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DISCUSSIONS

BENBAJI ON KILLING IN WAR AND 'THE WAR CONVENTION'

BY UWE STEINHOFF

Yitzhak Benbaji defends the view that soldiers on both the 'just' and the 'unjust' side in a war have the same liberty right to kill one another, because soldiers have 'tacitly accepted' the egalitarian laws of war and thereby waived their moral rights not to be attacked. I argue that soldiers on the 'just' side have not accepted the egalitarian laws of war; even if they had, they would not thereby have waived their moral rights not to be attacked. Moreover, the egalitarian laws of war and 'the war convention' are not fair and mutually beneficial, and so would not be accepted. Benbaji does not come to grips with the problem of the killing of civilians in war: his idea that states could waive the moral rights of their citizens is untenable.

Yitzhak Benbaji has criticized what he calls the 'purist' criticism of traditional just war theory. Others, like Jeff McMahan, call this 'purism' the 'moral view', as opposed to the 'orthodox view'. This 'moral view' is that just and unjust combatants do not have the same liberty to kill each other. It also affects the distinction between *jus ad bellum* and *jus in bello* in so far as it alleges that unjust soldiers, that is, soldiers who do not have the *jus ad bellum* on their side, cannot satisfy the *in bello* proportionality requirement.¹ Benbaji addresses these objections to the 'orthodox view', and seeks to prove with his 'short answer' to them 'that the traditional notions of equality and proportionality employed in the traditional view form a perfectly consistent theory of *jus in bello*'.² In a second step he then tries to deal with some 'deeper worries regarding the *ethical coherence* of the traditional view', which, however, do not concern me here.

In what follows I shall demonstrate that Benbaji's attempt to save 'the war convention' fails.

¹ I argue elsewhere that actually they can. While the 'moral view' is correct in principle, that is, just and unjust soldiers do not in all wars have the liberty or moral permission to kill their opponents, in many or even most wars they do. Thus the scope of the 'moral view' is much more restricted than its defenders would like to think. See my *On the Ethics of War and Terrorism* (Oxford UP, 2007), pp. 95–7, and 'Jeff McMahan on the Moral Inequality of Combatants', *Journal of Political Philosophy*, 16 (2008), pp. 220–6.

² Y. Benbaji, 'The War Convention and the Moral Division of Labour', *The Philosophical Quarterly*, 95 (2009), pp. 593–617, at p. 598.

Benbaji's 'short answer' goes like this ('The War Convention', pp. 598–9):

Natural moral rights, as construed in the Western political tradition, are exchangeable.... Here is a micro-level case in which basic moral rights are exchanged. Members of domestic societies have a right not to be attacked by others. By entering the ring, a boxer waives this right, and in return gains a right-privilege to attack his rival. *Ex ante* (i.e., before the match) the convention which governs boxing is considered by both sides to be fair and mutually beneficial. This is why we can safely presume that the boxers accept it. The redistribution of rights within the boxing ring is not produced by *explicit* agreement. Rather, it is generated by tacit acceptance of the rules, which is indicated by the combatants' entering the ring.

Benbaji (p. 599) then applies this idea to states in the following way:

... decent states would seek an agreed system of rules to govern their future wars, prior to any armed conflict between them. I assume, and this is a crucial assumption, that the objective of the contracting parties is minimizing the harm inflicted on morally innocent people within wars, without limiting the right states have to use force in protecting their just claims. I shall call the agreement whose goal I have described 'the *in bello* agreement' (or 'the *in bello* contract').

He adds (pp. 599–600) three allegedly 'highly plausible assumptions': first, 'states assume that international justice can be enforced only by self-help'; secondly, 'the obedience of soldiers is crucial for the efficiency of the national defence which armies provide'; thirdly, rules of war 'would be part of the *in bello* agreement only if it could be known by the warring parties during the war whether these rules were being intentionally violated'.

