

Michael Walzer on the Moral Legitimacy of States and the Morality of Killing in War

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## **ABSTRACT**

This thesis is divided into two chapters. In the first chapter, I analyze Michael Walzer's account of the moral legitimacy of states. In the second chapter, I analyze his account of the morality of killing in war. I begin the first chapter by contrasting Walzer's account of state legitimacy and humanitarian intervention with that of David Luban. Next, I develop a Rawlsian account of state legitimacy and humanitarian intervention and argue that this account is more plausible than both Walzer's and Luban's accounts.

The second chapter is divided into two parts. In the first part, I argue that Walzer's account of the distinction between combatants and noncombatants is misleading because it gives the impression that all and only infantry soldiers are combatants and that all and only civilians are noncombatants. In the second part of the second chapter, I describe an account of the morality of killing in war developed by Jeff McMahan that is based on an analogy with the morality of killing in domestic society and argue that this account is more plausible than Walzer's account of the morality of killing in war. I also suggest a way that McMahan's account could be improved.

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## INTRODUCTION

Traditionally, just war theory has been divided into two parts that are denoted by their Latin labels: *jus ad bellum* and *jus in bello*.<sup>1</sup> The first deals with the justice of war, or the moral constraints on the resort to war, and the second deals with justice in war, or the moral constraints on the conduct of war. Michael Walzer's *Just and Unjust Wars* is one of the most influential contemporary accounts of just war theory.<sup>2</sup> Walzer discusses *jus ad bellum* in the context of what he calls the "theory of aggression" and he discusses *jus in bello* in the context of what he calls the "war convention."

### ***The Theory of Aggression (Jus ad Bellum)***

As Walzer explains, the theory of aggression consists of the principles of *jus ad bellum* as they are expressed in international law. The theory is based on the domestic analogy, which is the application of principles that govern the relationships between citizens in domestic society to the relationships between nations in international society. Walzer refers to the conventional form of the theory of aggression as the "legalist paradigm," which he sums up in six propositions:

1. There exists an international society of independent states.
2. This international society has a law that establishes the rights to its members—above all, the rights to territorial integrity and political sovereignty.
3. Any use of force or immanent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act.
4. Aggression justifies two kinds of violent responses:
  - a. a war of self defense by the victim and
  - b. a war of law enforcement by the victim and any other member of the international society.

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<sup>1</sup> Brian Orend argues that a third part ought to be added to just war theory that deals with justice after war, or the moral constraints on the termination of war. This part would be called *jus post bellum*. Orend offers a set of principles for *jus post bellum* in "Justice after War," *Ethics and International Affairs*, vol. 16, no. 1 (2002), 43-56. Although Walzer addresses some of the issues involved in *jus post bellum* in Chapter 7 of *Just and Unjust Wars*, he does not seem to recognize it as a separate part of just war theory.

<sup>2</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3<sup>rd</sup> ed., (New York: Basic Books, 2000). Hereafter cited as 'JUW.'

5. Nothing but aggression can justify war.
6. Once the aggressor state has been militarily repulsed, it can also be punished (*JUW* 61-62).

Walzer argues for five revisions to the legalist paradigm. The first permits pre-emptive strikes, the second, third, and fourth permit military intervention for reasons other than self-defense and law enforcement, and the fifth restricts the aims of a just war to “resistance, restoration, [and] reasonable prevention” (*JUW* 121).

### ***The War Convention (Jus in Bello)***

Walzer discusses *jus in bello* in the context of what he calls the “war convention.” He uses this phrase to refer to “the set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements that shape our judgments of military conduct” (*JUW* 44). Whereas the legalist paradigm is designed to protect the rights that states possess to territorial integrity and political sovereignty, the war convention is designed to protect the rights that persons possess to life and liberty. The war convention consists of two principles. The first is that “once war has begun, soldiers are subject to attack at any time (unless they are wounded or captured)” (*JUW* 138). The second principle of the war convention is that “noncombatants cannot be attacked at any time” (*JUW* 151).

## **CHAPTER 1: MICHAEL WALZER ON THE MORAL LEGITIMACY OF STATES**

In this chapter, I contrast Walzer's account of state legitimacy and humanitarian intervention with David Luban's account of state legitimacy and humanitarian intervention. I then develop a Rawlsian account of state legitimacy and humanitarian intervention and argue that this account is more plausible than either Walzer's account or Luban's accounts.

### **Walzer's Account of the Moral Legitimacy of States**

To understand Walzer's account of state legitimacy, we must understand his conception of the state. He maintains that a state consists of a political community and that the latter consists of the "union" between the people and the government.<sup>3</sup> His conception of a political community can be understood by an analogy between the human body and the political community.<sup>4</sup> The body as a whole represents the political community, the head represents the government, and the other parts of the body represent the people. Each part of the body can be distinguished from the others and from the body itself even though the former partially constitute the latter. Similarly, each part of a political community can be distinguished from the other and from the community as a whole even though the former partially constitute the latter.

This analogy helps to clarify some of the distinctions that Walzer makes while discussing the moral legitimacy of states. One such distinction is between the members of a political community, i.e. the people, and their government. This distinction is straightforward. Since a political community consists of the "union" between the people and the government, it is easy to

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<sup>3</sup> Michael Walzer, "The Moral Standing of States: A Response to Four Critics," *Philosophy and Public Affairs*, vol. 9, no. 3 (Spring 1980), 212. Hereafter cited as 'MSS.'

<sup>4</sup> Walzer does not state that his conception of a political community is based on this analogy nor does he explain the former by using the latter. Although he never actually mentions the analogy, it seems to be consistent with, and helps to explain, his conception of a political community.

see how the people can be distinguished from their government (MSS 212). But Walzer also distinguishes between a political community and its government. This distinction is not as straightforward as the previous one. Since a political community is partially constituted by a government, it is not immediately clear how the former can be distinguished from the latter. But a person's head can be distinguished from his body even though the former partially constitutes the latter. In the same way, a government can be distinguished from a political community even though the former partially constitutes the latter. Now that we are familiar with Walzer's conception of the state, we may examine his account of state legitimacy.

Walzer distinguishes between two types of legitimacy regarding states, which he refers to as "internal" and "external" legitimacy (*JUW* 82 note). Internal legitimacy has to do with the moral standing of a government with respect to its people. If a government is legitimate, then it is entitled to obedience of its laws from the people. External legitimacy has to do with the moral standing of a state with respect to other states. If a state is legitimate, then it is entitled to military non-intervention from other states. Walzer claims that these two types of legitimacy are expressed by the judgments that we, as citizens of a liberal democracy, make regarding states.

The criterion for each type of legitimacy is based on the notion of "fit" between a government and its people (MSS 212). The term "fit" describes "the degree to which the government actually represents the political life of the people" (MSS 214). Regarding internal legitimacy, Walzer claims that "the judgments that we make reflect our democratic values and suggest that there is only one kind of legitimate state or only a narrow range of legitimacy" (MSS 215). Thus, the criterion for internal legitimacy is that the fit between a government and its people be "of a democratic sort" (MSS 216). That is, if the fit between a government and its people is "of a democratic sort," then the government is legitimate. And this means that the

government is entitled to obedience of its laws from the people. But if the fit is not “of a democratic sort,” then the government is not legitimate and it is not entitled to obedience of its laws from the people. When a government is not legitimate, Walzer claims that the people “are always free to rebel, whether they act on that right or not, and whether they believe themselves to have it or not” (MSS 215).

Regarding external legitimacy, Walzer claims that “the judgments we make reflect our recognition of diversity and our respect for communal integrity and for different patterns of cultural and political development” (MSS 215-216). Thus, the criterion for external legitimacy is that there be “a ‘fit’ of some sort” between a government and its people (MSS 216). That is, if there is “a ‘fit’ of some sort” between a government and its people, then the state is legitimate. This means that the state is entitled to military non-intervention from other states. But if “there is no fit at all,” then the state is not legitimate and it is not entitled to military non-intervention from other states (MSS 217).

There are three types of cases, according to Walzer, in which military intervention is morally permissible:

1. to assist secessionist movements (once they have demonstrated their representative character),
2. to balance the prior interventions of other powers, and
3. to rescue peoples threatened with massacre (*JUW* 108).

The reason why intervention is morally permissible in these types of cases is that they indicate that there is “no fit at all” between the government and the people and, as a result, the state is not entitled to non-intervention from other states. The third item on the list involves armed humanitarian intervention. In addition to massacre, Walzer adds enslavement and “the expulsion of very large numbers of people” to the list of acts that justify armed humanitarian intervention

because they also indicate that “there is no fit at all” between a government and its people (MSS 218).

The reason why the moral permissibility of military intervention tracks the external legitimacy of a state, rather than its internal legitimacy, according to Walzer is that external legitimacy tracks self-determination. That is, as long as there is “a ‘fit’ of some sort” between a government and its people, the political community is a self-determining entity. And as long as a political community is self-determining, it is entitled to non-intervention from other states. Intervention in a political community that is self-determining would violate the community’s right to self-determination and would therefore be morally wrong. If there is no fit between the government and the people, then the political community is not a self-determining entity, which means that the community is not entitled to non-intervention. Intervention in a political community that is not self-determining would not violate the community’s right to self-determination and therefore would not be morally wrong. The main purpose of intervening, when it is morally permissible, is to restore the community’s ability to be self-determining.

