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THE PREVENTION OF UNJUST WARS[1]

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1 The doctrine of the Permissibility of Participation

> War is a great moral evil … The first great moral challenge of war, then, is: prevention. For most possible wars the best response is prevention. Occasionally, a war may be the least available evil among a bad lot of choices. Since war always involves the commission of so much wrongful killing and injuring, making war itself a supreme evil, a particular war can be the least available evil only if it prevents, or anyhow is likely to prevent, an alternative evil that is very great indeed.[2]

This passage articulates a view of war that is hard to challenge, even for those who are antipathetic to pacifism. It can be interpreted as a claim about war as a phenomenon comprising the belligerent acts of *all* the parties to a conflict. The Second World War was a war in this sense, one that was clearly a great evil, though also the "least available evil" if the only alternative was the unopposed conquest of Europe by the Nazis. The Second World War was, however, neither a just war nor an unjust war; rather, it comprised both just and unjust wars. It encompassed both Britain's war against Germany, which was a just war, and Germany's wars against Britain, the Soviet Union, and other states, which were unjust wars. "War," therefore has two senses: a "wide" sense in which it refers to the acts of war by all sides, and a "narrow" sense in which it refers only to the acts of war by one side.

While wars in the wide sense are always great evils, it is not always wrong to bring them about. The Second World War need never have occurred if all the states that fought defensively had instead peacefully submitted to conquest or domination by the Axis powers. Similarly, it may not be wrong to initiate a just war of humanitarian intervention, which is a war in narrow sense, even if it will inevitably provoke a war in the wide sense. Wars in the narrow sense are therefore not always great moral evils in relation to the

only alternatives, and it is not always true that "the best response" to such wars "is prevention." Just wars ought seldom, if ever, to be prevented. Sometimes it is morally imperative that a just war be fought. There are even some wars in the narrow sense that are *unjust* that it might nevertheless be wrong to prevent – for example, a war that would achieve a just cause by necessary and proportionate means, but that can be successfully fought only by one state, which will fight only if it also pursues an unjust aim that, though greatly outweighed by the just cause, is unnecessary for the achievement of that cause[3] to avoid this complication (I will here use "unjust war" to refer only to those wars that are unjust because they lack a just cause). In general, though, while wars in the narrow sense ought not to be prevented if they are just, they ought to be if they are unjust. Indeed, because most wars in the wide sense are initiated by a war that is unjust, the best way to prevent those wars in the wide sense that ought to be prevented is to prevent states from initiating unjust wars.

There are many reasons why unjust wars occur, and many factors that contribute to a war's occurrence in any particular instance; therefore there are correspondingly many ways to try to prevent unjust wars from occurring. But there are certain conditions for any unjust war that are both obvious and potentially alterable. The impetus for an unjust war is seldom traceable to a state's citizenry; rather, it comes from a small group of political leaders who stand to gain in power and prestige. But these people cannot fight a war on their own; indeed, few ever go near a battlefield. They must therefore rely on a vast number of other people to fight their unjust war for them. How do they manage to get tens or hundreds of thousands, or even millions of ordinary people to risk their lives in order to kill other people as a means of achieving aims that are unjust? When people are called upon to fight in an unjust war, why do virtually all of them do so without question?

Again, there are many reasons. Those who are already members of a standing army typically believe that it is their professional duty to obey an order to fight. They have been conditioned to obey and may be eager to prove themselves in combat. Even conscripts generally accept that their government has the authority to order them to fight, and they tend, like those already in the military, to fear the official penalties and social stigma consequent upon refusal more than they fear the dangers of war. To the extent that soldiers reflect about whether their war is morally justified, they usually defer to their government's assurances that it is, in part, because they assume that their government must know much more about the matter than they do.

It may seldom occur to them that their adversaries, whom they assume to be wrongdoers, have been prompted to fight by the same considerations, which are independent of any substantive reasons why a war might be just. But if soldiers do have doubts, they are readily assuaged by the view, which has been pervasive in virtually all cultures for many centuries, that combatants

do no wrong, and are not blameworthy, if they fight in an unjust war, provided that they obey the moral, legal, and professional rules that govern the conduct of war. Call this the doctrine of the "Permissibility of Participation." Early exponents of the theory of the just war tended to defend the Permissibility of Participation by arguing that responsibility for a war lies solely with the political authority that commands it rather than with those who fight it. Augustine, for example, argued that a combatant who kills in war does not violate the commandment, "Thou shalt not kill," for "he to whom authority is delegated, and who is but the sword in the hand of him who uses it, is not himself responsible for the death he deals."[4] Similar claims were later made by Hobbes, Pufendorf, and others in the just war tradition.[5] The Permissibility of Participation received its canonical expression in the twentieth century in Michael Walzer's classic *Just and Unjust Wars*[6] and he has recently reaffirmed it in an influential article co-authored with Avishai Margalit, as follows: "Combatants are accountable only for their conduct in war … We can demand of soldiers that they react morally to concrete combat situations; we can't demand that they judge correctly the moral merit of the reasons their political leaders give them for going to war."[7] This claim is part of the common-sense understanding of the morality of war and finds corresponding legal expression in the international law of war, which does not hold combatants legally liable for fighting and killing in an illegal war.

Jonathan Glover recently had this exchange during an interview he was conducting:

GLOVER: Some people say that one problem with the army is that you have to obey orders, sometimes you kill people if there's a war, and it may not be right to do that always.
SUBJECT: To defend your country, yeah, too right it is.
GLOVER: In war, is it right?
SUBJECT: Yeah, of course it is. You're not just defending your homeland, you're defending the women, the children, people in it. You're defending their right to be free.
GLOVER: It takes two sides to make a war, and one side is defending and the other side is attacking. Can you always rely on our side to be the ones who are defending?
SUBJECT: If you're British, you stand for Britain, whether it's right or wrong. You're part of that country. If Britain says, "Right, I'm at war with this bunch," you don't argue. You just say, "Fair enough" and "Let's go to do what we've got to do."[8]

