights to self-determination that are currently enjoyed and killing in order to *realise* those rights when they are wrongly denied (as I have suggested there may be), consistency requires taking either a considerably more permissive view of insurgency, or a more restrictive view of national defence. To me, the latter seems the more palatable.<sup>39</sup>

### 3.3 Fiduciary Obligations

It is also possible to challenge the equivalence thesis on the ground that the threshold of injustice required to generate a just cause for insurgencies may be *lower* than that for interstate wars. In other words, there is a *permissive* justificatory asymmetry between insurgencies and interstate wars. To my knowledge, no one in the contemporary literature has explicitly advanced this view.<sup>40</sup> However, an argument for it can be constructed by combining two arguments that have been advanced in other contexts, and which are at least *prima facie* plausible.

The first argument begins with the idea that states and their officials stand in a fiduciary relationship to their subjects, having a special obligation to protect them and to act in their interests.<sup>41</sup> These obligations obtain regardless of how well or poorly the state in fact serves its citizens, for it is not a condition of having certain responsibilities that one does a good job of discharging them. In virtue of these obligations, states and their officials can wrong their subjects in a distinctive and particularly egregious manner.<sup>42</sup> For example, John Gardner has argued that a victim suffers a graver wrong if they are unjustly harmed by a police officer, rather than an ordinary citizen, for the same reasons that one would be if harmed by one's parent rather than a stranger.<sup>43</sup> This thought may

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<sup>38</sup> As Seth Lazar has pointed out to me, it may be objected that this intuition is not tracking the fact that these groups lack a just cause, but the fact that are likely to fail to meet some other *ad bellum* requirement. Admittedly, it is hard to tell. But in support of my claim, we might imagine that these groups have a magic button, which if pressed will result in their instantly having a fully functioning state of their own, but will cause the deaths of, say, 5000 soldiers and police officers of the (bloodlessly) oppressive regime, as well as 1000 civilians. Given the certainty of success and the favourable numbers, if we think (as I am inclined to) that pushing the button would be impermissible, this suggests that the intuition is in fact tracking the just cause requirement.

<sup>39</sup> For a more detailed version of this argument from consistency, see Jeff McMahan, 'What Rights May We Defend By Means of War?' in Fabre and Lazar (eds), *The Morality of Defensive War*, 114-155 at pp.133-135.

<sup>40</sup> Though Mattias Iser defends several of the elements of such an argument. Iser, 'Beyond the Paradigm of Self-Defense? On Revolutionary Violence'

<sup>41</sup> See, for example, Evan Fox-Decent, 'The Fiduciary Nature of State Authority', *Queens Law Journal* 31 (2005), 259-310.

<sup>42</sup> See, Iser, 'Beyond the Paradigm of Self-Defense? On Revolutionary Violence'

<sup>43</sup> John Gardner, 'Criminals in Uniform', in Anthony Duff, Lindsey Farmer, Sandra Marshall, Massimo Renzo and Victor Tadros (eds), *The Constitution of Criminal Law* (Oxford, Oxford University Press, 2012), 97-118.

gain further support from the idea that the distinctive wrongness of crimes against humanity lies in the fact that, in these cases, the institutions of the state are turned on those they are meant to protect.<sup>44</sup> This argument, if successful, establishes a moral asymmetry between unjust harms inflicted by one's own state and equivalent harms imposed by external aggressors.

It does not, however, suffice to show that there is a permissive asymmetry between just causes for insurgencies and interstate wars. To do so, a second argument must be invoked from the self-defence literature, concerning the factors that determine whether defensive harm is proportionate. While there is general agreement that the amount of defensive harm it is permissible to inflict on aggressors is sensitive to the amount of physical harm their victim's would otherwise suffer, several theorists argue that the degree of *wrongfulness* of the harm is also relevant.<sup>45</sup> The basic thought is that individuals have an interest not simply in avoiding harm, but also in avoiding being wronged or disrespected by others, which ought to be reflected in the content and limits of our defensive rights. Other things being equal, the graver the violation threatened, the greater the amount of harm it is permissible to cause to prevent it. For example, victims may inflict more harm in defending themselves against intentional rather than merely negligent harm, or against being harmed as a means rather than as a side-effect.<sup>46</sup>

