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Lukas Schmid

**Kantian Cosmopolitanism and  
Consequentialist State-  
Centrism: Two Ethical  
Paradigms in Just War Theory.**

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Dr. Christian Schwaabe  
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# Table of Contents

1. Introduction.....	3
2. Characterisations and Definitions.....	6
2.1 Kantianism as Deontology.....	7
2.2 Cosmopolitanism.....	9
2.3 (Rule-)Consequentialism as Teleology.....	11
2.4 Combatants and Non-Combatants.....	13
3. Ius in Bello.....	13
3.1 Traditional Ius in Bello and its Account of Permissible Killing.....	14
3.1.1 Discrimination.....	14
3.1.2 Proportionality.....	16
3.1.3 Necessity.....	17
3.1.4 Supreme Emergency.....	18
3.2 Consequentialism in Traditional Ius in Bello.....	19
3.2.1 Supreme Emergency.....	20
3.2.2 The Conditions for Permissible Killing.....	21
3.3 Cosmopolitan Ius in Bello and its Account of Permissible Killing.....	25
3.3.1 Determining Liability: The Separation of the Innocent and the Non-Innocent .....	26
3.3.2 Killing the Hostile Non-Innocent and Collateral Damage.....	28
3.4 Kantianism in Cosmopolitan Ius in Bello.....	31
3.4.1 Two Examples and Their Implications.....	32
3.4.2 Liability.....	33
3.4.3 The Non-Liable as Collateral Damage.....	36
4. Conclusion.....	39
5. References.....	40

# 1. Introduction

“It makes no difference what men think of war, said the judge. War endures. As well ask men what they think of stone. War was always here. Before man was, war waited for him. The ultimate trade awaiting the ultimate practitioner. That is the way it was and will be. That way and not some other way.” (McCarthy 2010: 259)

The Judge, the antagonist of Cormac McCarthy's 'Blood Meridian', is a nihilist. His perspective is solipsistic. He does not believe in norms guiding cooperative human life, morality, or constraints on actions in general; he may be seen as a poor man's interpretation of Nietzsche's *Übermensch*. Regarding war, he is an extreme version of what is generally called a *realist*: an adherent to a discourse that promises “to spring politics free from the constraints of moral judgement and limitation” and aims to show “people and states as they really are rather than as we might yearn them to be” (Elshtain 1985: 40). The opposite extreme is the idea of pacifism – “the unconditional rejection of war” rooted in the conviction “that it is always wrong to go to war” (Norman 1988: 198). As of today, realist ideas are still practised by some belligerents, but its discursive hegemony has vanished; the idea that war has to succumb to some restrictions and guidelines is treated as common sense and has found detailed institutionalization in international law and its regimes.<sup>1</sup> Pacifism, on the other hand, is still very much alive, both in moral philosophy and in public deliberation. Still, its doctrine arguably does not fit the political realities.

A third way is located between the two extremes: just war theory. In a nutshell, it says that both the decision to go to war and fighting in war can be just, but solely under some specific circumstances. Those circumstances allowing combatants to wage war are incorporated in two overarching principles: justice in the resort to war, *ius ad bellum*, and justice in the conduct of war, *ius in bello*. Coupled with a new category, *ius post bellum*, concerning the duties imposed on war parties after war is finished, those two considerations are the core of the just war theory. Contrary to common belief, those are not genuinely modern categories. Thinking about the justness of warfare originated even before Christianity arose, and thinkers as diverse as Saint Augustine and Hugo Grotius have since rediscovered it as a subject of practical philosophy (Reichberg, Syse & Begby 2016: 70-90, 385-438). However, deliberations on war have only come to the forefront of ethics after the genocidal rupture and general barbarity of World War Two and the holocaust; especially the *in bello*

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<sup>1</sup> There are a great number of examples to punctuate this point: Mainly, the Geneva Conventions and their additional protocols, the UN Security Council and the International Criminal Court are regimes dedicated to governing international conflict and war.

conduct has been controversially debated ever since. Traditionally, there are certain principles that combatants have to adhere to in order to wage just war. These principles govern every action in war and can be summarised as follows: *necessity*, meaning only those acts necessary to the achievement of military objectives may be carried out, *non-combatant immunity*, meaning only soldiers are legitimate targets of harm who may always target each other, and *proportionality*, referring to the notion that every action must be proportionate to the good combatants produce by acting as they do (Fabre 2012: 5)<sup>2</sup>. These doctrines have become utterly prominent, and have found reflection in international humanitarian law (see First additional protocol to the Geneva Conventions: Articles 48, 51 (4b), 57).

However, the absolute validity of those conventions has recently been contested by a loose group of scholars and theories adhering to what is commonly called *revisionist* just war theory. *Inter alia*, they have questioned absolute civilian immunity and hold, *pace* traditionalists, that individual soldiers fighting for what can be deemed a wrongful cause are not morally permitted to inflict harm (Lazar 2017: 1). While revisionists currently dominate the discourse on just war, there is plenty of tension between the traditionalist and revisionist camps. This is because revisionism is not merely a refinement of traditionalism but aspires to be an utter refutation of the latter's core principles, at least concerning the *in bello* doctrines. Generally classified as an adherent to the broader revisionist movement, Cecile Fabre's theory of a cosmopolitan war is both an extreme example of renunciation of the traditionalist principles and an innovative refinement of the debates' trend to question the importance of the nation-state as war's fundamental actor (c.f. Lazar 2014). Her theory is about cosmopolitan justice in war; she locates the ultimate unit of concern not in states, but in individual humans, and argues that the rules of warfare have to be deduced of the individual rights and duties all moral agents possess, regardless of national boundaries (Fabre 2012: 1-15). Much like other revisionist theories, Fabre's cosmopolitan war negates most of the *in bello* considerations set by traditionalists, especially questioning the previous account of combatant and non-combatant liability.

In this Bachelor's thesis, I strive to reveal the reason underlying the fundamental incongruity of the traditionalist and cosmopolitan strains in the discourse on *ius in bello*. My hypothesis is the following: traditionalist and cosmopolitan rules of *ius in bello* are incompatible because the normative ethics grounding them are diametrically opposed. While traditionalist principles of the just conduct in war are subject to consequentialist, especially rule-consequentialist, considerations, the cosmopolitan rules of *in bello* behaviour are deduced from deontological, especially Kantian,

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2 The most important and widely celebrated work on traditionalist theory is *Just and Unjust Wars* (1977) by Michael Walzer.

axioms. Thus, as the two theories of normative ethics are irreconcilable, the doctrines arising from their respective application are as well. To my knowledge, neither has this hypothesis been examined before, nor has the oppugnancy of the revisionist and traditionalist sides of this discourse on just war been explained as a clash of different normative theories.

Exploring this research question is relevant mainly for three reasons. First, it sheds light on the discourse surrounding questions on the just conduct in war. It both introduces the reader to the main properties traditionalists and revisionists employ and illuminates the source of their disparity. This, in turn, attracts attention to the astounding implication theoretical axioms on morality have on practical, life-or-death decisions combatants are faced with every day. My thesis shall hence contribute to the appreciation of theoretical concepts. Second, the research question and hypothesis proposed combine two separate, but closely intertwined branches of philosophical ethics: normative and applied ethics. The hypothesis, if confirmed, adds evidence to the notion that one cannot possibly study the morality of every-day actions of all sorts without resorting to the theoretical foundations of ethics. It shall remind moral and political philosophers working on war that their theories are built upon their own pivotal inclination for different kinds of normative ethics and thus rejects the notion that there is one overarching ethically 'true' principle of the moral behaviour in war, instead encouraging philosophers to think outside the box of their own moral predispositions. Third, if confirmed, the hypothesis would certainly contribute to the furthering of philosophy in the area of just war, since a direct link between normative ethics and *in bello* conduct has not yet been established.

Obviously, as I examine two vast fields of ethics, I am confronted with immeasurable amounts of literature. Identifying and integrating the relevant works both on just war and normative ethics is thus one of the main challenges this paper faces. I will hence proceed as follows: Regarding the normative ethics of Kantianism and consequentialism, I will largely restrict myself to using the canonical information, relying heavily on academic encyclopedias, overviews as secondary sources and greatly influential papers. Some of the most important works I use are *The Oxford Handbook of Ethical Theory* edited by David Copp (2006), *The Routledge Companion to Ethics* edited by John Skorupski (2010) and Shelly Kagans *Normative Ethics* (1998), among others. Regarding the debate on *in bello* considerations, the used literature is considerably more diverse and extensive. As I have to cover the great range of this debate, monographs as well as edited books and journal articles are used in ample fashion. Moreover, most of the literature I use here can be classified as primary sources, meaning that I work directly with a work of philosophy rather than extracting information about other works. Some of the most important texts used include *Cosmopolitan War* by Cecile Fabre (2012), *Killing in War* by Jeff McMahan (2009), *Just and Unjust Wars* by Michael Walzer

(the 2006 edition) and various articles by Seth Lazar (2012, 2014, 2015, 2016, 2017).

The thesis will be organised as follows. In section two, I will give a short introduction to the key concepts this paper works with, namely Kantianism, consequentialism, cosmopolitanism and the difference between combatants and non-combatants. This part is exclusively descriptive and discusses the scientific intricacies and possible definitions these notions are subjected to. Subsequently, section three enshrines the discussion of the research question as previously demonstrated. First off, in sections 3.1 to 3.1.4, I will discuss the traditional principles of just conduct in war – discrimination, proportionality, and necessity – at length, before introducing an exception to non-combatant immunity conceived by Michael Walzer, the supreme emergency exemption. Afterwards, I will turn to the first analytic part, arguing in section 3.2 that all those principles and the exemption are essentially act- or rule-consequentialist properties. Thereupon, I will repeat this procedure, illuminating the cosmopolitan theory's stance on *in bello* killing, and focusing especially on the liability of combatants and non-combatants in 3.3, before subsequently arguing that the cosmopolitan principles of the just conduct of war are grounded upon the Kantian version of deontology in 3.4. In the conclusion, I aim to reiterate key outcomes of my analysis before going on to evaluate if my original hypothesis holds up or has to be discarded.

## **2. Characterisations and Definitions**

Grappling with abstract concepts found within the realms of philosophy, like Kantianism, consequentialism or cosmopolitanism, I am aware that this thesis might bewilder a reader not intimately familiar with those considerations and the discourses surrounding them. Therefore, this following introductory chapter is inserted in order to bring about clarity regarding the central concepts this paper examines. I will define and characterise three philosophical notions, Kantianism as a version of deontology, cosmopolitanism, and consequentialism as teleology, and illuminate one legal distinction – the difference between combatants and non-combatants. In order to do so, I aim to reduce the philosophical concepts to their core, as all of them are the subject of enormous bodies of literature that cannot, for reasons of space and structure, be thoroughly examined in this paper. In practice, this may imply taking philosophical shortcuts that are not fully representative of the entire reasoning brought forward in regard to those concepts. However, taking these shortcuts allows for a concise summary of the thought-processes central to those notions as well as the proposition of clear-cut definitions which should prove able to guide the reader through the entirety of this paper.