The final passage in this exchange is a fair, if crude, statement of some of the implications of the Permissibility of Participation. For according to that

view, it becomes morally justifiable to kill people when one's own political leaders, acting on behalf of the state, have declared war on those people's state ("Right, I'm at war with this bunch"). The positive reason to fight (to "do what we've got to do") is the duty of obedience to legitimate authority in the state of which one is a citizen ("You're part of that country"). According to Hobbes, for example, "if I wage war at the commandment of my Prince, conceiving the war to be unjustly undertaken, I do not therefore do unjustly, but rather if I refuse to do it."[9] Glover's interlocutor does, however, omit one crucial condition of justification: in order for it to be permissible to kill people against whom one's leaders have declared war, they must be dressed in a certain way. But if *we* are at war with *them* and they are wearing one uniform while we are wearing another, that is thought to be sufficient to make it permissible for us to kill them. When, for example, Hitler ordered the invasion of Poland, that was sufficient, according to the Permissibility of Participation and the international law of war, to make it morally and legally permissible for Nazi soldiers to kill Polish soldiers. So prodigious were Hitler's alchemical powers that he could actually dissolve moral and legal constraints on the killing of Polish soldiers by German soldiers by incantation alone – that is, by uttering the declaration that initiated the unjust war. Those who accept the Permissibility of Participation do not, of course, claim that Hitler acted permissibly in initiating an unjust war, only that his initiation of war made it permissible for German soldiers to kill soldiers of the country against which he had declared war. They accept that while political leaders cannot themselves permissibly kill or order the killing of soldiers in another state who have not attacked them, and while their own soldiers cannot permissibly kill other soldiers in the absence of orders, it nevertheless becomes permissible for their soldiers to kill other soldiers when their leaders *impermissibly* order them to.

I have elsewhere argued at length against the Permissibility of Participation and will not rehearse my objections here.[10] I will assume that it is false. Yet its appeal is almost universal, from learned theorists of the just war all the way to the man Glover interviewed, who is currently confined at Broadmoor, Britain's highest-security hospital for dangerous offenders who have either been judged unfit to stand trial or been convicted but exempted from criminal punishment on grounds of insanity. The near-universal appeal of the Permissibility of Participation is, I suspect, traceable less to any reasons that might be adduced in support of its being true than to concerns about what the consequences would be if it were to be generally rejected. One reason, for example, why we may be reluctant to reject it, is that we recoil from condemning as wrongdoers those combatants who fight in accordance with the conventional rules in a war that is unjust, especially when they are our compatriots.

It is, however, unnecessary to accept the Permissibility of Participation to vindicate our sense that many, or most, unjust combatants are not moral

criminals. There are typically a variety of excusing or mitigating conditions present when combatants fight in unjust wars. Indeed, combatants on *both* sides in a war usually act in conditions of considerable uncertainty, both factual and normative, and are also subject to duress to the extent that they would face harsh penalties if they were to refuse to fight. Those who fight in unjust wars in such conditions may not be blameworthy, or may be blameworthy to only a relatively slight degree, and in consequence may rarely deserve punishment, provided that they have adhered to the legal and customary rules of war. Indeed, a combatant who has fought in an unjust war may, if his participation is largely excused, even deserve praise for the exercise of such virtues as courage, fortitude, and self-sacrifice in the achievement of his proximate aims, such as rescuing or protecting his comrades, even though the ultimate aims his action supported were unjust.

A second reason for concern about the consequences of the rejection of the Permissibility of Participation, is that it would require an expanded tolerance of conscientious refusal to fight in unjust wars, which would in turn offer opportunities for malingering soldiers to use feigned moral scruples as a pretext for refusing to fight in wars whenever they might be averse to fighting. This is, however, unlikely to be a serious problem in just wars of national self-defense, since people who are directly threatened tend to fight rather than submit – a fact that explains why Israel tends to be more tolerant, at least informally, of conscientious disobedience in its military forces than most other states are. Since the state's foundation, Israelis have lived continuously with grave external threats to their security. They know that they can tolerate a certain level of disobedience in military operations that are not really essential to their security, such as patrols in the occupied territories, since they also know that if they have to fight a war in which people are immediately threatened, those capable of fighting will do so cohesively and without dissent.

There is, however, a higher probability that soldiers would use pretended moral scruples as a means of evading service in just wars other than those of national self-defense – for example, just wars of humanitarian intervention or collective defense. This problem might have to be addressed in the way that liberal governments have traditionally dealt with conscientious objection, by attempting to test for the sincerity of those claiming to be conscientious refusers and to deter malingering by imposing penalties even on those whose claims are recognized as genuine. An active-duty soldier might, for example, be required to perform certain forms of community service, and perhaps to repay some or all of the wages he was paid while the government invested resources in training him for work he now refuses to do.

A third objection is that if it came to be generally accepted that it is morally wrong to fight in a war that lacks a just cause, soldiers would often *genuinely* question whether they should obey an order to go to war, thereby jeopardizing or altogether undermining the military chain of command and

thus the state's ability to fight *just* wars, including wars of national self-defense. And if liberal democratic states would be less likely than others to fight unjust wars but, as historical experience suggests, soldiers in such states would be more likely to engage in conscientious refusal, the net effect would be to give an advantage to precisely those states most disposed to fight unjust wars.

This risk of reduced military efficiency in just wars must be weighed against the potential benefits of a widespread rejection of the Permissibility of Participation. These benefits could be very great. As long as we continue to accept the Permissibility of Participation, we will deprive ourselves of an important resource for the prevention of unjust wars: namely, the moral conscience of individuals. In any state that is fighting or preparing to fight an unjust war, on what basis can those who oppose the war try to persuade soldiers to refuse to fight? How might a soldier rationally reach the conclusion that he ought not to fight? If the Permissibility of Participation were correct, that might not be possible. For if soldiers have a presumptive duty as part of their professional role to obey legitimate orders, and if they will face harsh penalties if they refuse to fight, and if, finally, they would do no wrong by fighting provided they obeyed the rules of engagement, they would simply be *foolish* to refuse to fight on the ground that the war is unjust. Why condemn oneself to punishment in order to avoid doing what would not only be permissible but also one's *prima facie* duty? The Permissibility of Participation is not an instance of the familiar "right to do wrong." Rather, it excludes the possibility that soldiers could have a moral reason not to fight based on the fact that the aims for which they would be fighting would be unjust.

If, however, the Permissibility of Participation were widely rejected and soldiers came to believe that they would do wrong by fighting in an unjust war, some might be emboldened to resist the pressures they would face to fight in wars they rightly perceived to be unjust. The prospect of such resistance, and the threat it would pose to a government's perceived legitimacy among its citizens, could help to deter governments from attempting to fight unjust wars.

