



# THE ETHICS OF ARMED CONFLICT

A COSMOPOLITAN JUST WAR THEORY

JOHN W. LANGO

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*A Cosmopolitan Just War Theory*

John W. Lango

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*For my son, sister, mother, and father*

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# PREFACE

During the Cold War, I was startled awake when the ground shook, frightened that nuclear war had begun; but it was Los Angeles, and only an earthquake. I have written this book with the wish that we all someday may awaken from the nightmare of armed conflict.

It was during the Vietnam War that I first learned about just war theory. In terms of just war principles, my belief was then, and still is, that the Vietnam War was unjust. After the Cold War, I was shocked by the genocide in Rwanda. In terms of just war principles, I believed then, and still do, that armed intervention there would have been just. My first article about just war theory, which featured the case of Rwanda – ‘Is armed humanitarian intervention to stop mass killing morally obligatory?’ (2001) – expressed theses that are precursors of theses in this book.

Truly, some uses of armed force are just, and some uses of armed force are unjust. The problematic of just war theorising is to formulate and support moral principles by means of which responsible agents can determine correctly whether a particular use of armed force would be just or unjust. This book is devoted to the study of such principles, which might be more aptly termed ‘unjust and just war principles’.

As the book’s subtitle indicates, my purpose is to develop a just war theory that is cosmopolitan, whereas more traditional just war theories tend to be state-centric. Stimulated by moral debate about the 2003 Iraq War, another of my articles – ‘Preventive wars, just war principles, and the United Nations’ (2005) – applied just war principles from the standpoint of the Security Council. Instead of being state-centric, my cosmopolitan just war theory is centred primarily on the Security Council.

During June 2004, I participated in an NEH Summer Institute at the US Naval Academy, ‘War and Morality: Re-thinking the Just War Tradition for the 21st Century’. Influenced by this instructive experience, I wrote an article that was a prototype for this book: ‘Generalizing and temporalizing just war principles: illustrated by the principle of just cause’ (2007b). In addition to

interstate wars, suitably generalised just war principles should be applicable to armed humanitarian interventions, counterinsurgency operations, armed revolutions and so forth. As its title indicates, this is a book about the ethics of all forms of armed conflict.

I am concerned especially with the question of how received just war theory should be rethought, so as to be applicable prospectively to present and future cases. This book is not a history of the just war tradition. Most of my real-world cases are recent – for instance, the cases of Afghanistan, Darfur, Libya, Rwanda and South Sudan. My purpose is to contribute to the cooperative endeavour of rethinking just war theory.

I have not served in the military, and I favour the use of armed force only as a last resort. Inspired by the civil rights movement, I wrote an article interrelating armed force and nonviolent action: ‘Before military force, nonviolent action: an application of a generalized just war principle of last resort’ (2009a). To counterbalance overemphasis of the idea of just cause, I emphasise a generalised last resort principle.

There are members of armed services who are advocates of just war theory. From 2005 onwards, I have participated in annual conferences of the International Society for Military Ethics (ISME). For instance, my talk at the 2007 ISME conference was based on my article ‘Military operations by armed UN peacekeeping missions: an application of generalized just war principles’ (2009b). The topic of UN peacekeeping is prominent among the topics considered in this book.

To establish that a proposed use of armed force would be just, responsible agents have the burden of proving by means of clear and convincing evidence that just war principles are satisfied. Sometimes, to obtain sufficient evidence, there is need for intelligence collection and analysis. Since 2008, I have participated in all but one of the annual conventions of the International Studies Association (ISA). My talk at the 2011 ISA convention was based on my article ‘Intelligence about noncombatants: the ethics of intelligence and the just war principle of noncombatant immunity’ (2011). To counterbalance overemphasis of the idea of just cause, I also emphasise the noncombatant immunity principle. (The proportionality principle is also emphasised.)

Indeed, the academic subject of just war theory is interdisciplinary. There are scholars of just war theory in departments and programmes of international studies, military affairs, peace and justice, philosophy, political science, religion and so forth. I am a philosopher, and I view just war theory especially through the lens of moral philosophy. However, a main theme of this book is that a just war theory should be interrelated with a variety of other theories, not only a moral theory, but also theories of global justice, human rights, international security and so forth.

A related main theme is that a just war theory should be interrelated with

real-world cases of armed conflict. To make such cases more vivid, I have provided some quotations from contemporary news articles, Security Council resolutions, statements by political leaders, reports by nongovernmental organisations and so forth. These (and other) quotations should be read as integral parts of the book.

I am particularly concerned to interrelate a cosmopolitan just war theory with a universalist theory of human rights. Some views about human rights that I expressed in a recent article – ‘Global health, human rights, and distributive justice’ (2012) – are also expressed here. Biomedical ethics is the most developed field of applied ethics. My conception of how just war principles should be applied to cases of armed conflict has been informed by my study of how general moral principles (e.g. distributive justice) have been applied to biomedical cases.

In summary, let me preview some distinctive approaches to the ethics of armed conflict that are interwoven in this book: a revisionist approach that involves generalising received just war principles, so that they are applicable by all sorts of responsible agents to all forms of armed conflict; a cosmopolitan approach that features the Security Council; a preventive approach that emphasises alternatives to armed force, including negotiation and mediation, nonviolent action and peacekeeping missions; a temporalist approach that prioritises the application of just war principles prospectively to present and future armed conflicts; a coherentist approach that interrelates just war principles, general moral principles (e.g. distributive justice) and real-world cases (e.g. the Rwandan genocide); and a human rights approach that encompasses not only armed humanitarian intervention, but also armed invasion, armed revolution and all other forms of armed conflict.

In these prefatory remarks, I have alluded to my past engagement in just war theorising. I want to stress that this book is not a collection of previously published articles. Although I have included some rewritten passages from some of those articles, the book is largely new.

I have striven to make the book accessible to a wide range of readers. There are many worthwhile writings about the ethics of war and peace, and I have profited greatly from my reading of them. (There is no space for a comprehensive bibliography. My list of references is limited to works cited; many significant works are not cited.) However, my book does not presuppose the reading of any other book about just war theory. It does not contain lengthy contestations of views of other just war theorists, nor are there notes cluttered with substantive remarks. The few notes in my book mostly contain my recommendations for collateral reading.

I have also striven to make the book reasonably academically rigorous. To strike a balance between rigour and accessibility, I have provided accounts of terms and ideas that might be unfamiliar to nonspecialist readers. Although

my argumentation is often demanding, it is largely self-contained. I have tried to state and support a cosmopolitan just war theory as cogently and completely as possible in the space available.

I have benefited considerably from thoughtful and instructive comments by Nigel Dower, Charles (Jim) Landesman and James Pattison about the entire penultimate draft of my book manuscript, and I wish especially to thank them for this. Over the years, I have had insightful conversations with many other persons about various topics in the book, conversations which surely helped to make it better than it otherwise would have been, and I wish to thank them also. Let me thank a few of them by name: Joe Betz, Michael Brough, Omar Dabhour, Randall Dipert, Jan Goldman, Carol C. Gould, Fran Harbour, Virginia Held, Phil Jenkins, George Lucas, Rosamond Rhodes, Jordy Rocheleau, Steve Ross and Harry van der Linden.

My work with Edinburgh University Press has proven very fruitful and pleasurable. I am especially grateful to Nicola Ramsey for her support and encouragement. I am also very appreciative of the helpfulness of other members of the editorial staff at various stages of the writing of this book – namely, James Dale, Michelle Houston, Jenny Peebles and John Watson. It was very gratifying to work on the cover design with Rebecca Mackenzie. My editing of the typescript was eased considerably from the advice of Eddie Clark. Finally, I am very indebted to Elizabeth Welsh for her helpful labours as copy-editor.

In closing, I would like to append some remarks about the cover. To me, this picture is chock-a-block with symbolism. The owl is an ancient symbol of wisdom. Just war theory aspires to morally constrain the use of armed force wisely. Nocturnal hunting by an owl is symbolic of the idea of a targeted military operation. The owl in the picture is a burrowing owl (*Athene cucularia*), standing resolutely before a burrow, symbolising the idea of self-defence. Unwisely, the burrow is near an entrance to a public beach, symbolising the idea of fallibility in just war theorising. Burrowing owls are endangered by human economic development, symbolising the idea of collateral damage. The right of this vulnerable animal to security is symbolic of a human rights approach to just war theory. The photograph of this small owl (its length is less than 30 cm) was not taken with a powerful telephoto lens. (The picture is an enlargement of a photograph taken with a 100 mm lens.) The owl's direct gaze is not an illusion of magnification. Unmistakably, as I photographed it a number of times, it would swivel its head to the left and right, but it would also look directly at me. On the cover of this book, the owl is looking at you, the reader, inviting you to enter its pages.

*John W. Lango*  
*New York, April 2013*

# CHAPTER 1

## INTRODUCTION

We the peoples of the United Nations determined . . . to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest . . .

*Charter of the United Nations*

This thoughtful passage from the Preamble of the UN Charter evokes ideas essential to a cosmopolitan ethics of armed conflict. What are the moral principles that should be accepted, in order to ensure that armed force is used only in the common interest? So as to protect civilians, what moral methods governing the use of armed force should be instituted? Should the term ‘armed force’ encompass all forms of armed conflict? What is the common interest worldwide? Should such questions be answered by means of a just war theory? These questions are somewhat vague, but they serve to indicate the sorts of questions that I am striving to answer in this book.

### I. PREVIEW

Following some introductory remarks in the first and second parts of this chapter, the third part cites four epochal events that have been pivotal for just war theory – namely, the framing of the UN Charter and the founding of the United Nations, the Cold War practice of military deterrence, the post-Cold War recognition of the responsibility to protect and the advent of the current global war on terror. The fourth part contains some concluding remarks. Finally, in the last part, what might prove to be a fifth epochal event is tentatively discerned in a cluster of recent military operations – for example, the US targeted military operation that killed Osama bin Laden and the limited military intervention by the US and NATO during 2011 in Libya.

#### A. GENERALISING AND TEMPORALISING JUST WAR PRINCIPLES

In response to contemporary forms of armed conflict, including genocidal civil wars and global terrorism, some advocates or practitioners of just war

theory (briefly, ‘just war theorists’) are presently engaged in projects of rethinking, revising or supplementing just war principles. My book is thus revisionary.

Some cases of armed conflict are hybrids of stock forms of armed conflict – for instance, an armed humanitarian intervention amidst a civil war, the parties to which commit acts of terrorism. Consequently, there is need for sufficiently general just war principles, so that diverse kinds of uses of armed force by diverse sorts of responsible agents can be interrelated coherently. For example, there is need for a sufficiently general noncombatant immunity principle – one that would be applicable both by agents responsible for a counterinsurgency operation and agents responsible for the insurgency.

Accordingly, a main thesis of this book is that received just war principles of just cause, last resort, proportionality and noncombatant immunity should be generalised, so that they are applicable by all sorts of responsible agents to all forms of armed conflict. Of course, they should be applicable to large-scale military operations – for instance, the 2003 invasion of Iraq. But they should also be applicable to small-scale military actions – for example, the use of air power to enforce no-fly zones and the use of naval power to intercept clandestine shipments of nuclear weapons. However large scale or small scale, armed force must not be used unjustly.

In the next chapter, a second main thesis is introduced. In addition to being generalised, received just war principles should be, in a sense that needs to be explained, ‘temporalised’.

A third main thesis is that just war principles should be elucidated by means of real-world cases of armed conflict – for instance, current US airstrikes against insurgents and terrorists. (This thesis is supported in Chapter 3, ‘Moral Theory’.) In contrast to invented schematic cases, which can be misleadingly simple, real-world cases are typically complex. I want to avoid making simplistic moral judgements about such real-world cases. Frequently (but not always), when I sketch a real-world use of armed force as an illustration, my purpose is neither to approve nor disapprove. There is no space to settle relevant disputes about international law, military strategy, alternative nonmilitary measures and so forth. Instead, my purpose is to illustrate how just war principles might be applied.

## B. THE CORE JUST WAR PRINCIPLES

A fourth main thesis is that the just cause, last resort, proportionality and noncombatant immunity principles are the ‘core just war principles’. Roughly, each core just war principle is a necessary moral criterion for determining whether a proposed military action would be just.

Traditionally, moral principles governing the resort to war (e.g. the just cause principle) are distinguished from moral principles governing the conduct

of war (e.g. the noncombatant immunity principle). Customarily, the former are called '*jus ad bellum* principles' and the latter '*jus in bello* principles', but instead I term them 'resort principles' and 'conduct principles'. A fifth main thesis is that the core just war principles are both resort principles and conduct principles.

Furthermore, there is the question of whether a just war theory should include '*jus post bellum* principles' (or 'aftermath principles') – that is, principles governing peacebuilding, stability operations and so forth (Orend 2002). And there is the question of whether a just war theory should include '*jus ante bellum* principles' (or 'prelude principles') – that is, principles governing conventional and nuclear deterrence, arms races and arms limitation treaties, military alliances and power balancing and so forth (van der Linden 2009). In theorising about just war principles, I investigate the interrelated subjects of the prelude to armed conflict, the resort to armed conflict, the conduct of armed conflict, the halting of armed conflict and the aftermath of armed conflict.

The set of core just war principles does not contain a principle of legitimate (or right, proper or competent) authority. It does not contain a principle of right (or proper or dominant) intention (or purpose). It does not contain a principle of reasonable hope (or chance, likelihood or prospect) of success. It does not contain a principle of minimum force (or necessity). And it does not contain a principle of goal (or end or aim) of peace. (Different just war theorists name these principles differently.) Nevertheless, ideas of legitimate authority, right intention, reasonable hope of success, minimum force and the goal of peace are still morally significant (but not as core just war principles).

### C. THE BOOK'S CHAPTERS

Having previewed the parts of this introductory chapter, I will now preview the other chapters of the book.

The next chapter – 'Just War Theory' – appraises just war theory panoptically.

Two chapters – 'Moral Theory' and 'Theory of Action' – root just war theory in a broader theoretical framework.

The idea of just cause is studied especially in the chapter 'Just Cause', but also in the chapter 'Last Resort'. The former chapter also explains why there should not be core just war principles of right intention and goal of peace.

The idea of last resort is studied especially in the chapters 'Last Resort' and 'Last Resort and Noncombatant Immunity', but also in the chapter 'Just War Theory'.

The idea of proportionality is studied in the chapter 'Proportionality and Authority'. That chapter also explains why there should not be core just

war principles of reasonable hope of success, minimum force and legitimate authority.

And the idea of noncombatant immunity is studied in various sections of the chapters ‘Moral Theory’, ‘Theory of Action’, ‘Last Resort and Non-combatant Immunity’, ‘Proportionality and Authority’ and ‘All Things Considered’.

The final chapter – ‘All Things Considered’ – investigates how the core just war principles should be applied conjointly.

## II. PARTICULAR JUST WAR THEORIES

Just war theory is a moral theory, and just war principles are moral principles. Ideally, just war principles ought to morally constrain responsible agents from using armed force unjustly. Hence the name ‘just war theory’ is misleading, and the theory might be renamed ‘unjust war theory’. Correlatively, just war principles also ought to morally constrain responsible agents to use armed force justly – for example, to stop genocide. As the title of Michael Walzer’s magnum opus *Just and Unjust Wars* (1977) suggests, just war theory might be renamed ‘just and unjust war theory’; alternatively, to emphasise the task of constraining injustice, it might be renamed ‘unjust and just war theory’. For brevity, although I prefer the longer name ‘unjust and just war theory’, I retain the traditional name – ‘just war theory’.

### A. CONTROVERSY

Nuclear weapons explode the theory of just war.

Michael Walzer, *Just and Unjust Wars* (1977: 282)

As this quotation epitomises, just war theory is controversial, as is moral philosophy generally. Similar to controversies among moral philosophers concerning fundamental moral principles, there are controversies among just war theorists about just war principles. What is the just cause principle? Is stopping genocide a just cause for armed humanitarian intervention? What is the last resort principle? Must diplomacy always be attempted before resorting to armed force? Different just war theorists answer such questions differently.

In the preceding paragraph, the term ‘just war theory’ is used to denote a field of inquiry, but the term has another meaning. Analogous to the distinction between the subject of world history and a particular world history (e.g. that of Arnold Toynbee), there is a distinction between the subject of just war theory and a particular just war theory (e.g. that of Michael Walzer). Primarily, a particular just war theory is a particular theory about the nature, justification and application of just war principles. In general, any theory about

moral principles is a theory about the nature (normative ethics), justification (metaethics) and application (applied ethics) of those principles.<sup>1</sup>

Presently, there is no single just war theory that is unanimously accepted. Instead, there are controversies among just war theorists about the nature, justification and application of just war principles.<sup>2</sup>

For the sake of illustration, let me mention such a controversy. Characteristically, military actions have highly destructive consequences. Hence it might be contended that a just war theory should be a consequentialist theory. For instance, R. B. Brandt defended a rule-utilitarian theory of the rules of war (1972).

By contrast, a main thesis of my book is that a just war theory should be a deontological theory. Briefly, the deontologist makes moral judgements primarily about actions, whereas the consequentialist makes moral judgements entirely about consequences (of actions). As the word 'primarily' indicates, the deontologist does not entirely disregard consequences. Although primarily concerned with moral (or deontological) constraints on uses of armed force, a just war theory should also be concerned with destructive consequences.

In the history of moral philosophy, the most influential form of consequentialism is termed 'utilitarianism'. For example, Jeremy Bentham advocated a greatest happiness principle – namely, 'that principle which states the greatest happiness of all those whose interest is in question, as being the right and proper, and only right and proper and universally desirable, end of human action' (1907: 1).

Historically, the most influential deontological theory was propounded by Immanuel Kant. The moral theory that I am presupposing in this book is substantially influenced by his ethical writings, but I have no space to examine his views thoroughly.

There are controversies among deontologists about the stringency (or strictness) of morality. According to Kant, moral duties hold absolutely, whatever the consequences. By contrast, according to the deontological theory of W. D. Ross, moral duties are *prima facie* duties, which do not hold absolutely. (Roughly, a *prima facie* moral requirement may be overridden by a more stringent *prima facie* moral requirement.) Also substantially influenced by Ross, I am presupposing a moral theory that is thus non-absolutist.<sup>3</sup>

In armed conflict, there is moral conflict. Because *prima facie* moral obligations about uses of armed force can conflict, we can be ensnared in moral dilemmas.<sup>4</sup> There are controversies among just war theorists about how moral dilemmas of armed conflict should be resolved.<sup>5</sup> My way of resolving them is influenced substantially by the later moral theory of R. M. Hare (1981). More exactly, I am influenced by him insofar as he is a Kantian (1981: 4) and Rossian (1981: 38), but not insofar as he is a utilitarian.

To complete this list of personal influences, my particular just war theory is substantially influenced by the particular just war theories of James Childress (1982) and Michael Walzer (1977).

Why are there controversies among just war theorists? Disputes about the justice or injustice of particular armed conflicts can be fostered by political bias or partisan ideology; and disputes about just war principles can be confounded by philosophical dogmatism or incoherent reasoning. Nevertheless, it is essential to realise that the phenomenon of moral disagreement is intrinsic to the dialectical process of rethinking, revising or supplementing just war theory. Throughout this book, I explore the question of why well-intentioned, knowledgeable just war theorists can profoundly disagree about principles and cases – briefly, it is the question of ‘principled moral disagreement’. Relatedly, there is the question of whether, when there is principled moral disagreement about time-urgent crises, there ought to be principled moral compromise.

#### B. A PARTICULAR COSMOPOLITAN JUST WAR THEORY

In surveying the history of the ethics of war from classical antiquity to the present, various overlapping just war theories can be discerned, which together constitute, or appear to constitute, what is often termed the ‘just war tradition’.<sup>6</sup> But there is not, nor should there be, a strictly orthodox answer to the question: what must a just war theorist accept from the history of theorising about the ethics of war and peace? I think of myself as a member of the just war tradition, because I am engaged in the project of revising received just war principles of just cause, last resort, proportionality and noncombatant immunity. However, my purpose in this book is not to study the history of just war theories. Instead, while considering some alternative just war theories, my purpose is to develop a particular just war theory.

More specifically, as the book’s subtitle announces, the particular just war theory that I am developing is one that is cosmopolitan. By contrast, many just war theories are, or tend largely to be, state-centric.<sup>7</sup> Roughly, a state-centric just war theory understands just war principles as primarily applicable to wars between states. More explicitly, according to a state-centric just war theory, the primary agents that apply just war principles are states (or rulers of states), and the primary targets to which those agents apply just war principles are states (or the military actions of states). Regard, for example, how a last resort principle has been formulated as a state-centric principle: ‘when conflicts of interest occur between two states, the use of force may be justified only as the last resort, that is, only when all nonmilitary means of conflict resolution have been tried’ (Coppeters et al. 2002: 101). For state-centric just war theories, the Second World War is a paradigm case. Did France have a just cause for waging a defensive war against Nazi

Germany? Did the US nuclear bombing of the Japanese cities of Hiroshima and Nagasaki violate the noncombatant immunity principle?

A main thesis is that, in contemporary theorising about just war principles, there ought to be a paradigm shift from a state-centric approach to a cosmopolitan approach. Just war principles are moral principles. But the idea of cosmopolitanism should not be simply a moral idea. It should also be a political idea. Indeed, it should involve a conception of moral universalism, but it should also involve political conceptions of global governance and global citizenship (Dower 2009: 62). In my cosmopolitan approach to just war theory, I consider these interrelated topics of moral universalism, global governance and global citizenship.

In developing a particular cosmopolitan just war theory, I feature a real-world global political institution – the Security Council (SC). Why should the Security Council have the primary responsibility for security? Why should a cosmopolitan just war theory be SC-centric? These questions are explored especially in the chapters ‘Just War Theory’, ‘Proportionality and Authority’ and ‘All Things Considered’.

Antedating Enlightenment ideals of democracy and influenced by political thought in the Middle Ages, the just war tradition was originally monarchical, in that it empowered rulers of polities as legitimate authorities for war-making. However, a cosmopolitan just war theory ought to include both top-down and bottom-up standpoints. In addition to the top-down question of why the Security Council should have the primary responsibility for security, there is a bottom-up question: should the primary locus of moral authority be, fundamentally, each and every human being? In a cosmopolitan just war theory, should the concept of responsible agent encompass (potentially) all human beings? In developing a particular just war theory, I maintain that the received monarchical idea of legitimate authority ought to be revised in two interrelated cosmopolitan ways: it ought to be globalised, but it also ought to be democratised. Even if a cosmopolitan just war theory should be SC-centric, it also should be (global) citizen-centric. (Like an ellipse, the theory can have two centres.)

Accordingly, instead of the impersonal term ‘responsible agents’, I often prefer to use personal pronouns. Ideally, we human beings ought to be morally constrained by just war principles.

There are ‘many varieties of cosmopolitanism’ (Dower 2007: 81), but I have no space here to study the subject of cosmopolitanism thoroughly. Presupposing general ideals of global governance and global citizenship, I want to explore issues that are specific to cosmopolitan just war theory as a field of inquiry. There can be alternative particular cosmopolitan just war theories.<sup>8</sup> Different cosmopolitan just war theories might accept different cosmopolitan just war principles.

However, my purpose in this book is to develop my own particular cosmopolitan just war theory. My view is that the core just war principles that I formulate here are compatible with some (even if not all) of the varieties of cosmopolitanism.

In developing her own particular cosmopolitan just war theory in *Cosmopolitan War*, Cécile Fabre reported that: ‘to my knowledge, there is no systematic, book-length cosmopolitan theory of the just war’ (2012: 2). To my own knowledge, her book is the first, and mine is the second. (Her book was published after I completed the penultimate draft of my book.) Let me summarise some differences. My theory is centred primarily on the Security Council, whereas hers is not. My theory emphasises the last resort principle, whereas hers does not (Fabre 2012: 5–6). My book contains chapters on moral theory and the theory of action, whereas hers does not. I utilise a Rossian conception of prima facie moral obligations, whereas she does not. My book contains chapters on just war principles, whereas hers does not. On the other hand, her book contains instructive chapters on different forms of armed conflict – namely, ‘Collective self-defence’, ‘Subsistence wars’, ‘Civil wars’, ‘Humanitarian intervention’, ‘Commodified wars’ and ‘Asymmetrical wars’ – whereas mine does not. It is in the midst of those chapters that she develops her own particular cosmopolitan just war theory.

My book does not presuppose the reading of Fabre’s book or any other book about just war theory. To ensure that my book is accessible to a wide range of readers, I have refrained from clogging the main text with knotty disputations of Fabre’s particular views or the particular views of other just war theorists. Sometimes, however, to encourage readers to make their own comparisons, I cite relevant writings in brief notes. My argumentation about just war theory is often demanding, but it is largely self-contained. My purpose is to state and support a particular cosmopolitan just war theory as cogently and completely as possible in the space available.

### III. FOUR EPOCHAL EVENTS

#### A. THE UNITED NATIONS

With the close of the Second World War, there was an epochal event, one that has been pivotal for just war theory – namely, the framing of the UN Charter and the founding of the United Nations. Although incompletely and imperfectly implemented and tragically eclipsed by the subsequent Cold War, the UN Charter expresses resplendent moral ideals that, from the moral standpoint of a cosmopolitan just war theory, still ought to be realised. Famously, the Preamble of the UN Charter begins: ‘We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind’. A

fundamental purpose of cosmopolitan just war principles ought to be to save the peoples of the world from the scourges of all forms of armed conflict, both by morally constraining responsible agents from using armed force unjustly and by morally constraining responsible agents to use armed force justly. In developing a cosmopolitan just war theory, I feature moral ideals expressed in the UN Charter.

But who are the responsible agents? State-centric just war theories empower rulers of states as the morally right authorities for war-making. However, by signing the UN Charter, the 193 Member States of the United Nations have committed themselves to comply with it. In particular, according to Article 24, the 193 Member States of the United Nations ‘confer on the Security Council primary responsibility for the maintenance of international peace and security’.

As a US citizen, I want to append a legal argument about the US Constitution, one that is admittedly controversial. The UN Charter is an international treaty, signed by the United States on 26 June 1945 and ratified by the US Senate on 28 July 1945. According to Article VI of the US Constitution, ‘all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land’. Therefore, Chapter VII of the UN Charter – which authorises the Security Council to make decisions for UN Member States about the use of armed force – is ‘the supreme Law’ of the United States.

Should there be a paradigm shift in just war theory from a state-centric approach to an approach centred primarily on the Security Council? To repeat, a main thesis is that just war principles should be elucidated by means of real-world cases of armed conflict. Abstracting from the particularities of such cases and levitating timelessly amongst purely moral concepts, I am inclined to endorse the moral ideal of a democratic world government. However, I am writing this book during the early years of the second decade of the twenty-first century. For brevity, let me refer to these years by means of the term ‘at present’. In light of moral ideals expressed in the UN Charter, a related main thesis is that, at present, the Security Council should have the primary responsibility for security.

For such an SC-centric approach to just war theory, there is a worrisome problem. Those states that are the members of the Security Council – notably, the five permanent members with their veto power, Britain, China, France, Russia and the United States – are too often motivated basically by national interests. For a state-centric approach to just war theory, there is a comparable problem. Individual states are too often motivated basically by national interests. In the just war tradition, a standard response to the latter problem can be summarised as follows. Just war theory is a moral theory. Ideally, state-centric just war principles ought to morally constrain states from using

armed force unjustly. My response to the former problem can be summarised comparably. Just war theory is a moral theory. Ideally, cosmopolitan just war principles ought to morally constrain the Security Council from authorising unjust uses of armed force. Both the Security Council and individual states ought to be motivated basically by a cosmopolitan ideal of the equality of interests of every human being everywhere in the world.

But suppose that, in a particular case of armed conflict, the Security Council fails to act or acts wrongly. A cosmopolitan just war theory can acknowledge that the Security Council has the primary responsibility for security, without accepting a legitimate authority principle as a core just war principle. Accordingly, another main thesis is that there may be alternative agents that have secondary responsibility for security – for instance, regional organisations, ad hoc coalitions of states or the United States alone. (The subject of such alternatives is discussed especially in the chapters ‘Proportionality and Authority’ and ‘All Things Considered’.) To be SC-centric, a cosmopolitan just war theory does not have to endorse SC-autocracy.

#### B. AFTER THE COLD WAR

Another epochal event that has been pivotal for just war theory was the ending of the Cold War. After the Cold War, the threat of a third worldwide interstate war greatly diminished. Sadly, instead of the emergence of global peace, numerous armed conflicts within states occurred during the first post-Cold War decade, many of which involved massive violations of human rights – for instance, the protracted civil war in Bosnia and the precipitous genocide in Rwanda. Notably, on 3 December 1992, a limited military operation of armed humanitarian intervention in Somalia, Operation Restore Hope, was authorised by Security Council Resolution 794 (1992).<sup>9</sup> By contrast, the Security Council refrained from authorising the armed humanitarian intervention during 1999 by NATO in Kosovo.

In response to this decade of internal armed conflicts and quarrels about armed humanitarian interventions – and presumably influenced by the just war tradition – the seminal 2001 Report of the International Commission on Intervention and State Sovereignty (ICISS), entitled *The Responsibility to Protect*, promulgated some ‘criteria for military intervention for human protection purposes’ (ICISS 2001a: 32). Subsequently, at the close of the 2005 UN World Summit, the General Assembly strongly endorsed the responsibility to protect (GA Res 2005: 30). Are just war principles applicable or generalisable to armed humanitarian interventions in internal armed conflicts?<sup>10</sup> Must armed humanitarian interventions be authorised by the Security Council? How should a just war theory interpret the ICISS criteria for military intervention? In the second part of the next chapter – ‘The

Responsibility to Protect’ – I explore how these and related questions should be answered. Indeed, a cosmopolitan just war theory should incorporate a conception of the responsibility to protect (R2P).

### C. TERRORISM AND COUNTERTERRORISM

When just war principles are applied to particular cases, there is, as A. J. Coates warned, a signal danger: ‘A one-sided and exaggerated emphasis on just cause’ (1997: 146). A third epochal event was the advent of the current global war on terror, which has induced an emphasis on just cause that is truly one-sided and exaggerated.<sup>11</sup>

Since the end of the Cold War, these overlapping eras of armed humanitarian interventions and military counterterrorism operations have underpinned a hawkish stereotype of just war theory – namely, that the chief function of just war theory is, as the word ‘just’ suggests, to morally justify uses of armed force.<sup>12</sup>

But a just cause is not enough. It is important to recognise that, despite the word ‘just’ in the term ‘just cause’, it is not sufficient to satisfy only the just cause principle. Traditionally, the just cause principle must be satisfied, but so must other just war principles – in particular, principles of last resort, proportionality and noncombatant immunity. To counterbalance overemphasis of the just cause principle, I am emphasising the last resort, proportionality and noncombatant immunity principles. These other just war principles are termed ‘ancillary just war principles’. How should a just cause principle be counterbalanced by ancillary just war principles? In the third part of the next chapter – ‘Ancillary Just War Principles’ – this demanding question is introduced.

### D. DURING THE COLD WAR

Looking backwards to the Cold War, there was then a dovish stereotype of just war theory – namely, that the chief function of just war theory is, despite the word ‘just’, to morally constrain uses of armed force. For example, the influential US Catholic Bishops’ *Pastoral Letter on War and Peace* declared that ‘just-war teaching has evolved, however, as an effort to prevent war’ (Bishops 1983: para. 83). Let me add that just war teaching has also evolved as an effort to prevent unjust uses of armed force in the conduct of military operations.

With the purpose of fortifying such moral constraint, a just war theory should include a crucial epistemic requirement. When we deliberate about whether to use armed force, we have to make the moral presumption that we must not. To override this moral presumption, we have the burden of proving that just war principles really are satisfied (Childress 1982: 64–73). We have the burden of proving that there really is a just cause for the use of armed

force; we have the burden of proving that the use of armed force really is a last resort; and so forth. In the words of the *Pastoral Letter*, ‘a decision [to go to war], especially today, requires extraordinarily strong reasons for overriding the presumption *in favor of peace* and *against war*’ (Bishops 1983: para. 83 [emphasis in original]). In the cosmopolitan just war theory that I am developing, these epistemic conceptions of moral presumption and burden of proof are crucial.

Relatedly, a just war theory ought to include a crucial ‘publicity requirement’: to satisfy the stated burden of proof fully, rulers of states, leaders of armed revolutions and other responsible agents must promulgate their full proofs publicly. This publicity requirement is crucial to effective global citizenship.

The Cold War was cold, since there was neither a nuclear nor conventional war between the Soviet Union and NATO; nonetheless, it was a dangerous belligerent conflict, since there were spiralling arms races, limited wars (e.g. the Korean War) and fusillades of deterrent military threats. Hence the Cold War was itself an epochal event that was pivotal for just war theory, in that it demonstrated that the chief function of just war theory is not only to morally constrain actual uses of armed force, but also to morally constrain deterrent threats to use armed force. Memorably, just war theorists concentrated on policies of nuclear deterrence.<sup>13</sup>

However, a comprehensive just war theory should also be concerned with policies of conventional deterrence – that is, deterrent threats to use conventional weapons.<sup>14</sup> The subjects of nuclear deterrence and conventional deterrence are not anachronistic, as a study of the 2010 US *Nuclear Posture Review Report* evidences (DOD 2010b).

A cosmopolitan just war theory should incorporate both a conception of the responsibility to protect and a conception of military deterrence. In interrelating the two conceptions, a key question that I address is whether it is morally permissible (or even morally obligatory) to attempt to prevent internal armed conflicts by means of deterrent military threats.

#### IV. GENERALISING JUST WAR PRINCIPLES

In light of these epochal events – the framing of the UN Charter and the founding of the United Nations, the Cold War practise of military deterrence, the post-Cold War recognition of the responsibility to protect and the advent of the current global war on terror – is a largely new ethics of armed conflict required or would an appropriately revised just war theory be sufficient?

As signalled by the term ‘armed conflict’ in the title of this book, my answer to this question is that received just war principles of just cause, last resort, proportionality and noncombatant immunity should be generalised,

so that they are applicable to all forms of armed conflict. Accordingly, they would be applicable not only to interstate wars, but also to civil wars, armed humanitarian interventions, armed revolutions, counterinsurgency operations, counterterrorism operations, military operations by UN peacekeeping missions and so forth.

Alternatively, rather than generalising just war principles, so that they are applicable to armed humanitarian interventions, specific ‘just intervention’ principles might be formulated – for example, the ‘*jus ad interventionem*’ principles formulated by George Lucas (2003: 85). Specific principles might also be formulated for other forms of armed conflict – for instance, just revolution principles. That such principles would be quite similar to received just war principles serves to indicate, I submit, that they should be understood as specifications of suitably generalised just war principles.

For the sake of concreteness, this book features a real-world global political institution – the Security Council. Nonetheless, Security Council authorisation – or authorisation by any other putative authority – should not be a necessary moral criterion for deciding whether a proposed military action would be just. The set of core just war principles should not contain a legitimate authority principle. Accordingly, those just war theorists who prefer a state-centric approach (e.g. Rawls 1999), or a cosmopolitan approach that is not SC-centric (e.g. Fabre 2012), or a feminist approach (e.g. Sjoberg 2006) or some other approach could still find these generalised just war principles acceptable.

More exactly, then, my answer to the stated question is that those received just war principles should be generalised, not only so that they are applicable to all forms of armed conflict, but also so that they are applicable by all sorts of responsible agents. In addition to the Security Council, they should be applicable by regional organisations (e.g. NATO), individual states, terrorist networks, revolutionary groups and so forth.

To evidence that just war principles should be thus generalised, the subject of armed revolution is featured.<sup>15</sup> (Also featured is the subject of ‘phases of escalation’; during the conduct of a military operation, generalised just war principles should morally constrain escalation.)

These generalised just war principles are in and of themselves moral principles. By contrast, Allen Buchanan’s ‘institutionalist’ approach to just war theory presupposes the following metaethical thesis: ‘Whether a norm is valid can depend upon institutional context’ (2006: 5). While agreeing that institutions matter, let me summarise how my approach differs. Each generalised just war principle is formulated as a moral principle, independently of real-world political institutions. However, when it is applied to a particular case, whether it is satisfied (in that particular case) can depend upon the particular institutional context.

For example, a generalised last resort principle may be formulated (provisionally) as follows. It is morally obligatory not to perform a military action, if every reasonable nonmilitary measure has not been attempted. This principle is applicable to all forms of armed conflict by all sorts of responsible agents. It is formulated as a moral principle, independently of any real-world political institution. However, when it is applied to a particular case, whether it is reasonable to attempt a particular nonmilitary measure in that particular case can depend upon the particular institutional context. Consider, for instance, the case of armed conflict in Darfur between rebel groups, the Janjaweed and the Sudanese Government. In Resolution 1828 (2008), the Security Council called upon ‘the Government of Sudan and rebel groups to engage fully and constructively in the peace process’. Subsequently (2009), peace negotiations were held, ‘under the auspices of the Joint African Union-United Nations Chief Mediator tasked with resolving the conflict in Darfur’, Djibril Yipènè Bassolé.<sup>16</sup> Whether it was reasonable then to attempt those particular negotiations could have depended upon that particular institutional context.

The theory of such generalised principles might be named ‘unjust and just armed-conflict theory’. In an earlier writing, I proposed the name ‘just armed-conflict theory’ (2007b: 76). However, in acknowledgment of the source of generalisation, I prefer now to retain the traditional name – ‘just war theory’.

## V. TARGETED MILITARY OPERATIONS

In order to prevent terrorist attacks on the United States and to save American lives, the United States Government conducts targeted strikes against specific al-Qaida terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones.

John O. Brennan, then-Assistant to the President for Homeland Security and Counterterrorism (2012)

Roughly, a targeted military operation has a narrowly focused goal, and the means of achieving the goal is a course of fittingly small-scale military actions – that is, military actions that are narrowly limited in fire-power, length of time, geographical extent and so forth. How are cosmopolitan just war principles applicable to targeted military operations? In various chapters of this book, I investigate how this contemporary question should be answered.<sup>17</sup>

Archetypically, the military operation by US Special Operations forces that killed Osama bin Laden in Pakistan on 2 May 2011 was a targeted military operation. Paradigmatically, there are airstrikes by unmanned aerial vehicles

(UAVs) (or ‘drones’) that are targeted military operations – for example, the US drone strike in Pakistan on 22 August 2011 that killed Atiyah Abd al-Rahman, ‘Al Qaeda’s second-ranking figure’ (Mazzetti 2011).<sup>18</sup>

Notably, there are such targeted counterterrorism operations, but there are also targeted military operations of other sorts – for instance, targeted armed humanitarian interventions. The armed humanitarian intervention by NATO in Kosovo during 1999 was relatively large scale (Wheeler 2000: 258–84). During one day of the NATO air campaign, ‘NATO planes attacked electrical transformers throughout Serbia’ (Becker 1999). By contrast, the relatively small-scale armed humanitarian intervention by the US and NATO in Libya during 2011 was a targeted military operation. Significantly, precise airstrikes against Libyan Government forces provided ‘close air support’ (CAS) for Libyan rebel forces (Fahim and Kirkpatrick 2011).<sup>19</sup>

As signalled by the word ‘relatively’, targeted military operations can be more or less limited in fire-power, length of time, geographical extent and so forth. The concept of ‘small scale’ admits of degree, as does the concept of ‘large scale’. In the Kosovo intervention, NATO aircraft used precision-guided munitions; and, according to a NATO statement about the inadvertent bombing of the Chinese Embassy in Belgrade, ‘extraordinary care is taken to avoid damage to other than legitimate military and military-related targets’ (NATO 1999). Instead of a sharp distinction between military operations that are targeted and ones that are not, there is a gamut of limited military operations. Presumably, there is a threshold below which military operations are sufficiently limited to be deemed ‘targeted’ and above which they are not.

How, then, should the concept of ‘targeted military operation’ be defined? How, in general, should concepts relevant to a just war theory be defined? The subject of definition is discussed in the chapters ‘Moral Theory’ and ‘Theory of Action’.

At present, a cosmopolitan just war theory should be SC-centric. ‘We have a clear UN mandate’, a NATO ‘Statement on Libya’ asserted, and we are ‘carrying out precision strikes against legitimate military targets’ (NATO 2011). Indeed, on 17 March 2011, the Libya intervention was authorised by Security Council Resolution 1973 (2011). By contrast, the Security Council refrained from authorising the Kosovo intervention. How should just war principles be applied to targeted military operations that are authorised by the Security Council? When addressing this question in later chapters, I refer to this paradigmatic Libya case.

Let me provide another illustration. Customarily, within the framework of the UN Charter, the Security Council authorises the establishment of UN peacekeeping missions.<sup>20</sup> Under some circumstances, a UN peacekeeping mission is given a ‘Chapter VII mandate’ that permits the use of armed force. (The term ‘Chapter VII’ refers to Chapter VII of the UN Charter.) Elsewhere,

I called such a mission an ‘armed UN peacekeeping mission’ (Lango 2009b: 116). Presumably, an armed UN peacekeeping mission may conduct targeted military operations – for instance, to establish and protect safe havens. As Nigel Dower remarked, a military force authorised by the Security Council might be (approximately) a cosmopolitan military force, if it is ‘wholly devoted to cosmopolitan goals’ (2009: 69).

To summarise, a central question is: how are cosmopolitan just war principles applicable to contemporary targeted military operations? What might prove to be a fifth epochal event pivotal for just war theory is the cluster of recent military operations that includes the US targeted military operation that killed Osama bin Laden and the armed humanitarian intervention by the US and NATO in Libya.

## NOTES

1. A classic introduction to moral philosophy is Frankena (1973).
2. Throughout this book, various particular just war theories are cited – for instance, Childress (1982), Coates (1997), Fabre (2012), Fisher (2011), Orend (2006), Sjoberg (2006) and Walzer (1977). For an introduction to just war theory as a field of inquiry, see Dower (2009), Frowe (2011), Lackey (1989) or Lee (2012). Concerning the broader subject of international ethics, see Coicaud and Warner (2001) and Harbour (1999).
3. For a fuller statement of my indebtedness to Ross’ conception of *prima facie* duties, see Lango (2001).
4. A classic article about moral dilemmas is Lemmon (1962). Various specific kinds of moral dilemmas in modern warfare are examined in Gross (2009).
5. A landmark article about such dilemmas is Nagel (1979).
6. An introductory book regarding that tradition is Bellamy (2006).
7. A concise statement of a particular state-centric just war theory is in Rawls (1999).
8. For different cosmopolitan approaches to just war theory, see Atack (2005), Caney (2005), Fabre (2012) and Moellendorf (2002). See also the remarks about cosmopolitan approaches to the ethics of war and peace in Dower (2007; 2009).
9. The standard abbreviated citation for this resolution is S/RES/1996 (2011). In citing SC resolutions, I omit the prefix ‘S/RES/’. Security Council resolutions are available at the UN website [http://www.un.org/Docs/sc/unsc\\_resolutions.html](http://www.un.org/Docs/sc/unsc_resolutions.html) (last accessed 22 July 2013).
10. Concerning armed humanitarian intervention, see Coady (2002), Pattison (2010) and Weiss (2007).
11. Concerning terrorism, see Coady (2008), Nathanson (2010), Steinhoff (2007) and Walzer (2006).
12. An example of such hawkishness is O’Driscoll (2008).
13. An example is Fisher (1985).
14. A Cold War book about conventional deterrence is Mearsheimer (1983).

15. A book that studies how just war principles are pertinent to revolutions is Dobos (2012).
16. 'Joint UN, African Union mediator convenes Darfur peace talks in Doha', *UN News Centre*, New York, 10 February 2009. Available at <http://www.un.org/apps/news/story.asp?NewsID=29847&Cr=darfur&Cr1=&Kw1=darfur+peace+talks&Kw2=&Kw3=#.UT356VeGe1c> (last accessed 22 July 2013).
17. For some reportage about contemporary examples, see Sanger (2012).
18. A study of counterterrorism and counterinsurgency that endorses targeted military operations is Kilcullen (2009).
19. Some cases of US 'discrete military operations' are found in Zenko (2010).
20. A broad discussion of UN peacekeeping missions is found in Goldstein (2011).

## CHAPTER 2

# JUST WAR THEORY

This chapter scrutinises just war theory generally, and later chapters concentrate specifically on the core just war principles of just cause, last resort, proportionality and noncombatant immunity.

The chapter is divided into five parts. The first part addresses the question of how received just war principles should be elucidated, revised or supplemented, so as to be applicable from the standpoint of the Security Council. The second part considers the pertinence of just war theory to the intertwined topics of armed humanitarian intervention and the responsibility to protect. With the aim of ensuring that uses of armed force are sufficiently morally constrained, the third part discusses how a demanding just cause principle ought to be counterbalanced especially by means of a stringent principle of last resort. In the fourth part, the main thesis – namely, that received just war principles should be generalised – is illustrated. The fifth part introduces the related main thesis that received just war principles should be temporalised.

### I. THE RESPONSIBILITY FOR SECURITY

[We must acknowledge] that the security threats we face reach far beyond states waging aggressive war; that they involve human security as much as state security; that they are interdependent and affect us all; that we have a shared responsibility to deal with them; and that we need fundamental and far-reaching changes to both our policies and our institutions if we are to exercise that responsibility effectively.

Gareth Evans, 'A more secure world: our shared responsibility'  
(2005)

Why should there be a paradigm shift in just war theory from a state-centric approach to an SC-centric approach? Why should the Security Council have the primary responsibility for security? Paralleling the widely used acronym

R2P for the term ‘the responsibility to protect’,<sup>1</sup> let me suggest that the term ‘the responsibility for security’ might have the acronym R4S. R4S includes R2P.

#### A. FIVE BASIC CRITERIA OF LEGITIMACY

With the purpose of promoting a rethinking of the ideal of collective security in the UN Charter, then Secretary-General Kofi Annan commissioned (in September 2003) the High-level Panel on Threats, Challenges and Change (briefly, the ‘High-level Panel’). In the Report of the High-level Panel, *A More Secure World: Our Shared Responsibility* (December 2004), a wide range of different kinds of threats to the security of states and human beings is surveyed: poverty, infectious disease, environmental degradation, conflict between states, conflict within states, weapons of mass destruction, terrorism and transnational organised crime.<sup>2</sup> Truly, the collective responsibility for security encompasses a broad variety of security threats. (The block quotation above is from a talk by Evans about the High-level Panel Report.)

Significantly, the High-level Panel Report (HLPR) contains the proposal that, whenever the Security Council deliberates about ‘whether to authorize or endorse the use of military force’ to counter a security threat, it ought to utilise the following ‘five basic criteria of legitimacy’ (HLPR 2004: 67 [emphasis in original]):

- (a) *Seriousness of threat*. Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force?<sup>3</sup> In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?
- (b) *Proper purpose*. Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?
- (c) *Last resort*. Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?
- (d) *Proportional means*. Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?
- (e) *Balance of consequences*. Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?

According to Evans, who was a member of the High-level Panel, these five criteria of legitimacy have ‘an explicit pedigree’ in the just war tradition (2008: 140). Indeed, the legitimacy criteria resemble received just war principles of just cause, right intention, last resort, proportionality, minimum force and reasonable chance of success. Most obviously, the legitimacy criterion of last resort resembles quite closely a just war principle of last resort. Also, the legitimacy criterion of proper purpose resembles a just war principle of right intention. In combination, the two criteria of proportional means and balance of consequences resemble just war principles of proportionality, minimum force and reasonable chance of success. Finally, the legitimacy criterion of seriousness of threat may be interpreted as a highly generalised just cause principle. Apparently, in accepting the legitimacy criteria, members of the High-level Panel were influenced appreciably by the just war tradition.

However, in contrast to state-centric just war principles, the legitimacy criteria are applicable to all forms of armed conflict: interstate wars, civil wars, armed humanitarian interventions, counterinsurgency operations, counterterrorism operations, military operations by UN peacekeeping missions and so forth. In brief, the legitimacy criteria are tantamount to generalised just war principles.

Mistakenly, the set of legitimacy criteria does not contain a noncombatant immunity principle. Roughly, the received noncombatant immunity principle prohibits harming noncombatants intentionally, but it permits proportionate foreseen but unintended harm to them. During the Cold War, it was often contended that, because of the indiscriminate destructiveness of nuclear weapons, the noncombatant immunity principle prohibits the waging of any nuclear war. Hence, although the principle is standardly categorised as a conduct principle, it can also be plausibly categorised as a resort principle. When appropriately generalised, it should govern both the resort to, and conduct of, every form of armed conflict, no matter how large or small scale. In deliberating whether to authorise or endorse the use of armed force, the Security Council also ought to answer the question:

*Noncombatant immunity.* Is it clear that the proposed military action will not involve the deliberate targeting of noncombatants?

In the consequent report of the Secretary-General, *In Larger Freedom*, Kofi Annan summarised the legitimacy criteria in the High-level Panel Report and recommended ‘that the Security Council adopt a resolution setting out these principles and expressing its intention to be guided by them when deciding whether to authorise or mandate the use of force’ (2005: para. 126). Later, at the close of the 2005 UN World Summit, the General Assembly adopted

a resolution, *2005 World Summit Outcome*, which contains an endorsement of the responsibility to protect (GA Res 2005). However, this Outcome Document does not contain an endorsement of the legitimacy criteria, even though in an earlier draft there was reference to them: ‘We recognize the need to continue discussing principles for the use of force, including those identified by the Secretary-General’ (GA 2005: para. 56). Regrettably, the Security Council has not yet adopted a resolution of the sort envisaged by Kofi Annan.

Quite often, the gulf between academic work in applied ethics and the practical domain of public affairs appears unbridgeable. It is remarkable, then, that the five legitimacy criteria were endorsed by the sixteen members of the High-level Panel, persons with outstanding careers in public affairs – for example, João Clemente Baena Soares (Brazil), former Secretary-General of the Organization of American States; Mary Chinery-Hesse (Ghana), former Deputy Director-General of the International Labour Organization; Gareth Evans (Australia), former President of the International Crisis Group; Amre Moussa (Egypt), former Secretary-General of the League of Arab States; Sadako Ogata (Japan), former UN High Commissioner for Refugees; Yevgenii Primakov, former Prime Minister of Russia; Qian Qichen, former Vice Prime Minister and Minister for Foreign Affairs of China; and Brent Scowcroft, former US National Security Adviser.

## B. COSMOPOLITAN JUST WAR PRINCIPLES

With the aim of helping to bridge the particular gulf between academic theorising about just war principles and practical deliberations about the use of armed force, I examine in this book the embodiment of just war principles in the High-level Panel Report as five basic criteria of legitimacy. There is no space for an extensive discussion of the entire just war tradition. The promulgation of these legitimacy criteria by Kofi Annan and the High-level Panel is a harbinger of a paradigm shift in just war theory from a state-centric approach to an SC-centric approach, or so I hope.

In formulating cosmopolitan just war principles, I start by examining the legitimacy criteria. My method of examining them is dialectical, in that I raise and answer controversial questions about them. In so doing, I make some proposals about how they ought to be elucidated, revised or supplemented. I have already proposed that the five legitimacy criteria should be supplemented by a sixth legitimacy criterion – noncombatant immunity.

My aim is to formulate generalised just war principles that are applicable to all forms of armed conflict by all sorts of responsible agents. According to Evans, the legitimacy criteria are ‘equally applicable to individual countries’ decisionmaking about the use of force’ (2008: 140). Additionally, my view is that they are equally applicable to decisionmaking about the use of armed

force by individual actors in civil wars, insurgencies and counterinsurgencies, armed revolutions and so forth.

### C. THE UN CHARTER

The powers given by the UN Charter to the Security Council are comprehensive. In the words of Michael J. Matheson in his book *Council Unbound*, the 'Charter gives extraordinary power to the Council' (2006: 33). In particular, according to Article 39, the Security Council has the power to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'. And according to Article 42, the Security Council has the power to decide to 'take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'. (Articles 39, 41 and 42 are in Chapter VII.)

Nonetheless, these powers should not be unlimited. In Plato's *Euthyphro*, Socrates asks Euthyphro whether the 'holy is beloved by the gods because it is holy, or holy because it is beloved by the gods' (1892a: 84). In answer to an analogous question about the Security Council's powers, I want to reject the view that the use of armed force is necessary because the Security Council decides that it is necessary. The Security Council does not wear the mantle of Louis XIV. Instead, the Security Council ought to decide that the use of armed force is necessary because it truly is necessary. To make such a decision, there is need for objective and impartial principles. In deciding whether the use of armed force is necessary, the Security Council ought to be governed by generalised just war principles.

In his article 'Platonism, adaptivism, and illusion in UN reform', Michael J. Glennon objected that the High-level Panel Report 'exhibits all the familiar shortcomings of old-style Platonic idealism, ignoring the real-world incentives and disincentives to which states actually respond' (2006: 614). But Socrates' question cannot be so cavalierly dismissed as old-fashioned, for it is archetypal of a controversial question that is debated more abstractly by moral theorists today: should an agent adhere to a moral principle because it truly is a moral principle, one that is universal; or is it only a moral principle for the agent, one that is only relative to the agent, because the agent adheres to it? An affirmative answer to the first part of this question may be termed 'moral universalism' and an affirmative answer to the second part may be termed 'moral relativism'.

Glennon also objected that the High-level Panel Report 'evinces a view of a world governed by objective, universal morality rather than by competition for power and shifting national interests' (2006: 614). More accurately, what the High-level Panel Report displays is a view that, although UN Member

States are motivated all too often by competition for power and shifting national interests, they ought to adhere to universal moral principles. However, the philosophical question of moral universalism versus moral relativism is controversial, and I have no space here to enter into this controversy. Instead, in opposition to moral relativism, I presuppose moral universalism. It is presupposed that there are universal moral principles to which agents ought to adhere.

Universalist moral ideas are expressed in the Preamble of the UN Charter: ‘We the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women’. Significantly, also expressed in the Preamble is a universalist idea of principles regarding the use of armed force: ‘We the peoples of the United Nations determined . . . to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest’. Frequently, in moral philosophy, the idea of the common interest is a universalist moral idea. Evidently, the advocacy of the legitimacy criteria by Kofi Annan and the High-level Panel is in close accordance with the Preamble’s enjoinder that, to constrain the use of armed force, apposite principles should be accepted.

The just war tradition is universalist. Glennon claimed that a just war theory has to be grounded on a theory of natural law (2006: 616), but just war theories have been grounded on different universalist moral theories (e.g. a theory of human rights). Having presupposed generally that there are universal moral principles to which agents ought to adhere, I presuppose specifically that there are universalist just war principles to which states and other agents ought to adhere.

The presupposition of moral universalism does not terminate principled disagreement about moral questions. Among different universalist moral theories, which one is correct? Among competing universal moral principles, which one is right? Answers to such questions are debated by moral theorists. Accordingly, the presupposition that there are just war principles does not terminate principled moral disagreement about them. Among the various just war theories, which one is correct? Among the different universalist moral theories, which one best elucidates a just war theory? How should just war principles be applied to cases? Answers to such questions are debated by just war theorists. The predicament of principled moral disagreement is not unique to just war theorists. For instance, the presupposition that there are universal human rights does not terminate principled moral disagreement about them. Which human rights are most basic? In addition to civil and political rights, are there social, economic and cultural rights?

Therefore, we must not expect that the mere adoption by the Security Council of a resolution expressing its intention to be guided by the legitimacy

criteria ought to terminate moral debate about them. In the High-level Panel Report, it is asserted that the adoption of the legitimacy criteria by the Security Council 'will not produce agreed conclusions with push-button predictability, but should significantly improve the chances of reaching international consensus on what have been in recent years deeply divisive issues' (HLPR 2004: 3–4). Glennon was sceptical of this assertion – 'there is, alas, little reason to think so' – but his scepticism was based on his assumption that members of the Security Council would have to be 'in unison', that they would have to be of 'one mind' (2006: 616). By contrast, I think that acceptance of the legitimacy criteria by members of the Security Council is compatible with their being of two or more minds about them. Instead of being in unison, they could be discordant. Indeed, we should hope that the chances of their reaching consensus on deeply divisive issues of collective security would be significantly improved, but we should also expect spirited debate. Acceptance of generalised just war principles by the Security Council is compatible with principled moral disagreement.

Let me reply to a different sort of objection: it is not practically urgent for the Security Council to be morally constrained by the legitimacy criteria; even though under the UN Charter, the Security Council has the legal power to authorise the use of armed force, it does not have any real power, military or otherwise. This objection is supported by the following observation: 'Where the Council has failed during this [post-Cold War] period, typically it has not been because of excessive use of this authority but because of neglect, irresolution, or delay in using it' (Matheson 2006: 241). Moreover, even if a Security Council resolution authorising the use of armed force were not blocked by the veto of a permanent member, it could be obstructed by the reluctance of UN Member States to implement it.

Granted, passivism in the Security Council is a problem currently, but there is also a (potential) problem of activism. Contemplating the threats to global security today – threats of poverty, infectious disease, environmental degradation, conflict between states, conflict within states, weapons of mass destruction, terrorism and transnational organised crime – it is not unreasonable to worry about future Security Council activism. Thus Ramesh Thakur, a member of ICISS, warned: 'If and when the UN Charter is reformed, one item on the agenda should be curbs on untrammelled authority in the UNSC, that is presently subject to no countervailing political check or judicial review' (2006: 306). Even if, from the point of view of the practical domain of public affairs, there is presently no urgency in answering the question of whether the Security Council ought to be morally constrained by the legitimacy criteria, it should be answered nonetheless, from the point of view of a universalist moral philosophy.

As a coda, let me respond metaphorically to a pithy metaphorical

objection to the moral universalism of the High-level Panel Report: ‘We are not yet singing from the same hymnal’ (Glennon 2006: 617). Indeed, there are different musical traditions in the world, but musicians from different traditions can still concertise together. At the Damrosch Park Bandshell in Lincoln Center (New York), I listened to such a concert, entitled ‘Absolute Arabian Nights’ (25 August 2007). A group of musicians trained in Western classical music, the Absolute Ensemble, concertised with a group of Arabic musicians, including Marcel Khalifé – a 2005 UNESCO Artist for Peace. The peoples of the United Nations might not yet sing from the same hymnal, but they still might sing harmoniously together.

## II. THE RESPONSIBILITY TO PROTECT

Having introduced the general idea of the responsibility for security, I now consider the specific idea of the responsibility to protect (R2P). Why should the Security Council have the primary responsibility to protect? How are the legitimacy criteria applicable to armed humanitarian interventions?

In the Outcome Document of the 2005 UN World Summit, there is a strong endorsement of R2P:

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. (GA Res 2005: para. 139)

Should only the Security Council have the responsibility to protect by means of collective military action?

### A. SIX CRITERIA FOR MILITARY INTERVENTION

Problematically, the legitimacy criteria are abstract and general. In particular, the criterion of seriousness of threat is too sketchy: ‘Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force?’ Especially problematic are the words ‘of a kind, and sufficiently clear and serious’. To elucidate this criterion adequately, the following questions need to be answered. Which kinds? How

clear? How serious? The first question is categorical, the second epistemic and the third evaluative. A fourth question also needs to be answered. What is meant by 'justify prima facie'?