## 2.1 Kantianism as Deontology

Defining what is meant by the term 'Kantianism' is crucial for several reasons. First, it is a loose term that may otherwise be interpreted as one sees fit, since, on the surface, it merely addresses a myriad of ideas that originated with Kant. It is paramount for this paper to distinguish those 'Kantian' paradigms that are relevant for the concept of cosmopolitanism. Kant himself was a great proponent of a philosophical and political cosmopolitanism, as one can observe in his theories of peace and law (Höffe 2001: 28-32). However, elaborating on his particular view on cosmopolitan principles would miss the point: in order to work with a conception of Kantianism in this paper's context, we need to extract the core constituents of Kant's view on morality, so that it can then be shown that the kind of moral cosmopolitanism examined here descends from Kant's moral foundations. Those moral foundations can be characterized by certain traits. In the following, I will present some integral features of Kant's thought on morality in order to end up at a definition of Kantianism that combines those essentials and may serve as a fitting groundwork for this paper's elaboration on cosmopolitan paradigms.

First off, the central question regarding Kant's view on morality has to concern the principle he proposes to guide actors towards moral soundness. This is the heart of his moral theory: the categorical imperative (from now on: CI), which is dynamically developed by Kant in the *Grounding for the Metaphysics of Morals*, and ultimately threefold, but is in its most common, and, for the ends of this paper, sufficient form formulated like this: "Act only according to that maxim whereby you can at the same time will that it should become a universal law [without contradiction, note]." (Kant, Wood & Schneewind 2002: 37). While this formula is well known even outside of the academic sphere, it is worth the effort to shed some light on why Kant regards it as an 'imperative' and why this imperative is 'categorical'. In order to do so, it is sufficient to quote Johnson & Cureton (2016), who give an eloquent explanation:

"It is an *imperative* because it is a command addressed to agents who could follow it but might not [...]. It is *categorical* in virtue of applying to us unconditionally, or simply because we possess [sic] rational wills, without reference to any ends that we might or might not have. It does not, in other words, apply to us on the condition that we have antecedently adopted some goal for ourselves."

In Kant's view, hence, the path to moral goodness rests on unconditional adherence to the principle of reflecting upon one's actions, and executing only those actions whose overarching maxims are

conceivably eligible to be established as universal, morally impeccable laws. This implies that Kant positions actions *per se* as the fundamental *loci* of moral relevance, and is therefore, barring very few exceptions, not concerned with their consequences. “Rightness, on the standard reading of Kant, is not grounded in the value of outcomes or character.” (ibid). Kant certainly seems to be a philosopher “who rejects the idea that what makes actions right is primarily their relationship to what good may come of those actions, someone who rejects outright the act consequentialist form of teleology.” (Johnson & Cureton 2016). While I will examine consequentialist forms of morality in another chapter, this leads to an insight of great significance: The crucial trait of Kant's moral philosophy is the instruction that ends never *ex ante* justify the means employed to pursue them. In fact, according to the CI, there are great constraints on every action one executes, regardless of the value of their potential consequences; moral rightness is a category that is fundamentally separate from the *good*, opposing to, say, utilitarian considerations (Robertson 2010: 440). This means that Kantianism is a variety of *deontology*, a school of ethics that regards an action's adherence to righteous norms as paramount for its moral acceptability (Alexander, Moore 2016). This is important to keep in mind.

Back to Kant's thinking on morality, it has to be stressed once again that his ethical philosophy originates from and is concerned with the individual subject, and this subject's rights and duties; every comprehensive subject is equal in those rights and duties. Consequently, this paradigm in itself entails some notion of cosmopolitanism. As Kleingeld explains,

“[...] all human beings, qua rational beings, are members of a single moral community. They can be called 'citizens' in this 'moral world' because they are conceived of as free and equal co-legislators of moral law and, as such, are analogous to citizens of a political state.” (Kleingeld 2000: 314)

This emphasizes the ethical irrelevance of man-made state boundaries in respect to fundamental rights and duties we demand for ourselves and owe to others (for example Kleingeld: 313-341). Thus, we can conclude that another central pillar of 'Kantianism' is concerned with the notion that all human beings are equal moral subjects, who constantly participate in morality as they owe duties to others and demand rights for themselves. We may therefore call his ethics universal (see Dower 2009: 72f.).

Now that I have established the central concepts on Kantian ethics in respect to the aims of this paper, I can move on to combine those traits in a uniting definition. The central ethical principles established are 1) the command of adherence to the categorical imperative, which 2) originates from the paradigm of the centrality of fundamental rights and duties ascribed to morally equal



individual subjects and 3) prescribes inherent moral worth only to actions *per se*, and not their possible consequences and has to be regarded as 4) universally valid, without particular respect to political boundaries. One may therefore call any deliberation or consideration that builds upon all four of those paradigms 'Kantian', or Kantian specifications of deontology.

## 2.2 *Cosmopolitanism*

“Asked where he came from, he said, 'I am a citizen of the world.'” (Diogenes Laertius 1958: 65)

As Diogenes of Sinope makes clear, and further supported by some of Kant's thoughts I just reflected upon, the cosmopolitan idea of world citizenship has been present throughout most of human history. Still, it is not imminently clear what exactly one means when referring to 'cosmopolitanism'. While 'cosmopolitan' may in everyday language allude to an attitude of “worldly sophistication”, it is of a more complicated nature within philosophy (Scheffler 2001: 111). Scholars have wildly debated the morality of cosmopolitanism and its implications in recent years<sup>3</sup>, some proposing cosmopolitan values as the gateway to overcoming nationalism (see Nussbaum & Cohen 1996), others discerning cosmopolitanism as a feat impossible to coherently achieve (see Sandel 1982). While there is political, or, more precisely, institutional cosmopolitanism, an effort concerned with translating cosmopolitan ideals of various shapes into institutions of supra- and transnational applicability, and cultural cosmopolitanism, concerned with the idea that the forging of individual identities is not determined by membership in a clearly defined cultural group, but dynamic and constantly modified by a myriad of influences, this paper's focus on ethical perspectives demands an examination of *moral* cosmopolitanism (for example Cabrera 2004, Waldron 2000). Following Samuel Scheffler, one may categorize this as “cosmopolitanism about justice” (Scheffler 2001: 112). Cosmopolitanism about justice combats the idea that “the norms of justice apply primarily within bounded groups comprising some subset of the global population”, thereby not only opposing communitarian thought, but also Rawlsian liberalism that insists principles of justice are, for reasons of reciprocal advantages, best applied in single societies (Scheffler 2001: 112ff.). It is paramount to stress that any allusion to 'the norms of justice' does not allude to a technical understanding of jurisprudence and its procedures, but is dedicated to justice *qua* morality (e.g. Kleingeld & Brown 2013).

In order to find a definition of cosmopolitanism that applies to individual rights and duties in war,

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3 Some important examples: Kymlicka 2001, Waldron 1992, Pogge 1992.

delving deeper into this cosmopolitanism about justice is the way to go. Now that it is clear that a definition focusing on rights and duties – applicable to the question of killing in war – is needed, we may move on to depict some thoughts by cosmopolitan thinkers within that very context. In his attempt at a definition of a global cosmopolitan ethic, Nigel Dower alleges that

“[...] it would need to be concerned not merely with how one behaves in relation to war (concerning decisions about how or in what circumstances one fights or whether to fight at all), but with *promoting* certain values.” (Dower 2009: 64)

While it is certainly true that cosmopolitans ascribe a great deal of importance to certain values that originate with the fundamental rights and duties every moral agent individually possesses, it is not clear why a definition of cosmopolitanism should include the requirement of actively promoting these values. As we have already established the key norm moral cosmopolitans stand for, namely world-wide validity of the norms of justice, the key to finding a satisfying definition of cosmopolitanism applicable to conduct in warfare lies in defining which aspects of this rather vague allusion to transnational justice are the most basic, in the sense that all other aspects of justice may be deduced from them. Cécile Fabre calls this a sufficientist, or rights-based, account of cosmopolitan justice. The basic principle of this endeavour is the declaration that

“all individuals [...] have rights to the freedoms and resources which they need in order to lead a minimally decent life, wherever they reside.” (Fabre 2012: 33)<sup>4</sup>

Focusing on everyone's right to lead a minimally decent life, it is apparent that Fabre is headed towards a minimal definition of cosmopolitanism. This fits her needs; laying out a cosmopolitan theory of morality in warfare, a definition of moral cosmopolitanism needs to be both robust in its core principles but yet able to encompass a great deal of phenomena. To further her notion of what characterizes a rights-based cosmopolitan theory: “all individuals are under the relevant correlative duties to rights-bearers, irrespective of political borders.” (Ibid). Thus, the limitless scope of the right to lead a minimally decent life is coupled with the corresponding need to establish universal esteem for these rights *qua* the duty to respect them. At this point, it has to be mentioned that these duties are both positive and negative, as Fabre obligates all individuals to refrain from supporting or taking part in practices undermining that basic right and holds that all individuals are under the duty to construct universally just legislation and institutions or support those pledging to construct them (Fabre 2012: 36). We can complement the aforementioned with a general starting point given by

<sup>4</sup> For the full argument defending this paradigm see Fabre 2012: 31-37.

Fabre:

“Cosmopolitanism is the view that human beings are the fundamental and primary *loci* for moral concern and respect and have equal moral worth. It is individualist, egalitarian, and universal, and insists that political borders are arbitrary from a moral point of view, and more precisely ought not to have a bearing on individuals' prospects for a flourishing life.” (Fabre 2012: 16)

Note that this is not yet the final definition this chapter longs for. In order to receive a satisfying definition of moral cosmopolitanism that is applicable to its employment within the realms of just war theory, the transpired traits have to be combined. Thus, in respect to the aim of grappling with developments within just war theory, one may call every mindset, approach and paradigm ethically cosmopolitan which 1) ascribes every human being a right to lead a minimally decent life, 2) introduces a general duty for all individuals to respect this right, and 3) disregards political borders and other institutions or practices separating human beings as morally arbitrary and meaningless. The next chapter will examine a different concept: the normative ethics of consequentialism.

### ***2.3 (Rule-)Consequentialism as Teleology***

While consequentialism “forms a large and heterogeneous family of moral theories”, encompassing such different forms as act-consequentialism, impartial and partial consequentialism, utilitarianism, virtue consequentialism and so on, there certainly is a set of common denominators which transcend these specializations and explain why they operate on a very similar moral ground (Brink 2006: 384).

“What all consequentialists about the morality of acts agree on is that, where there are differences in the value of consequences, these are always, directly or indirectly, decisive in the moral evaluation of acts.” (Hooker 2010: 444f.).

This means that consequentialists do not regard other factors besides the value of an act's consequences as critical for the determination of this act's status as right or wrong. As even if some other considerations would come into play, none of them could trump the paramountcy of consequences. Hence, as opposed to Kantianism, consequentialism is not deontological, but *teleological*. According to Rawls, teleological moral theories are distinguished by being

“[...] those that first specify the good independently of the right and then define moral rightness as that which maximizes the good.” (Robertson 2010: 440).

