

MORAL EQUALITY OF SOLDIERS IN WAR: NECESSITY OF SEPARATING JUS AD BELLUM FROM JUS IN BELLO

Dragan Stanar

University UNION – Nikola Tesla,
Faculty of International Politics and Security

In a world and age in which wars are a daily phenomenon, soldiers and combatants are often times judged as moral or immoral based on the morality of the war they are fighting. This is not the right path to take, as soldiers are to be judged solely for the way they are fighting in a war, not based on the justification of the war itself. Soldiers do not start wars, in reality they do not even have the freedom of choice whether to fight in them or not, nor can they stop wars on their own. They are trapped in a situation they did not cause, and have no power to exit it. Their enemies are not criminals, they are also men in uniforms, following orders from their superiors. This does not mean that soldiers have no moral responsibility whatsoever, on the contrary, they are fully responsible for the way they fight, how they apply violence and how they conduct warfare, and they are to be judged for their actions in combat, and in war in general. Thus it is possible for a soldier to fight justly, even if he fights for the unjust side. Similarly, it is also possible for a soldier to be unjust, even if he is on the just side of the conflict. These two elements must be separated, and judged independently.

Key words: Moral equality, jus ad bellum, jus in bello, soldiers, duty, criminalization of war

Introduction

The place and time of birth, which will largely determine the course of life, cultural matrix, language, way of thinking and certain ethical patterns, surely are not things which a man can control, nor can he be held responsible for being born in a certain time, and in a certain community. However, we can hardly claim that a man is completely determined, or better yet, that his entire future is utterly determined by the place and time of his birth, but there is no doubt that every man who ever existed was, and is, a slave to his time, and is, to a certain point, shaped and modeled by the culture he was born into and in which he formed as an individual. There are cases of men being born in the lowest castes of Indian society, in the time when the country (India) was at a substantially lower technical and technological level, compared to the Western world, who then went on to become important innovators, engineers, and pacesetters of the developed Western technological

society. Likewise, there are plenty of examples of people who gained all possible predispositions for a snug and careless life, with opened educational and professional opportunities in their youth, and still managed to end up on margins of the society, contemptible and rejected by the same society which was their playground. These, and similar cases are, however, seldom, for the history teaches us that the odds for overcoming the given starting conditions of life are possible, yet extremely rare. It is known that the majority of Greek and Roman philosophers came from the higher classes, the same way as the medieval sages and conquerors were predominantly born in families of sages and conquerors. Today, the situation hasn't changed at all, as the majority of men controlling global capital descend from families which have been doing it for decades, if not centuries. On the other side of the specter, most men who were born in slavery died as slaves, the same way as the medieval serfs were born as such, lived as such, and died as such. Again, the situation is pretty much the same today, with the enormous majority of those born in the so-called "third world" dying in the same place, often times suffering horrendous life conditions. Social changes truly are barely achievable, particularly when we have the improvement of the position of the poor and underprivileged parts of society in mind, in any part of the world. A society reproduces the ideology of the privileged, powerful decision makers using education¹, and the process (of social relations reproduction) is present in virtually all segments of any society. Certain parts of the planet, certain areas, regions and countries represent places in which men are born, for centuries and centuries, whose place of birth certainly dictates at least one war conflict in their lifetime. Even though war is a universal phenomenon, which spares no corner of planet Earth², there are particular focal points, in all periods of human civilization, for which "war is especially interested in." As an example, the Balkans is a region which can be characterized as one of the focal points of war, for a long period of time now, as it lies on the Huntington's border line between different civilizations, and it never seems to avoid global conflicts, and thus can be viewed as a litmus test of the state of relations between great powers of the world. Men born into such circumstances unfortunately have large odds to find themselves in the middle of a war conflict, in some point in their lifetime, wearing the uniform of the country they were born in.

Who starts, and who fights wars?

It seems naïve, especially in the modern age of developed critical thought, to presume that war is merely a matter of choice of each and every individual man who takes part in it. The idea of just war is an idea which "lives" for centuries, occupies great minds and produces brilliant solutions, but still, it relates to a very small number of people, in the sense that a negligible percentage of humanity is involved in making the decision whether to start a war or not, i.e. whether the war which is being started is just or unjust. On the other hand, an enormous percentage of men fights the same wars started by the negligible

¹ "Education reproduces inequality, justifying privileges." Mike Haralambos, and R.M Heald, *Uvod u sociologiju*, (Zagreb: Globus, 1989), page 183.