The central question, then, is whether, if the Permissibility of Participation were widely repudiated, soldiers would be more likely to disobey when ordered to fight in a war that was just, or when ordered to fight in an unjust war.

Since in virtually all wars that have occurred, at least one side has fought unjustly, the number of people throughout history who have fought in unjust wars is vast. There is little evidence that more than a tiny minority of these combatants believed that their war was unjust; rather, the vast majority appear to have believed that their war was just. If that is right, it is the *norm* for people to mistake an unjust war fought by their own state for a just war. But at least an equally high proportion of those who fight in wars that are objectively just believe that their war is just. People are strongly disposed to

believe that any war fought by their own country must be just, and this disposition is probably even stronger among those who must do the fighting. This tendency of people to assume that their country's war is just is difficult to overcome even in cases in which it ought to be luminously obvious that the war is unjust – for example, in the various wars of Nazi aggression.

When a war is in fact just, there are typically few apparent reasons to believe that it is unjust, and few people on the just side are motivated to appeal to those apparent reasons in arguing that the war is unjust. This is particularly obvious in the case of just wars of national self-defense. It is, therefore, highly unlikely that the general rejection of the Permissibility of Participation would lead soldiers to refuse on genuinely moral grounds to fight in just wars of national self-defense. And the same is true, though to a lesser degree, of just wars of humanitarian intervention. Yet in wars that are objectively unjust, there are typically facts that are difficult or impossible to conceal and that ought to prompt skepticism about the justness of the war – for example, that the war is being fought in a distant country that does not, and perhaps cannot, pose any military threat to one's own country, and that the forces one is fighting against manifestly enjoy the support and cooperation of a substantial proportion of the civilian population. The general repudiation of the Permissibility of Participation would, therefore, be considerably more likely to lead to doubts about the morality of wars that are in fact unjust than to provoke skepticism about the morality of wars that are just. If the rejection of that doctrine would increase the probability of conscientious refusal to fight, it would be substantially more likely to do so in unjust wars than in just wars. That seems highly desirable.

At present, US law requires a combatant, even during combat, to disobey a "manifestly unlawful" order from a superior officer. One assumption behind this requirement of disobedience is that a manifestly unlawful order is an order to act in a way that would be morally impermissible. A hundred years ago, such a requirement would have been inconceivable; everyone would have agreed that even to permit disobedience during combat, much less require it, would fatally undermine the chain of command. Yet it has not. The rejection of the Permissibility of Participation would, in effect, extend to *jus ad bellum* (the principles governing the resort to war), a permission that we already accept, and have translated into law in *jus in bello* (the principles governing the conduct of war).

One might argue that what is acceptable in *jus in bello* would be unacceptable in *jus ad bellum*, since there is greater uncertainty about whether a war is unjust than there is about whether an *in bello* command is unlawful. But this overstates the confidence that a combatant can have that an order is unlawful – for example, when an officer commands him to fire at people who appear to be civilians but who the officer insists are guerrillas with concealed weapons. The important question, however, is whether the

wrongness of an *ad bellum* order could ever be sufficiently "manifest" to justify disobedience.

Various writers who have accepted the Permissibility of Participation as a matter of practice have nonetheless conceded that *if* a soldier is *certain* that a war is unjust, it is permissible or obligatory for him to refuse to participate in it. Vitoria, for example, writes that "if the war seems patently unjust to the subject, he must not fight, even if he is ordered to do so by the prince."[11] More recently, Colonel Dan Zupan has posed this question: if a soldier "actually knew … that his side was unjust, could he or she justifiably go to war, knowing that he or she would be complicitous in what would amount to mass murder?" His answer is "Probably not."[12] Yet both these writers, and many others like them, accept the Permissibility of Participation in practice on the ground that the degree of certitude necessary to justify a refusal to fight is rarely, if ever, attainable. Zupan claims "that 'knowing' his or her war to be unjust turns out to be something he or she literally cannot do."[13] The unjust nature of a war is never, or almost never, sufficiently "manifest;" hence participation is, in practice, permissible.

Defenders of the Permissibility of Participation might seek to reinforce this conclusion by arguing that even if soldiers were to believe that it is seriously wrong to fight in an unjust war, and were strongly motivated not to engage in serious wrongdoing, they would nevertheless continue to fight in unjust wars because they would believe them to be just. Indeed, even the universal rejection of the Permissibility of Participation would have no practical effect at all if both those who fight in just wars ("just combatants"), and those who fight in wars that lack a just cause ("unjust combatants"), always believed that their war was just. The same would be true if soldiers felt unable to judge the moral status of their war and assumed, as most seem to do, that the right choice in that situation is to defer to the judgment of their leaders.

An alternative response to the difficulty of determining whether a war is just, is to conclude that there is a strong moral presumption against participation in *any* war. The moral risk involved in intentionally killing people when there is a significant probability that they are innocent (that is, have done nothing to forfeit their right not to be killed) is simply too great. Those who take this view conclude that the inevitable uncertainties about *jus ad bellum* entail contingent pacifism.

These views are counsels of despair. They take the frequent inability of soldiers – now and in the past – to reach reliable judgments about matters of *jus ad bellum* as an unalterable feature of the moral landscape. But there are ways of providing soldiers (and civilians) with guidance about issues of *jus ad bellum* that would be epistemically more reliable than the pronouncements of their own governments. To realize a scheme for providing moral guidance to soldiers will require moral vision as well as creativity in the design of new institutions. But I have tried to indicate why it is

important to make the effort. If we could enable soldiers to discriminate reliably between just and unjust wars, we could have the benefit of rejecting the the Permissibility of Participation – namely, the enlistment of soldiers' consciences in the effort to prevent unjust wars – without compromising the ability of states to fight just wars. My aim in the remainder of this chapter is to suggest a strategy for providing the necessary moral guidance.