Let me consider briefly the categorical question – the question of relevant kinds. The words 'of a kind' can be elucidated by means of a distinction between a principle and its specifications (Beauchamp and Childress 2009: 16–19). To decide whether the use of military force is prima facie justified in a particular case, the threat-seriousness criterion has to be specified appropriately for that case. In particular, the kind of threat to state or human security has to be specified.

In the High-level Panel Report, the threat-seriousness criterion is accompanied by a single illustration: 'In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?' In this illustration of the criterion, there are several kinds of threats to human security. For brevity, these several kinds may be collectively termed 'mass atrocities' (Evans 2008). For instance, the threat of genocide within a state is a threatened harm to human security that is of a kind to justify prima facie the use of military force, if it is sufficiently clear and serious.

Let me also briefly consider the evaluative question – the question of sufficient seriousness. Among the kinds of threats to human security specified in the illustration is the threat of large-scale killing. A sufficiently clear threat of killing within a state justifies prima facie the use of military force, if the killing is large scale. On the other hand, such a threat does not justify prima facie the use of military force, if the killing is not large scale. A threat of killing that is large scale is sufficiently serious, whereas a threat of killing that is not large scale is not sufficiently serious. As the term 'scale' indicates, the concept of seriousness is a scalar concept. Presumably, there is a threshold above which the scale of killings is sufficiently serious and below which it is not.

Because the term 'large scale' is imprecise, this threshold is problematic. Such threshold problems abound in just war theory and within moral philosophy generally. For instance, concerning the received noncombatant immunity principle, there is the problem of ascertaining the threshold between proportionate and disproportionate foreseen but unintended harms to noncombatants. How should such threshold problems be resolved? I want to stress that well-intentioned, knowledgeable just war theorists can profoundly disagree about how this question ought to be answered.

The 2004 High-level Panel Report was directly influenced by *The Responsibility to Protect* – the 2001 Report of the International Commission on Intervention and State Sovereignty (ICISS). According to Evans, who co-chaired ICISS with Mohamed Sahnoun, the legitimacy criteria in the High-level Panel Report draw 'very directly on the language in the ICISS Report' (Evans

2008: 45). In the ICISS Report, there are six criteria for military intervention – namely, principles of ‘right authority, just cause, right intention, last resort, proportional means and reasonable prospects’ (2001a: 32).

Note that, similar to the High-level Panel Report, the ICISS Report’s set of criteria of military intervention does not contain a criterion of noncombatant immunity. However, the ICISS Report includes a *jus in bello* conception of noncombatant immunity in a set of operational (or conduct) principles for a doctrine for ‘human protection operations’ (2001a: 67).

Even though directly influenced by the military intervention criteria in the ICISS Report, the legitimacy criteria in the High-level Panel Report are significantly different. Indeed, the High-level Panel Report incorporates broadly the ICISS Report’s criteria of right intention, last resort, proportional means and reasonable prospects.

However, only the aforementioned illustration of the High-level Panel Report’s threat-seriousness criterion draws directly on the ICISS Report’s language about the just cause criterion. Especially because of the wide range of kinds of security threats encompassed by the threat-seriousness criterion, the High-level Panel Report’s responsibility for security greatly expands the ICISS Report’s responsibility to protect.

Also, the High-level Panel Report does not have a criterion of legitimate authority. Apparently, it is assumed that the Security Council is the sole authority: ‘The task is not to find alternatives to the Security Council as a source of authority’ (HLPR 2004: 3). By contrast, the right authority criterion in the ICISS Report acknowledges the primacy of the Security Council, albeit qualifiedly: on the contingency that ‘the Security Council rejects a proposal or fails to deal with it in a reasonable time’, there is a gamut of ‘alternative options’ (2001a: xiii) – for instance, ‘consideration of the matter by the General Assembly’ or by ‘regional or sub-regional organizations’ (2001a: xiii). Further, the ICISS Report recognises (while not forthrightly endorsing) the alternative option of ‘a military intervention [that] is undertaken by an ad hoc coalition or individual state which *does* fully observe and respect all the criteria we have identified’ (2001a: 55 [emphasis in original]).

Additionally, my view is that a military action to stop mass atrocities – one that fully observes and respects just war principles – may be justly undertaken by nonstate actors. For example, the threat of genocide within an authoritarian state might be justly countered by an armed revolution. This view is supported in the fourth part of this chapter, ‘Just War Principles and Nonstate Actors’.

## B. PREVENTION VERSUS REACTION

The post-Cold War recognition of the responsibility to protect was an epochal event that has been pivotal for just war theory, and so was the Cold

War practice of military deterrence. A cosmopolitan just war theory ought to morally constrain both actual uses of armed force and deterrent threats to actually use armed force.

How should deterrence theory be integrated with R2P theory? According to the ICISS Report, there is the responsibility to react to mass atrocities, but there also is the responsibility to prevent them. The six criteria for military intervention – criteria that govern actual uses of armed force – are discussed extensively in the fourth chapter of the ICISS Report, ‘The responsibility to react’. Importantly, in the third chapter – ‘The responsibility to prevent’ – there is a brief discussion on the subject of threats to actually use armed force. Deterrent threats to use armed force comprise an essential tool of prevention. How, then, should R2P theory understand such threats?

In this chapter about the responsibility to prevent, there is a useful distinction between direct prevention and root-cause prevention. The tools of root-cause prevention include political measures (e.g. promoting democracy), economic measures (e.g. alleviating poverty), legal measures (e.g. implementing human rights in national legal systems) and even military measures (e.g. training military personnel about international humanitarian law). The tools of direct prevention also include political measures (e.g. crisis diplomacy), economic measures (e.g. economic sanctions) and legal measures (e.g. indictments by the International Criminal Court). Additionally, deterrent military threats comprise a tool of direct prevention: ‘In extreme cases, direct prevention might involve the threat to use force’ (ICISS 2001a: 25).

Who are the agents responsible for such preventive measures? Should the Security Council have the primary responsibility for prevention? To grasp how these questions should be answered, it is crucial to realise that the UN Charter mandates that the use of armed force must be a last resort. For, according to Chapter VI – ‘Pacific settlement of disputes’ – the parties to a peace-endangering dispute should ‘first of all’ attempt to settle their dispute ‘by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means’ (Article 33). Significantly, the Security Council is empowered by Chapter VI to ‘call upon the parties to settle their dispute by such means’ (Article 33). Empowered by Chapter VII to endorse military measures, the Security Council is also empowered by Chapter VI to endorse peaceful measures.

In addition to such peaceful nonmilitary measures, there are nonmilitary measures that are coercive – for instance, economic sanctions. If the parties to a peace-endangering dispute ‘fail to settle it’ through peaceful measures (Article 39), the Security Council is empowered (apparently limitlessly) by Article 41 of Chapter VII to ‘decide what [coercive] measures not involving the use of armed force are to be employed to give effect to its decisions’.

Instead of a dualism between peaceful measures and uses of armed force, there is a gamut of nonmilitary measures, from ones that are truly pacific (e.g. voluntary judicial settlements) to ones that are highly coercive (e.g. aggressive police measures). Finally, if such coercive nonmilitary measures 'would be inadequate or have proved to be inadequate' (Article 42), the Security Council may authorise the use of armed force. Empowered by Article 42 of Chapter VII to endorse military measures, the Security Council is also empowered by Article 41 of Chapter VII to endorse coercive nonmilitary measures.

Recall the last resort criterion in the High-level Panel Report: 'Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?' Borrowing words quoted above from the UN Charter, this criterion can be rephrased as follows. 'First of all', has every nonmilitary measure for meeting the threat in question been explored, with reasonable grounds for believing that such measures 'would be inadequate or have proved to be inadequate'? Evidently, the UN Charter mandates that the use of armed force must be a last resort. A Security Council resolution expressing the intention to be guided by a just war principle of last resort would be a reaffirmation of what the UN Charter already mandates.

Customarily, just war principles are applied reactively, but they may also be applied preventively (Lango 2005). Significantly, the last resort principle is standardly conceptualised as applicable reactively, but it should also be conceptualised as applicable preventively. Before reactively authorising the present use of armed force to counter a security threat – for instance, the present occurrence of mass atrocities – the Security Council ought to explore peaceful means (e.g. negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement) and coercive nonmilitary means (e.g. economic sanctions).

It is essential to recognise that the very same nonmilitary measures are tools of prevention that can be used to counter a future security threat. Suppose that mass atrocities are not presently occurring in a given state, but suppose also that there is a reasonable forecast (e.g. by the International Crisis Group) that mass atrocities are somewhat likely to occur there in future. Before preventively authorising the future use of armed force to counter this security threat, the Security Council ought to first fully explore peaceful means (e.g. negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement) and coercive nonmilitary means (e.g. economic sanctions).

A distinguishable type of nonmilitary measures ought to be acknowledged, one that is intermediate between the coercive nonmilitary measures of Article 41 and actual uses of armed force – namely, coercive military threats. For example, in Article 42, one of the listed measures is 'blockade'. Even if

weapons are not discharged in imposing a blockade, there is often a threat to use them against a transgressor.

Typically, a deterrent military threat by agents to targets is conditional: if you (the targets) perform a specified action, then we (the agents) will use specified armed force against you. Consider, for example, the case of Darfur. In SC Resolution 1591 (2005), the Security Council demanded 'that the Government of Sudan . . . immediately cease conducting offensive military flights in and over the Darfur region'. The Security Council might have enforced this demand by means of roughly the following deterrent threat: if the Government of Sudan conducts such flights, then armed force will be used against Sudanese military aircraft and airfields. The Security Council is empowered by Chapter VII to authorise deterrent threats to use armed force.

A deterrent threat to use armed force can be made reactively. However, it also can be made preventively. In order to halt present mass atrocities, the Security Council is empowered to threaten to authorise armed humanitarian intervention. However, the Security Council is also empowered to threaten to authorise armed humanitarian intervention, in order to prevent future mass atrocities (Lango and Patterson 2010).

Unhappily, since 11 September 2001, the international responsibility to protect has been overshadowed by the global war on terror. Notoriously, apparently drawing upon the idea of R2P, the 2003 invasion of Iraq was defended by a 'human rights-based argument' (Johnson 2005: 56).

Subsequently, there has been a tendency among friends of R2P to stress nonmilitary preventive measures. For instance, to counter the misunderstanding that the newer term 'R2P' is synonymous with the older term 'armed humanitarian intervention', Evans explained, in his book *The Responsibility to Protect*, that 'above all, R2P is about taking effective *preventive* action' (2008: 56 [emphasis in original]). In his book, he listed a variety of tools for combating mass atrocities (2008: 252–3). The tools for reacting to mass atrocities include diplomatic peacemaking, economic sanctions and the use of military force. The tools for preventing mass atrocities include preventive diplomacy and the threat of economic sanctions. Notably absent from the list of tools of prevention is the threat of military force. Instead, the threat of military force is included in the list of tools of reaction. Should the threat of military force also be a tool of prevention?

A main question addressed in this book is whether we should attempt to prevent mass atrocities by means of deterrent military threats. In accordance with just war theory, such deterrent threats should be restricted to uses of armed force that would satisfy just war principles. Even if just war principles were to prohibit deterrent threats of massive aerial bombardments, they might still permit more limited deterrent threats. Specifically, they might permit deterrent threats of targeted military actions. For instance, they might

permit targeted deterrent threats that are useful for imposing no-fly zones and protecting safe havens.

### III. ANCILLARY JUST WAR PRINCIPLES

My overarching purpose in this book is to develop a particular cosmopolitan just war theory. The starting point is the embodiment of just war principles in the High-level Panel Report as five basic criteria of legitimacy. In later chapters, I examine these legitimacy criteria dialectically, by raising and answering controversial questions about them. In so doing, I make some proposals about how they ought to be elucidated, revised or supplemented. The goal is to formulate generalised just war principles that are applicable by all sorts of responsible agents to all forms of armed conflict. In this part, I consider how a generalised just cause principle ought to be counterbalanced especially by a stringent principle of last resort.

#### A. JUST CAUSE VERSUS LAST RESORT

Problematically, the threat-seriousness criterion is abstract and general. In particular, to elucidate it adequately, a categorial question needs to be answered. What are the kinds of security threats that justify *prima facie* the use of military force, if they are sufficiently clear and serious? One of these kinds is declared in the UN Charter: the threat of ‘armed attack’ by one state (or group of states) against another state (or group of states) (Article 51). In the preceding part, another kind of security threat is discussed: mass atrocities. Are there additional kinds?

Disputably, among the kinds of threats to the security of states and human beings is the threat of environmental degradation – for example, the threat of catastrophic climate change. During April 2007, the Security Council held a landmark debate about the implications of climate change for global peace and security. Strikingly, the representative of Tuvalu, Afelee F. Pita, urged the Security Council to ‘review its mandate to fully embrace the concept of environmental security’ (SC 2007). Remember also that among the wide range of kinds of security threats surveyed in the High-level Panel Report is environmental degradation. Should the Security Council have the primary responsibility for countering this kind of threat?

Arguably, because the UN Charter empowers the Security Council to ‘determine the existence of any threat to the peace’ (Article 39), the Security Council has the legal authority to determine the existence of threats of the following kind: those environmental threats that are, by their very nature, threats to international peace and security. In short, the Security Council has the primary responsibility for environmental security. A conception of environmental security is advocated by Robyn Eckersley (2007). Some of her

main points are as follows. In addition to R2P, there is the responsibility to protect the environment – for instance, the responsibility to prevent massive destruction of an ecosystem. Should peaceful means (such as environmental treaties) be inadequate, the Security Council is empowered by Chapter VII of the UN Charter to authorise ‘armed ecological intervention’.

Do the legitimacy criteria encompass the threat of environmental degradation? Should received just war principles be generalised, so as to be morally permissive of armed ecological intervention? To repeat Thakur’s warning, there ‘should be curbs on untrammelled authority’ in the Security Council (2006: 306). Armed force is a blunt instrument, and military action designed to protect the environment could itself extensively damage the environment.

Relatedly, to repeat Coates’ warning, there is the grave problem of a ‘one-sided and exaggerated emphasis on just cause’ (1997: 146). My purpose in mentioning the threat of environmental degradation is to illustrate a comparable warning: in light of the abstractness and generality of the threat-seriousness criterion, there is a grave problem of a one-sided and exaggerated emphasis on it. Truly, a generalised just war theory that emphasises it unduly would be inordinately hawkish.

Traditionally, in just war theory, a just cause is not enough. Even when there is a just cause for war, the use of armed force is not morally permissible, unless additional just war principles are satisfied – for example, principles of last resort and proportionality. Similarly, according to the High-level Panel Report, it is necessary for the threat-seriousness criterion to be satisfied, but not sufficient. For even when that criterion is satisfied, the Security Council must not authorise the use of military force, unless the other legitimacy criteria are also satisfied.

Let us consider again the wording of the threat-seriousness criterion: ‘Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force?’ To interpret this criterion correctly, it is essential to realise the following. Even when the Security Council determines that there is such a security threat, the use of armed force is only justified *prima facie*.

What is meant by ‘justify *prima facie*’? This question can be answered by means of epistemic conceptions of moral presumption and burden of proof. To override the moral presumption that armed force must not be used, the Security Council has the burden of proving that the five legitimacy criteria are satisfied. Having proven that the threat-seriousness criterion is satisfied – thereby determining that the use of armed force is justified *prima facie* – there remains the burden of proving that the other legitimacy criteria are satisfied.

In particular, having proven that the threat-seriousness criterion is satisfied, the Security Council still has the burden of proving that the last

resort criterion is satisfied: ‘Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?’ What is intended by the phrase ‘reasonable grounds’? Because of the moral presumption that armed force must not be used, the Security Council must make the moral presumption that alternative nonmilitary measures will succeed. To override the latter moral presumption, the Security Council has the burden of proving – that is, the burden of providing reasonable grounds for believing – that alternative nonmilitary measures will not succeed.

#### B. THE COEQUALITY THESIS

To counterbalance overemphasis of the just cause principle, I am emphasising the last resort, proportionality and noncombatant immunity principles. Just war theory is a deontological theory, and the core just war principles are deontological principles. According to a deontological theory, fundamental moral requirements are stringent moral obligations (duties or rules). Crucially, a deontological requirement overrides any requirement of prudence (e.g. self-advantage). As deontological principles, the core just war principles override prudential requirements of national interest.

Indeed, the just cause principle is a deontological principle, but so are the ancillary principles of last resort, proportionality and noncombatant immunity. A main thesis is that the just cause principle and these ancillary just war principles are deontological principles coequally. None of them has priority over any of the others. I call this thesis ‘the coequality thesis’.

Consider, in particular, the coequality of the threat-seriousness and last resort criteria. First, applying the former criterion, the use of armed force must be justified *prima facie*. First, applying the latter criterion, every reasonable nonmilitary measure must be explored. The two occurrences of the word ‘first’ signal that the two criteria are coequal. There is a stringent moral obligation to determine that there is a just cause, but there is also a stringent moral obligation to explore every reasonable nonmilitary measure. Just cause does not have priority over last resort.

By contrast, according to James Turner Johnson, the just war principles of just cause, right authority and right intention are ‘deontological requirements’, whereas the just war principles of reasonable chance of success, proportionality and last resort are ‘prudential tests’; and deontological principles have ‘priority’ over principles that are prudential (1999: 34, 41):

Whereas the older criteria, sovereign authority, just cause, and right intention, including the aim of establishing peace, establish duties or obligations for the person or people in sovereign authority, the criterion of last resort and its associated criteria, equally recent, of reasonable

hope of success and overall proportionality of good over harm establish prudential tests, requiring that a judgment be made as to the consequences both of resorting to force and of not resorting to force. The classic criteria tell when a use of armed force is just; the newer criteria have to do with whether, even if it is known to be just, a use of armed force is likely to be unwise. The prudential criteria are thus secondary to and supportive of the classic ones. (Johnson 2005: 57)

In this quotation, the ‘classic’ or ‘older criteria’ that ‘establish duties or obligations’ are distinguished from the ‘recent’ or ‘newer’ criteria that ‘establish prudential tests’. However, I am not studying here the history of just war principles. Instead, I am engaging in the project of examining the embodiment of just war principles in the High-level Panel Report as five basic criteria of legitimacy. In doing this, it is dubious whether being ‘older’ or ‘newer’ matters. But suppose that Johnson’s historical claim about the last resort and proportionality principles is correct. Nonetheless, I would advocate a paradigm shift from a state-centric approach to a cosmopolitan approach that includes a transformation from such prudentialism to a thoroughgoing deontology. Such controversy about the relative weight or stringency of different just war principles illustrates the phenomenon of principled moral disagreement that is intrinsic to the dialectical process of revising traditional just war theory.

A chief purpose of later chapters of this book is to explain why the last resort, proportionality and noncombatant immunity principles ought to be construed as stringent deontological requirements.

### C. REASONABLENESS STANDARDS

With the aim of attempting both to clarify and resolve principled moral disagreement, I have designed this book dialectically. For instance, the chapter on the idea of just cause is counterbalanced partly by two chapters on the idea of last resort.

On the one hand, the threat-seriousness criterion might appear to be overly permissive. On the other hand, the last resort criterion might appear to be overly prohibitive. Thus Walzer has challenged the received just war principle of last resort:

Taken literally . . . ‘last resort’ would make war morally impossible. For we can never reach lastness, or we can never know that we have reached it. There is always something else to do: another diplomatic note, another United Nations resolution, another meeting. (2004: 88)

However, according to Childress, the last resort principle does not require ‘that all possible measures have to be attempted and exhausted if there is no

reasonable expectation that they will be successful' (1982: 75). Noting the occurrence here of the term 'reasonable' – a term that also occurs in the High-level Panel Report's last resort criterion – let me raise a crucial question. What are the standards for determining whether it is reasonable to attempt an alternative nonmilitary measure before resorting to the use of armed force? In brief, what are the 'reasonableness standards'? Rather than jettison the last resort principle, Walzer's challenge shows the need to investigate the topic of reasonableness standards. By means of such standards, we should strive to determine whether we have reached lastness. By means of such standards, we should strive to determine whether it is reasonable to transmit another diplomatic note, whether it is reasonable to seek another UN resolution, whether it is reasonable to hold another meeting.

In conclusion, when a last resort principle is subject to appropriate reasonableness standards, it is not overly prohibitive. The topic of reasonableness standards is discussed further in Chapter 6, 'Last Resort'.

#### IV. JUST WAR PRINCIPLES AND NONSTATE ACTORS

My aim is to formulate generalised just war principles that are applicable not only to armed conflicts of all forms, but also by all sorts of responsible agents. In traditional interstate warfare, the adversaries of states are states, and the responsible agents include rulers of states and military commanders. By contrast, in contemporary asymmetric warfare, the adversary of a state is an 'asymmetric adversary' – for example, 'sub-state actors', such as terrorist groups (Thornton 2007: 3).

In advocating a paradigm shift from a state-centric approach to a cosmopolitan approach, I want to emphasise that the Security Council is empowered by the UN Charter both to authorise and prohibit asymmetric warfare. For example, in order 'to protect civilians and civilian populated areas under threat of attack', Security Council Resolution 1973 (2011) authorised UN Member States to use armed force against an asymmetric adversary – namely, Libya.

A main thesis is that generalised just war principles should be applicable not only by rulers of states, but also by leaders of such nonstate actors as terrorist groups. According to moral universalism, there should be no moral asymmetry between states and nonstate actors, whatever the military asymmetry.

Why should just war principles be formulated so generally? To begin with, let me illustrate why the just cause principle should be generalised, so as to be applicable by nonstate actors. Consider the particular case of genocide in Rwanda.<sup>4</sup> Between 1990 and 1993, there was armed conflict between the Hutu Government of Rwanda and a nonstate actor – namely, a Tutsi rebel

group, the Rwandan Patriotic Front (RPF). In a formal peace agreement signed in August 1993, the Arusha Accords, the Rwandan Government and the RPF consented to the deployment of a UN peacekeeping mission (UNAMIR) in Rwanda. However, UNAMIR did not have a Chapter VII mandate authorising the use of armed force; UNAMIR was not an armed UN peacekeeping mission. Tragically, when genocide began in April 1994, the UN peacekeepers had to remain impartial and could not use armed force to attempt to stop genocide. By the end of April 1994, UNAMIR was abandoned.

Surely, there was a just cause for the use of armed force to stop genocide in Rwanda. 'From April to mid-July 1994, Rwanda experienced the equivalent of three 11 September 2001 attacks every day for 100 days' (HLPR 2004: 19). On 17 May 1994, Security Council Resolution 918 (1994) authorised a UN peacekeeping mission (UNAMIR II) in Rwanda with a more robust mandate that allowed limited uses of armed force: 'The Security Council . . . Recognizes that UNAMIR may be required to take action in self-defence against persons or groups who threaten protected sites and populations'. Surely, UNAMIR II had a just cause for the use of armed force to stop the genocide. (Disputably, the military operation in Rwanda begun in June 1994 by France – Operation Turquoise – had a just cause.) However, because of various delays, UNAMIR II was not deployed before the genocide ended in mid-July 1994.

Why did genocide in Rwanda end in mid-July 1994? When genocide began there in April 1994, armed conflict between the Hutu Government and the RPF resumed. By mid-July 1994, the RPF won this civil war. Genocide ended because the RPF stopped it (Des Forges 1999: 301–2).

Did the RPF have a just cause for using armed force to stop genocide in Rwanda? Presumably, if UNAMIR II had a just cause, then – in accordance with moral universalism – the RPF had a just cause. The moral claim that a nonstate actor, the RPF, had a just cause illustrates the general moral thesis that an adequately generalised just cause principle should be applicable by nonstate actors.

Especially because generalised just war principles should be applicable by nonstate actors, the set of core just war principles should not contain a legitimate authority principle. Each core just war principle is a necessary moral criterion for determining whether a particular use of armed force to stop genocide would be just. Presumably, as a 'nonstate' actor, the RPF was not a 'legitimate' authority. Suppose that a legitimate authority principle were accepted as a core just war principle. Then the use of armed force by the RPF to stop genocide in Rwanda would not have been just.

Why should the received noncombatant immunity principle be generalised, so as to be applicable by nonstate actors? Consider, as an illustration of asymmetric warfare, the specific issue of counterinsurgency operations.

Indeed, before a state (or coalition of states) engages in a counterinsurgency operation, leaders should ask whether noncombatants would be intentionally targeted. But the leaders of the asymmetric adversary of the counterinsurgency operation – the insurgency that the operation aims to counter – should also ask this question about their insurgency operations. In accordance with moral universalism, a noncombatant immunity principle should hold for counterinsurgents and insurgents symmetrically, whatever their military asymmetry.

Why should the received last resort principle be generalised, so as to be applicable by nonstate actors? Consider again the specific issue of counterinsurgency operations. Before a state (or coalition of states) engages in a counterinsurgency operation, leaders should ask whether it is reasonable to attempt an alternative nonmilitary measure. Comparably, the leaders of the asymmetric adversary of the counterinsurgency operation should also ask this question about their insurgency operations. In accordance with moral universalism, a last resort principle should hold for counterinsurgents and insurgents symmetrically, whatever their military asymmetry.

## V. TEMPORALISING JUST WAR PRINCIPLES

In addition to being generalised, a main thesis is that received just war principles should be temporalised (Lango 2004; 2007b). In this final part of the chapter, the concepts of ‘temporal phase’ and ‘temporal standpoint’ are introduced. As background, the main thesis that a just war theory should be a deontological theory is explained more fully.

### A. TEMPORAL PHASES OF ARMED CONFLICTS

The calculus of proportionality between probable good and evil in a war is a continuing one. It should be made before the decision to go to war. It must then be reviewed at critical points along the process of waging the war.

William V. O’Brien (1981: 27)

As this quotation implies, the process of waging a war is a temporal process. A war that initially satisfies the just war principle of proportionality might, at some critical juncture while it is being waged, cease to satisfy it (Fisher 2011: 75). Comparable remarks hold also of the other core just war principles. A war that initially has a just cause might, while it is being waged, cease to have a just cause, because (for instance) at some critical juncture there is inordinate escalation. A war that initially satisfies the last resort principle might, while it is being waged, cease to satisfy it, because (for instance) at some critical juncture there is a new opportunity for negotiation. A war

that initially satisfies the noncombatant immunity principle might, while it is being waged, cease to satisfy it, because (roughly) at some critical juncture noncombatants are no longer protected sufficiently from violence. The process of waging wars is a temporal process, and the process of applying just war principles to wars is also a temporal process.

To generalise, the process of performing military actions in armed conflicts of all forms is a temporal process and, correlatively, the process of applying just war principles to them is a temporal process.

Wars have temporally successive phases. For example, the Korean War had three chief temporal phases, which might be called ‘defending South Korea’, ‘invading North Korea’ and ‘defending against China’. In general, armed conflicts of all forms have temporally successive phases. For instance, the civil war in Libya during 2011 had two chief temporal phases – the initial phase of armed revolution against the Qaddafi regime and the subsequent phase of armed humanitarian intervention.

A main thesis is that just war principles are applicable at each temporal phase of any armed conflict. At each temporal phase of any armed conflict, the principles of just cause, last resort, proportionality and noncombatant immunity must be satisfied. For example, given that there was a just cause for defending South Korea, it is still necessary to answer the question: was there a just cause for invading North Korea? Given that there was a just cause for armed revolution in Libya, it is still necessary to answer the question: was there a just cause for armed humanitarian intervention there?

At each temporal phase of any armed conflict, we should determine whether just war principles are satisfied. But the thesis holds primarily of temporal phases that are critical. (Notice the word ‘critical’ in the block quotation.) As one temporal phase is succeeded by another temporal phase – and if the morally relevant circumstances remain unchanged – the new temporal phase is not one that is critical. On the other hand, as one temporal phase is succeeded by another temporal phase – and if some morally relevant circumstances have changed or if new morally relevant circumstances have emerged – the new temporal phase is one that is critical. Hence the task of applying just war principles to temporal phases of armed conflicts need not be unduly burdensome.

Additionally, there are prelude phases (e.g. preparing for war) and aftermath phases (e.g. implementing a peace treaty). Roughly, for each armed conflict, there are phases of prelude, resort, conduct, halting and aftermath. The concept of ‘temporal phase’ is discussed further in Chapter 4, ‘Theory of Action’.

#### B. DEONTOLOGICAL PRINCIPLES AND HUMAN AGENCY

What is essentially good in the action consists in the mental disposition let the consequences be what they may.

Kant ([1785] 1964: 84 [416])

Characteristically, armed conflicts are highly destructive. Regularly, when we use armed force, we kill or grievously injure human beings. Regularly, when we use armed force, we destroy property. And, all too frequently, when we use armed force, we wreak havoc on the ‘natural and cultural environment’ (Coady 2002: 18). In the memorable words of a classical just war theorist, Francisco de Vitoria: ‘all the effects of war are cruel and horrible – slaughter, fire, devastation’ (1991: 304). Because armed conflicts are so highly destructive, the chief function of a just war theory should be to morally constrain uses of armed force.

A just war theory should be a deontological theory. Just war principles should be deontological principles, and deontological principles are centred primarily on human agents. Deontological principles obligate, permit or prohibit the performance of actions by human agents. As agent-centred moral principles, just war principles morally obligate human agents not to use armed force unjustly, but they also morally obligate human agents to use armed force justly. For example, from the standpoint of each and every human agent who is deliberating about whether to use armed force, the last resort principle is centred on him or her. It is morally obligatory for him or her not to use armed force if he or she has not explored every reasonable nonmilitary measure. It is from the standpoint of a particular human agent – a particular ‘agential standpoint’ – that just war principles are primarily applicable.

Also, from the standpoint of each and every human agent who is deliberating about whether to use armed force, the noncombatant immunity principle is centred on him or her. It is morally obligatory for him or her not to kill or grievously injure noncombatants intentionally. Notice the term ‘intentionally’. In a deontological theory, it matters whether an action is performed intentionally. To use Kant’s phrase ‘mental disposition’, it matters whether an action has the mental disposition expressed by the word ‘intentionally’.

But other mental dispositions (or ‘states of mind’ or ‘mental states’) also matter. Specifically, in the moral theory that I am presupposing, it also matters whether an action is performed knowingly, recklessly or negligently.

Let me suggest a domestic analogy. In the *Model Penal Code* of the American Law Institute (ALI), the definition of criminal homicide is as follows: ‘A person is guilty of criminal homicide if he purposely, knowingly, recklessly, or negligently causes the death of another human being’ (ALI 1962: Section 210.1(1)). Each of the terms ‘purposely’, ‘knowingly’, ‘recklessly’ and ‘negligently’ refers to a guilty ‘mental state’ (or *mens rea*). My assumption is that the term ‘purposely’ may be replaced by the term ‘intentionally’ (ALI 1962: Section 1.13(12)).<sup>5</sup>

The concepts of mental state and agential standpoint are interrelated. The

actions performed by human agents are qualified by mental states. Analogous to the terms ‘purposely’, ‘knowingly’, ‘recklessly’ and ‘negligently’ in domestic criminal law, there are the terms ‘intentionally’, ‘knowingly’, ‘recklessly’ and ‘negligently’ in a deontological theory. It is from the standpoint of a particular responsible agent who would perform a military action intentionally, knowingly, recklessly or negligently that just war principles are primarily applicable.

In light of these four mental states, let me amplify the introductory paragraph to this section. Characteristically, armed conflicts are highly destructive. Regularly, when we use armed force, we intentionally kill or grievously injure human beings, we knowingly kill or grievously injure human beings, we recklessly kill or grievously injure human beings and we negligently kill or grievously injure human beings. Regularly, when we use armed force, we intentionally, knowingly, recklessly and negligently destroy property. And, all too frequently, when we use armed force, we knowingly, recklessly and negligently wreak havoc on the environment, even when we do not do this intentionally. Because armed conflicts are so highly destructive, the chief function of a just war theory should be to morally constrain intentional, knowing, reckless and negligent uses of armed force.

### C. AGENTIAL STANDPOINTS AND GLOBAL CITIZENSHIP

In accordance with moral universalism, just war principles are applicable from the agential standpoint of every human being anywhere in the world. Consider a particular human being who is not herself deliberating about whether she herself must not use armed force. Nevertheless, she is still able to make moral judgements about such deliberations by other human beings. From her own agential standpoint, she may (so to speak) ‘adopt’ a different agential standpoint. She may imagine (or hypothesise) that the standpoint of a responsible agent, who is himself deliberating about whether he himself must not use armed force, is her own agential standpoint. Imaginatively (or hypothetically), she may apply just war principles, as if she were that other responsible agent.

In a cosmopolitan just war theory, each and every human being is a morally responsible agent. A main thesis is that, from your own agential standpoint as a human being, you may apply just war principles from the agential standpoints of other human beings. From your own agential standpoint, you may adopt a different agential standpoint and imagine that you are a responsible agent, who is morally constrained by just war principles. For example, from your own agential standpoint as a citizen of a particular state, you may adopt the agential standpoint of a ruler of that state, a ruler of any other state or a leader of an armed revolution in any state, and apply just war principles as if you were that ruler or leader. Consequently, you may communicate your moral

judgements about uses of armed force to that ruler or leader by means of petitions, the ballot box, demonstrations and so forth. In a cosmopolitan just war theory, each and every human being is thus (potentially) a global citizen.

#### D. TEMPORAL STANDPOINTS IN ARMED CONFLICTS

An agential standpoint is a temporal standpoint. Just war principles are primarily applicable from a particular temporal standpoint of a particular responsible agent.

From the temporal standpoint of the present, we envisage the past retrospectively and the future prospectively. From the temporal standpoint of the present, we should apply just war principles both retrospectively to past armed conflicts and retrospectively to past military actions in armed conflicts that are presently occurring.

Nevertheless, because armed conflicts are so highly destructive, the chief function of a just war theory should be to morally constrain uses of armed force in the present and future. Most importantly, from the temporal standpoint of the present, we should apply just war principles both prospectively to military actions in future armed conflicts and prospectively to present and future military actions in present armed conflicts.

To illustrate the concept of ‘temporal standpoint’, let me draw upon the topic of US targeted airstrikes against insurgents and terrorists. Granted, there can be principled moral disagreement among just war theorists about the justice or injustice of such targeted military operations. In particular, US drone strikes have proven highly controversial. I want to stress that when I sketch a (hypothetical or actual) targeted airstrike as an illustration, I do not usually mean either to approve or disapprove. There is no space in this book to settle relevant disputes about international law, alternative nonmilitary measures and so forth. Instead, my purpose is to illustrate how just war principles might be applied.

On 21 February 2010, a US ‘helicopter attack’ in Afghanistan ‘killed 23 Afghan civilians’ and ‘also wounded 12 civilians’ (Drew 2010b). Of course, from the temporal standpoint of the present, we should apply just war principles retrospectively to this US helicopter attack. For instance, from the temporal standpoint of the present, we should determine retrospectively whether this helicopter attack satisfied or violated the noncombatant immunity principle.

Most importantly, from the temporal standpoint of the present, we should apply just war principles prospectively to present and future US targeted airstrikes against insurgents and terrorists. Suppose that, from the temporal standpoint of the present, the US President is contemplating prospectively whether to authorise a drone strike against terrorists in Somalia. Even though such a drone strike would be a targeted military operation, civilians could be killed or wounded. Accordingly, the US President should answer

the question: would this drone strike satisfy or violate the noncombatant immunity principle? Additionally, the question of whether the drone strike would satisfy or violate the just cause, last resort and proportionality principles should be answered.

In accordance with moral universalism, every human agent anywhere in the world may apply just war principles from other agential standpoints. Thus, from your own agential standpoint, you may adopt the agential standpoint of the US President. In doing so, you are equally entitled to answer the question: would this drone strike satisfy or violate these just war principles? As a (potential) global citizen, it is your moral responsibility to answer such questions as the following: if such a drone strike were authorised by the US President, would it satisfy or violate just war principles?

To paraphrase the Preamble of the UN Charter, the chief function of just war theory should be to save human beings from the scourge of armed conflict. From the temporal standpoint of the present, those civilians who were killed or wounded on 21 February 2010 by the cited US helicopter attack in Afghanistan cannot be saved from the scourge of armed conflict. By contrast, from the temporal standpoint of the present, we are capable of striving to save civilians from the scourge of present and future armed conflicts, and we are morally obligated by just war principles to do so.

Nonetheless, it is also important to apply just war principles retrospectively, both to past armed conflicts and past military actions in present armed conflicts.

#### E. RETROSPECTIVELY IMAGINING PAST TEMPORAL STANDPOINTS

The task that I assigned our forces – to protect the Libyan people from immediate danger, and to establish a no-fly zone – carries with it a U.N. mandate and international support. It's also what the Libyan opposition asked us to do. If we tried to overthrow Qaddafi by force, our coalition would splinter. We would likely have to put U.S. troops on the ground to accomplish that mission, or risk killing many civilians from the air.

Barack Obama, *Remarks by the President in Address to the Nation on Libya* (2011b)

It was to spare the Japanese people from utter destruction that the ultimatum of July 26 [1945] was issued at Potsdam. Their leaders promptly rejected that ultimatum. If they do not now accept our terms they may expect a rain of ruin from the air, the like of which has never been seen on this earth.

Harry S. Truman, *Statement by the President Announcing the Use of the A-Bomb at Hiroshima* (1945)

Is Truman morally blameworthy for his decision to use an atomic bomb on 5 August 1945 to obliterate Hiroshima? Is Obama morally praiseworthy for his decision not to 'risk killing many civilians from the air' in the Libya intervention? From the temporal standpoint of the present, by means of the retrospective application of just war principles, we might strive to answer such questions of moral blame and moral praise.

Most significantly, from the temporal standpoint of the present, when we apply just war principles to a past armed conflict or past military action in a present armed conflict, we should strive to answer questions of moral constraint. Let me explain.

From the temporal standpoint of the present, there are past temporal standpoints. From a past temporal standpoint, an armed conflict that is then occurring has past phases, a present phase and future phases. For instance, on 17 March 2011, Security Council Resolution 1973 (2011) authorised armed humanitarian intervention in Libya. On 17 March 2011, the phase of armed revolution was envisaged retrospectively, and the phase of armed humanitarian intervention was envisaged prospectively.

From our present temporal standpoint, we may adopt a past temporal standpoint. That is, we may imagine (or hypothesise) that some past temporal standpoint is our present temporal standpoint. Imaginatively (or hypothetically), we may envisage events from that past temporal standpoint. Imaginatively, from that past temporal standpoint, we may envisage earlier phases of an armed conflict retrospectively and later phases prospectively. For instance, from our present temporal standpoint, we may adopt the past temporal standpoint of 17 March 2011. Imagining that we are members of the Security Council, we may envisage the phase of armed revolution in Libya retrospectively and the phase of armed humanitarian intervention prospectively.

A main thesis is that, from the temporal standpoint of the present, we may strive to answer questions of moral constraint from a past temporal standpoint. From the temporal standpoint of the present, we may adopt a past temporal standpoint and imagine that we are responsible agents, who are, from that past temporal standpoint, morally constrained by just war principles.

For example, from the temporal standpoint of the present, we may adopt the temporal standpoint of 17 March 2011, imagine that we are members of the Security Council and deliberate morally about the Libyan civil war. In so doing, we may strive to answer the following questions of moral constraint from the temporal standpoint of 17 March 2011. Is there a just cause for armed humanitarian intervention in Libya? Before resorting to the use of armed force, is there a reasonable nonmilitary measure that should be attempted first? Are the principles of proportionality and noncombatant immunity satisfied?

We are imagining that today is 17 March 2011, and so these questions are asked in the present tense.

#### F. TEMPORAL STANDPOINTS AND NONMILITARY MEASURES

The most obvious and profound benefit of talking to groups that use terror is to hasten an end to the violence and produce a sustainable peace. This involves the mediator turning the terrorists from being part of the problem into being part of the solution by involving them in the peace process.

*Talking to Groups That Use Terror*, United States Institute of Peace  
(Byman et al. 2011: 15)

Consider, for example, the case of US and NATO counterinsurgency operations in Afghanistan against the Taliban insurgency from the temporal standpoint of 22 June 2011. There are other groups that use terror there – in particular, the Haqqani network (Mazzetti et al. 2011) – but, for brevity, I will focus on the Taliban.

The preceding sentence begins with the phrase ‘there are’. It does not begin with the phrase ‘there were’. In adopting this particular past temporal standpoint, we are imagining that our present temporal standpoint is 22 June 2011. That is, we are imagining that today is 22 June 2011. Therefore, sentences expressing what we imagine from this temporal standpoint should be in the present tense.

Evidently, the Taliban is a nonstate actor that uses terror. Insurgent attacks by means of improvised explosive devices (IEDs) in Afghanistan ‘accounted for the majority of civilians killed in 2010 with 904 killed and 1662 injured’ (UNAMA 2011: 6). Historically, the United States has used terror – for instance, the US firebombings of Tokyo during the Second World War (Searle 2002). However, US and NATO policy in Afghanistan eschews terror bombing and sanctions only tactical bombing: ‘leaders at all levels [are expected] to scrutinize and limit the use of force like close air support (CAS) against residential compounds and other locations likely to produce civilian casualties’ (McChrystal 2009). Officially, the US and NATO do not use terror.

A main thesis is that the just cause principle should be counterbalanced by ancillary just war principles. Briefly, the last resort principle mandates that, before resorting to the use of armed force, reasonable nonmilitary measures must be attempted – for instance, negotiation and mediation. When parties to an armed conflict engage in a process of negotiation, they should strive to achieve agreement concerning goals, methods and principles. Specifically, when one of the parties accepts just war principles, it should entreat the other party to accept them. A goal should be to

incorporate just war principles in a peace agreement. In accordance with moral universalism, just war principles should morally constrain each of the negotiating parties equally. While raising just war questions from its own point of view, a party to such negotiations should also raise just war questions from the point of view of its adversary.

From the temporal standpoint of 22 June 2011, should the US and NATO talk to a group that uses terror – namely, the Taliban? In his speech of 22 June 2011, US President Obama signalled US willingness to negotiate with the Taliban: ‘America will join initiatives that reconcile the Afghan people, including the Taliban’ (Obama 2011a). Officially, the US and NATO do not use terror in Afghanistan, but then neither do the Taliban, officially: ‘Both in statements and the code of conduct, the Taliban have a stated aim to minimize civilian loss’ (UNAMA 2011: 6). Negotiation to achieve agreement about a noncombatant immunity principle might pivot on this stated aim of the Taliban to minimise civilian loss. Admittedly, however, from the temporal standpoint of 22 June 2011, prospects for such negotiations are ‘murky’ and ‘confusing’ (Myers and Mazzetti 2011). Analogously, prospects for uses of armed force are often murky and confusing. Truly, there is a ‘fog of negotiation’, as there is a ‘fog of war’.

#### G. JUST WAR THEORISING AND FUTURE TEMPORAL STANDPOINTS

The process of applying just war principles is a temporal process, but so is the process of revising just war theory. From the temporal standpoint of the present, we may adopt hypothetical future temporal standpoints and imagine various cosmopolitan political authorities – for example, a globalised NATO (Daalder and Goldgeier 2006) or a world government. Conceivably, a suitable global institution might be founded by a treaty among all those states that are sufficiently democratic.<sup>6</sup> Truly, there can be principled moral disagreement among cosmopolitan just war theorists about the ideal of global governance.

For the sake of concreteness, I am writing this book from the temporal standpoint of the early years of the second decade of the twenty-first century. From this temporal standpoint, I am featuring the ideals expressed in the UN Charter and affirming that the Security Council should have primary responsibility for security.

#### H. ILLUSTRATIONS

Because armed conflicts are so highly destructive, the chief function of just war principles should be to morally constrain uses of armed force. To understand more adequately how they should morally constrain uses of

armed force in the present and the future, it is important to study how they should morally constrain uses of armed force in the past.

Let me sketch an illustration. To counterbalance overemphasis of the just cause principle, I am emphasising the last resort, proportionality and noncombatant immunity principles. On 6 June 2011, in the middle of the Libyan civil war, an influential nongovernmental organisation (NGO), the International Crisis Group (ICG), released a substantial report, *Making Sense of Libya* (ICG 2011).<sup>7</sup> From the temporal standpoint of the present, we may adopt the temporal standpoint of 6 June 2011 and imagine that we are responsible agents who deliberate morally, as follows. We ascertain that the Libyan civil war is in a phase of ‘military impasse’ (ICG 2011: ii). How, then, is the last resort principle applicable? Before resorting to further uses of armed force, we explore whether there are reasonable nonmilitary measures that should be attempted first. In particular, based on the information in the ICG report, we explore whether there should be ‘an immediate ceasefire’ and an ‘immediate search for a negotiated settlement’ (ICG 2011: ii). By studying how the last resort principle should morally constrain uses of armed force in the Libyan civil war, we could understand more adequately how it should morally constrain uses of armed force in the present and the future.

In closing, let me sketch another illustration. From the temporal standpoint of the crucial days before 5 August 1945, how should Truman’s deliberation regarding atomic bombing Hiroshima be morally constrained by the noncombatant immunity principle? Note that, in a telegram to Truman dated 9 August 1945, Samuel McCrea Cavert, General Secretary of the Federal Council of the Churches of Christ in America, declared: ‘Many Christians deeply disturbed over use of atomic bomb against Japanese cities because of their necessarily indiscriminate destructive effects’ (Cavert and Truman 1945).<sup>8</sup> In replying to Cavert on 11 August 1945, Truman explained: ‘When you have to deal with a beast you have to treat him as a beast’ (Cavert and Truman 1945). A chief message of just war theory is that, even if our enemy is a beast, we must not be bestial.

## NOTES

1. An alternative acronym is ‘RtoP’.
2. A volume of articles about the High-level Panel Report is Danchin and Fischer (2010).
3. Henceforth, when this sentence is quoted, the term ‘prima facie’ is not italicised.
4. A book about that particular case is Des Forges (1999).
5. To appreciate the relevance of legal concepts for just war theory, see Kenny (1978).

6. For a detailed proposal of an institutional model involving a 'democratic coalition' that would supplement the Security Council, see Buchanan and Keohane (2004: 18–20).
7. ICG reports are available at <http://www.crisisgroup.org> (last accessed 22 July 2013).
8. I have corrected this quotation by replacing the word 'efforts' with the word 'effects'.

## CHAPTER 3

# MORAL THEORY

UNICEF called today [11 April 2011] for an immediate end to the siege of Misrata [Libya], warning that tens of thousands of children were at risk in the conflict-ridden city. UNICEF said that intensified fighting and indiscriminate shelling has led to an increased number of children being killed in Misrata, with many others lacking food and safe water, and traumatised from the atrocities they have witnessed.

UNICEF Press Centre (2011)

The Security Council [on 17 March 2011] . . . Expressing its determination to ensure the protection of civilians and civilian populated areas [in Libya] . . . Demands the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians . . . Authorizes Member States . . . to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack . . .

Security Council Resolution 1973 (2011)

This news note from the UNICEF Press Centre about armed conflict in Libya illustrates, lamentably, the extreme destructiveness of armed conflicts. It might seem odd to start a chapter entitled 'Moral Theory' with a particular case of armed conflict. But a main thesis is that just war theory is interrelated intrinsically both with general moral principles and particular cases.

To counterbalance overemphasis of the just cause principle, I am emphasising the last resort, proportionality and noncombatant immunity principles. In the preceding chapter, the idea of last resort is featured. For the sake of concreteness, this chapter features the idea of noncombatant immunity.<sup>1</sup>

The preceding chapter raises the question of how the legitimacy criteria in the High-level Panel Report should be elucidated, revised or supplemented. With the aim of answering this question in later chapters, the present chapter

explores a prior question. Why should just war principles be accepted? Central to the chapter is an investigation of how just war principles can be elucidated by means of general moral principles – in particular, principles of nonmaleficence and beneficence. Some other topics discussed in this chapter are the moral relevance of particular cases, the process of moral deliberation and the problem of moral conflict.

Of course, this book is not a treatise on moral theory, so these topics of moral theory are discussed quite incompletely. In later chapters, there are additional remarks regarding topics of moral theory. The purpose is to introduce a framework of presuppositions.<sup>2</sup>

To supplement topics from moral theory, some interrelated topics from the theory of action are discussed in Chapter 4, ‘Theory of Action’. For example, a topic crucial to the noncombatant immunity principle is discussed there: the distinction between acts performed intentionally and acts performed knowingly. Additionally, interspersed throughout this book are discussions of relevant topics from other theories – specifically, theories of human rights, global governance, nonviolence and so forth. In brief, the purpose is to root just war theory within a broad theoretical framework.

However, I am a philosopher, and I view just war theory especially through the lens of moral philosophy. By contrast, there are scholars of just war theory who view it especially through the lens of political theory. In addition to moral universalism, cosmopolitanism should embrace ideals of global governance and global citizenship. Throughout this book, the ideal of global governance is illustrated controversially by the Security Council. Eventually, in the chapters ‘Proportionality and Authority’ and ‘All Things Considered’, the ideal of global citizenship is explored. But I concentrate in this chapter on a moral conception of moral universalism. To escape the labyrinth of controversies about just war theory, a thread should be woven of moral concepts.

## I. CASES AND PRINCIPLES

### A. MORAL DELIBERATION CASE BY CASE

In the Outcome Document of the 2005 UN World Summit, the responsibility to protect (R2P) is endorsed by UN Member States only qualifiedly. Notably, it is stated there that ‘we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis’ (GA Res 2005: para. 139). What is meant by the qualification ‘on a case-by-case basis’? Why is R2P endorsed with this qualification?

To generalise, should the Security Council deliberate about the use of armed force only on a case-by-case basis? I want to raise a comparable

question for just war theory. Should responsible agents of all sorts deliberate morally about the use of armed force only on a case-by-case basis?

The quoted statement about R2P is also qualified by the phrase ‘in accordance with the Charter’. Recall that the Preamble of the UN Charter expresses the determination ‘to ensure, by the acceptance of principles . . . that armed force shall not be used, save in the common interest’. Should the Security Council deliberate about such collective military action by means of apposite principles? In the preceding chapter, I maintain that deliberations about the use of armed force by the Security Council ought to be governed by just war principles. In general, my aim in this book is to articulate generalised just war principles that are applicable by all sorts of responsible agents to all forms of armed conflict.

But how can the Security Council deliberate about collective military action, both on a case-by-case basis and by means of just war principles? How can responsible agents of all sorts deliberate morally about the use of armed force, both on a case-by-case basis and by means of generalised just war principles? With the aim of answering these and related questions of just war theory, I also consider some prior questions of moral theory, among which are the following. Should a just war theory include comprehensive moral principles – for instance, a principle of nonmaleficence? How are particular cases and moral principles interrelated? By what process of moral deliberation should moral principles be applied to particular cases?

To begin with, let me venture a *realpolitik* answer to the question of why R2P is endorsed in the Outcome Document with the qualification ‘on a case-by-case basis’. UN Member States are frequently motivated by parochial national interests. Consider the case of Darfur. The International Criminal Court (ICC) has indicted the President of Sudan, Omar al Bashir, for genocide, crimes against humanity and war crimes in Darfur. Amongst the charges by the ICC Prosecutor is the charge that, when the Sudanese Armed Forces carried out attacks against villages in Darfur, ‘on occasion, the [Sudanese] Air Force would be called upon to drop bombs on the village as a precursor to the attacks’ (ICC 2008: 4). In deliberating about the case of Darfur, should the Security Council have authorised the establishment of no-fly zones to stop such aerial bombardments?

The United States is a permanent member of the Security Council. Consider also the case of US military operations in Afghanistan. US airstrikes in Afghanistan have caused civilian casualties. Should Presidents George W. Bush and Barack Obama be indicted by the ICC for war crimes or crimes against humanity? (This is a moral question and not a legal question, since the United States has not ratified the Rome Statute of the ICC.) It might appear to be in the parochial national interests of the United States not to have the case of Darfur serve as a precedent for the case of Afghanistan.

Similarly, it might appear to be in the parochial national interests of two other permanent members of the Security Council, China and Russia, not to have the case of Darfur serve as a precedent, respectively, for the cases of Tibet and Chechnya. Apparently, if the case-by-case qualification were to be observed strictly, moral judgements about the case of Darfur would not serve as moral precedents for other cases.

Should moral judgements about a particular case serve as moral precedents for other particular cases? Setting motives of realpolitik aside, I want to investigate how such questions about the moral relevance of cases should be answered by means of moral theory. Indeed, as the cases of Darfur, Afghanistan, Tibet and Chechnya evidence, various cases can differ greatly. Hence it is not implausible to hold the thesis that real-world moral judgements about armed conflict should (usually) be made on a case-by-case basis. In contrast to this ‘casuistic thesis’, there is a ‘principlistic thesis’ – namely, that real-world moral judgements about armed conflict should be made by means of just war principles. Are these two theses compatible? With the aim of answering this question, I start with the subject of casuistry.

#### B. FOUNDATIONALISM

In *The Abuse of Casuistry: A History of Moral Reasoning*, Albert R. Jonsen and Stephen Toulmin distinguished two ways of discussing cases:

We inherit two ways of discussing ethical issues. One of these frames these issues in terms of principles, rules, and other general ideas; the other focuses on the specific features of particular kinds of moral cases. In the first way general ethical rules relate to specific moral cases in a *theoretical* manner, with universal rules serving as ‘axioms’ from which particular moral judgments are deduced as theorems. In the second, this relation is frankly *practical*, with general moral rules serving as ‘maxims’, which can be fully understood only in terms of the paradigmatic cases that define their meaning and force. (1988: 23 [emphasis in original])

Jonsen and Toulmin strived in their book to rehabilitate the historical art of casuistry, and I follow their lead here in using the word ‘casuistry’ not as a pejorative, but rather as the name of the second way of discussing cases (1988: 12–13). As the words ‘axioms’ and ‘deduced’ indicate, it is appropriate to name the first way ‘moral deductivism’. In my book, I presuppose a third way – a ‘coherentist’ way of discussing cases and principles reciprocally.

Moral deductivism is a kind of ‘foundationalism’. According to a moral foundationalism of principles, there is a fundamental moral principle (or principles) that constitutes the foundation of a moral theory, in that it functions

as a fixed premise by means of which moral judgements can be made about cases (e.g. Bentham's greatest-happiness principle or Kant's categorical imperative). Moral deductivism supplements this picture of foundationalism with a concept of deduction: moral judgements about cases can be deduced logically from the fundamental moral principle (or principles).

Let me suggest that the second way of discussing cases – the casuistry of Jonsen and Toulmin – is also a kind of foundationalism, a foundationalism of paradigm cases. In the above block quotation, note especially the words 'define' and 'paradigmatic cases'; paradigmatic cases define the meaning and force of maxims.

Without attempting to study in detail their lengthy book, but using some of their words, I want now to sketch a form of casuistry that I call 'perceptual casuistry'. By analogy with our visual perceptions of physical objects, we can have 'moral perceptions' of paradigm cases (1988: 24). Just as we can visually perceive that a physical object is green, so we can morally perceive that a human action is wrong (or right). To avoid using the word 'perceive' ambiguously, let me restate this analogy. By analogy with our visual perceptions of a physical object, we can make 'particular concrete' moral judgements about a case (1988: 18). Perceptual casuistry is a kind of foundationalism. Such particular moral judgements about a case constitute a foundation, by means of which – through a process sometimes called 'moral induction' – revisable moral maxims can be obtained. In this way, moral judgements about a case can serve as moral precedents for other cases.

### C. COHERENTISM

In opposition to these two foundationalist ways of discussing particular cases, moral deductivism and perceptual casuistry, I presuppose a third way, a kind of 'coherentism', a coherentism of principles and cases. Moral theory is controversial, and one controversy among moral theorists is that of foundationalism versus coherentism.<sup>3</sup>

According to the kind of coherentism that I am presupposing, there are moral principles, but they are not fixed or unrevisable. Indeed, they can be used to make particular moral judgements about cases. But particular moral judgements about cases can also be used to rethink, revise or supplement them. Reciprocally, they can be used to rethink, revise or supplement particular moral judgements about cases. To borrow some of John Rawls' words regarding his coherentist notion of 'reflective equilibrium', moral deliberation about the use of armed force should involve a 'process of mutual adjustment of principles and considered judgments' about cases (1971: 20). In brief, a moral theory can be both principlistic and casuistic.

A just war theory can be both principlistic and casuistic. As Childress observed, just war principles 'constitute a formal framework and structure

for moral debates about the use of force' (1982: 90). Specifically, as C. A. J. Coady observed, '[t]he just war tradition provides the best framework for discussing the moral arguments for and against humanitarian intervention' (2002: 5). Similarly, my view is that, ideally, the set of core just war principles constitutes a moral framework, by means of which responsible agents can determine whether a proposed use of armed force would be just or unjust. But we should not be misled by the word 'framework'. Despite this word, which connotes rigidity, a moral framework of just war principles is not fixed or unreviseable. Just war principles can be used to make moral judgements about particular cases of armed conflict, but moral judgements about particular cases of armed conflict can also be used to rethink, revise or supplement just war principles. The aim should be to attain reflective equilibrium.

Complementary to the temporalisation of just war principles, the metaethical notion of coherentism should also be temporalised. The process of mutual adjustment of just war principles and moral judgements about cases is a temporal process. Indeed, there has been, as Johnson observed, a 'metamorphosis of the concept of just war over time' (1984: xxiii). It is from the particular temporal standpoint of the early years of the second decade of the twenty-first century that I am engaging in the project of revising received just war principles.

At present, then, my view is that a cosmopolitan just war theory should be SC-centric. In accordance with coherentism, acceptance by the Security Council of the five legitimacy criteria proposed in the High-level Panel Report would be compatible with moral debate about how those criteria should be revised. There can be moral debate about applications of the criteria, but there can also be moral debate about the criteria themselves. When members of the Security Council deliberate about whether to authorise the use of military force in a particular case, they could sometimes engage in a process of mutual adjustment of the criteria and their moral judgements about that particular case. While applying a criterion to a particular case, they could decide that they need to revise the criterion itself. Acceptance of the criteria by the Security Council would be compatible with principled moral disagreement about whether they should be revised.

In addition to making moral judgements about particular cases of armed conflict – for example, the case of armed conflict in Libya – we can make moral judgements about specific issues of armed conflict – that is, the specific issues of armed humanitarian intervention, pre-emptive first strikes, preventive war, weapons of mass destruction, insurgencies and counterinsurgencies, terrorism and counterterrorism, cyber warfare, private military companies, nonlethal weapons and so forth. According to coherentism, moral principles can be used to make moral judgements about specific issues, but also moral judgements about specific issues can be used to rethink, revise or supplement

moral principles. And, reciprocally, moral principles can be used to rethink, revise or supplement moral judgements about specific issues. Moral deliberation about the use of armed force should involve a process of mutual adjustment of moral principles and moral judgements about particular cases and specific issues. In this book, I am able to discuss in significant detail only an illustrative selection of specific issues.<sup>4</sup>

Coherentism extends to the meanings of terms – for instance, the terms ‘armed conflict’ and ‘noncombatant’. Provisionally, the meaning of a term might be defined casuistically, by examining a variety of paradigm cases. Provisionally, for instance, the terms ‘combatant’ and ‘noncombatant’ might be defined as follows. Combatants engage in combat; they use armed force in armed conflicts. And noncombatants do not engage in combat; they do not use armed force in armed conflicts. Frequently, such casuistical definitions of terms are somewhat ‘indeterminate’ (or ‘inexact’), because of difficult or borderline cases. Consequently, it is presupposed that meanings of terms can be elucidated, revised or supplemented – for example, by examining morally novel cases. By contrast, a foundationalist thesis about definitions is rejected – namely, that terms can be explicitly defined by means of primitive terms, whose meanings are transparent and indubitable. Notice that the terms ‘combatant’ and ‘noncombatant’ are provisionally defined above by means of terms that are themselves somewhat indeterminate – namely, ‘combat’, ‘armed force’ and ‘armed conflict’. Moral deliberation about the use of armed force should involve a process of mutual adjustment of moral principles, moral judgements about particular cases and specific issues and definitions of terms. The subject of definition is discussed further in Chapter IV, ‘Theory of Action’.