A further assumption is this (pp. 600–1):

... it is in the interest of individuals who live in a world of sovereign and mutually suspicious states to be protected by a decent state which controls an obedient army. That is, soldiers (and their families, friends and fellow citizens) benefit from the *in bello* agreement because it makes national defence more efficient.

Relying on these assumptions, he comes (p. 601) to the following conclusion:

It is, then, tacit acceptance of the fair and mutually beneficial egalitarian law of war that generates the moral equality of soldiers: no combatant wrongs another, provided they all accept the convention.

Benbaji's argument is fraught with problems. The most fundamental and indeed fatal one lies in his assumption, just quoted, that 'combatants alienate their right not to be attacked by the unjust combatant' by the 'tacit acceptance of the fair and mutually beneficial egalitarian law of war'. He gives no justification either for his claim that the soldiers actually do tacitly accept the egalitarian law of war or for his claim that by this acceptance of the *law* of war they alienate their *moral* right not to be attacked by unjust combatants. Both claims are implausible, and indeed wrong.

As regards the first claim, Benbaji is certainly wrong in claiming that by entering the ring the boxer automatically waives his legal right not to be hit by the other

boxer. Entering the ring does not count as tacit consent to the rules of boxing under all circumstances. For example, if late at night in the gym, boxer *A* enters the ring because boxer *B* is beating up *A*'s elderly father who had dared to step into the empty ring because he always wanted to do so once in his life, then *A* certainly does not tacitly accept that he may hit *B* only according to the rules of boxing or that *B* may hit him back. Accordingly, if he can save his father (and himself) against *B*'s aggression only by kicking *B* in the groin, then he is allowed to do this. *B* acts as an aggressive thug, and he just has to stop beating up *A*'s father. If he does not, *A* may act in defence of his father, and the mere fact that he has entered the ring does not give *B* the right to hit *A* back. *B* simply should leave both *A* and *A*'s father alone.

A war in which the just combatants *A* defend themselves and their fellow citizens against the unjust combatants *B* is analogous to the case I have just described, not to a tidier case like 'Klitschko vs Lewis'. The just combatants are *forced* into the ring by an unjust aggressive act. The aggression was ongoing *before* they entered the ring. But then their entering the ring cannot be construed as tacitly giving consent to the laws of war, let alone as waiving their moral right not to be attacked.³

As for second claim, it is simply not true that by accepting (whether tacitly or even explicitly) a fair and beneficial law laying down that certain unjust actors are not to be punished for their unjust acts, the potential victims of those unjust acts waive their moral right not to be subjected to those acts. There have been a few countries with a negotiated transition from a dictatorship to a democratic government. Part of the agreements between incumbents and opposition was that after the transition the latter would not punish the former for their crimes and atrocities. Such a contract is mutually beneficial. Often the transition would not be possible without it, so the contract helps the opposition; and it also obviously helps the incumbents, who can escape prosecution after the change and avoid the risk of being violently deposed. In addition, such a contract leads to a more just situation. Suppose in a particular case the opposition has also committed certain atrocities, and the contract states that they cannot be punished either. Thus this contract is also fair. The members of the opposition accept the contract, even those who are still being unjustly imprisoned and tortured. The contract has been signed and there is an agreed day for the incumbents to yield power to a democratically elected government or to a provisional government led by the opposition. Meanwhile, however, unjust imprisonment and torture still goes on to a certain degree (the contract did not state that it had to stop immediately; for certain reasons, the incumbents would not have accepted such a stipulation). Thus on Benbaji's account those members of the opposition who have accepted the contract and thus accepted that the torturers and other government gangsters are, for consequentialist reasons, *not to be legally punished* for these crimes, or who before being imprisoned have even explicitly empowered the opposition's leadership to negotiate such a contract in their name, have thereby also waived their *moral* claim rights not to be imprisoned or tortured. But this suggestion is clearly preposterous. So is Benbaji's similar suggestion with regard to the 'war convention' – I take this to be a *reductio ad absurdum* of his account.