Taken together, these two arguments support the conclusion that the threshold of unjust harm required to generate a just cause for insurgencies may be lower than the threshold for defence against external aggression, other things being equal.<sup>47</sup> The existence of fiduciary obligations magnifies the wrong individuals suffer when they are harmed by their own state, thereby justifying defensive actions that would not be permissible in their absence. This is in contrast to the equivalence view, which gives the impression that victims of states that grossly fail to perform their legitimating functions should regard their assailants as morally on-a-par with strangers.

#### **4. Authority, Consent and Popular Support**

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<sup>44</sup> See, for example, Richard Vernon, 'What is a Crime Against Humanity?', *Journal of Political Philosophy* 10, No.3 (2002), 231-249; David Luban, 'A Theory of Crimes Against Humanity', *Yale Journal of International Law* 29 (2004), 85-163.

<sup>45</sup> Jonathan Quong offers the most detailed argument for this position of which I am aware. 'Proportionality in Defensive Harm' (unpublished ms). For other endorsements, see Iser, 'Beyond the Paradigm of Self-Defense? On Revolutionary Violence'; Yitzhak Benbaji, 'Culpable Bystanders, Innocent Threats and the Ethics of Self-Defense', *Canadian Journal of Philosophy* 35, No.4 (2005), 585-622; Frances Kamm, 'Self-Defense, Resistance, and Suicide: The Taleban Women', in Helen Frowe and Gerald Lang (eds), *How We Fight* (Oxford: Oxford University Press, 2014), 75-86; Frowe, *Defensive Killing*, Ch.5.

<sup>46</sup> Quong, 'Proportionality in Defensive Harm'.

<sup>47</sup> One possible exception being cases in which the just cause for insurgency is grounded solely in the target state's treatment of outsiders. See n.31 above.

As we saw in the previous section, insurgents may, as a contingent matter, be at a disadvantage in terms of their ability to satisfy the requirements of last resort, reasonable prospect of success, and proportionality. In addition, the special relationship between insurgents and their state opponents may affect whether a given injustice generates a just cause for war. But these do not exhaust the standard requirements of *jus ad bellum*. Mainstream just war theory also includes the criterion of 'legitimate authority'. In the broadest terms, the criterion holds that in order to be justified, wars must be initiated and fought by a certain kind of belligerent entity. This is standardly interpreted to mean a state, a coalition of states, or, more permissively, certain non-state entities that aspire to statehood. While comparatively under-theorised in contemporary debates, the authority criterion is clearly crucial to answering our next question: To what extent does the political status of insurgent groups ground a justificatory asymmetry between insurgencies and traditional interstate wars? For if the standard interpretation of the criterion is correct, at least the majority of insurgencies will be automatically unjustified.

However, for precisely this reason, many find the authority criterion extremely implausible. Most obviously, it seems open to clear counter-examples. For one, it implies that a sub-state group facing genocide or enslavement could not permissibly wage war against their oppressors, *even if* they satisfied all other requirements for just war. This is very hard to believe. More theoretically, the criterion is also deeply at odds with a broadly reductivist approach, according to which the initiation and waging of wars can be justified as a composition of acts of permissible defensive harming between individuals. Since it is not a necessary condition of permissible self- or other-defence that one have a certain political status, or be authorised by someone who does, the authority criterion seems morally redundant.

Two conclusions may be drawn from these objections. An *abolitionist* view holds that the authority requirement should be entirely jettisoned.<sup>48</sup> If a war satisfies the remaining *ad bellum* criteria, this is sufficient for its permissibility. On this view, the political status of belligerents cannot ground any deep moral asymmetry between insurgencies and interstate wars. A *reformist* view denies the sufficiency claim. Instead, it aims to retain the criterion in a more plausible form, which both avoids absurd implications and is compatible with justifying war in terms of the rights and interests of individuals.