The notion of self-determination to which Walzer is appealing is the one developed by John Stuart Mill in “A Few Words on Non-Intervention.”<sup>5</sup> Walzer summarizes Mill’s view as follows:

We are to treat states as self-determining communities...whether or not their internal political arrangements are free, whether or not the citizens choose their government and openly debate the policies carried out in their own name... The members of a political community must seek their own freedom, just as the individual must cultivate his own virtue. They cannot be set free, as he cannot be made virtuous, by any external force (*JUW* 87).

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<sup>5</sup> John Stuart Mill, “A Few Words on Non-Intervention,” in *Dissertations and Discussions: Political, Philosophical, and Historical*, by John Stuart Mill (Boston: William V. Spencer, 1868) vol. 3, 238-263. The essay was originally published in *Frasier’s Magazine* in December, 1859.

As this passage indicates, Mill's account of self-determination is community-based rather than individually based. That is, a political community can be self-determining in a Millian sense even if none of the people are able to influence the government in any way. Furthermore, as Walzer points out, Mill's view implies that "there is no right to be protected against the consequences of domestic failure, even against a bloody repression" (*JUW* 88). The fact that a form of government oppression as severe as a bloody repression is consistent with a political community being self-determining in a Millian sense implies that most forms of government oppression are consistent with a political community being self-determining in this sense. And since military intervention is morally wrong as long as the political community within a state is self-determining, not even a bloody repression justifies armed humanitarian intervention. Let us call this Walzer's self-determination argument.

Once Walzer establishes that the moral permissibility of military intervention tracks external legitimacy rather than internal legitimacy, he goes on to argue that foreigners are morally obligated to presume "that there exists a certain 'fit' between the community and its government and that the state is 'legitimate'" (MSS 212). The reason for this presumption is that foreigners do not possess sufficient knowledge about the "internal life" of a political community to be competent judges of the "fit" between the community and the government (MSS 212). As Walzer explains:

[Foreigners] don't know enough about [a political community's] history, and they have no direct experience, and can form no concrete judgments, of the conflicts and harmonies, the historical choices and cultural affinities, the loyalties and resentments, that underlie it (MSS 212).

The only time that foreigners are competent to judge the "fit" between a government and its people is when the lack of "fit" is "radically apparent" (MSS 214). This occurs in the three types of cases in which Walzer claims that intervention is morally permissible, namely secession,

counter-intervention, and egregious human rights violations. Let us call this Walzer's epistemic argument.

It is important to understand that Walzer's notion of external legitimacy is a form of presumptive legitimacy rather than actual legitimacy. As we just saw, he claims that foreigners are morally obligated to *presume* that a state is legitimate. "My actual claim," Walzer writes, "is that foreign officials must act *as if* [tyrannical states] were legitimate, that is, must not make war against them" (MSS 216 emphasis added). Thus, Walzer is not claiming that states which oppress their people are *actually* legitimate. Rather, he is claiming that such states are *presumptively* legitimate, by which he means that "foreign officials must act *as if* [they] were legitimate, that is, must not make war against them" (MSS 216 emphasis added). "This presumption," Walzer writes, "is simply the respect that foreigners owe to a historic community and to its internal life" (MSS 212).

### **Luban's Account of the Moral Legitimacy of States**

Although Walzer's view of the moral permissibility of military intervention is more lenient than the view expressed by the legalist paradigm, several philosophers have criticized Walzer's view for being too restrictive.<sup>6</sup> David Luban argues that armed humanitarian intervention is morally permissible in cases of less severe oppression than those that Walzer cites. As we saw, Walzer claims that a bloody repression is consistent with a state being self-determining in a Millian sense. And this means that military intervention to stop such a

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<sup>6</sup> These philosophers include: (1) Gerald Doppelt, "Walzer's Theory of Morality in International Relations," *Philosophy and Public Affairs*, vol. 8, no. 1 (Autumn 1978), 3-26. (2) Richard Wasserstrom, "Review of *Just and Unjust Wars: A Moral Argument with Historical Illustrations*," *Harvard Law Review*, vol. 92, no. 2 (December 1978), 536-545. (3) Charles Beitz, "Bounded Morality: Justice and the State in World Politics," *International Organization*, vol. 33, no. 3 (Summer 1979), 405-424. (4) David Luban, "Just War and Human Rights," *Philosophy and Public Affairs*, vol. 9, no. 2 (Winter 1980), 160-181. Hereafter cited as 'JWHR.'

repression would be morally wrong because the intervention would violate the political community's right to self-determination. According to Luban, however, a bloody repression would justify armed humanitarian intervention. This is because such an act violates what Luban calls "socially basic human rights" and violations of these rights are a just cause for military intervention, provided that the proportionality requirement of just war theory is met.<sup>7</sup>

A socially basic human right, according to Luban, is "a right whose satisfaction is necessary for the enjoyment of any other rights" (JWHR 174).<sup>8</sup> They include "security rights—the right not to be subject to killing, torture, assault, and so on—and subsistence rights, which include the rights to healthy air and water, and adequate food, clothing, and shelter" (JWHR 175). These rights are universal, since "no one can do without them."<sup>9</sup> According to Luban, the universal nature of these rights "requires a universalist politics to implement them, even when this means breaching the wall of state sovereignty" (RNS 393). Thus, provided that the proportionality requirement is met, it is morally permissible for foreigners to intervene militarily in a state in order to stop a government from violating the socially basic rights of its people.

Luban's account of the moral permissibility of armed humanitarian intervention follows from his account of state legitimacy. He explains the latter by appealing to the notion of consent. The criterion for the internal legitimacy of a state is that the people within the state "consent to be governed" (JWHR 168). This means that if the people consent to be governed, then the

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<sup>7</sup> As Brian Orend explains, in the context of *jus in bello*, the proportionality requirement "mandates that a state considering launching a just war must weigh the expected universal benefits of doing so against the expected universal costs. Only if the projected benefits, in terms of securing the just cause, are at least equal to, and preferably greater than, such costs as casualties may the war action proceed" (MWWJ 100). The *jus ad bellum* proportionality requirement is not to be confused with the *jus in bello* proportionality requirement. The latter "mandates that soldiers deploy only proportionate force against legitimate targets" (MWWJ 121). Orend refers to the *jus ad bellum* proportionality requirement as "(Macro-)proportionality" and he refers to the latter as "(Micro-)proportionality." See Brian Orend, *Michael Walzer on War and Justice* (Cardiff: University of Wales Press, 2000). Cited as 'MWWJ.'

<sup>8</sup> Luban points out that he borrows his account of socially basic human rights from Henry Shue's "Foundation for a Balanced U.S. Policy on Human Rights: The Significance of Subsistence Rights" (College Park, Maryland: Center for Philosophy and Public Policy Working Paper HRFP-I, 1977) (JWHR 174 note 24).

<sup>9</sup> David Luban, "The Romance of the Nation State," *Philosophy and Public Affairs*, vol. 9, no. 4 (Summer 1980), 393. Hereafter cited as 'RNS.'

government is legitimate. And if the people do not consent to be governed, then the government is not legitimate. Luban seems to think that the criterion for the external legitimacy of a state is the same as the criterion for the internal legitimacy of a state. That is, if the people consent to be governed, then the state is legitimate, which, as we saw, means that it is entitled to non-intervention from other states. And this means that intervention would be morally wrong. But if the people do not consent to be governed, the state is not legitimate and therefore not entitled to non-intervention from other states, which means that intervention would not be morally wrong. Luban claims that “clear evidence can exist that a state is *not* based on consent and hence *not* legitimate” (JWHR 170). One example that he cites of such evidence is the Nicaraguan revolution of 1978 (JWHR 171). A bloody repression would be another example. The fact that lack of consent by the people makes a state externally illegitimate means that armed humanitarian intervention would be morally permissible in such cases.

Luban’s account of state legitimacy stands in stark contrast to Walzer’s. On Walzer’s account, internal legitimacy and external legitimacy are incongruent. That is, the criterion for internal legitimacy is much narrower than the criterion for external legitimacy. But on Luban’s account, internal legitimacy and external legitimacy overlap. That is, the criterion for internal legitimacy is the same as the criterion for external legitimacy. The disparity between how the two types of legitimacy are related in Walzer’s and Luban’s accounts of state legitimacy seems to be a result of the disparity between each philosopher’s notion of self-determination.

As we saw, Walzer’s notion of self-determination is very broad and is consistent with the people in a state being unable to influence their government in any way. It is also consistent with a government violating the human rights of its people to a significant extent. Luban’s notion of self-determination seems to be that a political community is self-determining only if it consents

to be governed. The fact that consent is the criterion of self-determination implies that some level of consultation must occur between the government and the people in order for the latter to be self-determining. Thus, Luban's notion of self-determination seems to be much narrower than Walzer's notion.

As we saw, Walzer seems to use his notion of self-determination as the basis for his account of external legitimacy. And he seems to use the latter as the basis for his account of the moral permissibility of intervention. Luban also seems to use the notion of self-determination as the basis for his account of external legitimacy. And he also seems to use the latter as the basis for his account of the moral permissibility of intervention. The fact that each philosopher begins with a different notion of self-determination means that they end up with two different accounts of external legitimacy, which, in turn, means that they end up with two different accounts of the moral permissibility of humanitarian intervention.