While it is disputed that teleologists such as consequentialists need to necessarily maximize good instead of limiting themselves to outcomes that are *good enough*<sup>5</sup>, specifying the good independently of the right is a major feature putting consequentialism in opposition to deontological moral theories such as Kantianism. For the purposes of this paper, it is important to grapple with the implications of understanding consequentialism in terms of shaping the pillars of a *latent* structure, in this case just war theory; this is, cautiously speaking, quite unusual, as consequentialism, like any other moral theory, is primarily applied to individual acts. Therefore, in order to grasp the logic of the structure of rules just war theory has set, it is rewarding to turn to one of the sub-specifications of consequentialism: rule-consequentialism, coined and defended by Brad Hooker.

While still a challenging endeavour, working with this subtype allows for a greater applicability of this normative moral theory to the arrangement of rules within just war theory than closely related subtypes, as, say, act-consequentialism. In a nutshell, one can break it down as follows:

“[...] rule-consequentialism holds that an act is morally permissible if it is allowed by the rules whose general acceptance (including the costs of getting them accepted) has the greatest expected value.” (Hooker 2010: 453)

It is important to note that while this sort of morality follows one or multiple general rule(s), it is still a teleological rather than a deontological variety of morality, since the validity of the rule is constituted by the value of its consequences. Furthermore, it has to be added that the expected value brought upon by a general rule is decidedly agent-neutral, meaning that rules are selected by their potential positive effect on no particular agent, but the welfare of all agents (or as many as possible). This implies an agent-neutral justification of rules, while the content of rules themselves are mostly agent-relative. To exemplify:

“The constraint of attacking others, for example, is the duty not to attack oneself, not the duty to minimize instances of attacks by agents generally.” (Hooker 2010: 454).

This example, unintentionally but conveniently, already leads us to war and the constraints in place to guide it according to ethical considerations; the fact that this particular author chose a war-related scenario to illuminate his point may serve us as *prima facie* evidence for the applicability of rule-

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5 For an influential argument in favour of *satisficing* consequentialism, see Slote & Pettit 1984.

consequentialism to scenarios of war.

## ***2.4 Combatants and Non-Combatants***

Finally, it is important to define and distinguish combatants and non-combatants, as ethical guidelines for warfare have put a fundamental distinction between the two sets of agents. Thus, while these are predominantly legal terms, they apply to ethical perspectives on warfare as well. According to the Geneva Convention, combatants are “all members of the armed forces of a party to the conflict [...], except medical and religious personnel” (International Committee of the Red Cross 2016). A non-combatant therefore does not engage in combat; he is either a civilian, meaning not declared as active personnel in the armed service or the police, or a member of the armed forces who is, by article three of the Geneva Convention, not regarded as a combatant and therefore not fighting – this includes primarily medical, psychological and religious staff (Merriam Webster 2016: Noncombatant [sic], Merriam Webster 2016: Civilian). Therefore, all civilians are non-combatants, but not all non-combatants are civilians. Authors in the Just War Theory tradition adhere to the legal definition of combatant, non-combatant and civilians in their writings, although it is generally accepted that there is no moral difference between non-combatants and civilians (see Primoratz 2011, Bellamy 2004, Walzer 2006). With those definitions and characterisations in mind, it is now time to move on to *ius in bello* and accounts of permissible killing.

## **3. Ius in Bello**

Reflections on the morality of warfare are usually conducted in three steps, each of which has their own rules, criteria, and reasoning. These three structures are commonly called *ius ad bellum*, *ius in bello*, and, established more recently, *ius post bellum*. Traditional just war theorists regard the distinction between those categories as utterly important. As Michael Walzer (2006: 21) puts it:

“The first kind of judgement is adjectival in character: we say that a particular war is just or unjust. The second is adverbial: we say that the war is being fought just or unjustly. [...] *Ius ad bellum* requires us to make judgements about aggression and self-defense; *ius in bello* about the observance or violation of the customary and positive rules of engagement. The two sorts of judgements are logically independent.”

While there is some serious disagreement concerning the separate nature of those considerations, the point of traditional just war theorists is that each of those three phases grapples with fundamentally different problems (McMahan 2009). Thus, while *ius ad bellum* is the sphere for deliberation about which *ex ante* conditions allow warfare and *ius post bellum* concerns itself with *ex post* questions of what is owed after war (restitution, reconstruction, and so forth), *ius in bello* is proposed to be the independent ethical structure setting moral rules for what may be done, and, in reverse, what may *not* be done in order to achieve the end of winning war (Allhoff, Evans & Henschke 2013: 2). This is the baseline of the traditionalist account of *ius in bello*, which is going to be explored in the following segment.

### ***3.1 Traditional Ius in Bello and its Account of Permissible Killing***

Rather obviously, *ius in bello* is concerned with the use of intense – and possibly lethal – force in war. In short, it tries to answer the questions of under which conditions an actor may resort to using deadly force, who can through which actions possibly become liable to suffer the use of severe force, and to which extent and scope force can be used justly. Traditionally, these deliberations are summed up by three principles which are, *mutatis mutandis*, reflected in international law: discrimination, proportionality, and necessity (Lazar 2016). In the view of traditionalist just war scholars, they represent the central pillars of just fighting. In the next four subsections, I will explore those principles and the one rare instance in which they may be annulled, supreme emergency, and trace the line(s) of thought which led to their consolidation.

#### **3.1.1 Discrimination**

The imperative of discrimination means that war parties of any sort have to distinguish between combatants and non-combatants and may only attack fellow combatants; civilians are off-limits. Every violent act in war has to be discriminatory in this regard. Interestingly, early post-world-war-two discourse about the principle of discrimination and non-combatant immunity has drawn heavily on notions of guilt and innocence in order to determine who is liable to be attacked, a thread that modern revisionists have picked up again; still, the most influential argument in favour of discrimination has been brought forward by Michael Walzer and the just war theorists of his generation (Anscombe 1961, Ramsey 2002, Walzer 2006). It begins with the ethical consensus that

human beings have a basic right to life. Therefore,

“no one can be forced to fight or risk his life, no one can be threatened by war or warred against, unless through some act of his own he has surrendered or lost his rights.” (Walzer 2006: 135)

So far, this merely reiterates basic human rights. However, by fighting, combatants lose this right to life and liberty, although a soldier may have committed no crime (Walzer 2006: 136). Lazar sums up:

“[...] merely by posing a threat to me, a person alienates himself from me, and from our common humanity, and so himself becomes a legitimate target of lethal force.” (Lazar 2016)

Although vague, this line of thought clearly aims at the concept that soldiers have forfeited their inherent right to life, while non-combatants have not. As might by now be apparent, the central notion employed here is the concept of *self-defence*. This line of thought draws on an analogy between self-defence in civilian situations and self-defence in war, as it is argued that there is no substantial moral difference between them. Therefore, the only reason why non-combatants should be immune to impairment is that they do not pose an active threat to anyone; in turn, the only reason one might become liable to endure serious harm or death is that one poses an active physical hazard to anyone. (Fullinwider 1975: 92-95, Nagel 1972: 138f.). This justification of discrimination prescribes itself the merit of being logically satisfying and, especially, eliminating all of the implications more vague distinctions on the basis on harm and innocence would entail; it delivers a clear-cut frame for morally permissible and impermissible killings in war. This leads us to another key principle following logically from this justification of discrimination: the moral equality of combatants. If the only relevant moral difference between persons possibly affected by fighting is their status as being either combatant or non-combatant, then the *sort of* combatant one may be is entirely irrelevant. According to Walzer, all combatants share the same moral status: it does not matter if they fight for a just or an unjust cause; a soldier fighting for Hitler's army enjoys the same moral status as a soldier fighting for France's territorial self-defence, since all combatants are threats to others and therefore forfeit the right to life (Walzer 2006: 34-40). This follows logically from the doctrine that *ius ad bellum* and *ius in bello* are two completely separate considerations:

“If, however, what combatants are permitted to do in war is independent of whether their war is just or unjust, or legal or illegal, their individual moral status must be independent of the moral character of their war.” (McMahan 2009: 4)

While I will look at potential issues and underlying moral themes of this line of thought at the end of the traditional *ius in bello* chapter, one can already retain that, while well argued, the approach of leaving notions of guilt and innocence out of deliberations about liability will seem counter-intuitive for a lot of people: it appears very technical and has been accused of sacrificing immediate rightfulness for the long term good – consequences (McMahan 2009: 1-32). This underlying thread will materialize starkly as I proceed to illustrate the traditional requirements for acting justly *in bello*. In the following, I will depict the concept of *proportionality*.

### **3.1.2 Proportionality**

One of the key requirements belligerents have to adhere to in order to fight justly, in traditional ethical view, is proportionality. As we have learned in the last section, deliberately targeting non-combatants is traditionally impermissible; proportionality has been established as a key requirement in order to govern unintentional killing of civilians, or, to use a well-established euphemism, *collateral damage*, while also introducing those constraints to the entirety of war (Mavrodes 1975: 119).

“[...] the *in bello* proportionality condition says the collateral killing of civilians is forbidden if the resulting civilian deaths are out of proportion to the relevant good one's act will do; excessive force is wrong.” (Hurka 2005: 36)

This implies several things. First of all, the killing of non-combatants in war is neither morally nor legally prohibited without exception: just the *intended* killing of non-combatants is. Secondly, proportionality caters to the reality of war, in which civilians often get hurt or killed, and is a means to try to limit those cases of civilian casualties to a bare minimum: the cases in which civilian casualties are justified by the amount of good the attacking act does. However, it is intuitively difficult, if not impossible, to weigh expected goods against the evil of killing civilians, or the use of excessive force in general, for that matter (Hurka 2005: 38). The principle of proportionality has often been formulated in terms of means and ends: military means have to be proportionate to legitimate military ends (O'Brien 1981: 40).



To give some clarification, Hurka (2005: 39-66) tries to identify the exact relevant goods and the method of comparing them with the evils of unnecessary deaths, in order to determine if proportionality is given. Interestingly, he concludes that the relevant goods produced in war cannot be determined independently of the cause this war serves: a war party fighting for an unjust cause can never achieve any relevant goods. This undermines the doctrine that *ius ad bellum* and *ius in bello* are to be considered separately. Regarding the moral comparison between achieved goods and evils done, he holds that lives are always of equal worth, regardless of their being soldiers or civilians, and on what side they are on. It follows that any act killing more civilians than it saves soldiers is generally impermissible. However, as he admits, this entails speculative decision-making in regards to future acts which “are merely hypothetical and can only be estimated given our available evidence”, and also includes the difficulty of weighing effects who “are of irreducibly different types” (Hurka 2005: 66). Still, this is an inevitably ambivalent formula, the applicability of which, it seems, has to be considered before every single war act that entails the possibility of excessive force. Therefore, while it may certainly have a strong *prima facie* claim to legitimacy and one can intrinsically understand why proportionality in warfare is important, it is a criterion that ultimately suffers from its inherent vagueness, and the traditional form of which has been fiercely challenged (McMahan 2016) .

