

Debate: Justification and Liability in War*

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I. THE CHALLENGE

MORAL responsibility for an unjust threat, or a threat of wrongful harm, is, I have argued, a basis of liability to attack in war. Uwe Steinhoff correctly observes that many acts of war by those who fight in a just war (“just combatants”) threaten innocent people with wrongful harm. This, he claims, makes them morally liable to attack according to the criterion of liability I have defended. But if both just combatants and unjust combatants (those who fight without just cause) are morally liable to attack, so that each is permitted to attack the other, the doctrine of the moral equality of combatants, against which I argued in my earlier essay, is not only true but, embarrassingly, true on the basis of my own claims.

This is a perceptive and important challenge that raises a number of issues that are important to understanding the morality of war. I am grateful to Steinhoff for raising them, and for providing me with an occasion to contribute to the discussion, and to defend and refine my position.

The criterion of liability to attack in war that I have defended invokes the notion of a “wrongful harm.” There are different ways in which harms inflicted by just combatants on innocent people may be wrongful. First, a wrongful harm may be one that is wrongfully inflicted, or inflicted by wrongful action. Just combatants might, for example, attack innocent people intentionally—for example, as a means of coercing their government to surrender—and to attack innocent people intentionally is generally conceded to be wrong, except perhaps in extreme conditions in which such an attack is necessary to avert a greater harm to the same people, or a much greater harm to other innocent people. Or just combatants might harm innocent people unintentionally, but recklessly or negligently—for example, by attacking a military target when this foreseeably causes harm to innocent bystanders that is unnecessary or disproportionate in relation to the importance of destroying the target.

Second, a wrongful harm may be inflicted by action that is permissible, or morally justified. In such a case, the action that inflicts the harm is not itself

*I am grateful to Christian Barry for illuminating comments on an earlier draft.

wrongful, but the victim is in no way liable to the harm she suffers. The harm is wrongful, not because it is wrongfully inflicted, but because it wrongs the victim, or infringes her rights.

I have, in previous work, conceded Steinhoff's point in cases of the first two types, in which just combatants act wrongly in attacking or harming the innocent.¹ In these cases they are indeed liable to defensive attack, even by unjust combatants. This, however, is of limited significance for the defense of the moral equality of combatants, which holds that all combatants are liable to attack by enemy combatants, so that unjust combatants *always* act permissibly in attacking just combatants, provided they do not inflict harm that is purely gratuitous (and provided that the just combatants are not trying to surrender and have not been rendered *hors de combat*). Since it is possible for just combatants to fight without inflicting unnecessary or disproportionate harm on the innocent, and since it is reasonable to assume that they often do fight this way, it follows that recognition that they are liable to attack when they wrongfully threaten or harm the innocent is insufficient to establish the moral equality of combatants.

II. TWO ASSUMPTIONS

Cases in which just combatants act wrongly in threatening or harming the innocent are not, however, the cases with which Steinhoff is concerned. His challenge instead focuses on cases in which just combatants act permissibly, or with moral justification, in attacking a legitimate target, but in the process cause harm to the innocent that is a foreseen, unintended, unavoidable, yet proportionate consequence of the attack. His claim is that even in these cases, just combatants are liable to attack in defense of the innocent, despite the fact that they are acting permissibly. If their action would otherwise kill the innocent, their liability makes it permissible for unjust combatants to kill them in these circumstances. In this part of his argument, Steinhoff makes explicit the first of two assumptions I will examine: namely, that liability extends even to those who threaten the innocent with wrongful harm as an unintended effect of action that is morally justified.

He concedes, however, that his argument is insufficient to establish the doctrine of the moral equality of combatants. For there are some wars, he suggests, in which just combatants do not threaten the innocent—for example, defensive wars fought entirely on home territory. He might, however, have attempted to extend the scope of his argument by claiming that wars in which just combatants pose no threat to the innocent never, or hardly ever, occur. For even when just combatants fight entirely on their own territory, their military action inevitably exposes some of their own innocent fellow citizens to risks of injury and death. Yet even if it takes into account the threat of wrongful harm that just

¹Jeff McMahan, "The ethics of killing in war," *Ethics*, 114 (2004), 693–733 at p. 712.

combatants may pose to their innocent compatriots, Steinhoff's argument still seems to stop short of supporting the moral equality of combatants. For there are many acts of war by just combatants that pose no threat to the innocent. Many just combatants go through an entire war without ever taking action that directly endangers innocent people. There can thus be no liability-based justification for attacking or killing just combatants to prevent them from engaging in acts of war that involve no risk of harm to the innocent. To make the same point in slightly different terms, when just combatants pose no threat to the innocent, attacks against them carried out by unjust combatants cannot be justified on the ground that those attacks have the effect of protecting the innocent.

At this point Steinhoff appeals to a second assumption, though without stating it explicitly. It is an assumption that is commonly made about the threat that combatants pose to their adversaries in war—namely, that combatants pose a threat continuously throughout the time that they are at war. It does not matter if a combatant is asleep, bathing, or walking unarmed far from the front. If he is an active-duty soldier in a time of war, he is judged to be a threat and as such liable to be attacked and killed. Thus, as Michael Walzer puts it, “once the fighting has begun, it is entirely legitimate to kill soldiers at random, as they come within range,” no matter what they are doing.² But if all combatants are rightly presumed to pose a threat to enemy combatants at all times when they are at war, then they should also be presumed to pose a threat to innocent bystanders at all times as well. Any attack by unjust combatants against just combatants is thus presumed to be protective of the innocent on the ground that it weakens the capacity of the just combatants to cause harm and, a fortiori, to cause harm to the innocent.