Walzer and Luban each respond to the other's account of state legitimacy and the moral permissibility of armed humanitarian intervention. Walzer argues that the fact that human rights are universal does not mean that they can be enforced universally. As he explains:

It is not the case that one can simply proclaim a list of rights and then look around for armed men to enforce it. Rights are only enforceable within political communities where they have been collectively recognized, and the process by which they come to be recognized is a political process which requires a political arena (MSS 226).

This seems to be a strong argument against Luban's view that armed humanitarian intervention is morally permissible, subject to the proportionality requirement, to stop a government from violating the human rights of its people. But this does not mean that all forms of intervention are morally wrong until the human rights violations are egregious. As we shall see, a more plausible view seems to be that some types of non-military intervention are morally permissible in such cases.

Luban attacks Walzer's self-determination argument and his epistemic argument. With respect to the former, Luban argues that the notion of self-determination that Walzer employs is implausible. As he explains:

In my view, [Walzer sets] the threshold [for intervention] too high; what he calls "ordinary oppression" can make the lack of fit apparent enough. Let us look at ordinary oppression in a medium-sized dictatorship. Each year there are a few score executions, a few hundred tortures, a few thousand political imprisonments, a few million people behaving cautiously because they know that a single slip will bring the police....If this is a "union of people and government," why are they jails so full? Surely all those strapped to the torture table are not misfits in their own culture (RNS 395).

This seems to be a strong argument against the notion of self-determination that Walzer employs and, as such, weakens his account of the permissibility of armed humanitarian intervention. As we shall see, however, adopting a more moderate notion of self-determination does not commit us to Luban's lenient account of the moral permissibility of humanitarian intervention.

Regarding Walzer's epistemic argument, Luban writes:

True, if we don't know enough about a foreign culture to judge its "fit" with its government, we should give it the benefit of the doubt and presume the fit is there. But why presume we are ignorant? We aren't, usually. There are, after all, experts, experienced travelers, expatriates, scholars, and spies; libraries have been written about the most remote cultures. Bafflingly, Walzer does not mention the obvious sources of information even to dismiss them (RNS 395).

This seems to be a strong criticism of Walzer's epistemic argument. As we saw, Walzer uses this argument to support the notion of presumptive external legitimacy, which he explains by saying that "foreign officials must act *as if* [they] were legitimate, that is, must not make war against them" (MSS 216 emphasis added). But Walzer could just omit the epistemic argument and support his notion of presumptive external legitimacy by appealing to his claim that the presumption "is simply the respect that foreigners owe to a historic community and to its internal life" (MSS 212). In any case, Walzer's self-determination argument is more important to his

account than the epistemic argument and it is Luban's response to the former that poses the greatest problem for Walzer's account.

### **Rawls's *The Law of Peoples***

Walzer's and Luban's accounts of the legitimacy of states may be seen as representing the opposite ends of a spectrum. Walzer's account of external legitimacy is very wide and, as a result, his account of the permissibility of armed humanitarian intervention is very restrictive. On the other hand, Luban's account of external legitimacy is very narrow and, as a result, his account of the permissibility of armed humanitarian intervention is very lenient. A more moderate account of state legitimacy is suggested by John Rawls in *The Law of Peoples*.<sup>10</sup> Although this account of state legitimacy is more moderate than those of Walzer and Luban, Rawls's account of the moral permissibility of armed humanitarian intervention is just as restrictive as Walzer's.

As the title of Rawls's book indicates, the subject of his account is peoples rather than states. His focus on peoples is meant to capture the shift in how international law has come to be understood since World War II. The two most significant changes since that time, according to Rawls, are "[the limitation of] a state's right to wage war to instances of self-defense...and collective security" and "[the restriction of] a state's right to internal sovereignty" (*LP* 27). Rawls's notion of a people seems to be similar to Walzer's notion of a political community in some contexts and with the people who constitute a political community in other contexts. Therefore, I will treat the terms as if they were synonymous.

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<sup>10</sup> John Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited,"* (Cambridge, MA: Harvard University Press 1999). Hereafter cited as '*LP*.'

In *The Law of Peoples*, Rawls sets out principles of justice that ought to govern the relations of well-ordered peoples with each other and with non-well-ordered peoples. He refers to these principles as the “Law of Peoples” (LP 3). The class of well-ordered peoples consists of liberal peoples and decent non-liberal peoples. All peoples who affirm the Law of Peoples constitute what Rawls calls the “Society of Peoples” (LP 3). As we shall see, Rawls argues that all well-ordered peoples would affirm the Law of Peoples. Thus, well-ordered peoples constitute the Society of Peoples (LP 3). In addition to liberal peoples and decent non-liberal peoples, Rawls identifies three other types of peoples. These are “outlaw states,” “societies burdened by unfavorable conditions,” and “benevolent absolutisms” (LP 4). None of these types of peoples is well-ordered and, as a result, none of them affirms the Law of Peoples, which means that none of them belongs to the Society of Peoples.

Let us examine briefly each type of society that Rawls identifies. Liberal peoples have three basic features, according to Rawls (LP 23):

1. a reasonably just constitutional democratic government that serves their fundamental interests
2. citizens united by common sympathies and a desire to be under the same democratic government
3. a moral nature

The first feature includes the ability of a people to influence public policy via the election of representatives (LP 23). The second feature refers to the peoples’ “pattern of cultural values” (LP 23, 25 note 20). The third feature refers to the notion that liberal peoples are “both reasonable and rational” (LP 25). One of the features that characterizes reasonable persons, according to Rawls, is “their willingness to offer fair terms of cooperation among equals” (LP 87). And one of the features that characterizes rational persons is their utilization of several types of rational principles. The simplest type of such principles are “the counting principles” (LP 88). An

example of a counting principle is: “other things being equal, it is rational to select the most effective means to one’s ends” (*LP* 88).

Rawls uses the term “decent peoples” to refer to non-liberal peoples who meet the following criteria:

[A] decent people must honor the laws of peace; its system of law must be such as to respect human rights and to impose duties and obligations on all persons in its territory. Its system of law must follow a common good conception of justice that takes into account what it sees as the fundamental interests of everyone in society. And, finally, there must be a sincere and reasonable belief on the part of judges and other officials that the law is indeed guided by a common good conception of justice (*LP* 67).<sup>11</sup>

Unlike liberal peoples, decent non-liberal peoples are not fully reasonable, according to Rawls, because they do not permit “full and equal liberty of conscience” (*LP* 74).<sup>12</sup> The fact that decent non-liberal peoples do not deny liberty of conscience entirely, however, means that they are not fully unreasonable either. And any decent people that is not fully unreasonable is “worthy of toleration” by liberal peoples, according to Rawls (*LP* 68).

To say that liberal peoples are to tolerate decent non-liberal peoples is to say that the former must “refrain from exercising political sanctions—military, economic, or diplomatic—to make [the latter] change [their] ways” (*LP* 59). It also means that liberal peoples must “recognize...[decent non-liberal peoples] as equal participating members in good standing of the Society of Peoples...” (*LP* 59). Rawls offers two reasons why it is important for liberal peoples to tolerate decent non-liberal peoples. One is that not doing so shows a lack of respect which “may wound the self-respect of decent non-liberal peoples as peoples, as well as their individual

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<sup>11</sup> Rawls explains the notion of a decent non-liberal society by describing one type of such a society, namely a decent hierarchical society. As he explains, this type of society is “*associationist* in form,” which means that “the members of these societies are viewed in public life as members of different groups, and each group is represented in the legal system by a body in a decent consultation hierarchy” (*LP* 64). Although he allows for the possibility of other types of decent non-liberal societies, he focuses on a decent hierarchical society. Since the fact that many different types of decent non-liberal societies are possible is not relevant to the topic of this chapter, I simply refer to decent non-liberal societies in general.

<sup>12</sup> Liberty of conscience includes such things as “freedom of religion and thought” (*LP* 65).

members, and may lead to great bitterness and resentment” (*LP* 61). Another reason why it is important for liberal peoples to tolerate decent non-liberal peoples, according to Rawls, is that it encourages non-liberal peoples to become more liberal (*LP* 61).

As we saw, Rawls claims that liberal peoples and decent non-liberal peoples would affirm the Law of Peoples. He supports this claim by appealing to a thought experiment in which the hypothetical representatives of actual well-ordered peoples meet to agree to principles of justice that will govern the relations between the actual well-ordered peoples being represented as well as non-well-ordered peoples.<sup>13</sup> This hypothetical agreement occurs while the representatives are in what Rawls calls the “original position,” which is a hypothetical place that models what actual well-ordered peoples consider to be fair and equal conditions in which to agree to principles of justice (*LP* 30). Given the features of liberal and decent non-liberal peoples, which their representatives share, as well as the conditions of fairness and equality modeled by the original position, Rawls argues that the representatives in the original position would agree to the following set of principles (*LP* 37):

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.

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<sup>13</sup> The actual process that Rawls employs is more complex. For one thing, it includes three uses of the original position. In the first, the representatives of liberal persons choose principles of justice that govern the basic structure of the society in which the persons will live. In the second, the representatives of liberal peoples choose principles of justice that govern their relations with each other and with non-liberal peoples. In the third, the representatives of decent non-liberal peoples agree to the principles of justice chosen by the representatives of liberal peoples. Thus, contrary to the process I describe, it is not the case that the representatives of liberal and decent non-liberal peoples meet together at the same time to agree to the principles of justice that will govern the relations between them and non-well-ordered peoples.