One promising way of rehabilitating the criterion, suggested by several writers, is to replace the formal property of statehood with the normative notion of consent.<sup>49</sup> The underlying claim is that it is an independent and necessary

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<sup>48</sup> See, for example, Fabre, *Cosmopolitan War*, Chs.3-4; Uwe Steinhoff, *The Ethics of War and Terrorism* (Oxford: Oxford University Press, 2007), Ch.1.

<sup>49</sup> Finlay, 'Legitimacy and Non-State Political Violence'; Anne Schwenkenbecher, 'Rethinking Legitimate Authority', in Fritz Allhoff, Nicholas G. Evans, and Adam Henschke (eds), *Routledge Handbook of Ethics and War* (Abingdon: Routledge 2013), 161-170; Lionel McPherson, 'Is

condition of permissible defensive force that the beneficiaries consent to it or, at very least, do not overtly refuse. Term this the *consent principle*.<sup>50</sup> On this view, an entity's having the authority to wage war consists in its being authorised to do so by those on whose behalf the war is fought. Without this authorisation, waging war is impermissible, even if all other conditions are met.

Though consent is intended to impose an independent constraint on all forms of armed conflict, it is particularly salient in the case of wars fought by sub-state belligerents, since these groups typically lack the institutional mechanisms to demonstrate that they have popular support, and are often criticised for claiming to fight in the name of others without a sufficient mandate. So, while this reformist view does not automatically disqualify these groups from having the authority to wage war (thus avoiding the counter-examples mentioned above), it may still provide support for the claim that insurgencies are harder to justify than wars fought by functioning states (if we grant the empirical assumption that sub-groups are less likely to be representative of those they fight on behalf of). The question, then, is whether, and to what extent, the consent principle does impose a genuine constraint on war.

#### 4.1 Against the Consent Requirement

The consent principle gains considerable support from our judgements about simple cases of other-defence. Consider the following example:

**Elevator:** Victor is taking a ride in an elevator. Agatha hates Victor and begins to saw through the elevator cable in order to kill him. Richie is walking by and is able to shoot Agatha with his sniper rifle before she succeeds in killing Victor. However, Victor is committed to non-violence and refuses Richie's defensive assistance.

In this case it does seem wrong for Richie to kill Agatha in defence of Victor (assuming Victor is mentally competent, aware of the facts, etc.). Victims occupy a morally privileged position within the morality of defence - it is *their* interests that are at stake after all - and this gives them the exclusive right to decide if and how those interests are defended.<sup>51</sup> The role of consent thus tracks an important distinction between there merely *being* a potential justification for defensive harm and a particular agent's actually *having* that justification. For the latter, the will of the victim must be engaged. Rescuers thus wrong *the victim* by defending

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Terrorism Distinctively Wrong?', *Ethics* 117, No.3 (2007), 524-546, Seth Lazar, 'Authorisation and the Morality of War' (unpublished ms).

<sup>50</sup> Here I borrow Allen Buchanan's terminology. 'The Ethics of Revolution and its Implications for the Ethics of Intervention.'

<sup>51</sup> For more detailed discussion, see Cecile Fabre, 'Permissible Rescue Killings', *Proceedings of the Aristotelian Society*, 109 (2009), 149-164. See also, Finlay, 'Legitimacy and Non-State Political Violence'.



him against his express wishes, even if they do not wrong the attacker. More specifically, they commit the distinctive wrong of paternalism.<sup>52</sup>

Despite its appeal in these cases, an obvious difficulty with invoking the consent principle as a constraint on war is that groups are not simply individuals writ large. There is no straightforward sense in which a victim group can consent to or refuse the use of force on its behalf in the same way an individual victim can. However, an obvious solution here is to appeal to majority consent in these cases. While the proportion of consent required is unlikely to be precise, it seems plausible that if a clear majority of the members of a victim group refuse war on their behalf, then defending them would violate the consent principle and so be impermissible.

