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Ariel Colonomos

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WHY THE ETHICS OF WAR NEEDS THE SOCIAL SCIENCES

Ariel Colonomos, Sciences Po, Centre de recherches internationales (CERI), CNRS, Paris, France.

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Abstract

This paper argues that, for both sociological and epistemic reasons, the ethics of war needs the social sciences and, accordingly, sets an alternative to the two prevailing approaches in the literature in the ethics of war field, i.e. the just war tradition model and the ethics of war theory. Given what we learn from the factual description of war and its interpretation in the social sciences, and given what their epistemic premises are, both models - and more particularly the second one - fail to address important normative issues that arise in the course of warfare. Based on the discussion of two case studies - states' policy in the face of hostage-taking and the rule of proportionality - I argue it is important to move beyond the divide between a state-centric approach (the just war tradition) and an individualistic one (the ethics of war theory): it is indispensable to take into consideration other social spheres where norms emerge and find, between those spheres, some 'overlapping normative ground'. I argue, both sociologically and normatively, that norms rely upon interlocking sets of expectations. I also argue that these social expectations need to be thoroughly examined in order to ascertain the plausibility of norms in warfare. As a conclusion, for reasons that are both sociological and normative, I stress the political importance, within a liberal and knowledge-oriented society, of the access to facts that always need to be interpreted when making normative claims.

Keywords: ethics; war; norms; hostages; proportionality; sociology; just war tradition; ethics of war theory

Introduction

In a provocative article on meta-ethics, Ruwen Ogien argued that moral philosophy needs the social sciences and that the former is fact-dependent.¹ Ogien, an analytical philosopher, invoked two principles: 'ought implies can' and 'no normative difference without factual difference' (i.e. the 'supervenience' theory, in this case, applied to ethics, facts and norms are codependent). Moreover, according to Ogien, facts are used in both virtue ethics and consequentialism. Therefore, within these two frameworks at least, because of their power of interpretation of facts, social sciences are required when making normative claims.

This methodological question, i.e. the relation between, on the one hand, ethics and, on the other, facts and their explanation, is important in the current debate on the ethics of war. Indeed, we can contrast the claim made by Ogién to Jeff McMahan's 'deep morality' thesis.² McMahan opposes 'deep morality' which is fact-independent to 'conventions' that are fact-dependent.³ Interestingly, McMahan makes this epistemic claim in an article entirely dedicated to the ethics of war, a crucial text that has, literally, set the ambitious agenda for philosophers in the development of a whole field, i.e. the ethics of war *theory*. Echoing Ogién's meta-ethical claim, in contradistinction to McMahan, I argue that the ethics of war is fact-dependent. As such, it needs the social sciences since, precisely, the former deals with facts.

In his 2004 article, McMahan himself reacted to Michael Walzer whose normative arguments are always illustrated and informed by historical examples and who argued, in his seminal book *Just and Unjust Wars*, that a 'war convention must be morally *plausible*'.⁴ For reasons that will appear in this article, I do not advocate in favor of a 'return to Walzer', although I believe that, indeed, Walzer's account of just war is more 'plausible' and more adequate from a normative standpoint than McMahan's.

To put it in Walzerian terms, plausible norms need to 'correspond to our sense of what is right' ⁵ In order to understand what is right, it is therefore not only indispensable to know the human capabilities and limitations of those who fight, but it is also necessary to discuss the different spheres of activity where those norms emerge and are applicable. For a norm to be plausible, it has to make sense in different places and at different levels. These spheres range from the micro to the macro, and we need to describe and understand the mechanisms that constitute norms of warfare in those different settings.⁶ In this article, I refer to these spheres as 'scales', as they differ in size and also in hierarchical terms. We can move from one sphere to the other from the lower level to a higher one.

