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War, Reciprocity and the Moral Equality of Combatants

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Abstract

In this article I address differences between myself and Uwe Steinhoff in relation to the moral principle of reciprocity and its implications for the doctrine of the moral equality of combatants. Whereas I agree with Steinhoff that there is a principle of reciprocity in play in war, contra Steinhoff, I suggest that this principle and, indeed, moral principles of reciprocity more generally, are particularist principles, although if conventionalised or given legal status they can assume a generalised form. Moreover, I also hold that there is a moral difference between those fighting a just war and those fighting an unjust war and this difference, taken in conjunction with the moral equality of combatants doctrine, generates a degree of moral complexity that seems to have gone unrecognised by Steinhoff (and, for that matter, by the two dominant schools of thought in this area, revisionists and Walzerians).

In his *The Ethics of War and the Force of Law* (Routledge, 2021), Uwe Steinhoff argues against what he terms, moral foundationalism, and in doing so makes use of a general principle of reciprocity. Moral foundationalism is a view Steinhoff ascribes to so-called revisionist just war theorists and, more specifically, reductive individualists, notably McMahan (2008 and, 2009) and his followers. Roughly speaking, moral foundationalism is “the view that the moral rules governing the use of force in war are the same as the moral rules governing the use of force in peacetime” (Steinhoff, 2021: 216). Naturally, the moral foundationalist can point to differences in the (so to speak) non-moral facts, such as the scale and complexity of conflict, to justify the differences in the response between, say, someone engaged in personal self-defence

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in peacetime and soldiers engaged in battle in a war zone. However, according to the moral foundationalist the moral rules remain unchanged.

By contrast, according to Steinhoff, “on the basis of a principle of *reciprocity*, widely accepted laws and conventions of war are partly constitutive of the *moral* rules that apply in a conflict” (Steinhoff, 2021: 2016). As a result, moral rules can differ from one armed conflict to another and moral rules in war are quite different from the moral rules governing personal self-defence in domestic settings in peace-time.

Steinhoff combines his rejection of moral fundamentalism with a rejection of “the idea that there is a “war justification” *sui generis*” (Steinhoff, 2021: 214). He argues that the same *kind of justifications* (e.g., self-defence, lesser evil justification) that apply to the use of force in peacetime also apply to the use of force in war but that, nevertheless, these justifications do not have the same *scopes and limits* in war that they have in peacetime.

I am in broad agreement with Steinhoff on these issues. Indeed, elsewhere I have argued that the general view characterised by Steinhoff as a species of moral fundamentalism is not sustainable (Miller, 2016a: Ch. 3; Miller, 2016b, 2017a); see also Skerker (2020) and that institutional arrangements, (e.g., the institutional role of police officer and of combatant), can make a constitutive difference to the moral norms in play (Miller, 2010, 2016a: Chs. 4 & 6; Miller, 2017b); Miller and Blackler (2005): Chs. 1 & 3). I have also argued that principles of reciprocity can make a difference to moral norms, including in war (Miller, 2016b, 2021). In addition, I have argued that there are multiple different moral principles of necessity, proportionality and discrimination (e.g., in personal self-defence, policing and in war (respectively), and that these differences are reflective in part of differences in institutional roles (and, hence, not simply reflective of non-moral differences of scale and complexity (Miller, 2017a, 2021).

On the other hand, there do seem to be some important differences between Steinhoff and myself on some aspects of these issues. Here I will content myself with addressing differences in relation to the principle of reciprocity and its implications for the doctrine of the moral equality of combatants.

Whereas I agree with Steinhoff that there is a principle of reciprocity in play in war, contra Steinhoff, I suggest that this principle and, indeed, moral principles of reciprocity more generally, are particularist principles, although if conventionalised or given legal status they can assume a generalised form (see below). A salient example of this is a suitably qualified moral equality of combatants principle. In my view, combatants fighting a just war are not morally equal to their enemy combatants fighting an unjust war. However, there is a moral equality of sorts among many combatants and their enemies, namely, as a result of a particularist moral principle of reciprocity (which principle exists in a conventionalised or legalised form referred to as the moral equality of combatants). Once hostilities are underway, the default conventional or legal principle of reciprocity in play is that it is permissible for each combatant to shoot to kill on sight any enemy combatant. As I said in Miller (2016a): 174): “Other things being equal, it is morally permissible for military combatants (say, members of A) to deliberately use lethal force against enemy combatants (members of B) in circumstances in which these enemy combatants are deliberately using lethal force against them”; and (at Miller (2016a): 175): “In short, regular soldiers

have an institutionally based, *prima facie* (special) moral right to use lethal force against enemy combatants in a theater of war, and they have that *prima facie* moral right even if they are fighting an unjust war”.