Moreover, there are problems of scale or degree. For instance, to elucidate the legitimacy criterion of ‘seriousness of threat’ adequately, the following questions need to be answered. Which kinds? How clear? How serious? The last two questions are questions of scale or degree. Moral deliberation about the use of armed force should involve a process of mutual adjustment of moral principles, moral judgements about particular cases and specific issues, definitions of terms and moral assessments of scale or degree.

Coherentism also extends to links between a moral theory and other relevant theories – for example, a theory of human action and a philosophy of time.<sup>5</sup> For military actions are human actions, and the process of applying just war principles to them is a temporal process.

In theorising about the ethics of armed conflict, I presuppose coherentism.

#### D. COMPREHENSIVE MORAL PRINCIPLES

Influenced by their work on the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, Jonsen and

Toulmin featured biomedical cases. Interestingly, although largely ignoring cases of armed conflict, they alluded to Walzer's *Just and Unjust Wars* as an illustration of casuistry (Jonsen and Toulmin 1988: 13). In an early section, 'The locus of moral certitude', they offered some anecdotal evidence for casuistry. When the eleven members of this national commission remained on the 'casuistical level, they usually agreed in their practical conclusions'; however, when they 'explained their individual *reasons*' for these conclusions, there were significant 'differences of opinion' (Jonsen and Toulmin 1988: 17–18 [emphasis in original]). Concerning 'specific types' of biomedical cases, they had 'practical certitude'; however, concerning relevant moral principles, they did not have 'theoretical certainty' (1988: 18). That the locus of their moral certitude was cases furnishes some anecdotal evidence for casuistry.

Relegated to an endnote for one of the paragraphs from which these quotations are taken is some anecdotal evidence for coherentism:

On a *completely* general level, it is true, the members of the commission were able to share certain agreements – for example, as to the principles of autonomy, justice, and beneficence. But these shared notions were too comprehensive and general to underwrite specific moral positions. (Jonsen and Toulmin 1988: 356 [emphasis in original])

In my book, I presuppose such comprehensive moral principles. We should morally deliberate about the use of armed force, both on the completely general level of such moral principles and on the particular level of cases of armed conflict. Admittedly, because such moral principles are so comprehensive and indeterminate, adequate moral judgements about cases cannot simply be deduced from them. Nonetheless, they can serve to elucidate just war principles. According to a coherentism of principles and cases, there can be comparable moral assuredness concerning both particular moral judgements about cases and such comprehensive moral principles.

In conclusion, let me preview how this coherentism of principles and cases pertains to my cosmopolitan just war theory. As specific moral principles about a limited domain of particular cases, just war principles are intermediate between moral judgements about particular cases in that domain and moral principles that hold comprehensively of all particular cases. On the one hand, we can make moral judgements about particular cases of armed conflict, in order to rethink, revise or supplement just war principles. On the other hand, in order to rethink, revise or supplement just war principles, we can also make use of such comprehensive moral principles as autonomy, justice and beneficence. Moral deliberation concerning the use of armed force should involve a process of mutual adjustment of comprehensive moral

principles, just war principles and moral judgements about particular cases. Additionally, this process of mutual adjustment should encompass moral judgements about specific issues, definitions of terms, moral assessments of scale or degree and relevant concepts from the theory of action and other theories. The aim should be to attain reflective equilibrium.

Specifically, in later chapters, I discuss how this coherentism of principles and cases pertains individually to the core just war principles of just cause, last resort, proportionality and noncombatant immunity.

#### E. NONMALEFICENCE, BENEFICENCE, JUSTICE, AUTONOMY

Which comprehensive moral principles should a just war theory accept? Biomedical ethics, with its extensive literature, various journals and numerous conferences, is the most developed field of applied ethics. Perhaps the most influential book in biomedical ethics is *Principles of Biomedical Ethics* by Tom Beauchamp and James Childress (2009). (The sixth edition was published in 2009 and the first edition in 1979.) In their book, there is a moral theory with four comprehensive moral principles – namely, nonmaleficence, beneficence, justice and respect for autonomy. Reflecting the Hippocratic Oath, the principle of nonmaleficence is, briefly: do no harm. But one can refrain from doing harm without doing good, and so there is need for a supplementary principle of beneficence, which is, briefly: do as much good as possible. The principle of justice is a principle of distributive justice. Finally, the principle of respect for a person's autonomy mandates respect for that person's own beliefs, choices and actions. Comprehensively, these four moral principles encompass all cases, including both biomedical cases and cases of armed conflict.

In my book, I presuppose comprehensive moral principles of nonmaleficence, beneficence, distributive justice and autonomy. (What is presupposed is a principle of autonomy and not a principle of respect for autonomy.) In the next two parts of this chapter, I discuss the principles of nonmaleficence and beneficence. The principles of distributive justice and autonomy are discussed in Chapter 8, 'Proportionality and Authority'.

In addition to ideals of global governance and global citizenship, cosmopolitanism should embrace moral universalism. The Preamble of the *Universal Declaration of Human Rights* (UDHR) recognises 'the equal and inalienable rights of all members of the human family' (UDHR 1948). In accordance with moral universalism, these four comprehensive moral principles hold equally and inalienably of all members of the human family. Everyone, everywhere in the world, must refrain from doing harm to anyone, anywhere in the world. Everyone, everywhere in the world, must do as much good as possible for anyone, anywhere in the world. The principle of justice is a principle of global distributive justice. Everyone,

everywhere in the world, is an autonomous moral agent. The moral notion of autonomous agency is especially crucial for a political notion of global citizenship. These four principles should be endorsed by responsible agents of global governance.

## II. NONMALEFICENCE

The injuring of another can be in no case just.

Plato, *The Republic* (1892b: 12)

If there are things that are bad in themselves we ought, *prima facie*, not to bring them upon others; and on this fact rests the duty of non-maleficence.

W. D. Ross ([1930] 2002: 26)

In his landmark book *The Right and the Good*, Ross advocated a ‘duty of non-maleficence’ – that is, ‘the duty not to harm others’ ([1930] 2002: 22). The moral theory that I am presupposing is influenced substantially by Ross’ moral theory, but I have no space here to examine his views thoroughly.

Using the term ‘obligation’ instead of the term ‘duty’, a comprehensive principle of nonmaleficence may be formulated provisionally thus: it is morally obligatory not to harm other persons. A moral requirement of moral universalism is that every human being, everywhere in the world, must refrain from harming any human being, anywhere in the world.

### A. A TEMPORALISED NONMALEFICENCE PRINCIPLE

An agential standpoint is a temporal standpoint. From the temporal standpoint of the present, moral principles are applicable both retrospectively and prospectively. Most significantly, in order to morally constrain uses of armed force, a nonmaleficence principle should be applied prospectively. But the future is open. Present actions are fraught with risks and uncertainties. In the fog of armed conflict, military operations are often (if not always) conducted under conditions of risk and uncertainty.

Under conditions of uncertainty, we might only be able to ascertain that a proposed military action is ‘likely’ to harm other persons; and so, if we were to perform it, we would ‘seriously risk’ harming them. As the terms ‘likely’ and ‘seriously risk’ indicate, there are problems of scale or degree.

I want to emphasise that there can be principled moral disagreement about how such scale problems should be resolved. Correlative to degrees of likelihood, there are degrees of risk. However, there are no mechanical decision procedures whereby correlative degrees of likelihood and risk can be computed. Presumably, there should be a threshold (or thresholds) above

which harm is judged to be likely and below which it is not. Presumably, there should be a threshold (or thresholds) above which a risk is judged to be serious and below which it is not. Evidently, there can be principled moral disagreement about how (or whether) such thresholds should (or can) be discerned or demarcated.

My view is that the concept of ‘harming’ should be understood as encompassing both ‘actual harming’ and ‘harming seriously risked’. (Compare the concept of ‘expected utility’.) By imposing the serious risk of harm on other persons, we harm them, even if by chance or luck they are not actually harmed. (For illustrations, ponder environmental hazards.)

During the siege of Misrata, UNICEF warned (on 11 April 2011) that many ‘children were at risk [from] indiscriminate shelling’ (UNICEF Press Centre 2011). From the temporal standpoint of 11 April 2011, it is morally obligatory for Libyan Government combatants not to seriously risk killing or injuring children in Misrata by indiscriminate shelling. This moral obligation holds, even if by chance or luck no child would actually be killed or injured. To seriously risk harming is to harm.

Therefore, the comprehensive principle of nonmaleficence that I am presupposing is:

*Nonmaleficence principle.* It is morally obligatory not to actually harm or seriously risk harming other persons.

For brevity, the principle can be expressed without the words ‘actually’ and ‘or seriously risk harming’, but then it should be read as containing those words implicitly. That is, it is morally obligatory not to [actually] harm [or seriously risk harming] other persons. A moral requirement of moral universalism is that every human being, everywhere in the world, must refrain from both actually harming and seriously risking harming any human being, anywhere in the world.

How should we morally deliberate about the use of armed force in terms of this nonmaleficence principle? More sweepingly, there is the coherentist question of how we should morally deliberate about the use of armed force on a case-by-case basis, in terms of generalised just war principles and in terms of such comprehensive moral principles as the principle of nonmaleficence.

Indeed, this nonmaleficence principle is comprehensive, but it is not self-evident. For it is, or appears to be, neither conceptually transparent nor indisputably acceptable. What should be meant by the term ‘harm’? Ordinarily, the loss of a game of chess is a negative consequence that is not caused by an act of harming. Which kinds of acts that cause negative consequences to persons are acts of harming them? Arguably, the relevant

concept of ‘harm’ is a concept that is somewhat indeterminate. Arguably, there are difficult or borderline cases where it cannot be determined whether the nonmaleficence principle has been violated.

#### B. THE NONHARM PRINCIPLE

Characteristically, armed conflicts are highly destructive. Because they are so highly destructive, a chief function of a just war theory should be to morally constrain uses of armed force. Regularly, when armed force is used, human beings are killed or otherwise grievously harmed. Accordingly, I want to presuppose the following specification of the nonmaleficence principle:

*Nonharm principle.* It is morally obligatory not to actually harm or seriously risk harming other persons grievously.

Again, for brevity, this principle can be expressed using the words ‘actually’ and ‘or seriously risk harming’, but then it should be read as containing those words implicitly. That is, it is morally obligatory not to [actually] grievously harm [or seriously risk grievously harming] other persons.

Even though restricted to acts of grievously harming, the nonharm principle also holds comprehensively of all cases. It is a moral requirement of moral universalism that every human being, everywhere in the world, must refrain from actually grievously harming or seriously risking grievously harming any human being, anywhere in the world.

The nonharm principle is a specification of the nonmaleficence principle, but what is specification? How are moral principles specified? The relation between a moral principle and its specifications is analogous to the relation between a genus and its species. In effect, when we specify a moral principle, we limit its scope to a specific kind (or kinds) of cases, thereby circumventing problems of indeterminateness about other kinds of cases. In effect, the nonharm principle limits the scope of the nonmaleficence principle to acts of grievously harming, thereby circumventing problems of indeterminateness about acts of harming of other kinds.

As R. M. Hare explained, there is a ‘difference between universality and generality’ (1981: 41). The distinction between the universal and the particular is different from the distinction between the general and the specific. A moral principle that specifies a universal moral principle is itself a universal moral principle.

In a deontological theory, it matters whether an action is performed intentionally, but it also matters whether an action is performed knowingly, recklessly or negligently. By analogy with the definition of criminal homicide in the *ALI Model Penal Code*, I propose to specify the nonharm principle as follows. It is morally obligatory not to intentionally, knowingly, recklessly or

negligently harm other persons grievously. It is a moral requirement of moral universalism that every human being, everywhere in the world, must refrain from actually grievously harming or seriously risking grievously harming any human being, anywhere in the world, whether intentionally, knowingly, recklessly or negligently.

### C. HUMAN RIGHTS THEORY

Which kinds of acts of harming other persons are acts of harming them grievously? In paradigmatic armed conflicts, innocent persons are actually grievously harmed in many or all of the following ways: they are killed, raped, enslaved, tortured, arbitrarily detained, forcibly deprived of crucial property, starved, denied essential medical care and so forth. Among the human rights listed in the UDHR, such acts of grievously harming are expressly prohibited: 'Everyone has the right to life, liberty and security of person' (Article 3); 'No one shall be held in slavery or servitude' (Article 4); 'No one shall be subjected to torture' (Article 5); 'No one shall be subjected to arbitrary arrest, detention or exile' (Article 9); 'No one shall be arbitrarily deprived of his property' (Article 17); 'Everyone has the right to . . . [basic] food, clothing, housing and medical care' (Article 25); and so forth (UDHR 1948).

Arguably, the concept of grievously harming is a somewhat indeterminate concept. Rather than simply presuppose it, I want to sharpen it by means of a theory of human rights: acts of grievously harming human beings are acts of gravely violating their basic human rights. It is morally obligatory not to gravely violate the basic human rights of other persons.

Accordingly, I propose to reformulate the original nonharm principle:

*Nonharm principle.* It is morally obligatory not to actually violate gravely or seriously risk violating gravely the basic human rights of other persons.

It is presupposed that this formulation of the nonharm principle and the original formulation of it are equivalent. It can be abbreviated as follows. It is morally obligatory not to gravely violate the basic human rights of other persons.

Moreover, the following specification is presupposed. It is morally obligatory not to actually violate gravely or seriously risk violating gravely the basic human rights of other persons, whether intentionally, knowingly, recklessly or negligently. Let me provide some examples. Evidently, to intentionally or knowingly kill noncombatants is to actually violate their right to life. And to intentionally risk or knowingly risk killing them is to seriously risk violating their right to life. By recklessly imposing a blockade,

responsible agents could seriously risk starving civilians. By negligence of command, military officers could seriously risk acts of rape by their soldiers.

To generalise, in accordance with a recent tendency among just war theorists (Orend 2006: 5), I presuppose that a just war theory should be human-rights based, but the word 'based' is potentially misleading.<sup>6</sup> I would reject the foundationalist thesis that there are principles of human rights that constitute (part of) the fixed and unalterable basis of a just war theory. Nonetheless, according to coherentism, a just war theory can be elucidated by interrelating it with a human rights theory. In particular, I am presupposing that the concept of 'grievously harming' can be elucidated by interrelating it with the concept of 'gravely violating basic human rights'.

But which kinds of acts of violating basic human rights are acts of violating those rights gravely? As the words 'grievously' and 'gravely' indicate, there are problems of scale or degree. Moreover, the human rights expressed in the quoted UDHR articles are somewhat indeterminate, although these articles are elaborated in later human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Even though sharpened by human rights theory, the concept of grievously harming remains somewhat indeterminate.

Therefore, acceptance of the nonharm principle by diverse responsible agents is compatible with principled moral disagreement among them regarding how it should be applied to difficult cases.

#### D. SUBSUMPTION ARGUMENTS

How should we deliberate morally about the use of armed force in terms of the nonharm principle? To answer this question, I start with the idea of 'subsumption'. Apparently, the deliberative process of applying moral principles to human actions involves a process of subsumption. Particular acts are subsumed under moral principles. Relatedly, more specific moral principles are subsumed under more general moral principles. For instance, the nonharm principle is subsumed under the nonmaleficence principle. Thus, according to just war theory, particular military actions or particular uses of armed force are subsumed under just war principles and just war principles are subsumed under comprehensive moral principles.

As an illustration of the idea of subsumption, let me examine a moral argument, the logical form of which is termed 'hypothetical syllogism':

1. If *A* is an act of grievously harming other persons, then it is morally obligatory not to perform *A*.
2. If *A* is an act of killing other persons, then *A* is an act of grievously harming other persons.

3. Therefore, if *A* is an act of killing other persons, then it is morally obligatory not to perform *A*.

The first premise of this moral argument is a compact reformulation of the nonharm principle. The second premise involves the subsumption of a more specific kind of act (killing) under a more general kind of act (grievously harming). More briefly, the conclusion can be reformulated thus: it is morally obligatory not to kill other persons. By means of this hypothetical syllogism, this more specific moral principle about killing is logically deduced from both a more general moral principle about grievously harming and the stated subsumption. I call such arguments involving processes of subsumption ‘subsumption arguments’.

By what process of moral deliberation should the nonharm principle be applied to particular cases of armed conflict? At the start of this chapter, there is a block quotation about the particular case of armed conflict during 2011 in Libya. Let me summarise, by means of a further process of subsumption, how the nonharm principle is applicable to this case. The preceding hypothetical syllogism – with the schematic letter ‘*A*’ – is a schematic moral argument. By contrast, the following is a particular moral argument about the case, the logical form of which is termed ‘*modus ponens*’:

1. This particular act of indiscriminate shelling is an act of killing other persons.
2. If this particular act of indiscriminate shelling is an act of killing other persons, then it is morally obligatory not to perform this particular act of indiscriminate shelling.
3. Therefore, it is morally obligatory not to perform this particular act of indiscriminate shelling.

The first premise of this moral argument stems from an observation made in April 2011 about a particular use of armed force in Misrata, Libya. The second premise is obtained by substituting the phrase ‘this particular act of indiscriminate shelling’ for the letter ‘*A*’ in the conclusion of the schematic moral argument. In this way, this particular use of armed force is subsumed under the schematic moral argument.

Presumably, subsumption arguments are, or are explicable as, deductive arguments. Usually, they are stated less tediously, but my purpose here is to exhibit clearly how the conclusion of a subsumption argument follows logically from the premises. For simplicity, I utilise logical forms from propositional logic, but some other type of logic might enable a deeper analysis – for instance, a predicate logic, deontic logic or combined deontic-modal logic (Lango 2007a). However, there is no space here to explore such complications.

## E. COHERENTISM VERSUS FOUNDATIONALISM

I want to challenge a foundationalist thesis – namely, that wholly adequate moral judgements about particular cases can always be obtained entirely by means of subsumption arguments. Specifically, I am challenging a foundationalist thesis about just war principles – namely, that wholly adequate moral judgements about particular cases of armed conflict can always be obtained entirely by means of subsumption arguments with fixed just war principles as premises.

Admittedly, subsumption arguments are often necessary, but they are often not sufficient. In this book, I am defending the coherentist thesis that moral deliberation about the use of armed force should involve a process of mutual adjustment of moral judgements about particular cases and specific issues, generalised just war principles and such comprehensive moral principles as nonmaleficence and beneficence. Such moral deliberation includes not only subsumption arguments, but also arguments of other types. For instance, there are ‘best-justification arguments’ – that is, arguments from moral judgements about particular cases or specific issues to the moral principles that explain or justify those moral judgements most adequately. Mutual adjustment involves both top-down argumentation and bottom-up argumentation.

Additionally, my conception of moral deliberation includes the idea of ‘overriding’ a moral principle. Let me provide a key illustration. Fundamental to the noncombatant immunity principle is a distinction between acts performed intentionally and acts performed knowingly. Clearly, an act of killing noncombatants is an act of grievously harming them, whether it is performed intentionally or it is performed knowingly. Consider, then, the following hypothetical syllogism, which closely parallels the one above:

1. If *A* is an act of grievously harming other persons, then it is morally obligatory not to perform *A*.
2. If *A* is an act of killing noncombatants knowingly, then *A* is an act of grievously harming other persons.
3. Therefore, if *A* is an act of killing noncombatants knowingly, then it is morally obligatory not to perform *A*.

May the nonharm principle be overridden when noncombatants are killed knowingly (but not intentionally)?

According to the casuistic thesis, real-world moral judgements about particular cases of armed conflict should be made on a case-by-case basis. Regard, for example, the particular case of US and NATO counterinsurgency operations in Afghanistan. According to a UN report about the protection of civilians in Afghanistan during 2011, ‘410 civilian deaths resulted from the operations of Pro-Government Forces’ (UNAMA 2012: 2). From the

temporal standpoint of the year 2011, agents responsible for US and NATO counterinsurgency operations in Afghanistan should ask: may the nonharm principle be overridden when these 410 civilians are killed?

In my cosmopolitan just war theory, the standpoint of the Security Council is featured. Presumably, when the Security Council authorised military measures in the Libya case, it was anticipated, or ought to have been anticipated, that the US and NATO, by launching airstrikes against military targets, could knowingly risk, but not intend, harm to noncombatants. To countenance such harm to noncombatants, may responsible agents of global governance override the nonharm principle?

These are challenging questions for a just war theory. Each of them presupposes the idea of ‘overriding’ a moral principle. In the fourth part of this chapter, ‘Moral Deliberation’, the general subject of overriding is discussed. And in the section ‘Collaterally Damaging Noncombatants’ in Chapter 9 (‘All Things Considered’), there is a discussion of the specific subject of overriding the moral obligation not to kill noncombatants knowingly.

### III. BENEFICENCE

To be beneficent, that is, to promote according to one’s means the happiness of others in need, without hoping for something in return, is every man’s duty.

Kant ([1797] 1991: 247 [453])

If there are things that are intrinsically good, it is *prima facie* a duty [of beneficence] to bring them into existence rather than not to do so, and to bring as much of them into existence as possible.

W. D. Ross ([1930] 2002: 24)

#### A. A COMPREHENSIVE PRINCIPLE OF BENEFICENCE

As these quotations illustrate, the idea of beneficence is firmly rooted in the history of ethics. In this book, I presuppose the following comprehensive moral principle of beneficence:

*Beneficence principle.* It is morally obligatory to attempt as much as possible to help other persons.

A moral requirement of moral universalism is that every human being, everywhere in the world, must attempt, as much as possible, to help any human being, anywhere in the world.

Whereas the nonmaleficence principle is, to use Kant’s terms, a perfect duty, this beneficence principle is, as the qualification ‘as much as possible’

implies, an imperfect duty. Similarly, Kant qualified his duty of beneficence with the phrase ‘according to one’s means’ and asked: ‘How far should a man expend his means in practicing beneficence?’ ([1797] 1991: 248 [454]). A comparable question needs to be asked about my beneficence principle: when attempting to help, how much is possible?

To repeat, I am investigating the question of principled moral disagreement – that is, the question of why well-intentioned, knowledgeable just war theorists can profoundly disagree about principles and cases. Let me stress here that there can be principled moral disagreement about how the last question should be answered. Arguably, the relevant concept of helping is a concept that is somewhat indeterminate. Arguably, there are difficult cases where it cannot be determined whether a beneficence principle has been satisfied.

Obviously, beneficent attempts can fail. Nevertheless, when we attempt, as much as possible, to help another person, we could satisfy the beneficence principle, even if our attempt were to fail. Consider a stock illustration. A person is drowning in a rip tide, so you attempt to rescue him, but you are not an expert swimmer. Before you are able to reach him, he drowns. Nonetheless, because you attempt as much as possible to rescue him, you satisfy the beneficence principle. Paraphrasing Kant, the principle mandates that we attempt to help according to our means; when we do this, we satisfy the principle, even if it proves beyond our means to help. The beneficence principle does not mandate success.

There is a problem of ‘distant strangers’ (O’Neill 1996: 113–21). Human beings have personal projects and goals. Surely, each and every human being is entitled to promote reasonably his or her own personal well-being. Truly, the beneficence principle would be overly demanding, if it morally required inordinate sacrifice of personal well-being for the well-being of others. Accordingly, I would understand Kant’s question, more explicitly, thus: given that we are entitled to expend our means somewhat in pursuit of our own well-being (and the well-being of our family and friends), how much should we expend our means in practicing beneficence to other persons? In particular, how much should we expend our means in practicing beneficence to distant strangers in foreign lands – for example, imminent victims of genocide?

Compounding the problem of distant strangers, there is a problem of state borders. Comparable to the question about distant strangers in foreign lands, there is this question: how much should we expend our means in practicing beneficence to distant strangers in our own country – for instance, those who lack medical insurance? As a US citizen residing in New York, Montreal is less distant from me than Phoenix. Surely, a beneficence principle should not be inclusive of more distant compatriots in Phoenix, but exclusive of less distant foreigners in Montreal. In accordance with moral universalism,

it is presupposed (roughly) that the distinction between distant foreigners and distant compatriots is not (usually) morally relevant (Fabre 2012: 31–8).

To summarise, a cosmopolitan just war theory is a morally universalist theory. The beneficence principle should hold equally and inalienably of all members of the human family, regardless of state borders and no matter how distant. It is morally obligatory to attempt to help other persons anywhere in the world, as much as it is possible to do so.

#### B. THE COUNTERHARM PRINCIPLE

By reflecting on the idea of beneficence, duties to do or promote good can be distinguished from duties to prevent or remove harm. Help can be promotive or protective. Accordingly, I want to presuppose a specification of the comprehensive beneficence principle – namely, that it is morally obligatory to attempt, as much as possible, to stop other persons from harming people grievously.

Since the term ‘harm’ encompasses both actual harm and harm seriously risked, the presupposed principle is, more explicitly, this:

*Counterharm principle.* It is morally obligatory to attempt as much as possible to stop other persons from actually harming or seriously risking harming people grievously.

For brevity, the principle can be expressed without the words ‘actually’ and ‘or seriously risk harming’, but then it should be read as containing those words implicitly. That is, it is morally obligatory to attempt, as much as possible, to stop other persons from [actually] harming [or seriously risking harming] people grievously. The term ‘stop’ is used broadly to include both acts of preventing and acts of removing.

Similarly, William Frankena’s ‘principle of beneficence’ includes the following parts: ‘One ought to prevent evil or harm’ and ‘One ought to remove evil’ (1973: 47). But these moral requirements of beneficence are broader than the counterharm principle. For some harms to other persons that one ought to prevent or remove occur naturally (e.g. because of hurricanes or floods) and some harms to other persons that one ought to prevent or remove occur humanly (e.g. by raping or kidnapping). By contrast, the counterharm principle specifically morally obligates agents to stop other persons from grievously harming people.

There are controversies among moral theorists about the moral import of two interrelated distinctions – that between killing and letting die and that between doing and allowing. The nonharm principle morally obligates us not to ‘do’ grievous harm to people. Does it also morally obligate us not to ‘allow’ people to be grievously harmed? Indeed, it is dubious whether

this question should be answered affirmatively. By contrast, the counterharm principle morally obligates us to stop other persons from grievously harming people. Even if it cannot be said that we ‘harm’ people grievously by ‘letting’ them be killed by other persons, the counterharm principle morally obligates us to attempt, as much as possible, to stop such killing.

Rather than simply presupposing the concept of grievously harming, I am sharpening it by means of a theory of human rights. Because people are grievously harmed when their basic human rights are gravely violated, we are morally obligated by the counterharm principle to attempt, as much as possible, to stop other persons from gravely violating basic human rights.

Accordingly, I propose to reformulate the stated counterharm principle:

*Counterharm principle.* It is morally obligatory to attempt as much as possible to stop other persons from actually violating gravely or seriously risking gravely violating people’s basic human rights.

It is presupposed that this formulation of the counterharm principle and the original formulation are equivalent. It can be abbreviated as follows. It is morally obligatory to attempt as much as possible to stop other persons from gravely violating people’s basic human rights.

Also, the formulations can be expressed without the qualifying phrase ‘as much as possible’, but then they should be understood as implicitly qualified by that phrase.

Furthermore, the following specifications are presupposed. It is morally obligatory to attempt, as much as possible, to stop other persons from intentionally, knowingly, recklessly or negligently harming people grievously. It is morally obligatory to attempt, as much as possible, to stop other persons from gravely violating people’s basic human rights, whether intentionally, knowingly, recklessly or negligently.

### C. HUMAN RIGHTS AND HUMAN DUTIES

Moral theory is controversial. There are controversies among moral philosophers about the stringency of beneficence. The view of W. D. Ross is that: ‘Non-maleficence is apprehended as a duty distinct from that of beneficence, and as a duty of a more stringent character’ ([1930] 2002: 21). (His view is discussed further in Chapter 9, ‘All Things Considered’.) Using his language, let me summarise a more sceptical view: whereas nonmaleficence is apprehended as a moral obligation, beneficence is apprehended as a moral ideal; and moral obligations are more stringent than moral ideals.<sup>7</sup> In terms of this sceptical view, let me voice an objection to the counterharm principle. That principle is a specification of the beneficence principle. Because beneficence is only a moral ideal, we would be morally

praiseworthy if we were to counter grievous harm as much as possible, but we are under no moral obligation to do so.

In light of such controversy, I have to presuppose the counterharm principle. Indeed, that principle can be derived by a subsumption argument from the beneficence principle, but I also have to presuppose the beneficence principle. Such top-down reasoning by itself is disputable.

In accordance with coherentism, the counterharm principle can be elucidated by interrelating it with a human rights theory. Human rights entail correlative human duties. Henry Shue has advocated a ‘tripartite typology of duties’ – namely, duties to ‘*avoid depriving*’, duties to ‘*protect from deprivation*’ and duties to ‘*aid the deprived*’ (1996: 52 [emphasis in original]). For example, correlative to the right to life, there is a tripartite typology of duties: the duty to avoid taking people’s lives, the duty to protect people from threats to their lives and the duty to aid people in preserving their lives. In general, correlative to each basic human right, there is such a tripartite typology of duties. In particular, correlative to each basic human right, there is the duty to protect people from violations of that basic human right. The counterharm principle can be supported by a human rights theory that includes this conception of a tripartite typology of duties.<sup>8</sup> But human rights theory is also controversial.

#### D. COUNTERING GRIEVOUS HARM

Instructively, Gilbert Ryle distinguished between verbs of ‘achievement’ (or ‘success’) and verbs of ‘activity’ (or ‘process’) (1949: 149–53). I am regimenting uses of the verbs ‘stop’ and ‘counter’ as follows. The verb ‘stop’ is an achievement verb, whereas the verb ‘counter’ is a process verb. When we stop an attack, what we achieve is the state of affairs ‘that the attack is stopped’. By contrast, when we counter an attack – for instance, by launching a counterattack – we engage in a process that might not be successful. A counterattack might fail to stop an attack.

As its name suggests, the counterharm principle morally obligates agents to ‘counter’ grievous harm. It is morally obligatory (as much as possible) to counter grave violations of basic human rights. Of course, when we act so as to counter such violations, we might (wholly or partly) fail to stop them. For example, a targeted military operation to rescue hostages of Somali pirates might fail; in February 2012, two of sixteen hostages were killed in such a rescue operation by the Danish Navy (Goodman 2012). Again paraphrasing Kant, the counterharm principle mandates that we counter grievous harm according to our means. When we do this, we satisfy the principle, even if we fail to stop the grievous harm. What is morally obligatory is to engage, as much as possible, in the process of countering grievous harm.

Therefore, it is essential that the stated formulations of the counterharm

principle are qualified by the verb ‘attempt’, which is a verb of process. When we engage in the process of attempting to stop an attack, our attempt might fail; the resultant state of affairs might be ‘that the attack is not stopped’. What is morally obligatory is to engage, as much as possible, in the process of attempting to stop other persons from grievously harming people. But the counterharm principle does not mandate success.

#### E. MORAL CONFLICT

By what process of moral deliberation should the counterharm principle be applied to cases of armed conflict? To begin with, let me illustrate the role of the principle in subsumption arguments. Frequently, in the conduct of a military operation, enemy combatants kill noncombatants. Evidently, acts of stopping enemy combatants from killing noncombatants comprise a specific kind that is subsumed under a general kind – namely, acts of stopping other persons from grievously harming people. Utilising this subsumption and the counterharm principle, a subsumption argument can be constructed, the conclusion of which is that it is morally obligatory to attempt to stop enemy combatants from killing noncombatants.

In particular cases of armed conflict, there can be moral conflict. For an illustration, let me summarise some subsumption arguments about the Libya case. From the temporal standpoint of 11 April 2011, consider a particular act by the crew of a Libyan Government tank of firing a shell indiscriminately into Misrata. Given that this particular act would (actually) kill (or seriously risk killing) noncombatants in Misrata, it is morally obligatory to attempt to stop the tank crew from performing it.

Now suppose that there are some noncombatants who are close to the tank and envisage a pilot of a NATO aircraft contemplating an airstrike against the tank. Under the circumstances, the pilot cannot intentionally kill the tank crew, without also knowingly killing those nearby noncombatants. Evidently, acts of killing nearby noncombatants knowingly comprise a specific kind that is subsumed under a general kind – namely, acts of grievously harming other persons. Utilising this subsumption and the nonharm principle, a subsumption argument can be constructed, the conclusion of which is that it is morally obligatory not to kill the nearby noncombatants knowingly. (Such a subsumption argument is discussed above in the section entitled ‘Coherentism Versus Foundationalism’.)

Therefore, the pilot is ensnared in a moral dilemma. One of the horns is that it is morally obligatory to attempt to stop the tank crew from killing noncombatants in Misrata, and the other horn is that it is morally obligatory not to knowingly kill the noncombatants who are close to the tank. To satisfy one of these moral obligations is to violate the other. Can such moral dilemmas be resolved?

## IV. MORAL DELIBERATION

War is always a matter of doing evil in the hope that good may come of it.

B. H. Liddell Hart (1967: 379)

Characteristically, in armed conflicts, our adversaries perform acts that are highly destructive. In stopping them from performing such acts, we could perform acts that are highly destructive. In stopping them from harming people grievously, we could harm people grievously. In stopping them from killing our noncombatants, we could kill their noncombatants. Consequently, we could be ensnared in various sorts of moral dilemmas. How should these moral dilemmas of armed conflict be resolved? This is a challenging question for a cosmopolitan just war theory, one that is addressed in Chapter 9, 'All Things Considered'.

## A. MAY A MORAL PRINCIPLE BE OVERRIDDEN?

The process of moral deliberation is a temporal process. It is from a particular temporal standpoint that we deliberate morally about a particular case. From the temporal standpoint of 11 April 2011, the pilot is ensnared in this moral dilemma about the Libya case.

To generalise, from particular temporal standpoints, we engage in moral deliberation about particular cases of armed conflict. Paradigmatically, we encounter moral conflict between the nonharm principle and the counterharm principle. Therefore, some challenging questions for a just war theory are as follows. To obviate moral conflict between these two comprehensive moral principles, may we override the nonharm principle? To resolve such moral dilemmas as the one about the Libya case, may we override the nonharm principle?

I am exploring the question of why well-intentioned, knowledgeable just war theorists can profoundly disagree about principles and cases, but there can also be principled moral disagreement between just war theorists and theorists of other sorts. In introductory works about the ethics of war and peace, just war theory is standardly contrasted with pacifism (Dower 2009). Of course, there is no single pacifist theory that is unanimously accepted, but instead there are various pacifist theories (Cady 2010). Arguably, a pacifist theory ought to endorse the nonharm principle absolutely. Let me raise some contrasting questions that are challenging for such a pacifist theory. To obviate moral conflict between the nonharm principle and the counterharm principle, may the counterharm principle be overridden? To resolve such moral dilemmas as the one about the Libya case, may the counterharm principle be overridden? A main

point is that when there is moral conflict between two moral principles, there can be principled moral disagreement about which of them may be overridden.

#### B. PRIMA FACIE MORAL PRINCIPLES

The nonharm principle should not be construed as an absolute moral principle. Instead, it should be construed as a prima facie moral principle. More generally, a main thesis is that the four comprehensive moral principles – and such specifications of them as the nonharm principle and the counterharm principle – are prima facie moral principles.

Similarly, the duties of nonmaleficence and beneficence are, according to W. D. Ross, prima facie duties. Also, Beauchamp and Childress interpret their four principles as prima facie principles (2009: 15). (The threat-seriousness criterion contains the phrase ‘justify prima facie’, but the term ‘prima facie’ there has a different sense.)

An absolute moral obligation must never be violated, it must always be fulfilled, whatever the consequences, whatever the circumstances and, as John Finnis, Joseph Boyle, Jr and Germain Grisez add, whatever the good intentions (1987: 77).

By contrast, a prima facie moral obligation need not always be fulfilled; instead, sometimes it may be violated. Roughly, we ‘fulfill’ the moral obligation to perform an action by performing it, and we ‘violate’ the moral obligation to perform an action by refraining from performing it.

More exactly, I propose to interpret the term ‘prima facie’ in terms of ideas of moral presumption and burden of proof (Childress 1982: 64–73). For example, when we deliberate about whether to harm other persons grievously, we have to make the moral presumption that we must not. To override this moral presumption, we have the burden of proving that we may. Central to the meaning of the term ‘prima facie’ is the following conception. So long as this burden of proof has not been satisfied, what we morally presume to be our obligation actually is our obligation. So long as the burden of proof has not been satisfied, we are morally obligated not to harm other persons grievously. Accordingly, instead of saying ‘to override the moral presumption that the nonharm principle holds’, we can also say, more briefly, ‘to override the nonharm principle’.

A key point is that there should be a set of necessary and sufficient moral criteria for determining whether this burden of proof has been satisfied.

#### C. WHY ACCEPT JUST WAR PRINCIPLES?

In the preceding chapter, I raised the question of how the legitimacy criteria in the High-level Panel Report should be elucidated, revised or

supplemented. With the aim of answering this question in later chapters, I am exploring the question of why just war principles should be accepted in this chapter.

Let me summarise my answer to this last question. Just war principles morally constrain responsible agents from using armed force unjustly. When we morally deliberate about whether to harm other persons grievously by the use of armed force, we have to make the moral presumption that they must not. To override this moral presumption, we have the burden of proving that we may.

A main thesis is that the core just war principles of just cause, last resort, proportionality and noncombatant immunity are moral criteria for determining whether this burden of proof has been satisfied.

Indeed, these four principles might be supported by subsumption arguments. Even if illuminating, such subsumption arguments would not be adequate. They do not fully answer the question of why just war principles should be accepted. Briefly, the four core just war principles should be accepted, so that the nonharm principle may be overridden.

Each core just war principle by itself is a necessary – but not a sufficient – moral criterion for determining whether the nonharm principle may be overridden. For example, suppose that, in a particular case, it has been proven that the just cause principle is satisfied. There is still the burden of proving that the ancillary just war principles are satisfied.

#### D. AN EPISTEMIC STANDARD

To satisfy such burdens of proof, there is need for sufficient evidence. What standard of evidence should a just war theory accept?

In domestic jurisprudence, there are different standards of evidence. ‘Because of the close connection between law and morality’, Lawrence Crocker maintained, ‘the law’s burden concepts have particular application to various sorts of moral disputes as well as to ethical theory’ (2008: 272). Is there a legal concept of burden of proof that has particular application to just war theory?

In a criminal trial, the defendant is presumed to be innocent, and the prosecution has the burden of proving that the defendant is guilty. This burden of proof is subject to a very strong standard: there must be no reasonable doubt that the defendant is guilty.

By contrast, for civil trials, there is usually a far weaker standard of the preponderance of the evidence. Roughly, plaintiffs in such trials have the burden of proving that their claims are ‘more likely than not’, even if by an iota (Crocker 2008: 275).

To satisfy burdens of proving that just war principles are satisfied, the standard of ‘beyond a reasonable doubt’ is too strong (ICISS 2001a: 35).

An armed conflict is a historical event, and historical evidence about past historical events is obtained crucially through the testimony of historical documents. A present or imminent armed conflict is history in the making or history about to be made. Evidence about a present or imminent armed conflict is also obtained crucially through testimony – for instance, the testimony of journalists, diplomats, spies and turncoats. And such testimony is itself often hearsay. In a criminal trial, there is time to corroborate testimony by witnesses about the guilt of the defendant; there is time to prove guilt beyond a reasonable doubt. By contrast, a present or imminent armed conflict is, paradigmatically, an emergency. There might not be time to prove that a military action is just beyond a reasonable doubt.

On the other hand, the standard of ‘preponderance of the evidence’ is too weak.

In order to morally constrain uses of armed force effectively, there is need for an intermediate standard of evidence. For some civil trials, there is an intermediate standard of ‘clear and convincing evidence’. Roughly, in such a trial, there is the burden of proving that the claim is ‘highly likely’ (Crocker 2008: 276). Between the extremes of ‘beyond a reasonable doubt’ and ‘more likely than not’, there is the intermediate of ‘highly likely’.

Analogously, a main thesis is that moral deliberation in just war theory should be governed by a standard of clear and convincing evidence:

*Epistemic standard.* The burden of proof must be satisfied by clear and convincing evidence.

Admittedly, the legal concepts of ‘beyond a reasonable doubt’, ‘preponderance of the evidence’ and ‘clear and convincing evidence’ are somewhat indeterminate. For each of these concepts, there are paradigm cases, but there are also difficult or borderline cases. Analogously, my presupposed concept of ‘clear and convincing evidence’ is somewhat indeterminate. Frequently, to obtain evidence that is clear and convincing, the particular circumstances of a particular case have to be examined quite closely. The standard of clear and convincing evidence is not a mechanical decision procedure. Consequently, acceptance of this epistemic standard by diverse responsible agents is compatible with principled moral disagreement among them regarding difficult cases.

Let me raise again a key question. How can we deliberate morally about the use of armed force, both on a case-by-case basis and in terms of generalised just war principles? In domestic jurisprudence, there is an analogous question. How can judges deliberate, both on a case-by-case basis and in terms of legal principles and statutory laws? Hopefully, these analogies with domestic jurisprudence serve to illuminate the main thesis

that, in addition to being principlistic, a cosmopolitan just war theory should be casuistic.

#### E. A SPECIFICITY STANDARD

Interrelated with the epistemic standard, there is a standard of specificity. Our real-world moral judgements about particular cases can be complicated and controversial when we consider all of the morally relevant details. When we apply just war principles to a particular military action, we have to specify morally relevant details sufficiently. And when we apply the last resort principle to an alternative nonmilitary measure, we also have to specify morally relevant details sufficiently. From a particular temporal standpoint, when we plan a military action or an alternative nonmilitary measure, we must envisage adequately the morally relevant details. Paradigmatically, various morally relevant details are entangled in historical cases, and a present or imminent case is history in the making or history about to be made.

Accordingly, a main thesis is that the process of applying just war principles to military actions and alternative nonmilitary measures should be governed by a moral requirement of specificity:

*Specificity standard.* The military action or nonmilitary measure must be sufficiently detailed.

How much detail and what sort of detail would be sufficient? This question can be answered fully only on a case-by-case basis. Of course, acceptance of this specificity standard by diverse responsible agents is compatible with principled moral disagreement among them regarding difficult cases.

The specificity standard and the epistemic standard are interrelated. To satisfy the various burdens of proving with clear and convincing evidence that a particular military action is just, that military action must be sufficiently detailed.

#### F. FORMULATING JUST WAR PRINCIPLES AS CONDITIONAL PROHIBITIONS

To say that it is morally obligatory not to grievously harm other persons is equivalent to saying that grievously harming them is morally prohibited. ('It is morally obligatory not to do A' is equivalent to 'it is morally prohibited to do A'.) The nonharm principle is a moral prohibition.

I propose to formulate just war principles as moral prohibitions. Consider, for instance, the following provisional formulation of a just cause principle: it is morally obligatory not to perform a military action, if there is not a just cause. Notice the word 'if' in this principle. What is morally prohibited is

the performance of the military action, 'if' – that is, on the condition that – there is not a just cause. In short, the just cause principle is a 'conditional prohibition'. (By contrast, a pacifist could affirm a moral prohibition that is unconditional – namely, that it is morally obligatory not to perform a military action.)

In later chapters, each core just war principle is formulated canonically as a conditional prohibition. For another example, consider the following provisional formulation of a last resort principle: it is morally obligatory not to perform a military action, if every reasonable nonmilitary measure has not been attempted.

When we morally deliberate about whether to harm other persons grievously by means of a particular military action, we have to make the moral presumption that we must not. To override this moral presumption, we have the burden of proving that the core just war principles are satisfied. What should be meant here by 'satisfy a just war principle'?

A just war principle is a moral prohibition. We satisfy it when we satisfy the burden of proving that it does not morally prohibit the military action. More exactly, it is a conditional prohibition. We satisfy it when we satisfy the burden of proving that the condition does not obtain. For instance, to establish that a military action is not morally prohibited by the stated just cause principle, we have the burden of proving that the stated condition does not obtain – that is, we have the burden of proving that there is a just cause. Also, to establish that the military action is not morally prohibited by the stated last resort principle, we have the burden of proving that the stated condition does not obtain – that is, we have the burden of proving that every reasonable nonmilitary measure has been attempted.

A main thesis is that each core just war principle is a necessary – but not a sufficient – moral criterion for determining whether the nonharm principle may be overridden. By formulating the core just war principles as conditional prohibitions, my purpose is to clarify and support this thesis.

A moral prohibition is different from a moral permission. ('It is morally permissible to do *A*' is equivalent to 'it is not morally obligatory not to do *A*'.) Significantly, a conditional prohibition is different from a conditional permission. Consider the following schematic conditional prohibition. It is morally obligatory not to do *A*, if *C* is not the case. Given this conditional prohibition, it does not follow (conceptually or logically) that it is not morally obligatory not to do *A*, if *C* is the case. That is, it does not follow (conceptually or logically) that it is morally permissible to do *A*, if *C* is the case. For instance, given the stated just cause principle, it does not follow (conceptually or logically) that it is morally permissible to perform the military action, if there is a just cause. Also, given the stated last resort principle, it does not follow (conceptually or logically) that it is morally

permissible to perform the military action, if every reasonable nonmilitary measure has been attempted.

In Chapter 9, 'All Things Considered', I investigate the process of moral deliberation, whereby the four core just war principles are applied to particular cases conjointly.

## NOTES

1. For a variety of views on the subject of noncombatant immunity, see Coady (2008), Coates (1997), Fabre (2012), Kasher (2007), Kaufman (2003), McMahan (2009) and Walzer (1977).
2. For a contrasting way of interrelating moral theory and the ethics of war and peace, see Norman (1995).
3. An instructive article relevant to this controversy is Hare (1996).
4. The specific issue of nonlethal weapons is thus interrelated with the idea of noncombatant immunity in Lango (2010c).
5. The philosophy of time and just war principles are interrelated in Lango (2004).
6. A classic article about basing just war theory on human rights theory is Luban (1980). Human rights theory is interrelated with the ethics of war in Rodin (2002).
7. For such a view, see Gert et al. (1997: 82–3). Also, see Beauchamp and Childress (2009: 198).
8. That conception is discussed more fully in Lango (2012).

## CHAPTER 4

# THEORY OF ACTION

What is an intentional action? Do moral concepts pertain primarily to intentional actions and secondarily to their consequences? How are just war principles applicable to courses of action and plans of action? In this chapter, these and other questions that interrelate moral theory and the theory of action are investigated.

However, this book is not exclusively a theoretical study, and topics in the theory of action are discussed quite incompletely.<sup>1</sup> The purpose is to enlarge the framework of presuppositions introduced in the preceding chapter. Again, to exhibit the relevance of the current chapter for later chapters, theoretical presuppositions are interrelated with topics in just war theory, including specific issues and particular cases.

To counterbalance overemphasis of the just cause principle, I am emphasising the last resort, proportionality and noncombatant immunity principles. For the sake of concreteness, this chapter continues to feature the idea of noncombatant immunity.

### I. HUMAN ACTIONS

The military actions of groups such as tank crews, regiments and armies are emergent from, supervenient on or reducible to actions performed collectively by human beings. Preliminary to discussing the subject of military actions in the second part of this chapter, I discuss, in this first part, the subject of human actions.

#### A. MORAL THEORY AND HUMAN ACTIONS

The cosmopolitan just war theory that I am developing is a deontological theory. Just war principles are deontological principles, as are the comprehensive moral principles. Fundamentally, deontological principles obligate, permit or prohibit the performance of actions. Deontological judgements are primarily moral judgements of human actions.

Human actions are performed by human agents. As agent-centred deontological principles, just war principles morally constrain human agents from performing unjust military actions, but they also morally constrain human agents to perform just military actions. Moreover, comprehensive moral principles such as the nonharm principle are agent-centred. From the agential standpoint of each and every human agent who is contemplating the use of armed force, the nonharm principle is centred on him or her. It is morally obligatory for him or her not to actually harm or seriously risk harming other persons grievously, whether intentionally, knowingly, recklessly or negligently.

Characteristically, armed conflicts are highly destructive. Regularly, when human beings use armed force, they intentionally kill other human beings. To use armed force intentionally is to perform an intentional action, a characteristic consequence of which is destruction. Indeed, military actions can have highly destructive consequences.

How should a deontological theory morally evaluate the consequences of actions? Specifically, how should a just war theory morally evaluate the destructive consequences of the uses of armed force by human beings? Just war principles are applicable primarily to human actions, but it is also important to address questions about how they are applicable secondarily to consequences.

#### B. ACTIONS, INTENTIONS, CONSEQUENCES

What is an intentional action? I concur broadly with the answer of Alan Gewirth: ‘By an action’s being purposive or intentional I mean that the agent acts for some end or purpose that constitutes his reason for acting’ (1980: 27). (Note that this answer assumes that the term ‘action’ is understood.) What should be meant by the ‘end or purpose’ of an action? According to Gewirth: ‘this purpose may consist in the action itself or in something to be achieved by the action’ (1980: 27).

I propose to augment or revise Gewirth’s answer somewhat. The agential standpoint is a temporally prospective vantage point on future goals (or ends). (Henceforth the term ‘goal’ is used instead of the term ‘end’.) From a particular temporal standpoint, a particular human agent performs a particular action, intending thereby to achieve a particular future goal.

Among the kinds of goals that can be achieved by an action is a ‘consequence’ – that is, an event (or state of affairs) brought about by the action. The agential standpoint is a temporally prospective vantage point on future consequences. For an illustration, let me return to the Libya case (utilised in Chapter 3). From the temporal standpoint of 11 April 2011, the tank crew fires a shell indiscriminately into Misrata, with the goal of achieving, as a consequence, the occurrence of noncombatant deaths. Briefly, firing

the shell is the means, and noncombatant deaths are the goal. To generalise, from a particular temporal standpoint, a particular human agent (or group of human agents) performs a particular action, intending thereby to achieve, as a goal, a particular future consequence.

A consequence is a goal that can be achieved by an action, but there are goals of another kind. As Gewirth asserted: 'this purpose may consist in the action itself' (1980: 27). Future actions are also goals. The agential standpoint is a temporally prospective vantage point on future actions. By performing one action, a human being can have as a goal the performance of a second action. One action is performed as a means for performing another action as a goal. Actions are interlinked by a relation of means to goal. (In other words, they are interlinked by a means-end relation.) For example, the tank crew fires a shell indiscriminately into Misrata, with the goal of killing noncombatants. By performing the action of firing a shell, the tank crew has, as the goal, the performance of the action of killing noncombatants. Briefly, firing the shell is the means, and killing noncombatants is the goal. To generalise again, from a particular temporal standpoint, a particular human agent (or group of human agents) performs a particular action as a means of achieving, as a goal, his or her performance of a particular future action.

### C. INTRINSIC RESULTS

Which is the goal of firing the shell: the consequence (noncombatant deaths) or the action (killing noncombatants)? In short, my answer is that the goal is both the action and the consequence. Necessarily, if the action is performed, then the consequence happens. The consequence is internally related to the action – the action cannot be performed without the consequence happening. That is, the consequence is an 'intrinsic result' of the action (von Wright 1963: 39–40). The tank crew cannot kill the noncombatants without bringing about their deaths. Accordingly, in firing the shell, the tank crew cannot have killing them as a goal without having bringing about their deaths as a goal.

How, then, are just war principles applicable? Because they are primarily applicable to the action – the killing of the noncombatants – they are secondarily applicable to the consequence – the deaths of the noncombatants. Specifically, the received noncombatant immunity principle is thus applicable. Primarily, it is morally obligatory not to intentionally kill the noncombatants. The moral obligation not to intentionally kill them entails the moral wrongness of intentionally bringing about, as a consequence, their deaths. This entailment stems from the internal relation between the happening of the consequence and the performance of the action. Necessarily, if it is morally obligatory not to intentionally kill them, then it is morally wrong to intentionally bring about, as a consequence, their deaths. Secondarily, it is morally wrong for

the tank crew to intentionally bring about, as a consequence, the deaths of noncombatants.

Firing the shell is the means, and killing noncombatants is the goal. What is the moral import of the means-goal (or means-end) relation? In interrelating moral theory and the theory of action, it is essential to consider this question. If it is morally obligatory not to intentionally kill noncombatants, then it is morally obligatory not to fire the shell as a means of achieving the goal of killing them. This particular moral judgement may be subsumed under a comprehensive moral principle:

*Means-goal principle.* If it is morally obligatory not to perform action *A*, then it is morally obligatory not to perform action *B* as a means of achieving the goal of performing action *A*.

To supplement the comprehensive moral principles of nonmaleficence, beneficence, justice and autonomy, I presuppose also this means-goal principle.

#### D. EXTRINSIC CONSEQUENCES

The tank crew fires a shell indiscriminately into Misrata, thereby intentionally bringing about, as a consequence, the deaths of noncombatants. This consequence of their deaths is internally related to the action of killing them, but how is it related to the action of firing the shell? My answer is that the consequence is externally related to the action – it is possible both to perform the action of firing the shell and to fail to bring about the intended consequence of noncombatant deaths. It is possibly the case that both the tank crew fires the shell and the intended consequence of noncombatant deaths does not occur. That is, the consequence is an ‘extrinsic consequence’ of the action (von Wright 1963: 39–40). (Note that the term ‘consequence of an action’ is used broadly: both extrinsic consequences and intrinsic results are consequences.)

How are just war principles applicable here? Specifically, how is the received noncombatant immunity principle applicable? It is morally obligatory for the tank crew not to intentionally kill noncombatants. It is also morally obligatory for the tank crew not to fire the shell as a means of achieving the goal of killing noncombatants. But this moral obligation not to fire the shell does not in and of itself entail the moral judgement that it is morally wrong to intentionally bring about, as a consequence, the occurrence of noncombatant deaths. There is no entailment, because the relation between the performance of the action and the happening of the consequence is an external relation.

Nevertheless, the moral obligation and the moral wrongness are interrelated inherently but indirectly by the following two entailments. On the one hand,

the moral obligation not to intentionally kill noncombatants entails the moral wrongness of intentionally bringing about, as a consequence, their deaths. On the other hand – applying the means-goal principle – the moral obligation not to intentionally kill them entails the moral obligation not to fire the shell as a means of achieving the goal of killing them. In brief, the moral obligation about killing entails both the moral obligation about firing the shell and the moral wrongness of the consequent deaths. The moral obligation about firing the shell and the moral wrongness of the consequent deaths are interrelated inherently but indirectly by means of the stated entailments.

The just war theory that I am developing is a deontological theory. It is not a consequentialist theory. According to a deontological theory, moral judgements should be made primarily about actions. By contrast, according to a consequentialist theory, moral judgements should be made entirely about consequences. The moral judgement about the moral wrongness of intentionally bringing about, as a consequence, the deaths of noncombatants might be labelled a ‘consequentialist judgement’, simply because it is a moral judgement about a consequence, but such a label would be inappropriate or misleading. It is not a standard or orthodox consequentialist judgement. It does not stem entirely from a moral appraisal or moral weighing of good and bad elements in, or aspects of, the consequence.

A chief aim of subsequent chapters is to formulate generalised just war principles that are clearly deontological. In contrast to Johnson’s view that the just war principles of last resort and proportionality are prudential tests, my view is that they are deontological requirements, or so I argue in later chapters.

#### E. ATTEMPTING

Our doubts are traitors,  
And make us lose the good we oft might win,  
By fearing to attempt.

Shakespeare, *Measure for Measure* (I, iv, 78–9)

This quotation, torn from its original context, resonates with some of this chapter’s themes. In the fog of genocidal armed conflict within a failed state, members of the Security Council might fear to attempt armed humanitarian intervention, thereby losing the good that might be won. On the other hand, in the fog of aerial targeting of a terrorist leader from a hovering drone, doubts about the absence of proximate noncombatants might not be traitors.

The agential standpoint is a temporally prospective vantage point on future contingencies. Frequently, when we apply just war principles prospectively, we have to make moral judgements about the use of armed force under conditions of uncertainty and urgency. With the best of intentions, projected

human actions might be successful or they might be failed attempts. In interrelating moral theory and the theory of action, it is important to introduce a concept of 'acting intentionally', but it is also important to introduce a concept of 'attempting to act'.

The standpoint of the tank crew at the moment when the shell is fired is a temporal standpoint. From this particular temporal standpoint, the tank crew performs the particular action of firing the shell, intending thereby to achieve the particular future goal of killing noncombatants. At the moment of firing, there are no deaths. By contrast, at the moment of killing, necessarily there are deaths. At the moment of firing, this action of firing and the consequence of deaths are externally related. By contrast, at the moment of killing, the action of killing and the consequence of deaths are internally related. At the moment of firing, the agential standpoint of the tank crew is a temporally prospective vantage point on a future contingency: the projected action of killing noncombatants might be successful or it might be a failed attempt.

What, then, should be meant by 'attempting to act'? Actions are interlinked by a relation of means to goal. The time when the means is used is simultaneous with, or earlier than, the time when the goal might be achieved. (The past cannot be undone.) Typically, in armed conflict, the time of the means is earlier than the time of the goal, if only by a split second. From the temporal standpoint of the performance of an action as a means of achieving a future action as a goal, a human agent is attempting to perform the future action. (Similarly, from the temporal standpoint of the performance of an action as a means for bringing about a future consequence, a human agent is attempting to bring about the future consequence.) By 'attempting to act', I mean 'attempting to perform an action as a goal, by performing an action as a means of achieving that goal'.

The subject of attempting is interrelated with a variety of topics in just war theory, as later chapters attest. Let me mention some examples. First, according to the counterharm principle, it is morally obligatory to attempt, as much as possible, to stop other persons from grievously harming people. Second, the last resort principle mandates that, before resorting to the use of armed force, every reasonable nonmilitary measure must be attempted.

#### F. ACTING KNOWINGLY

Even when destroying an obvious insurgent headquarters or command center, counterinsurgents must take care to minimize civilian casualties. New, precise munitions with smaller blast effects can limit collateral damage.

*Counterinsurgency* (COIN FM 2006: E-6)

Even a traditionally civilian object such as a house can be a military target if it is occupied and used by military forces.