### **3.1.3 Necessity**

Undoubtedly, necessity is a central requirement of both *ius ad bellum* and, *mutatis mutandis*, *ius in bello*. However, it has long been neglected by scholars of just war theory and moral philosophers in general (Lazar 2012: 4). This seems bewildering, as necessity certainly is a central norm regarding all forms of harm alike, governing principles of individual self-defence as it does the just conduct of war. Its baseline is quite simple: “Defensive harm H is necessary to avert unjustified threat T if and only if Defender cannot avert T without inflicting H.” (Lazar 2012: 5). But how, exactly, does this pertain to *ius in bello*, for which it is, traditionally, no longer relevant if the threats faced by war parties have originated from just defence, but rather, in which situations it is permissible to use force in order to achieve the end of winning the war? If necessity *in bello* simply concerns the issue of when it is permissible to use force, it appears to be the same thing as proportionality. However, this is not true. To put it simply: The necessity condition precedes the proportionality condition. In order to defend against an attack, after having figured out one or many way(s) able to block the attack, defender D has to first figure out the least harmful way to block, among all the possibilities,

before deciding whether this act is actually proportionate to the threat posed (Statman 2011: 436f.). Still, this line of thought seems to merely apply to past attacks, and therefore not quite suitable for the reality of war. Fittingly, it is transformed to include a future perspective:

“[...] states might be allowed to respond to a perceived unjust attack against them with an attack which is much harsher and more destructive than the one they themselves suffered if they have a reasonable basis for believing that such a response is necessary to block future attacks.” (Statman 2011: 438f.)

As one can observe, the necessity requirement in its traditional form pertains to both *ius ad bellum* and *ius in bello* in the same way: just as a war party has to decide, *ad bellum*, if a strike against a foreign power is the least harmful option to defend its right, a war party *in bello* has to decide if the particular war act it contemplates is the least harmful option to achieve its aim (McMahan 2016: 21). It is thus a precondition that has to be met in order to even advance to the testing of whether an act meets the proportionality condition. Together with discrimination, these principles traditionally build the moral grounding of just conduct of war. Again, similar to the principle of proportionality, and even discrimination, there are several issues with this traditional view of the necessity requirement, some of which are going to be of interest in the section depicting the underlying consequentialism in traditional *in bello* scholarship (Lazar 2012, Statman 2011, McMahan 2016). Before I go on to that section, however, there is one more component of traditional *ius in bello* left to clarify and analyse: the supreme emergency exemption.

### **3.1.4 Supreme Emergency**

<sup>6</sup>The institutionalization of the concept of supreme emergency, previously a vague idea at most, within just war theory was introduced by Michael Walzer in *Just and Unjust Wars* (originally published in 1997, the 2006 edition is cited here). Ever since it has been treated as part of a fixed canon of considerations within *ius in bello*, criticized by some but accepted within the greater discourse about morally just warfare, even provoking arguments in slightly different areas that clearly lean on its line of thought (see Held 2004). All this might be surprising at first; Walzer's scenario of a supreme emergency explicitly allows and might even call for intentional, lethal and indiscriminate attacks against civilians. (Walzer 2006: 251-255, Coady 2004: 777-783). Employing

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<sup>6</sup> Most of what is said in this section has been used exactly or almost exactly like this in a previous paper by myself. One can find this previous work in the references under Schmid 2016: 36-38.

the example of Nazi aggression, Walzer limits the eligibility of deliberate killings of civilians in war to cases that present

“an ultimate threat to everything decent in our lives, [...] a practice of domination so murderous, so degrading even to those who might survive, that the consequences of its final victory were literally beyond calculation, immeasurably awful. We see it [...] as evil objectified in the world [...]. (Walzer 2006: 253)

Thus, the very substance of the concept of supreme emergency is that there are some, very rare, situations in war, in which the usual *in bello* requirement of discrimination no longer applies: in these cases, innocent non-combatants may be sacrificed in order to secure the greater good. Walzer's only example of such a case is Nazi imperialism and the subsequent (last resort!) British indiscriminate bombing of German cities up until mid-1942; in the last two and a half years of World War II, the bombing was, in Walzer's opinion, not absolutely necessary and therefore transgressing against *ius in bello* requirements; there was no supreme emergency anymore (Walzer 2006: 255-262). Thus, while ignoring the discrimination requirement, supreme emergency still inherently adheres to necessity and proportionality: one could say that, in crises that represent supreme emergencies, ignoring discrimination is both necessary and proportional (Walzer 2006: 255). While this sounds cruel, and is not incorporated in international law, Walzer's idea pertains only to situations in which humanity itself and the very prevalence of the world as we know it are at stake. Still, this is rather vague and, it has been argued, may prove a dangerous provision to misinterpret and misuse – especially as Walzer has drafted this exemption with a state-centred mindset, thereby excluding non-state war actors, who are often just as relevant as state actors (Walzer 2006: 251-255, Coady 2004: 783). A rather controversial notion, supreme emergency has been criticized for inconsistency, basic ethical wrongness and a communitarian underpinning that prioritizes the preservation of certain ways of life over universal human rights (c.f. Bellamy 2004, Orend 2001). There is one uncontroversial thing, however: that the notion of supreme emergency is a fundamentally consequentialist consideration. In the following, I will take a hard look at the consequentialism underpinning traditional *in bello* considerations.

### ***3.2 Consequentialism in Traditional Ius in Bello***

On first thought, war parties' and soldiers' adherence to imperatives like discrimination, necessity,

and proportionality might seem guided by a deontological perception of morality – ideally, they display behaviour that is in accordance with all of those – ostensibly – inherently righteous guidelines. In fact, Michael Walzer, arguably the most influential advocate of traditional just war theory, has implied a deontological validity of those principles, a notion often shared among scholars (Walzer 2006: 150f., Bellamy 2004: 831). However, in this chapter, I will argue that this is a fallacy. What is more, I will closely analyse the deontological pretence these considerations emit, and subsequently make the case for those principles to be, effectively, derived from a sort of rule-consequentialism which resembles deontological morality on the surface. In order to alleviate the philosophical rigour this will entail, I will start off by examining supreme emergency, the only traditional *in bello* consideration which is, within the scholarly community, consensually considered a consequentialist consideration (Bellamy 2004, Statman 2006, Toner 2005).

### **3.2.1 Supreme Emergency**

“The central argument for SEE [Supreme Emergency Exemption, note] is straightforwardly an argument from consequences: if we do not engage in terror-bombing, the consequences will be, as Walzer put it above, 'immeasurably awful' [...]" (Toner 2005: 549)

This is what most theorists agree on. As I have established, the supreme emergency exemption is based on the notion that in such situations, when all is done, the evils averted greatly outnumber, quantitatively, but especially qualitatively, the evil caused by inflicting death on civilians: effectively, this course of action simply delivers the greatest amount of good. This is not rule-consequentialism, as the supreme emergency exemption is not a genuine rule, but, as the name says, an exemption to the rule of discrimination. It employs a simpler, more straightforward form: act-consequentialism, the doctrine claiming that an act is morally right only if this act maximizes the good, and brings about a greater amount of good than any other comparable act (c.f. Sinnott-Armstrong 2015). This is what Walzer implies about the act of indiscriminately bombing German cities in World War Two (up until 1942), thereby undermining his own deontological demands, which he postulates in the opening pages of *Just and Unjust Wars* (Walzer 2006: xxii). In fact, some have argued that the supreme emergency exemption even fails to meet those very consequentialist demands, as consequentialist morality usually holds that what is right is also mandatory. Walzer, however, merely argues in favour for the basic legitimacy of supreme emergency, and does not condone it as mandatory (Statman 2006: 60). However, this does not mean that the supreme emergency exemption is not built on consequentialist moral ground, but rather that it is a notion

that, while certainly relying on a teleological consideration of achieving more good than doing evil, is not able to satisfy the requirements of either deontological or consequentialist ethics in total, and therefore resides on an utterly shaky moral foundation. Hence, the fact that plenty of philosophers have argued for its abolishment can hardly surprise (Bellamy 2004, Coady 2004).

### **3.2.2 The Conditions for Permissible Killing**

After dwelling on *ipso facto* consensual approaches to the consequentialism inherent in the supreme emergency exemption, I now turn to the permissible killing *in bello*, and the rule-consequentialism that the principles guiding it employ. Most theorists have regarded those principles as deontological, especially the imperative of discrimination (c.f. Nagel 1972, Walzer 2006). Thomas Nagel (1972: 127), arguing in the context of the then ongoing Vietnam War, claims that civilians have too often been the target of violence justified by the gains made by this strategy, and condemns this consequentialist justification as utterly impermissible. He subsequently argues for a deontological absoluteness of a discrimination principle, emphasizing that

“[...] certain acts cannot be justified no matter what the consequences. Among those acts is murder – the deliberate killing of the harmless: civilians, prisoners of war, and medical personnel.” (ibid)

Certainly, this is a claim that most people could agree on; killing harmless people, innocent bystanders, is certainly morally impermissible. However, this statement does not capture the whole truth. It has been interposed that the traditional definition of who can actually be considered a non-combatant is *not* connected with a strictly absolutist, deontological classification of morality, but based on the principle of self-defence; thereby rendering everyone who does not, in war, pose an immediate physical threat to a fellow human being as not liable to be killed and therefore, *ex hypothesi*, a non-combatant (Mavrodes 1975: 123). This does, of course, make plenty of practical sense. Still, I argue, there are a great deal of situations where those liable to be killed, soldiers, bear much less responsibility for possible wrongdoings than some non-combatants, who, however, supposedly enjoy moral protection from harm.

Imagine a French soldier forced by his government to defend his country against the Nazis in World War Two. He does not desire any violence or harm; he has been made to fight for the just cause of self-defence against unwarranted aggression. On the other hand, imagine a German industrial magnate producing deadly weapons used by the Nazis against said Frenchman, purely out of desire for personal economic gain, with no concern for the unjust suffering he helps to bring about. While

the French soldier is, in traditional *in bello* view, liable to be killed, the industrial magnate is not, as he is a non-combatant who does not pose an immediate physical threat to anyone. Surely, given these prerequisites, most people would agree that the industrialist is burdened with a greater responsibility of inflicting suffering than the soldier, and is therefore, *ceteris paribus*, profoundly guiltier than the soldier. This is explicitly not to criticize the traditional requirements of *ius in bello*. However, it goes to show that a principle of discrimination that allows for cases like the above can never be argued to derive from genuine deontological ethics. Deontology is, among other things outlined in section 2.1, concerned with the idea that humans have a duty to never treat fellow persons as means, but ends in themselves (Kamm 2000: 206). However, the principle of discrimination can include cases, as the one shown above, that clearly make sense from a perspective of bringing about clarity, stability and limitation to matters of warfare, but in that sense alone. It thus follows that the principle of discrimination sometimes fails to account for immediate, deontological rights and duties in order to keep up the overall structure of clarity and limitation in war. For instance, ascribing the French soldier introduced above a liability to be killed is certainly not advocated by a genuinely deontological consideration, since a moral perspective based on immediate vices and virtues of this soldier's acts would clear him of any wrongdoing bringing about that liability<sup>7</sup>; rather, the French soldier's unfortunate moral status is a necessity to be endured if the aim of *in bello* considerations is to keep war limited and its rules easy to understand for all participants. Therefore, the French soldier is used as a means to a supposedly greater end.