This assumes that the war in which they fight necessarily exposes innocent people to risk. There can, however, be wars that do not, such as wars fought entirely at sea or, perhaps, in outer space. The Falklands War of 1982 shows that even now such wars are more than just a theoretical possibility. It is this kind of war that Steinhoff has in mind when he concedes that his argument cannot establish the moral equality of combatants as a universal doctrine. Yet such wars are sufficiently rare that one could claim that Steinhoff's argument, if otherwise sound, shows that the doctrine holds in almost all actual cases, and is thus a generally reliable guide to military practice as well as a suitable foundation for the law of war.

In summary, Steinhoff's argument presupposes (1) that just combatants can be liable to defensive attack by virtue of posing a threat of wrongful harm to innocent people, even if the action by which they do so is morally justified, and (2) that just combatants pose a threat in the sense relevant to liability not only when their action puts innocent people at immediate or imminent risk of wrongful harm, but continuously throughout the period in which they are at war.

²Michael Walzer, “Terrorism and just war,” *Philosophia*, 34 (2006), 3–12 at p. 3.

III. LIABILITY FOR POSING A THREAT OF WRONGFUL HARM

I will consider the second of these assumptions first. Precisely stated, this is the assumption that in a war that exposes innocent people to some risk of wrongful harm, all just combatants count, for the purpose of assigning liability, as posing a continuous threat to the innocent, simply by virtue of the fact that their belligerent activities might, at some point, actively endanger innocent people. This may seem too capacious a notion of posing a threat to serve as a basis for the attribution of liability to lethal attack. Assuming that it has application outside the context of war, it implies, for example, that all drivers are liable to preventive killing on the ground that the activity in which they are engaged poses a lethal threat to innocent people. This objection cannot be evaded by claiming that the probability that any individual driver will kill an innocent person is too low to be a basis for liability. For the probability of an individual just combatant's inadvertently killing an innocent person in war may be correspondingly low without that exempting him, on Steinhoff's view, from liability to preventive killing. If such a just combatant is liable simply because the nature of his activity makes him a threat, so is every driver.

But if it is a mistake to say that just combatants pose a continuous threat to the innocent while they are at war, the challenge is then to defend the common view that combatants pose a continuous threat *to enemy combatants* while they are at war, irrespective of what they may be doing at any given time. It seems plausible, for example, to claim that virtually all unjust combatants are morally liable to attack at all times in a war in which they are engaged, and that this is so because they are at all times responsible for posing a threat of wrongful harm. How, one might ask, can one consistently claim that unjust combatants pose a continuous threat to just combatants in war yet deny that combatants in general pose a continuous threat to innocent bystanders while war is in progress?

The answer is in the fact that responsibility for a threat of wrongful harm is only a necessary condition, not a sufficient condition, of liability to preventive defense. One can, therefore, accept the assumption that just combatants pose a continuous threat to innocent people while they are at war without being committed to accepting that they thereby make themselves liable to defensive attack. Anyone whose action creates a risk of harm to innocent people poses a threat of wrongful harm. Thus all drivers do in fact pose a threat of wrongful harm, both to pedestrians and to other drivers. But that alone does not make them liable to defensive action. The same is true of just combatants who are fighting in an area in which their action might at some point harm or kill innocent people.

What conditions, in addition to posing a threat of wrongful harm, would make a person liable to defensive or preventive action? Consider an ordinary driver who, without fault or culpability, poses a threat of wrongful harm to a pedestrian. Even if she is acting permissibly in the subjective sense—that is, even

if it was reasonable for her to believe as she drove that the risks she was imposing were no greater than those normally imposed by careful drivers—it nonetheless seems that if the probability that she will otherwise kill the pedestrian gets high enough (for example, if, as a result of mechanical failure, her car is veering uncontrollably toward him), she will then become liable to defensive killing. Her liability derives from her earlier choice to drive, made in the awareness of the risks she would impose, together with bad luck. So voluntary engagement in an activity known to impose a risk of wrongful harm, even if the *ex ante* risk is very low, is a basis of liability to defensive action if the probability of wrongful harm becomes unexpectedly high.

Liability is, however, sensitive to culpability. If, for example, the driver were driving negligently or recklessly, she could become liable to defensive killing even if the probability of her killing the pedestrian were lower than in the case in which she is driving carefully. And if she were *trying* to hit the pedestrian, she would be liable to defensive killing even if the probability of her actually killing the pedestrian were quite low. These examples involving drivers suggest that, while the probability of causing wrongful harm is relevant to liability, so is the moral character of the action that creates the threat.