2 A practical proposal

2.1 Enhanced understanding

To provide people with knowledge of which wars are just, one must possess the relevant knowledge oneself. At present, our understanding of the morality of *jus ad bellum* is rudimentary. Just war theorists have traditionally offered a list of conditions, all of which must be satisfied in order for the resort to war to be permissible: just cause, last resort or necessity, proportionality, reasonable hope of success, right intention, legitimate authority, and so on. But although these conditions have been invoked for centuries, they have never been carefully or rigorously analyzed and evaluated. When just war theorists have discussed the requirement of just cause, for example, they have tended to offer a short but ad hoc list of aims that count as just causes for war, but have typically failed to explain what the items on the list have in common or to defend a principled criterion for determining what should appear on the list. The comparative neglect of *jus ad bellum*, both in just war theory and in the law of war, can be explained largely by the fact that it has been easier to constrain the conduct of war than it has been to prevent wars from occurring. At least until after the First World War, people were reconciled to the idea that there was little that could be done to prevent wars from occurring; indeed, during the nineteenth century, the acceptance of the inevitability of war had led, in law, to the view that states possessed a sovereign right to resort to war for any reason. Both just war theorists and legal theorists concentrated their efforts on finding ways to regulate and restrain the conduct of war. They sought to identify constraints that it would be in the interest of all belligerent parties in a war to obey and then to promote the acceptance of those constraints through custom or treaties. By the middle of the twentieth century, however, after two catastrophic world wars, the prevention of war became paramount. Both in law and in just war theory, the list of just causes for war had shrunk to a single item: self-defense by a state in response to an actual attack. The UN Charter made that the sole legal justification for the unilateral resort to war.

Since the establishment of the UN, a small body of customary international law concerning *ad bellum* matters has evolved and has made some allowance for wars of preemptive self-defense, and perhaps for certain wars of humanitarian intervention. Yet the law of *jus ad bellum* remains

simplistic. And just war theorists have so far failed to articulate a rigorous, detailed, theoretically unified, and plausible account of the morality of the resort to war.

The first task, then, in any effort to provide soldiers, political leaders, and the global public generally with authoritative guidance in matters of *jus ad bellum* is to advance our comprehension of these matters far beyond the level of understanding we have thus far attained. This is a task for moral philosophers. If they can overcome the reluctance their predecessors have shown to work on an issue so lacking in philosophical cachet as the ethics of war, contemporary philosophers are now poised, with the enhanced understanding of various underlying issues of moral theory they have inherited, to produce a more sophisticated account of the morality of *jus ad bellum*.

After sufficient philosophical work has been done, the next step should be to codify our improved understanding of *jus ad bellum* in a body of deontic principles stating prohibitions, permissions, and perhaps requirements concerning the resort to war and the continuation of war. These principles should be formulated as guides to action; hence they must satisfy standards of clarity, precision, and relative simplicity. The ultimate aim is for these principles to become rules of international law that would be maximally congruent with the morality of *jus ad bellum*, while making allowance for the ways in which laws must sometimes diverge from the moral principles on which they are based – for example, because laws sometimes require a sharp threshold where morality recognizes only matters of degree, or must be crafted to avoid creating morally counterproductive incentives or deterrent effects. But, while it would be ideal for these principles to have the authority of law, it is, for reasons I will explain later, probably unavoidable, at least for the foreseeable future, for them to lack the status of law. But, as I will also explain, it is possible for them to lack the authority of law while nevertheless being more than merely hortatory.

Assuming that we were able to formulate a set of *ad bellum* principles that were sensitive to pragmatic considerations, but otherwise maximally congruent with morality, it would then be necessary to establish a court or court-like institution that would interpret and apply the principles to particular cases – that is, to deliver authoritative judgments on whether particular wars in the narrow sense are just or unjust. The ideal form that this institution could take would be a formally recognized court of law, in which case its judgments would concern the legality or illegality of particular wars, with the understanding that the law was intended to track morality as closely as possible. The reason this would be ideal is that the court's judgments would have the status and therefore the authority of law. Yet, just as it is unlikely that the *ad bellum* principles could be principles of international law, so it is unlikely, *a fortiori*, that these principles could be applied to particular cases by an official court of law. I will later say more about why

this is so. Nevertheless, for ease of exposition, I will continue to refer to a "court," indicating either explicitly or by context whether the reference is to an official court of law or to an unofficial body charged with the interpretation and application to particular cases of principles of *jus ad bellum*.

2.2 Enforcement

The aim of an *ad bellum* court, even if it had the status of a court of law, would not be the enforcement of the *ad bellum* principles. It would not be charged with determining whether individuals – either political leaders or combatants – deserve punishment for violations of the principles of *jus ad bellum*. Of course, the aim that motivates the proposal for such a court – facilitating the refusal by soldiers to fight in unjust wars – might be advanced by attempting to deter their participation through a threat of punishment. Yet it would be a mistake to threaten ordinary soldiers with punishment for fighting in an unjust war. This is true at present but would remain so even if there were an *ad bellum* court that would be able to distinguish just from unjust wars more reliably than any existing institution. At present, various mitigating conditions normally apply to those who fight in unjust wars – for example, that these combatants act in understandable ignorance and under duress (since they are threatened with punishment for disobedience). As a result, they are generally minimally culpable and thus undeserving of institutional punishment, and even those who might deserve punishment would deserve so little that a threat to inflict *proportionate* punishment would be unlikely to have a significant deterrent effect.[14]

Some will contend that if the Permissibility of Participation is false, many of those who fight in wars that are most obviously unjust – such as the Nazi invasions of countries that posed no threat to Germany – must be culpable to a significant degree. It is, however, instructive to compare such people to, for example, *patres familias* in ancient Rome who exercised absolute sovereignty over their wives and children, or slave owners in the antebellum South. Such people occupied roles that were regarded by virtually everyone in their society as necessary and justified, so that only morally exceptional people denounced the practices of which those roles were a part. But the idea that many slave owners did not deserve punishment is compatible with their having been liable to be seriously harmed, or even killed if that had been necessary to free their slaves; for the conditions of liability to punishment are more stringent than the conditions of liability to defensive action.

The existence of an *ad bellum* court, whether official or unofficial, would alter some, though not all, of the conditions that militate against punishing unjust combatants. If the court had correctly declared that a war in progress was unjust or illegal, and if this judgment was widely disseminated, that would weaken the excuses available to those fighting in it. Their ability

to plead nonculpable ignorance would be diminished. And to the extent that the court's judgment would generate international pressure on the state fighting the unjust war to treat dissenters leniently, it could also reduce the level of duress to which its soldiers would be subject. The weakening of these mitigating conditions would make unjust combatants more culpable for their participation, so that they might deserve forms of punishment sufficiently aversive that the threat of such punishment could be a modestly effective deterrent to participation in the war. Even so, there would still be other reasons why punishing combatants merely for participation would be objectionable, and these reasons together could outweigh the positive effect of enhanced deterrence.

