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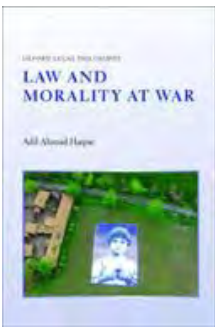
BOOK REVIEW



Law and Morality at War

Adil Ahmad Haque*

Book review by Lisa Hecht, Postdoctoral Researcher at the Department of Philosophy, Stockholm University.

Over the last decade, the philosophical study of war has turned into a flourishing research area. The ongoing debate on the morality of war challenges some widely accepted claims about how wars can be fought justly.[1] Notably, some scholars raise challenges to concepts like the equality of belligerents and civilian immunity, suggesting that there might be a large gap between law and morality. Insofar as international humanitarian law (IHL), also known as the law of armed conflict, is concerned, civilian immunity from direct attack applies equally to just and unjust combatants. However, IHL does not consider the moral considerations guiding just conduct in war. We need to know whether this omission is justified, or whether the law needs to change to better map onto morality.

Adil Ahmad Haque's book, *Law and Morality at War*, takes up this important question. Well-versed in both the philosophical and legal debates, Haque offers an insightful interpretation and critique of IHL. He argues that the law should enable those who adhere to it to better conform to their moral obligations not to kill unjustly. One problem with the current state of the law is the vagueness of some parts of IHL, which makes it difficult for combatants to know what their moral obligations are. Haque seeks to amend this by suggesting refinements of the law that build on moral principles.

Following the general trend in the ethics of war scholarship, Haque puts individual moral rights and duties at the centre of his philosophical thinking about war. He is committed to the doctrine of reductivism, which holds that "the moral norms governing violence in war are the same as the moral norms

* Published by Oxford University Press, Oxford, 2017.

governing violence outside of war".[2] According to Haque and other reductive individualists, the use of violence is permissible only in defence of individual rights. Based on his line of reasoning, individuals can lose their rights and become subject to defensive harm if they are responsible for an unjust threat of harm. This explains the permissibility of individual self-defence as well as the morally permissible use of force in war, and provides the basis from which the arguments in the book proceed.

However, a commitment to reductive individualism is at odds with the symmetrical application of the legal rules governing the conduct of hostilities. While the *in bello* laws apply equally to all sides of a conflict, reductive individualists like Jeff McMahan, Helen Frowe and Cécile Fabre argue that, by and large, only combatants fighting a just war can fight justly. In this view, the principles of necessity and proportionality that constrain defensive harm make sense only for those pursuing just ends. Hence, unjust combatants cannot be moral equals of just combatants. In contrast, IHL accepts the legal equality of combatants: armed forces have the right to participate directly in hostilities irrespective of the party for which they fight.[3] Furthermore, IHL "provides [lawful] combatants [belonging to all parties to the conflict] with immunity from domestic prosecution for acts which, although in accordance with IHL, may constitute crimes under the national criminal law of the parties to the conflict".[4]

Haque's defence of the symmetrical application of *in bello* rules rests on the service view of law. According to this view, the law "provides a service to moral agents by helping them to conform to their moral obligations better than they could on their own".[5] The law thus serves a valuable function in helping combatants on the unjust side to act less wrongfully, and in helping combatants on the just side to fight in accordance with their moral obligations. Crucially, it does this by imposing symmetrical rules. IHL is therefore not in need of substantial revision, even if reductive individualism is correct.

Haque's elaborations show that the law and morality are not in conflict. He explains how, contrary to a widespread misconception among philosophers,[6] the law does not grant combatants equal permission to kill. Rather, the law should more plausibly be read as granting equal immunity from prosecution to

1 Among them Jeff McMahan, *Killing in War*, Oxford University Press, Oxford, 2008; Cécile Fabre, *Cosmopolitan War*, Oxford University Press, Oxford, 2012; Helen Frowe, *Defensive Killing*, Oxford University Press, Oxford, 2014.

2 *Law and Morality at War*, p. 9.

3 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 43(2).

4 Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Law*, ICRC, Geneva, 2009, p. 83.

5 *Law and Morality at War*, p. 44.

6 McMahan, for example, interprets international law as permitting combatants to kill irrespective of the side they fight for. He writes: "This idea [that no one does wrong, or acts impermissibly, merely by fighting in a war that turns out to be unjust] lies at the core of the reigning theory of the just war and also informs the international law of war." J. McMahan, above note 1, p. 3.

combatants who fight in accordance with the rules of law.[7] This does not imply a permission to target opposing combatants. Thus, the symmetrical application of the rules governing the conduct of hostilities does not expose a deep disagreement between law and morality.