However, *contra* Steinhoff (if I have understood him correctly), I hold that there is a moral difference between those fighting a just war and those fighting an unjust war and this difference, taken in conjunction with the moral equality of combatants doctrine, generates a degree of moral complexity that seems to have gone unrecognised by Steinhoff (and, for that matter, by the two dominant schools of thought in this area, namely revisionists, such as McMahan, and the followers of Michael Walzer (Walzer, 1977). Consider in this connection the case of those combatants *knowingly* fighting an *egregiously* unjust war (while, nevertheless, complying with the *ius in bello* requirements). In some cases these moral (as opposed to pragmatic) considerations might override the principle of the moral equality of combatants. That said, if those fighting an unjust war know that they are fighting an unjust war (as opposed to, say, believing falsely that it is just) then they *might* still have an excuse - by virtue of the principle of reciprocity - for shooting enemy combatants notwithstanding that they know these enemy combatants are fighting a just war (and that they themselves are fighting an unjust one).

Importantly, again *contra* Steinhoff (again, if I have understood him correctly), I do not hold that this principle of reciprocity (underpinning in part the doctrine of the moral equality of combatants), once accepted by would-be combatants, has the effect that they *forfeit* their right to life or that their right to life is otherwise extinguished (at least *vis-à-vis* enemy combatants). They retain their right to life (a natural, as opposed to institutional, right) and, relatedly, right not to be killed (both are so-called claim rights), most notably with respect to those not involved in the war, but also (and it is here that my difference with Steinhoff emerges) with respect to enemy combatants. Rather my view is that the principle of reciprocity (taken in conjunction with other moral considerations) generates a special moral right to use lethal force against enemy combatants under certain conditions (e.g., in theatres of war, in accordance with lawful directives, refraining from the use of certain banned weapons, for the purpose of winning the war). This right is an institutional *and* moral, liberty right which *overrides* the prior natural moral right of those individuals (who are now combatants waging war) not to be killed by those individuals who are now their enemy combatants. In short, each combatant waging war has a special moral right to kill their enemy combatants under certain conditions and (other things being equal) this right overrides the prior natural moral right of their enemy combatants not to be killed.

The principle of reciprocity in play does not have the effect of forfeiting (or otherwise extinguishing) the (natural) moral right to life (or right not to be killed) of enemy combatants. The reason for this is that it is applicable in circumstances in which intentionally killing enemy combatants is a practical necessity. Once engaged in war, combatants kill enemy combatants because it is practically necessary to do so, given their enemy combatants are trying to kill them (and are likely to succeed absent

a lethal response or credible threat thereof).¹ In my view (the Fault-based Internalist Suspended Rights-based Theory or FIST) elaborated elsewhere (Miller, 1993; Miller 2016a: Ch. 2), at least in the cases of interest to us here, combatants do not forfeit (or, at least, suspend) their right to life (or right not to be killed) unless they meet the following condition (Miller, 2016a: 71): they do not reasonably believe that they have a good and decisive moral justification (e.g. self-defence) for killing enemy combatants in a theatre of war. If someone reasonably believes that they have a good and decisive moral justification for killing enemy combatants in a theatre of war – and this justification is action-guiding – then they have not forfeited (or suspended) their right to life (or right not to be killed) since they are insufficiently culpable (according to FIST).

Note that FIST embodies a *particularist* moral principle of reciprocity in that if a person, A, culpably launches a lethal attack against another person, B, and the attack will succeed absent B's intervention (or that of a third party, C) then A loses his right not to be killed by B, even if it is not necessary for B to kill A. (Steinhoff agrees with me on this first point.) However, A does not lose his right not to be killed by C. (Steinhoff disagrees with me on this second point.) By analogy, the *moral* principle of reciprocity governing combatants waging war is a particularist moral principle, although the conventional or legal doctrine of the moral equality of combatants which it underpins is not particularist in this sense. The *moral* principle of reciprocity governing combatants waging war is particularist in that, for instance, *by virtue of this principle* a combatant might not have a moral right to kill an armed, uniformed, enemy combatant who will not in fact kill him (even if the combatant has a *prima facie* special moral right to do so). This seems to be another point of difference between myself and Steinhoff (see below for further discussion).