As Rawls explains, “there is no single possible Law of Peoples, but rather a family of reasonable such laws...satisfying the representatives of peoples who will be determining the specifics of the law” (*LP* 4 note 4). The principles cited above “constitute the basic charter of the Law of Peoples,” according to Rawls (*LP* 37).

The sixth principle of justice relates to human rights. The conception of human rights that Rawls employs is similar to Luban’s account of socially basic human rights (*LP* 80). Like Luban, Rawls maintains that these rights are universal, in the sense that “their political (moral) force extends to all societies, and they are binding on all peoples and societies” (*LP* 80). Rawls identifies three roles that human rights play in the Law of Peoples (*LP* 80):

1. Their fulfillment is a necessary condition of the decency of a society’s political institutions and its legal order.
2. Their fulfillment is sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or in grave cases by military force.
3. They set a limit on the pluralism among peoples.

As we shall see, these roles are an important guide in developing a Rawlsian account of state legitimacy.

The third type of domestic society that Rawls identifies is an outlaw state. These are societies that do not respect human rights (*LP* 90). Rawls distinguishes between two types of outlaw states. One type is aggressive while the other is not aggressive. The former type does not respect the human rights of people outside of its borders because it is prepared to wage aggressive wars. The latter does not respect the human rights of people within its borders because the government oppresses its people. The fourth type of society that Rawls identifies includes those “burdened by unfavorable conditions” (*LP* 4). As their name indicates, these are societies “whose historical, social, and economic circumstances make their achieving a well-ordered regime, whether liberal or decent, difficult if not impossible” (*LP* 90). The last type of

domestic society is a benevolent absolutism. Although this type of society respects human rights, it does not permit its members to have “a meaningful role in making political decisions” (*LP* 92). Thus, a benevolent absolutism does not qualify as a well-ordered society.

### **A Rawlsian Account of State Legitimacy**

Although Rawls does not explicitly offer an account of state legitimacy, much of his discussion regarding the Law of Peoples can be used to develop a Rawlsian account of state legitimacy. With respect to internal legitimacy, it seems clear that Rawls considers only one type of government to be morally legitimate, namely a liberal democratic government. This is because it is the only form of government that both respects human rights and permits its people to have “a meaningful role in making political decisions” (*LP* 92). Thus, Rawls, Luban, and Walzer all seem to think that the criterion for the internal legitimacy of a state is a liberal democratic government.

As we have seen, Walzer and Luban have very different accounts of external legitimacy. One similarity between their accounts, however, is that they both seem to conceive of external legitimacy solely in terms of a state’s entitlement to military non-intervention by other states. Rawls’s discussion of the Society of Peoples suggests that a state’s entitlement to membership in the Society would be the focus of a Rawlsian account of external legitimacy. The benefits of membership include being entitled to non-interference from other states. This includes not only freedom from military intervention, but also economic and diplomatic intervention as well (*LP* 59). Another benefit of membership in the Society of Peoples is the entitlement to participate in “mutually beneficial cooperative practices” (*LP* 90).

Regarding the criteria for membership in the Society of Peoples, we have seen that the only types of peoples who qualify are liberal peoples and decent non-liberal peoples. This is because they are the only ones who affirm the Law of Peoples. And the reason why they affirm the Law of Peoples is that they are reasonable enough to respect human rights and to permit at least some members of their society to have at least some role in making political decisions. Thus, a government that respects human rights and permits at least some of its people to have at least some role in influencing public policy seem to be the criteria for being entitled to membership in the Society of Peoples.

This account seems to imply that armed humanitarian intervention is morally permissible in any state that is not a member of the Society of Peoples because it does not respect human rights. And this makes the Rawlsian account of external legitimacy seem similar to Luban's account. But there is an important difference between these two accounts. Unlike Luban, Rawls denies that armed humanitarian intervention is morally permissible (subject to the proportionality requirement) any time that a government violates the socially basic human right of its people. Like Walzer, Rawls maintains that armed humanitarian intervention is morally permissible only in severe cases of human rights violations (*LP* 94 note 6). Unlike Walzer, however, Rawls does not think that foreigners must not interfere in any way until the human rights violations become egregious. Rawls advocates the imposition of sanctions against states whose governments oppress their people. The first step in the process is for all well-ordered peoples to publicly criticize such states (*LP* 93). Since he recognizes that this sort of criticism is "unlikely to be effective" by itself, Rawls admits that more severe types of sanctions may be called for (*LP* 93). These include "the firm denial of economic and other assistance, or the refusal to admit outlaw regimes as members in good standing in mutually beneficial cooperative practices" (*LP* 90). If

the outlaw state continues to severely oppress its people after the imposition of sanctions, then military intervention may be permissible. Thus, unlike Luban, Rawls considers armed humanitarian intervention to be a last resort.

Rawls's support for the use of sanctions is not limited to encouraging governments to stop oppressing their people. He also supports their use against other types of non-well-ordered peoples in order to encourage them to become well-ordered. This is a reflection of Rawls's view that the "long-run aim" of well-ordered peoples is "to bring all societies eventually to honor the Law of Peoples and to become full members in good standing of the society of well-ordered peoples" (*LP* 93). The motivation behind this "long-run aim" is the notion that well-ordered peoples do not go to war with each other. Rawls supports this notion by appealing to the idea that states with democratic governments tend not to wage war with each other.<sup>14</sup>

Rawls is not saying that all well-ordered peoples ought to impose sanctions against all non-well-ordered people until the latter become well-ordered peoples. Rather, he is saying that in certain circumstances, the use of sanctions may be appropriate in order to encourage a non-well-ordered people to become well-ordered. Rawls respects non-well-ordered peoples' rights to self-determination enough to permit them plenty of time and opportunity to become well-ordered, unless severe human rights violations are being committed. Furthermore, he thinks that it is important for peoples to show respect toward other peoples to avoid "wounding [peoples'] self-respect [which] may lead to great bitterness and resentment" (*LP* 61).<sup>15</sup>

The Rawlsian account of state legitimacy just developed is an interesting contrast to Walzer's and Luban's accounts. With respect to internal legitimacy, all three seem to think that the criterion for internal legitimacy is a liberal democratic government since this is the only type

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<sup>14</sup> Rawls discusses this notion in Section 5 of Part I (*LP* 44-54).

<sup>15</sup> Rawls makes these comments in the context of arguing why liberal peoples ought to tolerate decent non-liberal peoples, but they seem appropriate in a wider context as well.

of government that both respects human rights and permits its people to have “a meaningful role in making political decisions” (*LP* 92). With respect to external legitimacy, we saw that, on Walzer’s account, the criterion for external legitimacy is much wider than the criterion for internal legitimacy, which yields a very restrictive view of the permissibility of armed humanitarian intervention. On Luban’s account, the criterion for external legitimacy is the same as the criterion for internal legitimacy, which yields a very liberal view of the permissibility of humanitarian intervention. On the Rawlsian account, the criterion for external legitimacy is wider than the criterion for internal legitimacy, and therefore wider than the criterion that Luban offers, but not nearly as wide as the criterion that Walzer offers. Despite this fact, however, Rawls’s view of the moral permissibility of armed humanitarian intervention is just as restrictive as Walzer’s view. This disparity is a result of the different way in which Walzer and Luban conceive of external legitimacy on the one hand and Rawls conceives of it on the other. Whereas Walzer and Luban conceive of external legitimacy solely in terms of a state’s entitlement to military non-intervention, Rawls conceives of it in terms of a state’s entitlement to membership in the Society of Peoples. Furthermore, the Rawlsian account of external legitimacy also calls for the use of sanctions to try to stop massive human rights violations within a state. Armed humanitarian intervention is morally permissible only if the sanctions fail to stop the violations.

The Rawlsian account of state legitimacy seems to be more plausible than Walzer’s and Luban’s accounts. Regarding Walzer’s account, we have seen that he maintains that foreigners must not interfere in a state in any way unless one of the three situations that he cites obtains, which includes egregious violations of human rights. The problem with this view is that it does not seem to show enough respect for human rights. It seems plausible that it is morally permissible for foreign states to intervene diplomatically in a state whose government is severely

violating the human rights of its people in order to stop the oppression. If it continues, then armed humanitarian intervention may be morally permissible. This approach shows some level of respect for the rights of the people being attacked as well as some level of respect for the political community's right to self-determination. Obviously, time is a crucial factor with respect to stopping something like genocide. The longer foreign governments wait for sanctions to work, the more time a government has to slaughter its people. This consideration suggests that the worse the oppression, the sooner armed humanitarian intervention is justified.

With respect to Luban's view, we have seen that he maintains that armed humanitarian intervention is morally permissible, subject to the proportionality requirement, whenever a government violates the human rights of its people. The problem with this view is that it does not show enough respect for the political community's right to self-determination. Again, it seems plausible that the first step in trying to stop a government from oppressing its people is to intervene diplomatically. Armed humanitarian intervention ought to be morally permissible only as a last resort, namely after non-military intervention has failed. This approach shows some level of respect for the rights of the people being attacked as well as some level of respect for the political community's right to self-determination. Although the proportionality requirement will probably restrict the cases of government oppression in which armed humanitarian intervention is morally permissible to those in which the human rights violations are moderate to severe, the fact that Luban's account does not consider military intervention to be a last resort makes it seem less plausible than one that does.