Having defended this view of the relationship between law and morality, Haque then spells out how law and rules of engagement can be refined in order to fulfil their service. Three chapters of the book are devoted to the legal and moral status of civilians (Chapter 3), combatants (Chapter 4) and human shields (Chapter 9). The third chapter, as well as the book's appendix, are particularly relevant for those interested in philosophical challenges to civilian immunity from targeted attack. Here, Haque defends the principle of civilian immunity on deep moral grounds. For practical purposes, the book is at its most valuable when offering refinements of the principles of distinction (Chapter 5), discrimination (Chapter 6), precaution (Chapter 7) and proportionality (Chapter 8). Here, Haque shows how deontological moral principles can help to make the sometimes vague formulations of legal principles more precise. For example, he invokes the moral asymmetry of *doing* and *allowing*, in order to defend the view that attacking forces may not forgo precautions and increase the risk of harm to civilians in order to expose themselves to a lesser risk of harm.

The legal standards that emerge from Haque's discussion are often more specific and more demanding than what is currently required by the law. Take the principle of distinction as an example. The law currently offers little guidance on the level of certainty that is required to lawfully attack a person and, as Haque argues, previous proposals of scholars and practitioners are either too permissive or too restrictive. As an alternative, Haque develops a deontological targeting approach. Individuals should be presumed to be civilians – and so immune to attack – unless there is *decisive reason* to believe an individual is a combatant. Only if there is a decisive reason may one consider whether killing the individual will prevent substantially greater expectable harm to others.[8] This approach respects the moral status of the targeted individual as a rights-holder who may be targeted only if the attacker believes she has lost those rights. Haque's approach to targeting thereby accounts for the importance that deontological moral theory assigns to rights and the notion of respect. It also allows a balancing of the expected costs and benefits of the action once there is a decisive reason to believe an individual is a lawful target.

In the book's closing chapter, Haque turns to the prosecution and punishment of war crimes. He lays out the discrepancies between IHL and the Rome Statute of the International Criminal Court (ICC), and makes suggestions as to how these discrepancies could be minimized. As Haque shows, some violations of IHL are not criminalized by the provisions of the Rome Statute and so cannot be prosecuted by the ICC.[9] Prohibiting only intentional attacks against

7 *Law and Morality at War*, pp. 23–30.
8 *Ibid.*, p. 136.
9 *Ibid.*, p. 237.

civilians, the Rome Statute could, for example, be read as not allowing the ICC to enforce the principle of distinction, since this principle is concerned with reckless, non-intentional endangering of civilians; Haque suggests that the mental elements of various war crimes should be expanded to include recklessness.[10]

With this detailed and comprehensive treatment of the central principles of IHL, Haque makes a valuable contribution to legal philosophy – but this is not all. Throughout the book, Haque competently moves between discussing deep moral principles and offering tangible suggestions for the improvement of law and rules of engagement. This makes the book as relevant for philosophers as for legal theorists and practitioners. While practitioners are offered concrete proposals for how to reform IHL, philosophers are presented with interesting arguments that invite further debate. In addition to his defence of civilian immunity, Haque's discussion of the permissibility of killing human shields and of actions under uncertainty are of high philosophical interest. Haque introduces new arguments and original ideas that are worthy of critical engagement. In what follows, I will discuss one such issue, namely civilian immunity.

Closing the book, Haque cautions that "[j]ust war theory must not become a forum for devising ingenious arguments seeking to show that intentionally killing defenceless civilians, though always unlawful, is often morally permissible".[11] Though in agreement with Haque on the importance of protecting civilians, I want to raise a critical point about his defence of civilian immunity from direct attack. This is not devastating to Haque's argument in support of civilian immunity; it does, however, show that Haque's defence of civilian immunity is not entirely invulnerable. But only if we find convincing answers to challenges such as the one I will raise below will we succeed in convincing sceptics among just war theorists that the principle of civilian immunity is a moral principle and not just a legal one. Otherwise, the principle will continue to invite attacks from "ingenious arguments".

According to Haque, the principle of civilian immunity can be based on the fact that most civilians make only superfluous contributions to the threats of unjust harm that combatants pose.[12] Individuals lose their protection and become liable to lethal defensive harm only if they unjustly threaten to kill or seriously injure innocent people or "are sufficiently responsible for similar unjust threats posed by others".[13] However, Haque argues that few civilians are sufficiently responsible for unjust threats – that is, for threats that innocent people have a right not to be subjected to. He writes that "the vast majority of contributing civilians make no one worse off through their individual political, material, strategic, and financial contributions to their governments and armed forces".[14] Presumably, this is because their contributions are small, because the outcome is already overdetermined or because individuals can be easily replaced if they do not contribute. The duty to

10 *Ibid.*, p. 251.
11 *Ibid.*, p. 270.
12 *Ibid.*, pp. 68, 268–269.
13 *Ibid.*, p. 9.
14 *Ibid.*, p. 68.

abstain from making such contributions is not very stringent and cannot be enforced with lethal force.[15] Haque admits that the aggregate of civilian contributions enables combatants to pose threats, but even so, he argues, we lose our rights by our own actions, not by the independent actions of others.[16] Therefore, voting, paying taxes and even working in a weapons factory does not make civilians morally or lawfully liable to be killed, even if these activities might collectively enable a threat of unjust harm.