IV. JUSTIFICATION DEFEATS LIABILITY

If culpability can exacerbate liability, can moral justification nullify it? The example of the driver who, through no fault of her own, has a high probability of killing a pedestrian shows that the mere permissibility of action that ends up posing the threat of wrongful harm does not exclude the agent's being liable for that action. I have argued elsewhere, however, that "justification defeats liability." That slogan is meant to capture the idea that, while responsibility for posing a threat of wrongful harm is normally a basis of liability to defensive harm, it is not when the responsible agent is morally justified in doing what threatens to inflict the harm. As the case of the driver shows, I mean by "justification" more than mere permissibility. If an act is justified in the sense I intend, there is a significant moral reason to do it. Sometimes, of course, there is a significant moral justification for driving. Driving a critically ill person to the hospital in an ambulance is an obvious example. But driving is more often not justified in the relevant sense. In many cases, that is, people who drive could have arranged not to drive without failing to act on an important moral reason. But just combatants have a strong moral reason to fight—namely, to contribute to the prevention or correction of a serious wrong. I claim, contrary to Steinhoff's first assumption, that their moral justification for acting exempts them from liability to defensive action for the threat of wrongful harm they may pose to innocent people.

If it is true that moral justification defeats liability to preventive or defensive attack, this explains the moral asymmetry between just and unjust combatants despite the fact that they may both threaten innocent people, even to an equivalent

degree. For the sake of simplicity, ignore for the moment the threats that unjust combatants pose to just combatants and that just combatants pose to unjust combatants. Suppose that the current military action of a group of just combatants has a certain probability of killing a certain number of innocent civilians as a side effect.³ And suppose that there is a group of unjust combatants who are now at a base remote from the fighting but who will be deployed in a week to the war zone where their action will then have the same probability of killing the same number of innocent civilians as the current action of the just combatants. I claim that the just combatants are not liable to attack but that the unjust combatants are, despite the fact that the threat the unjust combatants pose is not imminent. And I propose that the difference is best explained by the fact that the just combatants act with moral justification, while the unjust combatants do not.

This may seem to beg the question. Why is the action of the just combatants justified while that of the unjust combatants is not? The main difference is that the action of the just combatants contributes to the achievement of a just cause. There is an expected good of the appropriate type against which the wrongful harms they will inflict on the innocent can be weighed. The action of the unjust combatants, by contrast, serves unjust goals, the achievement of which would merely add to the bad effects of their action rather than offsetting the wrongful harms to innocent civilians.

It is true, of course, that the action of the unjust combatants *may* have the effect of protecting some innocent civilians on their side from wrongful harm by just combatants. But even assuming that this good weighs against the threat of wrongful harm to innocent civilians on the other side for the purpose of justification, there remains a general asymmetry between just combatants and unjust combatants. Because the military action of just combatants supports a just cause, a particular act of war by just combatants may be justified even if the number of innocent civilians it kills on the other side exceeds the number of innocent people it saves on their own side. But if an act of war by unjust combatants would kill more innocent people than it would save, it would not be justified. Yet, in general, acts of war by unjust combatants are not justified even if they save more innocent civilians than they kill. This is because acts of killing that have the effect of protecting the innocent are in general justified only if those who are intentionally killed have made themselves morally liable to be killed. And I claim that this is not true of just combatants precisely because their military

³Here and elsewhere in this essay I will make the assumption that civilians are innocent in the relevant sense—that is, that they are in no way liable to be harmed in war. I actually think that matters are more complicated than this and that some civilians, by virtue of being complicit in responsibility for the unjust war their country is fighting, can be liable at least to certain risks of being harmed as a side effect of attacks against legitimate military targets. If this is right, it is obviously relevant to the question of whether unjust combatants are permitted to defend them when the risks are about to be realized as actual harms. If I had space for a complete response to Steinhoff's challenge, I would pursue this matter in detail. But I cannot do that here. For a discussion of civilian liability, see Jeff McMahan, *The Ethics of Killing in War: The Oxford Uehiro Lectures 2006* (Oxford: Clarendon Press, forthcoming), ch. 3.

action is morally justified, even when it involves the unavoidable killing of a proportionate number of innocent people as a side effect.

Steinhoff advances three objections to the claim that when an act threatens to cause wrongful harm, the agent is nonetheless exempt from liability if the act is morally justified. These objections are (1) that the claim is “completely ad hoc,” (2) that even if it were true, it could still be permissible for both potential victims and third parties to attack those who pose such a threat if the attack would prevent the wrongful harm, and (3) that those who justifiably pose a threat of wrongful harm are intuitively liable to pay compensation to their victims *ex post*, while their potential victims would *not* be liable to pay compensation *to them* for harms they might suffer from defensive action by the potential victims. I will address the first two objections but will say nothing about the third other than that my intuitions about compensation are different from Steinhoff’s and that, in any case, one cannot infer that a person is liable to defensive action *ex ante* from his being liable to pay compensation *ex post*. An obvious example in which the one form of liability does not entail the other is Joel Feinberg’s case of the hiker in a snowstorm who, in order to avoid freezing to death, breaks into a unoccupied cabin and makes a fire by burning some furniture. He infringes the owner’s rights and owes the owner compensation, but the owner would have no moral right of defense against the trespass.⁴

If it is true that the idea that liability is defeasible by a justification is ad hoc, this presents a major problem for the law, which almost always allows a justification to nullify an agent’s liability. In criminal law, liability is always defeasible by a justification, and usually even by an excuse. A claim of necessity, or lesser evil, for example, can nullify criminal liability for harming the innocent. The only strict liability in criminal law is liability that is not defeasible by an excuse. In tort law, liability is never defeasible by an excuse. But the standard form of liability in torts, fault liability, is defeasible by a justification. Strict liability in tort law is liability that is defeasible neither by excuse nor by justification.⁵ This is, therefore, the only kind of liability in either criminal or tort law that is not defeasible by a justification, and it governs only a very limited domain of the law of torts. So the idea that liability is defeasible by justification is quite familiar in the law, and indeed it would be intolerable if the kind of strict liability found in pockets of tort law were to prevail throughout the law.