There are, for example, various reasons why any attempt to punish combatants merely for participation in an unjust war would be impracticable and counterproductive. There would be too many of them for procedurally fair trials to be feasible. And even a process by which only a certain proportion of the combatants, chosen by lottery, would be tried would be a waste of resources that would be better devoted to *post bellum* reconstruction. No state, moreover, could be expected to surrender tens or hundreds of thousands of its citizens to face punishment for participation in a war in which it had commanded them to fight. And a new war to compel the submission of the former unjust combatants would simply, and counterproductively, convert them into combatants again.

Finally, if punishment were allowed on the basis of the court's decisions, then in cases in which the court's judgment was mistaken, the combatants punished would be innocent. If the principal function of the court could be carried out without creating a risk of unjust punishment, that would obviously be preferable to taking so grave a risk. And this function – to provide reliable judgments about whether wars are just or unjust – *can* be achieved without any effort at enforcement.

2.3 The inhospitable domain of international law

This would be true even if the institution that delivered such judgments were an official court of law. Even now, the International Court of Justice (ICJ) issues judgments, in the form of "advisory opinions," that are legally authoritative and influential in practice, but neither enforceable nor even legally binding. These are judgments on questions of international law that are submitted to the court by one of the agencies or organs of the UN. As one international lawyer has noted, their:

> non-binding character does not mean that advisory opinions are without legal effect, because the legal reasoning embodied in them reflects the Court's authoritative views on important issues of international law and in arriving at them, the Court follows

> essentially the same rules and procedures that govern its binding judgments delivered in contentious cases submitted to it by sovereign states. An advisory opinion derives its status and authority from the fact that it is the official pronouncement of the principal judicial organ of the United Nations.[15]

A judgment of a formal *ad bellum* court about whether a war is legal or illegal could have much the same status and authority as an advisory opinion of the ICJ. Indeed, an institutional home for such a court could, in principle, be found within the ICJ itself. It might, for example, be established as a permanent special chamber of the ICJ, comparable to the special chamber on environmental issues that was created in 1993.

One reason that it would be desirable for judgments about war, intended to guide the consciences of soldiers, to issue from a court of law is that they would then be imbued with the status and authority of law, so that they would have to be taken seriously. Another reason is that juridical institutions can be designed to operate with a variety of procedural constraints that ensure a high level of epistemic reliability. Criminal courts, for example, are designed to yield judgments about individual guilt and innocence that are more likely to be correct than any private judgment. The aim of an *ad bellum* court would be to attain a comparable degree of epistemic reliability and therefore epistemic authority.

There are, however, many obstacles to the establishment of an official court of law capable of fulfilling the needed epistemic function. Many of these obstacles derive from the fact that such a court would be required to operate in ways, which I will enumerate later, in which no court now operates. These necessary differences from other legal institutions make an *ad bellum* court too ambitious to be feasible at present, especially in an area of the law that is still in its infancy.

The principal obstacle to the formulation of a reformed law of *jus ad bellum*, and the establishment of a court to administer it, is that both the international law of armed conflict and international criminal law depend for their authority on the consent of states. Thus, the ICJ recently reaffirmed that it "has jurisdiction in respect of States only to the extent that they have consented thereto."[16] And it is clear that states would not now consent to subject themselves to the jurisdiction of a court capable of authoritatively declaring their wars to be illegal, particularly if they had no veto over its judgments and no role in the appointment of its judges. Even now, the US, Russia, China, and India, among others, continue to refuse to ratify the Rome Statute and thus to submit their citizens to the jurisdiction of the International Criminal Court (ICC). Equally revealingly, those states that are signatories to the Statute took twelve years merely to agree to a definition of the sole *ad bellum* crime – aggression – yet the result of their labors is an understanding that simply defers on matters of substance to the

definition already found in the UN Charter. It is worth noting, incidentally, that the definition in the amendment to the Rome Statute affirms the legal version of the Permissibility of Participation by stipulating that no one other than "a person in a position effectively to exercise control over or to direct the political or military action of a State" can be guilty of the *ad bellum* crime of aggression. (It is also worth noting that the special chamber of the ICJ to which I referred, which had jurisdiction over environmental matters, was never called into service and was dissolved in 2006 after thirteen years of desuetude.)

It seems, therefore, that unlike domestic criminal law, which does not allow individuals to exempt themselves from its jurisdiction, the areas of the law governing relations among states, particularly with respect to war, are as yet too immature to be able to accommodate a court that could perform the epistemic functions necessary to inform the moral deliberations of soldiers and others, thereby helping to constrain the initiation of unjust wars.

2.4 An alternative epistemic authority

Assuming that the prospect of resistance from states makes it impossible in the near future to have a reformed *ad bellum* law with a special court to administer it, there are possible alternatives that, while lacking the authority of law, might nevertheless serve the intended epistemic function. It might be possible, for example, to organize a congress of eminent and respected authorities on international law and just war theory that would have as its purpose the formulation of an *ad bellum* code of the sort I have described, and the establishment of a court-like institution that would judge whether wars, in the narrow sense, were just or unjust by reference to the code. The members of the congress could include international lawyers, scholars of international law, including representatives of various national organizations, such as the American Society of International Law, veteran prosecutors, defenders, and judges from the criminal tribunals for Rwanda and Yugoslavia. This list could also include just war theorists, moral philosophers, political theorists, retired military officials, particularly former Judge Advocate Generals and their counterparts in other countries, and perhaps even some serving military personnel with training in law or ethics who might be seconded to the congress in an advisory capacity. This same congress could also design an unofficial court, modeled in appropriate ways on actual courts of law, and could also determine what the procedures would be for the appointment of members of the court.

One question is whether such a code and court could have any authority, on the assumption that neither states nor individuals would consent to be subject to them. Since consent is the principal source of jurisdictional authority in international law and international criminal law, neither the

code nor the court could have such authority. But since the purpose of the court would not be to issue binding, enforceable judgments about war, it need not assert jurisdictional authority of the sort claimed by courts of law. Its purpose would be epistemic only, so the relevant question is whether it could have *epistemic* authority. For this, the consent of states would be an impediment. States, or rather their leaders, consent to be restricted by principles not so much because they are committed to adhering to the demands of morality, but because they believe that the acceptance of restrictions is in their interest, given their awareness that other states will not accept those restrictions unless they do. Because morality imposes constraints on the pursuit of interests that are not open to compromise or negotiation, a code that must be designed to attract the consent of states cannot be expected to coincide with the moral principles that govern the practice of war.