To this end I discuss two case studies: states' policy in the face of hostage-taking, and the rule of proportionality. I believe that it is possible to bring these two cases together; more than that bringing them together is needed to make the more general argument. It is important to identify the groups that are involved in decisions about warfare, or are impacted by them, and to explain the social relations that constitute them from within and in their relation with the outside world. I argue that this is indispensable to make normative claims. However, it is hardly done in the literature on the ethics of war because philosophers are poorly trained in the social sciences,⁷ and where the usual divide between the state and the individual is the rule. We should turn to the epistemology of social sciences, the sociology of norms, the sociology of organisations, and of course, international relations (IR), as these disciplines amply discuss the relation between the individual and the collective level. I argue that the division between the individual

and the collective is problematic, and my analysis is tied to an epistemic argument, echoing Ogien's thesis.

This paper is divided into three parts. In the first part, I discuss the main reasons, both structural and epistemic, why, so far, we have avoided addressing the issue of scale within the ethics of war and, therefore, in the context of the just war tradition and the ethics of war theory that stand, in this field, as the two main paradigms. The social perspective that these two schools adopt is different: the just war tradition is state-centric, the ethics of the war theory is individualist. This unidimensional interpretation, as I argue, is problematic.

In the second part, I highlight the three different levels, i.e. scales, the micro, the national and the global where norms of warfare need to make sense. In order to exemplify this claim, I discuss the norm of hostage-taking negotiations, i.e. what should be an appropriate response when states and other institutions (states and non-state actors) are confronted with hostage-taking. I argue we need to find some 'overlapping normative ground' between these different spheres.

In the third part, I show that, within each of these levels (micro, national, macro) and these spheres, ethical norms rely upon collective expectations.⁸ As these different spheres are intertwined, these sets of expectations are interlocked.⁹ I use proportionality as an example and, more particularly, I highlight the role of Collateral Damage Estimation (CDE) within proportionality claims. I argue that the relations between the different social expectations that aggregate around CDE need to be thoroughly examined in order to ascertain the plausibility of norms of warfare.

As a conclusion, based on an argument which is sociological, epistemic and normative, I draw some political implications in the context of liberal democracies. I have argued that facts are important when making normative claims about warfare. It is, therefore, crucial that democracies and knowledge-based societies create political conditions where factual information about warfare is accessible. Non-state actors have a responsibility in making this information available.

The Shortcomings of the Just War Tradition and the Ethics of War: A Matter of Scale

The just war tradition and the ethics of war model are reflections of two opposite societal paradigms. The just war tradition echoes a holistic world in a Durkheimian sense where princes embody the whole community. In contrast, the ethics of war theory reflects liberal societies marked by individualism.¹⁰ These underlying social models are usually taken for granted and are rarely made explicit. Nonetheless, these assumptions about facts relying on implicit theories of social behavior predetermine the normative claims of each school and cause undesirable biases.

Princes and Anthropomorphised States in the Just War Tradition

The just war tradition originated in Augustine and Aquinas; it properly expanded however during the Renaissance, especially in the 17th century, a moment when Europe was plagued by wars of religion, ultimately leading to the signature of the peace of Westphalia and to a new international order. In their work, authors from the just war tradition discussed the rules that princes had to follow when they waged war (in *jus ad bellum*) and that they had to enforce when their soldiers fought (in *jus in bello*). Concomitantly, the Hobbesian state became the main paradigm of political power, and the just war tradition contributed to the formation of an international society of states in the context of European politics.

Since their main function was to favor the stability of an international society of states, the rules established in the just war tradition validate, in Hobbesian terms, the central role of the state both in times of war and in times of peace.¹¹ States (i.e. princes) should adopt *jus ad bellum* and *jus in bello* rules as standards of their behavior in order to restrain their resort to arms and its consequences. As reciprocity would prevail within a system of peers, states would be less involved in conflicts and wars would be less bloody.

In contradistinction to the rules that prevailed in the Middle Ages and that reflected a more offensive ethos of chivalry,¹² the just war tradition, notably in Grotius's work, puts a strong emphasis on caution. Accordingly, this tradition builds the portrait of an ideal prince who should always have sufficient insight in order to discriminate between his good and bad intentions and has the ability to measure the consequences, positive and negative, of his decisions.