This suggests that the defeasibility of liability by justification is not ad hoc, and indeed various reasons why justification defeats liability can be given. One is of course pragmatic: it would be foolish to deter people from doing what is right, and what the law wants them to do, by threatening them with liability to punishment or to the payment of compensation for doing it.

⁴Joel Feinberg, “Voluntary euthanasia and the inalienable right to life,” *Philosophy and Public Affairs*, 7 (1978), 93–123 at p. 102. Jules Coleman and I are currently writing a paper on asymmetries of liability that will discuss this kind of case, among others.

⁵Jules Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992), pp. 219–20.

One might argue, however, that the forms of liability in criminal and tort law are different from liability to attack in war. What one is liable to in criminal law is punishment, which is generally held to be a matter of retributive justice, and what one is liable to in torts is the payment of compensation, which is a matter of corrective justice. But in war, what one is liable to is defensive or preventive action, which is a matter of preventive justice, and it is possible that preventive justice is different from retributive and corrective justice in refusing to recognize a justification as a ground for nullifying liability for the infliction of a wrongful harm. In particular, the pragmatic rationale does not seem to apply. Just combatants expect to be attacked by unjust combatants whether or not their own attacks cause harm to innocent bystanders as a side effect. They will therefore not be deterred from fighting in a just war by being legally liable to defensive attack for threatening unintended harm to innocent civilians.

But there is another rationale for the idea that liability is defeasible by justification that applies to defense as well as to punishment and the demand for compensation. This is that the assignment of liability follows the distribution of harm in accordance with the demands of justice. In criminal law, a person is liable to punishment if he deserves it as a matter of retributive justice. In tort law, a person is liable to pay compensation because it is just that he should bear any losses attributable to his failure to exercise due care in the pursuit of his own activities. In self-defense and war, a person is liable to defensive harm if he is morally responsible for an unjust threat, or a threat of wrongful harm.

This may seem like an admission of defeat, since just combatants *are*, in the cases with which we are concerned, morally responsible for a threat of wrongful harm to innocent civilians. Yet to say of just combatants that they are morally justified in acting in a way that threatens the innocent with wrongful harm is precisely to absolve them of moral responsibility, *in the sense that is relevant to liability*, for the threat. This claim may seem merely to beg the question, but the substantive point is this: given that self-defense is a matter of justice in the ex ante distribution of unavoidable harm, and given that just combatants who pose a threat of wrongful harm have positive moral justification for their action, there is no reason why justice would demand that unavoidable harm be distributed to them, for acting out of respect for morality, rather than to innocent bystanders. In a conflict between those who act at the behest of morality and those who are wholly innocent and act in self-preservation, justice is silent.

An act that is morally justified may be morally required or it may instead be optional. The claim that justification defeats liability may seem more compelling in the case of justified acts that are morally required. If so, and if acts of war by just combatants that kill innocent people as a side effect are optional rather than required, this would weaken the case for the claim that those who engage in such acts do not thereby become liable. Yet contemporary wars cannot be effectively fought without killing innocent people, and if there are wars that are morally necessary or imperative to fight, then morality does often require just combatants

to conduct attacks that will foreseeably kill the innocent. I believe that there are wars that countries are morally required to fight, and therefore that some individuals are morally required to participate in—for example, a war of defense in which innocent people in a country that has been the victim of unjust aggression will suffer significantly greater harm if their army does not fight than innocent people in the aggressor country will suffer as a side effect if the army does fight. In this kind of case, there will be some attacks that will foreseeably kill innocent civilians but that just combatants are nevertheless morally required to conduct. And there may be others that, while morally optional, are nevertheless justified in the strong sense that they are not only permissible but also impartially better than any alternative—that is, there is no alternative act that would be morally better or even equally good.

There is, of course, a familiar problem in claiming that just combatants can be morally justified in acting in ways that kill innocent people. What distinguishes just from unjust combatants, and seems to make it justifiable for the former but not the latter to act in ways that kill innocent people, is that the action of just combatants supports a just cause. But sometimes the goals that terrorists pursue are also just. If it can be justifiable for just combatants to kill innocent people in pursuit of a just cause, why are terrorists not equally justified in killing innocent people when they too pursue a just cause? The traditional answer is that it makes a moral difference that terrorists kill the innocent intentionally, while just combatants, when they act with justification, kill them only as a foreseen but proportionate side effect of action that has a military purpose. Yet the idea that the intention with which an act is done can affect the act's permissibility has, as Steinhoff observes, been widely criticized in recent years, to the extent that it is probably no longer the dominant view among moral philosophers. I believe that while some of those criticisms are powerful, none is, as Steinhoff claims, "devastating." This, however, is an issue that I cannot take up here, though I do discuss it elsewhere.⁶ For the purposes of this paper, I will simply assume that part of the explanation of why acts of war by just combatants can be justified despite the fact that they kill the innocent is that the killing is unintended, or is a side effect rather than a means to the combatants' ends. By contrast, killings of the innocent by terrorists are intended as means of achieving their ends.