² Besides physical nature, modern war can be fought in the virtual world, and the so-called *cyber-warfare* has become an indispensable segment of military strategies of all modern countries. Perhaps the expansion of the battle field to the orbit, other planets or the entire universe awaits the humankind in the distant, or not so distant future.

percentage of men. An issue arises – what decision is harder to make, from a human and moral standpoint, whether to start a war which will be fought by others, or to take a life of another in a war which someone else started?³ We must stop here, to stress that we only speak of modern war conflicts, because there were cases in history of glorious rulers losing their lives in wars they themselves started.⁴ Unlike the ancient times, in which the king, or the ruler, would personally lead his army to battle, sometimes charging in the first line⁵, it is unthinkable to see the prime minister, president, chancellor, or anyone who had any part in making the direct decision to start the war, on the battlefield in today's wars. A soldier, usually a young man, simply finds himself in a situation on the battlefield, a situation referred to as "him or me" situation, and at this moment, it is pointless for him to contemplate who and why started the war. Not only is it useless to wonder why the war started at this point, but it is also impossible for a soldier to exit the current situation, i.e. "inability to stop the war renders the participants, in a sense, captives of this reality."⁶ "Captured" in a war in the way described, the only thing a soldier can do, and be held responsible for it, is to lead the war justly, respecting the rules of conducting warfare, i.e. respecting *jus in bello*. The soldier himself, naturally, obeys the orders, which can often clearly break the rules of *jus in bello*, and here we have a point in which a soldier can, and must, choose the morally correct action, to refuse to perform brutalities. Tolstoy writes that "a soldier directly kills, cuts, burns, robs, and these actions are always ordered by those who are above him."⁷ It clearly follows that the ethical education of officers is of outmost importance for the conduct of the army in war, i.e. respecting the rules of conducting just warfare, especially because "the enlisted personnel have neither the intellectual skills nor the professional responsibility of the officer. They are specialist in the application of violence not the management of violence."⁸ Precisely for this reason a soldier must remain morally equal to the soldier against whom he is fighting, or applies violence, for in the case he is prescribed with the moral superiority, based on the fact that his side is waging a just war, he would be prone, or at least more prone, to obey the mentioned orders which

³ Truly, those who formally declare and start wars almost never personally fight in them, and it is hard to imagine that those men who are forced to directly kill in war are the same men who started it in the first place. There is also an obvious generational gap between those men who start, and those men who fight wars, or as the 30th President of The United States of America, Herbert Hoover put it – "*Older men declare war. But it is the youth that must fight and die.*"

⁴ Serbian history remembers prince Lazar Hrebeljanović, or Emperor Lazar, as a ruler who personally led the Serbian army, and lost his life, in the Battle of Kosovo (1389). His death significantly influenced the creation of the Battle of Kosovo cult in Serbian nation. Turkish sultan Murad was also killed in the said battle. No less than nine Roman emperors died in battles, as well as some of the most famous rulers in the history of mankind – Cyrus the Great, Leonidas, Richard I (Richard the Lionheart) and many others.

⁵ Alexander the Great (Alexander of Macedon) unquestionably is one of the greatest generals the world has ever seen. It is a known fact that Alexander personally fought in virtually all battles led by his army, and often time, in the first cavalry lines, he spearheaded the attacks and exposed himself to mortal danger. In the Battle of the Granicus, he avoided death only thanks to his friend Cleitus. "King's "Companions", the Hetairoi, were the most lethal cavalry... nominal commander was Parmenion's son Philotas, but Alexander himself led the charge." *Stari svet, Ilustrovana istorija sveta, I* (Beograd: Narodna knjiga, 1983), pages 167-8.

⁶ Jovan Babić, *Etika rata i „teorija pravednog rata“*, Projekat Rastko, <http://www.rastko.rs/cms/files/books/5651a09f8bdef>, (downloaded 6/20/2016), page 52.