In this tradition, princes lead the war and citizens or subjects hardly play any role in the decision to wage war. Princes and kings are persons who literally embody the state. For example, in the just war tradition and in Gentili's work notably, the duel, as a model, has inspired the definition of war.¹³ Therefore, whether causing an offense to the prince and harming his honor becomes a legitimate cause to wage war is a question that often arises in the main texts of the just war tradition.¹⁴ Moreover, punitive wars, and, in some cases, those wars that have offended the prince, could be considered just wars.¹⁵

There are minor exceptions to this unidimensional vision of the politics of war. Francisco de Vitoria, a 16th century Spanish theologian, philosopher and lawyer, wrote that members of the royal council and 'territorial magnates' have also a duty to assess resort and advise and check the ruler.¹⁶ In some cases, lesser powers, i.e. non-sovereigns, may be justified in using force.¹⁷

However, sovereigntism and the anthropomorphisation of the state have prevailed. In a world where princes and kings ruled over warfare, it might have seemed reasonable to build a just war framework in which states, in their newly formed versions, would behave *like* persons, because, fundamentally, states were

ruled by one person. Yet, as the just war tradition prolonged itself and as the state became more bureaucratized and less monarchic, the principal laws of war remained unchanged. In its contemporary form, such as in the work of Walzer, the just war tradition essentially remains a Grotian model based on sovereignty, where states are seen as unitary acting bodies to which collective intention is attributed and where rules apply only to interstate warfare in a system of peers where the common denominator is state personhood.¹⁸

However, within the state, different units and groups might share responsibility for wrongdoings in warfare and states also wage wars against non-state actors.¹⁹ We have come to learn from well-established debates in IR about the fallacies of the anthropomorphisation of the state and this discussion has also nurtured a critical analysis of the state-centric view in classical IR.²⁰ The example validates, accordingly, Ogien's meta-ethical concerns: the focus on the importance of facts and the need to include the social sciences when making normative claims. It is regrettable that the ethics of war has failed to take into account important debates that have prevailed in IR over the last twenty years.

In the contemporary literature, those who refer to the just war tradition have hardly addressed the issue of collective decision within groups at the intra-state level, such as experts, cabinets, battalions. The just war tradition literature has also overlooked the role civilians play and ought to play in the writing of the laws of war. In this regard, the just war tradition's heuristic power has limitations since it is very rare to find such personification of power, at least in the context of contemporary liberal democracies.

Individualism in Stateless Ethics of War Theory

It is paradoxical (if not contradictory) for a theory which deliberately claims to be fact-independent to rely on an implicit (although unwarranted) empirical understanding of war and, more generally, social relations. "A theory" is related to the ethics of war theory there is a paradox since the ethics of war theory claims it is fact independent but it also relies on an empirical description of war.

The ethics of war theory mostly discusses the rights of persons, combatants, and civilians that are involved in conflicts. It is, fundamentally, a historically contingent individualistic model.²¹ As such, it belongs to the political history of liberalism that is so prevalent in the Anglo-American world. Debates in moral philosophy also echo discussions within the military about ethical codes and rules of engagement (ROE) manuals that should provide guidelines to soldiers. Moreover, the 1990s shift of military ethos, the move toward 'post-heroic warfare' and the emphasis on minimising civilians' casualties, are constitutive elements of this historical moment and this move toward greater individualism.²² This lack of reflexivity – i.e. the incapacity to situate oneself within one historical moment and, as a corollary,

to distance oneself from preconceived representations of social behavior – I argue, operates as a blinker.

From a 'revisionist' standpoint, the essential mission of the ethics of war is to bring answers to the questions that soldiers ought to ask themselves when they fight. One of McMahan's provocative idea is that unjust combatants, i.e. those who do not fight a just war, do not have the same rights as just combatants who fight a just war.²³ Unjust combatants should know that they are waging an unjust war and therefore should also refrain from it. If 'ought implies can', this is clearly problematic, as we may wonder if soldiers have the epistemic capacity to be aware whether the war is just or unjust, i.e. if they have sufficient information and if they are aware of what are the criteria according to which a war is deemed to be just or not. Indeed, if philosophers and experts have hesitations about whether a war is just or unjust, and since some of them often get it wrong, why would soldiers be more discerning? Imagine that a soldier believes that the war he is told to fight is unjust and that his assessment of the morality of the war is inaccurate, he would therefore unnecessarily have to forfeit some of his rights. Moreover, as they are also sometimes forced to serve in the military, soldiers lack the critical distance to make this reflexive judgment and often have no other choice than to fight.²⁴