⁶Jeff McMahan, *The Morality and Law of War* (New York: Oxford University Press, forthcoming). Steinhoff implies that I have suggested that the relevance of intention to the issues discussed here is that if one kills innocent people without intending to attack them, one does not wrong them and one's action is not unjust. I have, however, never suggested this and it is not a view that I would accept. Indeed, he elsewhere quotes me as saying that "the tactical bomber's justified action would wrong the civilians," which implies my rejection of this view, since the tactical bomber does not intend to attack or harm the civilians. Steinhoff refers to page 405 of my book, *The Ethics of Killing* (New York: Oxford University Press, 2002), indicating that I say there that one wrongs innocent bystanders only if one attacks them intentionally. But there is nothing on that page, or anywhere else in my writings, that says or implies that.

V. SYMMETRICAL DEFENSE CASES AND THIRD-PARTY INTERVENTION

Turn now to Steinhoff's second objection, which is, in effect, that unjust combatants can be permitted to attack just combatants if the attack would have the effect of protecting innocent civilians, even if the justification for the just combatants' action exempts them from *liability* to attack. As I point out in the paper from which Steinhoff quotes the principle that justification defeats liability, the claim that just combatants do not become liable to defensive killing provided they act with justification does not entail that it is impermissible for innocent civilians to kill them in self-defense.⁷ For there may be justifications for the defensive killing of just combatants other than that they are liable to be killed. (In the law of war, civilians are not permitted to kill combatants, but that legal restriction is irrelevant here.) It may be, for example, that all people are permitted to defend their right not to be killed against infringement by other moral agents, even when those agents act with justification, except, perhaps, when conditions are so dire that the potential victims are morally required to sacrifice themselves, despite having done nothing to lose or waive their rights. If this is correct, the confrontation between just combatants acting with moral justification and innocent civilians threatened with being killed as a side effect of that action is one in which there is a certain moral symmetry between the parties. Considerations of justice do not seem to favor the distribution of inevitable harm to one party or the other. Call cases of this sort "symmetrical defense cases." In such cases, the just combatants act justifiably in attacking, the civilians are justified in killing the combatants in self-defense if they can, and the combatants are in turn justified in killing the civilians in preemptive self-defense. All are innocent in the relevant sense, none is liable to be killed, yet those on each side are morally justified in killing those on the other, provided that only one can succeed. Most theories of self-defense deny that there can be symmetrical defense cases.⁸ But that there are such cases seems so intuitively compelling that our account of self-defense had better be able to accommodate them.

In most instances, of course, civilians are physically unable to defend themselves against just combatants. But Steinhoff thinks that if the civilians are morally permitted to defend themselves, it must also be permissible for their compatriots who *can* defend them—the unjust combatants—to do so. That the military action of the unjust combatants serves to defend innocent civilians on their own side is, he argues, what makes it permissible for them to fight.

I agree with Steinhoff that when people have a justification for killing in self-defense, that justification usually extends to third-party intervention on their

⁷Jeff McMahan, "The basis of moral liability to defensive killing," *Philosophical Issues*, 15 (2005), 386–405, esp. pp. 399–403.

⁸For example, the theory advanced by Judith Jarvis Thomson in "Self-defense," *Philosophy and Public Affairs*, 20 (1991), 283–310.

behalf. This is because the justification for self-defense usually appeals to considerations of justice in the distribution of harm and thus is almost always asymmetrical. That is, justice requires that the harm go to one party rather than the other. And the reason to distribute the harm to one party rather than the other is agent-neutral in character. But symmetrical defense cases are anomalous. The justification for self-defense in these cases is not a matter of justice but instead appeals to rights that both parties possess equally. In these cases, third-party intervention is in general impermissible.

This is why it is so important to determine whether there is a basis for holding just combatants morally liable to defensive action for the threat they pose to the innocent. If they are liable, these cases are not symmetrical defense cases (since the innocent civilians are not liable) and the justification for the defensive killing of just combatants extends to third parties; but if they are not liable, it does not.

Steinhoff argues that I am mistaken about third-party intervention. He contends that if it is permissible for an individual to act in self-defense, it must also be permissible at least for third parties who are specially related to her to act in her defense. I see the force of this point. That is why I wrote, in the passage he quotes, that in these special cases, “third parties are not, *other things being equal*, permitted to intervene,” and, in another passage on the same page that he does not quote, that “*disinterested* third parties may not intervene on behalf of either party to the conflict.”⁹ It seems reasonable to suppose that even in symmetrical defense cases, the justification that each party has for killing in self-defense may extend to others who are specially related to her. But even if this is so, whether the justification extends to a particular specially related third party depends on the nature and moral significance of the relation. Even if a person’s spouse may kill in her defense in a symmetrical defense case, someone else who is related to her only by being a member of the same race may not. The relation of being a citizen of the same state is, like being a member of the same race, not sufficiently significant to justify a third party’s killing a morally justified attacker in defense of his compatriot in a symmetrical defense case.