All of the features that mentioned above that would make Walzer's and Luban's accounts of state legitimacy and the moral permissibility of armed intervention seem more plausible are incorporated into the Rawlsian account developed above. One of these features is showing

respect for a political community's right to self-determination, as expressed by the use of military intervention as a last resort, contrary to Luban. Another feature is showing respect for human rights, as expressed by the use of diplomatic or economic sanctions against oppressive regimes before the oppression becomes severe enough to justify humanitarian intervention, contrary to Walzer. I am not claiming that the Rawlsian account is more plausible than Walzer's or Luban's because it is the most moderate of them all (that would be a fallacy). Rather, I am claiming that the Rawlsian account is more plausible because it combines the strongest features of the other two accounts while avoiding their weakest features.

## **CHAPTER II: MICHAEL WALZER ON THE MORALITY OF KILLING IN WAR**

This chapter is divided into two parts. In the first part, I argue that Walzer's discussion of the distinction between combatants and noncombatants is misleading because it gives the impression that all and only soldiers are combatants and that all and only civilians are noncombatants. In the second part of the chapter, I describe an account of the morality of killing in war that is based on an analogy with domestic society and argue that this account is more plausible than Walzer's account.

### **PART I: WALZER'S VIEW OF THE IDENTITY OF COMBATANTS AND NONCOMBATANTS**

As we saw in the Introduction, the second part of just war theory, namely *jus in bello*, deals with justice in war, or the moral constraints on the conduct of war. Walzer discusses *jus in bello* in the context of what he calls the "war convention." He uses this phrase to refer to "the set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements that shape our judgments of military conduct" (*JUW* 44). Walzer describes the convention as follows:

The war convention rests first on a certain view of combatants, which stipulates their battlefield equality. But it rests more deeply on a certain view of noncombatants, which holds that they are men and women with rights and that they cannot be used for some military purpose, even if it is a legitimate purpose (*JUW* 137).

The view of combatants upon which the war convention rests is expressed in the first principle of the convention, which, according to Walzer, is that, "once war has begun, soldiers are subject to attack at any time (unless they are wounded or captured)" (*JUW* 138). The view of noncombatants upon which the war convention rests is expressed in the second principle of the

convention, which, according to Walzer, is that, “noncombatants cannot be attacked at any time” (*JUW* 151).

Walzer’s use of the phrase “battlefield equality” in his description of the war convention as well as his use of the word ‘soldiers’ in his statement of the first principle of the war convention is misleading because it gives the impression that all and only infantry soldiers on the battlefield are combatants. Furthermore, in his statement of the second principle of the war convention, he describes the noncombatants to which he is referring as “men and women.” Since the vast majority of soldiers on the battlefield are male, the fact that he describes noncombatants as men and women gives the impression that he is using the word ‘noncombatant’ to refer to civilians. And this gives the impression that all and only civilians are noncombatants. These impressions reflect the commonly held views that all and only soldiers are combatants and that all and only civilians are noncombatants. But these views are mistaken. The fact that Walzer’s description of the war convention and his statements of its two principles seem to incorporate these views makes them misleading and, as a result, they ought to be clarified.

The distinction between combatants and noncombatants is based on the concept of ‘innocence.’ As Tomas Nagel explains, “in the definition of murder ‘innocent’ means ‘currently harmless,’ and it is opposed not to ‘guilty’ but to ‘doing harm.’”<sup>16</sup> Thus, he concludes that “we must distinguish combatants and noncombatants on the basis of their immediate threat or harmfulness” (*WM* 20). As Nagel points out, the notion of ‘immediate threat or harmfulness’ is vague. He addresses this vagueness by offering the following criterion to distinguish between those who pose threats great enough to make it permissible for them to be killed and those who do not:

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<sup>16</sup> Thomas Nagel, “War and Massacre,” in *War and Moral Responsibility: A Philosophy and Public Affairs Reader*, eds. Marshall Cohen, Thomas Nagel, and Thomas Scanlon, (Princeton: Princeton University Press, 1979), 19. Hereafter cited as ‘*WM*.’

The threat presented by an army and its members does not consist merely in the fact that they are men, but in the fact that they are armed and are using their arms in the pursuit of certain objectives. Contributions to their arms and logistics are contributions to this threat; contributions to their mere existence as men are not (WM 20).

In this passage, Nagel refers to the threat posed by an army, but an army is only one branch of a modern military, which also consists of a navy and an air force. Thus, I assume that he is referring to the threat posed by a military. Based on the criterion that Nagel offers, servicemembers who contribute to the “arms and logistics” of their military contribute to the threat posed by their military and therefore qualify as combatants.<sup>17</sup> On the other hand, servicemembers who contribute to the “mere existence” of their fellow servicemembers do not contribute to the threat posed by the military and therefore qualify as noncombatants.

Examples of noncombatants in all branches of a military are food service personnel and medical personnel. Examples of combatants in an army are infantry soldiers and examples of combatants in an air force are fighter pilots. Although fighter aircraft pose a greater threat to their enemies than military transport aircraft do, the fact that the latter contribute to the “arms and logistics” of the military, and thereby contribute to the threat posed by the military, suggests that the crewmembers of military transport aircraft also qualify as combatants. A similar analysis seems to apply to warships and military transport ships.<sup>18</sup> Although the threat posed by warships is greater than the threat posed by military transport ships, the fact that both types of ships contribute to the “arms and logistics” of the military, and thereby contribute to the threat posed by the military, suggests that the crewmembers of both types of ships qualify as combatants. One difference between military aircraft and military ships, however, is that all of the crewmembers aboard the former seem to be combatants whereas only some of the crewmembers aboard the latter seem to be combatants. This is because food service personnel and medical personnel,

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<sup>17</sup> A servicemember is someone who is a member of an armed force.

<sup>18</sup> By the term ‘warship,’ I am referring to surface ships and submarines.

whom we identified as noncombatants, serve aboard naval ships. But this seems to pose a problem because it is not possible to discriminate between combatants and noncombatants aboard naval ships using typical anti-ship weapons such as torpedoes or missiles. One way to deal with this problem would be to say that it is morally wrong to use such weapons.<sup>19</sup> A more plausible way to deal with the problem is to say that the doctrine of double effect applies to the killing of noncombatants who serve aboard warships.<sup>20</sup>

Nagel's criterion also can be used to classify civilians as combatants and noncombatants. Civilians who contribute to the "arms and logistics" of a military contribute to the threat posed by that military and therefore qualify as combatants. Civilians who contribute to the "mere existence" of servicemembers do not contribute to the threat posed by the military and therefore qualify as noncombatants. Based on this analysis, civilians who work in places such as tank factories qualify as combatants while civilians who work in places such as food processing plants qualify as noncombatants.<sup>21</sup> Thus, contrary to what many people believe, soldiers are only one type of servicemember and not all servicemembers are combatants. Furthermore, not all civilians are combatants.

As we have seen, Walzer casts his description of the war convention and his statements of its principles in terms of the notion that all and only soldiers are combatants and that all and only civilians are noncombatants. He does this in spite of the fact that he recognizes that some civilians qualify as combatants:

The relevant distinction [regarding civilians] is...between those who make what soldiers need to fight and those who make what they need to live, like all the rest of us. When it is

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<sup>19</sup> Many people argue that the use of chemical, biological, and nuclear weapons is immoral because it is not possible to discriminate between combatants and noncombatants when using such weapons.

<sup>20</sup> According to the doctrine of double effect, "[i]t is *sometimes* permissible to bring about as a *foreseen but unintended side effect* some harm that it would be impermissible to *aim* at, either as a *means* or as an *end*, all else being equal." This statement of the doctrine is from a handout by William FitzPatrick that he distributed in his Contemporary Normative Ethics course in Fall 2005.

<sup>21</sup> These are Walzer's examples (*JUW* 146).

militarily necessary, workers in a tank factory can be attacked and killed, but not workers in a food processing plant (*JUW* 146).

This is because the former “are...engaged in activities threatening and harmful to their enemies,” while the latter “are not similarly engaged” (*JUW* 146).<sup>22</sup>

Furthermore, Walzer also casts his explanation of the distinction between combatants and noncombatants in terms soldiers and civilians rather than combatants and noncombatants. This occurs in a series of passages, one of which is the following:

[T]he soldiers who do the fighting, though they can rarely be said to have chosen to fight, lose the rights they are supposedly defending. They gain war rights as combatants and potential prisoners, but they can now be attacked and killed at will by their enemies. Simply by fighting, whatever their private hopes and intentions, they have lost their title to life and liberty, and they have lost it even though, unlike aggressor states, they have committed no crime (*JUW* 136).

In this passage, Walzer is explaining why “soldiers who do the fighting” qualify as combatants, which makes it morally permissible for them to be killed. But, as we have seen, soldiers on the battlefield are only one type of combatant. Others include fighter pilots and warship commanders. To limit the discussion to the former gives a misleading impression of who qualifies as a combatant in war.