The epistemic authority of an *ad bellum* code and an informal *ad bellum* court could derive from a variety of sources. One is the provenance of the code in the work of people with recognized expertise in moral reasoning and experience in the formulation of principles for the regulation of conduct, such as just war theorists, moral philosophers, and distinguished legal and political theorists. These individuals may be presumed impartial and disinterested in a way that the representatives of states can never be. And the same could be true of "judges" selected for the court by means independent of the consent or approval of states. The status of the code and court could be further enhanced if they were endorsed by non-governmental organizations devoted to the protection of human rights and the promotion of the rule of law in relations among peoples.

In certain respects, criminal law and criminal courts provide the models for the suggested *ad bellum* code and informal *ad bellum* court. Just as domestic criminal law is widely and correctly believed to be closely congruent with various dimensions of the morality of interpersonal relations, so the *ad bellum* code would aim, as much as possible, to articulate the basic morality of war. And just as criminal courts are designed to be not only procedurally just but also epistemically reliable in determining whether criminal suspects are guilty, so an unofficial *ad bellum* court would have to be *procedurally* constrained to ensure that its judgments would be epistemically justified. They would, for example, be constrained by the necessity of conformity with a body of determinate, publicly accessible doctrine that had been widely endorsed by acknowledged authorities on morality and law. And, as with criminal courts, an *ad bellum* court could invite submissions from belligerents and welcome briefs from *amici curiae*, as well as having to operate in accordance with procedural rules characteristic of courts of law, such as rules of evidence, voting procedures, a requirement of public justification, and so on. Judges should ideally be of diverse national and religious (including nonreligious) backgrounds, and should be

required to recuse themselves from cases involving any state to which they had close ties, such as citizenship.

Even if an unofficial *ad bellum* court were to have all these features, it would take time for it to establish its epistemic authority. But its authority could be gradually established if it were to issue a series of judgments that were subsequently confirmed by the kind of consensus that in general eventually emerges after a war has ended and the passions that motivated it have faded. For example, although there was an intense debate about the morality of the American war in Vietnam while it was in progress, there is now general agreement that the war was unjust. If the judgments of the court were consistently to match the *post bellum* consensus, and in particular if the reasons it offered in support of its judgments were to be subsequently recognized as cogent, this could eventually generate considerable respect for – and deference to – the court's judgments in new cases. Indeed, if the court's epistemic authority were to become well established by virtue of its demonstrated competence, international legal institutions might be shamed into absorbing it and according it official standing in law.

Though no such court could be infallible, its judgments would have a stronger claim to epistemic reliability than the pronouncements of warring states, which are inevitably lacking in impartiality and disinterestedness. It is depressing that a state's citizens generally accept their government's claims about a war it wants to fight even when the exposure of its mendacity about the previous war is, or should be, still fresh in their memory. Perhaps this persistent credulity could be counteracted to some degree by an impartial *ad bellum* court.

Any effect that an *ad bellum* court might have would be unlikely to occur through its direct influence on the deliberations of governments. Political leaders who believe it is in their interest to go to war are unlikely to be restrained by arguments, however compelling, that the war would be unjust. But it is possible that many soldiers could be persuaded to refuse to fight by the judgment of an *ad bellum* court that their war was unjust, particularly if the doctrine of the Permissibility of Participation had been discredited in their culture. Many civilian citizens might also be persuaded to withdraw their support for a war that the court had declared unjust. Some might be driven to active opposition. The central practical effect of the court would thus be on the consciences of individuals, including soldiers, civilians, and perhaps even a few government officials. If the code encapsulated our best understanding of *jus ad bellum*, and the court were designed and structured to yield objective, impartial judgments in accordance with the code, those judgments could have significant practical effects even though neither the code nor the court would have been recognized by states. If states could anticipate that a ruling against them by the court might provoke resistance to their unjust war from their citizens and soldiers, thereby threatening their domestic legitimacy, the court could have a significant deterrent effect.

Earlier I mentioned the possibility that the widespread rejection of the Permissibility of Participation might lead some soldiers who have been commanded to fight in a just war to pretend to believe that the war is unjust to avoid having to fight. This possibility might ground a pragmatic argument for preserving the doctrine of the Permissibility of Participation even if it is untrue. But an *ad bellum* court could allay this concern. For if a war was just and the court had publicly declared it to be so, giving reasons for its judgment, it would be difficult to maintain a convincing pretense of believing that it was unjust.

3 Requirements for the effective functioning of the court

In order for the court to provide moral guidance, it must conduct its deliberations and deliver its judgment while the war is in progress, or even, if possible, before a war begins. It would thus be unlike a criminal court, which begins its investigations and delivers its judgment only after a crime has been completed (though there are rare instances in which a court acts on an application for an advance determination of the legality of an act, such as the surgical separation of infant conjoined twins). But unlike most domestic crimes – which are either of short duration or can in principle be stopped by law enforcement agents – wars may be protracted and can seldom be terminated except by the belligerent parties themselves. In many cases, therefore, the court could rule in the relatively early stages of a war. In cases in which there was a long build-up to war, it might be possible for the court to rule in advance of a war's initiation.

That the court would have to rule while war was in progress poses various problems. Trying to stop an unjust war is an exigent matter and the court would be under pressure to deliver a judgment quickly, in the hope of exerting its influence as early as possible. This creates a dilemma. Hasty deliberation would diminish the reliability, and hence the authority, of the court's judgment. Yet thorough deliberation would entail delay, during which the forces fighting unjustly might advance toward victory, causing ever-greater harm in the process. Indeed, a state fighting an unjust war might seek to retard the activities of the court by claiming that it required more time to prepare material explaining and defending its action. This dilemma can be resolved only by a compromise between the values of rapidity and soundness of judgment. Yet in cases in which we think that a political leader ought to be punished for an *ad bellum* decision made under pressure of time, we implicitly acknowledge that this sort of compromise can be responsibly made.

Given that the court's principal function would be epistemic and that it would therefore be essential to its purpose that it render its judgments as quickly as possible, it would have to be able to initiate its own cases. Again, if its standing were unofficial, this would pose no problem, for anyone may

offer a moral judgment about a war. But the authority to initiate its own cases would also be a necessary feature of any official successor court that might be established within the ICJ or some other international legal institution. Such a court would be ineffective in fulfilling its epistemic function if it had to wait for a petition from a belligerent party or even for a request for an advisory opinion from a UN agency before beginning its deliberations about the justice of a particular war.