This rejection of strict deontology is also, in a similar way, inherent in the *in bello* principles of proportionality and necessity.

Necessity, as we established, is concerned with using the least harmful means that can achieve a certain aim: a necessary attack in war is an attack which uses means that achieve the objective, but cause only so much damage as is absolutely necessary (McMahan 2016: 21). Now, this seems like a genuinely deontological guideline. However, let us employ the example of the French soldier once again. Drawing on Jeff McMahan's (2006, 2009) argument against the equality of combatants, one may legitimately argue that an attack executed by a German soldier against our Frenchman cannot *possibly* be necessary, since the Frenchman simply does not lose his right to life and liberty, as he fights for a just cause (c.f. McMahan 2006: 379f.). This would be McMahan's argument; here, I do

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7 Some short notes to support this point: Firstly, this example presupposes that the soldier is forced to fight, with no imaginable way out. Secondly, the soldier defends both his life and the endurance of his political community from an unwarranted attack which is perpetrated for morally unacceptable reasons. In this case, the CI, for example, would clearly rid the Frenchman of any wrongdoing, since his act does not transgress against any duty the universal application of which would be desirable from pure reason. While Kant does, of course, condemn killing on the basis of the CI, he allows killing in self-defence with no other intent of inflicting harm (see for example Finnis 1983: 131 ff.). So while traditional *in bello* theory considers the French soldier liable *qua* being a soldier, Kant would not agree to the automatic forfeiting of his right to life in this particular situation.

not condone (nor condemn) it, since the aim of this paper is not to normatively judge which side of the debates in just war theory is right. Still, I do retain that said necessity of an attack by a perpetrator of unwarranted aggression against our innocent Frenchman can never be given *from deontological perspective*. For example, Kant would remind the German soldier to only conduct actions which he can, from pure reason alone, wish to become a universal maxim; *a fortiori*, he would ultimately condemn any attack on our Frenchman.

The same applies, *mutatis mutandis*, to the principle of proportionality. According to deontology, acts that are *per se* wrong could never be proportionate. McMahan implies the obviousness of the non-deontology of proportionality in the following:

“The explanation of how traditional just war theory can consistently claim that a war that is disproportionate can consist entirely of acts that are proportionate is that the theory presupposes that the good effects that can offset the harms caused to innocent civilians by individual acts of war are neither just-cause goods or non-just-cause goods as ordinarily understood. Indeed, there is, according to the theory, only one good effect that weighs against the harms inflicted by any act of war in determining whether that act is proportionate: military advantage.” (McMahan 2016: 8).

While discussing another issue as this paper, this short segment supplies everything this paragraph wants to say about proportionality *in bello*: harms caused to innocent civilians can be offset by the good effects of military advantage. In this case, it is not relevant if the non-combatants targeted are actually innocent, since the principle theoretically applies to innocent civilians as well as non-innocent civilians. Such a notion can never be deemed deontological; it ultimately judges acts exclusively in relation to their foreseen or actual consequences.

The sort of ethics employed in the *in bello* principles are, *a fortiori*, of a consequentialist underpinning; they consistently rely on various sorts of good consequences in order to justify some shortcomings they possess. However, since the moral guidelines for just warfare are coded as imperatives which have to, theoretically, be adhered to unconditionally, one cannot categorize them, for example, as act-consequentialist; the rule of discrimination cannot be stalled simply because its temporary suspension would in one particular case “maximize human welfare” (Frey 2000: 165). On the contrary, those rules are absolute, and thus strikingly similar to deontological imperatives. Be that as it may, it has been established by now that they are not – instead, they stem from rule-consequentialist considerations. To reiterate,

“Rule-consequentialists believe that the rightness of an act depends not on its own consequences, but rather on the consequences of a code of rules”. (Hooker 2000: 183)

The code of rules employed in *in bello* ethics is not absolute because of its inherent merits and deontological permissibility, but because it is the aggregation of those imperatives believed to bring about the most goodness in warfare, if rigorously adhered to. This is why, for instance, traditional *in bello* theory and international law have to endure such fates as the one facing the hypothetical French soldier. The principle of non-combatant-immunity may not account for such individual cruelties, but it does, in their view, entail the best consequences by establishing the connection between direct physical threats and liability to harm, and thus *limiting* the cases of permissible killings in war. By employing notions of innocence and guilt in establishing who may be liable to attack, plenty of scholars have implicitly and explicitly argued, morality and law would fail in clearly limiting the cases of permissible killing in war; if one would include the hypothetical German industrialist, for example, the palpable threshold between permissible and impermissible killings in war would vanish (compare Johnson 2000). Thus, declaring non-combatants as not necessarily innocents, but those not posing immediate physical threats, the traditional interpretation of the discrimination principle is established as a gateway to ensuring accountability, stability and clarity regarding questions of permissible killing in war. Or, to put it differently: It is a rule established because it foreseeably entails the most valuable consequences among all alternatives. Therefore, deliberately killing civilians in war in traditional view is not wrong in itself, but it is wrong because it displays behaviour not in accordance with the rule bringing about the most goodness.

Similarly, the traditional design of the requirements of proportionality and necessity entails that one has to act in accordance to them because they are the most sensible rules conceivable, in the sense that adherence to them produces the consequences of the most value overall. For instance, it could be argued that an act of violence towards the Frenchman in our thought experiment can never be necessary nor proportional, since every attack on him would hinder him from achieving his just cause, and would likely arise out of unjust aggression (McMahan 2016: 17-23). However, traditional *ius in bello* does not share this view. As Hurka (2005: 38) clarifies,

“[...] the various proportionality conditions [...] all say a war or act of war is wrong if the relevant harm it will cause is out of proportion to its relevant good.”

As *ius in bello* and *ius ad bellum* are, in traditional view, entirely separate entities, there is no moral difference between just and unjust combatants; the proportionality criterion merely aims to carefully ponder the harms and goods achieved by a certain military action, and obligates combatants to



prefer the action bringing about the most possible overall good. While this is a consequentialist condition in itself, let's once again illuminate why regular attacks on our French soldier satisfy the traditional conception of proportionality (and thus of necessity). As shown, it has been argued that war acts perpetrated by soldiers fighting for an unjust cause can never be proportionate or necessary. However, embracing this view would break up of the notion that *ius in bello* and *ius ad bellum* are separate and thus may endanger the central maxims of limitation, stability and clarity in warfare: accepting the inherent inadmissibility of unjust soldiers attacking just soldiers, as a strictly deontological theory surely would, might lead to a formidable decrease in clarity, limitation and stability in war; it would break up the notion that *ius in bello* and *ius ad bellum* are separate. The overall harms may outweigh the overall goods; war might cease to be limited and clear. This is why combatants fighting for unjust causes are treated equally to those fighting for just causes, and why a Nazi attack on our French soldier can hence be necessary and proportional. General adherence to the traditional interpretation of necessity and proportionality is thus considered imperative, as it is postulated to be the rule entailing the best consequences of all alternatives at hand.

In this section, I have shown how the *in bello* conditions for permissible killing, discrimination, necessity, and proportionality, derive their general validity from a rule-consequentialist paradigm that obligates universal adherence to those imperatives because they are seen as the principles entailing the best possible consequences. In the following, I will attend to a revisionist view on *ius in bello* which comes to gravely different conclusions, a just war theory rooted in cosmopolitan perceptions of morality and justice.

### ***3.3 Cosmopolitan Ius in Bello and its Account of Permissible Killing***

Part of the broad revisionist movement in just war theory, Cecile Fabre has supplied the first book-length cosmopolitan war theory; that is, a re-evaluation of both the central *ad bellum* and *in bello* principles from this perspective (Fabre 2012: 3). The cosmopolitanism she alludes to is the one specified in section 2.2. In the following two chapters, I will take a close look at the requirements and principles this theory sets for *in bello* killing, both regarding the innocent and the non-innocent<sup>8</sup>. This procedure deviates from the traditional *in bello* analysis for the simple reason that both the requirement of non-combatant immunity and the principle of the moral equality of combatants connected with it are interpreted and formulated in a different way in the cosmopolitan

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<sup>8</sup> Meaning those who are not morally guilty by any measure, and, respectively, those who are morally guilty by some measure.

war theory (compare Fabre 2012: 90-95, 118-125, 157f.). As the liabilities of different groups of moral agents shift, so does the salience of traditional core principles such as proportionality and necessity; therefore, this section will focus on the distinction and basic difference in liability between the innocent and the non-innocent. I will start by illuminating the cosmopolitan theory's perspective on the permissibility of killing the innocent in war.

### **3.3.1 Determining Liability: The Separation of the Innocent and the Non-Innocent**

“[In subsistence wars, note]<sup>9</sup> the difficulty is that the rights violations which provide the very poor with a just cause for war are carried out by civilians. [...] citizens and public officials are under a duty of justice to (respectively) support and implement just institutions, laws, and policies, as well as duties not to take part in structured and organized practices the effects of which are severely harmful to others. The question, then, is whether those rights violations are such as to provide the very deprived with a justification for killing those individuals as a matter of rights.” (Fabre 2012: 118f.)

While this paragraph entails deliberations specifically applicable to subsistence wars<sup>10</sup>, – Fabre's cosmopolitanism leads her to analyse different types of war separately, as some involve different moral intricacies as others – it is immediately apparent that she reconsiders the conditions relevant for individual liability to attack, and arrives at different conclusions as the traditional *in bello* theory (Fabre 2012: 5f.). In fact, this is one of the gravest alterations her theory introduces, as her introduction reads: “[...] some non-combatants are also liable to being killed – those who in fact do take part, in relevant ways to be described later, in an unjust war.” (Fabre 2012: 6). This notion breaks with traditional derivations of the discrimination principle and challenges the traditional absoluteness of non-combatant immunity. However, all this does not yet pertain to the *innocent*. Those who are truly innocent – that means, not engaged in any significant wrongdoing in the context of warfare – can, of course, in no theory of the just war become liable to be killed, no less in this one (Fabre 2012: 68ff., 119f., 242f.). Inevitably, some threshold or criteria for the classification of innocents and non-innocents has to be set, in order to introduce a comprehensible account of liability. This cannot be an easy enterprise; latent and ambivalent notions of guilt and

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9 Subsistence wars are wars fought as (pre-emptive) defence against “violence of subsistence rights [...] the material resources we need to lead a minimally decent life)” (Fabre 2014: 8) [for example: water or basic agricultural products, note]. It may generally be controversial if a right to such basic goods does in fact exist, but the cosmopolitan human right to a minimally decent life implies an entitlement to minimally satisfying subsistence.

10 Please note that every conclusion I draw from different chapters of Fabre's book pertaining to different kinds of wars is applicable to every sort of war. While some aspects might be specifically true for one kind of war only, the general inference deduced from them is universally applicable (for instance, see the part about patriotic partiality in particular and the predication about the importance of rights in general in section 3.3.2).

responsibility have to be generalized in order to build a classification.