Another passage in which this issue appears is the following:

[S]oldiers as a class are set apart from the world of peaceful activity; they are trained to fight, provided with weapons, required to fight on demand. No doubt, they do not always fight; nor is war their personal enterprise. But it is the enterprise of their class, and this fact radically distinguishes the individual soldier from the civilians he leaves behind (*JUW* 144).

In this passage, Walzer is also speaking solely in terms of infantry soldiers, which gives the impression that all and only infantry soldiers are combatants. Furthermore, he contrasts them with civilians, which gives the impression that all and only civilians are noncombatants.

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<sup>22</sup> Since the only time that civilians “are...engaged in activities threatening and harmful to their enemies” is when they are at work, Walzer claims that the only time that they qualify as combatants is when they are at work. Thus, the only time that it is morally permissible for them to be attacked is when they are at work (*JUW* 146).

In another passage in which Walzer discusses the distinction between combatants and noncombatants, he identifies the place where he thinks the “line” which separates combatants and noncombatants ought to be drawn:

We begin with the distinction between soldiers engaged in combat and soldiers at rest; then we shift to the distinction between soldiers as a class and civilians; and then we concede this or that group of civilians as the processes of economic mobilization establish its direct contribution to the business of fighting (*JUW* 146).

In this passage, Walzer makes a series of distinctions that he uses to identify the “line” between combatants and noncombatants. The first distinction that he makes is between “soldiers engaged in combat and soldiers at rest.” This distinction refers to a discussion in which Walzer cites numerous historical cases of infantry soldiers on the battlefield who were engaged in combat operations but refused to shoot enemy infantry soldiers who were also on the battlefield but were performing everyday activities. With respect to this situation, Walzer writes that “[i]t is not against the rules of war as we currently understand them to kill soldiers who look funny, who are taking a bath, holding up their pants, reveling in the sun, [or] smoking a cigarette” (*JUW* 142). By this, Walzer means that it is morally permissible for soldiers on the battlefield to be killed regardless of whether they are engaged in combat operations or performing everyday activities. The phrase “soldiers engaged in combat” in the first distinction that Walzer cites in the passage above refers to the soldiers who were on the battlefield and were engaged in combat operations. The phrase “soldiers at rest” refers to the soldiers who were on the battlefield but were performing everyday activities. This distinction illustrates that even though the soldiers engaged in combat posed more of a threat than the soldiers at rest, both groups posed enough of a threat to be classified as combatants. As a result, it is morally permissible for the soldiers in both groups to be killed.

The second distinction that Walzer makes is between “soldiers as a class and civilians.” This seems to be where Walzer wants to place the line between combatants and noncombatants. The fact that we “concede” civilians who qualify as combatants into the class of soldiers implies that the class of soldiers demarcates the line between combatants and noncombatants.

As we have seen, some servicemembers qualify as combatants and some qualify as noncombatants. Furthermore, some civilians qualify as combatants and some qualify as noncombatants. Although the latter is reflected in Walzer’s account of where the line is between combatants and noncombatants, the former does not seem to be reflected in his account. That is, Walzer recognizes in his account the fact that some civilians qualify as combatants and some do not. But he contrasts civilians who are noncombatants with the class of soldiers, which seems to imply that all soldiers are combatants. Walzer seems to be using the phrase “soldiers as a class” to refer to the two groups of soldiers that he identified in the first distinction, namely “soldiers engaged in combat and soldiers at rest.” As we saw, he maintains that the soldiers in both of these groups qualify as combatants. If Walzer is using the phrase “soldiers as a class” to refer to the soldiers in the first distinction, then it would be the case that every member of the class of soldiers is a combatant. But this is misleading because it does not account for all of the soldiers and other servicemembers who are noncombatants. If, on the other hand, Walzer is using the phrase “soldiers as a class” to refer to soldiers who are combatants and soldiers who are not combatants, then it would not be the case that every member of the class of soldiers is a combatant. Thus, regardless of which group of soldiers Walzer is referring to by the phrase “soldiers as a class,” his account needs to be revised to take into account the fact that some servicemembers are combatants and some are not as well as the fact that some civilians are combatants and some are not.

## **PART II: WALZER'S VIEW OF THE MORALITY OF KILLING IN WAR**

In this part of the chapter, I describe an account of the morality of killing in war that is based on an analogy with domestic society and argue that this account is more plausible than Walzer's account.<sup>23</sup>

As we have seen, the distinction between combatants and noncombatants is based on the notion of 'innocence,' which, as Nagel explains, "means 'currently harmless,' and...is opposed not to 'guilty' but to 'doing harm'" (*WM* 19). As Walzer puts it, "our right not to be attacked...is lost by those who...pose a danger to other people. It is retained by those who don't [pose a danger to other people]" (*JUW* 144n). Thus, the criterion for losing one's right to life in war is posing a threat to one's enemies. The fact that combatants on both sides of a war pose a threat to each other means that it is morally permissible for them to kill each other regardless of whether they fight on the just or unjust side of a war.<sup>24</sup> Walzer describes this situation as the "moral equality of soldiers [i.e. combatants]" (*JUW* 34).

This is the account of the morality of killing in war that is contained in just war theory. But it stands in stark contrast to an account of the morality of killing in war that is based on the domestic analogy, which we shall now examine. Since the account is based on the morality of killing in domestic society, we must begin our examination there.

### **The Morality of Killing in Domestic Society**

The fact that every person possesses the right to life means that it is (usually) morally wrong for a person to be killed unless she has done something that causes her to forfeit her right

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<sup>23</sup> The account of the morality of killing in war is based on the account that Jeff McMahan develops in "The Ethics of Killing in War," *Ethics* 114, July 2004, 693-733. Hereafter cited as 'EKW.'

<sup>24</sup> For simplicity, I am assuming that there are two sides to a war and that one is just and the other is unjust.

to life. One thing that many people believe causes a person to forfeit her right to life is posing a deadly unjust threat to another person. A deadly unjust threat is a threat to someone's life for which a person does not have a just cause. A just cause entails a morally permissible reason for acting. Thus, an unjust cause entails a morally wrong reason for acting. A deadly unjust threat, then, is a threat to someone's life for which a person does not have a morally permissible reason. An example of a deadly unjust threat is an armed bank robber who shoots at police officers as they attempt to apprehend him. The robber's threat is unjust because it is (usually) morally wrong to steal. Thus, the reason for which the robber is threatening the lives of the police officers is not morally permissible. As a result, he forfeits his right to life. This means that it is morally permissible for the police officers to kill the robber (provided that the police officers are not able to overcome the robber's threat in a non-lethal way).

Suppose that the police officers shoot back at the robber. Now they pose a deadly threat to the robber. Unlike the threat posed by the robber, however, the threat posed by the police officers is a deadly just threat. A deadly just threat is a threat to someone's life for which a person has just cause. As we saw, a just cause entails a morally permissible reason for acting. Thus, a deadly just threat is a threat to someone's life for which a person has a morally permissible reason. Many people believe that it is morally permissible for a person who has done nothing to forfeit her right to life to defend this right by killing a person who is posing a deadly unjust threat to her (provided that she cannot overcome the threat in a non-lethal way). The fact that the police officers in our example have done nothing to forfeit their rights to life and the fact that the robber poses a deadly unjust threat to them means that it is morally permissible for the officers to defend their rights to life by killing the robber (again, provided that the police officers are not able to overcome the robber's threat in a non-lethal way).

### **A Domestic Analogy-Based Account of the Morality of Killing in War**

The account just sketched of the morality of killing in domestic society can be used to develop an account of the morality of killing in war. As we shall see, the latter stands in stark contrast to the account of the morality of killing in war contained in just war theory and which Walzer presents. We may begin by saying that an unjust war is a war for which a nation does not have a just cause. As we saw, an unjust cause entails a morally wrong reason for acting. Thus, an unjust cause for war entails a morally wrong reason for waging war. An example of an unjust cause for war is invading a country in order to acquire its natural resources. This is because such an invasion violates the rights to political sovereignty and territorial integrity which all legitimate states possess (*JUW* 53). Just as it is morally wrong for one person to violate the rights of another person, it is also morally wrong for one state to violate the rights of another state.

A just war, on the other hand, is a war for which a nation has a just cause. As we saw, a just cause entails a morally permissible reason for acting. Thus, a just cause for war entails a morally permissible reason for waging war. An example of a just cause for war is defending against an unjust attack. Just as it is morally permissible for a person who has done nothing to forfeit her right to life to defend this right against a deadly unjust threat, it is also morally permissible for a state that has done nothing to forfeit its rights to political sovereignty and territorial integrity to defend itself against an unjust attack.

Suppose that country X invades country Y in order to acquire its natural resources. Suppose that country Y defends itself militarily. The fact that the cause for which country X is waging war with country Y is unjust means that the soldiers who fight for country X fight on the unjust side of the war. Likewise, the fact that the cause for which country Y is waging war with country X is just means that the soldiers who fight for country Y fight on the just side of the war.

The most straightforward way of applying the account of the morality of killing in domestic society that we sketched in the previous section to killing in war is to say that combatants who fight on the unjust side of a war pose a deadly unjust threat to the combatants whom they are attacking.<sup>25</sup> Following Jeff McMahan, let us call combatants who fight in a just war “just combatants” and call combatants who fight in an unjust war “just combatants” (EKW 693).<sup>26</sup> As we saw, many people believe that posing a deadly unjust threat to someone causes the person posing the threat to forfeit his right to life. Thus, the fact that unjust combatants pose a deadly unjust threat to just combatants means that the former forfeit their rights to life. And this means that it is morally permissible for the just combatants to kill the unjust combatants.