⁷ Lav Tolstoj, *Rat i mir*, IV (Beograd: Prosveta, 1974), page 329.

⁸ Samuel P. Huntington, *The Soldier and The State* (Cambridge/London: Harvard University Press, 2000), pages 17-18.

obscenely neglect just warfare. However, we will have to leave the discussion regarding giving and obeying orders which disregard the *jus in bello* principle for some other time, simply because it is so utterly complex, that it deserves its own extensive research and paper. Perhaps the first thing we ought to do, is to explore and determine how exactly did the soldier find himself in the battle field, wearing a military uniform, fighting a war he didn't start and killing men he does not know, so that we could establish his moral responsibility in the given situation more reliably.

Soldier's Duty to Fight

Living in an organized state, which has its laws, and which enforces them across its territory, besides enjoying the security guaranteed by the state, which enables him to plan the future, a citizen also has certain responsibilities to his state. Like Hobbes says, by transferring from a natural state into the social state, every individual renounces some part of his natural rights, and transfers them onto the sovereign, so that he could enjoy "continual success."⁹ Declaration of war is one of the prerogatives of the sovereign, and this fact represents one of the corner stones and pivotal principles of the just war theory, i.e. that war can only be declared by a "competent authority", which is emphasized by virtually all philosophers in the tradition of deliberating just war – Thomas Aquinas^{10 11}, Hugo Grotius¹², Samuel Pufendorf¹³, Locke, Kant, etc. This means that the citizen transferred the right to declare war to his government, amongst other rights he transferred to the government, and in return, he received an opportunity for a relatively peaceful and predictable life, in a society governed by laws. This did not occur, meaning the transfer of rights to declare war to the state, solely so that the citizen would gain the mentioned peaceful life, but also because of what Jeff McMahan calls "the duty to defer to the epistemic authority of the government."¹⁴ A soldier, that is to say a citizen in peace time, accepts the fact that he simply isn't in the position to possess all relevant information, which would allow him to make the right decision about whether to take part in war or not. It seems clear that it is practically impossible, naïve and foolish to expect that every citizen should be familiarized with every single detail of high politics and the defense system, which has influence on making decisions of political and military establishment, especially in the modern states with the population of multiple million citizens. Even if the government attempted to explain the pros and cons of war to its citizens, it would render the decision impossible to make, and Victoria adds that "if the subject cannot serve in war except they are first satisfied of its justice, the state would fall into grave peril..."¹⁵ The danger is amplified, in the modern age of global technologies, by the fact that the population of a county preparing for war, or better to say for which war is prepared, can constantly be fed wrong, false and

⁹ Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 1998) page 41.

¹⁰ St. Thomas Aquinas, *Summa Theologica*, <http://www.ccel.org/ccel/aquinas/summa.html>, pages 1813-1814.

¹¹ Thomas Aquinas largely continues the thoughts of Aurelius Augustus

¹² Hugo Grotius, *The Rights of War and Peace* (Indiana: Liberty Fund, 2005) page 397.

¹³ Samuel Pufendorf, *The Whole Duty Of Man According to the Law of Nature* (Indiana: Liberty Fund, 2003) page 238.

¹⁴ Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009) page 66.

¹⁵ Francisco de Vitoria, *De Indis et de Jure Belli Relationes* ed. Ernest Nys, Washington D.C. 1917: On the Law of War, trans. John Pawley Bate, page 176, taken from Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), page 39.