Fabre (2012: 120) proposes that the harm non-combatants cause has to be severe and their actions must possess a strong and direct nexus to the deprivation of those affected, in order for the wrongdoer's basic right to life to be forfeited; deprivation caused by individual's support for unjust institutions (biased trade deals, for instance), for example, is morally condemnable and transgresses cosmopolitan ideals, but cannot lead to the forfeiture of basic rights of civilians. That being said, "one cannot rule out, on principle, that the possibility that civilians whose individual contributions or omissions have a significant connection with the harms suffered by distant strangers are legitimate targets." (Fabre 2012: 124). She specifies this point elsewhere:

"[...] whether or not those agents [those taking part in or supporting unjust practices and policies, note] are liable to being targeted depends on whether their contributions to those practices and policies themselves constitute a wrongful harm when taken on their own, or are significantly causally related to the resultant human rights violations." (Fabre 2012: 158)

In any case, civilians liable to attack, according to this theory, have one feature in common: they contribute to the furthering of unjust causes or their actions hinder just combatants to achieve their legitimate aims; in attacking civilians, one "should be guided by the criterion of contributory responsibility for a wrongful threat" and take into account "the degree to which the attack will succeed in forestalling that evil" (Fabre 2012: 287).<sup>11</sup> Before turning to a lengthier analysis of what may actually be done in which way to those deemed liable by this line of thought, it is definitely adequate to give room for one major objection to this view on liability: the threshold set seems both practically arbitrary and rather low. The relevant causal nexus to omitted harm, which she introduces as a central liability requirement, is both practically unmeasurable and blind to the possibility of *intention* constituting a category for the measurement of unethical behaviour (c.f. Lazar 2013: 411f.).

Still, all this implies a grave negation of traditional just war theory's core paradigm: the separation of *ius in bello* and *ius ad bellum*. The *in bello* permission to kill almost exclusively depends, *ex post*, on the *ad bellum* permission to fight for one's cause; in the following, I will illuminate how, then, a cosmopolitan conception of the just war accounts for the scope, requirements and ways of permissibly killing the hostile non-innocent.

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<sup>11</sup> One can also find this underlying paradigm in her partial defence of the use of human shields (Fabre 2012: 256-268).

### 3.3.2 Killing the Hostile<sup>12</sup> Non-Innocent and Collateral Damage

Thus far, I have concluded that Fabre's theory of the cosmopolitan war weakens the discrimination requirement because it allows for the killing of both combatants and some gravely responsible non-combatants *in bello*. As I have further claimed, the origin of this approach lies in the abandonment of the traditional separation between *ad bellum* and *in bello*. However, this also means that not all combatants can be legitimate targets in war. Her argument in this respect largely resembles the argument other revisionist theorists, especially Jeff McMahan, have brought forward against the moral equality of combatants<sup>13</sup>. In a nutshell:

“[...] whether combatants may – indeed, have the right to – kill enemy combatants (in large part) depends on the moral status of their war *ad bellum* in general and whether it has a just cause in particular.” (Fabre 2012: 71)

This conclusion is – again – reached through an analogy to self-defence. In her view, an unjust attacker A does not have the right to forcefully protect himself from the retaliation the self-defence of the unjustly attacked defender D inflicts upon him, while defender D has every right to retaliate against the unjust threat with all means necessary (and proportionately adequate) (Fabre 2012: 69f.) Hence, overall, the scope of permissible killings in war shifts in this cosmopolitan perspective: it becomes both wider and tighter, as some combatants are now exempt from suffering harm and some non-combatants liable to attack, as they are not automatically immune from harm *qua* being non-combatants. So far, this chapter has merely analysed questions about the scope of permissible harm *in bello*; yet, little has hitherto been said about the shape this harm may adapt, and it is yet to be determined which constraints govern the use of permissible force in which way. Analogous to the chapters concerned with traditional *in bello*, I consider the requirements of necessity and proportionality *in bello*, since this allows the different theories to be juxtaposed in an enlightening way. Necessity, firstly, is neither abandoned nor significantly changed: “necessity [...]

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12 The reference to hostile, meaning those of the adversarial war party, is important because Fabre, in quite the cosmopolitan fashion, also refers to possibilities of exposing civilians belonging to one's own party to lethal harm (Fabre 2012: 242-268). However, this paper is concerned with the confrontation of traditional views on killing enemies in war with the cosmopolitan perspective on this matter, which is why considerations on the liability of 'one's own' cannot be discussed here.

13 The argument against the moral equality of combatants has indeed been made well before Fabre's book, especially by Jeff McMahan (2009), and is, by now, well established. One might interject the question of why I don't simply analyse this broadly revisionist position, as it seems to make the same case for liability as Fabre's cosmopolitan notion. However, it does not. It cannot support the idea of civilian's liability to attack, since it locates the basis for liability in moral responsibility for a wrongful threat alone, while Fabre locates it in a broader contributory responsibility for wrongdoings, which is the actual novelty of her approach (Fabre 2012: 72, Footnote 21.)

remain[s] the same whether or not one believes that justice is global rather than national in scope”, which is why it is not a requirement in need of adjustment (Fabre 2012: 5). However, one might easily miss the one alteration that the necessity criterion is subject to. Necessity is, of course, always coupled with liability. As belligerents adhere to necessity, thus choosing the least harmful option available to reach their aim, their chosen act may be executed within the constraints of liability only. Therefore, only agents liable to be attacked can ever portray a satisfying object of the belligerents' proposed act, which has to be subjected to necessity considerations. Hence, as liability has shifted from merely pertaining to all combatants to exclude some soldiers and include some non-combatants, necessity has to adapt: from the cosmopolitan perspective, an unjust soldier can never claim necessity in attacking a just soldier. Not the requirement as such changes, but the scope of its application (this whole line of thought is not explicitly spelled out, but compare Fabre 2012: 72).

*Prima facie*, since necessity and proportionality are intertwined criteria, – there is no proportionality without necessity, and a necessary act still has to be deemed proportionate – one could assume that the same steadiness in principle but shift in scope applies to proportionality. A fitting example of the shift in scope is the harm done to (in some form) liable civilians. Confronted with the idea that non-innocent civilians may inflict wrongs upon moral agents which are in themselves morally condemnable, but not as grave that the perpetrators would lose their right to life, Fabre asserts:

“That said, the fact that agents who are not liable to being killed in the sense just defined but nevertheless unjustifiably contribute to the imposition of a wrongdoing provides their victims, or agents acting on their behalf, with a justification for deliberately imposing a lesser harm (than the loss of their life) on them collectively.” (Fabre 2012: 77)

While this contemplation initially reads like a justification for punitive harm, which is outlawed by just war theory in general, it is in fact formulated in the context of the infliction of (pre-emptive or imminent) self-defensive harm (compare Fabre 2012: 75ff.). As I have analysed before, those notions all take the applicability of a necessity principle as *prima facie* justified. Certainly, then, this line of thought also adopts the proportionality principle; it is thoroughly implied here, since the infliction of some degree of harm below the death-threshold is a deliberation not conceivable without proportionality as a central concern. The question of how much harm is to be inflicted as defence from a certain level of aggression touches the very fibre of proportionality. In fact, unjust attackers who are being retaliated against with unjust means or no consideration for necessity or

proportionality regain their right to attack the initially just defenders (Fabre 2012: 78)<sup>14</sup>. Thus, proportionality as the actuality of an adequate relation between the gravity of the suffered attack and the scope of defensive retaliation remains a central principle of designing war acts.

However, proportionality is explicitly addressed as one of the requirements in need of revision: “[...] goods and bads other than lives saved or destroyed must be included in the proportionality calculus, whether in its *ad bellum* or its *in bello* variants.” (Fabre 2012: 6). While proportionality as a criterion certainly has to be adjusted to apply to those cases covered by the liability criteria, it also becomes relevant in one further way. In the cosmopolitan theory of the just war, the string of the proportionality principle governing the extent of permissible harm endured by innocent bystanders as collateral damage is newly adjusted. The goods and bads other than lives saved or destroyed are located mainly in rights, Fabre claims. Thus, albeit counter-intuitive, from a cosmopolitan perspective, *jointly held rights*, for instance, may give reason to patriotic partiality in war. Those rights and their perseverance have to prevail as a valid good, and, in consequence, their violation as a valid vice (Fabre 2012: 82-92). Importantly, not the fact that a cosmopolitan theory of war may allow for patriotic partiality is essential, but the justification *via* rights. This fits into a cosmopolitan paradigm which seems to set an especially high standard of irredeemable individual rights and group rights deviated from them. The proportionality condition, thus, is amplified to include considerations about the defence of rights, whereas it merely includes lives, deaths and utility in war in orthodox *in bello* theory (c.f. Lazar 2013: 409f.). As Lazar (Ibid) observes:

“Fabre argues that insofar as co-citizens are defending joint rights to political sovereignty and territorial integrity, they can appeal to the agent-centred prerogatives that would justify their co-citizens in killing innocent by-standers as a side effect. [...] So when our armed forces defend our joint rights to sovereignty and territorial integrity, what they are really defending is individually held rights to the conditions for a minimally decent life.”

This is a novel consideration which has not been included in the traditional proportionality condition. As a comparison, it is fruitful to juxtapose this against the proportionality condition employed by (customary) international humanitarian law, which equals traditionalist *in bello* deliberations:

“Launching an 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

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<sup>14</sup> Again, while my portrayal of the positions brought forward in Fabres book make them look like mere claims, they are argued for at length, which, for reasons of space and clarity, I cannot adequately transfer to this paper. To reconstruct the full composition of this argument, see Fabre 2012: 71-81.

relation to the concrete and direct military advantage anticipated, is prohibited.” (International Committee of the Red Cross 2016: Rule 14)

While the cosmopolitan understanding of proportionality includes rights as a justification for collateral damage, the traditional understanding is restricted to military advantage.

All in all, the cosmopolitan paradigm differs from the traditionalist paradigm in two important aspects respective to *in bello* permissible killing. First, the principle of discrimination is readjusted, as liability shifts from those representing a direct physical threat to those with a sufficient contributory responsibility for severe wrongdoing. Therefore, some soldiers become non-labile while some civilians become liable. Subsequently, the scope of liability changes; necessity and proportionality have to adapt to the new scope. Furthermore, proportionality ceases to be restricted to a mere weighing of lives: jointly held individual rights have to be included in the equation. This may lead to a different justification of collateral damage (Fabre 2012: 6, 81-95, 120-124, 284). In the next section, I will show the Kantianism inherent in this line of thought. I will do so by employing an approach analogous to section 3.2.2.

### ***3.4 Kantianism in Cosmopolitan Ius in Bello***

As I aim to depict the Kantian ethics underpinning the cosmopolitan view on *ius in bello*, I will begin by showing why the latter is not compatible with consequentialist considerations. Subsequently, adopting the same example as in section 3.2.2, I aim to clarify why, contrariwise, the shape and scope of the cosmopolitan *in bello* principles are of a Kantian deontology.