We also saw that many people believe that it is morally permissible for a person who has done nothing to forfeit his right to life to defend this right by killing the person who is posing a deadly unjust threat to him (provided that she cannot overcome the threat in a non-lethal way). The fact that the unjust combatants in our example pose a deadly unjust threat to the just combatants means that it is morally permissible for the latter to defend their right to life by killing the former (again, provided that the just combatants are not able to overcome the unjust combatants’ threat in a non-lethal way).

We now have what seems to be a plausible account of the morality of killing in war that is based on the account of the morality of killing in domestic society that we sketched in the previous section. Despite the fact that there seems to be a strong analogy between killing in domestic society and killing in war, however, there also seems to be at least two major differences between the former and the latter. These differences must be examined in order to

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<sup>25</sup> I assume that there is at most one just side in a war.

<sup>26</sup> McMahan uses the term ‘unjust combatants’ to refer to “those who fight in a war that is unjust because it lacks a just cause” (EKW 693). McMahan explains this condition by saying that “I suspect...that those who fight in a war that has a just cause but is unjust for some other reason (e.g. because it is unnecessary or disproportionate) have a different moral status from those who fight without a just cause” (EKW 693n).

determine what effect, if any, they have on the plausibility of the account of the morality of killing in war that we just developed.

## **Two Differences between Killing in Domestic Society and Killing in War**

### *First Difference*

One difference between the bank robber in the first example and the unjust combatants in the second example is that the former (let us assume) was not forced to rob the bank and therefore was not forced to pose a deadly threat to the police officers attempting to apprehend him. As Walzer points out, however, many soldiers are forced to fight (*JUW* 136). That is, if they refuse to fight, they will be punished in some way. An extreme penalty that has been used to punish combatants who refuse to fight is death. A more moderate penalty, currently used by the U.S. military, is a combination of reduction in rank, loss of wages, imprisonment, or dishonorable discharge. The analogy between the bank robber and the unjust soldiers can be strengthened by considering cases in domestic society in which a person is forced to pose a deadly threat. By analyzing these cases, we can determine whether the fact that a person is forced to pose a deadly threat has any effect on the unjustness of that threat.

Let us begin with a case in which a person is forced to kill someone under threat of death. Suppose that Tom forces Dick to kill Harry. If Dick refuses to kill Harry, Tom will kill Dick. Suppose that Dick kills Harry to avoid being killed by Tom. It seems plausible that it was morally wrong for Dick to kill Harry. It also seems plausible that the fact that Tom would have killed Dick if he had not killed Harry means that Dick is not as morally blameworthy for killing Harry as he would have been if he had not been forced to kill Harry. According to this account,

then, the fact that Dick was forced to kill Harry does not seem to make it morally permissible for Dick to kill Harry, but it does seem to make Dick less morally blameworthy for killing Harry.

We can apply this analysis to unjust combatants who are forced to kill just combatants under penalty of death as follows. It is morally wrong for unjust combatants to kill just combatants even if the former are forced to kill the latter under penalty of death. However, the fact that unjust combatants are forced to kill just combatants means that the former are not as morally blameworthy as they would have been if they had not been forced to kill the latter. According to this account, then, the fact that unjust combatants are forced to kill just combatants does not make it morally permissible for the former to kill the latter, but it does make the former less morally blameworthy for killing the latter.

Let us now consider a case in which a person is forced to kill someone under threat of a penalty analogous to reduction in rank, loss of wages, or imprisonment. Suppose again that Tom forces Dick to kill Harry, but this time, if Dick refuses to kill Harry, Tom will demote Dick, withhold his wages, and incarcerate him. Suppose again that Dick kills Harry to avoid being punished by Tom. It seems clear that it was morally wrong for Dick to kill Harry in this case because the consequences for refusing to do so are less severe than they were in the previous case. The fact that the consequences are less severe also suggests that Dick is more morally blameworthy for killing Harry in this case than he was in the previous case, although perhaps still not quite as morally blameworthy as he would have been if Tom had not threatened to punish him at all. On the other hand, it could also be argued that Dick is just as morally blameworthy for killing Harry as he would have been if he had not been forced to kill Harry because the consequences for not killing Harry were not severe enough to morally excuse Dick

from killing Harry. In other words, Dick was morally obligated to suffer the consequences for not killing Harry in this case and, as a result, Dick is not morally excused at all for killing Harry.

We can apply this analysis to unjust combatants who are forced to fight under penalty of being demoted, losing their wages, and being incarcerated as follows. It seems clear that it is morally wrong for unjust combatants to kill just combatants in this case because the consequences for refusing to do so were less severe than they were in the previous case. The fact that the consequences were less severe also suggests that the unjust combatants are more morally blameworthy for killing the just combatants in this case than they were in the previous case, although perhaps still not quite as morally blameworthy as they would have been if the unjust combatants had not been threatened at all. On the other hand, it might also be argued that the unjust combatants are just as morally blameworthy for killing the just combatants as the former would have been if they had not been forced to kill the latter because the consequences for not killing the latter were not severe enough to morally excuse the unjust combatants for killing the just combatants. That is, the unjust combatants are morally obligated to suffer the consequences for not killing the just combatants in this case and, as a result, the former are not morally excused at all for killing the latter.

Based on the preceding considerations, the fact that unjust combatants are forced to kill just combatants does not seem to change the fact that it is morally wrong for the former to kill the latter. It does, however, seem to effect the extent to which the former is morally blameworthy for killing the latter. The extent to which the moral blameworthiness of unjust combatants who are forced to kill just combatants is reduced seems to be directly proportional to the severity of the consequences for refusing to kill just combatants. That is, the more severe the consequences

are for refusing to kill just combatants, the less morally blameworthy unjust combatants are for killing just combatants.

### *Second Difference*

Another difference between the bank robber on the one hand and the unjust combatants on the other is that the bank robber (let us assume) knows that it is morally wrong to rob banks and shoot at police officers. As Walzer points out, however, “[combatants] are led to fight by their loyalty to their own states and by their lawful obedience. They are most likely to believe that their wars are just...” (*JUW* 127). The analogy between the bank robber and the unjust soldiers can be strengthened by considering cases in domestic society which incorporate the factors that Walzer mentions. By examining these cases, we can determine whether these factors have any effect on the unjustness of the threat posed by the person in each case.

Let us consider first the claim that “[combatants] are most likely to believe that their wars are just.” We can strengthen the analogy between the bank robber and the unjust combatants by considering a case in domestic society in which a person believes falsely that he has a morally permissible reason to kill someone. Suppose that Tom joins an anti-government cult and is brainwashed by Dick, the cult leader, such that Tom believes that it is morally permissible to kill government agents. Suppose that Dick commands Tom to kill Harry, who is a federal agent. Clearly, it is morally wrong for Tom to kill Harry in this case regardless of the fact that Tom believes that what he is doing is morally permissible. The fact that Tom was brainwashed by Dick may make him less morally blameworthy than he would have been if he had not been brainwashed, but it does not change the fact that it was morally wrong for Tom to kill Harry. We can apply this analysis to unjust combatants who, because they were brainwashed, believe falsely

that the cause for which they are fighting is just as follows. The fact that unjust combatants were brainwashed and, as a result, hold false beliefs regarding the injustice of the cause for which they are fighting makes them less morally blameworthy than they would have been if they had not been brainwashed and therefore did not hold false beliefs. But this does not change the fact that the unjust combatants are fighting on the unjust side of a war and, as a result, act morally wrongly when they kill just soldiers.<sup>27</sup>

Let us now consider the claim that “[combatants] are led to fight by their loyalty to their own states.” The analogy between the bank robber and unjust combatants can be improved by considering a case in domestic society in which a person kills someone out of loyalty to an organization. Suppose that Tom is a loyal member of a gang in which Dick is the leader. Suppose that Dick tells Tom to kill Harry, who belongs to a rival gang. Obviously, it is morally wrong for Tom to kill Harry. The fact that Tom killed Harry out of loyalty to his gang does not change the fact that it was morally wrong for Tom to kill Harry. Furthermore, the fact that Tom killed Harry out of loyalty to his gang also seems to have no effect on the moral blameworthiness of Tom for killing Harry. Thus, the fact that a person kills someone solely out of loyalty to an organization does not make a morally wrong act morally permissible, nor does it seem to make the killer less morally blameworthy. We can apply this analysis to unjust combatants by saying that it is morally wrong for them to kill just combatants even if they do it out of loyalty to their country or military. Furthermore, unjust soldiers who kill just combatants out of loyalty to their country are just as morally blameworthy as they would have been if they had killed just combatants for some other than loyalty to their country.

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<sup>27</sup> If the reason why the unjust combatants hold false beliefs regarding the unjustness of the cause for a war is that they simply chose to ignore compelling arguments to the contrary, then it seems plausible that the unjust combatants would be morally blameworthy for killing just combatants.