Another problem the court would face is that it might lack access to empirical information that would be critical to its ability to evaluate a war. The epistemic authority of its judgments would depend as much on its access to factual information as on the soundness of its principles and reasoning. But just as states often present false or misleading representations of the facts to their own citizens and to the world at large, so they could be expected to do the same if they were willing to cooperate with the court to the extent of presenting their case to it.

States may also claim, occasionally with justification, that revealing information that is essential to their justification for going to war would compromise their intelligence services and thus imperil their ability to gather further information vital to their security (it has, for example, happened at the ICJ that a state has refused to submit sensitive information on the ground that it could not trust one of the judges not to reveal that information to its adversary in the dispute before the court). Given that the epistemic authority of the court would depend on its being required to make its deliberations public and thus open to scrutiny and challenge, it is doubtful that this problem could be solved by allowing states to submit evidence that the court would pledge not to reveal. There are, therefore, obstacles to obtaining empirical information necessary for a fully informed judgment.

This is, of course, a problem that every individual confronts in judging the morality of a war in progress. If it were an insuperable obstacle to an epistemically justified judgment, no one other than a few government officials would ever be justified in judging a war to be just or unjust until well after it had ended, if then. But few of us accept that our lack of access to classified information always, or even usually, renders us incapable of justifiably believing that a war in progress is just or unjust. Sometimes the morally salient facts cannot be concealed, and no amount of classified information could undermine the moral conclusions to which they point. In general, however, the important question is not whether an *ad bellum* court would be infallible, but whether its judgments could be reasonably believed to be more reliable than those of any state or individual. And clearly, they could be. The court could, for example, have its own research staff, each of whom would be a recognized specialist in the history, politics, or culture of a particular state or region. Each member of this perhaps quite extensive group of experts might be continuously "on call" in the service of the court and thus charged with monitoring developments in the area of the

world about which he or she is knowledgeable. The court might still lack information possessed by a state that refuses to divulge it, but in most cases the lack of such information would be compensated for by the absence of self-interest that inevitably contaminates the empirical and evaluative claims made by states.

Another concern is how an unofficial court, or even an official one, could ensure that its judgments would reach those most in need of guidance – namely, soldiers fighting, or on the verge of fighting, in an unjust war and their civilian fellow citizens. This is a less serious problem than it would have been in the past. The Internet, email, cell phones with cameras that can transmit images taken, and other decentralized communications systems such as Twitter make it possible for information to be disseminated throughout the world almost instantaneously, as the Iranian regime discovered while suppressing popular uprisings during the summer of 2009. Because armies are critically reliant on communications technologies, and often operate in areas in which individual combatants can have independent access to such technologies, it is difficult for a government to deny its forces access to information that is readily accessible to others throughout the world.

I have noted that the epistemic function of the court requires that it render its judgment not only while war is in progress but also as early in the course of the war as possible. As long as the *ad bellum* court remained unofficial, there would obviously be no higher court of appeal to which the belligerent party whose war in progress had been ruled unjust could apply in the hope of having the judgment reversed or revised. This would probably have to remain the case even if there were an official *ad bellum* court whose rulings would have the status of law. But the absence of an appeals process does not mean that an *ad bellum* court would never revisit or reconsider a ruling it had made. On the contrary, it would be necessary for such a court to continue to monitor a war on which it had ruled in case the circumstances of the war were to change in a way that would require a new ruling. For *jus ad bellum* is concerned not only with the resort to war but with the continuation of war, as the moral character of a war can change over time. A just war may become unjust if, for example, it achieves its just cause and yet continues in order to achieve further aims that cannot justify the continuation of war. And an unjust war may become just, or at least justified. This arguably occurred in the Iraq war. It may be that even though the initial invasion was unjust, the destruction of all political authority necessitated an occupation with continued fighting that only the US was willing and able to impose. Even though the occupation wronged most of those burdened by it, and so was unjust, it may have been morally justified, and better even for those wronged by it, in the conditions created by the unjust invasion.[17] If the moral status of a war in the narrow sense were to change in one of these ways, it would be necessary for the court to change its initial judgment to reflect the altered circumstances.

Not only can the moral character of a war change over time, but it can also be internally complex at any given time. A war may have a just cause and be both necessary for the achievement of that cause and proportionate in relation to its importance, and yet also have other aims that are wrong or unjust. Alternatively, a war may have a main goal that is unjust but also have a subsidiary goal that is just, though not sufficiently important on its own to justify the resort to war. In either case the war as a whole may be unjust yet include some acts of war that contribute only to the achievement of a just goal. For example, in a war whose main aim is the annexation of land containing oilfields, some combatants might be deployed for the sole aim of releasing political dissidents from unjust imprisonment. If the court could deliver only one of two possible judgments – that a war is just or unjust – its judgment might fail to provide appropriate guidance to the combatants involved in this mission. For perhaps it can be morally permissible to fight in certain ways in a war that is unjust overall but may nevertheless achieve an aim that is just.[18]

Presumably, an *ad bellum* court would, like other courts, render a single judgment (or, if necessary, a sequence of judgments) on each war it considered. Just as criminal courts do not make positive judgments of innocence but only judgments of guilty or not guilty, so an *ad bellum* court might not issue a judgment that a war was just but only judgments of unjust or not unjust. One possibility would be that both belligerent parties were fighting unjust wars.

The judgment of the court would be determined by the votes of the various judges – presumably by a simple majority. Given that the purpose of the court would be epistemic, the degree of agreement or disagreement among the judges might have greater significance than it does in other courts. The voting could serve as a measure of the degree of certainty or uncertainty about the morality of a particular war. Soldiers would be warranted in having a high degree of credence in a unanimous judgment of the judges. The degree of credence warranted in a case in which the judges were almost evenly divided, with the particular judgment winning by only one vote, would be significantly lower. Even in such a case the court would succeed in providing epistemic guidance of a sort. For a strongly divided court would indicate significant moral uncertainty. Soldiers on both sides might reasonably conclude that it was permissible, in what Parfit calls the "evidence-relative sense," to continue to fight.[19] If it later became clear that one side had been objectively in the wrong, combatants who had fought on that side might be morally excused for fighting on grounds of non-culpable ignorance, and the court's judgment could be cited as confirmation that their ignorance was non-culpable.