malicious information, which encourage the alleged “pacifism”, but in reality are merely a segment of the special war, which represents a very cost effective style of warfare in modern age. In certain phases of special war, states and international institutions pressure a community, with the goal of “waiving aggressive intentions... by encouraging disobedience... compromising the military and defense system; discrediting the government, etc.”¹⁶ Accepting the decision of entering war, made by a “competent authority” is the duty of every citizen, and the only thing that makes accepting this decision any different from accepting any other government decision, is the complexity and moral specificity of war, as a state which suspends “normal life”, or to say, the laws which make life safe and predictable. As Walzer states, this discipline is not simply imposed, “it is also a discipline they accept, thinking that they have to for the sake of their families and their country.”¹⁷ The demand to risk one’s life is a legitimate demand of the state, and Walzer adds that “surely there has never been a more successful claimant of human life than the state.”¹⁸ Even if the citizen, in the state of war soldier, has doubts about justness of war, he must accept his epistemological limitations, and accept the possibility that “he merely *thinks* the war is unjust, but he *knows* he could be mistaken.”¹⁹ Besides the fact that an individual has a duty to his state to fight in the war it declares, state’s mechanisms, especially in war times, literally force citizens to answer the call to arms. Not only is the moral condemnation of the community present, for all those who avoid, or try to avoid their duty to fight, but there are also various legal measures which are used against the mentioned citizens, which vary from state to state. Even though they differ, they all have one thing in common, they are always drastic, and summarily executed, i.e. in court martial. The fact that a citizen may not agree with the decision his government made, does not grant him the permission to simply refuse to obey it, much like he is not allowed to simply chose not to obey other government decisions, like paying taxes, or respecting traffic rules. Some authors go to the extreme of proposing the introduction of death penalty²⁰ for anyone who chooses to refuse military service, or even suggesting suicide²¹ to those who are convinced that they ought not take part in their state’s war conflict.

Soldiers, not Criminals

Now, when we demonstrated how the soldier wound up on the battle field in the first place, face to face with the soldier on the opposite side, it is redundant to ask if the two of them are morally equal. These soldiers took no part in starting the war, nor have they

¹⁶ Ljubomir Stajić, *Osnovi bezbednosti* (Beograd: Policijska akademija, 2004) pages 231, 233 and 241.

¹⁷ Walzer, *Just and Unjust Wars*, page 35.

¹⁸ Michael Walzer, *Obligations – Essays on Disobedience, War and Citizenship* (Cambridge: Harvard University Press, 1970) page 77.

¹⁹ Dan Zupsek, “A Presumption of the Moral Equality of Combatants: A Citizen-Soldier’s Perspective” in *Just and Unjust Warriors*, David Rodin and Henry Shue, (Oxford: Oxford University Press, 2008), page 224.

²⁰ C.D Broad, “Ought we to fight for our country in the next war?” *Hibbert Journal*, 1936, Volume XXXIV, April, reprinted in *Ethics and the History of Philosophy*, 1952. Reprinted in *Broad’s Critical Essays in Moral Philosophy*, ed. David R. Cheney (New York: Humanities Press, 1971), page. 7.

²¹ *Ibid.*

considered whether the attack, or defense, of their state meet the *jus ad bellum* conditions, nor are they to be held responsible for eventual unjustness of their side. Moreover, besides not being responsible, at no moment in time were they in a position to know with certainty, that their side's war is just or unjust. Based on the information they possess, they may have, and usually do have, an opinion or an assumption, but the reality of the situation is that, due to the propaganda activity of both sides, limited information, insufficient education and knowledge of the topic, and many other important factors, they simply cannot have a reliable notion whether they are on the just side or not. It is almost certain that a huge majority of soldiers, in all wars which have been waged in human history, thought that they were on the "right" side of the conflict, including soldiers who were on the opposite sides, fighting each other on the battlefield. Hence the only preoccupation of a soldier ought to be to justly wage the war which simply happened to him, which captured him, and which was predestined to him, simply due to the fact that he was born in a particular corner of the planet, at a particular age. The separation of *jus ad bellum* and *jus in bello*, within both the thesis of symmetry and the thesis of independence, derives not only and exclusively from the fact that men who are affected by the second (soldiers) have nothing to do with the first, but also from the implications which their "merging" would create. If we were to tie the behavior of a soldier in war, i.e. justness and righteousness of the manner he fights in war, to the justness of the war itself, on which he did not have any influence whatsoever, we would find ourselves in a situation in which all acts of a soldier fighting for the side which is perceived as unjust, would be unjust. This would lead to an absurd situation, in which a soldier who is forced to fight in a war, has no right to defend his own life, if he is attacked by the soldier on the opposite side of the battlefield, who is fighting on the just side, simply because his self-defense would then be considered unjust violence! This makes David Rodin's view that moral asymmetry of *jus in bello* is only "half true"²² even more astonishing, as well as Jeff McMahan's claim that Wolzer's theory of independence of *jus ad bellum* and *jus in bello* is false, and that the justness of fighting in a war directly depends on the justness of the war itself.