Finally, let us consider the claim that “[combatants] are led to fight...by their lawful obedience.” The analogy between the bank robber and unjust combatants can be improved by considering a case in domestic society in which a person is told by his superior to kill another person. Suppose that Dick is a police sniper and that Tom is Dick’s superior. Suppose that they are called to a hostage situation in which Harry is the hostage taker. Suppose that Dick is able to get a clear shot at Harry without placing the hostages in too much danger. Suppose that Harry decides to surrender to the police but Tom order Dick to kill Harry anyway. Clearly, it would be morally wrong for Dick to kill Harry regardless of the fact that the person telling Dick to kill Harry, namely Tom, is Dick’s superior. It seems plausible that a person has no moral obligation to follow an order to kill someone unjustly. It also seems plausible that a person has a moral obligation not to obey an order to kill someone unjustly. But suppose that Dick kills Harry. It seems plausible that Dick is as morally responsible for killing Harry as he would have been if Tom hadn’t ordered Dick to kill Harry. Thus, the fact that a person is ordered by his superior to kill someone unjustly does not change the fact that it would be morally wrong for the former to kill the latter. Nor does it change the fact that the killer is just as morally blameworthy as he would have be if he had not been ordered to kill the person. We can apply this analysis to unjust combatants by saying that it is morally wrong for unjust combatants to kill just combatants regardless of the fact that they have been ordered to do so. Furthermore, unjust combatants who kill just combatants because they are ordered to are just as morally blameworthy as they would have been if they had not been ordered to do so.

Based on the preceding considerations, neither of the two main differences between killing in domestic society and killing in war seems to change the fact that it is morally wrong for unjust combatants to kill just combatants. Although the first difference does seem to reduce the

moral blameworthiness of unjust combatants for killing just combatants, the second difference does not seem to reduce the moral blameworthiness of unjust combatants for killing just combatants.

### **Walzer's Rejection of the Analogy between Killing in Domestic Society and Killing in War**

Despite the plausibility of the domestic analogy-based account of the morality of killing in war, Walzer rejects the analogy between the morality of killing in domestic society and the morality of killing in war. He writes that:

The domestic analogy is of little help here. War as an activity (the conduct rather than the initiation of the fighting) has no equivalent in a settled civil society. It is not like an armed robbery, for example, even when its ends are similar in kind. Indeed, it is the contrast rather than the correspondence that illuminates the war convention (*JUW* 127).

Walzer explains why the analogy does not hold between the morality of killing in domestic society and the morality of killing in war by appealing to the moral judgments that we make regarding killing in each situation.<sup>28</sup> He describes our moral judgments regarding killing in domestic society as follows:

In the course of a bank robbery, a thief shoots a guard reaching for his gun. The thief is guilty of murder, even if he claims that he acted in self-defense. Since he had no right to rob the bank, he also had no right to defend himself against the bank's defenders (*JUW* 128).

The account of the morality of killing in domestic society that Walzer outlines in this passage is similar to the one we sketched above. The question, then, is: Why does Walzer deny that this account can serve as the basis for an account of the morality of killing in war? His answer seems to involve the nature of the relationship between our moral judgments regarding killing in

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<sup>28</sup> Walzer uses the pronoun 'we' to refer to those of us who "share a common morality" (*JUW* xx).

domestic society and our moral judgments regarding killing in war. Walzer describes the latter judgments as follows:

In the course of an aggressive war, a soldier shoots another soldier, a member of the enemy army defending his homeland. Assuming a conventional firefight, this is not called murder; nor is the soldier regarded after the war as a murderer, even by his former enemies. The case is in fact no different from what it would be if the second soldier shot the first. Neither man is a criminal, and so both can be said to act in self-defense (*JUW* 128).

Walzer goes on to say that:

We call [combatants] murderers only when they take aim at noncombatants, innocent bystanders (civilians), wounded or disarmed soldiers. If they shoot men trying to surrender or join in the massacre of the inhabitants of a captured town, we have (or ought to have) no hesitation in condemning them. But so long as they fight in accordance with the rules of war, no condemnation is possible (*JUW* 128).

In these passages, Walzer seems to be appealing to the fact that we judge the morality of killing in domestic society very differently than we judge the morality of killing in war as the ultimate reason why the analogy fails to hold between killing in domestic society and killing in war. In other words, the fact that there is such a disparity between our moral judgments regarding killing in domestic society on the one hand and our moral judgments regarding killing in war on the other hand reveals that the circumstances of domestic society and the circumstances of war are too dissimilar for an account of the morality of killing in domestic society to serve as the basis for an account of the morality of killing in war.

The dissimilarities between killing in domestic society and killing in war to which Walzer is referring are the two differences that we just examined. The first difference was that the bank robber in our example was not forced to rob the bank and therefore was not forced to pose a deadly threat to the police officers attempting to apprehend him. As Walzer points out, however, many combatants are forced to fight (*JUW* 136). The second difference was that the bank robber knew that it is morally wrong to rob banks and shoot at police officers. As Walzer

points out, however, “[combatants] are led to fight by their loyalty to their own states and by their lawful obedience. They are most likely to believe that their wars are just...” (*JUW* 127). After analyzing these two differences between killing in domestic society and killing in war, we concluded that neither of them seems to change the fact that it is morally wrong for unjust combatants to kill just combatants. Although the first difference does seem to reduce the moral blameworthiness of unjust combatants for killing just combatants, the second difference does not seem to reduce the moral blameworthiness of unjust combatants for killing just combatants.

As McMahan points out, the mistake that Walzer seems to make is to confuse justification with excuse (*EKW* 700). To say that someone is morally justified in performing some act is to say that it is morally permissible for her to perform it. To say that someone is morally excused for performing some act means that it was morally wrong for the person to perform the act but, for some reason, she is not morally blameworthy for performing the act, or at least not as morally blameworthy as she would have been without the excuse. Walzer seems to think that the factors he cites regarding coercion and obedience justify the killing of just combatants by unjust combatants. That is, these factors make it morally permissible for the former to kill the latter. Based on our analyses, however, the factors that Walzer cites, at most, morally excuse the unjust combatants for killing just combatants. That is, it is morally wrong for unjust combatants to kill just combatants, but the former may be less morally blameworthy for killing that latter because of the aforementioned factors than they would have been if the factors had not been present.

The fact that Walzer seems to confuse the distinction between justification and excuse significantly weakens his account of the morality of killing in war. And the fact that McMahan’s account of the morality of killing in war is based on the domestic analogy, which is the basis for

the principles that govern the relations among states, significantly strengthens his account. Based on these considerations, McMahan's account of the morality of killing in war seems more plausible than Walzer's account. One way that McMahan's account could be improved, however, is by incorporating the notion of moral badness into it. As we have seen, McMahan's account includes two dimensions, namely moral permissibility and moral blameworthiness. The former is bivalent whereas the latter admits of degrees. That is, performing act is either morally permissible or morally wrong, but the extent to which a person may be blameworthy for performing a morally wrong act admits of degrees depending on the circumstances. For example, an unjust combatant who kills a just combatant to avoid being punished with death is less morally blameworthy than an unjust combatant who kills a just combatant to avoid being put in prison. Both unjust combatants act morally wrongly when they kill just combatants, but one is less morally blameworthy than the other.

Like blameworthiness, the dimension of moral badness also seems to admit to degrees. Stealing a piece of candy from someone and stealing a person's car are both morally wrong, but the former is less bad than the latter. This can be applied to McMahan's theory by saying that it is less bad for unjust soldiers to kill noncombatants than it is for them to kill just soldiers. Both acts are morally wrong, but killing noncombatants is worse than killing unjust soldiers. This distinction enables us to account for Walzer's claim that we do not consider unjust combatants to be murderers. According to Walzer, the reason why we do not consider unjust combatants to be murderers is that they do not act morally wrongly when they kill just combatants. McMahan would explain this by claiming that unjust combatants are often not morally blameworthy for killing just combatants. If we included the notion of badness, we could explain our judgment that unjust combatants are not murderers by saying that they are often not morally blameworthy and

even if they are, what they did is not as bad as killing unjustly in domestic society. Based on this consideration, incorporating the dimension of moral badness into McMahan's account of the morality of killing in war seems to make his account even stronger and thus, even more plausible than Walzer's account.

## CONCLUSION

In this thesis, I have analyzed two aspects of Michael Walzer's account of just war theory. The first is his account of the moral legitimacy of states and the second is his account of the morality of killing in war. With respect to the former, I argued that Walzer's account of (presumptive) external legitimacy is too permissive and, as a result, his account of the morality of humanitarian intervention is too restrictive. I contrasted Walzer's account with Luban's account and argued that Luban's account of external legitimacy is too restrictive and, as a result, his account of the morality of humanitarian intervention is too permissive. Finally, I developed a Rawlsian account of state legitimacy and the morality of humanitarian intervention and argued that this account is more plausible than either Walzer's or Luban's accounts.

I began my analysis of Walzer's account of the morality of killing in war by arguing that his description of the war convention and his explanation of the distinction between combatants and noncombatants are misleading because they give the impression that all and only infantry soldiers are combatants and that all and only civilians are noncombatants. Walzer does not hold this view but his account suggests it. Next, I described an account of the morality of killing in war developed by McMahan that is based on an analogy with the morality of killing in domestic society and argue that this account is more plausible than Walzer's account. I also suggested that McMahan's account could be improved by adding the dimension of moral badness to it. It seems to me that an account of just war theory that contained the views for which I argue in this thesis would be more plausible than Walzer's account.

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