US Department of Defense (DOD 2003: F-1)

In light of these two quotations, let us imagine realistically a particular case – a US targeted military operation in Pakistan – from the temporal standpoint of a particular day in the year 2012. It is known that a leader of Al Qaeda is presently in a civilian object – a house. Aerial surveillance from a hovering drone detects the presence of a few noncombatants also in the house. To minimise noncombatant casualties, the remote pilot of the drone launches a precision-guided missile at the house, thereby intentionally killing the Al Qaeda leader. But there is also ‘collateral damage’.

The term ‘collateral damage’ is ambiguous. The word ‘damage’ functions as both noun and verb. People damage (the verb) something, and it suffers damage (the noun). Military forces collaterally damage (the verb) noncombatants, and the noncombatants suffer collateral damage (the noun). But the term ‘collateral damage’ is not simply a euphemism for such human damage, for it also encompasses collateral damage to property and the environment. Military forces collaterally damage (the verb) property and the environment, and property and the environment suffers collateral damage (the noun).

In the Pakistan case, does the drone pilot bring about, as a foreseen but unintended consequence, collateral damage (the noun) or does he (or she) knowingly collaterally damage (the verb)? To collaterally damage is, more explicitly, to perform the action of collaterally damaging. In short, my answer is that he both brings about the consequence and performs the action. Let me explain.

The drone pilot performs the action of launching the missile at the house, with the goal of bringing about, as an extrinsic consequence, the death of the Al Qaeda leader. Note that this consequence is also an intrinsic result of a second action that he performs – namely, his intentional action of killing the Al Qaeda leader. Moreover, he performs the action of launching the missile at the house, while foreseeing that noncombatant deaths will be an unintended consequence. This consequence is also extrinsic to the action; for it is possibly the case both that he launches the missile and that noncombatant deaths do not occur.

Is this consequence of noncombatant deaths also an intrinsic result of a third action that he performs – namely, his knowing (but not intentional) action of killing the noncombatants? By launching the missile, does he both intentionally kill the Al Qaeda leader and knowingly kill the noncombatants?

To answer this question, I presuppose Gewirth’s concept of ‘voluntary action’ (but with a qualification): ‘By an action’s being voluntary or free I mean that its performance is under the agent’s control in that he unforcedly

chooses to act as he does, knowing the relevant proximate circumstances of his action' (1980: 27). The qualification is that the word 'unforcedly' should be omitted. When a human agent performs a voluntary action, she knows sufficiently the relevant circumstances; she chooses to perform the action, for she might have chosen otherwise; and the action is under her control, in that it is within her power to refrain from performing the action.

This broad idea of acting 'voluntarily' is different from a narrower idea of acting 'willingly'. During the prelude phase of an armed conflict, potential belligerents could employ coercive measures; not only coercive nonmilitary measures, such as economic sanctions, but also deterrent (or compellent) threats to use armed force. When a human being is coerced to perform an action by means of a threat of serious harm, she does not perform it 'willingly', but she does perform it (in a broad sense of the term) 'voluntarily'. For she might have chosen not to perform it; instead, she might have chosen to attempt to stop or evade the threatened harm. In the face of coercion, we may submit or resist.

Clearly, an intentional action is a voluntary action. When we act to achieve goals, we act voluntarily. When a human agent performs a particular action for the sake of achieving a particular goal, that intentional action is under her control, in that it is within her power to refrain from attempting to achieve that goal.

Acting knowingly is acting voluntarily. At the moment of launching the missile, the drone pilot knows a very relevant circumstance – namely, that noncombatants will die. Indeed, he does not intend to kill them; killing them is not his purpose. Nevertheless, he voluntarily kills them. He chooses to kill them, for he might have chosen not to kill them. His action of killing them is under his control, in that it is within his power to refrain from killing them. By launching the missile, the drone pilot both intentionally kills the Al Qaeda leader and knowingly kills the noncombatants.

I am using the military term 'collateral damage', but there is a term more widely used in writings concerning just war theory: 'side effect'. The occurrence of noncombatant deaths is a 'side effect' of the launching of the missile by the drone pilot. But the term 'side effect' is misleading, insofar as it suggests that the deaths merely happen to occur, that their occurrence lies outside the drone pilot's sphere of control. However, because he is able to refrain from launching the missile, it is within his power to refrain from killing the noncombatants, and he knows this. By saying that he performs the action of knowingly killing them, rather than saying merely that he brings about the foreseen but unintended occurrence of their deaths as a side effect, we give expression to his responsibility for their dying. Even if he neither intends nor wants to do this, he kills them.

Is it morally obligatory for the drone pilot not to kill noncombatants knowingly? To kill other persons is to grievously harm them, whether

intentionally or knowingly. Therefore, by means of a subsumption argument with the nonharm principle as a premise, the following conclusion can be derived. It is morally obligatory not to kill noncombatants knowingly.

How should this destructive consequence of the drone pilot's airstrike – the foreseen but unintended occurrence of noncombatant deaths – be morally evaluated? Primarily, it is morally obligatory not to knowingly kill the noncombatants. This moral obligation entails the moral wrongness of knowingly bringing about, as a consequence, their deaths. This entailment stems from the internal relation between the happening of the consequence and the performance of the action. Necessarily, if it is morally obligatory not to knowingly kill them, then it is morally wrong to knowingly bring about, as a consequence, their deaths. Secondly, it is morally wrong for the drone pilot to knowingly bring about, as 'collateral damage', the deaths of noncombatants.

#### G. RISKING

The subject of the ethics of risk is interrelated with various topics in just war theory. Let me mention some examples. First, when a targeted military operation is attempted, there is often a risk of escalation. Second, in an unstable crisis, one might attempt a preventive first strike, rather than risk invasion. Third, in attempting to negotiate, while the adversary is mobilising militarily, one might risk military disadvantage.

But the subject of the ethics of risk is complex, in that it interrelates ideas of moral theory, the theory of action and the theory of knowledge. In the fog of armed conflict, moral judgements are often (if not always) made under conditions of risk and uncertainty. In attempting uncertainly to achieve a goal, we might risk not achieving it. While attempting uncertainly to counter harm, we might risk acting harmfully. Under conditions of uncertainty, we might foresee that a proposed military action is 'likely' to harm noncombatants and so, if we were to attempt to perform it, we would 'seriously risk' harming them. The ideas of attempting and risking are intertwined. And, problematically, the concepts of 'likelihood' and 'risk' admit of scale or degree. Clearly, there can be principled moral disagreement about the likelihood of harms and the seriousness of risks.

Consequently, my discussion of the subject of the ethics of risk is quite incomplete. For the sake of concreteness, the idea of noncombatant immunity is featured. In a study of the doctrine of double-effect (DDE), T. A. Cavanaugh reported that 'in standard contemporary double-effect cases (for example, tactical bombing that harms non-combatants) one foresees harm as an inevitable consequence' (2006: 12). By contrast, my view is that a noncombatant immunity principle should also encompass grievous harm foreseen as a likely consequence. The nonharm principle morally prohibits actual grievous harm and grievous harm seriously risked.

Under conditions of uncertainty, a human agent might seriously risk killing noncombatants. In the Pakistan case, the drone pilot foresees with certainty that noncombatants will be killed; and so, by using armed force, he knowingly kills them. In other cases, the foresight of human agents is clouded with uncertainty; they foresee that it is likely that noncombatants will be killed; and so, if they were to use armed force, they would seriously risk killing them.

In preceding sections, I have interrelated the concept of ‘acting intentionally’ with the concept of ‘acting knowingly’. In the following sections, I discuss the interrelated concepts of ‘acting recklessly’ and ‘acting negligently’. In rethinking or revising the traditional noncombatant immunity principle, it is essential to morally prohibit not only military actions that would actually grievously harm noncombatants intentionally, but also military actions that would seriously risk grievously harming them intentionally (even if, by luck or chance, they were not actually grievously harmed).

#### H. ACTING RECKLESSLY

Let us imagine realistically another particular case – a US targeted military operation in Yemen – from the temporal standpoint of a particular day in the year 2012. It is known that a truly dangerous terrorist leader is presently in a house. Human intelligence warns that it is likely that noncombatants are nearby. Consequently, a drone pilot foresees that, if he were to launch a precision-guided missile at the house, it is likely that noncombatants would die. Nonetheless, while seriously risking killing noncombatants, he launches the missile, with the goal of killing the terrorist leader. Of course, his attempt might fail or no noncombatant deaths might occur. Let us imagine, however, that he kills the terrorist leader and also that some noncombatants die. Is this consequence of noncombatant deaths an intrinsic result of an action that he performs – namely, a reckless action of killing the noncombatants?

Acting recklessly is acting voluntarily. When launching the missile, the drone pilot is conscious of a very relevant circumstance – namely, that it is likely that noncombatants will die. Hence he acts ‘recklessly’, in that ‘he consciously disregards a substantial and unjustifiable risk’ that he will kill them (ALI 1962: Section 2.02(2)). Indeed, he does not intend to kill them; killing them is not his purpose. Nevertheless, he voluntarily risks killing them. He chooses to risk killing them, for he might have chosen not to risk killing them. His action of killing them is under his control, in that it is within his power to refrain from launching the missile. It is within his power to refrain from killing the noncombatants. By launching the missile, the drone pilot both kills the terrorist leader intentionally and kills the noncombatants ‘recklessly’.

The time of launching is earlier than the time of killing. Notice that the

mental state ‘recklessly’ qualifies both the action of launching and the action of killing. The drone pilot launches the missile recklessly, and he kills the noncombatants recklessly. Similarly, in the Pakistan case, the mental state ‘knowingly’ qualifies both the action of missile launching and the action of killing noncombatants. Also, the mental state ‘intentionally’ qualifies both the action of using a means and the action of achieving the goal.

Moral requirements should be temporalised. In a criminal trial, the idea of recklessness is applied retrospectively; the prosecution strives to convince the jury that the defendant committed a criminally reckless act. Analogously, this moral idea of recklessness can be applied retrospectively to morally blame. Combatants can be morally blamed for having killed noncombatants recklessly.

Most importantly, the moral idea of recklessness should be applied prospectively to morally constrain. To recklessly kill (or seriously risk killing) other persons is to grievously harm them. Therefore, by means of a subsumption argument with the nonharm principle as a premise, the following conclusion can be derived. It is morally obligatory not to seriously risk killing noncombatants recklessly. From the temporal standpoint of the action of launching the missile, it is morally obligatory for the drone pilot not to seriously risk killing noncombatants recklessly.

The idea of noncombatant immunity is embodied in international laws regulating the conduct of war (i.e. the ‘laws of war’ or ‘international humanitarian law’). In particular, Protocol I (of 8 June 1977) to the Geneva Conventions (of 12 August 1949) contains a legal requirement of ‘due care’: ‘Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects’ (ICRC 1977a: Article 57(2)). Applied prospectively, this ‘due care’ requirement ought to constrain combatants from grievously harming civilians recklessly.

### I. ACTING NEGLIGENTLY

Let us imagine realistically a third particular case – a US targeted military operation in Somalia – from the temporal standpoint of a particular day in the year 2012. It is known that a truly dangerous terrorist leader is presently in a house. Without obtaining intelligence about noncombatants, a drone pilot intentionally kills the terrorist leader by launching a precision-guided missile. Collaterally, noncombatants die. Is this extrinsic consequence of the missile launching an intrinsic result of an action that the drone pilot performs – namely, a negligent action of killing?

Acting negligently is acting voluntarily. When launching the missile, the drone pilot acts ‘negligently’, in that ‘he should be aware of a substantial and unjustifiable risk’ that he might kill noncombatants (ALI 1962: Section

2.02(2)). Indeed, he does not intend to kill them; killing them is not his purpose. Nevertheless, he voluntarily risks killing them. For he chooses not to do what a 'reasonable person' would do (ALI 1962: Section 2.02(2)) – namely, obtain intelligence about whether noncombatants are nearby. Thus his action of killing noncombatants is under his control, in that it is within his power to obtain intelligence about noncombatants; if he were to discover that noncombatants are nearby, it would be within his power to refrain from launching the missile. By launching the missile, he both kills the terrorist leader intentionally and kills noncombatants 'negligently'. Notice that the mental state 'negligently' qualifies both the action of launching and the action of killing. In launching the missile, the drone pilot seriously risks killing noncombatants negligently; and by launching it, he kills noncombatants negligently.

But should combatants be held to such a 'reasonable person' standard? Would a 'reasonable' drone pilot obtain intelligence about noncombatants? To answer this last question, let me consult the new US counterinsurgency field manual (COIN FM), which (arguably) every US military officer ought to master. (The COIN FM is taught in US military academies.) In Appendix E, 'Airpower in counterinsurgency', there is a specific requirement to mitigate the negative effects of air power: 'Bombing, even with the most precise weapons, can cause unintended civilian casualties', but 'counterinsurgents must take care to minimize civilian casualties', and such 'adverse effects' can be mitigated, 'given timely, accurate intelligence' (COIN FM 2006: E-5, E-6). The imagined Somalia case is realistic; the drone pilot is negligent.

In Protocol I, there is a related legal requirement: 'Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects' (ICRC 1977a: Article 57(2)). Indeed, in a criminal trial by the ICC, this requirement can be applied retrospectively. On the other hand, applied prospectively, the legal requirement should constrain combatants from harming civilians negligently.

Analogously, the moral idea of negligence can be applied retrospectively to morally blame. Most importantly, it should be applied prospectively to morally constrain. To negligently kill (or seriously risk killing) other persons is to grievously harm them. Therefore, by means of another subsumption argument with the nonharm principle as a premise, the following conclusion can be derived. It is morally obligatory not to seriously risk killing noncombatants negligently.

#### J. KNOWINGLY RISKING AND INTENTIONALLY RISKING

It is morally obligatory not to intentionally, knowingly, recklessly or negligently harm other persons grievously. In interpreting this specification of the nonharm principle, it is essential to recognise that the four mental states

qualify not only actual harming, but also harming seriously risked. A deontological theory should include concepts of ‘intentionally risking’, ‘knowingly risking’, ‘recklessly risking’ and ‘negligently risking’. For brevity, the word ‘seriously’ is omitted, but these terms should be read as containing that word implicitly – for instance, ‘knowingly (seriously) risking’. Similarly, the word ‘actually’ is omitted in the terms ‘intentionally (actually) harming’, ‘knowingly (actually) harming’ and so forth. Obviously, reckless acts can impose grievous risks of harm, as can negligent acts. But what should be meant by the terms ‘knowingly risking’ and ‘intentionally risking’?

Traditionally, the noncombatant immunity principle is understood as morally permitting combatants to cause some foreseen but unintended harms to noncombatants, but only when those harms satisfy a standard of proportionately – that is (roughly), only when the harms are outweighed by relevant benefits. Thus, as the COIN FM mandates: ‘It is wrong to [intentionally] harm innocents’, but, under some (‘proportional’) circumstances, US combatants ‘may take actions where they knowingly risk, but do not intend, harm to noncombatants’ (COIN FM 2006: 7–23). Significantly, the COIN FM uses the phrase ‘knowingly risk’.

The moral obligation not to intentionally harm civilians is embodied in Protocol I: ‘The civilian population as such, as well as individual civilians, shall not be the object of attack’ (ICRC 1977a: Article 51(2)). Arguably, the moral obligation not to intentionally risk harming civilians is also (implicitly) embodied in Protocol I: ‘Indiscriminate attacks are prohibited’ (ICRC 1977a: Article 51(4)). Paradigmatically, for example, the indiscriminate bombardment of military targets and civilians involves both the intention to destroy military targets and (at least) the intention to risk harming civilians (if not also the intention to actually harm them). In brief, a truly indiscriminate attack, even when not involving the intention to actually harm civilians, involves the intention to risk harming them.

By contrast and paradigmatically, a bombardment that discriminates between military targets and civilians involves the intention to destroy military targets, while knowingly harming, or knowingly risking the harming of, civilians. Whereas the idea of ‘knowingly risking’ is linked with the idea of ‘attacking discriminately’, the idea of ‘intentionally risking’ is linked with the idea of ‘attacking indiscriminately’.

But what is the difference between ‘knowingly risking discriminately’ and ‘consciously risking recklessly’? Let me sketch one way that this question might be answered. Frequently, in armed conflicts, combatants are so remote from their targets that only what is likely can be foreseen. Precision-guided munitions can mitigate, but not always obviate, the harming of noncombatants. Let us suppose that we consciously risk harming noncombatants recklessly when we consciously fail to satisfy the ‘due care’ requirement (in Protocol I).

On the other hand, despite taking ‘all feasible precautions’, we might still foresee that it is likely that noncombatants will be grievously harmed; we might still knowingly risk grievously harming noncombatants. When launching an attack – despite attempting to discriminate with ‘due care’ between combatants and noncombatants – we might still knowingly risk grievously harming noncombatants.

In conclusion, it is morally obligatory not to actually grievously harm noncombatants knowingly, but it is also morally obligatory not to seriously risk grievously harming them knowingly. It is morally obligatory not to actually grievously harm them intentionally, but it is also morally obligatory not to seriously risk harming them intentionally. And it is morally obligatory not to actually grievously harm or seriously risk grievously harming them recklessly or negligently.

In light of these moral prohibitions, how should the received noncombatant immunity principle be revised? This question is addressed in Chapter 7, ‘Last Resort and Noncombatant Immunity’.

#### K. PLANNED COURSES OF ACTIONS

Finally, let me introduce the key concept of a ‘planned course of actions’. A voluntary action can be performed intentionally, knowingly, recklessly or negligently. An intentional action is performed for the sake of some goal. Typically, an intentional action is part of a ‘planned course of actions’ – that is, a course of actions that is followed for the sake of some goal. The actions in a planned course of actions are causally interlinked and have interlinked goals (e.g. by relations of means to ends). A planned course of actions is mutable: at any juncture, while carrying it out, its plan could be revised and so could its goal. Some plans are well-formulated in advance and others are partly or wholly improvised; some are expressly formulated and others are partly or wholly implicit. Usually, a plan is incomplete, in that it does not specify every action to be performed in realising its goal. Also, a group of interrelated plans is itself a plan, and such a plan could be incomplete, insofar as the component plans are incompletely interrelated. Furthermore, in anticipation of contingencies, there is need to provide for alternative courses of action, each of which might be followed to realise the goal.<sup>2</sup>

A main thesis is that just war principles are applicable primarily to planned courses of military actions.

## II. MILITARY ACTIONS

First, military might still matters in twenty-first-century geopolitics. The security challenges facing Europe include conflicts in its neighborhood, such as in Libya; terrorism from failed states further away; and emerging

threats such as the proliferation of weapons of mass destruction and cyberwarfare. What defines these threats is both their diversity and their unpredictability. Investing in homeland security and retrenching will not be enough to counter them.

Anders Fogh Rasmussen, Secretary-General of NATO (2011: 3)

In developing a cosmopolitan just war theory, my aim is to formulate generalised just war principles that are applicable to all forms of armed conflict. As NATO Secretary-General Rasmussen observed, NATO faces a ‘diversity’ of ‘threats’. To ‘counter them’, NATO might engage in diverse sorts of military actions or deterrent threats of military actions. What are military actions? Is the concept of ‘military action’ so vague and general as to be indeterminate? In this second part of the chapter, these questions and related questions are explored.

Indeed, Libya is in Europe’s Mediterranean neighbourhood. However, from a cosmopolitan point of view – to echo the title of the landmark report of the Commission on Global Governance, *Our Global Neighborhood* (CGG 1995) – our neighbourhood is global. Just as individual states have national security strategies, should the Security Council have a global security strategy? What is a cosmopolitan security strategy?<sup>3</sup>

To counter threats of ‘terrorism from failed states’, what should be our global counterterrorism strategy? The threats of ‘the proliferation of weapons of mass destruction and cyberwarfare’ are extraordinarily dire. What should be our global strategy to counter them?

Presumably, in asserting that ‘homeland security’ is not enough, Rasmussen is espousing something akin to NATO’s Cold War policy of ‘forward defence’. Unfortunately, just as one person’s freedom fighter is another person’s terrorist, so one person’s forward defence is another person’s looming offence. Should the Security Council endorse a proactive global security strategy that prioritises targeted military operations?

A strategy is a plan. To address such questions about global security strategies – and also other questions about military plans and actions – the concept of a ‘planned course of military actions’ is introduced. Complex military actions – for instance, military operations – have, as components, planned courses of military actions of individual human beings. The process of performing any military action in a planned course of military actions is a temporal process; correlatively, the process of applying just war principles to a planned course of military actions is a temporal process.

#### A. WHAT IS A MILITARY ACTION?

According to traditional state-centric just war theories, the primary agents that apply just war principles are states (or rulers of states), and the primary

targets to which those agents apply the principles are states (or the military actions of states). By contrast, my aim in this book is to formulate generalised just war principles that are applicable by all sorts of responsible agents to all forms of armed conflict. Indeed, interstate wars comprise a paradigm form of armed conflict, but so do revolutionary wars. Correspondingly, rulers of states comprise a sort of responsible agents, but so do leaders of armed revolutions.

Presumably, the term ‘armed conflict’ also encompasses armed humanitarian interventions, civil wars, insurgencies and counterinsurgencies and so forth. Noting the phrase ‘and so forth’, it might be surmised that there are problematic borderline cases. For example, is a military operation by UN peacekeepers against peace agreement ‘spoilers’ a form of armed conflict? What are armed conflicts? Who are responsible agents? Are the concepts of ‘armed conflict’ and ‘responsible agent’ so vague and general as to be indeterminate? The subject of indeterminate concepts is discussed in a later section, ‘Open Texture and Sufficient Resemblance’.

In order to generalise just war principles sufficiently, it is essential to have a sufficiently general concept of ‘military action’. The generalised just war principles of a cosmopolitan just war theory should be applicable to military actions of all types. To begin with, I list some types of military actions that are paradigmatic. Waging a war is a military action. More explicitly, some paradigm types of military actions are the waging of an interstate war, the waging of a revolutionary war and the waging of a civil war. In general, it is presupposed that to wage (or engage in) an armed conflict of any form is to perform a military action.

In accordance with coherentism, a just war theory can be elucidated by interrelating it with a theory of military affairs. In theorising about the waging of wars, different ‘levels’ of military action can be distinguished – namely, a tactical level, an operational (or ‘theatre’) level, a strategic level and a political level (Smith 2007: 13). At the political level, rulers of states, leaders of armed revolutions or other politically responsible agents deliberate about political purposes or goals. Traditionally, at this level, *jus ad bellum* principles are applicable; at the other three levels, *jus in bello* principles are applicable. By contrast, in order to generalise just war principles sufficiently, a main thesis is that the core just war principles should be applicable at all four levels.

At the strategic level, military commanders or other responsible agents plan military campaigns; at the operational level, military operations are planned. During the waging of an interstate war (e.g. the Second World War), there are military campaigns (e.g. the North African Campaign) and military operations (e.g. during the Battle of the Bulge). Carrying out such a military campaign is a paradigm type of military action, as is conducting

such a military operation. Presumably, there are military campaigns and operations in armed conflicts of other forms – for instance, civil wars and armed humanitarian interventions. Consider the cases of Libya and Rwanda. In carrying out a military campaign in 2011 against the Libyan Government, US and NATO air forces conducted military operations. In carrying out a military campaign in 1994 against the Rwandan Government, the RPF conducted military operations.

To generalise again, it is presupposed that to carry out a military campaign or conduct a military operation is to perform a military action, whatever the form of armed conflict. Generalised just war principles should be applicable to all such military actions.

The relevant concept of ‘military action’ is even more general. At the tactical level, during a standard military operation, there are particular combats. Fighting a combat is a military action. In participating in a combat, individual human agents use armed force. Any use of armed force by an individual human agent is a military action. A major in the US Marines, Glen G. Butler, in discussing his experiences in the Iraq War, said: ‘I have not shot one round without good cause’ (Butler 2004). Suppose that he meant by ‘good cause’ a cause that is morally good, although he might have meant something different. In this book, I am endorsing such a moral intuition regarding the need for a just cause. It should be the purpose of the just cause principle to morally constrain his shooting of each round.

Every military action, no matter how large scale or small scale, must satisfy the core principles of just cause, last resort, proportionality and noncombatant immunity.

#### B. MILITARY ACTIONS VERSUS POLICE ACTIONS

Considering accordingly that there are reasonable grounds to believe that Muammar Gaddafi is criminally responsible as an indirect co-perpetrator, under article 25(3)(a) of the [Rome] Statute [of the ICC], for the following crimes committed by Security Forces under his control in various localities of the Libyan territory . . . i. murder as a crime against humanity . . . and ii. persecution as a crime against humanity . . . the [ICC] Chamber hereby issues a warrant of arrest for Muammar Mohammed Abu Minyar Gaddafi . . .

Pre-Trial Chamber I of the International Criminal Court  
(ICC 2011: 6–7)

On 27 June 2011, the ICC issued this warrant of arrest for Qaddafi (also spelled ‘Gaddafi’). Let us consider this particular case from the temporal standpoint of that day. At present, there is no international police force that is empowered to enforce this arrest warrant by invading the territory of Libya

and apprehending Qaddafi, using all necessary means, including armed force, if necessary.

Arguably, the Security Council is empowered by the UN Charter to authorise the enforcement of this arrest warrant. Let us imagine (hypothetically, of course) some crucial elements of a pertinent Security Council resolution, the wording of which is mostly borrowed from the aforementioned Resolution 1973 (2011 [emphasis in original]).

*The Security Council,*

*Recalling* its decision to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court,

*Determining* that the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security,

*Acting* under Chapter VII of the Charter of the United Nations,

*Authorises* Member States, acting nationally or through regional organisations or arrangements, to take all necessary measures to enforce compliance with the warrant of arrest for Muammar Mohammed Abu Minyar Gaddafi issued by the International Criminal Court on 27 June 2011.

From the temporal standpoint of that date, let us imagine prospectively (and hypothetically) a future mission by US Special Operations forces, the goal of which is to arrest Qaddafi and transport him to The Hague for trial by the ICC. Authorised by such a Security Council resolution, this mission is authorised, in particular, to take ‘all necessary measures’, including the use of armed force, if necessary. Informed by human intelligence about Qaddafi’s whereabouts, the human agents involved in this mission invade Tripoli, enter the building where he resides, kill some of his bodyguards and wound him. Quickly, he is transported to a hospital in The Hague, where he will receive medical care and be tried by the ICC.

Is this mission by US Special Operations forces a military action or is it a police action? Note that the word ‘or’ in this sentence can be used either exclusively or inclusively. I reject an ‘exclusive distinction’: it is either a military action or a police action, but not both. Instead, I accept an ‘inclusive distinction’: it is either a military action or a police action or both. Briefly, my answer is that it is both a military action and a police action. It resembles paradigm military actions, but it also resembles paradigm police actions. Indeed, this particular case might be called a ‘borderline case’, but I prefer to call it an ‘overlap case’. For the class of military actions and the class of police actions overlap; this particular case is in this overlap – that is, it is a member of both of the two classes. The distinction between military actions and police actions is thus inclusive.

### C. JUST WAR THEORY AND HUMAN SECURITY

In her book *Human Security*, Mary Kaldor rejected just war theory. Instead, she advocated ‘a new ethical approach’ (2007: 154) – one that is ‘cosmopolitan’ (2007: 122). Specifically, it is a human security approach, because ‘security is understood as the defence of individual human beings’ (2007: 122). ‘There is still a role for legitimate military force’, she admitted, ‘but the way it is used is more akin to domestic law enforcement than war-fighting’ (2007: 155). Apparently, she interpreted the distinction between law enforcement and war-fighting as an exclusive distinction.

By contrast, my view is that, even if the role for legitimate military force in a particular case is more akin to law enforcement, it might still be akin to war-fighting, albeit less akin. The class of acts of law enforcement and the class of acts of war-fighting overlap.

With the aim of formulating cosmopolitan just war principles, I am starting with the five criteria of legitimacy proposed in the High-level Panel Report. Note that the term ‘human security’ occurs in the criterion of ‘seriousness of threat’. Indeed, Kaldor’s human security approach is incompatible with traditional just war theory. By contrast, my cosmopolitan approach to just war theory is a sort of human security approach, for it too stresses the defence of individual human beings.

Consider the criterion of ‘proportional means’: ‘Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?’ Typically, armed conflicts are highly destructive, and a chief function of a just war theory should be to morally constrain the scale, duration and intensity of uses of armed force. Characteristically, the scale, duration and intensity of a military action that is not also a police action (briefly, a ‘nonoverlap military action’) are greater than the scale, duration and intensity of a military action that is also a police action (briefly, an ‘overlap military action’).

In accordance with the proportional means criterion – and by analogy with the last resort principle – I support in this book roughly the following ‘policing resort principle’. Before attempting to achieve a goal by means of a nonoverlap military action, we are morally required to attempt to achieve the goal by means of an overlap military action, whenever it is reasonable to do so. This principle is discussed more fully in Chapter 7, ‘Last Resort and Noncombatant Immunity’.

But how can there be such overlap cases?

### D. OPEN TEXTURE AND SUFFICIENT RESEMBLANCE

Faced with the question whether the rule prohibiting the use of vehicles in the park is applicable to some combination of circumstances in which it appears indeterminate, all that the person called upon to answer can do

is to consider (as does one who makes use of a precedent) whether the present case resembles the plain case ‘sufficiently’ in ‘relevant’ respects.

H. L. A. Hart, *The Concept of Law* (1961: 124)

Hart’s notion of the indeterminateness of rules was influenced by Friedrich Waismann’s notion of the ‘open texture’ of empirical concepts (Hart 1961: 249). The concept of ‘vehicle’ has an open texture. An automobile is a paradigm case of a vehicle, and an apple is clearly not a vehicle. Is a wheelchair a vehicle? Does this rule prohibit the use of wheelchairs in the park?

When a concept has an open texture, it cannot be defined with ‘absolute precision’ (Waismann 1968: 42). Suppose that, according to our current definition of the concept of ‘vehicle’, we cannot determine whether a wheelchair is a vehicle. Then, to answer the question, we need to ‘modify our definition’ (Waismann 1968: 42). We need to consider whether wheelchairs resemble automobiles (or other paradigm cases) sufficiently in relevant respects. If they do (or do not), and if we modify our definition accordingly, it is no longer indeterminate whether wheelchairs are (or are not) vehicles. It is no longer indeterminate whether the rule prohibits them.

What should be meant by ‘resembles sufficiently in relevant respects’? There is no space to examine how Hart would answer this question, and so I only state my own answer. To begin with, let me illustrate the idea of ‘resembling sufficiently in relevant respects’ by means of the Qaddafi case.

On the one hand, suppose that, according to our current definition of the concept of ‘military action’, we cannot determine whether the hypothetical mission by US Special Operations forces to arrest Qaddafi is a military action. Does it resemble sufficiently in relevant respects paradigm cases of military actions? Consider the case of armed humanitarian intervention in Somalia from 1992 to 1994 (Wheeler 2000: 172–207). On 6 June 1993, in response to the killing of UN peacekeepers in Somalia, Security Council Resolution 837 (1993) authorised the taking of ‘all necessary measures against all those responsible’. Subsequently, in the Battle of Mogadishu from 3–4 October 1993, a US Special Forces operation attempted to kill or capture the person believed to be most responsible, General Mohamed Fatah Aidid. Arguably, the hypothetical US mission to arrest Qaddafi resembles sufficiently in relevant respects this US military action against Aidid.

On the other hand, suppose that, according to our current definition of the concept of ‘police action’, we cannot determine whether the hypothetical US mission to arrest Qaddafi is a police action. Does it resemble sufficiently in relevant respects paradigm cases of police actions? Consider the case of the arrest of the former President of Liberia, Charles Taylor, by the United Nations Mission in Liberia (UNMIL). On 3 March 2003, Taylor was indicted

by the Special Court for Sierra Leone – a court approved by the Security Council. On 19 September 2003, Security Council Resolution 1509 (2003) established UNMIL. However, UNMIL's mandate does not include the phrase 'all necessary means'. On 29 March 2006, Taylor was 'apprehended' in Nigeria, transported from Nigeria to Liberia, formally and peacefully 'arrested' by UNMIL and 'transferred to the custody of the Special Court for Sierra Leone' (Open Society 2011). Arguably, the hypothetical US mission to arrest Qaddafi resembles sufficiently in relevant respects the police action by UNMIL of arresting Taylor.

Arguably, then, the hypothetical US mission to arrest Qaddafi both resembles sufficiently in relevant respects a paradigm military action and resembles sufficiently in relevant respects a paradigm police action. For brevity, the three actions are henceforth termed, respectively, the 'Qaddafi action', the 'Aidid action' and the 'Taylor action'. Arguably, the Qaddafi action is both a military action and a police action – that is, it is an overlap military action. To support this last claim more fully, it might be compared with other paradigm military actions and police actions.

What are some relevant respects for determining whether a military action is also a police action? Paradigmatically, police 'arrest subjects on evidence and submit them to judicial proceedings' (Bayley and Perito 2010: 53). Thus, in the Qaddafi action, Qaddafi is arrested on evidence stated in the ICC warrant of arrest and submitted to judicial proceedings of the ICC.

Let me reply to an objection to the idea of overlap cases. Relations of resemblance have the formal property of 'symmetry' (Armstrong 1989: 102). (Roughly, a relation  $R$  is 'symmetric' just in case, if  $xRy$ , then  $yRx$ .) Since the Qaddafi action resembles the Aidid action, it follows, of necessity (or conceptually or logically), that the Aidid action resembles the Qaddafi action. Therefore, since the Qaddafi action is a police action, so is the Aidid action. Clearly, however, the Aidid action is not a police action. Also, since the Qaddafi action resembles the Taylor action, it follows, of necessity, that the Taylor action resembles the Qaddafi action. Therefore, since the Qaddafi action is a military action, so is the Taylor action. Clearly, however, the Taylor action is not a military action. To avoid these contradictions, the distinction between military actions and police actions has to be an exclusive distinction.

My reply to the objection is as follows. Admittedly, there is a relation of 'resembling sufficiently in relevant respects', but it does not have this formal property of 'symmetry'. Given that we can determine that the Qaddafi action is a military action because it resembles sufficiently in relevant respects the Aidid action, it does not follow, of necessity (or conceptually or logically), that we can determine that the Aidid action is a police action because it resembles sufficiently in relevant respects the Qaddafi action. For the relevant respects sufficient for determining whether the Qaddafi action is a military action are

considerably different than the relevant respects sufficient for determining whether the Aidid action is a police action. Similarly, given that we can determine that the Qaddafi action is a police action because it resembles sufficiently in relevant respects the Taylor action, it does not follow, of necessity, that we can determine that the Taylor action is a military action because it resembles sufficiently in relevant respects the Qaddafi action. For the relevant respects sufficient for determining whether the Qaddafi action is a police action are considerably different than the relevant respects sufficient for determining whether the Taylor action is a military action. The distinction between military actions and police actions is inclusive.

We should not be misled by the word ‘resembles’. The relation of ‘resembling sufficiently in relevant respects’ is not a relation of ‘exact resemblance’. A relation of exact resemblance is reflexive, symmetric and transitive – that is, it is an ‘equivalence relation’ (Armstrong 1989: 41). (Roughly, a relation  $R$  is ‘transitive’ just in case, if  $xRy$  and  $yRz$ , then  $xRz$ ; and it is ‘reflexive’ just in case  $xRx$ .) The classes of objects between which an equivalence relation holds are mutually exclusive. In Euclidean geometry, an equivalence relation of similarity divides the class of triangles into mutually exclusive subclasses – for instance, the subclass of equilateral triangles and the subclass of isosceles right triangles. By contrast, because the relation of ‘resembling sufficiently in relevant respects’ is neither symmetric nor transitive, the classes of cases between which it holds can overlap.

In conclusion, my presupposition of coherentism extends to the process of defining concepts. Provisionally, a concept might be defined casuistically, by examining paradigm cases. Frequently, concepts thus defined have an open texture. For instance, suppose that, according to our current definitions of the concepts of ‘military action’ and ‘police action’, we cannot determine whether the Qaddafi action is both a military action and a police action. Then we need to consider both whether it resembles sufficiently in relevant respects paradigm cases of military actions and whether it resembles sufficiently in relevant respects paradigm cases of police actions. Consequently, we might need to modify our definitions of those concepts. In general, it is presupposed that definitions can be elucidated, revised or supplemented. Moral deliberation about uses of armed force should involve a process of mutual adjustment of moral judgements about particular cases and specific issues, moral principles and definitions of concepts.

#### E. COMPLEX MILITARY ACTIONS

In order to defend and advance our national interests, the Department of Defense must balance resources and risk among four priority objectives: prevail in today’s wars, prevent and deter conflict, prepare to defeat adversaries and succeed in a wide range of contingencies, and

preserve and enhance the All-Volunteer Force. These objectives reflect a strategic approach that can evolve and adapt in response to a changing security environment.

US Department of Defense (DOD 2010a: 11)

Entitled ‘U.S. defense objectives’, this paragraph from the 2010 *Quadrennial Defense Review Report* (QDR) summarises – from the temporal standpoint of February 2010, which is the month the QDR was released – the goals of US military strategy. The general concept of ‘interest’ has an open texture, as does the specific concept of ‘national interest’. Evidently, the US ‘strategic approach’ in the QDR is primarily state-centric. By contrast, a cosmopolitan strategic approach should ‘defend and advance’ global interests, but the specific concept of ‘global interest’ also has an open texture. The paragraph is replete with verbs – ‘defend’, ‘advance’, ‘balance’, ‘prevail’, ‘prevent’, ‘deter’, ‘prepare’, ‘defeat’, ‘succeed’ – each of which expresses a concept that has an open texture. A comparable remark holds of such nouns in the paragraph as ‘war’, ‘conflict’, ‘adversary’ and ‘contingency’. In the preceding section, I focus on the concepts of ‘military action’ and ‘police action’, but my main points there are generalisable to a variety of other concepts apposite for just war theorising.

In this section, for the sake of concreteness, let us adopt the temporal standpoint of February 2010. How are just war principles applicable to such goals (or objectives) of military strategy? The paragraph’s initial phrase – ‘in order to’ – signals a relation between means and goal. For instance, prevailing in today’s wars is a means, the goal of which is defending and advancing national interests. In particular, in order to prevail in today’s war in Afghanistan, the US Department of Defense is carrying out a counterinsurgency campaign there. Carrying out the counterinsurgency campaign is the means, the goal of which is prevailing in the Afghan War. In general, a military strategy is a plan, and plans involve actions that are interlinked by relations of means to goals.

Just war principles are deontological principles, and deontological principles obligate, permit or prohibit performances of actions. For example, two of the aforementioned military actions may be described more explicitly as follows. Performing the military action of carrying out the counterinsurgency campaign in Afghanistan is a means of achieving the goal of performing the military action of prevailing in today’s wars. When goals of military strategy are thus understood as performances of military actions, just war principles are applicable. For instance, the proportionality principle requires (roughly) that the benefits of a military action must outweigh the harms. Thus, if the harms of prevailing in today’s wars would outweigh the benefits, it is morally obligatory not to attempt to perform that military action.

In the preceding paragraph, the singular term ‘the military action’ is used. Presumably, however, each of the military actions is ‘complex’. For instance, a military campaign is, according to Quincy Wright, ‘a group of military operations within a limited period of time connected by a strategic plan under the control of a single command’ (1942: 687). Thus a ‘complex’ military action (e.g. a military campaign) has ‘component’ military actions (e.g. military operations). The counterinsurgency campaign in Afghanistan is thus complex; for example, it has as a component the counterinsurgency operation in Marja (a town in Afghanistan’s Helmand Province). The complex military action of prevailing in today’s wars has such component military actions as prevailing in the Afghan War and prevailing in the Iraq War.

To generalise just war principles sufficiently, the general concept of ‘military action’ should involve a concept of ‘complex military action’. Every military action must satisfy the principles of just cause, last resort, proportionality and noncombatant immunity, whatever the complexity.

#### F. ARE THERE BASIC MILITARY ACTIONS?

Since there are complex military actions – to adapt Leibniz’s famous dictum – must there be ‘simple’ ones? Evidently, there are different levels of complexity – for example, battles are components of military operations and military operations are components of military campaigns – but is there a foundational level? Military actions of groups of human beings are emergent from, or supervenient on, military actions performed collectively by individual human beings. During various counterinsurgency operations in Afghanistan, individual US soldiers fired weapons, searched dwellings, policed checkpoints and so forth. Complex military actions have, as components, military actions of individual human beings.

First, I summarise a foundationalist answer to this question of whether there are ‘simple’ military actions. Consider a particular (but hypothetical) case, from a particular temporal standpoint in the year 2010. In order to fire an assault rifle at a particular suspected Taliban fighter, a particular US soldier squeezes the trigger. Such a particular ‘bodily movement’ as squeezing a trigger is a ‘basic action’. Roughly, a human being performs a basic action when she intentionally moves her body in a certain way (Moya 1990: 14–17). In short, the foundationalist answer is that there are simple military actions – namely, such basic military actions of bodily movement.

By contrast, my coherentist answer to the question of ‘simples’ is as follows. Indeed, just war principles are applicable to such military actions of bodily movement as squeezing the trigger. In order to kill the suspect, the soldier squeezes the trigger. Suppose that, by applying just war principles, we determine that it is morally obligatory not to kill the suspect. Then, by applying the means-goal principle, we determine that it is morally obligatory

not to squeeze the trigger. The main point is that, instead of morally evaluating a single action, we are morally evaluating a 'course of actions'. Instead of morally evaluating the action of squeezing the trigger by itself, we are morally evaluating a course of actions consisting of (at least) squeezing the trigger and killing the suspect.

As indicated by the parenthetical phrase 'at least', the morally relevant course of actions in this particular case is considerably more complex: it includes patrolling a neighbourhood, spotting a suspect, deliberating about whether to kill him, deciding to kill him, planning how to kill him, aiming the weapon, squeezing the trigger, firing the weapon and killing him. In addition to 'outward' actions of patrolling, spotting, aiming, squeezing, firing and killing, this course of actions includes 'inward' actions (or 'mental acts') of deliberating, deciding and planning. (But these concepts of 'outward' and 'inward' have open textures.)

#### G. PLANNED COURSES OF MILITARY ACTIONS

I call such a course of actions a 'planned course of military actions'. Complex military actions by groups of human beings have as components planned courses of military actions of individual human beings.

Truly, there are such 'mental actions', for the soldier voluntarily deliberates, decides and plans. For instance, to plan is to act voluntarily. When a human agent plans to follow a course of actions, she knows sufficiently the relevant circumstances; she chooses to plan to follow the course of actions, for she might have chosen not to plan to follow it; and her planning is under her control, in that it is within her power to refrain from planning to follow it.

How are just war principles applicable to such acts of planning? The agential standpoint is a temporal standpoint. In particular, the agential standpoint of this soldier during the time of his planning of the killing of the suspect is a temporal standpoint. Suppose that, by applying just war principles, he determines that it is morally obligatory not to kill the suspect. Then, by applying the means-goal principle, he should determine that it is morally obligatory not to plan a course of military actions as a means of achieving the goal of killing the suspect. In brief, it is morally obligatory not to plan to kill the suspect.

At every level of complexity, military actions involve planning. Just war principles should be applicable to military plans, whatever the level of complexity, up to and including the US military strategy in the QDR. They should be applicable to the planning of uses of armed force at the tactical, operational, strategic and political levels. To morally constrain responsible agents from performing unjust military actions with sufficient effectiveness, it is essential to morally constrain them during the times of planning.

Broadly, for each armed conflict, there are prelude, resort, conduct, halting

and aftermath phases. The hypothetical case of the killing of a suspected Taliban fighter by a US soldier occurs during the conduct phase of the Afghan War. I want to emphasise that the idea of military planning is pertinent also to prelude, resort, halting and aftermath phases. Just war principles are applicable not only to military planning during resort and conduct phases, but also to military planning during prelude, halting and aftermath phases.

In light of the concept of ‘mental action’, let me sketch a different foundationalist answer to the question of ‘simples’. In accordance with a ‘volitional theory of action’, the basic actions are ‘volitions’ – for instance, the basic action of ‘willing’ to squeeze a trigger (Moya 1990: 19–22). My coherentist response is as follows. Typically, instead of a single mental action of ‘willing’, there is a course of mental actions of (at least) deliberating, deciding, planning and (perhaps) willing. Instead of morally evaluating the soldier’s mental action of willing to squeeze the trigger by itself, we should morally evaluate a course of the soldier’s mental actions – namely, deliberating about whether to kill the suspect, deciding to kill him, planning how to kill him and (perhaps) willing to kill him.

In conclusion, rather than a foundationalist conception of basic actions of bodily movement (or willing), I am presupposing a coherentist conception of planned courses of actions. Each planned course of military actions is itself a complex military action. Conversely, each military action involves some planning, even if rudimentary. For instance, rather than a ‘basic action’ of ‘firing a rifle’, there is a planned course of actions, including loading a rifle, shouldering it, aiming it and squeezing the trigger. Accordingly, a main thesis is that the concept of ‘military action’ should be understood in terms of the concept of ‘planned course of military actions’.

Comparably, the concept of ‘nonmilitary measure’ should be understood in terms of the concept of ‘planned course of nonmilitary actions’.

Henceforth, the terms ‘military action’ and ‘planned course of military actions’ are used interchangeably, as are the terms ‘nonmilitary measure’ and ‘planned course of nonmilitary actions’. The former terms abbreviate the latter terms.

In a deontological just war theory, the primary unit of moral evaluation is a planned course of actions.

#### H. REFRAINING

Frequently, when we plan, we envisage alternative courses of actions, we deliberate about which of them to follow, we decide to follow one particular course of actions and we plan how to follow it. In the hypothetical case, rather than the stated course of actions, the soldier might have followed an alternative course of actions – namely, patrolling the neighbourhood, spotting the suspect, deliberating about whether to kill him, deciding not

to kill him, planning not to kill him, refraining from aiming the weapon, refraining from squeezing the trigger, refraining from firing the weapon and refraining from killing him.

Truly, such refrainings are voluntary actions, albeit ‘negative actions’ (or ‘negative acts’) (Vermazen 1985). When a human agent refrains from performing an action, she knows sufficiently the relevant circumstances; she chooses to refrain from performing it, for she might have chosen otherwise; and her refraining from performing it is under her control, in that it is within her power to perform it. Thus, when the soldier performs the ‘negative action’ of refraining from firing the weapon, he knows sufficiently the relevant circumstances; he chooses to perform the negative action, for he might have chosen otherwise; and his performing the negative action is under his control, in that it is within his power to fire the weapon.

Often, moral requirements of my just war theory are expressed by means of the word ‘not’. Canonically, just war principles are expressed as conditional prohibitions. Suppose, for example, that a particular agent understands that it is morally obligatory not to intentionally kill noncombatants. Then it is morally obligatory for him (or her) to intentionally refrain from intentionally killing them. Suppose, also, that he understands that it is morally obligatory not to knowingly kill noncombatants. Then it is also morally obligatory for him to intentionally refrain from knowingly killing them. To generalise, when it is morally obligatory for a particular agent not to perform a military action – and a reasonable agent should know this – then it is morally obligatory for that agent to intentionally refrain from performing it.

#### I. TEMPORAL PHASES OF MILITARY ACTIONS

The concept of a ‘planned course of military actions’ is a temporal concept. Typically, a planned course of military actions has temporal phases, and each of the temporal phases is itself a planned course of military actions. Correlatively, the process of applying just war principles at any temporal phase of a planned course of military actions is a temporal process. In Chapter 2 (‘Just War Theory’), a concept of ‘temporal phase’ is introduced. In this section, that concept is generalised.

The concept of ‘temporal phase of a planned course of military actions’ has an open texture. How, in a particular case, can military actions be grouped together into phases? A coherentist answer to this question should involve a process of mutual adjustment of a definition of the concept of ‘temporal phase’, informed judgements about the particular case, relevant normative and empirical theories and so forth.

Answers to the question can be controversial. Consider, for example, the following three military actions: the 1991 Gulf War, the intermediate period of airstrikes in Iraq to enforce no-fly zones and the 2003 invasion of

Iraq. From a temporal standpoint shortly before the 2003 invasion, Thomas Nichols argued that ‘Iraq does not accept the no-fly zones . . . the Iraqis have fired on coalition aircraft over 700 times since 1998 alone . . . [and therefore] the United States and its allies are already at war with the Iraqis’ (2003: 28). Accordingly, it might be argued that the Iraq War began in 1991 and ended in 2003, and that the military actions of the Iraq War should be grouped into three chief temporal phases: ‘defending Kuwait’, ‘enforcing no-fly zones’ and ‘invading Iraq’.

A just cause principle should be applicable to all forms of armed conflict, however they are categorised or named. Suppose that there was a single war between (primarily) the United States and Iraq that began in 1991 and ended in 2003. Roughly, according to a just cause principle, it is morally obligatory not to perform a military action, if there is not a just cause. Suppose that, from the temporal standpoint of the year 1991, there is a just cause for defending Kuwait. Nevertheless, from the temporal standpoint of the year 2003, it is morally obligatory not to invade Iraq, if there is not a just cause. Granted that there was a just cause for defending Kuwait, it does not follow (conceptually or logically) that there was a just cause for invading Iraq, however these armed conflicts are categorised or named.

To generalise, a main thesis is that the core just war principles of just cause, last resort, proportionality and noncombatant immunity should be applicable at every phase of any planned course of military actions.

#### J. TEMPORAL STANDPOINTS AND CONTINGENCY PLANS

From the temporal standpoint of the present, the future is open. When a human agent performs a voluntary action, she chooses to perform it, and she might have chosen otherwise. When we plan a course of military actions, we choose to plan it, and we might have chosen to plan an alternative course of military actions.

The agential standpoint is a temporally prospective vantage point on future contingencies. The open future is an uncertain future, so there is need for contingency planning. In the fog of armed conflict, we have to plan contingently. Contingency plans are standardly expressed by conditionals: ‘if deterrence fails, launch an attack’; ‘if the enemy attacks, counterattack’; ‘if civilians are present, abort the mission’; and so forth. The concept of ‘contingency planning’ is interrelated with the concept of ‘attempting to act’. An attempt to achieve a goal by means of a planned course of military actions might fail, so there is need to plan contingently to achieve the goal by means of an alternative course of military actions.

I am emphasising the idea of last resort, in order to counterbalance overemphasis of the idea of just cause. The process of applying a last resort principle is a temporal process. Roughly, such a principle morally requires

that, before using armed force to achieve a goal, every reasonable nonmilitary measure must be attempted. More explicitly, the following is morally required. Before attempting to achieve a goal by means of a course of military actions, it is morally obligatory to attempt to achieve it by means of a course of nonmilitary actions, whenever it is reasonable to do so. Suppose that it is reasonable to attempt to achieve the goal by means of a course of peaceful actions – for instance, a process of negotiation. The future is uncertain, such an attempt might fail, so there is need to plan contingently to achieve the goal by means of an alternative reasonable course of nonmilitary actions, perhaps one that is coercive – for example, a process of imposing targeted economic sanctions. The future is uncertain, every reasonable attempt to achieve the goal by means of a course of nonmilitary actions might fail, so there is need to plan contingently to achieve it by means of a course of military actions. The concept of ‘contingency planning’ is integral to the idea of last resort.

Truly, there is a fog of uncertainty shrouding the future, but there is also a fog of inevitability shrouding the past. The past is settled. From the temporal standpoint of the present, each past military action has happened and cannot be undone. Hence, from the temporal standpoint of the present, it might appear that what happened had to happen; it might appear that the armed conflicts that occurred had to occur; it might appear that, when one military action occurs later than another, the later one had to occur because the earlier one occurred. But these appearances are illusions – illusions of the inevitability of history.

Instead, human beings make history. From the temporal standpoint of the present, there are past temporal standpoints. When we imaginatively adopt a past temporal standpoint, the future – prospectively, from that past temporal standpoint – is open. From a particular temporal standpoint in the past, there are present military actions, past military actions and future military actions. From that past temporal standpoint, when responsible agents plan a course of military actions, they choose to plan it, but they might have chosen to plan an alternative course of military actions. Human beings make war, but they might not have made war.

For an illustration, regard again the case of genocide in Rwanda. From the temporal standpoint of the present, some relevant events are as follows. Between 1990 and 1993, armed conflict occurred between the Rwandan Government and the Tutsi rebel group (RPF); in August 1993, a peace agreement was signed; on 5 October 1993, Security Council Resolution 872 (1993) authorised UNAMIR; subsequently, UNAMIR was deployed; and, from April to mid-July 1994, the genocide happened. In the fog of inevitability shrouding the past, it might appear that the genocide had to happen, but this appearance is an illusion.

Recall that, on 6 June 1993, in the aforementioned case of armed

humanitarian intervention in Somalia, the Security Council authorised the taking of all necessary measures. Four months later, the Security Council failed to authorise the taking of all necessary measures: UNAMIR was not provided with a Chapter VII mandate authorising the use of armed force, if necessary.

When we imaginatively adopt the temporal standpoint of the months from October 1993 to April 1994, the future (prospectively, from that past temporal standpoint) is open. From that past temporal standpoint, agents responsible for UNAMIR only plan courses of nonmilitary actions in Rwanda. However, the Security Council might have decided otherwise; UNAMIR might have been provided with a Chapter VII mandate; UNAMIR might have been an armed UN peacekeeping mission. Consequently, from the temporal standpoint of the months from October 1993 to April 1994, instead of only planning courses of nonmilitary actions, the Force Commander of UNAMIR, Lieutenant-General Romeo Dallaire, might have also planned courses of military actions contingently, as epitomised by the following conditional: ‘use armed force to protect civilians, if necessary’. The genocide in Rwanda might never have happened.

#### NOTES

1. An introduction to the theory of action is Moya (1990).
2. For a discussion of the role of a concept of plan in a theory of intention, see Bratman (1987).
3. Concerning military strategy, see Smith (2007). Concerning US national security, see Betts (2012).

## CHAPTER 5

# JUST CAUSE

Our cause is just.

Barack Obama, *Remarks by the President in Address to the Nation on the Way Forward in Afghanistan and Pakistan* (1 December 2009) (2009c)

The [Afghan] insurgents in general and Taliban in particular have a sense of themselves as being moral and noncorrupt. They generally consider themselves to be fighting a just cause.

Michael Semple, *Reconciliation in Afghanistan* (2009: 37)

From the temporal standpoint of 1 December 2009, do the counterinsurgency operations in Afghanistan by the US and NATO have a just cause? Do the insurgents in Afghanistan have a just cause?

A main thesis is that a generalised just cause principle should be applicable by all sorts of responsible agents to all forms of armed conflict. Moral deliberation should be dialectical. In addition to questioning whether our own military operations have a just cause, we should raise the just cause question from the agential standpoint of our adversaries. This dialectical approach to the subject of just cause is illustrated by the above two block quotations. Even if the US and NATO have a just cause for counterinsurgency operations in Afghanistan and Pakistan, it is illuminating to raise the just cause question from the agential standpoints of the various insurgents.<sup>1</sup>

What should be meant by the term ‘just cause’? What just cause principle should a just war theory accept? How should we determine whether a military action has a just cause? My purpose in this chapter is to explore such questions concerning the idea of just cause.

The first part contains some preliminary remarks. In the second part, a traditional state-centric conception of just cause is critically examined – roughly, that a just cause for interstate war is defence against aggression. In

the third part, the criterion of seriousness of threat is scrutinised and revised. In the fourth part, in terms of that revised criterion, a generalised just cause principle is formulated and illustrated.

## I. JUST GOAL

Roughly, a traditional just cause for war is attack by an aggressor. But the just cause here is not an event – namely, the occurrence of the attack. Indeed, the harms caused by the attack may be evaluated as morally bad, but such a moral evaluation of consequences is different from an agent-centred moral constraint on action. Instead, the just cause is the just goal of stopping the attack.

To generalise, just war principles are agent-centred. Most importantly, they morally constrain us from performing unjust military actions. Specifically, the just cause principle morally constrains us from performing military actions that have unjust goals. For the concept of just cause should be understood teleologically; and the term ‘cause’ should be construed to mean ‘goal’ (Lango 2007b). A just cause is a just goal. A just cause principle should be a just goal principle.

It might be objected that, because a teleological theory is a type of consequentialist theory, this teleological concept of just cause is a consequentialist concept. However, as explained in the preceding chapter, the goal of an action is (primarily) another action. For example, when we perform the action of using armed force as a means of stopping an aggressor’s attack, our just goal is performing the action of stopping the aggressor’s attack. A deontological just war theory can incorporate a teleological concept of just cause.

More exactly, the primary unit of moral evaluation is a planned course of actions – that is, a course of actions that is followed for the sake of some goal. To determine whether a projected military action has a just cause, we have to morally evaluate not only the goal of the military action, but also the planned course of military actions that together comprise the means of achieving that goal. A just cause is a just goal pursued by just means. A just cause principle should be a principle of just goal and just means. Insofar as the idea of just cause has been understood differently in the just war tradition, my understanding of it is revisionary.<sup>2</sup>

Let me provide a real-world illustration (Lango 2010b). From the temporal standpoint of 27 March 2009, is there a just cause for US military operations in Afghanistan? In a speech given on that particular day, *Remarks by the President on a New Strategy for Afghanistan and Pakistan* (2009a), Obama answered such a question as follows:

We have a clear and focused goal: to disrupt, dismantle and defeat al Qaeda in Pakistan and Afghanistan, and to prevent their return to either country in the future. That's the goal that must be achieved. That is a cause that could not be more just.

Noting the linkage between the word 'goal' in the second sentence and the word 'cause' in the third sentence, it would appear that Obama understands the concept of just cause teleologically. It would appear that, by the third sentence, he meant: 'that is a goal that could not be more just'.

But should the concept of a just cause be understood instead in terms of the concept of a 'moral reason'? The term 'just cause' is a philosophical term of art. In the just war tradition, it is used to translate Thomas Aquinas' term '*causa iusta*'. What did Aquinas, a medieval originator of just war theory, who was greatly influenced by the philosophy of Aristotle, mean by '*causa*'? In accordance with Aristotle's doctrine of four 'causes', he might have meant '*causa efficiens*' (i.e. 'efficient' or 'moving' cause) or he might have meant '*causa finalis*' (i.e. 'final cause' or goal). (For brevity, the ideas of 'formal cause' and 'material cause' are ignored.) In the Aristotelian tradition, those reasons that are final causes (or goals) have explanatory priority.

By contrast, in modern science, those reasons that are efficient causes have explanatory priority. Omitting a qualifying adjective such as 'moving', the term 'cause' has become a scientific term of art: the 'cause' of a given event is an antecedent event that is productive of it as an effect. For example, the event of the al Qaeda attack on 11 September 2001 was (partly) productive of the event of US military operations in Afghanistan on 27 March 2009.

In light of these different meanings of the term 'cause', I would reject the view that a just cause for the use of armed force is an antecedent event that justly motivated that use of armed force. A just cause is not a moral reason to be 'reactive'. The question of just cause is not a question of 'just retaliation' or 'just retribution'. Instead, it is a question of 'just prevention'. A just cause is a moral reason to be 'proactive'. Granted, a just cause is a moral reason, but it is a specific kind of moral reason – namely, a just goal. More precisely, to anticipate a main thesis of this chapter, the just cause is the just goal of preventing sufficiently grave violations of basic human rights.

## II. AGGRESSION

In the twentieth century and in most contemporary accounts of just war doctrine, the main just cause is self-defence in the event of external aggression.