³ Cf. J. McMahan, *Killing in War* (Oxford UP, 2009), p. 53.

So far I have tried to establish that soldiers do not tacitly consent to the laws of armed conflict, and that even if they did, this would not result in a 'redistribution of their rights'. I shall now argue that the laws of armed conflict are not fair and beneficial.

Why does Benbaji think they are? He explains (p. 600):

States guarantee *post bellum* immunity to enemy soldiers in order to secure *post bellum* immunity for their own soldiers. This agreement straightforwardly supports the obedience of their soldiers, and therefore enhances their power to protect their *just* claims. In a clear sense, then, the legal equality of soldiers is an element of a fair contract.

He also claims (p. 599) that only this legal equality can meet the enforceability requirement stating that rules of war 'would be part of the *in bello* agreement only if it could be known by the warring parties during the war whether these rules were being intentionally violated'. Thus according to him 'the objective of the contracting parties is minimizing the harm inflicted on morally innocent people within wars, without limiting the right states have to use force in protecting their just claims'.

What he overlooks, however, is that these goals conflict. In many if not in most wars it is impossible to minimize the harm inflicted on morally innocent people without limiting the right states have to use force in protecting their just claims. But this precisely means nothing less than that *limiting* the right to use force which states have might be a way to *protect* innocent people. In the same vein, Benbaji is mistaken when he claims (p. 601) that 'soldiers (and their families, friends and fellow citizens) benefit from the *in bello* agreement because it makes national defence more efficient'. People might benefit much more when enemy states are less efficient in waging wars.

Here is an example at the domestic level. People have a right to defend themselves. If they are not allowed to carry machine-guns, flamethrowers, hand grenades and perhaps a fair amount of poisonous gas around with them, the efficiency of their self-defensive measures will be undermined. After all, if you are attacked by a group of gangsters, a flamethrower or a poison gas grenade might come in handy. Obviously, however, if other people also start running around heavily armed, this will definitely be a severe blow to your own security. Even if you are not directly targeted, the chances that you may become the 'collateral' victim of other people's self-defence against an aggressor, or what they perceive to be an aggressor, would be significantly heightened.

The application to war is obvious. Being surrounded by a bunch of states which have obedient soldiers who are willing blindly to follow orders to invade other countries, and who are labouring under the assumption that the attacked people have waived their rights not to be attacked by them, certainly will seriously undermine your security, even (or perhaps especially) if your own state can count on the equally blind obedience of your own soldiers. Thus even if there were good moral and pragmatic reasons not to legally sanction soldiers for violations of the *jus ad bellum* (how good those reasons are is open to debate), there are still very good reasons for having laws of armed conflict which outlaw participation in unjust

wars and thus instil in soldiers a sense of responsibility which they nowadays, unfortunately, often lack.

Interestingly, Benbaji seems to admit as much. ‘Purists’ might argue, he says (p. 616), that

the war convention promotes injustice, since it permits (and thus legitimizes) killing innocent people for no good reason. After all, were soldiers ... required to justify the war in which they participate in a national or an international court ... the number of unjust wars would be reduced.... So the alternative norms which purists envisage are superior to the traditional norms, even from the standpoint of moderated morality.

Benbaji does not say that the ‘purists’ are wrong in their assessment (and in my view they are right, for precisely the reasons he adduces). Yet he thinks (*ibid.*) that nevertheless ‘the current norm is not indecent or egregiously immoral’. But this is a surprising statement given Benbaji’s concession. After all, one would tend to think that if anything is indecent and egregiously immoral, it is a convention that ‘promotes injustice, since it permits (and thus legitimizes) killing innocent people for no good reason’.