Steinhoff could argue, however, that unjust combatants are not merely compatriots of the innocent civilians who are threatened by the military action of just combatants; they are also under a special contractual obligation to defend those civilians, having pledged and been paid to do so. Thus if it is permissible for the civilians to defend themselves against the just combatants, it should be permissible for the unjust combatants to defend them as well. An analogy at the individual level might be a hired bodyguard. Consider the familiar trolley case, which, with a few additional details, is arguably a symmetrical defense case. A runaway trolley on the main track will hit and kill five innocent people unless it is diverted onto a branch track, on which there is one person who will be killed if it is diverted. A neutral person who has no special responsibilities in the case

⁹Ibid., p. 400, emphases added.

and is unrelated to any of the possible victims has access to a switch that can divert the trolley. Most people agree that it would be morally justified for her to throw the switch. Suppose she is about to do so. If the one person on the branch track could kill her preemptively, thereby preventing the diversion of the trolley toward him, most people agree that it would be permissible for him to do so, provided there were no other way to save himself. This is not, I claim, because the neutral person is liable. It is simply because the innocent person on the track is permitted to defend his right not to be killed against infringement, even by another innocent person who acts with justification.¹⁰ But now suppose that the person trapped on the branch track is unable to act in self-defense but that his hired bodyguard can kill the neutral person before she throws the switch. It may seem permissible for the bodyguard to act in defense of his employer, for he is not a disinterested third party, but acts instead as the agent of the person on the branch track. One might, indeed, think of the person on the track as acting vicariously through the agency of his bodyguard.¹¹

VI. RESPONSIBILITY FOR THE THREAT TO INNOCENT CIVILIANS

The bodyguard in this example is not, however, analogous to unjust combatants fighting in an unjust war. One relevant difference is that while the bodyguard's sole aim in killing the neutral person before she can throw the switch is to save the life of his innocent employer on the branch track, acts of war by unjust combatants are seldom intended solely to defend innocent civilians from harm they would otherwise suffer from the military action of just combatants. When unjust combatants are engaged in combat, their dominant aim as individuals tends to be to defend themselves and their comrades, though the larger reason why they are involved in combat at all is that they are supporting their side's aims in the war, which by hypothesis are unjust. On occasion their action may be intended primarily, or even solely, to defend innocent civilians on their side; often it is intended at least in part to defend innocent civilians, since unjust combatants recognize that the protection of the civilian population is one goal of their efforts to weaken the enemy's military capacity; occasionally it may have the protection of the innocent as a merely foreseen effect; occasionally it may protect the

¹⁰For this claim to be true, it is essential that the innocent person who poses the threat should be acting as a morally responsible agent. Otherwise her action could not infringe the *right* of the person on the track, even if it would kill him. Rights can be infringed only by acts that constitute failures to act on corresponding duties, and only acts for which agents are morally responsible can be duties.

¹¹Since writing this paper, I have been led by discussions with Regina Rini and Jonathan Winterbottom to doubt whether the bodyguard, or indeed any other specially related third party, is permitted to intervene on behalf of the innocent person trapped on the branch track. It may be that in symmetrical defense cases, the permission to engage in self-defense that an innocent person threatened by a justified attacker has is fully *agent*-relative and does not extend to any third party, no matter how closely related that third party may be to the person under threat. I cannot here discuss the reasons that have led me to doubt the permissibility in these cases of all third-party intervention that is aimed solely at the defense of the innocent, but I hope to do so in subsequent work.

innocent in a way that was unforeseen; sometimes it may unwittingly endanger innocent civilians on the unjust combatants' side; and, finally, it may sometimes foreseeably endanger those people.

One might argue, as I have noted that many philosophers do, that the intention with which an agent acts is in itself irrelevant to the permissibility of his action, or that even if intention is relevant, unintended good effects can make an otherwise impermissible act permissible in just the way that unintended bad effects can make an otherwise permissible act impermissible. Even so, everyone concedes that an agent's intentions are morally relevant insofar as they provide evidence of the likely effects of the agent's action. And while the bodyguard's sole aim in killing the neutral person is to save the life of his innocent employer, the aims that guide the action of unjust combatants are typically more complex. Their killing of just combatants thus tends to have a variety of further effects, including not only the protection of innocent civilians on their side, but also the killing of innocent civilians on the other side and the advancement or promotion of their side's unjust war aims. The bad effects have to be weighed against the good effects in determining whether their action is permissible.

Steinhoff would no doubt concede this. But there is another and more important reason for calling attention to the fact that the action of unjust combatants in war is guided by considerations other than the defense of their own innocent civilians. Had the primary aim of the unjust combatants and their leaders been the protection of their civilian population, they would not have done what gave the just combatants a just cause for war—let us assume that in this case it was the launching of an aggressive war. Had their civilian population been unjustly threatened, their war might not be unjust; but it is unjust, by hypothesis. So their civilian population was not under threat prior to their going to war. The unjust combatants therefore went to war *despite* the fact that doing so would expose their civilian population to risks that would otherwise not have existed, such as risks of harm as a side effect of justified, defensive attacks by just combatants. They, not the just combatants, therefore bear ultimate responsibility for the threat their innocent civilians face. This, admittedly, gives them a special responsibility for protecting those innocent people from the threat they face. But it may also morally constrain what they are permitted to do that might provide that protection. If, in particular, their action would kill more innocent people than it would save, then it is not permissible. I use “innocent” here in the generic sense according to which it means “not liable”—in this case, not liable to be killed. I have argued that just combatants do not make themselves liable to be killed by threatening innocent civilians, provided that their action is morally justified. And Steinhoff's second objection is supposed to apply even if my argument for that claim succeeds. But if we include just combatants among the innocent and assume that military operations by unjust combatants in general kill at least as many innocent civilians as a side effect as military operations by just combatants (a realistic assumption, since there is no reason to suppose that unjust

combatants in general exercise greater care to avoid harming enemy civilians than just combatants do), it follows that acts of war by unjust combatants rarely save more innocent people than they kill. If, moreover, we accept the claim of common sense morality that one's moral reason not to *kill* an innocent person is in general stronger than one's moral reason not to *allow* an innocent person to be killed, then acts of war by unjust combatants are not permissible even if the number of innocent people they would save is comparable to, or even somewhat greater than, the number they would kill.