“I agree with deontologists, of whom I am, that *pace* consequentialists, some acts are intrinsically right or, as the case may be, intrinsically wrong, irrespective of their consequences. [...] However, I also take on board the quasi-consequentialist point that consequences sometimes do matter a great deal. The resulting theory might seem an *ad hoc*, unhappy hybrid of deontological and consequentialist intuitions.” (Fabre 2012: 13)

The aim of this section, to put it differently, is to illuminate this statement by Fabre; to show why one may still call her theory Kantian although she herself admits to incorporating consequentialist considerations. Let me start with the scope and shape of liability to harm.

### 3.4.1 Two Examples and Their Implications

As I have shown before, both the scope and the shape of this liability is developed in the cosmopolitan theory of *in bello* conduct to ultimately differ quite gravely from the traditional view. While morally innocent non-combatants stay protected from deliberately inflicted physical harm, non-innocent civilians may be subjected to such impairment. On the other hand, innocent soldiers, i.e. those fighting for a profoundly just cause employing just means, are, too, protected, while non-innocent soldiers, i.e. those fighting for an unjust cause or with unjust means, are liable to harm (Fabre 2012: 71f., 119f.). Let me illuminate how this may be applied in actual warfare. Again, one can consider the same example of the hypothetical French soldier in World War II as before. While I have already set the stipulation that he is fighting for a just cause with just means, one can furthermore *prima facie* assume that his counterpart, the German soldier, is fighting for an unjust cause (although not necessarily with unjust means). In this scenario, Fabre's cosmopolitan theory would rid the Frenchman of any liability to harm, as he is clearly acting justly, defending both himself and the collective rights his polity guarantees against unwarranted aggression. The German soldier, meanwhile, is liable to every sort of harm necessary and proportionate to parry his unsolicited attack.

Now, let me refine this example. Let us assume that the Frenchman and his regiment of men with exactly the same properties as him face a decision: In order to stop a conglomerate of Nazi troops from capturing a town, their only available option is to demolish a bridge which at that time may or may not be frequented by innocent German civilians; the French regiment has no way of knowing for sure, although it generally is a busy bridge. The catch is the following: This regiment of Nazis is a very benevolent outlier, and they would not kill the inhabitants. Furthermore, the town is not strategically relevant to the overall invasion of French. The Nazis would, however, inhabit the town and create their own institutions, laws and norms pertaining to that town; the original population would be degraded to second-class citizens. Let me further assume that the number of moral agents affected by the Nazis' seizing of the town is lower than the number of casualties produced by demolishing the bridge. In this case, *pace* traditional just war theory, Fabre's cosmopolitan theory of war would allow the demolishing of the bridge, even if innocent civilians were to unintentionally be killed, on the ground that jointly held rights of the French citizens would be transgressed against; "jointly held rights to political self-determination and territorial integrity" are so important as to justify the killing of innocent as collateral damage, even though neither a life nor a military advantage is at stake (Fabre 2012: 96, 93f.). This conclusion fits into the notion that a cosmopolitan



just war theory assigns more value to a greater range of rights than the traditional view on *in bello* conduct.

Again, this contrast in action between the traditional and cosmopolitan just war theory is largely due to their different grounding in normative ethics. I will thus demonstrate the non-consequentialism of the line of thought employed in both examples. To paraphrase, various forms of (act-) consequentialism are built upon the premise that only those acts are favourable whose consequences maximize the good and are thereby of high value, while rule-consequentialism holds that all acts are to be in adherence with those rules which produce the greatest value (Frey 2000: 165, Hooker 200: 181ff.). One might argue that neither of the courses of action described in the examples are likely to produce consequences of the highest value. In every case, however, it is certainly clear that neither notion would have been embraced by a consequentialist mindset. Let me start with the first case: the non-liability of the French soldier. In the following, I will show that Fabre's notion of combatant liability is not consequentialist, but Kantian. I will then include her principle of non-combatant liability in the same argument.

### **3.4.2 Liability**

As I have established in section 3.2.2., the reason for strict non-combatant immunity and the moral equality of soldiers *in bello* is a rule-consequentialist paradigm which sets rules according to the value they produce. In Fabre's theory, both strict non-combatant immunity and the moral equality of soldiers are negated for reasons of individual accountability (e.g. Fabre 2012: 71f., 119f.). Therefore, these cosmopolitan conclusions do not fit within the traditional rules set with rule-consequentialist considerations in mind. Hence, they cannot contain rule-consequentialist properties, since there cannot be two legitimate rules containing contradictory propositions. What is more, Fabre's notions on combatant liability can also not be interpreted as act-consequentialist (or, for that matter, any other form of consequentialism concerned with actions)<sup>15</sup>. On the surface, it might certainly seem like the non-liability of the French soldier and the German soldier's inadmissibility to defend himself against the righteous acts of the French combatant bring about the consequences of the greatest (or satisficingly great) value. On an agent-related notion on consequentialism, this might be true for the French, but not for the German soldier, because their priorities differ and the German assumably wants to protect his life<sup>16</sup>. On an agent-neutral notion of

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15 Another form of consequentialism, motive-consequentialism, is principally inapplicable to this topic because it concerns issues of *intention* for acts, which is in this form not relevant for either the traditional nor the cosmopolitan view on just war (Adams 1976: 467f.).

16 There is debate about whether there is such a thing as agent-relative consequentialism. See Portmore: 2001,

consequentialism, however, it might be true for the German, but not for the French soldier, because there might be an option bringing about more value than shooting the German soldier (c.f. Portmore 2001: 375ff., McNaughton, Rawling 1991: 167-185). This already signals great trouble for a consequentialist explanation of Fabre's theory of liability.

Be that as it may, there is an even more powerful argument doubting the behaviour *in bello* proposed by Fabre's theory (the acts of the French and the German soldier in this particular example) is conducted by consequentialist considerations. This is the fact that the way liability is constructed in her argument does simply not account for an assessment by consequences. Combatant liability, as illuminated by the example employing the French and the German soldier, is, in the cosmopolitan theory, rooted in the cause each combatant is fighting for; every combatant thus has to carry the burden of individually deciding if the reason he fights for is a just concern. This, in turn, means that there is some norm, some independent value that governs the righteousness of his act. The act of fighting *per se*, thus, is a function of upholding a certain property. Hence, it is oriented not toward any future end, but toward an indispensable value which is guiding action. This is the bottom line of *deontological* ethics, and stands in plain contrast to *teleology* (Hurley 2013: 1275f.).

Thus, the reason that our French soldier is allowed to forcefully defend himself against the German soldier, who, *ceteris paribus*, is not permitted to retaliate in his favour, is of a deontological consideration: the German transgresses *prima facie* duties by defending himself, whilst the Frenchman does not. Now that it is asserted that Fabre's theory on combatant liability, illustrated by the first example, is in fact rooted in deontological ethics, I have yet to determine the Kantianism of this account. I will do so by looking to locate all the constituent parts of Kantianism introduced in section 2.1<sup>17</sup>. Since it is already settled that Fabre's deliberations prescribe moral worth to actions *per se*, I merely have to examine if her theory of just action and combatant liability is in accordance with the CI and if it is built on the principle of assigning fundamental rights and duties to individuals in a universal fashion, i.e. without being restricted by artificial boundaries. Firstly, let me examine adherence to the CI as formulated in 2.1<sup>18</sup>. To start with, it is safe to determine that the actions Fabre would demand of both the French and the German soldier in this particular situation do accord with *some* maxim. This is the maxim that only those acts of war are justified which follow the attainment of a just cause and are necessary and proportionate; this does not only pertain

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McNaughton, Rawling 1991.

17 To shortly reiterate, these are 1) adherence to the CI, which demands 2) acceptance of the centrality of fundamental rights and duties ascribed to every individual moral agent, 3) the prescription of moral worth to actions *per se*, and not their consequences, and has to be regarded as 4) universally valid, without respect to borders.

18 "Act only according to that maxim whereby you can at the same time will that it should become a universal law [without contradiction, note]." (Kant, Wood & Schneewind 2002: 37)

to the leadership of the war parties, but every individual taking part in hostilities (Fabre 2012: 71ff.). The decisive question is whether this maxim can be boundlessly advocated to become a universal law. Let me analyse that question by means of working through a catalogue that allows examination of a certain maxim in regards to the CI by Johnson and Cureton (2016):

“First, formulate a maxim that enshrines your reason for acting as you propose. Second, recast that maxim as a universal law of nature governing all rational agents, and so as holding that all must, by natural law, act as you yourself propose to act in these circumstances. Third, consider whether your maxim is even conceivable in a world governed by this law of nature. If it is, then, fourth, ask yourself whether you would, or could, rationally *will* to act on your maxim in such a world. If you could, then your action is morally permissible.”

To clarify, the maxim examined according to those steps is the principle that the permissibility of inflicting harm *in bello* and, in turn, the status of individual liability, depends on the moral properties of the cause one is fighting for. Since the first two criteria set by Johnson and Cureton are already processed by default, I can directly turn to stipulation three. In a world governed by this law of moral liability, it stands to reason that no one would fight for an unjust cause, thus eliminating warfare entirely, since fighting for a just cause can always merely be the repudiation of the infliction of unjust harm. At the very least, however, it would ensure that those fighting for unjust causes of aggression would be morally condemned. There is no contradiction by the maxim and its implications. The maxim at hand is thus conceivable in a world governed by it as a natural law. What is more, I have already implied the maxim's accordance to obligation four. It seems that one should rationally act on this maxim when implemented as a law of nature, since it is in accordance with *prima facie* rights and duties. Inflicting harm in war only if fighting for a just cause surely accords with the furthering of rights and duties pertaining to life and liberty, since it treats those *prima facie* norms as the founding properties for action. I have thus established that Fabre's cosmopolitan notion of combatant liability is in concord with Kant's CI.

Furthermore, her notion also conforms to the principle that the acceptance of *prima facie* individual rights and duties are central to Kantian ethics. As I have just shown, the prominence of those rights and duties are furthered by strict adherence to her concept of combatant liability. Also, Fabre's theory explicitly ascribes all moral agents “rights to the resources and freedoms which they need in order to lead a minimally decent life.” (Fabre 2012: 7). Moreover, those rights are outspokenly universal: “[...] political borders are arbitrary from a moral point of view, and more precisely ought not to have a bearing on individuals' prospects for a flourishing life.” (Fabre 2012: 16). This notion of rights grounds Fabre's concept of combatant liability, which is hence genuinely Kantian from an

ethical point of view; the reason that the French soldier may legitimately attack the German in self-defence, but not the other way around, is hence rooted in Kantian considerations.

It is of the utmost importance to note that the Kantianism employed in Fabre's theory of combatant liability applies to her notion of non-combatant liability as well. Firstly, her consideration that, principally, non-combatants may sometimes be liable to deliberate harm, cannot be consequentialist for the same reason that her argument on combatant liability cannot be consequentialist. In both cases, the point of reference for liability is the immediate righteousness of an act, i.e. the accordance of an act with *prima facie* duties. For the same reason, we can analogously conclude that her view on non-combatant liability is a Kantian conclusion as well; to deny this point would mean to deny that the prescription of liability to soldiers and to civilians follows the same rules. This notion, in turn, would have to prescribe different, innate properties to being a soldier and being a civilian; it would have to postulate a distinct 'soldier-ness' and 'civilian-ness'. In Fabre's theory, however, liability of harm is a mere consequence from a certain contributory responsibility for wrongdoing, in the civilian context as well as in the context of war (Fabre 2012: 72, Footnote 21). There is no qualitative difference. Therefore, her theories' loosening of non-combatant-immunity is Kantian for the same reason that her views on combatant liability are.