Another defence he offers is the following:

Thus, suppose that, within the optimal institutional arrangement, soldiers would be legally unequal. Even then the outcome produced by the current egalitarian legislation might be a ‘suboptimal co-operative equilibrium’: although a better outcome might be imagined, no one would be better off had he alone followed another rule. Currently, the general acceptance of the egalitarian convention is, in this weak sense, mutually beneficial.⁴

Slavery is also, in a world where slavery is accepted, ‘mutually beneficial’ in this ‘weak sense’: no one gains anything from being the only one who does not accept the permissibility of slavery. Obviously, then, the fact that something is ‘mutually beneficial’ in a ‘weak sense’ does not speak to its legitimacy. Finally, general acceptance of the egalitarian convention is actually not even ‘in the weak sense’ mutually beneficial. If a very powerful but peaceful state holds soldiers of states who are unjustly attacking it legally accountable for their *jus ad bellum* violations, this is a strong disincentive from further attacks and thus enhances the security of this powerful and peaceful state.

Thus the war convention as Benbaji understands it is *not* mutually beneficial, either in the irrelevant ‘weak sense’, or, as Benbaji seems to admit, in the relevant literal sense. Consequently his ‘contractualist’ argument for the moral equality of soldiers collapses.

As regards the fairness condition, Benbaji again himself mentions (*ibid.*) a powerful objection, but dismisses it without any serious argument:

It might be thought that the egalitarian convention does not ... benefit members of military forces who protect a state that is very unlikely to engage in unjust aggressive

⁴ Benbaji, ‘A Defense of the Traditional War Convention’, *Ethics*, 118 (2008), pp. 464–95, at p. 491.

wars. Such soldiers – the objection goes – would benefit from a different rule which allows blind obedience only to non-aggressive governments. I disagree. First, I take it that in accepting the convention, soldiers of a state *S* consider the interests of soldiers that will serve in *S*’s military forces as if they are their own interests. Secondly, I assume that it cannot be known now how aggressive a state is likely to be in the remote future. Hence, in assessing how beneficial a convention is to members in *S*’s military forces, *S*’s presently apparent peaceful dispositions are irrelevant. The equalizing convention is justifiably believed to be mutually beneficial, even by soldiers of a presently non-aggressive state.

These remarks do not fit the facts. First, it is simply incorrect that soldiers who are *now* members of the armed forces (this is how Benbaji’s ‘first’ point needs to be interpreted if it is to make sense) consider the interests of soldiers who will serve in those forces in the future as if they were their own interests. Why should they?

Secondly, it is true that it cannot be known how aggressive a state will be in the remote future if ‘remote future’ means ‘in a hundred years’. However, there is no need to know this. In fact, there might not be any states at all in 100 years; if there are, the ‘war convention’ might have radically changed meanwhile. So soldiers and citizens who live now care about the not so remote future, and this is quite rational. They care about how the convention affects *their* interests. It is just wrong to say that the likelihood that states like, say, Finland, Oman, Costa Rica, Sweden, Moldova, Bhutan, Mali, Switzerland or Paraguay will engage in an unjust war in the next three decades is the same as in the case of Russia, Israel or the USA. In fact, the states mentioned in the first group are extremely unlikely to engage in an unjust war (or in any war at all, for that matter). Thus the ‘equalizing condition’ is definitely not ‘justifiably believed to be mutually beneficial’. But then according to Benbaji’s own assumptions (see ‘A Defense’, p. 488) the convention will not be accepted.

There is still a further problem in Benbaji’s account, namely, the problem of civilians. He correctly states that his boxing-match analogy ‘is inapplicable to civilians: there is no datable act of will by which civilians manifest acceptance of *in bello* proportionality’. However, he claims (‘The War Convention’, p. 606) that

a state is authorized by its citizens to act in their interests in such matters. As part of this general tacit authorization, states have the moral authority to reach an *in bello* contract, which redistributes civilians’ rights and duties. Therefore a pilot fighting an unjust war who carries out an *in bello* proportionate attack violates no claim which just non-combatants hold against him.