The background presupposition that helps to guarantee the truth of these claims is that the unjust combatants themselves are not among the innocent. The fact that they and their leaders bear ultimate moral responsibility for the threats that all the relevant parties face (the threats to just combatants, to enemy civilians, to their own civilian population, and even the threats to themselves) makes them liable in a way that none of the other threatened people are. Because of their liability, the fact that their military action would also defend *them* does not contribute to the moral justification of that action, or at least not in the way that the action's effect in protecting innocent civilians does.

VII. RIVAL EXPLANATIONS OF THE WRONGNESS OF DEFENSIVE ACTION BY UNJUST COMBATANTS

I have so far argued (1) that just combatants whose military action threatens innocent civilians with wrongful harm are nonetheless not liable to be killed if their action is morally justified, (2) that it may nevertheless be permissible for the innocent civilians to kill the just combatants in self-defense if they can, but (3) that this justification does not extend to unjust combatants, despite the latter's contractual commitment to defend the innocent civilians. One might argue for the compatibility of claims 2 and 3 in a different way—a way that appeals to a feature of the concept of liability. Liability seems to be a three-term relation. A person is liable *by virtue* of having done some specific act, *to* some specific harm, inflicted *by* some specific agent or agents. The third term in this relation is a restriction on the agents who are entitled to inflict a harm to which another has made himself liable. This constraint on liability is familiar in the criminal law, in which only certain authorized persons or bodies within the judicial system are entitled to impose the punishments to which offenders have made themselves liable. If this kind of constraint applies to defensive as well as punitive action, it may make sense to say that while just combatants are liable to be killed by the innocent civilians they threaten, and perhaps by individuals who are specially related to these civilians in some highly significant way, they are not liable to be killed by others, including unjust combatants.

I have argued, by contrast, that just combatants are not liable to attack by anyone, even the innocent civilians they threaten. Yet I concede that it can be permissible for innocent civilians to kill them to prevent the infringement of their

right not to be killed. One may wonder, however, whether there is any significant difference between these two views, given that they both imply that just combatants may permissibly be killed by innocent civilians whom they threaten but not by others, including unjust combatants. There is in fact an important difference, which is that if just combatants are liable to be killed in self-defense by innocent civilians, it follows that they have no right of self-defense against those civilians; for there can be no justified defense against harms to which one is morally liable, just as there can be no justified defense against harms that one deserves.¹² The just combatants may, on this view, be permitted to attack the civilians preemptively, but only to ensure the success of their mission, not to defend themselves. If, however, just combatants are not liable to attack by innocent civilians, they may be permitted to defend themselves against the permissible defensive action of the innocent civilians for the same reason that the innocent civilians are permitted to attack them—that is, to defend their rights against permissible infringement. Intuitively, this seems right: both parties retain their right of self-defense, so that conflicts between just combatants and innocent civilians are symmetrical defense cases.

If Steinhoff were right and just combatants who foreseeably but unintentionally threaten innocent civilians thereby make themselves liable to attack not only by the civilians but also by third parties, these cases would instead be asymmetrical in a way that seems highly implausible. If just combatants are liable to attack by unjust combatants in these cases, and if there is no right of defense against an attack to which one is liable, then just combatants have no right of self-defense against unjust combatants. Yet if they *were* to attempt to defend themselves, the unjust combatants *would* have a right of defense against them.

As in cases of conflict between just combatants and innocent civilians, it does not follow that just combatants have no right to attack unjust combatants; for Steinhoff's view does not deny that unjust combatants are also liable to attack both because they pursue unjust aims by violent means and because they unjustifiably threaten innocent civilians as a side effect of their own military action. Yet it remains implausible in itself to suppose that when the justified action of just combatants threatens innocent civilians and the military action of unjust combatants would, perhaps unintentionally, help to protect the civilians, the just combatants would have no right of self-defense against the unjust combatants, though the unjust combatants would have a right of defense against the just combatants.

A further implication of Steinhoff's view is worth noting. As I observed earlier, the military action of just combatants sometimes puts members of their own civilian population at risk. It sometimes happens, for example, that although

¹²There can be cases in which one is justified in doing what will avert a harm one deserves to suffer. But the justification in these cases does not appeal to the right of self-defense but, for example, to the necessity of choosing the lesser evil.

defensive military action taken by just combatants on their own territory will result in a net saving of the lives of their innocent fellow citizens, it will also kill some members of their civilian population (who, we might stipulate, would otherwise not be harmed) as a side effect. It is perhaps plausible to suppose that those civilians who would otherwise be killed by “friendly fire” are permitted to try to defend themselves even by killing their own combatants. But Steinhoff’s view implies that by threatening their own innocent civilians, the just combatants make themselves liable to be killed by the invading unjust combatants, even if the unjust combatants would be unaware that their military action would save the lives of certain civilians. And assuming that there can be no justified defense against harms to which one is liable, it implies that the just combatants would have no right of self-defense—though again it does not follow that they would have no right to attack the unjust combatants.