4 Conclusion

In the many variations of the traditional just war doctrine of *jus ad bellum*, one fairly constant element has been a requirement of "legitimate

authority." While there is a cynical explanation of its appearance on some of the early lists of *ad bellum* requirements – namely, that it appealed to leaders of states because it seemed effectively to rule out domestic revolution – there are also reasons why such a requirement can be important. It can, for example, help to ensure that a society is not taken to war against the will of its members. But those who have insisted on a requirement of proper authorization for the resort to war have also been concerned to prevent war from being undertaken without adequate justification. On this view, the role of the authority is primarily epistemic. But if this is the purpose of the requirement, it has not been well served by the bodies that are typically cited when people want to show that a war has satisfied the requirement: for example, the UN Security Council or, in the US, the Congress, which according to the Constitution is the only entity with the authority to declare war. An international, impartial, and disinterested *ad bellum* court, whether official or unofficial, would at last offer a reasonable prospect that a war could satisfy not just the letter but also the substance of this traditional just war requirement.

The proposal I have sketched is no doubt defective in many ways, utopian in some respects, and insufficiently imaginative in others. But its aims are ones we all should share. We can, I think, agree that it would be desirable if soldiers were to refuse to fight in wars that are objectively unjust because they lack a just cause. And we should agree that young people who are commanded by their rulers to risk their lives in order to kill others, deserve moral guidance that we know they will not receive from those who seek to use them in this way. Readers who discover the inevitable flaws in my arguments therefore have reason not merely to expose them but to consider whether the deficiencies can be remedied, and whether the obstacles they may perceive to the realization of the proposal could be overcome. Even if the proposal is hopeless, perhaps the reasons I have given for thinking it profoundly important to provide soldiers with reliable moral guidance may inspire others to identify a better means of doing so.

Appendix: the use of robots in war

It is worth noting one implication of these claims about the potential utility of an *ad bellum* court. Progress in various areas of science has led to increasing controversy about the use of robots and other autonomous technologies for military purposes. Those who advocate the use of robotic weaponry often claim that advances in both sensor technology and programming have made it possible to design robots that would be better able to discriminate between enemy combatants and noncombatants than human combatants are. This may be true and is of significance to the extent that the distinction between combatants and noncombatants coincides with the distinction between legitimate and illegitimate targets. But no one, to

my knowledge, claims that robots could be better at discriminating between just and unjust wars than an individual person might be; and if robots will be less adept at distinguishing between just and unjust wars than individual persons, it seems to follow, *a fortiori*, that they would be less adept than an *ad bellum* court. Nor has anyone proposed a way of making robots that would be usable in just wars but not in unjust wars. The development of robots for military uses in war therefore threatens to subvert the aims that an *ad bellum* court would be intended to serve. The immediate aim of the court would be to guide the consciences of soldiers and citizens by providing them with an epistemically reliable and authoritative judgment of the morality of their country's war. To the extent that soldiers might be motivated to resist a command to fight in a war that the court had judged to be unjust, the court could function to constrain the initiation of unjust wars by raising the costs to states of fighting them. But if a state can reduce its reliance on soldiers with consciences by deploying robots in their place, the practical effect of the court would be diminished. More generally, even if the use of robots could facilitate conformity with the requirements of *jus in bello*, the replacement of morally autonomous agents in war with robots is inimical to the *ad bellum* aim of preventing unjust wars.

Notes

1 I am very grateful to Simon Mark O'Connor of the ICRC and Seth Lazar for unusually extensive and illuminating comments and advice. Graham Long, Naomi Sussman, and Victor Tadros gave me very helpful written comments on an earlier draft. I have also benefited from discussions with Brian Burge-Hendrix, Antony Duff, Claire Finkelstein, Mattias Kumm, Larry May, Massimo Renzo, Regina Rini, David Rodin, Scott Shapiro, Michael Walzer, and, especially, Patrick Emerton.
2 Henry Shue and Janina Dill, "Limiting Killing in War: Military Necessity, Not Individual Liability," unpublished paper.
3 See Saba Bazargan, "The Permissibility of Aiding and Abetting Unjust Wars," *Journal of Moral Philosophy* 8, 2011, 513–29.
4 Augustine, *The City of God*, trans. Marcus Dods, New York: Modern Library, 1950, p. 27.
5 See Jeff McMahan, *Killing in War*, Oxford: Clarendon Press, 2009, pp. 104–54.
6 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, New York: Basic Books, 1977.
7 Avishai Margalit and Michael Walzer, "Israel: Civilians and Combatants," *The New York Review of Books* 56, May 14, 2009, 21–22.
8 Quoted from draft material for a book in progress.
9 Thomas Hobbes, *De Cive*, Whitefish: Kessinger Publishing, 2012, pp. 97–98.
10 McMahan, *Killing in War*, pp. 1–103.
11 Francisco de Vitoria, "On the Law of War," in Anthony Pagden and Jeremy Lawrance (eds.), *Political Writings*, Cambridge: Cambridge University Press, 1991, p. 307.
12 Dan Zupan, "A Presumption of the Moral Equality of Combatants: A Citizen-Soldier's Perspective," in David Rodin and Henry Shue (eds), *Just and Unjust Warriors*, Oxford: Oxford University Press, 2008, p. 217.

13 Ibid., p. 218.
14 For further arguments against the punishment of mere participation in an unjust war, see McMahan, *Killing in War*, pp. 189–92.
15 Pieter H.F. Bekker, "The UN General Assembly Requests a World Court Advisory Opinion on Israel's Separation Barrier," The American Society of International Law, *ASIL Insights* (December 2003) at www.asil.org/insigh121.cfm.
16 "Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility," *Judgment, I.C.J. Reports 2006*, p.32, para.64f.
17 On the distinction between a just war and a justified war, and on the case of Iraq in particular, see Jeff McMahan, "The Morality of Military Occupation," *Loyola International and Comparative Law Review* 31, 2009, 7–29, pp. 14–15.
18 I am indebted here to Bazargan's article, cited in note 2, which concludes that, at least in some instances, the unit of evaluation in *jus ad bellum* should not be wars in the narrow sense, but the goals of such wars.
19 Derek Parfit, *On What Matters vol. 2 (The Berkely Tanner Lectures)*, New York: Oxford University Press, 2011, pp. 213–43.