Individualism remains the main prism through which revisionist philosophers elaborate their normative claims about warfare even when they address issues of *jus ad bellum*, therefore when they discuss decisions that should pertain to governments. Indeed, states seem to have intentions *like* individuals.²⁵ Theorists of the ethics of war neglect the fact that states, precisely, cannot behave like individuals (nota bene, this analogy contravenes the supervenience theory). Whereas authors such as Michael Walzer are more at ease when discussing interstate war such as World War Two, Vietnam or the first Gulf War, analytical philosophers have widely published on issues such as targeted killings or drones and made an important contributions to this field.²⁶ This should not come as a surprise, because individualism is one of the features of asymmetrical warfare (targets are selected individually). However, factually and consequently normatively, this individualist approach is a partial view of this situation. Ethics of war theorists tend to neglect that individual decisions and procedures are part of a collective decision-making process. When assessing the responsibility of the soldier, we need to take into account this fact: the soldier is part of a chain of command. We also need to discuss the collective responsibility of those bodies that have a role to play in fighting the war.²⁷

Both schools of thought, the just war tradition and the ethics of war theory, depend upon factual descriptions and explanations of the world, but the analyses particular to both are partial and, in some cases, misleading. Both paradigms are predetermined by their social premises and lack flexibility. In contradistinction, I argue that moral arguments about the use of force need to be 'object-driven':

they need to start with the identification of a specific object and should be informed by social analysis.

Multiple Scales Analysis and Plausible Norms: The Case of Hostage-Taking

Both traditional just war thinking, and ethics of war theory, see war mostly through the lenses of one sole actor, the prince or the ruler in the just war tradition, the individual soldier in the ethics of war theory. But states and soldiers are not the only protagonists of war.

Social sciences often teach us that several actors, at different levels, in terms of size and hierarchical position from the bottom of society to the top, are involved in the making of decisions related to conflicts or in public debates about the use of force.²⁸ At different levels, groups of different sizes have a voice in the debates over what is a just response in the face of political and military crises. Moreover, different groups are concerned by the decision to use force and their claims about what is a just response in the face of such crises also need to be taken into account. For reasons that will appear below, it is important to describe what their views are and what their claims, both factual and normative, are. It is important to know whether normative claims within these spheres correspond to 'what is right.'

As we learn from the case of hostage-taking, it is also important to ascertain that the claims that emerge within each of these different spheres are compatible. Different spheres of society and politics, both at the national and international level, are involved in the debate about hostage-taking and about what ought to be the appropriate response in the case of such crime. I argue that, in order to preserve a political equilibrium, we need to find a norm that is compatible with the claims that emerge at three levels, the micro, the state and the global.²⁹ Hostage-taking is a very sensitive issue that often creates divides within a nation-state and also becomes an object of international dispute. Different social spheres are mobilised and have a responsibility vis-à-vis the person who is abducted. As, socially and politically, we expect from a functional society a certain degree of cohesion, we need to examine the normative claims within those spheres and ask ourselves whether they are compatible.

The Micro, the State and the Global

It is important to have a historical perspective in order to understand better the specificity of the current debates in the face of hostage-taking. The seizing of hostages is a longstanding practice in the history of war.³⁰ In some cases, in ancient Rome, hostages, those sons of the kings and leaders who challenged the Roman imperial rule, had a social function: they would serve as warrants in a peace

process. This norm was accepted in Roman culture and Romans would treat their hostages well, at least some of them.

However, since then, the face of hostageship has changed. The practice of hostage-taking (facts) and the doctrine and approaches in the context of such crises (norms), have evolved concomitantly: hostage-taking is an interesting example that shows the co-dependence of facts and norms. Progressively, as we learn from some of the 17th century just war tradition texts, hostage-taking has become an unlawful practice of warfare.³¹ Today, the taking of hostages is illegal, it creates moral indignation and the main perpetrators of this crime are non-state deviant actors, although the Islamic Republic of Iran also uses hostages as pawns in its negotiations with Western states. More recently, whether they are foreign nationals or bi-nationals, Iran has taken academics as hostages.