VIII. WHAT OUGHT UNJUST COMBATANTS TO DO?

I argued earlier that unjust combatants and their leaders bear primary responsibility for the threat of wrongful harm that just combatants justifiably pose to innocent civilians. And I conceded that this gives unjust combatants a special responsibility to ensure the security of these civilians. Yet I also argued that their responsibility for the threat, together with their status as third parties to a conflict in which none of the parties is liable, makes it impermissible for them to kill just combatants even in defense of the innocent. One might argue, however, that the unjust combatants’ responsibility for the threat of harm to the innocent gives them a reason to prevent that harm that is strong enough to override the constraint against their killing the just combatants. Consider a similar though admittedly not precisely analogous situation. Suppose that five innocent people will be killed unless another innocent person is killed as a means of saving them. Most of us agree that it would be wrong for a third party, or indeed any one of the five, to kill the one. Yet there may be one exception. Suppose there is one person who is culpably responsible for the threat to the five, so that if they die, he will have wrongfully killed them. It can be argued (though for most of us this is counterintuitive) that *he* would be justified in killing the one, since the only alternative for him at this point is murdering five. If he has placed himself in a situation in which it is unavoidable that he will murder five or murder one, he ought to murder only one.

It may be unnecessary to answer this objection directly, for it is relevant to whether unjust combatants have a justification for killing just combatants only if their killing just combatants is the most effective means of fulfilling their responsibility to protect the innocent civilians whom they have put at risk. Suppose there were some other means of protecting their innocent civilians that was slightly less effective but also considerably less risky to themselves. It would be wrong for them to pursue that option. Their responsibility for the threat to the

innocent makes them liable to any risks necessary for the most effective defense of the innocent whom they have wrongfully placed at risk. Indeed, if the civilians could save themselves either by killing a certain number of just combatants or by killing an equal or, within limits, even greater number of unjust combatants, justice would require that they kill their own unjust combatants.

I doubt that unjust combatants can most effectively protect the innocent by continuing to fight, at least in most contexts. Even if on some particular occasions military action by unjust combatants prevents the killing of certain innocent civilians by just combatants, the net effect of continued military action by unjust combatants is likely, unless they can win the war very quickly, to be to increase the danger to their civilian population as a whole. For continued military action prolongs an unjust war, providing continued justification for attacks by just combatants, some of which threaten unintended harm to civilians. These civilians would be safer were the combatants on their side to stop fighting rather than to continue to fight.

Of course, if the unjust combatants' civilian population would continue to be at risk of attack even if they were to stop fighting, the situation would be altogether different. But if that were true, the combatants would presumably have a just cause and their war would be in part just and could become wholly just, in which case they would cease to be unjust combatants and become just combatants themselves.

Steinhoff addresses this point in his critique, noting, as I have done elsewhere, that while unjust combatants *collectively* could best protect their civilian population by surrendering, or stopping fighting, no individual unjust combatant can stop the war on his own. Steinhoff therefore concludes that the best way for *each* unjust combatant effectively to defend his civilian compatriots is to continue to fight. But this latter claim is not obviously true; nor is it obvious what an individual unjust combatant ought to do even if it were true, since there seem to be instances in which people ought not to participate in some activity even if it will be worse for some innocent people if they do not.

The best way for an unjust combatant to protect innocent people on his own side is to do whatever will most effectively contribute to bringing an early end to the war. Acting to defend *some* innocent people on one occasion after another is counterproductive if the larger effect is to continue to prolong the war indefinitely, thereby repeatedly sustaining the threat to other members of the civilian population who have so far survived. Perhaps what would be in the best interests of the unjust combatant's civilian population is an early victory. This raises questions about proportionality. Quite apart from considerations of intention, can the protection of some innocent civilians be justified if it comes at the cost of the achievement of an unjust cause, with all the attendant harms and injustices to the innocent that this would involve? If the answer is "yes," this may suggest that in fact the war fought by the ostensibly just combatants is itself disproportionate and therefore unjust, since the harms their war would

unintentionally inflict on the innocent would outweigh the harms and injustices their side would suffer through capitulation. So, if by hypothesis the other side's war is just, it seems to follow that victory by unjust combatants cannot be justified on the ground that it provides the best protection of their own civilian population.

Admittedly, Steinhoff does not attempt to argue for the justifiability of victory by unjust combatants. He simply argues that individual action in war by unjust combatants can be justified on the ground that it has the effect of defending innocent people from harm by those who are liable for the threat they pose. But since it seems that unjust combatants ought not simply to fight on one occasion after another without considering whether this has the effect of prolonging the war in a way that is counterproductive, and since it seems that they ought not to aim at victory, perhaps what they should aim for is the early defeat of their own side. This may be the option that would best protect their own civilians from injury and death caused by the military action of just combatants. If so, an individual unjust combatant has various possible options: he can simply refuse to fight, or attempt to sabotage his own side's military efforts, or even defect to the other side—hoping, perhaps, that his example will inspire others to follow. For any individual unjust combatant, this may be what would best protect his civilian population from the threat of wrongful harms. It would not, of course, protect them from the threat of harms that are inevitable concomitants of defeat, but those harms would not be unjust.