Mary Kaldor (2007: 162)

Should the received just cause principle voiced by Kaldor be revised? How should the concept of ‘aggression’ be defined? Should a just war theory accept defence against aggression as a just cause?

#### A. ACTS OF AGGRESSION AND INTERNATIONAL LAW

In developing a cosmopolitan just war theory, I am featuring the moral ideals expressed in the UN Charter. To begin with, let me make some remarks about Article 2(4): ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’.

Explicitly, interstate wars – and other uses of force, as well as threats to use force – that violate territorial integrity or political independence are prohibited by Article 2(4) (May 2008: 10). Implicitly – because of the clause ‘or in any other manner inconsistent with the Purposes of the United Nations’ – other sorts of threats or uses of force are also prohibited. According to Article 1, the ‘Purposes of the United Nations’ include the following: ‘To take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace’. The concepts of ‘threat to the peace’ and ‘other breach of the peace’ are (apparently) all-inclusive (and also have open textures).

Accordingly, Article 2(4) can be read as expressing the following moral ideal. It is morally obligatory for each state, in its relations with other states, to refrain from threatening to use armed force or using armed force to threaten the peace or to breach the peace, whatever the sort of threat or breach.

Nevertheless, Article 51 permits some wars of self-defence against aggression, albeit temporarily:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

Similar to the concept of ‘military action’, the concept of ‘armed attack’ has an open texture. Is a cyberattack against a Member State an armed attack or a coercive nonmilitary measure or both?

Note that Article 1 includes the phrase ‘acts of aggression’. Paradigmatically, armed attacks by a state against the territorial integrity or political independence of another state are acts of aggression. How, then, should the concept of ‘act of aggression’ be defined?

To illustrate how coherentism extends to the process of defining concepts, let me examine a legal definition proposed at the 2010 Review Conference

of the Rome Statute of the International Criminal Court. Among the ‘Amendments to the Rome Statute of the International Criminal Court on the crime of aggression’ proposed at this ICC Review Conference, there is the following definition: “‘act of aggression’ means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations’ (ICC 2010: 18).

Interestingly, this ICC definition borrows wording from Article 2(4) of the UN Charter, but with some significant differences. First, the ICC definition contains the word ‘sovereignty’, whereas Article 2(4) does not. Second, whereas Article 2(4) prohibits both the use of force and the threat to use force, the ICC definition explicitly encompasses only the use of armed force. Third, in Article 1 of the UN Charter, the phrase ‘acts of aggression or other breaches of the peace’ implies that there are breaches of the peace that are not acts of aggression. By contrast, I read the ICC definition as implying that every use of armed force to breach the peace is an act of aggression. For the ICC definition includes ‘any other manner inconsistent with the Charter of the United Nations’ in the meaning of ‘acts of aggression’. And it is inconsistent with Article 1 of the UN Charter to use armed force to breach the peace.

Should the definition of the concept of ‘act of aggression’ be limited to actual uses of armed force or should it encompass both actual uses of armed force and threats to use armed force? For instance, should it include (at least some) threats to use nuclear weapons? Should it encompass every use of armed force that breaches the peace? Should it be accepted by a just war theory? A coherentist answer to these questions should involve a process of mutual adjustment of the definition of the concept of ‘act of aggression’, normative and empirical theories involving the concept and informed judgements concerning particular cases of aggression.

I am rejecting a foundationalist thesis about definitions – namely, that terms can be explicitly defined by means of primitive terms, whose meanings are transparent and indubitable. The ICC definition of the term ‘act of aggression’ is not so defined, for it presupposes concepts that have open textures, especially a concept of ‘use of armed force’ and (implicitly) a concept of ‘breach of the peace’. It is indispensable, then, that the paragraph stating the definition also states seven specific types of acts of aggression – that is, invasion, bombardment, blockade and so forth (ICC 2010: 18). In later sections, I focus on the subject of invasion.

## B. THE CRIME OF AGGRESSION

Acts of aggression by groups of human beings are emergent from, or supervenient on, acts of aggression by individual human beings. The

International Criminal Court has jurisdiction over individual human beings. At the 2010 ICC Review Conference, a resolution was adopted that adds the crime of aggression to the crimes in the Rome Statute – namely, Resolution RC/Res.6 ‘The crime of aggression’ (ICC 2010: 17). The concept of ‘crime of aggression’ as a crime committed by individual human beings is defined in the following paragraph (ICC 2010: 18):

For the purpose of this Statute, ‘crime of aggression’ means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

Note that this paragraph presupposes the above definition of the concept of ‘act of aggression’.

This legal definition of the concept of ‘crime of aggression’ displays a moral ideal that a cosmopolitan just war theory ought to accept. It is morally obligatory for any human being who effectively exercises control over or directs political or military actions of a state to refrain from planning, preparing, initiating or executing such an act of aggression.

Illuminatingly, the definition is qualified by the terms ‘character’, ‘gravity’ and ‘scale’. To constitute a crime, the act of aggression must be sufficiently serious. Presumably, there are thresholds of gravity and scale above which an act of aggression is sufficiently serious and below which it is not.

### C. SUFFICIENTLY SERIOUS THREATENED HARMS OF INVASION

For the sake of concreteness, it is instructive to focus on a paradigm type of act of aggression – namely, violating the territorial integrity or political independence of a state by means of an armed invasion. Paradigmatically, such invasions are highly destructive. Is the goal of stopping an invasion a just cause for the use of armed force? Let me raise such a question in the language of the threat-seriousness criterion. Is the threatened harm of armed invasion of a kind and sufficiently clear and serious to justify *prima facie* the use of armed force?

When is a threatened harm of armed invasion sufficiently serious? A just cause for the use of armed force is not simply the goal of stopping such an invasion. In accordance with coherentism, I am presupposing that a cosmopolitan just war theory can be elucidated by interrelating it with a theory of human rights. Paradigmatically, when a state is invaded by another state – for example, the invasion of France by Germany during the Second World War – basic human rights of the citizens of the invaded state are extremely violated. The just cause for using armed force is the goal of

preventing sufficiently grave violations of basic human rights, and the means of achieving this goal is stopping the invasion.

In conclusion, should a just war theory accept defence against aggression as a just cause? Briefly, my answer is that a just cause for the use of armed force is defence against a sufficiently serious act of aggression. To be acceptable, the concept of ‘defence against aggression’ needs to be qualified by the idea of ‘sufficient seriousness’.

### III. SERIOUSNESS OF THREAT

With the aim of formulating a just cause principle that is applicable by all sorts of responsible agents to all forms of armed conflict, I make some proposals in this part about how the criterion of seriousness of threat in the High-level Panel Report ought to be elucidated and revised.

*Seriousness of threat.* Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? (HLPR 2004: 67)

Reportedly, this criterion has ‘an explicit pedigree’ in the just war tradition (Evans 2008: 140). The High-level Panel Report was influenced by the ICISS Report. In the Supplementary Volume to the ICISS Report, the traditional understanding of just cause is summarised thus: ‘In general, then, it was understood to depend on the degree of harm inflicted’ (ICISS 2001b: 139).

Although I am not studying the history of just war theories, let me mention a conception of just cause that was expressed by a classical just war theorist. According to Vitoria, ‘the sole and only just cause for waging war is when harm has been inflicted’; however, ‘not every or any injury gives sufficient grounds for waging war’ (1991: 303–4). Noting the phrase ‘has been inflicted’, it would appear that the question of just cause is, for Vitoria, a retrospective question about an antecedent event of sufficiently serious harming. By contrast, the corresponding question in the High-level Panel Report is a prospective question about a sufficiently serious threatened harm in the present or future.

Let me also mention a modern just war theorist who expressed, prior to the release of the High-level Panel Report, a conception of just cause that is broadly similar to the threat-seriousness criterion. According to Childress, there is a just cause for the use of armed force when there is a sufficiently ‘serious and weighty’ responsibility to counter a threatened harm (1982: 75).

Johnson’s ‘criterion of just cause’ is roughly similar, in that it involves ‘the purpose of protecting major values broadly held’, but the idea of ‘protecting major values’ is not the same as the idea of ‘stopping serious harms’ (1999: 69).

Jeff McMahan's 'formal concept of just cause' is roughly similar, in that it involves the notion of 'action that threatens to wrong or has already wronged other people in certain ways', but it also involves a complicating notion of 'liability', and the idea of wrong is not the same as the idea of harm (2005: 8).

With the aim of helping to bridge the divide between abstract theorising by academics about the idea of just cause and practical deliberations by political and military agents about the use of armed force, I am critically examining the criterion of seriousness of threat in the High-level Panel Report. There is no space for comparable critical examinations of other versions of a just cause principle.

Three questions about the threat-seriousness criterion are explored. Which kinds? This is the categorial question of 'specificity of threat'. How clear? This is the epistemic question of 'clarity of threat'. How serious? This is the evaluative question of 'scale of threat'.

#### A. REVISING THE CRITERION OF SERIOUSNESS OF THREAT

In Chapter 3 ('Moral Theory'), the following presuppositions are introduced. A just war theory can be elucidated by interrelating it with a theory of human rights. In particular, the concept of grievously harming can be elucidated by interrelating it with the concept of gravely violating basic human rights.

Utilising these presuppositions, my purpose in this section is to propose some revisions to the threat-seriousness criterion. Specifically, the concept of 'grievously harming state or human security' can be elucidated by interrelating it with the concept of 'gravely violating basic human rights of individual human beings'. Paradigmatically, when armed force is used unjustly, basic human rights of individual human beings are gravely violated.

Accordingly, my first proposal is that the criterion ought to be revised thus:

*Seriousness of threat.* Is the threatened harm to basic human rights of a kind, and sufficiently clear and serious, to justify prima facie the use of armed force?

The just goal for using armed force is preventing sufficiently grave violations of basic human rights, and the means of achieving this goal is stopping the threatened harm.

More exactly, the primary unit of moral evaluation is a planned course of military actions – for instance, gathering intelligence about an imminent invasion, mobilising troops to counter the invasion, preparing border defences against the invasion, firing weapons at invading military forces, stopping the invasion and (thereby) preventing sufficiently grave violations of basic human rights.

Accordingly, I propose to revise the criterion further:

*Seriousness of threat.* Is the threatened harm to basic human rights of a kind, and sufficiently clear and serious, to justify prima facie the planned course of military actions?

The just goal for using armed force is preventing sufficiently grave violations of basic human rights, and the means of achieving this goal is the planned course of military actions to stop the threatened harm.

The criterion contains the phrase ‘justify prima facie’. In Chapter 3 (‘Moral Theory’), such moral principles as the counterharm principle are presupposed as prima facie moral principles. It should be recognised that these are different uses of the term ‘prima facie’. To avoid confusion, my final proposal is that the criterion ought to be rewritten as follows.

*Seriousness of threat.* Is the threatened harm to basic human rights of a kind, and sufficiently clear and serious, to justify tentatively the planned course of military actions?

The justification is tentative, and it becomes definitive only if the other legitimacy criteria prove satisfied.

#### B. SCALE OF THREAT

To begin with, I address the evaluative question of ‘scale of threat’. Some threatened harms are not sufficiently serious. The concept of ‘seriousness’ is a scalar concept. When the threat-seriousness criterion is applied, problems of scale or degree have to be addressed. Sometimes basic human rights are not violated, or they are violated, but not sufficiently gravely. The concept of ‘graveness’ is also a scalar concept.

For the sake of concreteness, let me scrutinise a specific type of threatened harm – namely, the threatened harm of armed invasion of uninhabited territory. There is not a just cause for war, Larry May contended, ‘merely to protect territory or property, unless that territory was occupied’ (2008: 103). Granted, his contention holds of some particular cases.

From the temporal standpoint of the year 2011, let us envisage such a case, one that involves the territorial dispute between China and Japan about some uninhabited islands controlled by Japan, the Diaoyu/Senkaku Islands: ‘a group of five small volcanic islands and three rocky outcroppings’ (Hefflin 2000: 2). Suppose that Chinese military forces were to invade and occupy one of the islands. Suppose further that this armed invasion is not intended as a means of achieving some broader military goal. Suppose instead that it is intended only as a targeted act of ‘coercive diplomacy’, the goal of which is

to pressure Japan to cede control of the islands. Disputably, then, there would not be a just cause for the use of armed force merely to counter this military operation of targeted invasion.

### C. THE JUST-CORRELATIVITY REQUIREMENT

Some threatened harms of invasion are sufficiently serious, but others are not. In general, some threatened harms are sufficiently serious, but others are not. In order to apply the threat-seriousness criterion correctly, it is presupposed that there is a moral requirement of ‘just correlativity’ between the scale (or degree) of seriousness of the threatened harm and the scale (or degree) of the amount of armed force used to stop it.

*Just-correlativity requirement.* Given that the threatened harm to basic human rights is sufficiently serious, the planned course of military actions by means of which the threatened harm is to be stopped must be correlatively limited.

In other words, given that the seriousness of the threatened harm is sufficiently large scale to satisfy the threat-seriousness criterion, the planned course of military actions must be correlatively small scale. How is this just-correlativity requirement different from a proportionality principle? This question is answered in Chapter 8, ‘Proportionality and Authority’.

Roughly, the term ‘correlatively’ can be understood thus: a less serious threatened harm must be stopped by a more limited use of armed force, and a more serious threatened harm may be stopped by a less limited use of armed force.

In brief, the scale of force must be justly correlative to the scale of harm. I want to emphasise that acceptance of this just-correlativity requirement by diverse responsible agents is compatible with principled moral disagreement among them regarding how it should be applied to difficult cases.

### D. JUST CORRELATIVITY AND TARGETED INVASIONS

Specifically, there is a moral requirement of ‘just correlativity’ between the scale of the seriousness of the threatened harm of invasion and the scale of the amount of armed force used to defend against it. Thus, in reaction to a targeted invasion of uninhabited territory, there might be a just cause for a correlatively small-scale targeted defence.

To illustrate the just-correlativity requirement, let us envisage three different hypothetical cases, from the temporal standpoint of the year 2011. The three cases involve the aforementioned territorial dispute between China and Japan. They share a balance-of-power context. What are the goals of Chinese military strategy? ‘In the twenty-first century’, Robert Kaplan

predicted, 'China will project hard power abroad primarily through its navy' (2010: 33). What are the goals of US maritime strategy? According to the 2010 *Quadrennial Defense Review Report*, 'U.S. naval forces likewise will continue to be capable of robust forward presence and power projection operations' (DOD 2010a: x). Indeed, US naval power projection and Chinese naval power projection might clash. Is the projection of naval power a threat to the peace?

In the context of these potentially conflicting US and Chinese maritime strategies, the three cases involve three different US targeted military operations against China's targeted invasion of the uninhabited island. First, there is a planned course of military actions that includes imposing a naval blockade of the island, patrolling the island's airspace and firing warning shots at supply ships. Second, there is a planned course of military actions that includes aerial bombarding of the island, landing ground forces and killing, disabling or capturing occupying troops. Third, there is a planned course of military actions that includes targeting a destroyer, firing cruise missiles at it, sinking it and signalling resolve to escalate, if necessary. It is assumed that each of these three different planned courses of military actions is intended as a means of achieving the goal of defeating China's invasion of the island; that defeating China's invasion of the island is intended as a means of achieving the goal of containing China's military power; and that containing China's military power is intended as a means of preventing sufficiently grave violations of basic human rights of those individual human beings who are threatened by China's military power. Of course, this assumption is highly controversial, but my purpose is only illustrative. (Let me be clear that my purpose is not to endorse any of these alternatives.)

The just-correlativity requirement is illustrated controversially as follows. Conceivably, the threatened harm of invasion of the uninhabited island might be sufficiently clear and serious to justify tentatively the first planned course of military actions, but not the other two planned courses of military actions. For the first planned course of military actions might be sufficiently small scale, whereas the other two planned courses of military actions might be too large scale.

#### E. TARGETED INVASIONS AND THE SECURITY COUNCIL

In light of the moral ideals expressed in the UN Charter, I am investigating the question of whether a cosmopolitan just war theory ought to be SC-centric. Apparently, Article 51 permits such defensive targeted military operations by a Member State against such a targeted invasion by another Member State, but only 'until the Security Council has taken measures necessary to maintain international peace and security'. Realistically, the Security Council would

most likely fail to take any measure in this hypothetical Diaoyu/Senkaku Islands crisis, because the United States and China are permanent members.

Ideally, nonetheless, the Security Council ought to accept the criterion of seriousness of threat. Note that, according to Article 42, the Security Council has the power to authorise any of these US targeted military operations. Conceivably, then, it might be best if the Security Council were to decide to authorise one of them. However, in accordance with the just-correlativity requirement, the Security Council must not authorise a targeted military operation if it is not sufficiently small scale.

#### F. CLARITY OF THREAT

Having addressed the evaluative question of ‘scale of threat’, I want now to address the epistemic question of ‘clarity of threat’. In the fog of armed conflict, there will always be some unclarity, so the question concerns whether there is sufficient clarity.

To interpret the phrase ‘sufficient clarity’, I draw upon conceptions of ‘moral presumption’ and ‘burden of proof’. When we deliberate about whether to use armed force, we should make the moral presumption that we must not. To override this moral presumption, we have the burden of proving that just war principles are satisfied. In particular, we have the burden of proving that there is a just cause. In terms of the threat-seriousness criterion, we have the burden of proving that the threatened harm to basic human rights is both of a kind and sufficiently serious to justify tentatively the planned course of military actions. To satisfy this burden of proof, there has to be sufficient clarity.

That is, to satisfy the burden of proof, there has to be sufficient evidence. Prospective clarity stems from present evidence. As explained in Chapter 3 (‘Moral Theory’) in the section ‘An Epistemic Standard’, moral deliberation in just war theory should be governed by an ‘epistemic standard’: the burden of proof must be satisfied by clear and convincing evidence.

#### G. CLEAR AND CONVINCING EVIDENCE ABOUT CACHES OF WEAPONS IN RWANDA

*January 10* [1994]. Belgian UNAMIR officers met with an informant [code-] named Jean-Pierre, an Interahamwe commander, who offered to show the location [in Kigali] of a weapons cache in return for protection for himself and his family.

Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (1999: 150 [emphasis in original])

In the fog of armed conflict, there can be clear and convincing evidence, even when there is not proof beyond a reasonable doubt. For an elementary

illustration of this standard of sufficient clarity, let us return to the case of Rwanda.

From the temporal standpoint of 10 January 1994, as the block quotation indicates, a just goal for a targeted military operation by UNAMIR is to seize weapons. On 5 October 1993, the establishment of UNAMIR was authorised by Security Council Resolution 872 (1993). In that resolution, UNAMIR was tasked with upholding ‘a weapons-secure area’ in and around Kigali – the capital of Rwanda. Disputably, then, UNAMIR was authorised by the Security Council to use armed force to seize weapons in the weapons-secure area (Barnett 2002: 70–1).

My own moral judgement that there was such a just cause stems from the testimony of Dallaire, UNAMIR’s Force Commander, in his book *Shake Hands with the Devil*, which I summarise as follows. The informant, a commander of the Interahamwe – the militia of genocidaires – claimed that there were ‘four separate arms caches in Kigali’ (2004: 143). From this testimony by itself, the existence of these weapons caches might seem more likely than not. However, the informant ‘might not be telling the truth and this might possibly be a set-up’ (2004: 141). On 13 January 1994, in order to verify the testimony, the informant took members of UNAMIR’s ‘intelligence team’ to the location of ‘one of the arms caches’ and showed them the weapons (2004: 150). Indeed, this was proof beyond a reasonable doubt that, in violation of the weapons-secure area, there was a cache of weapons.

‘If we did not react to the reality of the arms caches’, Dallaire argued, ‘the weapons could eventually be turned against us and against many innocent Rwandans’ (2004: 147). From the temporal standpoint of 13 January 1994, Dallaire’s argument is not beyond a reasonable doubt. In the fog of armed conflict, how could there be certitude of future massacre? However, when the verified testimony of the informant is combined with other contemporary evidence related by Dallaire in his book, the standard of ‘clear and convincing evidence’ is satisfied. From the temporal standpoint of 13 January 1994, it is highly likely that the weapons will be used to massacre many innocent Rwandans. This is an emergency – ‘I had to catch these guys off guard’, Dallaire explained (2004: 144) – there is no time for proof beyond a reasonable doubt.

Therefore, from the temporal standpoint of 13 January 1994, a just goal for the immediate use of armed force by UNAMIR is preventing the future massacre of innocent Rwandans, and the means of achieving this goal is a justly correlative planned course of military actions, including rapidly mobilising UN soldiers, quickly storming the buildings where the weapons caches are located and seizing the weapons.

This military operation by UNAMIR did not happen. When Dallaire

informed the UN Department of Peacekeeping Operations that he was planning to seize the weapons, he was ordered 'to suspend the operation immediately' (Dallaire 2004: 146). Truly, there can be principled moral disagreement about armed humanitarian intervention.

It might be objected that such an operation by UNAMIR would have been a police operation. My reply is that it would have been both a police operation and a military operation. It would have resembled sufficiently both paradigm police operations and paradigm military operations. As discussed in Chapter 4 ('Theory of Action'), it would have been an 'overlap military action'. In general, when a military operation authorised by the Security Council is sufficiently narrowly targeted, it is, or is tantamount to, a police operation.

#### H. SPECIFICITY OF THREAT

Having addressed the evaluative question of 'scale of threat' and the epistemic question of 'clarity of threat', I address in this section the categorial question of 'specificity of threat' – that is, the question: which kinds?

As explained in Chapter 3 ('Moral Theory') in the section 'A Specificity Standard', moral deliberation in just war theory should be governed by a 'specificity standard': the military action or nonmilitary measure must be sufficiently detailed. In order to apply the threat-seriousness criterion correctly, the planned course of military actions by means of which the threatened harm is to be stopped must be sufficiently detailed. To determine whether there is a just cause, we must specify sufficiently both the goal and the planned course of military actions that together comprise the means of achieving that goal.

In particular, the kind of threatened harm to basic human rights has to be specified sufficiently. In the High-level Panel Report, the paragraph containing the threat-seriousness criterion also contains this illustration: 'In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?' For instance, the threatened harm of large-scale killing is of a kind to justify tentatively the use of armed force, if it is sufficiently clear and serious. By contrast, the threatened harm of a global economic recession, no matter how clear and serious, is (presumably) not of a kind to justify, even tentatively, the use of armed force.

Sometimes, a threatened harm is 'complex', in that it combines two (or more) distinguishable threatened harms. Correspondingly, there can be a 'compound' goal of stopping that complex threatened harm – for instance, the (disputable) goal of both stopping terrorism and stopping an insurgency in Afghanistan (Lango 2010b).

What, then, are these kinds? The concept of 'kind of threatened harm to

basic human rights' has an open texture. Indeed, some of these kinds are paradigmatic, but others are controversial. In Chapter 3 ('Moral Theory'), the following question is raised. How can we deliberate morally about the use of armed force, both on a case-by-case basis and in terms of just war principles? In the present section, I want to raise a related question. How can we deliberate morally about the use of armed force, both in terms of just war principles and on a kind-by-kind basis? A coherentist answer to this last question should involve a process of mutual adjustment of moral principles, moral judgements about paradigm cases, relevant empirical theories and so forth. In this book, I am able to discuss in significant detail only an illustrative selection of kinds.

These kinds are quite various. Stereotypically, the actors posing sufficiently serious threatened harms are states, but such harms are also posed by nonstate actors. Darrel Moellendorf's 'cosmopolitan account' of just cause is partly state-centric, in that it involves the goal of 'advancing justice in the basic structure of the state or the international effects of its domestic policy' (2002: 159). By contrast, the concept of 'kind of threatened harm to basic human rights' is more general. For instance, invoking the legitimacy criteria, the Security Council might authorise the use of armed force to counter a sufficiently serious threat posed by a transnational criminal organisation engaged in human trafficking.<sup>3</sup> (Such a military action might also be conceptualised as a police action.)

The kind matters. Indeed, the scale (or degree) of a threatened harm matters, but so does its nature (or character). For the sake of comparison, let me mention a famous controversy in the history of utilitarianism: for Jeremy Bentham, only quantity matters; by contrast, for John Stuart Mill, quality also matters. According to the deontological moral theory that I am presupposing, the nature of an act of murder and the nature of an act of theft are such that the former kind of act is intrinsically morally worse than the latter kind of act, whatever the scale (or degree).

A single act of murder is intrinsically morally worse than a thousand thefts of diamonds. In the UDHR, some basic human rights are expressed as follows. 'Everyone has the right to life, liberty and security of person' (Article 3). A main thesis is that there can be just causes for targeted military operations to stop targeted violations of basic human rights. Each and every individual human being has the basic human right to life. Specifically, there can be a just cause for a targeted military operation to stop the targeted killing of a single human being. A threatened harm to the basic human right to life, even of a single human being, when it is sufficiently clear and serious, is of a kind to justify tentatively the use of armed force. Disputably, for example, when Daniel Pearl, a reporter for the *Wall Street Journal*, was kidnapped by militants in Pakistan during January 2002 (Eckholm and Barringer 2002),

there was a just cause for a sufficiently targeted military operation to rescue him. However, such a rescue did not happen, the fog shrouding his kidnapping was too thick and he was eventually beheaded.

#### I. EXCEPTIONAL OR NORMAL?

Military intervention for human protection purposes must be regarded as an exceptional and extraordinary measure.

*The Responsibility to Protect* (ICISS 2001a: 32)

Perhaps, from the temporal standpoint of the year 2001 – the year of the release of the ICISS Report – all future armed humanitarian interventions should be ‘exceptional and extraordinary’. The ICISS Report was strongly influenced by a recent paradigm: the relatively large-scale armed humanitarian intervention by NATO in Kosovo during 1999. Perhaps, from the temporal standpoint of the year 2013, all large-scale armed humanitarian interventions should remain, in future, exceptional and extraordinary.

However, a main thesis is that there is a gamut of armed humanitarian interventions, from the very large scale to the very small scale (Weiss 2007: 8–10). For example, the armed humanitarian intervention by the US and NATO in Libya during 2011 was relatively small scale. Perhaps, from the temporal standpoint of the year 2013, sufficiently targeted armed humanitarian interventions – when authorised by Security Council resolutions and with such limited purposes as imposing no-fly zones, establishing safe havens and enforcing indictments by the International Criminal Court – should become normal and ordinary. Of course, concerning the question of whether armed humanitarian interventions should remain exceptional or become normal, there can be principled moral disagreement.

It might be objected that the imposition of a no-fly zone is not an armed humanitarian intervention. In the ICISS Report, the topic of no-fly zones is relegated to a single paragraph: ‘The military intervention phase will necessarily be preceded by preventive actions’ – for instance, ‘sanctions’ and ‘no-fly zones’ (ICISS 2001a: 58). Although these preventive actions are called ‘military measures’ (ICISS 2001a: 58), it would seem that the imposition of a no-fly zone is not conceptualised in the ICISS Report as a military intervention. However, as the Supplementary Volume to the ICISS Report makes clear, the ICISS Report was also strongly influenced by an earlier paradigm of military intervention – ‘the establishment and enforcement of no-fly zones in northern Iraq in 1991’ (ICISS 2001b: 166).

Let me respond to the objection by means of an illustration. Recall that, in the ICC indictment of the President of Sudan, it is charged that the Sudanese ‘Air Force would be called upon to drop bombs’ on villages in Darfur (ICC 2008: 4). Clearly, the dropping of bombs by Sudanese aircraft on innocent

villagers gravely violates their basic human rights to life, liberty and security. On 29 March 2005, Security Council Resolution 1591 (2005) demanded ‘that the Government of Sudan . . . immediately cease conducting offensive military flights in and over the Darfur region’. Subsequently, an ICG report of 12 October 2006, *Getting the UN into Darfur*, advocated the imposition of a no-fly zone (ICG 2006: 11–12). Paradigmatically, a no-fly zone (NFZ) is enforced by the use of air power: ‘Enforcing the NFZ would require a squadron of twelve to eighteen Harrier fighter aircraft . . . that could force aircraft to land, shoot them down or disable their runways’ (ICG 2006: 12). Clearly, to shoot down a Sudanese aircraft is to perform a military action. Moreover, to shoot down the aircraft as a means of achieving the goal of stopping it from violating basic human rights of innocent villagers by dropping bombs on them is to engage in armed humanitarian intervention. Such an imposition of a no-fly zone should be conceptualised as a military intervention.

Interestingly, in this ICG report, the question of ‘whether at this stage the situation [in Darfur] is so grave as to justify . . . a major military “humanitarian intervention”’ is answered by means of the High-level Panel Report’s legitimacy criteria (ICG 2006: 16). To interpret the quoted question, it is important to grasp the qualification expressed by the word ‘major’. Briefly, it is argued in the ICG report that the threat-seriousness criterion is satisfied, but it is also argued that the last resort criterion is not satisfied: ‘Much more still can and should be done by the international community before non-consensual military intervention is considered’ (ICG 2006: 17) – that is, before considering a military humanitarian intervention that is major.

By means of the legitimacy criteria, the ICG report should also have answered a related question – namely, whether at this stage the situation is so grave as to justify the imposition of a no-fly zone. Certainly, from the temporal standpoint of 12 October 2006, if the threat-seriousness criterion is satisfied for a major armed humanitarian intervention, it is also satisfied for a relatively smaller-scale imposition of a no-fly zone. From that temporal standpoint, should the international community do more before considering the nonconsensual imposition of a no-fly zone? Such a question is addressed in the following two chapters about the idea of last resort.

#### J. THE PROBLEM OF MULTITUDE

To generalise, a main thesis is that, for every form of armed conflict, there is a gamut of military actions, from the very large scale to the very small scale. Correspondingly, for every form of armed conflict, there are various just causes for the use of armed force to stop sufficiently clear and serious threatened harms. The scale of force must be justly correlative to the scale of harm. There can be just causes for large-scale military operations to stop

large-scale violations of basic human rights, and there can be just causes for targeted military operations to stop small-scale violations of basic human rights.

Accordingly, the threat-seriousness criterion might appear to be both overly demanding and overly permissive. Just causes are inordinately multitudinous, or so it might appear. Let me respond briefly to this problem of multitude. When it is proven that a proposed military action satisfies the threat-seriousness criterion, the military action is only justified tentatively. The burden remains of proving that the other legitimacy criteria are satisfied. To counterbalance overemphasis of the just cause principle, I am emphasising last resort, proportionality and noncombatant immunity principles. Dialectically, the present chapter, 'Just Cause', is counterbalanced by the later chapters 'Last Resort', 'Last Resort and Noncombatant Immunity' and 'Proportionality and Authority'.

#### IV. A JUST CAUSE PRINCIPLE

Having critically examined the threat-seriousness criterion, my purpose in this part of the chapter is to formulate a generalised just cause principle. For the sake of concreteness, the principle is applied to the problem of escalation.

##### A. A COSMOPOLITAN JUST CAUSE PRINCIPLE

Canonically, the idea of just cause may be expressed roughly as a conditional prohibition: it is morally obligatory not to perform a military action, if there is not a just cause.

Provisionally, this rough principle may be amplified in terms of the just-correlativity requirement: it is morally obligatory not to perform a military action, if there is not a just cause; and there is a just cause, when there is both a just goal and a justly correlative means. The phrase 'justly correlative' expresses the just-correlativity requirement. A just cause principle is a principle of just goal and justly correlative means.

Finally, by incorporating elements of the revised criterion of seriousness of threat, the just cause principle that I am proposing is formulated as follows:

*Just cause principle.* It is morally obligatory not to perform a military action, if there is not a just cause. There is a just cause, when there is both a just goal and a justly correlative means. The just goal is preventing sufficiently grave violations of basic human rights, and the means of achieving it is a justly correlative planned course of military actions.

It is presupposed that, in applying this principle, three questions about the threatened harm to basic human rights must be answered – namely, a

categorical question of kind of threat, an epistemic question of clarity of threat and an evaluative question of scale of threat.

This just cause principle is formulated rather briefly and simply. Similarly, for example, in the UN Charter, there is a rather brief and simple formulation of a right of self-defence (Article 51). As R. M. Hare argued, there are 'practical and psychological reasons for having relatively simple principles of action if we are to learn to behave either morally or skillfully or with prudence' (1981: 39). Instead of complicating a relatively simple principle by incorporating various qualifications within it, subordinate or elucidatory principles should be formulated, which themselves should be relatively simple.

Accordingly, the specificity standard of sufficient detail and the epistemic standard of clear and convincing evidence are presupposed as principles that are elucidatory of this just cause principle.

The threat-seriousness criterion contains the phrase 'justify prima facie', and the revised threat-seriousness criterion contains the phrase 'justify tentatively', but such phrases are potentially misleading, insofar as the term 'justify' is accented and the qualifying term is neglected. By contrast, this just cause principle does not contain such a phrase. When it is proven that the principle is satisfied, the performance of the military action is not justified, even tentatively. The purpose is to ensure that the principle functions clearly as a moral constraint. Let me explain.

When we apply the principle to a particular military action, we have to morally presume that there is not a just cause, and we have the burden of proving that there is. On the one hand, suppose that we fail to satisfy this burden of proof. Our moral presumption becomes determinative: we have to decide that there is not a just cause for performing the military action. And, therefore, we have to conclude that it is morally obligatory not to perform it. Formulated thus as a conditional prohibition, the principle functions clearly as a moral constraint.

On the other hand, suppose that we succeed in satisfying the burden of proving that there is a just cause for the military action. The just cause principle is a conditional prohibition. It is not a conditional permission. It does not say: 'it is morally permissible to perform a military action, if there is a just cause'. Therefore, we cannot conclude even tentatively that it is morally permissible to perform the military action. And there is still the burden of proving that the ancillary just war principles are satisfied. Because the just cause principle does not include such a moral permission, it functions clearly again as a moral constraint.

#### B. PREVENTIVE MILITARY ACTIONS

The question of just cause is a question of just prevention. From a particular temporal standpoint, we apply just war principles prospectively. Specifically,

when we apply the just cause principle, our just goal is one of ‘prevention’ – namely, preventing sufficiently grave violations of basic human rights.

It might be objected that a just war theory should not endorse a doctrine of preventive war. ‘Preventive war justifications hold’, Buchanan explained, ‘that it can be permissible to make war to avert a temporally distant harm’ (2006: 2). The qualification ‘temporally distant’ is crucial. Truly, we should be sceptical about proposals to use armed force to counter threatened harms that are temporally distant. To satisfy the just cause principle (and also the other core just war principles), the epistemic standard of clear and convincing evidence must be satisfied. But the future is shrouded in a fog of uncertainty. Paradigmatically, when a threatened harm is temporally distant, the relevant evidence is less than clear and convincing. What is problematic about such preventive war justifications is not the idea of prevention per se. Instead, what is problematic is whether the epistemic standard can be satisfied.

On the other hand, when a threatened harm is not temporally distant, we need not be so sceptical. Consider again, for instance, the subject of invasion. First, by means of clear and convincing intelligence, we might discover that an invasion is imminent; and we might have a just cause for a pre-emptive first strike to prevent the imminent invasion from happening. Second, we might have a just cause for using armed force to counter an invasion that is currently happening – that is, we might have the just goal of preventing the invasion from advancing. Third, we might have a just cause for using armed force after we have been occupied by an invader – that is, we might have the just goal of preventing the occupation from continuing. In this book, the terms ‘stop’, ‘counter’ and ‘prevent’ are used broadly.

Even if the just cause principle is satisfied, the last resort principle must also be satisfied. Paradigmatically, when a suspected harm is temporally distant, there is ample time to explore alternative nonmilitary measures. It might be objected that we should also be sceptical about proposals to counter temporally distant harms by means of nonmilitary measures. Let me summarise my reply to this objection. To establish that the just cause principle is satisfied, we have to morally presume that there is not a just cause, and we have the burden of proving that there is. By contrast, to establish that the last resort principle is satisfied, we have to morally presume that it is reasonable to attempt an alternative nonmilitary measure, and we have the burden of proving that it is not. Absent clear and convincing evidence that an alternative nonmilitary measure will not be successful, it is reasonable to attempt it, before using armed force. (These points are explained more fully in Chapter 6, ‘Last Resort’.)

Let me sketch an admittedly controversial counterexample to a blanket prohibition of preventive military actions with temporally distant goals – namely, a targeted military operation to intercept a nuclear weapon in transit

at sea. The Proliferation Security Initiative (PSI) was developed by the Bush administration and has been continued by the Obama administration. The PSI has been endorsed by ninety-eight states. The PSI ‘interdiction principles’ include a principle concerning actions to ‘stop and/or search’ ships that are ‘reasonably suspected’ of transporting nuclear weapons and also actions to ‘seize’ nuclear weapons found on such ships (PSI 2003). Let me add that sometimes, if such actions were to be accomplished, armed force would have to be used. Under some circumstances, limited uses of armed force to seize a nuclear weapon in transit at sea could satisfy the just cause principle. The just goal would be to prevent massive violations of the human right to life by the detonation of a nuclear weapon in the temporally distant future, and the just means of achieving this goal would be a targeted military operation to seize that nuclear weapon. (Such a military action might also be conceptualised as a police action.)

Having discussed the subject of preventive war elsewhere (Lango 2005), my discussion here is brief. In this book, I am able to thoroughly examine only an illustrative selection of specific issues. This chapter focuses on the specific issue of escalation.

### C. RIGHT INTENTION

A main thesis is that the set of core just war principles contains only just cause, last resort, noncombatant immunity and proportionality principles. Admittedly, this thesis is controversial. Should there be other core just war principles – for instance, a traditional principle of right (or proper or dominant) intention (or purpose)?

Among the legitimacy criteria in the High-level Panel Report, there is a right intention principle:

*Proper purpose.* Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved? (HLPR 2004: 67)

Similarly, presupposing the just cause principle, a correlative right intention principle might be formulated thus:

*Right intention.* It is morally obligatory not to perform the military action, if the just goal is not the primary goal.

Must agents responsible for the military action have as their ‘dominant intention’ achieving the just goal by the justly correlative means (Fisher 2011: 72)?

Each core just war principle is a necessary moral criterion for determining

whether the nonharm principle may be overridden. When we morally deliberate about whether to harm other persons grievously by means of the use of armed force, we have to make the moral presumption that we must not. To override this moral presumption, we have the burden of proving that the just cause, last resort, proportionality and noncombatant immunity principles are satisfied. To override the moral presumption, should we have the additional burden of proving that our just goal is our primary goal?

A military action can be just, even when the just goal is not the primary goal. Let me sketch some controversial illustrations. (In each of these illustrations, it is supposed that the stated military action would satisfy the four core just war principles.) From the temporal standpoint of 10 January 1994, a targeted military operation by UNAMIR to seize weapons in Rwanda would still be just, even if Dallaire's primary goal were to win a Nobel Prize. From the temporal standpoint of 2 May 2011, the US targeted military operation that killed Osama bin Laden would still be just, even if Obama's primary goal were to win re-election. From the temporal standpoint of 17 March 2011, the authorisation by the Security Council of armed intervention in Libya would still be just, even if the primary goal were to demonstrate the resoluteness (or 'credibility') of the Security Council in matters of war and peace.

In conclusion, the set of core just war principles should not contain a separate principle of right intention. A right intention principle is not a necessary moral criterion for determining whether a proposed military action would be just.

#### D. ALL RESPONSIBLE AGENTS AND ALL ARMED CONFLICTS

Explicitly, as advocated in the High-level Panel Report, the threat-seriousness criterion is applicable only by the Security Council. However, according to Gareth Evans, the five legitimacy criteria are 'equally applicable to individual countries' decisionmaking about the use of force' (2008: 140).

A main thesis is that the just cause principle formulated above is equally applicable by responsible agents of all sorts. Therefore, it is also equally applicable by nonstate actors. For instance, during the 1994 genocide in Rwanda, it was applicable by leaders of the RPF.

In accordance with moral universalism, the just cause principle is equally applicable by each and every individual human being. Even if you yourself are not engaged in decisionmaking about your own use of armed force, you may still make moral judgements about such decisionmaking by other human beings. From your own agential standpoint, you may adopt a different agential standpoint. You may imagine that the standpoint of responsible agents who are themselves engaged in decisionmaking about the use of armed force is your own agential standpoint.

For example, anyone, anywhere, may read Dallaire's *Shake Hands with*

*the Devil* (and other pertinent writings) and make the moral judgement that there was a just cause for a targeted military operation by UNAMIR in early January 1994 to seize illegal weapons in the weapons-secure area in Kigali. The generalisation of just war principles to all sorts of responsible agents is discussed especially in Chapter 8, 'Proportionality and Authority'. Such a generalisation is essential for a cosmopolitan conception of global citizenship.

A related main thesis is that the just cause principle is applicable to all forms of armed conflict. It is applicable to every military action, however large scale or small scale. It is both a resort principle and a conduct principle. Is this generalised principle therefore overly general? According to coherentism, a resolution of this problem of overgeneralisation should involve a process of mutual adjustment of the idea of just cause, general moral principles, ancillary just war principles, moral judgements about specific issues and particular cases and so forth. In this book, I am able to discuss only an illustrative selection of specific issues and particular cases in significant detail – for instance, the problem of escalation.

#### E. JUST CAUSE AND ESCALATION

Typically, a military action has temporal phases, and each temporal phase is itself a military action. The just cause principle is therefore applicable to every temporal phase of any military action. In this section, I study how the principle is applicable to phases of escalation.

To begin with, let us consider the Cold War subject of nuclear escalation – that is, the process of transformation from conventional war to nuclear war. Characteristically, large-scale conventional wars are very destructive, but nuclear wars are expected to be drastically more destructive. If there had been a Third World War between NATO and the Soviet Union, there might have been two chief temporal phases – an initial phase of conventional war and then a subsequent phase of nuclear war. Because states continue to possess nuclear weapons, there is still an alarming danger of nuclear escalation. A chief function of just war principles should be to morally constrain nuclear escalation.

Coined in the Cold War, the term 'escalation' is extendible to armed conflicts of all forms (Fisher 1985: 96). For example, there might be escalation from a limited war to a major war. A targeted military operation has a narrowly focused goal, to be achieved by a course of military actions that are narrowly limited in fire-power, length of time, geographical extent and so forth. Obviously, there might be escalation from a targeted military operation to one that is appreciably more destructive.

Whenever there is armed conflict, there might be a process of transformation – that is, an 'escalation' – from a temporal phase of smaller-scale military

actions to a temporal phase of significantly larger-scale military actions. Because phases of escalation are appreciably more destructive, a chief function of just war principles should be to morally constrain them.

How is the just cause principle applicable to a phase of escalation? To begin with, let me construct a hypothetical case involving the aforementioned territorial dispute between China and Japan. (Two of the stated three cases are rewritten as two phases of a single case.) The US targeted military operation against China's targeted invasion of the uninhabited island has two chief phases. In the first phase, there is a planned course of military actions that includes imposing a naval blockade of the island and patrolling the island's airspace. In the second phase, there is a planned course of military actions that includes aerial bombarding of the island and landing ground forces. Evidently, subsequent to the first phase of 'encirclement', the second phase of 'counterattack' is a phase of escalation. Given that the first phase has a just cause, it does not follow conceptually (or logically) that the second phase has a just cause. Given that there is a just cause for aerial patrolling, we may still ask: is there a just cause for aerial bombardment? Given that there is a just cause for a naval blockade, we may still ask: is there a just cause for landing ground forces?

#### F. UNAMIR II AND MISSION CREEP

During an armed humanitarian intervention, there might be a somewhat gradual process of escalation, sometimes termed 'mission creep' (Cushman 1993). For example, from an initial phase of securing safe havens by the defensive use of armed force, there might be a process of escalation to a subsequent phase of preventive military intervention in a civil war. Given that there is a just cause for securing the safe havens, we may still ask: is there a just cause for intervening in the civil war?

For an illustration, let us return to the case of Rwanda. On 17 May 1994 – in the middle of the genocide that happened there from April to mid-July 1994 – Security Council Resolution 918 (1994) authorised an armed UN peacekeeping mission (UNAMIR II). From the temporal standpoint of 17 May 1994, let us imagine hypothetically what UNAMIR II might have done.

According to SC Resolution 918 (1994), UNAMIR II has this primary responsibility: 'the establishment and maintenance, where feasible, of secure humanitarian areas'. Securing these safe havens is the means of achieving as a goal 'the security and protection of displaced persons, refugees and civilians at risk in Rwanda'. Military action may be taken by UNAMIR II 'in self-defence against persons or groups who threaten protected sites and populations'. Just as the imposition of a no-fly zone is a limited form of armed humanitarian intervention, so is the use of armed force to establish and maintain safe havens.

In applying the just cause principle from the temporal standpoint of 17 May 1994, the categorial, evaluative and epistemic questions must be answered. Obviously, stopping genocide is a paradigmatic kind. Surely, a just goal for the use of armed force by UNAMIR II is preventing large-scale massacres of innocent Rwandans. Evidently, a justly correlative means of achieving that just goal is a planned course of military actions that involves fortifying safe havens and using armed force when necessary to defend them. Furthermore, from the testimony of Dallaire, Human Rights Watch and other reliable sources, there is clear and convincing evidence that such targeted uses of armed force would stop Hutu genocidaires from massacring some (but not all) innocent Rwandans.

There is a problem of mission creep. SC Resolution 918 (1994) demands that 'all parties to the conflict immediately cease hostilities, agree to a cease-fire, and bring an end to the mindless violence and carnage engulfing Rwanda'. However, it is not stated in this Resolution that UNAMIR II is permitted to intervene militarily to enforce this demand. According to Michael Barnett, the Security Council's view was that 'a cease-fire was required before UNAMIR II could be deployed' (2002: 142). Disputably, however, what is minimally required is that the Hutu Government and the RPF agree not to interfere with the establishment of safe havens and also that they agree to cease their hostilities in demilitarised zones around safe havens. Should the Security Council permit UNAMIR II to use armed force to compel the Hutu Government and the RPF to adhere to such agreements? There is a slippery slope here, from the use of armed force against Hutu genocidaires to armed intervention in the civil war.

Disputably, then, from the temporal standpoint of 17 May 1994, responsible agents for UNAMIR II should plan contingently for two chief temporal phases in the implementation of the mandate of UNAMIR II – namely, a phase of safe havens initially and (potentially) a subsequent phase of armed intervention in the civil war. Given that there is a just cause for the safe haven phase, they should still ask: is there a just cause for a phase of civil war intervention?

Specifically, there are categorial, evaluative and epistemic questions regarding a phase of civil war intervention. Surely, there is still the just goal of using armed force to prevent large-scale massacres of innocent Rwandans. However, civil war intervention is a quite different and more disputable kind. The plan about safe havens involves military actions that are narrowly limited in fire-power and geographical extent. By contrast, any plan for civil war intervention would most likely involve military actions with appreciably greater fire-power – for instance, airstrikes from helicopter gunships – extending over a much larger geographical area. It is more disputable, then, whether the just-correlativity requirement would be satisfied. Further, any

such plan would be obscured by the fog of civil war. Would UNAMIR II create 'an informal alliance with the RPF' (Barnett 2002: 140)? In light of the RPF's announced opposition to UNAMIR II (Barnett 2002: 137), would the troops of UNAMIR II have to engage the RPF in combat? Disputably, the epistemic standard of clear and convincing evidence would not be satisfied.

#### G. THE GOAL OF PEACE

The purpose of war is peace.

Vitoria (1991: 305)

The set of core just war principles contains only just cause, last resort, proportionality and noncombatant immunity principles. Let me raise, again, the question of whether there should be other core just war principles. In the just war tradition, we find the moral requirement that a just war must have as the ultimate goal 'the end of peace' (Johnson 1984: 18). Should there be a core just war principle mandating 'the goal (or end or aim) of peace'?

To answer this question, a related question needs to be answered. What should be meant by the term 'peace'? On the one hand, as Dower explained, there is a significant 'positive conception' of peace – namely, that peace consists of 'harmonious relationships between individuals and groups' (2009: 138). I am happy to endorse this ideal of harmony. However, harmonious relationships between people cannot be imposed through the force of arms. A just war theory should not include such a core just war principle as the following: 'it is morally obligatory not to perform a military action, if that military action is not intended as a means of achieving the goal of harmonious relationships between people'. Instead, the ideal of harmonious relationships should be encouraged by peaceful means.

On the other hand, as Dower also explained, there is a minimal 'negative conception' of peace – namely, the mere 'absence of war' (2009: 6). To generalise, a minimal goal of peace is the goal of the absence of armed conflict. Again, I am happy to endorse this goal. However, there is no need to have a separate core just war principle about it.

Is there an intermediate goal of peace that is not so minimal as the mere absence of armed conflict, but also not so maximal as the ideal of harmonious relationships between people? Interestingly, Dower advocated a 'middle position' between the negative and positive conceptions of peace – namely, a conception of 'just durable peace' (2009: 7). My view is that such a peace also cannot be imposed through the force of arms, but instead must be promoted by peaceful means.<sup>4</sup>

The just cause principle formulated in this chapter includes an intermediate goal of peace. The just goal of preventing sufficiently grave violations of basic human rights is a substantive goal of peace. Relationships between individuals

and groups are substantively peaceful, even if not fully harmonious, when basic human rights are not gravely violated.

Are there additional goals of peace that may be achieved by means of armed force – for example, the goals of regime change and democratisation? We should beware of an answer that is too expansive. Analogous to the process of escalation from properly small-scale military actions to ones that are unduly large scale, there might be a process of ‘escalation’ from properly circumscribed peace goals to ones that are unduly extensive. Nevertheless, in morally deliberating about a particular case, we might judge that the just goal of preventing grave violations of basic human rights ought to be achieved by means of a course of military actions that includes the action of forcibly democratising a regime or the action of forcibly changing a regime. Let me emphasise that, in making such a moral judgement, we have the burden of proving that the just-correlativity requirement is satisfied. In short, additional peace goals for using armed force are thus subordinate to the stated just goal.

In conclusion, the set of core just war principles should not contain a separate principle that peace must be the ultimate goal.

#### NOTES

1. Similarly, according to Sjöberg’s feminist just war theory, the ‘standard of just cause’ should be ‘interpreted dialogically’ (2006: 77).
2. Compare this chapter with the chapter entitled ‘Just cause’ in Coates (1997). The term ‘just cause’ is interpreted in terms of a conception of ‘goal’ in Kamm (2011: 119). In surveying the just war tradition, Hensel expresses the idea of just cause thus: ‘force may be used only to secure just goals’ (2007: ix).
3. See Kapstein (2006). Compare Sjöberg (2006: 79).
4. Concerning peacebuilding, see Murithi (2009) and Webel and Galtung (2007).

## CHAPTER 6

# LAST RESORT

I have always resisted the argument that force is a last resort.

Michael Walzer (2004: 160)

The criterion of last resort underlines the primacy of peace over war in just war thinking.

A. J. Coates (1997: 189)

The cosmopolitan just cause principle introduced in the preceding chapter might appear to be overly permissive, and the cosmopolitan last resort principle introduced in this chapter might appear to be overly prohibitive. Hence, a chief purpose here is to explore how the two principles are interrelated. To counterbalance overemphasis of the idea of just cause, I am emphasising the idea of last resort.

As the block quotations display, there can be principled moral disagreement about the idea of last resort.<sup>1</sup> Disputably, in Walzer's words, 'we can never reach lastness, or we can never know that we have reached it' (2004: 88). Another main purpose is to defend the idea of last resort against such scepticism.

The idea of last resort is discussed both in this chapter and the next, 'Last Resort and Noncombatant Immunity'. The first part of this chapter contains some introductory remarks. In the second part, a cosmopolitan last resort principle is formulated. In the third part, the principle is applied to some particular cases. In the fourth part, reasonableness standards are proposed. The fifth part appends some additional remarks.

### I. PRELIMINARIES

According to Johnson, a last resort principle is 'not found in classic statements of the just war idea' (2005: 36). Arguably, however, an intimation of last resort is found in one of Vitoria's rules of war:

First Canon: since princes have the authority to wage war, they should strive above all to avoid all provocations and causes of war. If it be possible, the prince should seek as much as lieth in him to live peaceably with all men, according to Paul's words in Rom. 12: 18. (1991: 326–7)

But I am not studying the history of the idea of last resort. Instead, I am engaging in the project of rethinking, revising or supplementing received just war principles, among which is a last resort principle. With the aim of formulating a cosmopolitan last resort principle, I want to examine the criterion of 'last resort' in the High-level Panel Report.

A last resort principle was expressed succinctly by William V. O'Brien: 'Every reasonable peaceful alternative should be exhausted' (1981: 33). As Richard Regan underscored: 'The key word is *reasonable*' (1996: 64 [emphasis in original]). To illuminate this particular word, let me suggest a domestic analogy. In a criminal trial, there must be proof 'beyond a reasonable doubt' (ALI 1962: 1.12); and to decide whether a person has acted negligently, we have to ascertain how a 'reasonable person' would have acted (ALI 1962: 2.02). In domestic jurisprudence, the word 'reasonable' is also a key word.

Accordingly, let me raise a key question. What are the standards for determining whether it is no longer reasonable to attempt an alternative nonmilitary measure before resorting to the use of armed force? A main thesis is that we are able to determine that we have reached lastness by means of 'reasonableness standards'.

Another key word is 'peaceful'. Paradigmatically, what should be exhausted is every reasonable alternative that is peaceful. Whereas military actions can be highly destructive, alternative measures that are peaceful can be highly constructive.<sup>2</sup> During the Cold War, there might have been an enormously destructive nuclear war. Fortunately, some peaceful alternative measures were attempted, including one that still promises to be strikingly constructive – namely, the negotiation and ratification of the Nuclear Non-Proliferation Treaty (NPT). By ratifying the NPT, states are committed to engage in 'negotiations in good faith' about 'effective measures' for bringing about 'nuclear disarmament' (NPT 1968: Article VI).

There is a crucial moral difference between a military action and an alternative measure that is peaceful. Regularly, when we perform military actions, we intentionally or knowingly kill or otherwise gravely violate basic human rights of other persons. According to the nonharm principle, we are morally obligated not to gravely violate basic human rights of other persons. In order to override the nonharm principle, we have the burden of proving that just war principles are satisfied.

By contrast and paradigmatically, when we attempt alternative measures

that are peaceful, we do not gravely violate basic human rights. The nonharm principle does not have to be overridden. This crucial moral difference helps to clarify why before using armed force, every reasonable peaceful alternative should be exhausted (Childress 1982: 75).

There are problems of intermediate cases. First, there is a ‘coercion problem’. In addition to peaceful measures, there are alternative measures that are coercive – notably, economic sanctions. By attempting a coercive nonmilitary measure, we might also gravely violate basic human rights of other persons – for instance, the human right to ‘food, clothing, housing and medical care’ (UDHR 1948: Article 25). Second, there is a ‘threat problem’. Should deterrent or compellent threats to use armed force be conceptualised as military actions or coercive nonmilitary measures? Third, there is a ‘concurrence problem’. While a military action is being performed, should we also attempt nonmilitary measures? For instance, should we negotiate while fighting? Later, I investigate how these three problems might be resolved.

## II. A LAST RESORT PRINCIPLE

My purpose in this second part is to formulate and support a cosmopolitan last resort principle that is applicable by all sorts of responsible agents to all forms of armed conflict.

### A. THE CRITERION OF LAST RESORT

To begin with, I want to examine the last resort criterion in the High-level Panel Report:

*Last resort.* Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed? (HLPR 2004: 67)

In accordance with moral universalism, it is presupposed that this criterion is applicable by all sorts of responsible agents to all forms of armed conflict.

Notice the presence of the word ‘reasonable’. Again, a key question should be raised. What are the standards for determining whether, in a particular case, there are no ‘reasonable grounds’? In short, what are the ‘reasonableness standards’? Notice also the absence of the word ‘peaceful’. Apparently, the term ‘non-military option’ encompasses both peaceful measures and coercive nonmilitary measures.

Correspondingly, I propose to formulate provisionally a cosmopolitan last resort principle as a conditional prohibition:

*Last resort principle.* It is morally obligatory not to perform a military action, if every reasonable nonmilitary measure has not been attempted.

Presumably, the last resort criterion incorporates a reasonableness standard of impracticality (or infeasibility) – roughly, that the nonmilitary measure ‘will not succeed’. By contrast, instead of complicating the last resort principle by incorporating reasonableness standards in it, I propose to formulate some reasonableness standards as principles subordinate to, or elucidatory of, it – namely, not only an impracticality standard, but also standards of disproportionality and awfulness. Additionally, there are the epistemic and specificity standards.

#### B. A COERCIVE RESORT PRINCIPLE

I am featuring moral ideals expressed in the UN Charter. In Chapters VI and VII, a conception of peaceful measures is clearly distinguished from a conception of coercive nonmilitary measures.

According to Chapter VI, the parties to a sufficiently dangerous dispute are required, ‘first of all’, to attempt to settle their dispute by ‘peaceful means’ – for instance, through ‘negotiation’ and ‘judicial settlement’ (Article 33). Significantly, the Security Council is empowered to ‘call upon the parties to settle their dispute by such means’ (Article 33). In brief, the Security Council is empowered by Chapter VI to explore peaceful measures.

The Security Council is also empowered by Chapter VII to explore coercive nonmilitary measures. Specifically, if the parties ‘fail to settle’ their dispute by peaceful measures (Article 39), the Security Council is empowered to authorise coercive measures ‘not involving the use of armed force’ to settle it – for instance, ‘complete or partial interruption of economic relations’ (Article 41).

In the UN Charter, these conceptions of peaceful measures and coercive nonmilitary measures are clearly distinguished from a conception of military actions. As a last resort, if coercive nonmilitary measures ‘would be inadequate or have proved to be inadequate’, the Security Council is empowered by Chapter VII to authorise military actions (Article 42).

Analogous to the aforementioned crucial moral difference between peaceful measures and military actions, there is a crucial moral difference between peaceful measures and coercive nonmilitary measures. Paradigmatically, when a coercive nonmilitary measure is attempted, the nonharm principle has to be overridden. Frequently, particular cases of such coercion involve grave violations of basic human rights. By contrast and paradigmatically, when a peaceful measure is attempted, the nonharm principle does not have to be overridden. The former crucial moral difference helps to clarify why before using armed force, every reasonable peaceful alternative should be

exhausted. Analogously, the latter crucial moral difference helps to clarify why before attempting a coercive nonmilitary measure, every reasonable peaceful alternative should be exhausted.

Therefore, analogous to the provisional last resort principle, I propose to formulate provisionally a principle concerning coercive nonmilitary measures:

*Coercive resort principle.* It is morally obligatory not to attempt a coercive nonmilitary measure, if every reasonable peaceful measure has not been attempted.

‘A feminist understanding of last resort’, Laura Sjoberg explained, ‘would require the inclusion of non-coercive strategies to obtain policy goals’ (2006: 81). Granted, a feminist approach to just war theory is somewhat different from my Kantian approach, but there are some concordances, as this coercive resort principle illustrates.<sup>3</sup>

Between military actions and coercive nonmilitary measures, there is not such a crucial moral difference, or so it would appear. Before using armed force, why should every reasonable coercive nonmilitary measure be exhausted? In some particular cases, economic sanctions might be considerably more destructive than targeted military actions. Later, I investigate how this ‘coercion problem’ might be resolved.