The problem, however, is that intuitive judgements militate against the straightforward move to a majoritarian version of the consent principle. Consider the following case<sup>53</sup>:

**Multiple Elevator:** Victor and four others are taking a ride in an elevator. Agatha begins to saw through the elevator cable in order to kill its occupants because she hates them. Richie is walking by and is able to shoot Agatha with his sniper rifle before she succeeds in killing the five. Victor consents to Richie's defensive assistance, but the remaining four victims refuse due to their commitment to non-violence.

In this case, a clear majority of victims explicitly refuse defence, yet it seems permissible for Richie to use defensive force nevertheless. The explanation of why defence is impermissible in the original Elevator case does not apply here. While individuals may have the right to decide whether or not *their own* lives are defended, this does not extend to the lives of others. This seems true even if the victim group is not a pure aggregate of individuals, but is instead made up of individuals linked by morally significant 'unifying relations', such as shared ethnicity, culture or conception of the good.<sup>54</sup> As Andrew Altman and Christopher Heath Wellman put it, when lives are at stake, "It seems dubious to hold that a group has this type of normative dominion over its members."<sup>55</sup>

Given this result, some conclude that it cannot be a necessary condition of permissible war that the majority of the victim group consent to its prosecution,

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<sup>52</sup> On a fairly standard characterisation, an action is paternalist if it involves: (i) interference with an individual; (ii) against their will; (iii) for the sake of their good.

<sup>53</sup> Based on a case in Andrew Altman and Christopher Heath Wellman, 'From Humanitarian Intervention to Assassination: Human Rights and Political Violence', *Ethics* 118, No.2 (2008), 228-257 at p.244.

<sup>54</sup> I borrow this phrase from McMahan, 'Intervention and Collective Self-Determination'.

<sup>55</sup> Altman and Wellman, 'From Humanitarian Intervention to Assassination', p.243.

or even that *many* consent.<sup>56</sup> In cases where: (i) consent is mixed among the members of a victim group, and (ii) defending those who do not consent is a condition of defending those that do, a lack of consent does not render defence impermissible. In other words, provided that *some* members of a victim group consent to defence (or are not competent to refuse) the consent principle is satisfied.<sup>57</sup>

Of course, this is not to deny that consent may play an important *indirect* role in justifying war. For example, widespread refusal may provide good evidence that a proposed war would not be justified, or render it unlikely to succeed.<sup>58</sup> The claim is that the consent of the victims does not place an *independent* constraint on defensive war, at least in any minimally realistic case. If this sceptical view is correct, then the fact that insurgents are typically less representative of those they fight on behalf of, compared to state belligerents, would not provide any independent support for the claim that insurgencies are harder to justify.

#### 4.2 A Qualified Defence of Consent

I believe that both the simple majoritarian view and the strong sceptical view are mistaken. The correct account of the role of consent in justifying war lies somewhere in the middle. While the sceptics are correct that majority or widespread consent is not always required for permissible defence, this does not licence the stronger conclusion that it is never (or rarely) required. In order to defend a more robust consent requirement, one must identify a relevant moral difference between defensive wars and mixed-consent cases like Multiple Elevator, which explains why broad consent may be required in the former but not the latter. Here I sketch two possible responses of this type.

##### 4.2.1 Individual vs. Collective Rights

One strategy identifies a distinction in the kinds of rights that are at stake in the two types of case. It points out that just causes for war not only include preventing rights violations such as death, enslavement, and other atrocities, but also defending rights to political and social goods such as territory, independence, and self-determination.<sup>59</sup> The argument concedes that majority consent is not a requirement for defending the former class of rights (as in the Multiple Elevator cases), but holds that it is required for defending the latter. Since wars and insurgencies are often, perhaps typically, justified by appeal to

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<sup>56</sup> For different arguments against the consent principle, see Buchanan, 'The Ethics of Revolution and its Implications for the Ethics of Intervention.'

<sup>57</sup> McMahan, 'Humanitarian Intervention, Consent, and Proportionality'.

<sup>58</sup> Altman and Wellman, 'From Humanitarian Intervention to Assassination'. Interestingly, however, there is empirical evidence that civilian support for insurgencies often depends on military success, rather than *vice versa*. Kalyvas, *The Logic of Violence in Civil War*, Chs. 4-5.