Note that notwithstanding this latter point this particularist moral principle of reciprocity is broadly consistent with, and indeed presupposed by, the above-mentioned institutionally based, *prima facie*, special moral right of combatants to use lethal force against enemy combatants in a theatre of war. Note also that this special moral right of a combatant is a *prima facie* right that might be overridden in particular cases, e.g., cases such as that just mentioned of an armed, uniformed, enemy combatant who will not in fact kill the combatant in circumstances in which this fact is known to the combatant. However, it should also be pointed out that there are potentially still further moral considerations in play that would provide moral weight in favour of the exercise of the *prima facie* special moral right of a combatant to kill enemy combatants, even in circumstances in which the combatant knows that the enemy combatants will not in fact kill him. For instance, the enemy combatants might be vastly superior in number and, therefore, a policy of degrading their force is necessary. If so, and supposing it is not possible to take enemy combatants as prisoners at this time, then it may be morally justified to ambush and kill them, notwithstanding that these enemy combatants do not pose a lethal threat (at this time).

¹ Naturally, there might be some combatants who are not in fact trying to kill enemy combatants and thus do not in fact pose a threat; however, combatants cannot be expected to know who these *de facto* non-combatants are, given they are armed and in uniform. See below for further discussion on this point.

Doubtless, those fighting an unjust war should not have embarked on this course of action and, indeed, they should sue for peace. Hence the moral complexity surrounding the doctrine of the moral equality of combatants. However, war is a joint activity (Miller, 2016a: Ch. 6), and a single combatant cannot by his actions alone bring about the cessation of hostilities. Moreover, as argued elsewhere (Miller, 2016a: 173), combatants of liberal democracies are not only legally but also (*pro tanto*) morally required to obey a lawful directive of their military commanders and, ultimately, their legitimate political leaders to wage war. This is not to say that they have transferred their natural right to decide whether or not to use lethal force. Rather their decision to wage war by joining or remaining in the armed forces constitutes the waiving of that natural right. Nor is it necessarily reasonable to expect a single combatant to abandon his own shoot to kill on sight policy in a war zone, given the enemy combatants have not abandoned theirs, even if they are fighting a just war and he is not. Of course, a single combatant may seek to extricate himself from fighting an unjust war by, for instance, personally surrendering when his unit has not surrendered. This is not necessarily a morally acceptable option, given it may have no effect on the war and may, in fact, be at unreasonably high cost to himself, e.g., he might be imprisoned or shot dead by the enemy or imprisoned or shot dead (as a deserter or coward) by his own forces for failure to comply with a (morally based) lawful directive (Miller, 2016a: 174).

Let us now turn to some specific points about Steinhoff's argument in so far as it is based on his example of psychotic-homicidal and non-psychotic drinkers of polluted water in a village (Steinhoff, 2021: 231-2). Something in the water causes many drinkers to become blue in the face and some drinkers to become psychotic, indeed, homicidal and, thereby, seek to kill anyone else they come across. All psychotics are blue in the face but only 50% of those who are blue in the face are psychotic. All psychotics will shoot to kill anyone on sight. However, 95% of non-psychotics have adopted a policy to shoot to kill on sight a person with a blue face for the reason that they know that 50% are homicidal and, hence, all blue-faced persons constitute a potential lethal threat (statistically speaking).

A preliminary point to be made here pertains to fairness. Contra Steinhoff, I don't treat you fairly (in the substantive sense of that term) merely because I treat you as I would have you treat me. Perhaps I steal from you but would not complain if you stole from me. I am consistent. But what if you wish to abide by a different principle; the principle of refraining from stealing. You are consistent if you do not steal from me and do not complain if I do not steal from you. Assume you are consistent. We are both consistent. But do we both act fairly? Is fairness mere consistency? There is a difference between us; stealing is morally wrong. I am rightly opposed to stealing and refuse to steal from you. Moreover, stealing could not be universalized on pain of the collapse of property rights; it is not a principle that *all* of us could consistently adhere to and, therefore, reasonably adopt. (This is one reason stealing is wrong.) Stealing fails the consistency test across individuals, i.e. at the collective level (so to speak). Arguably, in order for an act to be regarded as fair in the substantive sense, it has to meet both the individual and the collective consistency tests. At any rate, individual consistency is a very weak moral test and the fact that it is complied with does not count for much. The possibility of a complaint of unfairness (in the stronger

substantive, if not necessarily only correct, sense) remains. So this argument of Steinhoff does not demonstrate that Lou in abandoning the shoot to kill on sight policy in favour of the more stringent only shoot to kill imminent threats policy is not entitled to complain about Joe who does not choose to abandon the shoot to kill on sight policy. But let us return to the main point of Steinhoff's example.