### **3.4.3 The Non-Liable as Collateral Damage**

Let me now turn to the second example, the unintentional killing of non-liable enemy civilians in order to retain fundamentally important jointly held rights<sup>19</sup>. This is arguably trickier than the first example, since it is not about the justification of liability, but the overruling of non-liability. Condoning the killing of innocents in order to preserve fundamental rights sure appears like an agent-relative consequentialist consideration: the preservation of rights outweighs the evils done by killing the innocent. However, it is not that clear.

Again, one can safely assume that this is not a rule-consequentialist consideration, since the fact that her perception of acceptable collateral damage in this case widens the scope for permissible casualties, a notion that does not fit with the rule-consequentialist conception that “the rules whose widespread internalization would maximize utility are what determine whether acts are right or wrong.” (Hooker 2013: 491). One could hardly formulate a general rule condoning the demolition of the bridge in my example, since its widespread internalization would arguably not maximize

19 On the surface, one could immediately criticize this notion as inconsequential and illogical, as Fabre's cosmopolitan theory regards borders as morally irrelevant. Why, then, should one distinguish between enemy and 'own' civilians? Fabre explains this at length. In a nutshell, she argues that the people with whom one shares society and polity are reason to grant collective rights as an aggregate of individual rights, since individual rights to build political communities resonate in jointly held rights on an aggregate level (Fabre 2012: 42-45, 82-92).

overall utility (as a desirable consequence) to include fundamental rights on the same qualitative level as lives. However, this is inconceivable, because consequentialist theories generally target the attainment of the *good*, in the sense of the *pleasurable* as the antecedent of the *right* (Robertson 2010: 440). *A fortiori*, while a deontological theory might accept Fabre's primacy of fundamental rights, since it does not view good and right as independent notions, the rule-consequentialist focus on the good cannot allow the bombing of the bridge, since the rule condoning it would not lead to an overall increase in valuable consequences, especially if the bombing infers more casualties than moral agents are affected by the Nazis' occupation. This argument also applies to act-consequentialism, since it shares the prominence of the overall resulting good with rule-consequentialism; in this way, both varieties of teleology are analogous (c.f. Kagan 1998: 222f.).

Thus, the underlining normative ethics guiding Fabre's permission of the bombing in my example have to be of a deontological nature. In order to test if said deontology is of Kantian coinage, I can, again, resort to the criteria set by Johnson and Cureton (2016) (see section 3.4.2). To start with, a maxim enshrining the act of bombing the bridge in the example has to be formulated. This maxim may be codified as follows: combatants fighting for a just cause have a justification for inflicting collateral damage on innocent non-combatants belonging to the party waging war in pursuit of unjust ends, if doing so is the last resort option to retaining the lives or jointly held fundamental rights<sup>20</sup> of themselves or their co-citizens. Now, let me imagine this maxim as a universal law. In a world governed by this law, analogously to Fabre's argument on combatant liability, the maxim is still conceivable; there is no apparent contradiction between the results of its application and the properties it is designed to accomplish. The hard part is the next criterion. Can one rationally want to act on this proposed universal law? This last criterion touches on *prima facie* rights and duties. These are double-edged: on one side, there is the just combatants' (and their co-citizens') obvious right to life, liberty and defence against unwarranted aggression. On the other side, there is the non-liable civilians' right to life and liberty. What is more, there is also the just combatants' duty to protect themselves and their co-citizens from that unwarranted aggression – in a sense, there is a duty to fight. Nonetheless, is there also a duty to condone the unintentional killing of non-liable enemy civilians? Hardly. However, Fabre explicitly states:

“It seems to me that a plausible justification for unequal weighing lies in agents' personal prerogative to confer greater weight on their own rights than on the rights of strangers.” (Fabre 2012: 89)<sup>21</sup>

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20 Especially territorial integrity and political sovereignty.

21 This is also why, in her view, the attacked non-liable civilians would have the moral right to defend themselves.

She thus endorses the agent-relative ethics of deontology; Kantianism does so as well. Note that the final point of Kantian deliberation on the permissibility of acts always relies on a subjective assessment as to whether the maxim guiding the proposed act should become a universal law. While this subjectivity is hard to transcend, and will certainly bring about different conclusion depending on if one is the just combatant or the non-labile civilian, it seems to me that most rational moral agents who are neither, and thus secluded from this particular situation, would agree with the proposed maxim because of its immediate reinforcement of the importance of inalienable rights. Despite the instability the application of this maxim might possibly bring about in our world, there seems to be ample evidence for the thesis that this principle would strengthen the role of fundamental *prima facie* rights and duties in a world in which it has been institutionalized and is universally adhered to. Therefore, one can justifiably say that the proposed maxim heeds the premises of the CI. Furthermore, this notion on permissible collateral damage is *ex hypothesi* universal, meaning irrespective of borders, and, through adherence to the CI, explicitly meets Kantianism's conditions two and three<sup>22</sup>.

It has thus been shown that Cecile Fabre's cosmopolitan notion on the permissibility of collateral damage *in bello* is of a Kantian nature. Revisiting the example, I can now say that the permissibility of unintentionally harming non-labile civilians by demolishing a bridge as a last resort to saving the fundamental rights jointly held with one's co-citizens has a Kantian foundation<sup>23</sup>. Overall, thus, Fabre's cosmopolitan principles of killing *in bello* are Kantian. The consequentialism she acknowledges herself (Fabre 2012: 13) does hence not pertain to her views on liability and collateral damage (rather, for example, it is employed in her *ad bellum* deliberations on humanitarian intervention, see Fabre 2012: 169-178). Finally, I will henceforth reiterate the key aspects this paper has disclosed and tend to the overall validity of the original hypothesis.

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22 Again, see 2.1.

23 There is one ostensibly powerful argument derailing my whole train of thought: the assertion that collateral damage can never be condoned by Kantian ethics, since it effectively uses humans as a means to an end. This argument would claim that, to truly be Kantian, one would have to assess the possibility of unintentionally killing the innocent separately from any perks this act might bring about, such as the preservation of rights. However, this strikes me as a philosophical shortcut. Kant certainly does not forbid all killings. In fact, he introduced the concept of a duty of virtue: “a requirement of reason to adopt certain general ends, values and fundamental attitudes toward persons” and advocates that “it is a duty to make 'the right of humanity' one's end” (Reath 2013: 460f.). In fact, the unintentional killing discussed in my example strikes me as a prime instance of an act which is not right by its consequences, but its virtues: it derives from the duty to further human welfare, as it defends the significance of fundamental rights and duties. Moreover, Reath (*ibid*) locates the core of the duties of virtue in the “preservation and development of the capacity for inner freedom and self-government”. Thus, passing the universality test, Fabre's notion on collateral damage does not denigrate humans as means to an end, but rather stresses the preservation of a virtuous value: that one may defend himself against unwarranted attacks on life and liberty (c.f. Yaganak 2011: 33). Note, of course, that Kant could never allow the intentional killing of those innocent civilians.

## 4. Conclusion

All in all, several important points have been revealed in this thesis. Firstly, I have debunked the general belief that traditionalist principles of *in bello* conduct, – non-combatant immunity, necessity, and proportionality – and the perception of liability to harm grounding them, stem from deontological considerations. Instead, I have aimed to depict them as the result of a rule-consequentialist approach to determining regulations of warfare. Contrariwise, I have shown that one particular strain of the revisionist movement in just war theory, cosmopolitanism, employs principles for *in bello* behaviour that are grounded upon a Kantian comprehension of morality. Specifically, its conception of liability is Kantian because it evaluates actions by their inherent merits. Those different normative ethics have been shown to lead to opposed notions for the rules to be employed in war. I aspired to illuminate these conditions and their implications by both reviewing existent literature and using original arguments and examples to clarify my point. Overall, my original hypothesis can be maintained: traditionalist and cosmopolitan rules of *ius in bello* are incompatible because the normative ethics grounding them are diametrically opposed.

This conclusion is essential for the general understanding of the philosophy on morally correct warfare, since it illuminates the controversial issues at hand from a previously unexplored angle. Providing this angle, I hope to have delivered clarification on the controversial notions of *ius in bello*, for readers foreign to these issues and experts alike. Specifically, I hope to have adequately introduced the reader to the intricacies of a cosmopolitan account of warfare, which might, hitherto, have been alien to plenty of observers, acquainted or unacquainted with the ethics of war. While I have specifically depicted the cosmopolitan theory of just war for reasons including its radicalness, vividness, and innovation, I do not normatively judge if it is 'better' or 'worse' than the traditionalist just war theory, or any other theory for that matter. Still, it has to be said that for all its innovation, it is certainly not flawless. For example, it has been pointed out that Fabre's account of liability lacks an adequate threshold separating the liable from the non-liable (Lazar 2014: 409ff.).

What is more, it has to be acknowledged that the cosmopolitan theory of just warfare merely represents one distinct subspecies of the general revisionist movement. The conclusions reached regarding its ethical foundations cannot be generalized to capture the intricacies of all of revisionist just war theory. There are plenty of theories deviating from the cosmopolitan view, especially in regard to the liability of non-combatants<sup>24</sup>. An extensive comparative analysis juxtaposing the

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<sup>24</sup> Notable contributions include Lazar, Seth 2015. *Sparing civilians*. Oxford: Oxford University Press, and Frowe, Helen 2014. *Defensive killing*. Oxford, United Kingdom: Oxford University Press.

normative ethics of revisionist just war theories with those of the traditional war theory is thus yet to be undertaken, although it seems questionable if the myriad of different perceptions within revisionism allow for valid generalisations. In fact, evaluating the different revisionist theories might prove to become a great challenge for ethics in general, as the diversity and quantity of contributions in this field seems to ever grow.

What is more, it will be enthralling to observe if those newly developed notions of just warfare will gain so much traction as to be incorporated in international humanitarian law, especially as the traditionalist focus on nation-states seems partly obsolete, since inter-state wars decline and intra-state wars appear to become the norm. This development is especially fascinating because of its stark contrast to hitherto practised principles. On the one side, philosophers defending the doctrine of the moral equality of combatants, for example, are rarely found today. On the other side, it is inconceivable that states, the eventual decision-makers in international law, were to ever codify a set of rules connecting the permissibility of acts in war with its *ad bellum* status of permissibility. In any case, however, it is of great importance to stress the individual relevance moral philosophy on war possesses, independent of its codification in law. In a way, morality, especially if its norms have been internalized through social construction, is a more powerful tool than law: it shapes how individuals feel about their actions and guides the way we perceive human interaction. Hence, the just war tradition, institutionalized or not, changes the way people perceive warfare by its own right, as it is taught to soldiers, discussed by scholars, and included in public deliberations.



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Hiermit erkläre ich, dass ich die Arbeit selbstständig und ohne Benutzung anderer als der angegebenen Quellen und Hilfsmittel angefertigt habe.

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