<sup>59</sup> Though this will depend on one's views about the bloodless aggression/injustice question raised in the previous section.

political goods (national liberation struggles spring to mind most obviously), majority consent is therefore usually required.

But why should this difference in rights ground a difference in the consent requirement? One answer points to a difference in the *strength* of the interests that the rights protect. While the value of majority rule may trump the importance of protecting less weighty political rights, when it comes to our most stringent rights (such as those to life and limb), this value pales in comparison.<sup>60</sup> However, this doesn't seem to be the right answer. Consider a variation on the Multiple Elevator case, in which Agatha threatens to inflict a much less severe harm on her five victims, a vicious pinch say, which Richie can avert by defensively pinching Agatha. If the severity-based explanation were correct, we would expect to judge that defending the victims in the face of majority refusal would be wrong. Yet defence still seems permissible. As in the original case, while each victim has the right to decide whether their interests are defended, this does not extend to the interests of others.

A more promising explanation appeals to a distinction in the *type* of rights at stake, rather than the weight of the interests they protect. On this view, majority consent among the members of a victim group is required when the rights violations threatened are *collective* rights, such as those to territory or self-determination, but not when the relevant rights are *individual* rights, such as those to life and limb. A full account of collective rights is far beyond the scope of this chapter. But, for our purposes, we need only highlight one important feature of collective rights, which that is that while such rights can be *grounded* in the interests of individuals – namely, individuals' interests in enjoying certain collective or communal goods – they can only be *exercised* collectively.<sup>61</sup> No one member can unilaterally exercise a collective right on his or her own, including authorising third-parties to act on that right.<sup>62</sup> Rather, some collective procedure is required in order to successfully do so, majority decision-making being a paradigmatic example.

This feature of collective rights, it may be argued, explains why, in certain cases, the consent of the majority of the members of a victim group is a necessary condition for justifying defensive war. When a just cause for war is based purely on individual rights (such as a war of defence against mass murder or enslavement), each individual right-holder has the moral power to authorise a third-party to defend their rights, which is unaffected by the refusal of other victims. By contrast, if the just cause is grounded in the defence of interests that

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<sup>60</sup> Schwenkenbecher, 'Rethinking Legitimate Authority'. For a different take on the link between severity and consent, Fabre, *Cosmopolitan War*, p.155

<sup>61</sup> On this point, see Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, CO: Westview Press, 1991), pp.74-75. See also, Joseph Raz, *The Morality of Freedom*, (Oxford: Oxford University Press, 1986), p.208.

<sup>62</sup> For a related discussion of authorisation in the context of defending jointly-held rights, see Fabre, *Cosmopolitan War* (esp. Ch.2) and Seth Lazar's review of the same in *Ethics* 124, No.2 (2014), 496-412.

are protected by collective rights, that right can only be permissibly acted upon by those who have been collectively authorised to do so. So, while it is false that majority consent is a necessary condition for *all* wars, it may be true for a (possibly large) subset.

It should be noted, however, that one could resist this conclusion by adopting a high threshold view of just cause, as discussed in the previous section. For if the kind of interests protected by collective rights are not important enough to justify large-scale killing, then having the consent of the victims of collective rights violations is practically irrelevant for justifying war in their defence.

#### 4.2.2 Consent and Proportionality

A different strategy aims to show that widespread consent among the victim group may be required even when the rights threatened are purely individual. It locates the relevant difference between defensive wars and cases like Multiple Elevator in the fact that the former typically involves collaterally killing innocents, which must be justified as a matter of proportionality. On the view under consideration, the consent of the victims plays two distinct roles in establishing whether defending them is proportionate, by determining (i) whether certain good effects are *admissible* in the proportionality calculation and (ii) whether certain bad effects are *discounted*.

The argument for the first claim rests on a particular view of the normative effect that follows from a victim refusing defensive assistance. The basic thought, familiar from discussions of paternalism, is that, by refusing, the victim removes their interests from the 'pot' of values that may be appealed to in justifying defensive harm. One way of capturing this idea is by thinking of an individual's refusal as morally equivalent to their non-existence, for the purposes of justifying harm. Hence, in justifying defence rescuers may only invoke the interests of those victims that have not been rendered ineligible by their refusal.