Let us then imagine a soldier fighting for his state, which is waging an unjust war, who was placed in the described "him or me" situation on the battlefield, thanks to his state's and army's mechanisms of coercion. If we consider his every action to be unjust, simply because his side is unjust,²³ then it follows that he has no right whatsoever neither to open, nor to return fire. There is a famous analogy with the police officer and criminal who has no right to return fire, if the police are firing shots at him. Still, neither one of these imaginary soldiers, who are on opposite sides, is the police, nor is he in a police action against a criminal, but rather in war conflict against a soldier with equal moral and legal rights. Criminalization of one side, which is achieved by joining *jus ad bellum* and *jus in bello*, would produce a situation in which "our enemies are denied the right to defend themselves,

²² David Rodin, "The Moral Inequality of Soldiers: Why Jus in Bello Asymmetry is Half Right", in *Just and Unjust Warriors*, David Rodin and Henry Shue, (Oxford: Oxford University Press, 2008) page 68.

²³ This raises a serious issue, would this imply the establishment of some kind of a global, universal moral, which would determine who is just and who is unjust, at the very beginning of the war? This moral would negate different moral systems, because what one society considers moral, may be considered immoral by another society. Moreover, often times belligerents in a conflict have completely different ethical standpoints of certain pivotal sticking points.

and war is equated with police action against something wrong, illegal and evil.²⁴ There is a lot of symbolism in how official Croatia refers to the operations “Oluja” (Storm) and “Bljesak” (Flash) – military-police actions. However, when it comes to civil wars, or perhaps better to say internal conflicts,²⁵ it is an extremely difficult and thankless task to provide any final conclusions regarding *jus ad bellum* and *jus in bello*.

Can it even be possible for a state to accuse another state of illegal actions, when there is no applicable law, no common authority, no sovereign recognized by both states, in the sense of global government, which would be capable of punishing a state, or authorizing another to conduct a punitive war? After finishing this “war”, and the question stands whether to call this police-action-like conflict a war, all the soldiers who fought for their country, the state which would be dubbed unjust by the global authority, would have to be treated as common criminals, and accordingly convicted of their crimes. This would practically mean indicting all the soldiers on the defeated side for the acts of murder, attempted murder, kidnaping and various other crimes. A permanent and sustainable peace is unthinkable in this scenario, where one side of the conflict would be criminalized to such extent that all the “criminals”, or soldiers of the defeated side, would be imprisoned in jails. From this follows that the war would be impossible to end in any other way than with the triumph of the just side over the criminals, as it seems unimaginable that criminals could secure a permanent victory over the police! Even the formulation “police victory” seems a bit clumsy and misfortunate, because the task of the police is to enable the criminals to be punished, not to triumph, and an even more misfortunate formulation would then be derived from the notion of a war against criminals – “punitive war.”²⁶ Hence the necessity of separating *jus ad bellum* and *jus in bello* lies not only in enabling the fair treatment of all soldiers in a conflict, it also represents a *condicio sine qua non* of a permanent, sustainable peace, simply because a peace can be achieved with quondam war enemies, but never with a state of criminals.

Conclusion

The existence of moral symmetry of soldiers in a war conflict is absolutely necessary, i.e. the separation of *jus ad bellum* and *jus in bello*, which is also supported by the classical law of war, for it “postulates equality of the belligerents and hence bilateral, non-

²⁴ Jovan Babić, *Teorija pravednog rata i moralni status neizvesnosti njegovog ishoda*, Projekat Rastko, <http://www.rastko.rs/filosofija/rat-i-mir/delo/14130> (downloaded on 5/11/2016)

²⁵ Due to the complexity and layered character of civil wars and conflicts within a state, it is difficult to pinpoint and determine the exact form, or type of political violence in play. Whether something is a rebellion, unrest, war, terrorism, guerrilla, subversion, repression, retaliation or some other form of political science, recognized by political science, can be very hard to define, especially because these forms of political violence tend to mix, transform from one to another, etc. This naturally has tremendous implications on how the violence is dealt with, particularly so in the sense of acceptable moral actions and measures, because there is significant difference in the treatment of enemy soldier, terrorist, rebel or murderer. The doctrine of causing low intensity conflicts, which is heavily in use by today’s superpowers, as well as asymmetric conflicts, further deepen the problem, and dim the already vague lines of differentiation between various forms of political violence even more.