### C. THE COEQUALITY OF LAST RESORT AND JUST CAUSE

The criterion of ‘seriousness of threat’ in the High-level Panel Report includes the phrase ‘to justify prima facie’, and the revised threat-seriousness criterion in the preceding chapter includes the phrase ‘to justify tentatively’. These phrases suggest that the threat-seriousness criterion ought to be satisfied first, as does the phrase ‘the threat in question’ in the last resort criterion. Nonetheless, I think that the last resort criterion ought to be satisfied, even when the threat-seriousness criterion is not satisfied.

According to Johnson, the just cause principle is a ‘deontological’ principle, whereas the last resort principle is a ‘prudential’ principle; and deontological principles have ‘priority’ over prudential principles (1999: 34, 41).

By contrast, I am formulating cosmopolitan just cause and last resort principles as coequal deontological principles. Neither has priority over the other.

In his article ‘Just cause for war’, McMahan argued that the requirement of just cause has priority over the requirement of necessity – that is, the requirement ‘that war be a necessary means of achieving the just cause’ (2005: 5). (I read his necessity requirement as a last resort requirement; the term ‘last resort’ does not occur in his article.) He claimed that ‘just cause has priority over the other valid requirements in this sense: the others cannot be satisfied, even in principle, unless just cause is satisfied’ (2005: 5). His

argument that just cause has priority over necessity was stated briefly: ‘The claim that war is necessary for something other than the achievement of a just cause has no justificatory force’ (2005: 5).

Instead of such a priority thesis, I am advocating a coequality thesis – namely, that the just cause principle and the other core just war principles are deontological principles coequally. None of them has priority over any of the others. Therefore, the last resort principle must be satisfied, even when the just cause principle is not satisfied. Because armed conflicts are so highly destructive, the chief function of just war principles should be to morally constrain uses of armed force. Even when agents responsible for a military action fail to satisfy the just cause principle, they are still morally constrained by the last resort principle. It is still morally obligatory for them not to use armed force to achieve a goal that is not a just goal, if they have not attempted every reasonable nonmilitary measure.

Let me sketch a controversial illustration. Presumably, China has as a goal ‘the fusing of Taiwan with the Chinese mainland’ (Kaplan 2010: 36). But China does not have a just cause for the use of armed force, or so I believe. Even when the just cause principle is disregarded, China is still morally constrained by the last resort principle. Before attacking Taiwan, China must negotiate with Taiwan about unification. Hopefully, the temporal process of negotiation between China and Taiwan and the time requisite for attempting every other reasonable nonmilitary measure would keep ‘Taiwan functionally independent until China became a more liberal society’ (Kaplan 2010: 37). Thus might the destructiveness of war be circumvented.

#### D. A COSMOPOLITAN LAST RESORT PRINCIPLE

In this section, the provisional last resort principle is revised, in order to make explicit that a just cause is not presupposed.

Admittedly, the just cause and last resort principles are interrelated. The idea of just cause should be understood teleologically, but so should the idea of last resort. According to the just cause principle, a military action must be performed as a means of achieving a just goal. Correlatively, the last resort principle morally requires that, before performing that military action as a means of achieving that just goal, every reasonable nonmilitary means of achieving that just goal must be attempted.

Accordingly, to fortify McMahan’s priority thesis, his necessity requirement – namely, ‘that war be a necessary means of achieving the just cause’ (2005: 5) – might be reconstructed as follows.

*Necessity requirement.* It is morally obligatory not to attempt to achieve a just goal by means of a military action, if it is reasonable to attempt to achieve that just goal by means of a nonmilitary measure.

By contrast, my conception of last resort is more inclusive. For it also morally requires that, before performing a military action as a means of achieving a goal that is not just, every reasonable nonmilitary means of achieving that goal that is not just must be attempted.

Therefore, in order to make explicit that a just cause is not presupposed, I propose to revise the provisional formulation of the cosmopolitan last resort principle as follows.

*Last resort principle.* It is morally obligatory not to attempt to achieve a goal by means of a military action, if it is reasonable to attempt to achieve that goal by means of a nonmilitary measure.

In accordance with moral universalism, it is presupposed that the principle is applicable by all sorts of responsible agents. It is morally obligatory for any responsible agent not to attempt to achieve a goal by means of a military action, if it is reasonable for that responsible agent to attempt to achieve that goal by means of a nonmilitary measure. Moreover, the principle is applicable to all forms of armed conflict. It is applicable to every military action, however large scale or small scale.

Additionally, let me propose an analogous revision of the principle about coercive nonmilitary measures:

*Coercive resort principle.* It is morally obligatory not to attempt to achieve a goal by means of a coercive nonmilitary measure, if it is reasonable to attempt to achieve that goal by means of a peaceful measure.

Goal or just goal? The necessity requirement is transformed into the last resort principle by deleting the word 'just'. By juxtaposing these two principles, my purpose is to illuminate why there can be principled moral disagreement about whether just cause has priority over, or is coequal with, last resort.

The primary unit of moral evaluation is a planned course of actions. Similar to the concept of a 'planned course of military actions', there is the concept of a 'planned course of nonmilitary actions'. The temporal process of attempting to achieve a goal by means of a nonmilitary measure is equivalent to, or explicable as, the temporal process of attempting to achieve it by means of a planned course of nonmilitary actions.

Accordingly, I propose to formulate the last resort principle more explicitly as follows.

*Last resort principle.* It is morally obligatory not to attempt to achieve a goal by means of a planned course of military actions, if it is reasonable

to attempt to achieve that goal by means of a planned course of nonmilitary actions.

#### E. JUST GOAL VERSUS RIGHT GOAL

In support of this last resort principle, I want to make some brief remarks about some moral terms. Among the goals that are not – in the technical sense of a just war theory – ‘just’, there are goals that are meaningfully called ‘good’ or ‘right’. Let me draw upon a work of literature for a domestic analogy. Concerning the cause for a trial by combat, Shakespeare used such words in *Richard II*: ‘the justice of his cause’ (I, iii, 50); ‘thy cause is right’ (I, iii, 55); ‘thy good cause’ (I, iii, 78).

Standardly, in moral philosophy, actions are morally evaluated as ‘right’ or ‘wrong’, and the consequences of actions are morally evaluated as ‘good’ or ‘bad’. Hence a goal that is a consequence of an action is morally evaluated as ‘good’ or ‘bad’. Also, by performing one action, we can have, as a goal, the performance of a second action. Hence a goal that is an action is morally evaluated as ‘right’ or ‘wrong’. For brevity, I am presupposing that the goals of actions are themselves (primarily) actions.

When there is not a cause that is – in the technical sense of a just war theory – ‘just’, there might still be a cause that is – in the standard terminology of a moral theory – ‘right’. To be more explicit, when the goal of a military action is not a just goal, it might still be a right goal of a nonmilitary measure. Disputably, democratising an authoritarian state is not a just goal of a military campaign. Nevertheless, democratising that authoritarian state might still be a right goal of a nonmilitary measure (QDDR 2010: 42). Suppose that the goal of a proposed armed humanitarian intervention is not a just goal, but also that it is a right goal of the nonmilitary measure of negotiation. Surely, it might be worthwhile or even imperative to attempt to achieve that right goal by means of negotiation. Crucially, the last resort principle morally requires that, before performing a military action as a means of achieving a goal that is right but not just, every reasonable nonmilitary means of achieving that goal must be attempted.

### III. APPLICATIONS

#### A. MORAL COMPROMISE ABOUT ARMED HUMANITARIAN INTERVENTION IN DARFUR

The sporadic fighting that took place between [Sudanese] Government and [rebel] movement forces [in Darfur] during the last three months [of April to June 2011] caused instability in affected areas, as well as protection and humanitarian needs among communities . . . I once again reiterate to the belligerent parties that there is no military solution to the

Darfur conflict. The continued pursuit of their political objectives by military means merely prolongs the suffering of the people of Darfur and delays the arrival of peace.

Ban Ki-moon, *Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur* (Ban 2011: 14)

In this section, I support the last resort principle by means of some moral judgements about the particular case of Darfur. The block quotation is an excerpt from a report by Secretary-General Ban to the Security Council that is dated 8 July 2011.

From the temporal standpoint of 8 July 2011, let us imagine (quite hypothetically) how the just cause and last resort principles might be applied prospectively to the conflict in Darfur by members of the Security Council. To illustrate the interrelated ideas of principled moral disagreement and principled moral compromise, let us suppose that members of the Security Council are divided into two groups: those who desire prompt armed humanitarian intervention (termed the ‘interventionists’) versus those who counsel continued negotiations (termed the ‘negotiationists’). (This supposition might be counterfactual, since the set of interventionists in the case of Darfur in the Security Council might, in fact, be identical to the null set.)

On the one hand, the negotiationists might argue as follows. Indeed, the people of Darfur continue to suffer. But the fighting between Sudanese Government forces and rebel movement forces during the last three months was only sporadic. Although there were grave violations of basic human rights, they were not sufficiently grave. In the fog of armed conflict, it would appear that fighting will continue to be sporadic. We do not have clear and convincing evidence that the present phase of sporadic fighting will escalate shortly to a phase of significantly more destructive fighting. Thus we cannot make the moral judgement that there will soon be sufficiently grave violations of basic human rights. Presently, there is not a just goal for prompt armed humanitarian intervention. Even if such intervention were a military solution to the Darfur conflict, it would not be a moral solution. Nevertheless, the goal of stopping grave violations of basic human rights in Darfur is a goal that is right. Concurring with the Secretary-General’s Report – which discusses, for instance, the African Union–United Nations Joint Mediation Team and the All Darfur Stakeholders Conference (Ban 2011: 1–2) – we believe that this right goal must be achieved by means of such nonmilitary measures as mediation and negotiation.

On the other hand, the interventionists might argue as follows. During the last three months, as the Secretary-General’s Report confirms, Sudanese Government aircraft deliberately attacked innocent civilians (Ban 2011:

4–6). For instance, on 15 May 2011, such ‘aircraft dropped four bombs at Labado [in Southern Darfur] . . . One civilian was killed and another was injured’ (Ban 2011: 5). Each and every innocent civilian in Darfur has the basic human right to life. There can be a just cause for a targeted military operation to stop the targeted killing of a single human being. Despite the fog of armed conflict, we have clear and convincing evidence that Sudanese Government aircraft will continue to carry out targeted aerial bombardments of innocent civilians. Therefore, we believe that there is a just cause for a targeted armed humanitarian intervention in Darfur – namely, the imposition of a no-fly zone. We appeal to a contemporary precedent: targeted armed humanitarian intervention by NATO aircraft in Libya. Presently, NATO aircraft are also providing close air support for Libyan rebel forces. As the Secretary-General’s Report admits, many of the rebel movement forces in Darfur ‘remain outside the peace process’ and continue ‘to pursue their objectives through military means’ (Ban 2011: 12–13). Similarly, we believe also that there is a just cause for close air support of rebel movement forces in Darfur.

Indeed, there is principled moral disagreement between the negotiationists and the interventionists about whether there is a just cause for armed humanitarian intervention in Darfur. Nevertheless, there might still be principled moral compromise between them regarding the alternative nonmilitary measures of negotiation and mediation.

For the negotiationists might respond as follows. It is dubious whether the goals of those rebel movement forces in Darfur amount to a just goal, so we do not think that there is a just cause for close air support. However, stopping the aerial bombardment of innocent civilians is a right goal, even though presently it is not a just goal. Nonetheless, the last resort principle morally requires that, before imposing a no-fly zone, negotiation and mediation must be attempted, so long as it is reasonable to do this.

Consequently, the interventionists might compromise as follows. In accordance with the last resort principle, we concur that, before armed humanitarian intervention, negotiation and mediation must be attempted, so long as it is reasonable to do this.

#### B. REVOLUTION AND NONVIOLENCE

At the Indian National Congress meeting on December 31 in Lahore, Gandhi introduced a motion declaring complete independence to be the goal of the Congress. Despite opposition, resolutions in favor of independence and endorsing a campaign of civil disobedience were passed on December 31, 1929 with Gandhi’s support.

Gene Sharp, *Waging Nonviolent Struggle* (2005: 102)

Are the last resort and just cause principles together overly prohibitive? Because the last resort and just cause principles are applicable by all sorts of responsible agents to all forms of armed conflict, they are also applicable by agents responsible for insurgencies, rebellions and revolutions. Before starting an armed revolution, must revolutionary groups exhaust every reasonable nonmilitary measure? Disputably, democratising an authoritarian state is not a just goal of armed humanitarian intervention; analogously, is it also not a just goal of armed revolution? From the temporal standpoint of 8 July 2011, do rebel movement forces in Darfur have a just cause for rebelling against the Sudanese Government? Before using armed force, must they exhaust every reasonable nonmilitary measure? From the temporal standpoint of 4 July 1776, is there a just cause for armed revolution by the British colonies in North America against the British Empire? Specifically, are the last resort and just cause principles overly prohibitive of armed revolutions?

From the temporal standpoint of 31 December 1929, is there a just cause for armed revolution by the Indian National Congress against the British Empire? Famously, Mohandas Gandhi supports nonviolent action. And so, as reported in the block quotation, the Indian National Congress endorses 'a campaign of civil disobedience'. Does the last resort principle morally require that, before resorting to armed revolution against the British Empire, the Indian National Congress must perform reasonable nonviolent actions?

To generalise, does the concept of nonmilitary measure in the last resort principle encompass the idea of nonviolent action? Various specific methods of nonviolent action are divided by Gene Sharp, who is widely esteemed as a 'great theoretician of nonviolent power' (Ackerman and DuVall 2000: 9), into three broad categories – namely, nonviolent protest and persuasion, noncooperation and nonviolent intervention (Sharp 2005: 50).

By contrast, the peaceful measures listed in Chapter VI of the UN Charter are these:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. (Article 33)

Notably absent from this list of peaceful measures are such methods of nonviolent action as civil disobedience.

As the phrase 'of their own choice' indicates, the parties to such a dispute have to be in agreement about the use of such peaceful measures. Let us suppose that there are only two disputing parties. In order for one of the parties to perform the peaceful action of negotiating with the other party, there has to

be reciprocation; the latter has to perform the peaceful action of negotiating with the former. Similar remarks hold of the other peaceful measures. In short, these peaceful measures are ‘bilateral’. When there are more than two parties, the peaceful measures are ‘multilateral’. In other words, the peaceful measures listed in Chapter VI are ‘consensual measures’. To use one of these consensual measures, the parties to such a dispute have to interact sufficiently peacefully. Their actions have to be sufficiently concordant.

In an ordinary sense of the word ‘nonviolent’, all of the consensual measures listed in Chapter VI are nonviolent measures. For instance, to negotiate is to act nonviolently.

Paradigmatically, however, acts of civil disobedience are ‘unilateral’ or ‘nonconsensual’. Specifically, Sharp’s methods of nonviolent action – nonviolent protest and persuasion, noncooperation and nonviolent intervention – are ‘unilateral’ or ‘nonconsensual’. (Compare the difference between a bilateral nuclear arms reduction treaty and a unilateral nuclear freeze.) Again, let us suppose that there are only two disputing parties – the violent party and the nonviolent party. Typically, the two parties are in disagreement about nonviolence and armed force. Their actions could be entirely discordant. In order for the nonviolent party to perform actions of nonviolent protest and persuasion, there does not have to be reciprocation; the violent party may continue to be violent. Similarly, in order for the nonviolent party to perform an action of noncooperation, there does not have to be reciprocation; the violent party may continue to be violent. And in order for the nonviolent party to perform an action of nonviolent intervention, there does not have to be reciprocation; the violent party may continue to be violent.

Although consensual measures and these nonconsensual methods of nonviolent action are thus distinguishable, they are also interrelated. For instance, the nonviolent party may advocate negotiation to the violent party unilaterally, but negotiation itself is consensual. Correlative to a consensual measure is the nonviolent action of advocating it, which is unilateral.

Accordingly, I propose to regiment the term ‘nonviolent action’ as follows. A ‘nonviolent action’ is a ‘unilateral’ or ‘nonconsensual’ nonmilitary action. Notice that the coercive nonmilitary measures listed in Chapter VII of the UN Charter – roughly, economic sanctions and ‘the severance of diplomatic relations’ – are also unilateral. Economic sanctions are imposed unilaterally, and diplomatic relations are severed unilaterally. Interestingly, among Sharp’s particular methods of noncooperation are: ‘international trade embargo’ and ‘severance of diplomatic relations’ (2005: 58, 61). Although some methods of nonviolent action are peaceful – for instance, peaceful demonstrations – some are coercive.

In conclusion, my view is that the concept of ‘nonmilitary measure’ in the

last resort principle encompasses the idea of '(unilateral) nonviolent action'. The last resort principle morally requires that, before resorting to the use of armed force, every reasonable nonviolent action must be attempted.<sup>4</sup>

Arguably, then, the last resort and just cause principles are not overly prohibitive of nonviolent revolutions. But the question remains: are they overly prohibitive of armed revolutions? For with the last resort principle as a premise, the following conclusion may be obtained by a subsumption argument. It is morally obligatory not to attempt to achieve the goal of democratising an authoritarian state by means of an armed revolution, if it is reasonable to attempt to achieve that goal by means of a nonviolent revolution.<sup>5</sup>

Let me raise a comparable question. Are the last resort and just cause principles overly prohibitive of armed insurgency against foreign occupation? Frequently in writings about the issue of *jus post bellum*, the ethics of occupation is discussed largely from the standpoint of the victorious party (Orend 2006: 163), but the standpoint of the defeated party also matters. For instance, with the last resort principle as a premise, the following conclusion may also be obtained by a subsumption argument. It is morally obligatory not to attempt to achieve the goal of expelling an occupying power by means of an armed insurgency, if it is reasonable to attempt to achieve that goal by means of nonviolent action.

When is attempting a nonviolent revolution or nonviolent insurgency not reasonable?

### C. NONVIOLENT ACTION VERSUS ARMED REVOLUTION IN LIBYA

Few Americans have heard of Mr. [Gene] Sharp. But for decades, his practical writings on nonviolent revolution . . . have inspired dissidents around the world, including in Burma, Bosnia, Estonia and Zimbabwe, and now Tunisia and Egypt.

Sheryl Gay Stolberg, 'Shy U.S. intellectual created playbook used in a revolution' (2011)

Thousands of Libyan protesters defied threats of violence and arrest in several cities on Thursday [17 February 2011], mounting one of the sharpest challenges to Col. Muammar el-Qaddafi's 40-year rule in a 'day of rage' modeled on the uprisings coursing through neighboring countries [of Tunisia and Egypt].

Jack Healy, 'Popular rage is met with violence in mideast' (2011)

From the temporal standpoint of 17 February 2011, is there a just cause for armed revolution in Libya? On this 'day of rage', Libyan protesters

demonstrate nonviolently. However, their demonstrations are ‘met with violence’ and ‘at least four people’ are killed (Healy 2011). Disputably, because so few people are killed, the basic human right to life is not violated sufficiently gravely.

The Libyan conflict quickly escalated. For example, from mid-March to mid-May 2011, ‘[m]ore than 1,000 people reportedly died in the assault on Misrata’ (PHR 2011: 7). From the temporal standpoint of mid-March to mid-May 2011, are the last resort and just cause principles overly prohibitive of armed revolution in Libya? When the basic human right to life is so gravely violated, is it reasonable for Libyan protesters to continue to attempt to achieve the goal of democratising Libya by means of nonviolent actions?

On 17 March 2011, the Security Council authorised armed humanitarian intervention in Libya. Subsequently, US and NATO aircraft provided close air support for Libyan rebel forces. From the temporal standpoint of mid-March to mid-May 2011, if it is questionable whether Libyan rebel forces have a just cause for armed revolution, then – in accordance with moral universalism – it should also be questionable whether there is a just cause for close air support by US and NATO aircraft of that armed revolution. And if it is questionable whether Libyan rebel forces have exhausted every reasonable nonmilitary measure before engaging in armed revolution, it should also be questionable whether the Security Council has exhausted every reasonable nonmilitary measure before authorising armed humanitarian intervention.

Frequently, moral questions about external intervention are intertwined with moral questions about internal conflict. In addition to illustrating the last resort principle, the case of Libya serves to illustrate why received just war principles should be generalised, so as to be applicable both to armed interventions and armed revolutions. Similarly, the cosmopolitan just cause and last resort principles are applicable both to counterinsurgencies and insurgencies, both to counterterrorism and terrorism and so forth.

But when is attempting a nonmilitary measure not reasonable?

## IV. REASONABLENESS STANDARDS

### A. A KEY QUESTION

Because armed conflicts are so highly destructive, the chief function of a cosmopolitan just war theory is to morally constrain uses of armed force. When we deliberate about whether to use armed force, we have to make the moral presumption that we must not. To override this moral presumption, we have the burden of proving that just war principles are satisfied.

Specifically, there is the burden of proving that the last resort principle is satisfied. To ascertain that the just cause principle is satisfied, we have to morally presume that there is not a just cause, and we have the burden of

proving that there is. By contrast, to ascertain that the last resort principle is satisfied, we have to morally presume that it is reasonable to attempt an alternative nonmilitary measure, and we have the burden of proving that it is not.

I want to emphasise that the key question here is not: when is attempting a nonmilitary measure reasonable? Instead, the key question is: when is attempting a nonmilitary measure not reasonable?

More explicitly, to ascertain that the last resort principle is satisfied, we have to morally presume that, instead of attempting to achieve a goal by means of a military action, it is reasonable to attempt to achieve it by means of a nonmilitary measure; and we have the burden of proving that it is not reasonable to attempt to achieve it by means of a nonmilitary measure.

On the one hand, suppose that we fail to satisfy this burden of proof. Our moral presumption becomes determinative: we have to decide that it is reasonable to attempt to achieve the goal by means of a nonmilitary measure. And therefore, we have to conclude that it is morally obligatory not to perform the military action. Thus, formulated as a conditional prohibition, the last resort principle functions clearly as a moral constraint.

On the other hand, suppose that we succeed in satisfying the burden of proving that it is not reasonable to attempt to achieve the goal by means of a nonmilitary measure. The last resort principle is a conditional prohibition. It is not a conditional permission. It does not say: 'it is morally permissible to attempt to achieve a goal by means of a military action, if it is not reasonable to attempt to achieve that goal by means of a nonmilitary measure'. Therefore, we cannot conclude, even tentatively, that it is morally permissible to perform the military action. And there is still the burden of proving that the other core just war principles are satisfied. Because the last resort principle does not include such a moral permission, it functions clearly again as a moral constraint.

A main thesis is that we are able to ascertain that the last resort principle is satisfied by means of standards of reasonableness. By means of them, we are able to determine that it is not reasonable to attempt alternative nonmilitary measures before resorting to the use of armed force. The last resort principle is formulated briefly and simply. Instead of complicating it by incorporating various qualifications, I am proposing, as subordinate principles, some reasonableness standards, which are also formulated briefly and simply.

There are five reasonableness standards. The next section discusses epistemic and specificity standards. Standards of impracticality, disproportionality and awfulness are discussed in the following three sections. The impracticality, disproportionality and awfulness standards are applied disjunctively: for each particular alternative nonmilitary measure, it is sufficient to prove that one of these three subordinate principles is satisfied. The five

standards are not mechanical decision procedures. Acceptance of them by diverse responsible agents is compatible with principled moral disagreement about difficult cases.

#### B. CLARITY AND SPECIFICITY

First, there is the epistemic standard of clear and convincing evidence. The last resort principle is primarily applicable by particular responsible agents from particular temporal standpoints. From the temporal standpoint of the present, responsible agents apply the last resort principle prospectively to future nonmilitary measures. Prospective clarity stems from present evidence. To satisfy the burden of proving that it is not reasonable to attempt to achieve a particular goal by means of a particular nonmilitary measure, there has to be clear and convincing evidence.

Second, there is the specificity standard of sufficient detail. To satisfy the burden of proving that it is not reasonable to attempt to achieve a particular goal by means of a particular nonmilitary measure, we have to specify, by means of sufficient detail, the planned course of nonmilitary actions that together comprise that particular means of achieving that particular goal.

How much detail and what sort of detail would be sufficient? This question can be answered fully only on a case-by-case basis. The five reasonableness standards are interrelated, and the other standards presuppose relevant detail.

#### C. IMPRACTICALITY

Third, there is a standard of impracticality (or infeasibility). In the language of the last resort criterion in the High-level Panel Report, there have to be 'reasonable grounds' for determining that the nonmilitary measure 'will not succeed'. Similarly, Childress contends that the last resort principle does not require 'that all possible measures have to be attempted and exhausted if there is no reasonable expectation that they will be successful' (1982: 75).

Accordingly, to ascertain that the last resort principle is satisfied, we have the burden of proving that the goal would not be achieved by means of a nonmilitary measure. Subordinate to the last resort principle, there is a standard concerning the impracticality of nonmilitary measures:

*Impracticality standard.* The planned course of nonmilitary actions would not achieve the goal.

This standard is interrelated with the epistemic standard. To satisfy the burden of proving that the goal would not be achieved by means of a particular nonmilitary measure, there has to be clear and convincing evidence. And both standards are interrelated with the specificity standard. To satisfy the burden of proving with clear and convincing evidence that the goal would

not be achieved by means of a particular nonmilitary measure, the particular planned course of nonmilitary action has to be sufficiently detailed.

#### D. DISPROPORTIONALITY

Fourth, there is a standard of disproportionality. Even when a particular nonmilitary measure would achieve the goal, it must not be disproportionate.

Accordingly, let me suggest a major revision of the last resort criterion in the High-level Panel Report: has every nonmilitary measure for meeting the threat in question been explored, with reasonable grounds for believing either that it would not succeed or that it would not be proportionate?

Comparably, to ascertain that the last resort principle is satisfied, we have the burden of proving that the goal would be attempted by means of a nonmilitary measure that would be disproportionate. Subordinate to the last resort principle, there is a standard of disproportionality. Roughly, the benefits of a planned course of nonmilitary actions would be outweighed by the grievous harms. More precisely, I propose to formulate this standard as follows.

*Disproportionality standard.* Vitally beneficent actions in a planned course of nonmilitary actions would be outbalanced by grievously harmful actions.

In Chapter 8, ‘Proportionality and Authority’, the terms ‘vitally beneficent action’ and ‘outbalanced’ are explained. I record the disproportionality standard here for ease of reference.

#### E. AWFULNESS

Fifth, there is a standard of awfulness. According to Simon Caney, the last resort principle is grounded on ‘the assumption that war is the most awful option’ (2005: 202). Indeed, large-scale war is a terrible option – one that is correctly thought to be the most awful. However, sometimes a sufficiently limited or targeted use of armed force might not be the most awful option; sometimes an alternative nonmilitary measure might be more horrific – for example, the imposition of large-scale economic sanctions. Even when both the impracticality and disproportionality standards are not satisfied, a nonmilitary measure could still be substantially more awful than a sufficiently limited or targeted military action.

Accordingly, let me suggest another major revision of the last resort criterion in the High-level Panel Report: has every nonmilitary measure for meeting the threat in question been explored, with reasonable grounds for believing either that it would not succeed or that it would not be proportionate or that it would be substantially more awful?

Comparably, to ascertain that the last resort principle is satisfied, we have the burden of proving that attempting to achieve a goal by means of a nonmilitary measure would be substantially more awful than attempting to achieve it by means of military action. To supplement the impracticality and disproportionality standards, there is the following standard of comparative awfulness.

*Awfulness standard.* The planned course of nonmilitary actions would be substantially more awful.

How is the awfulness standard different from the disproportionality standard? Roughly, my answer is as follows. Even when the grievous harms of an alternative nonmilitary measure are outweighed by the benefits, those grievous harms might still be substantially more awful than the grievous harms of the military action. This question is answered more fully in Chapter 8, 'Proportionality and Authority'.

What should be meant by the qualification 'substantially'? To satisfy the just cause principle, a threatened harm has to be sufficiently serious. The concept of 'seriousness' is a scalar concept. Similarly, the concept of 'substantialness' is a scalar concept. Presumably, there is a threshold (or thresholds) above which a particular nonmilitary measure would prove substantially more awful and below which it would not.

In terms of the awfulness standard, let me briefly answer a stock question about nonviolent action: 'Should the victims of brutal tyranny be expected to maintain a strictly nonviolent response?' (Cortright 2006: 112) Presumably, the victims have a just goal for the use of armed force – roughly, stopping the brutal tyranny from gravely violating their basic human rights. Even if they cannot prove that this goal would not be achieved by means of nonviolent action, they might be able to prove that struggling against the brutal tyranny by means of nonviolent action would be substantially more awful than struggling against it by means of the use of armed force. Frequently, for example, it would be substantially more awful to suffer genocide than to target genocidaires.

#### F. CONCLUDING REMARKS

Remember that the impracticality, disproportionality and awfulness standards are applied disjunctively. To satisfy the last resort principle, it has to be proven that each alternative nonmilitary measure either would not achieve the goal or would be disproportionate or would be substantially more awful.

In conclusion, by means of the five reasonableness standards, we are able to ascertain that the last resort principle is satisfied. To satisfy that principle, we have to prove with clear and convincing evidence that each sufficiently

detailed planned course of nonmilitary actions either would not achieve the goal or would be disproportionate or would be substantially more awful.

## V. FURTHER OBSERVATIONS

### A. PEACEFUL NEGOTIATION VERSUS ARMED INTERVENTION IN DARFUR

Sudan, where prospects for peace had looked so promising for much of 2003, has become a potential horror story in 2004. The rapid onset of war in its western region of Darfur has created one of the world's worst humanitarian crises – thousands dead and some 830,000 uprooted from homes.

International Crisis Group, 25 March 2004 (ICG 2004: i)

In Darfur, where as many as 10,000 people or more, overwhelmingly civilians, continue to die each month, stronger measures are still needed to restore security and prevent further mass deaths.

International Crisis Group, 26 April 2005 (ICG 2005: 1)

In this section, I support the awfulness standard by means of some additional moral judgements concerning the particular case of Darfur. The general question illustrated here is roughly this: under some circumstances, would it be substantially more awful to continue negotiating than to intervene militarily?

The two block quotations are excerpted from ICG reports dated 25 March 2004 and 26 April 2005. The first quotation reports the onset of genocide in Darfur, and the second quotation reports the continuation of genocide there.

Again, let us imagine how the just cause and last resort principles might be applied prospectively by the Security Council. From the temporal standpoint of 25 March 2004, the negotiationists and the interventionists are in agreement that there is a just cause for armed humanitarian intervention to stop genocide in Darfur. In this ICG report, it is recommended that the Security Council pass a resolution that 'calls for internationally facilitated political negotiations between government and rebels in Darfur, the initial aim of which would be an internationally monitored ceasefire' (ICG 2004: iii). To satisfy the last resort principle, it has to be proven with clear and convincing evidence that such negotiations either would not stop the genocide or would be disproportionate or would be substantially more awful than armed intervention. From the temporal standpoint of 25 March 2004, the negotiationists and the interventionists also agree that there is not such clear and convincing evidence.

From the temporal standpoint of 26 April 2005, the negotiationists and

interventionists still agree that there is a just cause for armed humanitarian intervention to stop genocide in Darfur. But now they are in disagreement about the last resort principle. On 8 April 2004, a limited peace agreement was signed: the N'djamena Ceasefire Agreement (ICG 2005: 2). Presently, however, 'efforts to achieve a political solution are stalled. The AU-led negotiations in Abuja have not resumed since the unsuccessful December 2004 round' (ICG 2005: 3).

On the one hand, the negotiationists maintain that there is still not clear and convincing evidence that continuing such negotiations either would not stop the genocide or would be disproportionate or would be substantially more awful than armed intervention.

On the other hand, the interventionists reason as follows. We agree that there is not clear and convincing evidence that continuing such negotiations would not stop the genocide. Also, we agree about the disproportionality standard. Nonetheless, we disagree about the awfulness standard. In each of the months from April 2004 to April 2005, 'as many as 10,000 people or more, overwhelmingly civilians' died (ICG 2005: 1). Despite the fog of armed conflict, there is clear and convincing evidence that large numbers of innocent civilians will die in future months. Therefore, continuing to negotiate would be substantially more awful than a sufficiently targeted armed intervention.

Despite such principled moral disagreement, there might be principled moral compromise. For the negotiationists might respond as follows. A month ago, the Security Council demanded, in Resolution 1591 (2005), that the Sudanese Government 'immediately cease conducting offensive military flights in and over the Darfur region'. The Sudanese Government has failed to comply with this demand, so we are now willing to support a resolution authorising a highly targeted armed intervention – namely, the imposition of a no-fly zone – but only if the resolution also mandates that negotiations must continue.

From the temporal standpoint of 26 April 2005, the negotiationists and the interventionists agree to authorise a no-fly zone. While this no-fly zone is being imposed, should negotiations continue? This question illustrates the concurrence problem. While a military action is being performed, should nonmilitary measures be attempted? This problem is considered in the next section, 'The Concurrence Problem'.

By contrast, from the later temporal standpoint of 8 July 2011, the negotiationists and the interventionists agree that, before authorising a no-fly zone, reasonable negotiation and mediation must be attempted. A comparison of what is imagined about the case of Darfur in this section with what is imagined above in the section 'Moral Compromise about Armed Humanitarian Intervention in Darfur' illustrates why temporal standpoints matter.

Conceivably, from the earlier temporal standpoint of 25 March 2004, the negotiationists and interventionists might also agree about a different kind of measure – namely, that the Security Council should ‘threaten’ to impose a no-fly zone, in order to ‘deter’ the Sudanese Government from conducting offensive military flights (ICG 2006: 1).

Is the ‘deterrent threat’ to impose a no-fly zone a nonmilitary measure? In the next chapter (‘Last Resort and Noncombatant Immunity’), I explore such questions that interrelate the ideas of ‘coercive military threat’ and last resort.

#### B. THE CONCURRENCE PROBLEM

While we perform a military action, should we attempt a nonmilitary measure? For instance, while we fight, should we negotiate? It might be thought that the last resort principle is applicable only during prelude and resort phases, but this thought is incorrect. It is also applicable during conduct, halting and aftermath phases. The process of performing a military action is a temporal process, and so is the process of applying the last resort principle.

Let me provide a schematic case. During the resort phase, we apply the last resort principle: it is morally obligatory not to ‘start to perform’ a proposed military action as a means of attempting to achieve a particular goal, if it is reasonable to attempt to achieve that goal by means of a nonmilitary measure. At each critical juncture, during the conduct phase, we apply the last resort principle: it is morally obligatory not to ‘continue to perform’ that military action as a means of attempting to achieve that goal, if it is reasonable to attempt to achieve that goal by means of a nonmilitary measure.

Even if mental ‘inertia’ makes continuing easier than starting, these moral prohibitions are comparably stringent. During the resort phase, we have the burden of proving that the last resort principle is satisfied. Before we start to perform the proposed military action, we have to morally presume that it is reasonable to attempt a nonmilitary measure, and we have the burden of proving that it is not. For example, we have to prove by clear and convincing evidence that the nonmilitary measure of negotiation would be impractical (or disproportionate or substantially more awful). Comparably, during the conduct phase, at each critical juncture, we have the burden of proving that the last resort principle is still satisfied. While we continue to perform that military action, we have to morally presume that it is reasonable to attempt a nonmilitary measure, and we have the burden of proving that it is not. For example, we have to prove by clear and convincing evidence that the nonmilitary measure of negotiation would still be impractical (or disproportionate or substantially more awful).

Sometimes, during the conduct phase, the most effective way to obtain clear and convincing evidence that it is not reasonable to attempt to achieve a goal by negotiating is by actually engaging in the process of negotiating.

Sometimes, while we are fighting, we should also be negotiating. (Of course, there are other reasons for negotiating while fighting.)

### C. NEITHER VICTORY NOR DEFEAT

Suppose that, during the conduct phase, at some critical juncture, we fail to satisfy the burden of proving that it is not reasonable to attempt to achieve our goal by negotiating. Our moral presumption becomes determinative: we have to decide that it is reasonable to attempt to achieve our goal by negotiating. And therefore, we have to conclude that it is morally obligatory to cease performing the military action. At that critical juncture, the conduct phase becomes a phase of halting.

Indeed, whenever there is armed conflict, there might be a process of escalation, but there might also be a process of de-escalation. Stereotypically, wars end in victory or defeat. However, there are various intermediate types of armed-conflict termination, including ceasefire, truce and armistice. A main thesis is that sometimes, during the conduct phase, when the last resort principle is no longer satisfied, it is morally obligatory to de-escalate unilaterally. (Comparable theses hold of the other core just war principles.) Sometimes, in order to realise a truce, a unilateral initiative – for example, cessation of deep strikes – is morally obligatory. Sometimes, a unilateral ceasefire is morally obligatory. Even if we scent victory, we must halt.

### NOTES

1. Compare this chapter with the chapter 'Last resort' in Coates (1997). Most books on just war theory devote only a handful of pages to the subject of last resort.
2. A handbook that surveys a wide variety of peaceful measures is Webel and Galtung (2007).
3. For some comparisons of Kantian ethics and feminist ethics, see Lango (1998).
4. For a fuller discussion of this view, see Lango (2009a).
5. Concerning the subject of 'unarmed insurrections', see Schock (2005).

## CHAPTER 7

# LAST RESORT AND NONCOMBATANT IMMUNITY

To counterbalance overemphasis of the just cause principle, I am devoting two chapters to the last resort principle. In the first part of this chapter, the idea of last resort is interrelated with the idea of ‘coercive military threat’. In the second part, a ‘penultimate’ (or ‘next-to-last’) resort principle concerning coercive military threats is proposed and supported. Additionally, in the second and third parts, four other resort principles are proposed and supported. In the third part, the idea of last resort is interrelated with the idea of noncombatant immunity. Finally, in the fourth part, the core noncombatant immunity principle is introduced.

### I. DETERRENCE AND COMPELLENCE

We will maintain a safe, secure, and effective nuclear arsenal to deter attack on the United States, and on our allies and partners.

*Nuclear Posture Review Report* (DOD 2010b: vi)

#### A. NUCLEAR DETERRENCE

During the Cold War, writings on the subject of ‘nuclear ethics’ were primarily concerned with the ethics of nuclear deterrence. The central question was this: is it morally permissible to deter a nuclear attack by threatening nuclear retaliation? There was also the related question of ‘first use’. Is it morally permissible to deter a conventional attack – in particular, a Soviet invasion of Western Europe – by threatening nuclear retaliation?

The subject of nuclear ethics might presently appear to be outmoded, now that the Cold War has ended. However, it has been revived by the threat of ‘rogue states’ and terrorist groups armed with nuclear weapons. Additionally, there is the threat of such actors armed with weapons of mass destruction (WMD) of other sorts – namely, biological, chemical and radiological

weapons. Therefore, in this post-Cold War era, it is important to consider a broader topic than that of nuclear ethics – namely, the ethics of weapons of mass destruction. More briefly, this broader topic may be called ‘the ethics of WMD’ (Hasmi and Lee 2004: 1) or ‘WMD ethics’.

Consequently, in addition to the stated questions about nuclear deterrence, a just war theory should be concerned with other questions regarding ‘WMD deterrence’. For example, is it morally permissible to deter an attack with chemical and biological weapons (CBW) by threatening nuclear retaliation? That this question is not fanciful is evidenced by an implicit declaratory threat made by the United States to ‘states not in compliance with their nuclear non-proliferation obligations’ (e.g. North Korea) – namely, that ‘U.S. nuclear weapons may still play a role in deterring a conventional or CBW attack against the United States or its allies and partners’ (DOD 2010b: viii).

My view is that the mere possession of nuclear weapons by any state – whether by a ‘rogue state’, such as North Korea, or by a ‘responsible’ member of the international community, such as the United States – is a grave threat to world peace. The Nuclear Non-Proliferation Treaty incorporates the goal of the abolition of nuclear weapons. Significantly, during his speech in Prague on 5 April 2009, Obama promulgated the goal of ‘a world without nuclear weapons’, but he also stated: ‘This goal will not be reached quickly – perhaps not in my lifetime’ (2009b). Accordingly, immediately preceding the block quotation from the 2010 US *Nuclear Posture Review Report*, there is the following sentence: ‘Until such time as the Administration’s goal of a world free of nuclear weapons is achieved, nuclear capabilities will be maintained as a core mission for the Department of Defense’ (DOD 2010b: vi).

#### B. CONVENTIONAL DETERRENCE

In addition to questions about WMD deterrence, a just war theory should address questions about conventional deterrence. For example, is it morally permissible to deter an armed invasion by threatening to use conventional weapons?

Even if it is morally obligatory not to threaten to use nuclear weapons, it does not follow (conceptually or logically) that it is morally obligatory not to threaten to use conventional weapons. The ethics of conventional deterrence is distinguishable from, albeit interrelated with, the ethics of nuclear deterrence.

Arguably, under some circumstances, it is morally permissible – and sometimes even morally obligatory – to threaten to use conventional weapons. For instance, should the Security Council threaten to authorise armed humanitarian intervention, in order to deter genocide? Consider again the case of Darfur, from the temporal standpoint of 29 March 2005. In Resolution 1591 (2005), the Security Council demands that the Sudanese

Government ‘immediately cease conducting offensive military flights in and over the Darfur region’. Should the Security Council also threaten to impose a no-fly zone, in order to deter the Sudanese Government from continuing to conduct such flights?

In general, then, a just war theory should address moral questions about military deterrence. Is it morally permissible to deter the use of armed force by threatening to use armed force? Additionally, moral questions about ‘compellent’ threats should be addressed.

### C. ARE MILITARY THREATS NONMILITARY MEASURES?

Today [1965] we are beginning again the comprehensive pursuit of new ideas and new procedures. We realize that, terrible as these [nuclear] weapons are, they exist, and therefore they may be used. In any case, their use will be threatened, and such threats are a kind of use.

Herman Kahn, *On Escalation* (1965: 199)

Herman Kahn – a prestigious but controversial Cold War military strategist – was especially concerned with nuclear threats. Granted that nuclear weapons still exist and that they still might be used, I want to distinguish two questions. Is the threat to use them a kind of use of them? Alternatively, is the threat to use them a kind of nonmilitary measure?

In this section, I investigate a generalisation of these questions. Is the threat to use armed force a kind of use of armed force or a kind of nonmilitary measure? In other words, should ‘coercive military threats’ be conceptualised as military actions or as coercive nonmilitary measures? As a clue to how these questions might be answered, let me add that the word ‘or’ is used inclusively.

The concept of ‘coercive military threat’ encompasses both deterrent threats and ‘compellent’ threats. As Thomas Schelling explained, the usual idea of deterrence can be distinguished from a conception of ‘compellence’ (1966: 70–1). For example, during the Cold War, NATO made (roughly) the following deterrent threat: if the Soviet Army invades Western Europe, NATO might counterattack with tactical nuclear weapons. And had the Soviet Army invaded Western Europe, NATO could have made (roughly) the following compellent threat: if the Soviet Army does not withdraw from Western Europe immediately, NATO might counterattack with tactical nuclear weapons.

Some coercive threats to use armed force are both deterrent and compellent. For instance, from the temporal standpoint of 25 March 2004, imagine that the Security Council threatens to impose a no-fly zone in Darfur. The purpose of this coercive military threat may be described as either ‘to deter the Sudanese government from continuing to conduct offensive military flights’

or ‘to compel the Sudanese government to cease conducting offensive military flights’.

In addition to such ‘declaratory threats’, the concepts of deterrence and compellence encompass a wide range of actions of other kinds – for example, troop mobilisations and ‘demonstration shots’. For instance, from the temporal standpoint of 25 March 2004, imagine that the Security Council calls upon members of NATO to transport ‘a squadron of twelve to eighteen Harrier fighter aircraft’ to an airfield in Chad (ICG 2006: 12). The mobilisation of these aircraft would signal the resolve of the Security Council to authorise the imposition of a no-fly zone in Darfur, if necessary. Imagine also that the Security Council calls upon the United States to launch a single cruise missile against parked Sudanese military aircraft, thereby ‘demonstrating the resolve’ to enforce a no-fly zone by means of the use of armed force, if necessary.

During the Cold War, McGeorge Bundy developed a conception of ‘existential [nuclear] deterrence’ – roughly, that the mere existence of nuclear weapons, apart from any explicit threat or intention or commitment to use them, generates ‘terrible and unavoidable uncertainties’, uncertainties that suffice to deter attacks (1984: 8–9). Comparably, there is a conception of ‘existential conventional deterrence’. For example, the mere existence of military forces that might be used to counter aggression poses, even if only implicitly, a deterrent threat to counter aggression, if necessary.

Also, the mere presence in a Chad airfield of NATO aircraft that might be used to counter Sudanese aircraft poses, even if only implicitly, a deterrent (or compellent) threat to counter them, if necessary.

Analogously, the mere firing of a demonstration shot against a military target poses, even if only implicitly, a deterrent (or compellent) threat to use armed force against other military targets, if necessary. Inherently, a demonstration shot is both a use of armed force and a threat to use armed force. In short, demonstration shots are overlap cases.

Let me return to the main question of this section. Is a threat to use armed force a use of armed force or a nonmilitary measure? My answer is that, seemingly paradoxically, coercive military threats are coercive nonmilitary measures. According to the last resort principle, it is morally obligatory not to use armed force, if every reasonable threat to use armed force has not been attempted.

However, I want to stress that some coercive military threats are overlap cases, in that they are both coercive nonmilitary measures and military actions – for instance, demonstration shots. Thus cases of coercive military threats are intermediate cases, in that they are neither paradigm cases of coercive nonmilitary measures nor paradigm cases of military actions. A main thesis is that, among the various kinds of coercive nonmilitary measures, coercive

military threats resemble military actions most closely. (This use of the term 'resemble' is inclusive of 'identity', since some coercive military threats are military actions.)

#### D. A LAST RESORT THREAT

Sincere and credible commitment to the last resort principle constitutes a form of existential deterrence. Suppose that, in a particular case, the other core just war principles are satisfied. Roughly, the last resort principle mandates that, before we (the responsible agents) resort to the use of armed force against you (our adversaries), we must attempt every reasonable nonmilitary measure. Accordingly, we could make (explicitly or implicitly) the following deterrent threat: if we satisfy the burden of proving that we have attempted every reasonable nonmilitary measure, we will use armed force against you. This 'last resort threat' does not have to be voiced, for it is inherent in the very idea of 'attempting every reasonable nonmilitary measure, before using armed force'. A concept of 'deterrent military threat' is inherent in the idea of last resort.

## II. A LADDER OF RESORTS

In addition to morally constraining uses of armed force, a just war theory should morally constrain threats to use armed force. Characteristically, uses of armed force are highly destructive, and threats to use armed force are highly dangerous. The arms races of the Cold War, the mobilisation race that was a proximate cause of the First World War and the 'coercive diplomacy' of Vietnam War aerial bombardments evidence that acts of deterrence and compellence can be extremely dangerous and even destructive. There is a slippery slope from the existential threat of the mere possession of military forces to greatly destructive acts of 'intra-war' deterrence and compellence.

Paradigmatically, a deterrent military threat by agents to targets is conditional: 'if' you (the targets) perform a specified action, 'then' we (the agents) will use specified armed force against you. Presumably, when such a conditional threat is made, harms of armed conflict would be avoided were the targets to refrain from performing the action specified in the condition. Furthermore, by endeavouring to make the threat credible, not only would the agents intend to coerce the targets to refrain from performing the specified action, but they also might expect and even predict that the targets will refrain from performing it. Nonetheless, even though unintended, unexpected or unpredicted, the targets could still perform it. Deterrence could fail. And then the agents could respond by using the specified armed force against the targets, especially because their threat was meant to be credible. Consequently, in making the deterrent threat, agents create for themselves the serious risk

of having to perform acts of killing or grievously injuring human beings. Paradigmatically, such deterrent threats are highly dangerous. (For brevity, I make remarks about deterrent threats, but parallel remarks also hold of compellent threats.)

#### A. A PENULTIMATE RESORT PRINCIPLE

Truly, among the various kinds of coercive nonmilitary measures, coercive military threats resemble military actions most closely. Accordingly, a main thesis is that coercive military threats should be a 'next-to-last' resort. Before threatening to use armed force, every reasonable 'nonforceful' measure should be exhausted. The term 'nonforceful measure' is stipulated to mean 'a nonmilitary measure that is not a coercive military threat'. Specifically, the set of 'coercive nonforceful measures' contain all those coercive nonmilitary measures that are not coercive military threats.

Therefore, supplementary to the last resort principle for actual uses of armed force, I propose to formulate a principle of 'penultimate resort' for deterrent and compellent threats to use armed force as follows.

*Penultimate resort principle.* It is morally obligatory not to attempt to achieve a goal by means of a threat to use armed force, if it is reasonable to attempt to achieve that goal by means of a nonforceful measure.

Because threats to use armed force can be highly dangerous, a just war theory should morally constrain them. When we deliberate about whether to threaten to use armed force, we have to make the moral presumption that we must not. To override this moral presumption, we have the burden of proving that the penultimate resort principle is satisfied. To ascertain that the principle is satisfied, we have to morally presume that it is reasonable to attempt a nonforceful measure, and we have the burden of proving that it is not.

What are the standards for determining that it is not reasonable to attempt a nonforceful measure? The reasonableness standards for the last resort principle are also standards of reasonableness for the penultimate resort principle. To satisfy the penultimate resort principle, we have to prove with clear and convincing evidence that each sufficiently detailed nonforceful measure either would not achieve the goal or would be disproportionate or would be substantially more awful.

In the preceding chapter, a related principle is advocated:

*Coercive resort principle.* It is morally obligatory not to attempt to achieve a goal by means of a coercive nonmilitary measure, if it is reasonable to attempt to achieve that goal by means of a peaceful measure.

The reasonableness standards for the last resort principle are also standards of reasonableness for the coercive resort principle. To satisfy the coercive resort principle, we have to prove with clear and convincing evidence that each sufficiently detailed peaceful measure either would not achieve the goal or would be disproportionate or would be substantially more awful.

Indeed, there is a gamut of kinds of nonmilitary measures, from ones that are genuinely pacific to ones that are exceedingly coercive. Together, the coercive resort, penultimate resort and last resort principles establish a 'ladder of resorts' – roughly, peaceful measures before coercive nonforceful measures, coercive nonforceful measures before threats to use armed force and threats to use armed force before uses of armed force.

Instead of a simple dichotomy between nonmilitary measures and uses of armed force, I am advocating what may be termed a 'polychotomy'. A dichotomy has two primary parts, whereas a polychotomy has many primary parts. The resort ladder involves a polychotomy, the primary parts of which are peaceful measures, coercive nonforceful measures, threats to use armed force and uses of armed force. Although jointly exhaustive, these primary parts are not mutually exclusive, insofar as there are overlap cases.

#### B. COMPOUND NONMILITARY MEASURES

The impasse over deploying a major UN peacekeeping force to Darfur results directly from the international community's three-year failure to apply effective diplomatic and economic pressure on Sudan's government and its senior officials . . . [for example] targeted sanctions against regime leaders and their business interests.

*Getting the UN into Darfur*, 12 October 2006 (ICG 2006: 1)

Let us consider again the case of Darfur, but from the temporal standpoint of 12 October 2006. Presumably, deploying a UN peacekeeping mission is a nonmilitary measure, as is imposing targeted economic sanctions. The block quotation illustrates the idea of a 'compound nonmilitary measure' – for example, imposing targeted economic sanctions, in order to 'pressure' the Sudanese Government to consent to the deployment of a UN peacekeeping mission. Another example is 'pressuring' the Sudanese Government to consent to that deployment, by 'immediately planning for the establishment and enforcement of a no-fly zone over Darfur' (ICG 2006: 1). Paradigmatically, as the term 'pressure' signals, peaceful measures can be buttressed by coercive nonmilitary measures. (Often, the verb 'pressure' is used as a euphemism for the verb 'coerce'.)

Compound nonmilitary measures involve relations of means to goals – for instance, imposing targeted economic sanctions, 'in order to' deploy a UN peacekeeping mission. More explicitly, the compound nonmilitary measure

is as follows. Imposing targeted economic sanctions is intended as a means of achieving the goal of deploying a UN peacekeeping mission, and deploying the UN peacekeeping mission is intended as a means of achieving the goal of stopping sufficiently grave violations of basic human rights. Another example is threatening prosecution by the International Criminal Court, in order to 'pressure' parties to an armed conflict to negotiate a peace agreement. More explicitly, this compound nonmilitary measure is as follows. Threatening ICC prosecution is intended as a means of achieving the goal of negotiating a peace agreement, and negotiating the peace agreement is intended as a means of achieving the goal of stopping sufficiently grave violations of basic human rights. In each example, two nonmilitary measures are compounded by relations of means to goals.

Significantly, coercive military threats and nonforceful measures can be thus compounded. Let me sketch an important illustration. From the temporal standpoint of 12 October 2006, imagine that the Security Council threatens to authorise armed humanitarian intervention in Darfur, if the Sudanese Government does not allow a UN peacekeeping mission to deploy there. Threatening to authorise armed humanitarian intervention is intended as a means of achieving the goal of deploying a UN peacekeeping mission, and deploying the UN peacekeeping mission is intended as a means of achieving the goal of stopping sufficiently grave violations of basic human rights.

Furthermore, peaceful measures can be buttressed by peaceful measures – for instance, diplomatic measures to facilitate negotiations. Coercive nonforceful measures can be buttressed by coercive nonforceful measures – for example, a threat of economic sanctions against a spoiler of an economic sanctions regime. And so forth.

### C. A PROXIMATE RESORT PRINCIPLE

Paradigmatically, when military measures are employed, basic human rights are gravely violated; whereas, when peaceful measures are employed, basic human rights are not gravely violated. Although there is this crucial moral difference between paradigmatic military measures and paradigmatic peaceful measures, there are problems in cases that are not paradigmatic.

Under some circumstances, when we buttress peaceful measures by coercive nonmilitary measures, we actually violate gravely or seriously risk gravely violating basic human rights. For example, economic pressure to negotiate might actually violate gravely or seriously risk gravely violating basic economic rights.

I call such compound nonmilitary measures 'coercive–peaceful measures'. A 'coercive–peaceful measure' is a compound nonmilitary measure that employs a coercive nonmilitary measure as a means of achieving, as a goal, the employment of a peaceful measure. Coercive–peaceful measures

are ‘indirectly’ coercive. In the preceding example, imposing economic sanctions is intended as a means of achieving the goal of negotiating a peace agreement, and negotiating a peace agreement is intended as a means of achieving the goal of stopping sufficiently grave violations of basic human rights. Despite the word ‘peaceful’, coercive–peaceful measures are coercive nonmilitary measures, even if not paradigmatic ones.

By contrast, some nonmilitary measures are ‘entirely peaceful’ and some are ‘entirely coercive’. Roughly, a peaceful measure is ‘entirely peaceful’ when it is not compounded with a coercive measure, and a coercive nonmilitary measure is ‘entirely coercive’ when it is not compounded with a peaceful measure. Entirely coercive nonmilitary measures can be ‘directly’ coercive. Under some circumstances, imposing targeted economic sanctions on adversaries is directly intended as a means of achieving the goal of stopping those adversaries from gravely violating basic human rights.

Among the various kinds of coercive nonmilitary measures, coercive–peaceful measures resemble entirely peaceful measures most closely. Analogous to the crucial moral difference between peaceful measures and coercive nonmilitary measures, there is a crucial moral difference between coercive–peaceful measures and entirely coercive nonmilitary measures. Accordingly, a main thesis is that coercive–peaceful measures should be a ‘proximate’ (or ‘next-to-first’) resort. Before attempting an entirely coercive nonmilitary measure, every reasonable coercive–peaceful measure should be exhausted.

Therefore, I propose to formulate a resort principle about coercive–peaceful measures as follows.

*Proximate resort principle.* It is morally obligatory not to attempt to achieve a goal by means of an entirely coercive nonmilitary measure, if it is reasonable to attempt to achieve that goal by means of a coercive–peaceful measure.

What are the standards for determining that it is not reasonable to attempt a coercive–peaceful measure? The reasonableness standards for the last resort principle are also standards of reasonableness for the proximate resort principle. To satisfy the latter principle, we have to prove with clear and convincing evidence that each sufficiently detailed coercive–peaceful measure either would not achieve the goal or would be disproportionate or would be substantially more awful.

Nonviolent actions are nonmilitary measures. Under some circumstances, we could buttress consensual peaceful measures by means of peaceful actions that are unilateral. For instance, we might promote negotiations by means of demonstrations. Analogous to the proximate resort principle,

should there also be a ‘nonviolent resort principle’? I would answer this question negatively. Paradigmatically, when we perform nonviolent actions, we do not gravely violate basic human rights.

In conclusion, because there are now four resort principles, the ladder of resorts needs to have additional rungs – roughly, entirely peaceful measures before coercive–peaceful measures, coercive–peaceful measures before entirely coercive nonforceful measures and so forth. Correspondingly, the stated polychotomy needs to be more fine-grained. Together, the four resort principles partition the set of nonmilitary and military measures into the following primary parts: entirely peaceful measures, coercive–peaceful measures, entirely coercive nonforceful measures, entirely coercive threats to use armed force and uses of armed force. These primary parts are jointly exhaustive, but they are not mutually exclusive, insofar as there are overlap cases.

According to the coequality thesis, the just cause principle and the other core just war principles are deontological principles coequally. Therefore, the last resort principle must be satisfied, even when the just cause principle is not satisfied. Let me extend this coequality thesis as follows. Even when we fail to satisfy the just cause principle, we are still morally constrained by the four resort principles. It is still morally obligatory for us not to use armed force to achieve a goal that is not a just goal, if we have not attempted (first) every reasonable entirely peaceful measure, (second) every reasonable coercive–peaceful measure, (third) every reasonable entirely coercive nonforceful measure and (fourth) every reasonable entirely coercive threat to use armed force. Under some circumstances, because of the time requisite for attempting all of the nonmilitary measures that are reasonable, the destructiveness of unjust armed conflict could be circumvented.

#### D. THRESHOLDS

And as Commander-in-Chief, I have determined that it is in our vital national interest to send an additional 30,000 U.S. troops to Afghanistan. After 18 months, our troops will begin to come home. These are the resources that we need to seize the initiative, while building the Afghan capacity that can allow for a responsible transition of our forces out of Afghanistan.

Barack Obama, *Remarks by the President in Address to the Nation on the Way Forward in Afghanistan and Pakistan*  
(1 December 2009) (2009c)

A presupposition of the ladder of resorts is that the set of nonmilitary measures is partitioned into four primary parts. Should the set of military measures also be partitioned into primary parts? Should the stated polychotomy be even more fine-grained?

There is a 'spectrum' of military actions, ranging from actions that are very small-scale to ones that are very large-scale. Frequently, when there is armed conflict, there is a process of escalation from smaller-scale to larger-scale military actions. A chief function of just war principles should be to morally constrain processes of escalation – notably, 'nuclear escalation'.