In order to provide a plausible normative response in the face of hostage-taking, facts matter, in this case the historical context in which we live. It is also important, factually, to consider what social groups are primarily concerned in the face of such an event: firstly, the family of the hostages or those private groups the hostages are members of, secondly, nation-states and, thirdly, the global system.

When individuals are captured by non-state actors that hold to ransom the states to whom the hostages belong, and, in some cases, their families, a question then arises: is it acceptable to compromise with hostage-takers by giving them money or making political concessions? Two views stand in opposition to the other and are presented as a dilemma. Some argue that states ought to negotiate with hostage-takers in order to save innocent lives. Others resist this view, because, they argue, compromising with hostage-takers would create further wrongs to their political community, since those groups that trade hostages will be encouraged to continue their activities and, accordingly, the prices of ransoms will increase.

In practice, France and some other western European states such as Italy, Switzerland or Germany are used to negotiating, whereas the UK does not and the US is reluctant to do so. I will argue in favor of the former response. My description and my interpretation of what has become a general pattern inform my normative argument.

Intertwined Responsibilities in Hostage Crises

How to formulate a response in the face of hostage taking is a difficult question that arises at the micro level (i.e. the primary groups to which hostages belong), at the national level and at the global level.

At those different levels, groups of different sizes bear responsibility towards those that are being abducted. Moreover, the three spheres are intertwined, as states are constitutive parts of the international system and families are part of a nation-state (or, in some cases, several nation-states); companies or religious groups are also part of at least one nation-state. Therefore, responsibility is also shared between those groups. States have responsibilities vis-à-vis both families and companies, which have also to follow state laws. Finally, from a liberal perspective, states have also responsibilities vis-à-vis other states and this implies a certain degree of coordination when they make decisions about international security. However, although hostage-taking is a violation of the law, there is no law, at the international level that either obliges states to negotiate with hostage-takers in order to free those that are being abducted or, on the contrary, that forbids it.

Given this intertwinement, it is important to find a common normative ground that would be shared by those different spheres (as for example in the definition of responsibility and the ways to build a responsible political response in the face of a crisis), the absence of a minimum level of agreement would be disruptive for the different groups to which the hostage belongs. A lack of coordination between these spheres, potentially, could also hurt the lives of the hostages. I argue that, given what, factually, we believe our society requires in order to be cohesive, and given what those different spheres are, we must to find some 'overlapping normative ground.'

Within the family as a social unit, the norm of rescuing the members of one's group is well-established. This is as well the case within an ethnic or a religious community, as in Judaism where, in some texts, it is argued the community has an obligation to rescue its members if they are abducted.³² Within a company, insurance companies also serve as intermediaries to organise the freeing of their employees when taken as hostages.³³

Within the nation state, there is less room for consensus. Indeed, on the one hand, it could be argued that, given that the rights of their citizens are being violated, in the face of undue suffering, governments have the obligation to rescue them. On the other, we hear governments, political parties or policy-makers that make the claim that compromising with hostage-takers will threaten, in the more or less distant future, the security of other citizens, potentially a larger number, and will, therefore, destabilise the whole political community.

The first claim is rights-based and, indeed, hostage-taking is a violation of one of the most fundamental human rights. Since hostages have a right to freedom, it could be argued that states have to take the necessary measures at their disposal to free them. Potentially, this could include compromising with the abductors.

The second argument is grounded in consequentialism and needs to be thoroughly examined both factually and normatively. There is no evidence showing that compromising with current abductors such as ISIS, Hezbollah or Boko Haram has necessarily negative middle term or long-term effects on the security of potential future hostages and will thus contribute to create future harm. In other settings, although these findings are disputed, social scientists, economists notably, have tried to show that the payment of a ransom increases the price of future ransoms.³⁴ However, the current situation is very specific, and there is no evidence of such a causal mechanism. There is no evidence showing that countries that accept to compromise pay higher prices each time one of their citizens is being captured. Moreover, citizens from countries that do not compromise or are very reluctant to do so, such as the UK and the US, are still the targets of hostage-taking.