This view accounts for why majority consent is intuitively not required in the Multiple Elevator case. Though each of the four non-consenters successfully withdraw their interests from the pot of eligible values, this does not render defence impermissible because the interests of the single consenters are sufficient to justify the total amount of defensive harm. Were the non-consenters not to exist, it would still be permissible to kill Agatha in defence of Victor. It is this particular feature of the case that explains why the number of refusing victims seems morally irrelevant. But, crucially, this feature is absent in cases where defending members of a victim group also requires collaterally killing innocent persons, such as defensive wars. To demonstrate, consider a variation on the Multiple Elevator case:

**Collateral Elevator:** Victor and four others are taking a ride in an elevator. Agatha begins to saw through the elevator cable in order to kill its occupants because she hates them. Richie is walking by and is

able to blow up Agatha with his grenade before she succeeds in killing the five. However, doing so will also kill an innocent bystander as a side effect. Victor consents to Richie's defensive assistance, but the remaining four victims refuse due to their commitment to non-violence.

In this case, the interests of the single consentor are *not* sufficient to justify defence. Were the four non-consenters not to exist, Richie would not be permitted to defend Victor, because collaterally killing one innocent person would be disproportionate. In fact, the absence of just *one* of the victims could be enough to render defence disproportionate, depending on where one sets the relevant threshold.

If we accept the idea that individuals have this kind of normative control over their good, the refusal of members of the victim group may be much more relevant to the permissibility of defensive force than the sceptic alleges. By refusing, victims diminish the amount of value that may be invoked in order to justify collateral harm. Since wars usually involve considerable amounts of collateral harm, widespread refusal by the intended beneficiaries of that war may significantly count against it being proportionate.

Whereas the first argument for the dependence of proportionality on consent focuses on victims *qua* beneficiaries, the second focuses on victims *qua* objects of collateral harm. For it will often be the case that defending a group of victims by means of war will risk significant collateral harm to members of that group (perhaps especially so in the case of insurgencies, which are often fought in close proximity to their putative beneficiaries). The argument rests on the plausible idea that the amount of harm it is permissible to impose in order to bring about a good effect is sensitive to whether those *who will be harmed* (as opposed to benefitted) consent to its imposition. For example, consider the standard Trolley Case, in which one person is collaterally killed in order to save five. Let's stipulate that five lives is the precise threshold at which killing one is permissible. Now imagine a variation in which there are only four victims on the main track, but the single person on the side-track freely consents to being killed for the greater good. In this case, the victim's consent intuitively makes all the difference, rendering permissible an otherwise disproportionate act of collateral killing.

Generalising somewhat (and ignoring some important complications), this result suggests that defensive actions that would otherwise be disproportionate in virtue of the risk of harm imposed on members of the victim group can be rendered permissible in virtue of the consent of a sufficient number of those victims. This is because consent can permit discounting certain bad effects in the proportionality calculus.

As with the argument from collective rights, these two proportionality-based arguments do not show that widespread consent within a victim group is

necessary in order to justify *all* defensive wars. But, taken together, they provide firm support for the idea that insurgents may be at a moral disadvantage compared to state actors (on the empirical assumption that insurgent groups are generally less likely to be representative of those on whose behalf they claim to fight.)<sup>63</sup>

## **5. Conclusion**

According to perhaps the most popular method for doing moral and political philosophy, one systematically compares one's judgements about particular cases and about general principles, and then goes through a process of revising these judgements where necessary in order to bring them into a state of coherence and mutual support. If there is a general lesson to be learnt from issues I have sketched in this chapter, it is that when it comes to the task of uncovering the morality of war, we will need to include our judgements about a much wider range of cases as inputs into this reflective process. These may require some interesting revisions in order to be accommodated.

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<sup>63</sup> For different arguments in support of a similar conclusion, see Lazar, 'Authorisation and the Morality of War'.