According to Steinhoff, each of the non-psychotics forfeits his right to life in pursuing the shoot to kill on sight policy (Steinhoff, 2021: 234). But the shoot to kill on sight policy is based on practical necessity; that is, necessity understood in practical terms, such as that there is a 95% chance that any blue-faced person A encounters (say, B) will kill A unless A kills B first. If the policy is based on necessity (albeit practical necessity) then according to my own account described above, each does not forfeit his right to life. Rather each person's right to life is overridden by (in effect) the reciprocity principle. Moreover, it is only overridden by virtue of this principle in situations in which those they encounter will shoot to kill them on sight. Thus, if Lou would not shoot to kill Joe, unless Joe was an imminent threat (as opposed to shooting to kill Joe on sight) then Lou's right not to be killed is not overridden. Naturally, as Steinhoff points out, Joe would be disadvantaged relative to others (other than Lou) but this an entirely different consideration; it is not part of the principle of reciprocity which is particularist and pertains only (in this instance) to Joe.

Let us pursue this issue further. If Lou and Joe had *mutual knowledge*² that neither was psychotic-homicidal but rather that each was non-psychotic then it would not be necessary for either to shoot the other – and this would also be mutual knowledge. They could and, I suggest, should make an exception to their shoot to kill on sight policy. On the other hand, if one was non-psychotic but knew the other was psychotic, then the shoot to kill on sight policy should be complied with by the non-psychotic (and, of course, would be complied with by the psychotic). Accordingly, there is a difference between the non-psychotics and the homicidal psychotics with respect to the forfeiture (or suspension) of their respective rights to life (or rights not to be killed). The psychotics (let us assume) are morally culpable; they would shoot to kill on sight even if it was not necessary to do so. Accordingly, they do forfeit (or suspend) their right to life (or right not to be killed) in the circumstance that they know that Joe is a non-psychotic who wrongly believes that he and they mutually know that he and they are non-psychotics. More specifically, in this circumstance they do not reasonably believe that they have a good and decisive moral justification (e.g., self-defence) for killing Joe but they kill him anyway (or try to do so and would have succeeded absent his or someone else's intervention).

It might be responded to this that in the scenario as described by Steinhoff, neither Joe nor the psychotic know whether the other is a psychotic or not and, in any case, each has the same policy, namely, that of shooting to kill on sight. So, it might be argued, there is no relevant moral difference between Joe and psychotic at least in this circumstance. Rather the only difference is that the shoot to kill on sight policy of the psychotic is motivationally overdetermined; but this is a difference that makes no difference. Well it makes no difference to their actions in this circumstance. But

² A and B have mutual knowledge that p if A knows that p, B knows that p, A knows that B knows that p, B knows that A knows that p etc.

the question is whether it makes any difference to the forfeiture (or suspension) of the prior right of the psychotic not to be killed. I suggest that it does make a difference to the forfeiture question. For the justification based on the reciprocity principle is motivationally inert in the case of the psychotic; it is not an action-guiding justification. The psychotic adopts the shoot to kill on sight policy in order to kill as many of the villagers as possible; this is the psychotic's action-guiding justification. The psychotic would have that policy irrespective of whether the other villagers had the same policy or not. The psychotic did not adopt this policy, and has not continued with this policy, on the basis of adopting the justification provided by the principle of reciprocity. Therefore, the reciprocity based justification *qua action-guiding justification* is not available to the psychotic for his or her actions. I conclude that the psychotic forfeits (or suspends) their right not to be killed and does so by virtue of their action-guiding justification, i.e., their only action-guiding justification, namely, to kill as many villagers as possible. This latter action-guiding justification renders their actions very seriously morally culpable and, as a result (and consistent with FIST), they forfeit (or suspend) their right not to be killed.

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