I have already shown that ‘the war convention’ is certainly not fair or mutually beneficial. Many informed and intelligent civilians and soldiers alike would therefore reject it. But there are a couple of further problems with Benbaji’s way of dealing with civilians.

First, if the state is authorized to negotiate away the rights of its citizens so long as this is, allegedly, in their own best interests, then it is unclear why the boxing-match analogy is needed in the first place. If the state can negotiate away the rights of its civilians, it can also negotiate away the rights of its soldiers.

Secondly, the difficulties with the concept of ‘tacit consent’ are notorious. As many authors have pointed out from Hume onwards, the mere fact that people are residing in a state can hardly be construed as ‘tacit consent’ to its norms.

Thirdly, as already stated, the legal *in bello* contract does not comprise the moral equality of combatants. States have nowhere said that soldiers of other states do not violate the moral rights of innocent civilians if they shoot them or blow them up. Thus the state has not negotiated away the rights of its civilians not to be unjustly attacked by enemy soldiers in any case, and thus the civilians have not consented to such abdications of their rights, neither tacitly nor explicitly.

Fourthly, babies cannot consent to anything. Soldiers who unjustly kill them would thus violate their rights even if one granted that adults have tacitly consented to the waiving of their moral right not to be unjustly killed by enemy soldiers.

Fifthly, many people explicitly state that they have a right not to be unjustly killed by enemy soldiers. Such an explicit statement, it seems, should override any presumed ‘tacit consent’.

Sixthly, even if one granted for the sake of argument that the explicit statement does not override tacit consent, it is still clear that citizens *fighting against* the state can hardly be considered to have tacitly authorized the state to negotiate away their rights. Indeed, they make it very clear through their rebellion or resistance that they reject the state’s authority, both tacitly and explicitly. Thus if incumbents unjustly suppress a guerrilla movement and its followers, they would violate the rights of innocent guerrilla fighters and civilians. The same would be true of an external force trying to help the incumbents. Furthermore, if a guerrilla movement overthrows the state and founds a new state which criticizes as filthy imperialists and ruthless murderers the powers unjustly trying to intervene and to re-establish the old order, and which rejects the legal *jus in bello* in cases of anti-imperialist struggles, then the anti-imperialist soldiers and civilians completely retain their rights not to be killed by the imperialist soldiers, for the new state quite explicitly has not negotiated away those rights.

Seventhly, and rather importantly, the whole idea that states are somehow authorized, tacitly or expressly, to waive rights of their citizens with regard to agents of other states is certainly not part of the (liberal) Western tradition. If it were, something would be seriously wrong with that tradition. Suppose two states have a problem with a deadly epidemic disease. In order to find a cure as quickly as possible, human experiments are required. While it is clear that these experiments would kill most of the human subjects, it is also as good as certain that many more people could be saved by these experiments. Both states want to join forces. Neither state, however, wants their own scientists to conduct experiments on their own citizens. Thus they officially waive the rights of their citizens not to be abducted and experimented upon by the agents of the other state. An additional agreement stipulates that not more than 100 persons are to be abducted per month. The contract is *ex ante* mutually beneficial and fair. Thus according to Benbaji, given this contract, not only would the agents of state *A* be morally permitted to abduct and to experiment upon citizens of state *B*, but these citizens would also be morally *prohibited* from defending themselves against near certain death – for they no longer have the right not to be

abducted and used for deadly medical experiments. Again I consider this to be a *reductio ad absurdum* of Benbaji’s account. States simply do not have the power to waive moral rights of their citizens.

Thus Benbaji’s ‘short answer’ is profoundly mistaken, for a whole battery of reasons. Neither soldiers nor citizens have waived their moral right not to be unjustly killed by enemy soldiers. His ‘long answer’ does not provide any further arguments which could undermine this result. Rather, it seems to address a completely different issue.

I conclude that Benbaji’s attempt to save ‘the war convention’, understood as a convention which grants soldiers on both just and unjust sides alike an equal moral liberty right to kill each other, fails.

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