The block quotation above provides another illustration – namely, the US 'surge strategy' in Afghanistan. From the temporal standpoint of 1 December 2009, the sending of 30,000 additional US troops to Afghanistan is part of a process of escalating the US counterinsurgency operation there. Disputably, even if this military operation satisfies just war principles presently, it might cease to satisfy them after this 'surge'. A chief function of just war principles should be to morally constrain such processes of 'conventional escalation'.

During the Cold War, Kahn studied a 'spectrum of international crises', from 'low-level' crises to 'all-out' wars (1965: 37). Instructively, he arranged international crises in 'roughly increasing levels of intensity' on an 'escalation ladder' with forty-four rungs (1965: 38–9). As we climb, rung by rung, up the escalation ladder, we cross 'six basic thresholds' – most importantly, the 'nuclear threshold' (1965: 94). Each threshold on the escalation ladder is a sharp 'line of demarcation' in the spectrum of international crises (1965: 95). Significantly, these thresholds can function as 'constraints' or 'restraints' on the process of escalation (1965: 97). As a US military strategist, he constructed this escalation ladder primarily from the standpoint of US national security.

Disputably, during the Cold War, it was vital to have such thresholds as practical constraints. Presently, there is a spectrum of crises, both international and internal – for instance, crises of genocide, terrorism and nuclear proliferation. In terms of a cosmopolitan conception of global security, an escalation ladder might be constructed, with thresholds as practical constraints. In Chapter 5 ('Just Cause'), I mentioned the idea of 'mission creep' – that is, a somewhat gradual process of escalation, which might occur during a military operation. Thresholds on a cosmopolitan escalation ladder might function as practical constraints on mission creep.

From the universalist moral standpoint of a cosmopolitan just war theory, I want to raise a key question. Given that there are practical constraints on the process of escalation, what are the moral constraints? In answer to this question, I propose to enlarge the ladder of resorts, by constructing rungs within the spectrum of military actions. In what follows, two resort principles concerning military measures are proposed and supported. Additionally, the stated polychotomy is augmented, by partitioning the set of military measures into primary parts.

## E. A POLICING RESORT PRINCIPLE

Analogous to compound nonmilitary measures, there are compound military measures. A coercive–peaceful measure is a compound nonmilitary measure that employs a coercive nonmilitary measure as a means of achieving, as a goal, the employment of a peaceful measure. Analogously, a ‘circuitous military measure’ is a compound military measure that employs a military measure as a means of achieving, as a goal, the employment of a nonmilitary measure. Even though a nonmilitary measure is employed, such a compound measure should be conceptualised as a military measure, because a military measure is also employed. Circuitous military measures use armed force ‘indirectly’.

For example, an armed humanitarian intervention might be circuitous. From the temporal standpoint of 12 October 2006, let me consider again the ‘impasse over deploying a major UN peacekeeping force to Darfur’ (ICG 2006: 1). Imagine that the Security Council authorises very limited military strikes against a few military targets in Sudan, in order to ‘convince’ the Sudanese Government to allow the deployment of such a peacekeeping mission. More explicitly, this circuitous military measure is as follows. Relatively small-scale military strikes are intended as a means of achieving the goal of deploying the peacekeeping mission, and deploying the peacekeeping mission is intended as a means of achieving the goal of stopping sufficiently grave violations of basic human rights.

Frequently, when armed force is used, the overarching goal is to ‘defeat’ adversaries, or ‘prevail’ against them. Frequently, by contrast, circuitous military measures can involve goals of compromise and accommodation. For an illustration, let us return to the case of Rwanda. On 9 April 1994, Dallaire attempted unsuccessfully to obtain additional troops and logistical support. ‘If we were given a new mandate and the necessary force’, he remarked, ‘we might be able to get the two parties back to the negotiating table’ (2004: 276). When the purpose is to ‘pressure’ adversaries to negotiate, circuitous military measures should not be employed so destructively as to undermine or obviate negotiation. Comparable remarks hold for peaceful measures of other kinds. In brief, sometimes military measures that are circuitous should also be sufficiently targeted.

Disputably, the imagined circuitous armed humanitarian intervention in Darfur is an ‘overlap military action’: it resembles sufficiently in relevant respects paradigm military actions, but it also resembles sufficiently in relevant respects paradigm police actions. To generalise, some circuitous military measures can also be conceptualised as police actions. As another example, armed force might be used to police an economic sanctions regime.

Furthermore, some targeted military operations that are not circuitous military measures can be conceptualised as police actions. Disputably,

for instance, the one that killed Osama bin Laden – although resembling sufficiently in relevant respects paradigm military actions – also resembles sufficiently in relevant respects paradigm police actions.

Characteristically, the scale, duration and intensity of a military action that is also a police action (i.e. an ‘overlap military action’) are less than the scale, duration and intensity of a military action that is not also a police action (i.e. a ‘nonoverlap military action’). Paradigmatically, large-scale nonoverlap military actions are significantly more destructive than small-scale overlap military actions. A main thesis is that, among the various kinds of military actions, overlap military actions resemble coercive nonmilitary measures most closely. Indeed, there is a crucial moral difference between overlap military actions and nonoverlap military actions.

Therefore, supplementary to the last resort principle about military actions generally, I propose to formulate a ‘first-of-last’ resort principle about overlap military actions specifically.

*Policing resort principle.* It is morally obligatory not to attempt to achieve a goal by means of a military action that is not also a police action, if it is reasonable to attempt to achieve that goal by means of a military action that is also a police action.

That there can be armed interventions that conform to this principle is confirmed by the case of ‘light intervention’ in Bougainville (Regan 2010).

The last resort principle is a core just war principle, whereas the policing resort principle is not. The last resort principle is a necessary moral criterion for determining whether a proposed military action would be just. By contrast, the policing resort principle is especially relevant to a question explored in Chapter 9, ‘All Things Considered’: among alternative proposed military actions, each of which would be just, which one would be best?

In conclusion, there are now five resort principles, so the ladder of resorts needs to have an additional rung – roughly, overlap military actions before nonoverlap military actions. In the next part, the set of military measures is further polychotomised.

### III. LAST RESORT AND NONCOMBATANTS

In accordance with coherentism, it is illuminating to investigate how the last resort principle is interrelated with other just war principles. In this part of the chapter, the idea of last resort is interrelated with the idea of noncombatant immunity. Specifically, a resort principle protecting noncombatants is proposed and supported. In the fourth part of this chapter, the core noncombatant immunity principle is introduced. A purpose of the

two parts is to elucidate how the permissiveness of the just cause principle is counterbalanced by the prohibitiveness of the last resort and noncombatant immunity principles.

As explained in Chapter 3 ('Moral Theory'), the concept of 'harming' encompasses both the concept of 'actually harming' and the concept of 'seriously risking harming'. Roughly, noncombatants should be protected not only from actual grievous harm, but also from the serious risk of grievous harm. Accordingly, the phrase 'grievously harm' should be understood as abbreviating the phrase 'actually grievously harm or seriously risk grievously harming'. Similarly, the phrase 'gravely violate basic human rights' should be understood as abbreviating the phrase 'actually violate gravely or seriously risk gravely violating basic human rights'.

#### A. CIVILIAN CASUALTIES IN AFGHANISTAN

I expect leaders at all levels to scrutinize and limit the use of force like close air support (CAS) against residential compounds and other locations likely to produce civilian casualties . . . Following this intent requires a cultural shift within our forces – and complete understanding at every level – down to the most junior soldiers.

General Stanley McChrystal, Commander of NATO's International Security Assistance Force (ISAF) in Afghanistan, 6 July 2009  
(McChrystal 2009)

A main thesis is that the core just war principles are applicable to all forms of armed conflict by all sorts of responsible agents. In the words of the above block quotation, these principles are applicable 'down to the most junior soldiers'. Every combatant, no matter how subordinate in the hierarchy of command, must satisfy the just cause, last resort, proportionality and noncombatant immunity principles.

In January 2009, the United Nations Assistance Mission in Afghanistan (UNAMA) reported that, during the year 2008, there were 2,118 'civilian casualties', 1,160 caused by 'antigovernment elements' and 828 caused by 'pro-government forces' (UNAMA 2009a: ii). In July 2009, UNAMA reported 'an increase of 24% of civilian casualties in the first six months of 2009 as compared to the same period in 2008' (UNAMA 2009b: 1).

On 6 July 2009, with the goal of reducing civilian casualties in Afghanistan, General McChrystal issued a 'Tactical Directive' to US and NATO forces there; the block quotation is taken from this directive. (He was Commander then and is now retired.)

In March 2011, UNAMA reported that, during the year 2010, there were 2,777 civilian deaths, 2,080 caused by 'Anti-Government Elements' and 440 caused by 'Pro-Government Forces' (UNAMA 2011: i). Apparently, the

Tactical Directive was effective. ‘Notably’, as UNAMA reported, ‘there was a 52 per cent decline in civilian deaths from air attacks compared to 2009’ (UNAMA 2011: i). The number of civilians killed by the 2010 air attacks was 171 (UNAMA 2011: i).

What do such numbers mean? In the Second World War, the US firebombing of Tokyo during 9–10 March 1945 killed ‘at least 83,793 Japanese civilians’ (Searle 2002: 103). Is there a morally relevant difference between the larger number of 83,793 and the smaller number of 171? Because the number 171 is so small, did the US and NATO air attacks in Afghanistan during 2010 satisfy the received noncombatant immunity principle? Plainly, there can be principled moral disagreement about how such questions should be answered.

#### B. A SINGULAR MORAL DILEMMA

Every citizen of Afghanistan must know ISAF will continue to do all we can to reduce casualties that affect the Afghan civilian population. This data is promising but there is more work to be done . . . Even one civilian casualty is a tragedy and I will continue to direct each member of the coalition to work to drive the number of ISAF-caused civilian casualties to zero.

General John R. Allen, Commander of NATO’s International Security Assistance Force (ISAF) in Afghanistan (4 February 2012)<sup>1</sup>

My view is that the death of a single noncombatant is one death too many. For each and every noncombatant has the basic human right to life. And according to the nonharm principle, it is morally obligatory not to gravely violate basic human rights, even of a single noncombatant.

It is also my view (as explained in Chapter 5, ‘Just Cause’) that there can be a just cause for a targeted military operation to stop the killing of a single human being. For according to the counterharm principle, it is morally obligatory to attempt, as much as possible, to stop other persons from gravely violating the basic human right to life, even of a single human being.

Therefore, it is my view (as explained in Chapter 3, ‘Moral Theory’) that there can be a moral dilemma about even a single noncombatant. Let me sketch one schematically. Under the particular circumstances of a particular targeted military operation, it is impossible to stop the killing of a single innocent human being without killing a single noncombatant. One of the horns of the moral dilemma is that it is morally obligatory to stop the killing of the single innocent human being; and the other horn is that it is morally obligatory not to kill the single noncombatant. The subject of moral dilemmas is discussed further in Chapter 9, ‘All Things Considered’.

## C. A NONCOMBATANT RESORT PRINCIPLE

Therefore, supplementary to the last resort principle, I propose to formulate a resort principle about noncombatants as follows.

*Noncombatant resort principle.* It is morally obligatory not to attempt to achieve a goal by means of a military action that would grievously harm noncombatants, if it is reasonable to attempt to achieve that goal by means of a military action that would not grievously harm noncombatants.

More explicitly, it is morally obligatory not to attempt to achieve a goal by means of a planned course of military actions that would actually violate gravely (or seriously risk gravely violating) noncombatants' basic human rights (whether intentionally, knowingly, recklessly or negligently), if it is reasonable to attempt to achieve that goal by means of a planned course of military actions that would not thus harm noncombatants.

Roughly, the noncombatant immunity principle morally prohibits grievously harming noncombatants intentionally. Even if we ignore, reject or otherwise fail to satisfy the noncombatant immunity principle, we are still morally constrained by the noncombatant resort principle.

In light of the great destructiveness of the most memorable armed conflicts, it might be thought that the noncombatant resort principle is pointless or naively aspirational, but this thought is mistaken. Domestically, police officers must attempt to stop criminals without any collateral damage whatsoever. Analogously, when we perform a military action that is also a police action, it is not pointless, nor is it naively aspirational, that we must satisfy the noncombatant resort principle. Relatedly, targeted military operations are narrowly limited in fire-power, length of time, geographical extent and so forth. It is neither pointless nor naively aspirational to mandate that they must satisfy the noncombatant resort principle.

Let me sketch an illustration. Truly, US drone strikes against military targets have produced collateral damage. Drones are also employed in intelligence, surveillance and reconnaissance (ISR) operations. When drones are employed in targeted military operations, they 'can linger over an area with their video cameras gathering intelligence for as long as 20 hours, and then strike without warning' (Drew 2010a). On the other hand, they can hover over a target, gather intelligence about the presence of noncombatants and ensure that a mission is safely aborted (Chivers 2012). Therefore, it is not pointless, nor is it naively aspirational, to command human agents responsible for remotely piloting drones to satisfy the noncombatant resort principle.

The last resort principle is a core just war principle, whereas the

noncombatant resort principle is not. The last resort principle is a necessary moral criterion for determining whether a proposed military action would be just. By contrast, the noncombatant resort principle is especially relevant to a question explored in Chapter 9, 'All Things Considered': among alternative proposed military actions, each of which would be just, which one would be best?

#### D. THE NONCOMBATANT AND POLICING RESORT PRINCIPLES

The noncombatant resort principle should be applied conjointly with the policing resort principle. In light of these two principles, we may distinguish military actions that both are police actions and do not grievously harm noncombatants from military actions that either grievously harm noncombatants or are not police actions. Together, the two principles partition the set of military measures into the following primary parts: (type 1) military actions that are police actions and do not grievously harm noncombatants; (type 2) military actions that do not grievously harm noncombatants, but are not police actions; (type 3) military actions that are police actions, but grievously harm noncombatants; and (type 4) military actions that are not police actions and grievously harm noncombatants.

The metaphor of a 'ladder' suggests that the primary parts of a polychotomy are ordered 'linearly' (or 'serially'). Nevertheless, for the sake of full generality, it is presupposed that a polychotomy can have primary parts that are ordered 'nonlinearly'. Generally, actions of type 1 are less harmful than actions of the other three types, actions of type 2 are less harmful than actions of type 4 and actions of type 3 are less harmful than actions of type 4. Generally, however, actions of type 2 are neither more harmful than, nor less harmful than, actions of type 3. Metaphorically, a 'ladder' of resorts can have branches.

More precisely, it is presupposed that a polychotomy can have primary parts that are ordered 'partially'. A relation is a 'partial ordering' just in case it is reflexive, antisymmetric and transitive (Suppes 1957: 221). (Roughly, a relation  $R$  is 'antisymmetric' just in case, if  $xRy$  and  $x$  is not identical to  $y$ , then it is not the case that  $yRx$ .) Note that the subsets of a set are partially ordered by the relation of set-inclusion. Accordingly, the primary parts of a polychotomy may be depicted on a Venn diagram (Suppes 1957: 195–201).

In the first chapter, I conjecture that the cluster of recent targeted military operations might prove to be an epochal event that is pivotal for just war theory. A chief function of a just war theory should be to morally constrain processes of conventional escalation. A main thesis is that a cosmopolitan just war theory should morally constrain escalation from a military operation that is fittingly targeted to one that is unwarrantedly not targeted. Specifically, when a proposed targeted military operation would be a police action

that would not grievously harm noncombatants (type 1), the policing and noncombatant resort principles should together morally constrain escalation. When a proposed targeted military operation would not grievously harm noncombatants, but would not be a police action (type 2), the noncombatant resort principle should morally constrain escalation. And when a proposed targeted military operation would be a police action that would grievously harm noncombatants (type 3), the policing resort principle should morally constrain escalation.

In summary, there is a spectrum of nonmilitary measures, from ones that are very pacific to ones that are very coercive. And there is also a spectrum of military measures, from ones that are very small-scale to ones that are very large-scale. In short, there is a spectrum of measures, from nonmilitary measures that are very pacific to military measures that are very large-scale. To control or stop escalation from less destructive measures to more destructive measures, there should be various moral constraints. Supplementary to the last resort principle, I am proposing five additional resort principles: the coercive resort principle, the proximate resort principle, the penultimate resort principle, the policing resort principle and the noncombatant resort principle. Together, these six resort principles establish a (nonlinear) ‘ladder of resorts’.

#### IV. NONCOMBATANT IMMUNITY

The civilian population as such, as well as individual civilians, shall not be the object of attack.

*Protocols Additional to the Geneva Conventions*  
(ICRC 1997a and ICRC 1997b)

That civilians are not to be targeted is an old, very salient rule, and can be crucial to the kind of peace that follows a war.

Herman Kahn, *On Escalation* (1965: 161)

In the just war tradition, the targeting of civilians is morally prohibited by a noncombatant immunity principle. Such a moral prohibition is embodied in international humanitarian law (IHL). The first block quotation above is from the two 1977 Protocols to the Geneva Conventions. In Protocol I, the quoted legal prohibition pertains to ‘International Armed Conflicts’ (ICRC 1977a: Article 51). In Protocol II, the quoted legal prohibition is extended to ‘Non-International Armed Conflicts’ (ICRC 1977b: Article 13).

In this final part, a noncombatant immunity principle is introduced. A goal is to elucidate how the prohibitiveness of this principle can serve to counterbalance the permissiveness of the just cause principle. But the

controversial subject of noncombatant immunity is discussed incompletely. In various writings about just war theory, there is a labyrinth of argumentation about this subject, a labyrinth with many corridors, only some of which can be explored in this book.<sup>2</sup>

#### A. TARGETING NONCOMBATANTS

In Chapter 2 ('Just War Theory'), I suggest that the five legitimacy criteria in the High-level Panel Report should be augmented by a sixth criterion: is it clear that the proposed military action will not involve the deliberate targeting of noncombatants? Presumably, the words 'deliberate' and 'intentional' may be used interchangeably. Provisionally, a noncombatant immunity principle might be formulated as follows. It is morally obligatory not to target noncombatants intentionally.

My view is that the received noncombatant immunity principle should be revised, so as to allow (under some circumstances) the intentional targeting of noncombatants by 'nonlethal' weapons (Lango 2010c). The website of the US Department of Defense Non-Lethal Weapons Program provides some examples, which 'range from non-lethal munitions and acoustic devices to non-lethal optical distractors and vehicle stopping devices' – for instance, the M-84 Flash Bang Grenade and the Portable Vehicle Arresting Barrier.<sup>3</sup> Granted, nonlethal weapons might unintentionally or inadvertently cause deaths, injuries and other damage. Accordingly, alternative terms – for instance, 'less than lethal weapon' – are sometimes used instead (Koplow 2006: 9–10).

Apparently, before effective nonlethal weapons were sufficiently envisaged, many just war theorists assumed (roughly) that to target means to (intend to) kill. Consider, for instance, the following relationship between targeting and killing stated by Douglas Lackey: 'the killing of civilians is intentional if, and only if, they are the chosen *targets* of military force' (1989: 60 [emphasis in original]). Now that effective nonlethal weapons have been envisaged, it should be clear that there is no conceptual (or logically necessary) connection between intentionally targeting and intentionally killing. For when nonlethal weapons are used, there can be intentional targeting without intentional killing.

#### B. A NONCOMBATANT IMMUNITY PRINCIPLE

Therefore, I think that a noncombatant immunity principle should only morally prohibit targeting that would kill or otherwise gravely violate basic human rights of noncombatants. Moreover, in accordance with the nonharm principle, targeting that would seriously risk gravely violating their basic human rights should also be morally prohibited. Accordingly, a noncombatant immunity principle might be formulated as follows. It is morally obligatory

not to actually harm grievously or seriously risk grievously harming noncombatants intentionally.

Heretofore, I have formulated noncombatant immunity principles as unconditional prohibitions. More revealingly, I propose now to formulate a cosmopolitan noncombatant immunity principle as a conditional prohibition:

*Noncombatant immunity principle.* It is morally obligatory not to perform a military action, if that military action would grievously harm noncombatants intentionally.

In other words:

*Noncombatant immunity principle.* It is morally obligatory not to follow a planned course of military actions, if noncombatants would be grievously harmed intentionally.

More explicitly, it is morally obligatory not to perform a military action, if that military action would actually harm grievously or seriously risk grievously harming noncombatants intentionally. Even more explicitly, it is morally obligatory not to perform a military action, if that military action would actually violate gravely or seriously risk gravely violating basic human rights of noncombatants intentionally.

In accordance with moral universalism, it is presupposed that this principle is applicable by all sorts of responsible agents. It is morally obligatory for any responsible agent not to perform a military action, if he or she would thereby grievously harm noncombatants intentionally. Moreover, the principle is applicable to all forms of armed conflict. It is applicable to every military action, however large scale or small scale. The most junior soldier must not grievously harm noncombatants intentionally, but also the loftiest head of state must not devise a war plan that involves the intention to grievously harm noncombatants.

The noncombatant immunity principle and the other core just war principles are coequal deontological principles. According to this coequality thesis, each must be satisfied, even when others are not satisfied. For instance, even when we fail to satisfy the just cause principle, we are still morally constrained by the noncombatant immunity principle. It is still morally obligatory for us not to use armed force to achieve a goal that is not just – even if that goal is a right goal – if we would grievously harm noncombatants intentionally.

When we apply the principle to a particular military action, we have to morally presume that we would grievously harm noncombatants intentionally, and we have the burden of proving that we would not. On the one hand, suppose that we fail to satisfy this burden of proof. Our moral presumption

becomes determinative: we have to decide that we would grievously harm noncombatants intentionally. Therefore, we have to conclude that it is morally obligatory not to perform the military action. Formulated thus as a conditional prohibition, the principle functions clearly as a moral constraint.

On the other hand, suppose that we succeed in satisfying the burden of proving that we would not grievously harm noncombatants intentionally. The noncombatant immunity principle is a conditional prohibition. It is not a conditional permission. It does not say: 'it is morally permissible to perform a military action, if that military action would not grievously harm noncombatants intentionally'. Therefore, we cannot conclude, even tentatively, that it is morally permissible to perform the military action. Because the principle does not include such a moral permission, it functions clearly again as a moral constraint.

### C. IMMUNITY STANDARDS

What are the standards for determining whether we have satisfied this burden of proof? In brief, what are the 'immunity standards'? In addition to the epistemic standard of clear and convincing evidence, there is the specificity standard of sufficient detail. Sometimes, for example, to ensure that a sufficiently detailed targeted military action (e.g. a drone strike) does not violate the noncombatant immunity principle, we must obtain clear and convincing battlefield intelligence (Lango 2011).

There is a third immunity standard. Admittedly, the concepts of 'combatant' and 'noncombatant' are somewhat indeterminate. Notice that Protocol I asserts that, 'in case of doubt whether a person is a civilian, that person shall be considered to be a civilian' (ICRC 1977a: Article 50(1)). In other words, it must be presumed that the person is a civilian. 'Protocol I of 1977 expands protection of civilians considerably', Ingrid Detter de Lupis explained, 'especially by a paramount presumption that anyone who is not proved to be a combatant has civilian status' (1987: 243). Analogously, when we apply the noncombatant immunity principle, we must morally presume that any person whom we would grievously harm by our military action is a noncombatant, and we have the burden of proving that he or she is a combatant. Therefore, I propose to formulate a third immunity standard as follows.

*Indeterminacy standard.* Human beings must be classified as non-combatants, unless there is clear and convincing evidence that they are combatants.

### D. NONCOMBATANT IMMUNITY AND PROPORTIONALITY

According to a traditional noncombatant immunity principle, it is morally permissible to cause foreseen proportionate but unintended harms to non-

combatants. However, I prefer not to complicate a noncombatant immunity principle by incorporating such a qualification. Instead, for simplicity and clarity, I am proposing proportionality and noncombatant immunity principles as separate core just war principles. Suppose that, when we apply the core just war principles to a particular military action, we succeed in satisfying the burden of proving that we would not grievously harm noncombatants intentionally. We still have the burden of proving (among other things) that we would not collaterally damage noncombatants disproportionately.

I return to the subject of noncombatant immunity in the section ‘Risk Acceptance and Noncombatant Immunity’ within Chapter 8 (‘Proportionality and Authority’) and the sections ‘Noncombatants and Stringency’ and ‘Collaterally Damaging Noncombatants’ within Chapter 9 (‘All Things Considered’).

## NOTES

1. Quoted in ISAF (2012).
2. Compare this part with the chapter entitled ‘Noncombatant immunity’ in Coates (1997).
3. See <http://jnlwp.defense.gov/current/default.html> (accessed 17 April 2013).

## CHAPTER 8

# PROPORTIONALITY AND AUTHORITY

The set of core just war principles contains a proportionality principle, but not a legitimate authority principle. In this chapter, the ideas of proportionality and authority are elucidated by means of comprehensive moral principles of distributive justice and autonomy.

### I. PROPORTIONALITY

Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Protocol I to the Geneva Conventions (ICRC 1977a: Article 57(2))

Presumably, in this quotation, the term ‘incidental’ adumbrates the legal requirement that such harmful effects must not be intended, and the term ‘excessive’ adumbrates a legal standard of proportionality. In addition to mandating that civilians ‘shall not be the object of attack’ (ICRC 1977a: Article 51(2)), Protocol I mandates that civilians must be spared from unintended but disproportionate harm. In Protocol I, the idea of noncombatant immunity is interrelated with the idea of proportionality.

But the two ideas are different. Instead of complicating the noncombatant immunity principle formulated in the preceding chapter by incorporating a qualification concerning proportionality, my view is that a proportionality principle should be formulated separately. A purpose of this first part of the present chapter is to propose and support a generalised just war principle of proportionality that is applicable by all sorts of responsible agents to all forms of armed conflict.

Traditionally, an *ad bellum* proportionality principle is distinguished from

an *in bello* proportionality principle. By contrast, a main thesis is that this generalised proportionality principle should be both a resort principle and a conduct principle.<sup>1</sup> Very roughly, a proportionality principle requires that harms must be outweighed by benefits. But the phrase ‘the concrete and direct military advantage anticipated’ in the block quotation above is potentially misleading. As a conduct principle, a proportionality principle should not simply require that (anticipated) harms must be outweighed merely by (anticipated) concrete and direct military advantages. When we attempt to attain a concrete and direct military advantage, we must do so for the sake of a goal of stopping sufficiently grave violations of basic human rights. The benefits that are weighed should encompass this human rights goal. For an example, consider again the Libya case. Suppose that a Libyan tank that is indiscriminately shelling Misrata is destroyed by a NATO airstrike and, collaterally, some noncombatants are knowingly killed. A proportionality principle should not simply require that these noncombatant deaths must be outweighed merely by the concrete and direct military advantage of destroying the tank. For the tank is destroyed with the goal of stopping the tank crew from gravely violating basic human rights of noncombatants in Misrata.

Another main thesis is that a just cause principle should be counterbalanced by last resort, noncombatant immunity and proportionality principles. In writings about just war theory, there is a tendency to neglect or devalue the subject of last resort, so I am discussing that subject extensively. By contrast, in writings on moral philosophy and political theory, a customary subject is that of weighing costs and benefits. Accordingly, my discussion of the subject of proportionality can be more concise.

In light of controversies among moral philosophers and political theorists about such weighing, it should not be surprising that there is principled moral disagreement among just war theorists concerning the idea of proportionality. In this chapter, I formulate a proportionality principle that is fully deontological. In different just war theories, proportionality principles are formulated differently. Those who reject my proportionality principle might still find much of my just war theory acceptable. For the just cause, last resort and noncombatant immunity principles proposed in preceding chapters are, I submit, compatible with some (even if not all) of the alternative proportionality principles endorsed by other just war theorists.

#### A. PROPORTIONAL MEANS AND BALANCE OF CONSEQUENCES

*Proportional means.* Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?

*Balance of consequences.* Is there a reasonable chance of the military

action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?

*A More Secure World* (HLPR 2004: 67)

In developing a cosmopolitan just war theory, my starting point is the embodiment of received just war principles in the High-level Panel Report as five basic criteria of legitimacy. In this section, I make some remarks about the two quoted legitimacy criteria.

Entangled in these criteria are three ideas that need to be disentangled – namely, ideas of proportionality, minimality and feasibility. The words ‘proportional’ and ‘balance’ in the titles are misleading, in that the criteria also include moral requirements other than that of proportionality.

First, an idea of feasibility is expressed by the words ‘reasonable chance of the military action being successful’. Among received just war principles, there is one that is called the principle of ‘reasonable chance (or likelihood or hope or prospect) of success’. For brevity, I call it the ‘feasibility principle’. Controversially, because a military action cannot be proportionate without being feasible, a proportionality principle should incorporate a feasibility principle (Hurka 2005: 37). In a later section, I return to the subject of feasibility.

Second, an idea of minimum force (or necessity) is expressed by the sentence with the phrase ‘minimum necessary’. This idea is different from the idea of proportionality. Sometimes a minimum necessary use of armed force is disproportionate, and sometimes a proportionate use of armed force is not the minimum necessary. In this book, I prefer not to formulate a separate just war principle of minimum force. Instead, I strive to realise or approximate a moral ideal of minimising harm in diverse ways. For instance, to control or stop escalation from less destructive military measures to more destructive military measures, I am advocating a ladder of resorts.

Third, the idea of proportionality is implicit in the phrase ‘the consequences of action not likely to be worse than the consequences of inaction’. Noting the term ‘consequences’, it might be thought that a proportionality principle should be a consequentialist principle. In this book, I am engaging in the dialectical process of rethinking, revising or supplementing received just war principles. Even if there is a received proportionality principle that is a consequentialist principle, my view is that a cosmopolitan proportionality principle should instead be a deontological principle. Briefly, instead of simply ‘weighing’ consequences of actions, the actions themselves must be ‘balanced’. In this first part of the chapter, my aim is to explain this brief sentence.

Different just war theorists formulate proportionality principles differently.

In a seminal article, Thomas Hurka claimed that a proportionality principle should ‘incorporate the other just war conditions about consequences’; specifically, it should incorporate not only a feasibility principle, but also a last resort principle (2005: 37). Admittedly, a just war theory might accept a proportionality principle of such complexity. However, for the sake of clarity and simplicity, my view is that a proportionality principle should be formulated as a separate core just war principle. (Additionally, I propose some ‘proportionality standards’ as subordinate principles.)

#### B. A PRINCIPLE OF PROPORTIONALITY

By means of some succinct remarks about the idea of proportionality, my purpose in this section is to formulate straightaway a generalised proportionality principle that is applicable by all sorts of responsible agents to all forms of armed conflict. It is both a conduct principle and a resort principle. And it is pertinent also to the prelude, halting and aftermath phases.

The gist of this idea is that harms must not outweigh benefits. Provisionally, a proportionality principle may be formulated as follows. The harms of a military action must be outweighed by the benefits. More exactly, because the unit of moral evaluation is a planned course of military actions, the harms of a planned course of military actions must be outweighed by the benefits.

Just war theory is a deontological moral theory. In this book, I am engaged in the dialectical process of revising received just war principles. Indeed, the received proportionality principle might be a consequentialist principle. Nevertheless, my view is that a proportionality principle should instead be a deontological principle. Moral judgements of proportionality should be made primarily about actions. Instead of primarily comparing harmful consequences and beneficial consequences, what should be primarily compared are harmful actions and beneficent actions. That is, what should be primarily compared are actions that violate the nonmaleficence principle and actions that satisfy the beneficence principle.

Consequently, the provisional principle needs to be revised. The harmful actions in a planned course of military actions must be outweighed by the beneficent actions.

Indeed, quantity matters, but quality also matters (Coates 1997: 176). Hence the term ‘outweighed’, which suggests that only quantity matters, should be replaced by the term ‘outbalanced’. The harmful actions in a planned course of military actions must be outbalanced by the beneficent actions.

In accordance with coherentism, it is illuminating to interrelate the proportionality principle with the nonharm and counterharm principles. Typically, a planned course of military actions includes ones that are grievously harmful and ones that (are attempts to) stop grievous harming. (This distinction is inclusive.) Typically, when we make a proportionality

judgement, we have to compare actions that violate the nonharm principle with actions that satisfy the counterharm principle. To coin a term, actions of the latter kind are called ‘vitaly beneficent’ actions.

A main thesis is that, in making a proportionality judgement, we should only compare grievously harmful actions and vitaly beneficent actions. Only grievously harmful and vitaly beneficent actions matter. When harmful actions that are not grievously harmful are ignored, proportionality judgements can be more focused and achievable.

Therefore, the provisional principle needs to be further revised. The grievously harmful actions in a planned course of military actions must be outbalanced by the vitaly beneficent actions. Now imagine a stock illustration. In a tactical bombing mission, bombings that (actually) grievously harm (or seriously risk grievously harming) noncombatants must be outbalanced by bombings of military targets that are vitaly beneficent.

In writings on moral philosophy and political theory, a familiar subject is that of weighing costs and benefits. But the idea of a costly action is different from the idea of a grievously harmful action. Some costly actions violate the nonharm principle, but some do not. Frequently, when we weigh costs and benefits, we do not plan to violate any moral principle. By contrast, when we plan a course of military actions, we plan (paradigmatically) to kill some human beings, in order to save the lives of other human beings. We plan to violate the nonharm principle, in order to satisfy the counterharm principle. We are thus ensnared in a moral dilemma. The proportionality principle is a necessary moral criterion for determining whether the nonharm principle may be overridden.

Just war principles morally constrain the full range of voluntary actions. Specifically, the proportionality principle morally prohibits a planned course of military actions that would be intentionally disproportionate, but it also morally prohibits a planned course of military actions that would be disproportionate knowingly, recklessly or negligently. In short, voluntary actions that are grievously harmful must be outbalanced by voluntary actions that are vitaly beneficent.

In light of these remarks concerning the idea of proportionality, I propose to formulate a just war principle of proportionality canonically as a conditional prohibition.

*Proportionality principle.* It is morally obligatory not to follow a planned course of military actions, if those that are grievously harmful are not outbalanced by those that are vitaly beneficent.

Acts of grievously harming human beings are acts of gravely violating their basic human rights. It is morally obligatory not to follow a planned

course of military actions, if those that gravely violate basic human rights are not outbalanced by those that (are attempts to) stop grave violations of basic human rights. More explicitly, then, the proportionality principle may be formulated equivalently as follows.

*Proportionality principle.* It is morally obligatory not to follow a planned course of military actions, if those that actually violate gravely (or seriously risk gravely violating) people's basic human rights are not outbalanced by those that (are attempts to) stop other persons from actually violating gravely (or seriously risking gravely violating) people's basic human rights.

As discussed in Chapter 4 ('Theory of Action'), just war principles are applicable primarily to actions, but they are also applicable secondarily to consequences. Implicit in this principle is the following conditional prohibition. It is morally obligatory not to follow a planned course of military actions, if the bad intrinsic results of the ones that are grievously harmful are not outbalanced by the good intrinsic results of the ones that are vitally beneficent.

Let me summarise very roughly how this proportionality principle is both a resort principle and a conduct principle. Whether we are planning to use armed force or conducting a military operation, our own human rights violations must be outbalanced sufficiently by our attempts to stop human rights violations.

When we apply the principle to a particular planned course of military actions, we have to morally presume that it is not thus proportionate, and we have the burden of proving that it is. On the one hand, suppose that we fail to satisfy this burden of proof. Our moral presumption becomes determinative: we have to decide that the planned course of military actions is not proportionate. And, therefore, we have to conclude that it is morally obligatory not to follow it. Formulated thus as a conditional prohibition, the principle functions clearly as a moral constraint.

On the other hand, suppose that we succeed in satisfying the burden of proving that the planned course of military actions is thus proportionate. The proportionality principle is a conditional prohibition. It is not a conditional permission. It does not say: 'it is morally permissible to follow a planned course of military actions, if those that are grievously harmful are outbalanced by those that are vitally beneficent'. Therefore, we cannot conclude, even tentatively, that it is morally permissible to follow the planned course of military actions. And there is still the burden of proving that the other just war principles are satisfied. Because the principle does not include such a moral permission, it functions clearly again as a moral constraint.

The proportionality principle is formulated briefly and simply. Arguably, it is overly abstract and indeterminate. Instead of complicating it by incorporating within it various qualifications, I propose to make it more concrete and determinate by means of some subordinate principles, termed ‘proportionality standards’, which I also formulate briefly and simply.

### C. PROPORTIONALITY STANDARDS

The proportionality principle is a moral prohibition. We have the burden of proving that it does not morally prohibit the planned course of military actions. More exactly, we have the burden of proving that the stated condition does not obtain. That is, we have the burden of proving that the grievously harmful actions are outbalanced by the vitally beneficent actions. A main thesis is that we are able to satisfy this burden of proof by means of four proportionality standards. These standards are not mechanical decision procedures. Acceptance of them by diverse responsible agents is compatible with principled moral disagreement about difficult cases. Analogously, there are controversies among social scientists about how people’s well-being should be ascertained.<sup>2</sup>

First, there is the epistemic standard of clear and convincing evidence. Because of this standard, there must be clear and convincing evidence that grievously harmful actions are outbalanced by vitally beneficent actions.

The proportionality principle is applicable primarily to actions, but it is also applicable secondarily to consequences. Implicit in the standard is the following moral requirement. There must be clear and convincing evidence that bad intrinsic results of grievously harmful actions are outbalanced by good intrinsic results of vitally beneficent actions.

The proportionality principle is primarily applicable from particular temporal standpoints. From the temporal standpoint of the present, the principle is applicable prospectively to a future planned course of military actions or to a planned course of military actions that is presently being followed. A prospective judgement of proportionality stems from present evidence.

Despite the fog of prospective armed conflict, there must be clear and convincing evidence. Is the epistemic standard overly demanding? The proportionality principle morally constrains voluntary actions. Each grievously harmful or vitally beneficent action is a voluntary action. When a human agent performs an action voluntarily, the intrinsic result of that action is under his or her control. In comprehending the nature of the action, he or she comprehends the nature of its intrinsic result.

Of course, in the fog of prospective armed conflict, there will always be some uncertainty. Especially uncertain are the extrinsic consequences of actions. However, the epistemic standard does not say: ‘there must be

clear and convincing evidence that bad extrinsic consequences (and intrinsic results) are outbalanced by good extrinsic consequences (and intrinsic results)'. Instead, a main thesis is that, in making proportionality judgements, only intrinsic results matter. More precisely, what matters are the intrinsic results of grievously harmful and vitally beneficent actions. Because extrinsic consequences are thus ignored, proportionality judgements can be more focused and achievable.

Second, there is a standard about degrees of rightness and wrongness.

*Scale standard.* The degree of wrongness of each grievously harmful action must be ascertained, as must the degree of rightness of each vitally beneficent action.

For the concept of 'moral balancing' is a scalar (or ordinal) concept. Different grievously harmful actions have different 'moral degrees', as do different vitally beneficent actions. (The concept of 'moral degree' is inclusive of zero.) The moral balance could be tipped erroneously by the failure to assess the degree of wrongness or rightness of a relevant action correctly.

Frequently, the degree of rightness or wrongness of an action is somewhat indeterminate. Evidently, there can be principled moral disagreement about such moral balancing. There are no mechanical decision procedures for making judgements of proportionality.

Different intrinsic results of grievously harmful actions have different moral degrees, as do different intrinsic results of vitally beneficent actions. Applicable primarily to actions, the scale standard is also applicable secondarily to intrinsic results. Implicit in that standard is the following moral requirement. The degree of badness of the intrinsic result of each grievously harmful action must be ascertained, as must the degree of goodness of the intrinsic result of each vitally beneficent action.

Third, there is the specificity standard of sufficient detail. The nature (or character) of each grievously harmful or vitally beneficent action must be specified sufficiently. The degree of wrongness or rightness of the action matters, but so does its nature (or character). Presumably, for example, an act of knowingly killing noncombatants is intrinsically morally worse than an act of intentionally killing enemy combatants.

Acts of grievously harming human beings are acts of gravely violating their basic human rights. To specify sufficiently how an action would be grievously harmful, we must specify sufficiently how basic human rights would be gravely violated. Additionally, to specify sufficiently how an action would be vitally beneficent, we must specify sufficiently how that action would be performed with the goal of attempting, as much as possible, to stop grave violations of basic human rights.

In planning a course of military actions, we must envisage every morally relevant grievously harmful action and every morally relevant vitally beneficent action. By the failure to envisage a relevant grievously harmful action, the moral balance could be tipped erroneously. And the moral balance could be tipped erroneously by the failure to envisage a relevant vitally beneficent action. To prove that the proportionality principle is satisfied, we must prove that all of the grievously harmful actions relevant to a planned course of military actions are outbalanced by all of the vitally beneficent actions relevant to it.

How much detail and what sort of detail would be sufficient? This question can be answered fully only on a case-by-case basis.

The Preamble of the UDHR proclaims: ‘the equal and inalienable rights of all members of the human family’. In accordance with moral universalism, the proportionality principle holds equally and inalienably of all persons in any battlespace and any homeland. The basic human rights of noncombatants matter, but so do the basic human rights of combatants. The basic human rights of each and every person matter, even those who are enemies.

Fourth, there is a proportionality standard of ‘fairness’, which is discussed in the next section.

#### D. GLOBAL DISTRIBUTIVE JUSTICE

I am presupposing comprehensive moral principles of nonmaleficence, beneficence, distributive justice and autonomy. Different theorists formulate principles of distributive justice differently (Beauchamp and Childress 2009: 242–3). It is sufficient for my purposes to presuppose a roughly formulated egalitarian principle of just distribution – namely, that the costs and benefits of an action must be apportioned among the people affected ‘as widely and equally as possible’ (Frankena 1973: 43). In accordance with cosmopolitanism, it is a principle of global distributive justice (Caney 2005: 102).

A stock criticism of the classical utilitarianism of Bentham and Mill is that some actions that maximise happiness are distributively unjust. For instance, some actions that apportion benefits widely and equally also allocate costs narrowly and unequally.

Similarly, it might be objected that the proportionality principle is thus distributively unjust. To circumvent such an objection, I am proposing, as a fourth subordinate principle, a standard of fairness. This standard is a specification of the egalitarian principle of global distributive justice. The grievous harms and vital benefits of a planned course of military actions must be apportioned among the people affected as widely and equally as possible. Accordingly, the standard is formulated thus:

*Fairness standard.* The bad intrinsic results of the grievously harmful actions and the good intrinsic results of the vitally beneficent actions must be fairly distributed.

The fairness standard is not a mechanical decision procedure. Acceptance of it by diverse responsible agents is compatible with principled moral disagreement concerning difficult cases.

Let us ponder a domestic disanalogy. There is a related criticism of classical utilitarianism – namely, that sometimes, in order to bring about the greatest happiness of the greatest number of people, human rights have to be violated. Paradigmatically, in peacetime, we pursue happiness without violating human rights.

Disanalogously, when we plan a course of military actions, we plan (paradigmatically) to violate the human right to life of some persons, in order to satisfy the human right to life of other persons. For instance, ‘to save American lives, the United States Government conducts targeted strikes against specific al-Qaida terrorists’ (Brennan 2012), and (let me add) some of these targeted strikes take the lives of noncombatants. To satisfy the human right to life of Americans, the United States has violated (presumably unintentionally or inadvertently) the human right to life of innocent Afghans, Pakistanis, Somalis, Yemenis and so forth. Of course, there can be principled moral disagreement about whether such targeted strikes are proportionate or disproportionate.

The fairness standard requires that grave violations of basic human rights during a planned course of military actions must be fairly distributed. In the next section, this standard is illustrated.

#### E. RISK ACCEPTANCE AND NONCOMBATANT IMMUNITY

The hard question in war is what degree of risk we are willing to accept for our own soldiers in order to reduce the risks we impose on enemy civilians.

Michael Walzer, ‘Terrorism and just war’ (2006: 11)

According to the traditional noncombatant immunity principle, it is morally permissible for an agent to cause foreseen proportionate but unintended harms to noncombatants. In *Just and Unjust Wars*, Walzer revised the traditional principle by adding a moral requirement of risk acceptance: ‘aware of the evil involved, he seeks to minimize it, accepting costs to himself’ (1977: 155). Similarly, in the new US counterinsurgency field manual (COIN FM), risk acceptance is morally required: ‘Combat, including counterinsurgency and other forms of unconventional warfare, often obligates Soldiers and Marines to accept some risk to minimize harm to noncombatants’ (COIN FM 2006: 7–21).<sup>3</sup>

But how much risk should combatants be required to accept? Obviously, there can be principled moral disagreement about how this question should be answered. For example, the COIN FM answers: 'At the same time, combatants are not required to take so much risk that they fail in their missions or forfeit their lives' (2006: 7–23). By contrast, Walzer answers: 'If saving civilian lives means risking soldier's lives, the risk must be accepted' (1977: 156).

I am formulating noncombatant immunity and proportionality principles as separate core just war principles. Moreover, I prefer not to complicate the noncombatant immunity principle by incorporating within it a qualification about risk acceptance. Instead, my view is that this question should be answered by means of the proportionality principle, and especially by means of the fairness standard. Let me explain.

Truly, enemy noncombatants have the human right to life, but so do our own soldiers (Dubik 1982). Even enemy soldiers are human beings; even they have the human right to life. When we make a proportionality judgement, we should compare actions that are grievously harmful and actions that are vitally beneficial to our noncombatants, enemy noncombatants, our combatants and enemy combatants. According to the fairness standard, both the bad and good intrinsic results of these actions must be fairly distributed among our noncombatants, enemy noncombatants, our combatants and enemy combatants.

The proportionality principle is both a conduct principle and a resort principle. It pertains both to battlespaces and homelands. In the language of the block quotation, an equally hard question in armed conflict is what degree of risk we are willing to accept for our own civilians in our own homeland, in order to reduce the risks we impose on enemy civilians in foreign battlespaces.

For example, I live in Manhattan in an apartment located several miles from the site of the World Trade Center. During the afternoon of 11 September 2001, while walking along the north edge of the Reservoir in Central Park, I witnessed pillars of smoke. While visiting London during June and July 2005, I rode occasionally on Underground trains. On 7 July 2005, terrorists detonated bombs on some London Underground trains. Living in New York City, I ride frequently on subway trains. Apparently, I am personally at risk of a terrorist attack. How much risk should I accept?

To generalise, how much risk should Americans (and others) accept, in order to minimise the grievous harms that US targeted counterterrorism strikes inflict on innocent citizens of Afghanistan, Pakistan, Somalia, Yemen and so forth?

My purpose, in proposing the four proportionality standards, is to make the proportionality principle more concrete and determinate. Granted, these

standards are themselves somewhat abstract and indeterminate. Acceptance of them by diverse responsible agents is compatible with principled moral disagreement concerning how this last question and other difficult questions should be answered. In accordance with the casuistic thesis, real-world judgements by means of that principle and those standards can be made fully only on a case-by-case basis (Lackey 1989: 41).

In the following five sections, the proportionality principle is elucidated further by means of remarks about other moral requirements.

#### F. REASONABLE HOPE OF SUCCESS

Different just war theorists formulate proportionality principles differently. In particular, Hurka claimed that a proportionality principle should incorporate 'hope-of-success considerations' (2005: 37–8).

Among received just war principles, there is one that is called the principle of 'reasonable hope (or chance or likelihood or prospect) of success'. For brevity, I call it the 'feasibility principle'. My proportionality principle does not incorporate a feasibility principle.

Granted, under some circumstances, a judgement that a planned course of military actions is proportionate can involve the judgement that it is feasible. However, when we make a proportionality judgement, we are morally evaluating our own voluntary actions. By contrast, in order to make a feasibility judgement, we have to scrutinise voluntary actions of our adversaries. Whether we have a reasonable hope of being successful might depend on whether they are likely to decide to flee from the battlefield, whether they are likely to decide to surrender under bombardment and so forth.

A main thesis is that the set of core just war principles should not contain a separate feasibility principle. Occasionally, to oppose extraordinarily grave violations of basic human rights, a military operation that is demonstrably hopeless can still be just – for example, the Warsaw Ghetto Uprising (1943).

#### G. PROPORTIONALITY VERSUS JUST CORRELATIVITY

How is the proportionality principle different from the just-correlativity requirement for the just cause principle?

The four core just war principles are coequal deontological principles. According to the coequality thesis, the proportionality principle must be satisfied, even when the just cause principle is not satisfied. Because armed conflicts are so highly destructive, the chief function of just war principles should be to morally constrain uses of armed force. Even when responsible agents fail to satisfy the just cause principle, they are still morally constrained by the proportionality principle. It is still morally obligatory for them not to attempt to achieve an unjust goal by means of a particular planned course of military actions, if grievously harmful

military actions are not outbalanced by vitally beneficent military actions. Reportedly, in many historical cases of unjust armed conflicts, responsible agents believed that their unjust causes were just. Responsible agents who believe falsely in the justice of their unjust goals should still be morally constrained by the proportionality principle.

Whereas the proportionality and just cause principles are coequal, the moral requirements of just goal and justly correlative means are not. If there is no just goal, there cannot be a justly correlative means. According to the just cause principle, a just goal is a goal of preventing sufficiently grave violations of basic human rights, and the means of achieving the goal is a justly correlative planned course of military actions. Roughly, less serious violations must be prevented by more limited uses of armed force, and more serious violations may be prevented by less limited uses of armed force. Even when a planned course of military actions is not thus justly correlative, grievously harmful military actions must still be outbalanced by vitally beneficent military actions. For instance, a planned course of military actions, the goal of which is right but not just, must still be proportionate. The proportionality principle must be satisfied, even when the just-correlativity requirement is not satisfied.

On the other hand, when the just-correlativity requirement is satisfied, the proportionality principle might not be satisfied. For example, when a just goal is attempted by means of a justly correlative planned course of military actions, bad intrinsic results and good intrinsic results might not be fairly distributed.

#### H. MINIMUM FORCE

In developing a cosmopolitan just war theory, my starting point is the embodiment of received just war principles in the High-level Panel Report as five basic criteria of legitimacy. Despite the word 'proportional', a proportionality principle is not embodied in the criterion of 'proportional means': 'Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?' (HLPR 2004: 67) For the idea of minimum force is different from the idea of proportionality. Sometimes a minimum necessary use of armed force is disproportionate, and sometimes a proportionate use of armed force is not the minimum necessary.

Because of the fairness standard (among other reasons), my just war theory does not include a separate just war principle of minimum force. Sometimes, in order to distribute grievous harms and vital benefits fairly, the scale, duration or intensity of a planned course of military actions has to be greater than the minimum necessary. Instead, I strive to realise or approximate a moral ideal of minimising harm in diverse ways. For instance, to control or stop escalation from less destructive military measures to more destructive military measures, I am advocating a ladder of resorts.

### I. ALTERNATIVE MILITARY ACTIONS

Both a proportionality principle and a feasibility principle are embodied in the High-level Panel Report's criterion of 'balance of consequences': 'Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?' (HLPR 2004: 67) Notice that this criterion is a comparative principle, in that it compares 'the consequences of [military] action' and 'the consequences of inaction'. But inaction is not the only alternative. Frequently, instead of a proposed military action, there are various alternative military actions.

Interestingly, Hurka's proportionality principle is a 'comparative' principle; according to his principle, 'comparative' judgements must be made about alternative military actions (2005: 37–8). (Similarly, a minimum force principle is a comparative principle.)

But the requirement that benefits of a particular military action must outweigh harms is different from the requirement that the sum of benefits and harms of that particular military action must outweigh the sum of benefits and harms of every alternative military action.

For the sake of simplicity and clarity, I prefer to formulate a proportionality principle that is not a comparative principle. The question of how alternative planned courses of military action should be compared is explored in Chapter 9, 'All Things Considered'.

### J. PROPORTIONALITY AND LAST RESORT

Additionally, for the sake of simplicity and clarity, I prefer to formulate proportionality and last resort principles as separate core just war principles. By contrast, according to Hurka's proportionality principle, 'comparative' judgements must be made not only concerning alternative military actions, but also concerning alternative nonmilitary actions; thereby, his principle incorporates 'last-resort considerations' (2005: 38).

In Chapter 6 ('Last Resort'), the idea of last resort is interrelated with the idea of proportionality. Subordinate to the last resort principle, there is a disproportionality standard – namely, that vitally beneficent nonmilitary actions would be outbalanced by grievously harmful nonmilitary actions.

Admittedly, the last resort principle is a 'comparative' principle, in that it involves a comparison of a military action with alternative nonmilitary measures. To satisfy the principle, we have to prove (with clear and convincing evidence) that each (sufficiently detailed) alternative nonmilitary measure either would not achieve the goal of the military action or would be disproportionate or would be substantially more awful.

### K. PROPORTIONALITY VERSUS DISPROPORTIONALITY VERSUS AWFULNESS

How, then, is the disproportionality standard different from the awfulness standard? And how are both different from the proportionality principle? To indicate briefly how these questions should be answered, let me sketch a schematic case. A particular planned course of military actions is proportionate – that is, grievously harmful military actions are outbalanced by vitally beneficent military actions. But there is also an alternative planned course of nonmilitary actions that is not disproportionate – that is, vitally beneficent nonmilitary actions are not outbalanced by grievously harmful nonmilitary actions. Nevertheless, the grievously harmful nonmilitary actions of the latter are substantially more awful than the grievously harmful military actions of the former. Under some circumstances, the imposition of large-scale economic sanctions is substantially more awful than a sufficiently limited military operation, even when both the latter and the former are proportionate.

## II. AUTHORITY

Generalised just war principles are applicable to all forms of armed conflict by all sorts of responsible agents. The idea of ‘responsible agent’ is implicit in the canonical formulations of core just war principles as conditional prohibitions. The main clause of each principle should be understood thus: ‘It is morally obligatory [for responsible agents] not to follow a planned course of military actions’.

Who in the real world of states, intergovernmental organisations, revolutionary groups, terrorist networks and so forth are the ‘primary’ responsible agents? In short, who is ‘primarily responsible’? Should the set of core just war principles contain a principle of ‘legitimate (or right or proper or competent) authority’? Especially because of my negative answer to the latter question, my discussion of the subject of authority can also be more concise.<sup>4</sup>

### A. MORAL AUTHORITY

The first criterion of a just war is right or legitimate authority, which is really a presupposition of the rest of the criteria. In fact, it determines *who* is primarily responsible for judging whether the other criteria are met.

James Childress, *Moral Responsibility in Conflicts*  
(1982: 74 [emphasis in original])

Autonomy of the will is the property the will has of being a law to itself.  
Immanuel Kant, *Groundwork of the Metaphysic of Morals*  
([1785] 1964: 108 [440])

According to Kant's moral theory, the will of every human being is autonomous. Every human being has the capacity to determine for him or herself what is or is not moral law. In addition to moral principles of nonmaleficence, beneficence and distributive justice, I am presupposing a Kantian moral principle of autonomy. Every human being has moral authority.

The just war theory that I am developing is influenced appreciably by the just war theory of James Childress (1982). However, I disagree with his quoted remarks about legitimate authority. Instead, a main thesis is that the autonomy principle determines who is primarily responsible for judging whether the core just war principles are satisfied. Every human being is primarily responsible. Everyone has the moral authority to apply those principles to cases of armed conflict.

By contrast, the traditional legitimate authority principle is autocratic (or monarchical), in that it bestows on rulers (or princes) of states (or commonwealths) the primary responsibility for judging whether other just war principles are satisfied. For example, according to Vitoria, 'any person, even a private citizen, may declare and wage defensive war'; moreover, 'any commonwealth has the authority to declare and wage war'; nevertheless, 'where the commonwealth has a legitimate prince, all authority rests in his hands, and no public action can be taken, whether in peace or war, without him' (1991: 299–301).

A main thesis is that the received monarchical idea of legitimate authority should be revised in two interrelated cosmopolitan ways: it should be both globalised and democratised. Even if a cosmopolitan just war theory should be SC-centric, it should also be (global) citizen-centric.

Let me sketch an illustration. Concerning US counterterrorism operations in Afghanistan and Pakistan, Obama declared that 'our cause is just' (2009c). In his Nobel Peace Prize acceptance speech, he endorsed just war theory (2009d). Under his presidential authority, a US counterterrorism operation killed Osama bin Laden in Pakistan. Perhaps, acting as US President, he judged that this military operation satisfied just war principles (Becker and Shane 2012). However, according to the autonomy principle, every human being, anywhere in the world – not only Obama, but also every US citizen, every citizen of Pakistan and so forth – has the moral authority to judge whether the killing of Osama bin Laden satisfied just war principles.

Human beings everywhere are the morally primary responsible agents.

#### B. LEGAL AUTHORITY

Just-war theory requires that decisions to wage war be made by those who are legally authorized to do so.

Richard Regan, *Just War: Principles and Cases* (1996: 20)

It might be objected that, although everyone has the moral authority to apply just war principles, only rulers of states have the legal authority. Truly, the idea of moral authority is different from the idea of legal authority. Should the set of core just war principles contain a principle of ‘legal authority’?

Which responsible agents have legal authority? Regan’s answer is found in the remainder of the paragraph containing the quoted sentence: ‘The constitution and laws of nation-states specify the institutions and personnel authorized to make their war decisions’ (1996: 20). This answer might be enough for a state-centric just war theory, but Regan’s full answer is (apparently) SC-centric: ‘and the U.N. Charter authorises the Security Council to make the international community’s war decisions’ (1996: 20).

Nevertheless, a particular use of armed force is not just because the Security Council decides that it is just. Instead, the Security Council ought to decide that it is just because it truly is just. To decide that it is just, the Security Council has the burden of proving that it has a just cause, that it is a last resort, that it would be proportionate and that it would not grievously harm noncombatants intentionally. To decide that it is just, there is not the additional burden of proving that the Security Council has the legal authority to decide whether it is just. If it is just, it would still be just, even if the Security Council did not have the legal authority to decide whether it is just.

According to the autonomy principle, every human being, anywhere in the world, has the moral authority to decide whether that particular use of armed force is just. To decide that it is just, he or she has the burden of proving that it has a just cause, that it is a last resort, that it would be proportionate and that it would not grievously harm noncombatants intentionally. To decide that it is just, he or she does not have the additional burden of proving that he or she has the legal authority to decide whether it is just.

In conclusion, the set of core just war principles does not contain a legal authority principle. Core just war principles are applicable to all forms of armed conflict – for example, armed revolutions. And they are applicable by all sorts of responsible agents – for example, leaders of armed revolutions. A core legal authority principle is rejected, because (among other reasons) an armed revolution could not satisfy it.

### C. GLOBAL CITIZENSHIP AND ARMED REVOLUTION

Old John Brown’s body lies moldering in the grave,  
 While weep the sons of bondage whom he ventured all to save;  
 But tho he lost his life while struggling for the slave,  
 His soul is marching on.

William W. Patton, ‘John Brown’ (1861)

A basic human right expressed in the UDHR is as follows: ‘No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms’ (Article 4). Before the US Civil War, this basic human right was massively violated in the United States. In the middle of October 1859, the abolitionist John Brown led ‘a twenty-two man raid on Harpers Ferry, Virginia’, in a ‘doomed heroic effort to free the slaves’ (Reynolds 2005: 3). Clearly, John Brown had no legal authority. Nevertheless, from a cosmopolitan point of view, abolitionism was a global movement, and John Brown had moral authority as a global citizen. The advent of abolitionism in the eighteenth century was simultaneously the dawn of the human rights movement.