²⁶ Sharon Anderson-Gold, “Kant and the unjust enemy: Lessons for our war on terrorism”, *Filozofski godišnjak*, 2010, 23: page 254.

discriminatory application of the *jus in bello*, without any reference to the merits of the conflict.”²⁷ The stated arguments for moral equality of soldiers would allow for an unimpeded judging of just warfare, i.e. respecting of *jus in bello* by both belligerents. For it is certain that the abolition of moral right of the opposing side, regardless of its name, in the war between two sovereign states,²⁸ could potentially lead to the encouragement of soldiers on the “just side” to cross the limits of just warfare, or to enjoy “*in bello* privileges”²⁹, for they are now not fighting against enemy soldiers, but against an army of criminals. Even Waltzer’s³⁰ “back-to-the-wall”³¹ argument, or “supreme emergency” in situations in which the entire civilization is in danger, suspends *jus in bello*, so it seems problematic to answer whether only the just side can invoke the argument of supreme emergency,³² because it is difficult to imagine that the unjust side has to react in such a way to protect the civilization. Statman’s *Continuum thesis* “undermines the Separation Thesis, according to which *jus in bello* is separate from *jus ad bellum*.”³³ It is also interesting to wonder, how would a soldier react if he knew that he was perceived as unjust, almost as a criminal, and whether this would lead to him granting himself the mentioned *in bello* privileges, because if he is a criminal, if he will be judged as one, why not use criminal methods? War is a hell in which men express all the best and worst characteristics, and “the most sublime place to express all the value of ethics of life and the most dangerous place where the life of ethics can forever perish.”³⁴ Not only would merging or joining *jus ad bellum* and *jus in bello* cause such consequences, but it would also significantly hinder the prospect of achieving a just peace, and “an unjust peace will always produce new causes for war.”³⁵ And in every future war, a soldier will play the pivotal role, regardless of how much we strive to robotize war, and the conflicts will grow increasingly complex to morally judge. “Judging by the experience of the last two decades, the visions of long-range, computerized, high-tech warfare so dear to the military-industrial complex will never come to pass. Armed conflict will be waged by men on earth, not robots in space.”³⁶ Finally, the mentioned men, tens of millions of them, who were born, for which they have no responsibility, in an “unjust” and “criminal” state, would then be destined to become unjust soldiers, criminals, felons and murderers, simply by being involved in a war of the country of their birth. This is, unfortunately, a cruel reality for many former, present and future soldiers who come from the countries in “modern war hotspots.”

²⁷ Peter Haggemacher, “Just War and Regular War in Sixteenth Century Spanish Doctrine”, *International Review of the Red Cross*, 1992,32, Special Issue 290: pages 441-442.

²⁸ In this paper we have limited ourselves to scrutinizing the concept of war as the conflict of two sovereign states, while other forms of conflict deserve somewhat different view and interpretation of the equality of participants in them.

²⁹ David Rodin, “The Moral Inequality of Soldiers: Why Jus in Bello Asymmetry is Half Right”, in *Just and Unjust Warriors*, David Rodin and Henry Shue, (Oxford: Oxford University Press, 2008), page 54.

³⁰ Walzer is one of the most prominent advocates of separation of *jus ad bellum* and *jus in bello*

³¹ Walzer, *Just and Unjust Wars*, page 252.

³² Walzer devised the term *supreme emergency*

³³ Daniel Statman, “Supreme Emergencies and the continuum problem”, *Filozofski godišnjak*, 2010, 23: page 88.

³⁴ Ilija Kajtez, *Mudrost i mač*, (Beograd: Medija centar Odbrana, 2012), page 606.

³⁵ Babić, *Etika rata i „teorija pravednog rata“*, page 35.

³⁶ Martin Van Creveld, *Transformation of War*, (New York: Free Press, 1991), page 208.

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