Some civilians lose their immunity, namely those who directly participate in hostilities and those who enable unjust threats by making individually necessary contributions. Those who directly participate in hostilities will lose their protection if they directly threaten to harm innocent people and/or if they attack members of the armed forces, who are not "innocent" *per se*. With respect to civilians making necessary contributions to threats of unjust harm, Haque argues that while the duty not to enable is "different and less stringent than the duty not to kill",[17] it is still stringent enough that the contributors are "morally required to die rather than enable others to kill many innocent people".[18] Thus, a civilian's liability varies with the kind of contribution she makes.

However, the distinction between civilians making necessary, versus superfluous, contributions is less clear than Haque suggests. The distinction rests on the idea that superfluous contributions are less morally problematic than necessary contributions. This seems morally suspect – sometimes very serious harm is brought about by many small and individually superfluous acts taken together. Therefore, it is worth asking whether by making a superfluous contribution, one does indeed escape moral responsibility.

To understand this, consider the following: the government holds an election on whether to fight an unjust war. An absolute majority of the people has to vote in favour. As it happens, it's a close call and one vote makes a difference. One vote less and the election would have been lost, sparing the lives of many innocent victims. Everyone voting in favour is now an enabler – they make a necessary contribution to bringing a threat about.

The moral evaluation of contributions changes once a certain threshold is passed. It takes a few more people voting in favour and the outcome is overdetermined, thereby making any one vote a superfluous contribution to the outcome. In the overdetermined election, more people perform the same act, which they would have a very stringent duty not to perform were each action necessary for the outcome. Yet, while people have a stringent duty not to make necessary contributions to a threat, they only have a rather weak duty not to make superfluous contributions.

Inevitably, among those who make superfluous contributions are many sets of people who are necessary to bring about the outcome. Thus, it seems

15 *Ibid.*, p. 78.
16 *Ibid.*, p. 77.
17 *Ibid.*, p. 74.
18 *Ibid.*, p. 75.

counterintuitive that one could escape responsibility because more than enough people do what they should not do. How to assign responsibility in such cases remains a deep philosophical puzzle, and not everyone agrees with Haque's view that individuals can escape responsibility for superfluous contributions. The philosopher Derek Parfit, for example, suggests the following principle as a solution to overdetermination cases: "Even if an act harms no one, this act may be wrong because it is one of a *set* of acts that *together* harm other people."[19] Parfit's principle is similar to the necessary element of a sufficient set (NESS) test,[20] which could be extended to explain liability in cases of overdetermined outcomes. In small-scale overdetermination cases, the NESS test does have more intuitive appeal than testing for the difference that the single contributions make. For example, if the decision to fight an unjust war requires a majority of a small committee to vote in favour, then the outcome is overdetermined when four out of five members vote in favour of going to war. No single vote contributes to the future victims of war being worse off. Instead of letting the committee members off the hook, it seems more appropriate to hold all four responsible for the outcome. Though no one individually is necessary for the overall outcome, each of them is a necessary element of a *subset* which is sufficient for the outcome. If we find this the more plausible approach to determining responsibility in small-scale overdetermination cases, it is unclear why it should not equally apply in large-scale overdetermination cases such as we find in the war context. This approach implies that superfluous contributors have the same moral status as those making a necessary contribution.

Even if one remains unconvinced that the NESS test is a good solution to overdetermination cases, there is further reason to think that the duty not to make superfluous contributions is more stringent than Haque suggests. The duty not to make superfluous contributions might be rather stringent because there is often at least a slight chance that one's contribution will make a major difference.[21] For example, though unlikely, a single vote could be decisive, as in the hypothetical case given above, or there might not be an easy substitute for the worker in the weapons factory. Given the expected disutility of potentially making many people worse off, a civilian might be under a strict duty not to perform these acts even if the chances are very low that she would indeed make a difference. Such a probabilistic approach to difference-making might not imply liability to be killed, but again, it could make a superfluous contributor more similar to a necessary contributor. The costs they are required to bear might be higher than Haque suggests.

19 Derek Parfit, *Reasons and Persons*, Oxford University Press, Oxford, 1984, p. 70.

20 For formulation and discussion of the NESS condition, see Richard W. Wright, "Causation in Tort Law", *California Law Review*, Vol. 73, No. 6, 1985, p. 1790.

21 For such proposals, see, for example, Shelly Kagan, "Do I Make a Difference?", *Philosophy &Public Affairs*, Vol. 39, No. 2, 2011; Julia Nefsky, "How You Can Help, Without Making a Difference", *Philosophical Studies*, Vol. 174, No. 11, 2017; Christian Barry and Gerhard Øverland, "Individual Responsibility for Carbon Emissions: Is there Anything Wrong with Overdetermining Harm?", in Jeremy Moss (ed.), *Climate Change and Justice*, Cambridge University Press, Cambridge, 2015.

Although one could raise this issue and some other philosophical worries about the arguments in the book, Haque undeniably rests his case on firm grounds. He succeeds in making apparent the moral underpinnings of the law, and where clarity in the law is missing, he calls on morality to offer guidance. Thus, despite the suggestive title, the reader learns that law and morality need not be at war but can be brought into conversation geared towards mutual benefit. *Law and Morality at War* is therefore of great importance to scholars of international law as well as ethics.