From the temporal standpoint of October 1859, does this raid satisfy just war principles? Let me sketch an answer. Countering US slavery is a just cause, and noncombatants would not be grievously harmed intentionally. Nonetheless, even if the raid would be proportionate, it is still reasonable to attempt nonmilitary measures. That John Brown has legal authority is not a necessary moral criterion for deciding whether the raid would be just.

To generalise, a main thesis is that every human being has the moral authority to determine for him or herself whether an armed revolution (or armed insurrection) is just. Is this thesis overly permissive? In the contemporary world, there are authoritarian states that gravely violate basic human rights. Correspondingly, there can be just causes for armed revolutions.

#### D. NONMILITARY MEASURES AND GLOBAL CITIZENSHIP

We send international volunteers to areas of conflict, providing protective accompaniment to human rights defenders threatened by political violence.

Peace Brigades International<sup>5</sup>

However, to counterbalance overemphasis of the just cause principle, I am emphasising the ancillary just war principles. Before starting an armed revolution, the last resort principle mandates that reasonable nonmilitary measures must be attempted – for instance, nonviolent actions (Lango 2009a). Every human being has the moral authority to determine whether, before engaging in armed revolution, it would be reasonable to engage in nonviolent revolution (or nonviolent resistance).

In light of the multitude of nonviolent actions that might be attempted before resorting to armed revolution, the last resort principle might appear to be overly prohibitive. Although I am strongly supportive of the use of nonmilitary measures, I am not advocating nonviolence as a panacea. Memorably, *die Weiße Rose* (the White Rose), a nonviolent group in Nazi Germany, whose ‘crime’ was distributing anti-Nazi leaflets, was crushed by

imprisonment and execution (Gill 1994). Truly, under some circumstances, struggling against an authoritarian state by means of nonviolent actions would be substantially more awful than struggling against it by means of armed revolution.

To generalise further, a main thesis is that every human being has the moral authority to determine for him or herself the justice or injustice of any use of armed force by the Security Council, by any state, by any revolutionary group, by any terrorist network and so forth. Acting as global citizens, we human beings may communicate our moral evaluations of uses of armed force to relevant leaders by such peaceful means as petitions, the ballot box, demonstrations and nongovernmental organisations (NGOs). As an illustration, representatives of NGOs in the NGO Working Group on the Security Council (sponsored by the Global Policy Forum) – for instance, Amnesty International, Human Rights Watch and the Global Centre on the Responsibility to Protect – have been meeting regularly with Security Council ambassadors since 1996 (Paul 2010).

Additionally, instead of merely communicating, a global citizen might participate directly – for example, by joining one of Peace Brigades International's team of volunteers. Let me sketch a famous illustration. To resist underground nuclear weapons testing by France in 1985 at an uninhabited atoll in the South Pacific, the organisation Greenpeace planned to sail the ship *Rainbow Warrior* into the testing zone. France counterresisted violently: the *Rainbow Warrior* was sunk by French Government agents and a photographer onboard the ship, Fernando Pereira, drowned. However, the French act of violence 'backfired, sparking worldwide outrage'.<sup>6</sup> The tragedy of the *Rainbow Warrior* illustrates both the value of nonviolent action and its dangerousness.

To fulfil the ideal of global citizenship, there are many different kinds of actions that might be attempted.

#### E. REFORMING THE SECURITY COUNCIL MORALLY

Even though the set of core just war principles does not contain a legitimate authority principle, legitimate authority still matters. In addition to conceptions of moral universalism and global citizenship, a cosmopolitan just war theory should include a conception of global governance.

From the temporal standpoint of the early years of the second decade of the twenty-first century, I am featuring a real-world global political institution – the Security Council. It might be objected that, although endowed by the UN Charter with legal authority, the Security Council lacks sufficient moral authority. Indeed, the UN Secretary-General is often perceived as having 'moral authority' (Evans 2008: 176). By contrast, the five permanent members of the Security Council are often perceived as being motivated mainly by parochial national interests.

Ideally, the Security Council should be reformed, so that it is invested with considerable moral authority (Lango 2009c: 222–4). Let me sketch (albeit incompletely) a project of moral reform. The General Assembly is empowered by the UN Charter to elect the Security Council's nonpermanent members. The provisions for this election include one concerning: 'due regard being specially paid . . . to equitable geographical distribution' (Article 23). Importantly, there is also a provision concerning: 'due regard being specially paid . . . to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization' (Article 23).

To offset the five permanent members, the General Assembly should elect five nonpermanent members that are stable democracies, obey international laws, pursue alternatives to war, reject nuclear weapons, support environmentalism and respect human rights – for example, Botswana, Canada, Costa Rica, Japan and the Netherlands. Imagine, additionally, that each of these nonpermanent members selects as its UN ambassador a Nobel Peace Prize recipient – for example, Mohamed ElBaradei, Jimmy Carter, Kofi Annan, Jody Williams, Aung San Suu Kyi and Mikhail Gorbachev.

Instead of serving parochial national interests, these five UN ambassadors ought to serve global interests – namely, the common interests of every human being, everywhere in the world. Concerning threats to international peace and security, they should make moral judgements that satisfy just war principles. To epitomise the traditional military function of the Security Council, the five permanent members might be called 'the Circle of Warriors'. And, to epitomise the moral purpose of the UN Charter, these five UN ambassadors might be called 'the Circle of Judges'. Just as the words and actions of the Secretary-General can have significant moral authority, so the words and actions of this Circle of Judges might have significant moral authority.

#### F. GLOBAL GOVERNANCE AND THE SECURITY COUNCIL

Unfortunately, in the fog of international relations, prospects for significant Security Council reform are obscure. Consequently, at present, there is a crucial question, which is voiced in the ICISS Report regarding military interventions, but which is generalisable to all uses of armed force: if the Security Council 'fails to act', 'what are the options' (2001a: 53)? There is a related question, which also is crucial: what are the options, if the Security Council acts wrongly?

The ICISS Report acknowledges the primacy of the Security Council. However, if 'the Security Council rejects a proposal or fails to deal with it in a reasonable time', the ICISS Report also recommends some 'alternative options' – in particular, 'consideration of the matter by the General Assembly'

or by 'regional or sub-regional organizations' (2001a: xiii). Further, the ICISS Report recognises (while not forthrightly endorsing) alternative options of military interventions by 'ad hoc coalitions' or 'individual states' (2001a: 54). Also, let me mention controversial alternative options of military interventions by nonstate actors – for instance, revolutionary groups or 'private military companies' (PMCs).<sup>7</sup>

Arguably, the 'principle of state sovereignty' is still the 'cornerstone' of the 'traditional legal order of international relations' (Hoffman 1996: 12). Customarily, rulers of sovereign states have also been motivated by parochial national interests. Conceivably, however, this traditional legal order might be morally reformed. Conceivably, there might be a different system of sovereign states governed by cosmopolitan rulers motivated by global interests. At present, in the fog of international relations, prospects for such moral reform are similarly obscure.

At present, is the United Nations system the best system of global governance? In accordance with coherentism, this question should be answered by interrelating a political theory of global governance with comprehensive moral principles. At present, which realisable system of global governance would best satisfy the principles of nonmaleficence, beneficence, distributive justice and autonomy? At present, is the UN system more nonmaleficent, beneficent, fair (distributive justice) and representative (autonomy) than any other realisable system of global governance? I want to stress that acceptance of the set of core just war principles is compatible with principled moral disagreement about how such questions should be answered. In this book, I have to presuppose that the last question can be answered affirmatively, since I have no space to explore the controversial subject of global governance thoroughly.

In conclusion, the Security Council is a key institution in the UN system, and the UN system is, at present, the best system of global governance, or so I am presupposing. At present, in the real world of states, intergovernmental organisations, revolutionary groups, terrorist networks and so forth, the Security Council should have primary responsibility for security. However, if the Security Council fails to act or acts wrongly, there may be alternative responsible agents – for instance, regional organisations, ad hoc coalitions of states and the United States alone. A main thesis is that a cosmopolitan just war theory can be thus SC-centric, even though the set of core just war principles does not contain a legitimate authority principle.

## NOTES

1. Compare this part with the two chapters on proportionality in Coates (1997).
2. For example, see Stiglitz et al. (2009).

3. I discuss the topic of risk acceptance, with reference to Walzer and the COIN FM, in Lango (2011).
4. Compare this part with the chapter 'Legitimate authority' in Coates (1997). The traditional concept of legitimate authority is contested by both Fabre (2012) and Pattison (2010).
5. This quotation is from <http://www.peacebrigades.org/index.php> (last accessed 22 July 2013).
6. This quotation is from <http://www.greenpeace.org/international/about/ships/the-rainbow-warrior> (last accessed 22 July 2013).
7. Concerning PMCs, see the chapter 'Commodified wars' in Fabre (2012).

## CHAPTER 9

# ALL THINGS CONSIDERED

We may find in History, almost in every Page, the dismal Calamities of War, whole Cities destroyed, or their Walls thrown down to the Ground, Lands ravaged, and every Thing set on fire.

Hugo Grotius, *The Rights of War and Peace* ([1625] 2005: 1303–4)

Truly, our military actions can be highly destructive. To establish prospectively that a proposed military action would be just, we have the burden of proving, by clear and convincing evidence, that all of the core just war principles would be satisfied.

In the first part of this chapter, our shared responsibility for global human security is elucidated. For the sake of concreteness, a contemporary case is detailed: the case of Sudan versus South Sudan. In the second and third parts, the question of how the core just war principles are applied conjointly to particular cases is investigated. In applying them conjointly, two questions need to be distinguished. Would a proposed military action be just? Among alternative proposed military actions, each of which would be just, which one would be best? The former question is considered in the second part and the latter in the third part. Real-world moral judgements regarding particular cases can be complicated and controversial, when all things are considered.<sup>1</sup>

### I. OUR SHARED RESPONSIBILITY

According to the High-level Panel Report, the subtitle of which includes the phrase ‘our shared responsibility’, ‘the front-line actors in dealing with all the threats we face, new and old, continue to be individual sovereign States’ (HLPR 2004: 1). How should the responsibility for preventing grave violations of basic human rights be shared among sovereign states? For a state-centric approach, this question is crucial.

For a cosmopolitan approach, a different question is also crucial. How should the responsibility for preventing grave violations of basic human

rights be shared among all human beings everywhere in the world? As global citizens, how do we share responsibility for global human security?

Both questions are answerable in terms of the egalitarian principle of global distributive justice. Paradigmatically, the military actions performed by (groups of) human beings as agents have as targets other (groups of) human beings. In the preceding chapter, a question is raised about human beings as targets – namely, how should the grievous harms and vital benefits of a planned course of military actions be apportioned among the people affected? To answer this question, a fairness standard is formulated by specifying the principle of distributive justice. In the first part of this chapter, a comparable question is raised about human beings as agents – roughly, how should the burdens and benefits of a planned course of military actions be apportioned among the people responsible?

Because the use of armed force must be a last resort, a related fairness question is raised about human beings as agents – roughly, how should the burdens and benefits of attempting reasonable nonmilitary measures be apportioned among the people responsible?

#### A. MUTUAL DEFENCE TREATIES

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all . . .

North Atlantic Treaty (NATO 1949: Article 5)

As secretary general of the North Atlantic Treaty Organization, I travel often to Washington. Every time I do, I hear voices expressing concern about burden-sharing in the trans-Atlantic alliance. Their message is clear: the Europeans do too little.

Anders Fogh Rasmussen, 'Taking stock of the Atlantic Alliance'  
(2012)

First, let me address the question of shared responsibility among sovereign states. As Article 51 of the UN Charter acknowledges, there is a distinction between 'individual' self-defence and 'collective' self-defence. In Chapter 5 ('Just Cause'), I examine a traditional type of just cause: self-defence by an individual sovereign state against aggression. In this section, a distinguishable type of just cause is considered: collective self-defence by several sovereign states against aggression.

As the North Atlantic Treaty exemplifies, the purpose of collective self-defence is often formalised by a mutual defence treaty. Each state party to a mutual defence treaty agrees to defend each of the other states parties to the treaty against aggression. The word 'other' is significant. Conceptually,

the idea of individual self-defence against aggression is different than the idea of 'other defence against aggression' (Orend 2006: 32). Why should a just war theory accept 'other defence' against aggression as a just cause? It might be answered that, because states parties to a mutual defence treaty have committed themselves to other defence, they are duty-bound to honour this commitment, but this answer is inadequate. Given that there is such a treaty-based duty of other defence, it does not follow (conceptually or logically) that there is a moral obligation of other defence. Why should a just war theory morally permit treaty commitments to other defence?

My cosmopolitan approach to just war theory is a sort of human security approach, because it prioritises the defence of individual human beings. In accordance with coherentism, it is presupposed that a cosmopolitan just war theory can be elucidated by means of a theory of human rights. Paradigmatically, for example, when a state party to a mutual defence treaty is invaded by an aggressor, basic human rights are gravely violated. In general, acts of defence against aggression are emergent from, or supervenient on, acts of preventing grave violations of basic human rights. According to the counterharm principle, it is morally obligatory to attempt, as much as possible, to stop other persons from gravely violating basic human rights. Therefore, it is morally obligatory for each state party to a mutual defence treaty to attempt, as much as possible, to defend each of the other states parties against such aggression.

To generalise, it is morally obligatory for any sovereign state to attempt, as much as possible, to defend any other sovereign state against uses of armed force that would gravely violate basic human rights. The UN Charter is a mutual defence treaty among 193 sovereign states, as the following passage from the Preamble attests: 'to unite our strength to maintain international peace and security'. How should the responsibility for defence against aggression be shared among UN Member States? As the quotation by NATO Secretary-General Rasmussen evidences, burden-sharing among states parties to a mutual defence treaty can be quite contentious.

To generalise further, it is morally obligatory for any sovereign state to attempt, as much as possible, to defend individual human beings in, or citizens of, any other sovereign state against uses of armed force that would gravely violate their basic human rights. Arguably, the UN Charter is also a human security treaty, as the following passage from the Preamble may be read as implying: 'to reaffirm faith in fundamental human rights'. How should the responsibility for armed humanitarian intervention be shared among UN Member States?

Relatedly, there is the question of how the burdens of UN peacekeeping missions and other reasonable nonmilitary measures should be shared.

Briefly, my answer to these questions about our shared responsibility is as

follows. In accordance with the egalitarian principle of just distribution, the burdens and benefits must be shared as widely and equally as possible. In subsequent sections, this answer is illustrated.

#### B. THE CASE OF SUDAN VERSUS SOUTH SUDAN

*The Security Council* [on 2 May 2012] . . .

*Determining* that the prevailing situation along the border between Sudan and South Sudan constitutes a serious threat to international peace and security,

*Acting* under Chapter VII of the Charter of the United Nations,

1. *Decides* that Sudan and South Sudan shall take the following actions . . .

(i) Immediately cease all hostilities, including aerial bombardments . . .

(ii) Unconditionally withdraw all of their armed forces to their side of the border . . .

2. *Decides* that Sudan and South Sudan shall unconditionally resume negotiations, under the auspices of the AUHIP [the African Union High-level Implementation Panel] . . .

Security Council Resolution 2046 (2012 [emphasis in original])

From the temporal standpoint of 2 May 2012, let us consider the case of Sudan versus South Sudan (briefly, ‘the South Sudan case’). (This case should not be confused with the Darfur case discussed in preceding chapters.) My purpose here is to make illustrative comments. Because the South Sudan case is so complex, I am not able to apply just war principles conclusively.<sup>2</sup>

Looking backwards, some key dates are as follows. On 14 July 2011, South Sudan became the 193rd Member State of the United Nations. On 9 July 2011, South Sudan, formerly part of Sudan, became an independent sovereign state. On 8 July 2011, Security Council Resolution 1996 (2011) authorised a new UN peacekeeping mission in South Sudan (UNMISS). During January 2011, the people of South Sudan voted for independence from Sudan. On 9 January 2005, a terrible civil war between South Sudan and (North) Sudan was formally ended by the Comprehensive Peace Agreement (CPA), which provided for an independence referendum and a UN peacekeeping mission in South Sudan (UNMISS). From 1983 to 2005, South Sudan and (North) Sudan were locked in (a second) civil war, during which more than two million civilians died. (Earlier, there was a first civil war.)

Usually, the ethics of armed humanitarian intervention in internal conflicts is sharply distinguished from the ethics of military intervention in interstate wars. Intriguingly, the South Sudan case blurs this distinction. Originally a case of internal conflict, the South Sudan case has evolved into a case

of interstate conflict. From the temporal standpoint of (say) the year 2002, should the Security Council authorise armed humanitarian intervention in the civil war between (North) Sudan and South Sudan, ‘one of the deadliest conflicts since World War II’ (ICG 2002: i)? From the temporal standpoint of 2 May 2012, should the Security Council authorise military intervention to counter the threat of interstate war between Sudan and South Sudan? A human security approach to the ethics of armed conflict should regard these two questions as closely similar. For the just goals of both sorts of armed interventions should be preventing sufficiently grave violations of basic human rights.

The South Sudan case illustrates the question of how responsibility for alternative nonmilitary measures should be shared among UN Member States. Disputably, sovereign states closer to, or more impacted by, a security threat have greater responsibility. Fittingly, Resolution 2046 (2012) mandates that negotiations shall resume under the auspices of a regional organisation – the African Union (AU). Similarly, the negotiations that resulted in the CPA were held under the auspices of the Intergovernmental Authority on Development (IGAD), a regional organisation of nearby African states – namely, Djibouti, Eritrea, Ethiopia, Kenya, Uganda and also Sudan itself. Other supporters of the process of negotiating and implementing the CPA include the AU, the UN, the EU, the Arab League, Britain, Egypt, Italy, the Netherlands, Norway and (importantly) the United States.

Resolution 2046 (2012) condemns ‘the repeated incidents of cross-border violence between Sudan and South Sudan’. Nonetheless, it fails to authorise the use of armed force, or the threat to use armed force, to prevent future incidents of such violence. The earlier Resolution 1996 (2011) provides the UN peacekeeping mission in South Sudan (UNMISS) with a Chapter VII mandate, but only for human protection purposes within South Sudan. Truly, the clause ‘Acting under Chapter VII’ in Resolution 2046 (2012) is misleading.

### C. ARMED INTERVENTION, ARMED PEACEKEEPING AND GLOBAL GOVERNANCE

Following bombardments [by Sudan] in Unity State [in South Sudan], some South Sudanese authorities and communities criticized UNMISS for not responding adequately to protect civilians. Significant outreach was required to explain that the UNMISS protection mandate exists within South Sudan and does not include protection of territory or borders, nor protection against aerial bombardment.

Ban Ki-moon, *Report of the Secretary-General on South Sudan*,  
26 June 2012 (Ban 2012: 18)

From the temporal standpoint of 26 June 2012, should the Security Council authorise the use of armed force to protect South Sudan from aerial bombardment by Sudan? Should the use of armed force for protection of territory or borders be authorised? For instance, should the establishment of a no-fly zone or precision airstrikes be authorised? This case illustrates the question of how UN Member States should share responsibility for targeted military operations. Sufficiently limited uses of armed force to protect borders are a sort of policing, so this case also illustrates the question of how responsibility should be shared for overlap military actions.

The process of applying just war principles to particular cases is a temporal process. Broadly, there are temporal phases of prelude, resort, conduct, halting and aftermath, but such phases might intertwine. The day of 26 June 2012 is a day in both an aftermath phase and a prelude phase. What sort of military operation might the Security Council authorise, both to keep the peace of the CPA and counter the threat of interstate war?

In addition to the threat of interstate war, there is the threat of internal conflict, both in Sudan and South Sudan. Resolution 2046 (2012) expresses 'deep concern' about 'continued fighting in the states of Southern Kordofan and Blue Nile, in Sudan'. Thus this case illustrates the question of how UN Member States should share responsibility for armed humanitarian interventions.

In South Sudan, there is the threat of inter-communal violence (Hsiao et al. 2012), but there are also threats of violence by militia groups and the Lord's Resistance Army (LRA). Accordingly, Resolution 1996 (2011) includes among the tasks that UNMISS is authorised to perform, by 'all necessary means', the following: 'protecting civilians under imminent threat of physical violence'. Hence the case illustrates the question of how UN Member States should share responsibility for armed UN peacekeeping missions.

#### D. HUMAN SECURITY AND GLOBAL CITIZENSHIP

In this section, I address the question of how responsibility for human security should be shared among all human beings everywhere in the world. As global citizens, how should we share responsibility for preventing grave violations of basic human rights?

In the Libya case, when massacre threatened, Obama declared: 'It was not in our national interest to let that happen' (2011b). In the South Sudan case, even if it is not in the (perceived) US national interest to protect civilians, surely it is in the global interest.

As of 31 May 2012, military personnel from fifty-three states were serving in UNMISS, but none from the United States. As Secretary-General Ban reported: 'the continued absence of military helicopters [for UNMISS] is of great concern' (2012: 11). Arguably, in light of the huge US military budget

and the vast US arsenal (and despite the ‘great recession’), US taxpayers should share financial responsibility for the contribution of several military helicopters. To generalise, the UN peacekeeping budget – recently, ‘about \$8 billion a year’ (Goldstein 2011: 309) – should be substantially increased, and the consequent economic burden should be shared fairly by human beings everywhere.

To be sufficiently effective, individual human beings should share responsibility for human security by acting collectively in groups. Again, the South Sudan case is illustrative. From the temporal standpoint of the year 2005, George W. Bush’s ‘crowning achievement’ as US President, Nicholas Kristof affirmed, ‘was ending one war in Sudan, between north and south’ (Kristof 2005). The Sudan policy of the Bush administration was strongly influenced by evangelical Christian groups, but also by some African-American, Jewish and humanitarian groups (Huliaras 2006). Later, in the Obama administration’s 2010 *National Security Strategy* – under the heading ‘Peacekeeping and armed conflict’ – the South Sudan case was featured (NSS 2010: 48). Acting collectively in groups – for instance, United to End Genocide (see <http://endgenocide.org>) – individual human beings might significantly influence future South Sudan policy.

In viewing just war theory through the lens of moral philosophy, I am stressing moral ideals. Sovereign states are often motivated by their (perceived) national interests, but they ought to be motivated primarily by (universal) global interests. Analogously, such groups of individual human beings are often motivated by divisive special interests, but they ought to be motivated primarily by universalist (cosmopolitan) ideals. Ideally, we human beings, acting collectively as global citizens, should attempt, as much as possible, to prevent grave violations of basic human rights worldwide.

Finally, let me mention an especially controversial question. For the sake of human security, should a cosmopolitan just war theory morally permit global citizens to act collectively in ‘armed groups’? For example, imagine that South Sudan forms a ‘foreign legion’. May individual human beings, acting as global citizens, volunteer for it? (In the Spanish Civil War, there were International Brigades – for instance, the Abraham Lincoln Brigade.) The relevant concept of ‘armed group’ is somewhat indeterminate. Should that concept be understood as including groups of insurgents? Should it be understood as including ‘private military companies’ (PMCs)? In addition to for-profit PMCs, can there be non-profit PMCs? For example, imagine that Human Rights Watch has a ‘military wing’. May individual human beings, acting as global citizens, join it and collectively intervene in South Sudan? Evidently, there can be principled moral disagreement about how such questions should be answered.

## II. MORAL JUDGEMENTS ABOUT PARTICULAR CASES

As the South Sudan case indicates, real-world moral judgements about particular cases of armed conflict can be complicated and controversial, all things considered. In this part and the next part, I investigate the question of how the core just war principles are applicable to particular cases conjointly. When we apply them conjointly, we need to distinguish two questions. Would a proposed military action be just? Among alternative proposed military actions, each of which would be just, which one would be best? The former question is considered in this part and the latter in the next part. Discussions in these two parts draw upon relevant discussions in earlier chapters – most importantly, Part IV (‘Moral Deliberation’) of Chapter 3 (‘Moral Theory’). Consequently, my answer to the question of how the core just war principles are applicable conjointly to particular cases can be relatively concise.

### A. ARMED CONFLICT AND MORAL CONFLICT

In armed conflict, there is moral conflict. According to the just cause principle, the just goal for a planned course of military actions is preventing sufficiently grave violations of basic human rights. And according to the counterharm principle, it is morally obligatory to attempt, as much as possible, to achieve that just goal. Let me term such a moral obligation a ‘just-goal obligation’.

Paradigmatically, when we plan a course of military actions, we plan to gravely violate basic human rights. However, according to the nonharm principle, it is morally obligatory not to gravely violate basic human rights. Let me term such a moral obligation a ‘grievous-harm prohibition’.

Therefore, in particular cases of armed conflict, we can be ensnared in moral dilemmas. We cannot satisfy the counterharm principle without violating the nonharm principle. We cannot fulfil a just-goal obligation without failing to fulfil a grievous-harm prohibition.

Specifically, when our proposed military action would gravely violate basic human rights of noncombatants, we are ensnared in a moral dilemma. Moreover, even if our proposed military action is so narrowly targeted that only basic human rights of enemy combatants would be gravely violated, we are still ensnared in a moral dilemma.

Such moral dilemmas have the following logical form. It is morally obligatory to do *A*, and it is morally obligatory not to do *B*, but *A* cannot be done without doing *B*. The term ‘dilemma’ is appropriate, because both of these moral obligations cannot be fulfilled simultaneously. More exactly, both cannot be simultaneously fulfilled, under the ‘dilemmatic circumstance’ that *A* cannot be done without doing *B*. If we fulfil the moral obligation to do *A*, we fail to fulfil the moral obligation not to do *B*, for we cannot do *A*

without doing *B*; or if we fulfil the moral obligation not to do *B*, we fail to fulfil the moral obligation to do *A*, for we cannot refrain from doing *B* without refraining from doing *A*.

Truly, a moral dilemma is an ensnarement. Either we do *A* or we do not do *A*. If we do not do *A*, we violate our moral obligation to do *A*. Alternatively, if we do *A* – thereby doing *B* – we violate our moral obligation not to do *B*. There is no third alternative. We are ensnared in the moral dilemma.

In his landmark article ‘War and massacre’, Thomas Nagel conceptualised moral dilemmas of warfare as moral conflicts ‘between [deontological] absolutism and utilitarianism’ (1979: 56). By contrast, I am conceptualising moral dilemmas of armed conflict as moral conflicts between deontological moral requirements – for example, moral conflict between a just-goal obligation and a grievous-harm prohibition. Whereas utilitarianism’s greatest happiness principle mandates beneficial consequences, the deontological beneficence principle mandates beneficent actions. Instead of the idea of clashes between harmful actions and beneficial consequences, I am utilising the idea of clashes between harmful actions and beneficent actions. Indeed, there can be principled moral disagreement among moral theorists about the nature of moral dilemmas.

#### B. FULFILLING JUST-GOAL OBLIGATIONS AND OVERRIDING GRIEVOUS-HARM PROHIBITIONS

The counterharm and nonharm principles are *prima facie* (non-absolute) moral requirements. Specifically, a just-goal obligation and a grievous-harm prohibition are *prima facie* moral requirements. In particular cases of armed conflict, we can be ensnared in moral dilemmas, the logical form of which is as follows. Because we cannot do *A* without doing *B*, we cannot fulfil both the just-goal obligation to do *A* and the grievous-harm prohibition of the doing of *B*. Let me term such a moral dilemma a ‘just-war dilemma’. To resolve the just-war dilemma and fulfil the just-goal obligation, may the grievous-harm prohibition be overridden?

Usually, according to the casuistic thesis, real-world moral judgements about armed conflict should be made on a case-by-case basis. In deliberating morally about a particular case, just-goal obligations have to be specified sufficiently. For instance, as the South Sudan case illustrates, the question of who specifically shares responsibility for fulfilling the obligation has to be answered. Correlatively, in deliberating morally about a particular case, grievous-harm prohibitions have to be specified sufficiently.

Therefore, in deliberating morally about a particular case, just-war dilemmas have to be specified sufficiently. Suppose that, under a particular dilemmatic circumstance, we cannot fulfil a specific just-goal obligation without failing to fulfil a specific grievous-harm prohibition. To resolve this

specific just-war dilemma and fulfil the specific just-goal obligation, may the specific grievous-harm prohibition be overridden?

This question of overriding is not merely a question of weighing. Of course, scales (or degrees) matter, but so do natures (or kinds). The question of whether the grievous-harm prohibition may be overridden is not merely a question of whether it is (quantitatively) ‘outweighed’ by the just-goal obligation.

Instead, the question of overriding is a question of whether the grievous-harm prohibition is ‘outbalanced’ by the just-goal obligation. For the nature of the just-goal obligation matters. Additionally, the nature of the grievous-harm prohibition matters. The question of overriding is primarily a question of ‘qualitative’, not ‘quantitative’, moral judgement, all things considered.

A grievous-harm prohibition is stringent. A main thesis is that the concept of ‘stringency’ admits of degrees. The concept of ‘stringency’ is a scalar concept. To say that one prima facie moral requirement ‘overrides’ (or ‘outbalances’) another prima facie moral requirement is to say that the former is ‘more stringent’ than the latter. The question of overriding is a question of ‘comparative stringency’ (Ross [1930] 2002: 41). To resolve a specific just-war dilemma, the following question has to be answered. Which prima facie moral requirement is more stringent by its very nature: the specific just-goal obligation or the specific grievous-harm prohibition? Another main thesis is that this question should be answered by means of the epistemic conceptions of moral presumption and burden of proof.

### C. BURDEN OF PROOF

Military force when employed has only two immediate effects: it kills people and destroys things.

General Rupert Smith, *The Utility of Force* (2007: 8)

When we deliberate about whether to fulfil a prima facie moral obligation, we have to make the moral presumption that we must fulfil it. To override this moral presumption, we have the burden of proving that we need not fulfil it. Central to the meaning of the term ‘prima facie’ is the following conception. So long as this burden of proof has not been satisfied, what we morally presume to be our obligation actually is our obligation.

Accordingly, a prima facie just-goal obligation may be defended ‘negatively’ as follows. When we deliberate about whether to fulfil it, we have to make the moral presumption that we must fulfil it. To override this moral presumption, we have the burden of proving that we need not fulfil it. So long as this burden of proof has not been satisfied, what we morally presume to be our obligation actually is our obligation.

Because armed conflicts are so highly destructive – because people are killed and things are destroyed – the chief function of a just war theory should be to morally constrain uses of armed force. A main thesis is that a grievous-harm prohibition is, by its very nature, highly stringent. When we are ensnared in a just-war dilemma – and if we only defend the just-goal obligation negatively – the grievous-harm prohibition is, by its very nature, more stringent.

Therefore, for the sake of greater stringency, the just-goal obligation must be defended ‘affirmatively’. Let me sketch a domestic analogy. In US federal law, an insanity defence is an affirmative defence: ‘The defendant has the burden of proving the defense of insanity by clear and convincing evidence’ (18 USC §17).<sup>3</sup> Metaphorically, war is collective insanity, and so this analogy seems fitting, rhetorically.

Presupposing an epistemic standard of clear and convincing evidence, the just cause principle mandates an ‘affirmative defence’ of a prima facie just-goal obligation. When we apply the just cause principle to a planned course of military actions, we have to morally presume that there is not a just cause, and we have the burden of proving (by clear and convincing evidence) that there is. There is a just cause when there is both a just goal and a justly correlative means. Accordingly, we have to morally presume that there is not a just goal, and we have the burden of proving that there is. The just goal is preventing sufficiently grave violations of basic human rights. Accordingly, we have to morally presume that there are not sufficiently grave violations of basic human rights, and we have the burden of proving that there are. The just cause principle mandates such an ‘affirmative defence’ of a prima facie moral obligation to attempt, as much as possible, to achieve a goal of preventing sufficiently grave violations of basic human rights.

#### D. APPLYING CORE JUST WAR PRINCIPLES CONJOINTLY

Non-maleficence is apprehended as a duty distinct from that of beneficence, and as a duty of a more stringent character.

W. D. Ross, *The Right and the Good* ([1930] 2002: 21)

In preceding chapters, the core just war principles are studied separately. They are coequal deontological principles. According to the coequality thesis, each of them must be satisfied, even when the others are not satisfied. Each of them is applicable disjointly, even to military actions that would be unjust. By contrast, in the present chapter, my purpose is to study how they are applicable conjointly, in order to establish that military actions would be just.

Let us return to the question of overriding. To resolve a just-war dilemma and fulfil a just-goal obligation, may a grievous-harm prohibition be

overridden? More explicitly, the question is whether a *prima facie* moral obligation not to gravely violate basic human rights may be overridden.

A *prima facie* grievous-harm prohibition may be defended ‘negatively’ as follows. When we deliberate about whether to gravely violate basic human rights, we have to make the moral presumption that we must not. To override this moral presumption, we have the burden of proving that we may. So long as this burden of proof has not been satisfied, what we morally presume to be a prohibition actually is a prohibition.

A main thesis is that this negative defence is sufficient. A grievous-harm prohibition is, by its very nature, highly stringent. Even when it is only negatively defended, it is, by its very nature, sufficiently stringent. When we are ensnared in a just-war dilemma – and even if we have defended the just-goal obligation affirmatively – the negatively defended grievous-harm prohibition is still, by its very nature, more stringent. A proven just goal is not enough.

Therefore, an affirmative answer to the question of overriding has to be defended affirmatively. To resolve the just-war dilemma and fulfil the just-goal obligation, we have the burden of proving that the grievous-harm prohibition may be overridden. A main thesis is that the four core just war principles are moral criteria for determining whether we have satisfied this burden of proof.

Let me summarise this affirmative defence. To override the grievous-harm prohibition, we have to prove that the core just war principles are satisfied conjointly. Each of them is a conditional prohibition. To prove that they are satisfied conjointly, we have to prove that none of their conditions obtain. More explicitly, we have to prove that there is a just cause, that every reasonable nonmilitary measure has been attempted, that noncombatants would not be grievously harmed intentionally and that grievously harmful military actions would be outbalanced by vitally beneficent military actions. By proving that the core just war principles are satisfied conjointly, we prove that the just-goal obligation is more stringent than the grievous-harm prohibition.

In the preceding section, I explain how the just cause principle mandates an affirmative defence of a just-goal obligation. However, there is a just cause when there is both a just goal and a justly correlative means. Accordingly, let me now explain how the just cause principle also mandates an affirmative defence of a justly correlative means. When we apply the principle to a planned course of military actions, we have to morally presume that there is not a justly correlative means, and we have the burden of proving that there is. That is, we have to prove (by clear and convincing evidence) that our means of achieving our just goal is a justly correlative planned course of military actions. If our means were not justly correlative, the grievous-harm prohibition would be more stringent than the just-goal obligation.

## E. PROPORTIONALITY AND DEONTOLOGY

The question of overriding is a question of whether the grievous-harm prohibition is outbalanced by the just-goal obligation. The term ‘outbalanced’ also occurs in the proportionality principle. It is morally obligatory not to follow a planned course of military actions, if those that are grievously harmful are not outbalanced by those that are vitally beneficent.

The proportionality principle is a conditional prohibition. To prove that it is satisfied, we have to prove that its condition does not obtain. To prove that its condition does not obtain, we have to prove that vitally beneficent military actions outbalance grievously harmful military actions.

In light of the two occurrences of the term ‘outbalanced’, the following equivalency might be conjectured. The just-goal obligation outbalances the grievous-harm prohibition ‘if and only if’ vitally beneficent military actions outbalance grievously harmful military actions. Admittedly, different cosmopolitan just war theories might accept different core just war principles. Conceivably, there might be a cosmopolitan just war theory that endorses this conjecture and accepts only the proportionality principle. Accordingly, the proportionality principle would be both a necessary and a sufficient moral criterion for determining whether the just-goal obligation is more stringent than the grievous-harm prohibition. Nevertheless, such a truncated just war theory would still be a deontological theory, since the proportionality principle is a deontological principle.

By contrast, my view is that the proportionality principle is a necessary – but not a sufficient – moral criterion for determining whether the just-goal obligation is more stringent than the grievous-harm prohibition. The obligation outbalances the prohibition ‘only if’ – not ‘if and only if’ – vitally beneficent military actions outbalance grievously harmful military actions. To prove that the obligation is more stringent than the prohibition, it is necessary – but not sufficient – that we prove (by clear and convincing evidence) that vitally beneficent military actions outbalance grievously harmful military actions. Proportionality is not enough.

The proportionality principle is applicable primarily to military actions, but it is also applicable secondarily to their consequences. Good intrinsic results of vitally beneficent military actions must outbalance bad intrinsic results of grievously harmful military actions. Accordingly, the just-goal obligation outbalances the grievous-harm prohibition ‘only if’ – not ‘if and only if’ – such good intrinsic results outbalance such bad intrinsic results. Even though applicable thus to consequences, the proportionality principle is a deontological principle.

Different just war theories accept different just war principles. For instance, a consequentialist just war theory might accept only a consequentialist proportionality principle, according to which a military action is just

‘if and only if’ (expected) good consequences outweigh (expected) bad consequences.

Alternatively, in addition to an ‘absolutist’ just cause principle, a just war theory might accept a ‘utilitarian’ proportionality principle, according to which a military action is just ‘only if’ good consequences outweigh bad consequences. Alternatively, in addition to ‘absolutist’ just cause and noncombatant immunity principles, a just war theory might accept such a ‘utilitarian’ proportionality principle. Indeed, these two just war theories might conceptualise moral dilemmas of armed conflict as moral conflicts ‘between absolutism and utilitarianism’ (Nagel 1979: 56).

By contrast, the proportionality principle that I am proposing is a deontological principle. It is not merely a ‘prudential test’ (Johnson 1999: 34). It is not merely a precautionary principle that ‘urges a sober caution’ (Orend 2006: 241). Instead, it is crucial for answering the question of overriding – a question that is essentially deontological. To fulfil a deontological obligation, may a morally conflicting deontological prohibition be overridden?

I realise that, because my discussion of the subject of proportionality in the preceding chapter is so brief, my proportionality principle might not prove acceptable. Nevertheless, my view is that those who reject it could still find the other three core just war principles acceptable. Let me explain.

Although making moral judgements primarily about actions, the deontologist does not entirely disregard consequences. While accepting my just cause, last resort and noncombatant immunity principles, a different just war theory – one that is still deontological – could accept a different proportionality principle – one that is wholly about consequences. Even though wholly about consequences, such a proportionality principle would not be merely a prudential test. It would not be merely a precautionary principle. For it would be crucial for answering the stated question of overriding – a question that is essentially deontological. Such an answer is summarised (roughly) as follows. The just-goal obligation outbalances the grievous-harm prohibition only if good consequences outbalance bad consequences. To prove that the obligation is more stringent than the prohibition, it is necessary that we prove (by clear and convincing evidence) that good consequences outbalance bad consequences.

#### F. NONMILITARY MEASURES

Because military actions are so destructive, a grievous-harm prohibition is, by its very nature, highly stringent. To prove that a just-goal obligation is even more stringent, we also have to prove that the last resort principle is satisfied.

Let me sketch a schematic case. We are ensnared in a just-war dilemma; we have defended the just-goal obligation affirmatively; we have proven that

our means of achieving our proven just goal is a justly correlative planned course of military actions; and we have proven that vitally beneficent military actions outbalance grievously harmful military actions.

Nevertheless, because our planned course of military actions would be so destructive, we must attempt reasonable nonmilitary measures first. To answer the question of overriding affirmatively, we still have the burden of proving that our planned course of military actions is a last resort. According to the last resort principle, we are morally obligated not to attempt to achieve our proven just goal by means of our planned course of military actions, if it is reasonable to attempt to achieve it by means of a nonmilitary measure.

The last resort principle is a conditional prohibition. To prove that it is satisfied, we have to prove that its condition does not obtain. To prove that its condition does not obtain, we have to prove that it is not reasonable to attempt to achieve the proven just goal by means of a nonmilitary measure. More explicitly, we have the burden of proving (by clear and convincing evidence) that each sufficiently detailed planned course of nonmilitary actions either would not achieve the proven just goal or would be disproportionate or would be substantially more awful than our planned course of military actions.

The last resort principle is a deontological principle. It is not merely a 'prudential test' (Johnson 1999: 34). It is not merely a precautionary principle that exhorts agents 'not to be precipitate in their resort to force' (Orend 2000: 195).<sup>4</sup> Instead, it is a necessary – but not a sufficient – moral criterion for determining whether our just-goal obligation is more stringent than the grievous-harm prohibition. To prove that this deontological obligation overrides this deontological prohibition, we have to prove that the last resort principle is satisfied.

Since the subject of last resort is discussed at great length in preceding chapters, I am assuming that these brief comments here are adequate.

#### G. NONCOMBATANTS AND STRINGENCY

In a deontological moral theory, intention matters. The moral obligation not to grievously harm other persons intentionally is inherently more stringent than the moral obligation not to grievously harm them knowingly, recklessly or negligently. Specifically, the moral obligation not to grievously harm noncombatants intentionally is more stringent. The nature of a grievous-harm prohibition matters, and some grievous-harm prohibitions are, by their very natures, more stringent than others. Concurring broadly with traditional just war theory, a main thesis is that a moral prohibition of grievously harming noncombatants intentionally is, by its very nature, extraordinarily stringent.

Therefore, to answer the question of overriding affirmatively, there is also the burden of proving that the noncombatant immunity principle is satisfied. According to this principle, we are morally obligated not to follow our planned

course of military actions, if we would grievously harm noncombatants intentionally. It is a conditional prohibition. To prove that it is satisfied, we have to prove that its condition does not obtain. To prove that its condition does not obtain, we have to prove (by clear and convincing evidence) that we would not grievously harm noncombatants intentionally. If we were to grievously harm noncombatants intentionally, the grievous-harm prohibition would be more stringent than our just-goal obligation. The noncombatant immunity principle is a necessary – but not a sufficient – moral criterion for determining whether our just-goal obligation overrides the grievous-harm prohibition.

There is a difficulty. The nonharm principle is a *prima facie* moral requirement. Arguably, any moral requirement that follows by means of a subsumption argument from a *prima facie* moral requirement is itself a *prima facie* moral requirement. Therefore, because a moral prohibition of grievously harming noncombatants intentionally is derivable by means of a subsumption argument from the nonharm principle, it is itself a *prima facie* moral requirement. Even though it is extraordinarily stringent, it might still be outbalanced by an even more stringent just-goal obligation. Arguably, then, the noncombatant immunity principle is a *prima facie* moral principle. Accordingly, the difficulty is this. In making moral judgements about particular cases of armed conflict, may the noncombatant immunity principle ever be overridden? Obviously, there can be principled moral disagreement about how this question should be answered. Let me distinguish four answers.

First, there is an ‘absolutist’ answer – namely, that the noncombatant immunity principle is an absolute moral principle. The other three answers presuppose that it is a *prima facie* moral principle.

Second, there is a ‘quasi absolutist’ answer – namely, that the burden of proving that the noncombatant immunity principle may be overridden can never be satisfied, whatever the consequences, whatever the circumstances and whatever the good intentions. If this answer is accepted, the scale of comparative stringency should be understood as having (in effect) an upper bound. Even though the noncombatant immunity principle is a *prima facie* moral principle, it is tantamount to an absolute moral principle, in that it is so stringent that it can never be overridden.

Third, there is a ‘fantasy’ answer. Arguably, any moral requirement can be demolished by a fantastic counterexample. Disputably, for instance, the moral prohibition of torture can be demolished by a ‘ticking-bomb’ scenario (Lango 2010a). Let us imagine a fantastic counterexample to the noncombatant immunity principle: the entrance to a room containing a ticking nuclear bomb is blocked by a baby, and the bomb cannot be defused without killing the baby intentionally. As Walzer remarked: ‘philosophers delight in inventing such cases to test out our moral doctrines’ (1977: 262). Accordingly, the

fantasy answer is summarised as follows. Admittedly, in real-world cases, the stated burden of proof can never be satisfied; nevertheless, the noncombatant immunity principle may sometimes be overridden in fantastic cases.

Fourth, there is an ‘emergency’ answer. Notably, Walzer contended that the laws of war may be overridden in a ‘supreme emergency’ (1977: 251). He defined supreme emergencies by means of ‘two criteria’: their ‘imminence’ and their being dangers ‘of an unusual and horrifying kind’ (1977: 252–3). His choice of the term ‘supreme emergency’ stemmed from Winston Churchill’s use of it at the outbreak of the Second World War to interpret a danger that appeared to be both imminent and unusual and horrifying – namely, the danger posed to Britain by Nazi Germany (1977: 245). Thus, a controversial issue is whether that danger morally legitimated the British decision to engage in the deliberate strategic bombardment of civilians living in German cities, terror bombing designed to undermine morale (1977: 253–63). Briefly, the emergency answer is that the stated burden of proof can be satisfied in a sufficiently extreme emergency.

Which answer is correct: the absolutist, quasi absolutist, fantasy or emergency? I have no space to try to settle principled moral disagreement concerning this question. However, I do need to reconsider the main thesis that, to resolve a just-war dilemma, the four core just war principles are moral criteria for determining whether the just-goal obligation overrides the grievous-harm prohibition. If the emergency answer is accepted, this main thesis holds, except for sufficiently extreme emergencies; nevertheless, when there is a sufficiently extreme emergency, the other three core just war principles are such moral criteria. If the fantasy answer is accepted, the main thesis holds for all real-world cases; nevertheless, for fantastic cases, the other three core just war principles (at least) are such moral criteria. If the quasi absolutist answer or the absolutist answer is accepted, the main thesis holds unqualifiedly.

#### H. COLLATERALLY DAMAGING NONCOMBATANTS

Intention matters, but so do other mental states. According to the nonharm principle, it is also morally obligatory not to actually grievously harm or seriously risk grievously harming noncombatants knowingly, recklessly or negligently. A related main thesis is that this moral prohibition is also, by its very nature, extraordinarily stringent.

Traditionally, the idea of noncombatant immunity has been linked with an idea of ‘foresight’. As discussed in Chapter 4, ‘Theory of Action’, we ‘foresee’ not only when we act knowingly, but also when we act recklessly. For instance, when a drone pilot launches a missile recklessly – foreseeing that it is likely that noncombatants will die – he seriously risks killing them recklessly. Moreover, the concept of acting negligently is interrelated with

the idea of choosing not to foresee what a reasonable person would foresee. In this section, I focus on the mental state expressed by the word ‘knowingly’.

The traditional idea of noncombatant immunity has been supported by the doctrine of double-effect (DDE) (Walzer 1977: 152–3). For brevity, I utilise the compact formulation of the DDE by Cavanaugh (2006: 26):

1. the act in itself is good or indifferent;
2. the agent intends the good effect [of the act] and not the evil effect;
3. the good effect is not produced by the evil effect; and
4. there is a proportionately grave reason for causing the evil effect.

In various writings about the controversial subject of noncombatant immunity, there is labyrinthine argumentation about the DDE, but I have space only for a few remarks. Clearly, the DDE morally prohibits grievously harming noncombatants intentionally. However, under some circumstances, the DDE morally permits causing foreseen but unintended grievous harm to noncombatants, but only if there is a ‘proportionately grave reason’. I find (something like) this notion of a ‘proportionately grave reason’ acceptable, when it is adapted suitably. Let me explain.

To begin with, it is instructive to consider just-war dilemmas of a specific kind. Frequently, when we plan a course of military actions, we plan to grievously harm noncombatants knowingly. Therefore, in particular cases of armed conflict, we can be ensnared in moral dilemmas of the following specific kind. We cannot fulfil a just-goal obligation without failing to fulfil a grievous-harm prohibition of grievously harming noncombatants knowingly. To resolve this dilemma and fulfil the obligation, may the prohibition be overridden? In the language of the DDE, this question of overriding can be amplified as follows. May the prohibition be overridden by a proportionately grave reason?

The word ‘proportionately’ is potentially misleading. This moral requirement of a proportionately grave reason should not be understood as the moral requirement that only the proportionality principle must be satisfied. To prove that the obligation overrides the prohibition, we have to prove that all of the core just war principles are satisfied.

Moreover, the word ‘grave’ should be understood in terms of the concept of stringency. Even though the moral prohibition of grievously harming noncombatants knowingly is, by its very nature, extraordinarily stringent, it might still be outbalanced by an even more stringent just-goal obligation. In brief, a proportionately grave reason is an overridingly stringent just-goal obligation.

In conclusion, the core just war principle of noncombatant immunity only morally constrains acts performed intentionally. My purpose in this section

is to elucidate how the just war theory that I am developing also morally constrains acts of gravely violating basic human rights of noncombatants knowingly. Even though the moral obligation not to grievously harm them intentionally is inherently more stringent than the moral obligation not to grievously harm them knowingly, the latter is still, by its very nature, extraordinarily stringent. (For brevity, I omit discussions of reckless and negligent acts of grievously harming noncombatants, but comparable conclusions hold of them.)

### III. AMONG JUST ALTERNATIVES, WHICH IS BEST?

Would a proposed military action be just? In the preceding part, I explain how such questions should be answered, by means of the core just war principles. Among alternative proposed military actions, each of which would be just, which one would be best? In the present part, I explain how such questions should be answered, by means of the comprehensive moral principles of nonmaleficence, beneficence, justice and autonomy.

#### A. JUST ALTERNATIVES

Let me start with a domestic analogy. In ordinary life, when we plan to achieve a goal, we might envisage alternative means of achieving it. Analogously, in cases of armed conflict, when responsible agents plan to achieve a goal, they might envisage alternative courses of military actions as means of achieving it.

Returning to the South Sudan case, let me sketch an illustration. From the temporal standpoint of 26 June 2012, imagine that the Security Council authorises the use of armed force to protect South Sudan from aerial bombardment by Sudan. Reflecting the distinction between ‘frontline defence’ and ‘deep strikes’, two means of stopping such aerial bombardments may be distinguished – namely, destroying Sudanese military aircraft as they enter a no-fly zone (NFZ) imposed over South Sudan (the ‘NFZ plan’) or launching precision airstrikes (PAS) against military aircraft on Sudanese airfields (the ‘PAS plan’).

Conceivably, both the NFZ plan and the PAS plan would be just. Both might have the just goal of preventing sufficiently grave violations of basic human rights of people in South Sudan. Either might be a last resort, each might be proportionate and neither might grievously harm noncombatants intentionally. Which just alternative would be best?

#### B. JUST ARMED UN PEACEKEEPING VERSUS JUST ARMED US INTERVENTION

Let me furnish another illustration by imagining, in the case of Rwanda, what might have happened, but did not.

First, from the temporal standpoint of April 1994, when genocide begins in Rwanda, imagine (counterfactually) that UNAMIR is an armed peacekeeping mission. Imagine that, in Resolution 872 of 5 October 1993, the Security Council provided UNAMIR with a Chapter VII mandate authorising the use of armed force, if necessary. Imagine that UNAMIR has ‘four thousand effective troops’, enough to ‘stop the killing’ (Dallaire 2004: 289), and also sufficient armoured personnel carriers (APCs). Finally, imagine a planned course of military actions by UNAMIR – the goal of which is to stop the genocide. To decide that this armed UN peacekeeping mission is just, the Security Council has the burden of proving that it has a just cause, that it is a last resort, that it would be proportionate and that it would not grievously harm noncombatants intentionally. If it is just, it would still be just, even if the Security Council were not primarily responsible for security. Suppose that it would be just.

Second, from the temporal standpoint of April 1994, imagine (counterfactually) an alternative option – namely, prompt unilateral armed intervention, without Security Council authorisation, by the United States. Effective armed intervention requires a force of ‘5,000 well-trained and armed troops’ (Frye 2000: 28); 300 US Marines are stationed in a neighbouring country (Des Forges 1999: 606); and sufficient additional armed troops and APCs can be transported by large US cargo aircraft. Finally, imagine a planned course of military actions by the United States – the goal of which is to stop the genocide. To decide that this armed humanitarian intervention is just, the United States has the burden of proving that it has a just cause, that it is a last resort, that it would be proportionate and that it would not grievously harm noncombatants intentionally. That it should be legally authorised by the Security Council is not a necessary moral criterion for deciding whether it would be just. Suppose that it would be just.

From the temporal standpoint of April 1994, the future is open. The goal of stopping genocide might be achieved by a just armed UN peacekeeping mission, but it also might be achieved by a just armed US intervention. Which of these two just planned courses of military actions would be best?

### C. THE BEST JUST MILITARY ACTION, ALL THINGS CONSIDERED

In accordance with coherentism, a main thesis is that such questions about which alternative just planned course of military actions would be best should be answered by applying the nonmaleficence, beneficence, justice and autonomy principles conjointly. From the temporal standpoint of April 1994, which would be less harmful, more beneficial, fairer (distributive justice) and more representative (autonomy): a just armed UN peacekeeping mission or a just armed US intervention?

Having determined that there are just alternatives, there is the burden of proving, by means of those comprehensive moral principles, that one of them is best. A related main thesis is that moral deliberation about the best just military action should also be governed by the epistemic standard of clear and convincing evidence.

It might be objected that a question of whether one just military action would be better than another should be answered solely in terms of their comparative harmfulness. However, a moral requirement of comparative harmfulness is not enough. As explained in the preceding chapter, the set of core just war principles should not contain a separate principle of minimum force. In addition to comparative harmfulness, there should be moral requirements of comparative beneficialness, comparative fairness and comparative responsibility.

For example, I am presupposing that, at present, the UN system is the best system of global governance and that the Security Council should have the primary responsibility for security. Accordingly, from the temporal standpoint of April 1994, a just armed UN peacekeeping mission might be more beneficial, if the authority of the Security Council would thereby be buttressed. Such a mission might be fairer, if troop casualties and economic costs would be more justly distributed worldwide. As illustrated by the South Sudan case, such a mission might be more representative. Nevertheless, if the Security Council were to fail to deal effectively with the genocide in Rwanda within a reasonable time period, a just armed US intervention might prove to be best, all things considered.

Usually, when we act beneficently, we want our act to be effective. Sometimes, to accord sufficiently with the beneficence principle, the best just military action might be the one that is most effective. Sometimes, in cases of genocide, a truly effective just armed humanitarian intervention without Security Council authorisation might be better than a comparatively ineffective but still just armed UN peacekeeping mission.<sup>5</sup>

Indeed, a quest for the best just military action should include a quest for the best responsible agents. Even though the set of core just war principles does not contain a legitimate authority principle, morally right authority still matters. However, a moral requirement of comparative responsibility is not enough. Sometimes, when the nonmaleficence, beneficence, justice and autonomy principles are applied conjointly, it might be determined that the best just military action is one that would have to be performed by responsible agents who are not themselves best.<sup>6</sup>

Relatedly, it would be best if the just goal of a just military action were the primary goal. Even though the set of core just war principles does not contain a right intention principle, it matters whether responsible agents have morally right intentions. Sometimes, however, when these comprehensive

moral principles are applied conjointly, it might be determined that the best just military action is one that would have to be performed by responsible agents with ulterior motives or disparate interests – for instance, to win re-election or secure access to oil. Representativeness matters, but so do fairness, beneficialness and harmfulness.

Let me respond to another objection – namely, that my cosmopolitan just war theory is overly permissive of armed humanitarian intervention. For the Outcome Document of the 2005 UN World Summit prohibited such intervention, unless (among other conditions) ‘national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity’ (GA Res 2005: 30). My view is that this extreme harmfulness condition is overly prohibitive. Instead, to balance state sovereignty and SC-authority correctly, the nonmaleficence, beneficence, justice and autonomy principles should be applied conjointly. In cases of sufficiently grave violations of basic human rights within a state, the following question should be answered. Which would be less harmful, more beneficial, fairer and more representative: a just use of armed force by the national authority or a just SC-authorised armed humanitarian intervention? Of course, this question is readily answered, if the national authority is incapable of using armed force justly. Sometimes, however, it might be determined that the best just military action would have to be performed by a quite imperfect national authority.

#### D. THE GOAL OF PEACE AND THE LADDER OF RESORTS

The set of core just war principles does not contain a separate principle that peace must be the ultimate goal. Nevertheless, the quality or nature of the peace that would be achieved still matters. In some cases of armed conflict, a just alternative employing minimum force would only achieve a minimal peace, whereas a different just alternative employing force more robustly would achieve a peace that is sufficiently ‘durable’ (Dower 2009: 7). Among just alternatives, which would be the most pacific, all things considered? In terms of the beneficence and distributive justice principles especially, my answer is, roughly, that the most pacific just alternative is the one that would most benefit people fairly.

Concordantly, let me sketch a resolution of the concurrence problem. While a military action is being performed, should nonmilitary measures also be attempted? Consider, for instance, the following question about a schematic case of armed conflict. Which of these two just alternatives would be best: fighting without negotiating or fighting while negotiating? Sometimes, when we apply the comprehensive moral principles conjointly, we might determine that the best just military action is one that would be performed concurrently with the attempting of a nonmilitary measure. Sometimes, when we negotiate

while justly fighting, our purpose should be to achieve a more durable peace.

How is moral deliberation about the best just military action governed by the ladder of military resorts? First, let me summarise how the policing resort principle is applicable. It is morally obligatory not to attempt to achieve a just goal by means of a just military action that is not also a police action, if it is reasonable to attempt to achieve that just goal by means of a just military action that is also a police action. Would the latter be less harmful, more beneficial, fairer and more representative than the former? If we fail to prove with clear and convincing evidence that this question should be answered negatively, the better just alternative is the military action that is also a police action.

Second, the noncombatant resort principle is comparably applicable. It is morally obligatory not to attempt to achieve a just goal by means of a just military action that would grievously harm noncombatants, if it is reasonable to attempt to achieve that just goal by means of a just military action that would not grievously harm noncombatants. Would the latter be less harmful, more beneficial, fairer and more representative than the former? If we fail to prove with clear and convincing evidence that this question should be answered negatively, the better just alternative is the military action that would not grievously harm noncombatants.

#### E. CONCLUDING SUMMARY

Our real-world moral judgements about particular cases of armed conflict can be complicated and controversial, when we consider all of the things that are morally relevant. Typically, various morally relevant details are entangled in historical cases, and a present or imminent case is history in the making or history about to be made. Usually, then, prospective moral judgements have to be made on a case-by-case basis.

To determine whether a proposed military action would be just, the core just war principles should be applied. And to determine whether a proposed military action that would be just is also the one that would be best, the comprehensive moral principles should be applied. There are no uncontroversial recipes for applying these principles.

The process of applying just war principles is a temporal process, and so is the process of revising them. From the particular temporal standpoint of the early years of the second decade of the twenty-first century, I am developing a particular cosmopolitan just war theory.

Many questions are raised, only some of which are investigated. Only an illustrative selection of particular cases and specific issues is considered. This book is not intended as a definitive treatise that settles all controversies. Much remains to be accomplished.

## NOTES

1. Concerning the idea of 'all things considered' in moral theory, see Chang (2004).
2. An overview of the case is Hsiao (2012). The case is discussed from the earlier temporal standpoint of August 2010 in Lango and Patterson (2010).
3. See [www.law.cornell.edu/uscode/text/18/17](http://www.law.cornell.edu/uscode/text/18/17) (last accessed 22 July 2013).
4. See also Orend (2006: 58, 241).
5. For a defence of the importance of 'effectiveness' in armed humanitarian intervention, see Pattison (2010: 79–97).
6. For a book focused on the question of who should be the agents of armed humanitarian intervention, see Pattison (2010).



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