It is also important to take into consideration that, in the case of ISIS for example, displaying the execution of hostages on the internet is rewarding: it is a resource used by this group to mobilise its own troops. Therefore, ISIS draws some benefit from its action even in the absence of ransom or political concessions it would benefit from.

We also need to address another issue. The normative equation that aggregates non-commensurable variables such as, on the one hand, the well-being of hypothetical persons in the future and or 'national security', and, in the other, the material concessions to hostage takers is, for logical reasons, dubious, as these goods are not commensurable.³⁵ The problems we encounter when trying to make goods commensurable that are not commensurable, i.e. human lives and material interest, weaken the consequentialist arguments and reinforce the rights-based approach. For both empirical and normative reasons, the latter appears as a more logical, plausible and appropriate alternative, since, factually, it also echoes important collective expectations within the family of those taken as hostages and, at large, in some large portions of civil society.

We also need to take into consideration another factor while relying on IR. At the state level, as we can learn from constructivism, the national interest is a fact that varies according to the ideas, values and beliefs that orient it.³⁶ According to realism, the national interest is also contextual.³⁷ Therefore, under the pressure of non-state actors, in a context where compromising with the abductors is acceptable because it is the only solution to bring back the hostages, the state will reorient its interest and enter negotiations. For the sake of social cohesion, it *should* also do so. This is the case of Israel, a state where the discourse of the national interest is extremely prevalent and security concerns are taken very seriously.

In sum, a social sciences approach to the issue of hostage negotiations and a description of recent cases in the Middle East and Africa show that the traditional

consequentialist account according to which it is better to avoid compromising in order to preserve the wellbeing of future persons is not established by facts. Therefore, finding a reasonable compromise with hostage takers is a better policy. Seeking to compromise in order to free the hostages combines a well-informed consequentialist argument with a rights-based approach according to which lives ought to be saved. Moreover, a critical approach to the decisions of states that adopt the non-compromising policy, shows that, in fact, the primary goal of those states is to preserve their sovereign power. They do not behave ethically; they, fundamentally, want to preserve their stronghold over security issues. This approach toward security can change and, in some cases, states adopt a new vision of what is their national interest that is more consistent with ethical claims that emerge within their own societies.

The Case for Negotiation and Global Cooperation

We may draw some further conclusions from this state of affairs and its interpretation and move to another level. At the international level, it is important for states to elaborate shared norms that protect human beings from hostage taking. Abduction has become a global practice and states have shared responsibilities in the face of this problem. Moreover, in some cases, hostages are bi-nationals or belong to a transnational social group that is being targeted as such (Westerners, Jews, women, Christians). Therefore, within one single group of hostages we may find individuals of different nationalities. Finally, when states negotiate with hostage-takers or refuse to do so, this has consequences on the strategy of hostage-takers as a group, therefore, potentially, impacting the lives of people from other states. The current sovereignist model, i.e. national states, alone, decide over the policy vis-à-vis the abduction of their citizens is misleading: hostage-taking is and should be an issue for states as a collective.

We learn from both rationalism and constructivism that norms matter and are the cement of a global society.³⁸ If, on the basis of a shared norm, cooperation prevailed between states, it would be easier for states to fight the criminal activities of hostage-takers that operate as networks. Although it is not an evidence based on a causal law, in this case, this consequentialist claim which relies on a plausible prediction needs to be taken into account.

In practice, negotiating with hostage-takers and punishing them are not incompatible. We should take into account another factual dimension.

Negotiating with hostage-takers provides more information on their structures, which makes it easier for states to punish them, once the hostages have been freed. Coalition forces could also be used to rescue the hostages. If states were to put resources in the fight against hostage-taking, for example by establishing a task force and training negotiators, this problem could be more easily dealt with. In this case, social expectations within the national community and families of

victims would influence states to search for compromises with hostage-takers. This norm should also rely upon multilateral cooperation for both reasons of justice and equality (the 'lottery of passports' should not prevail, i.e., as for now, based on their nationality, UK and US citizens are unlucky if taken as hostages) and efficiency (states would join their forces).

Interlocking Sets of Expectations in Proportionality Claims

The discussion of the law of proportionality and its uses is no less controversial than the debates around the responses to hostage-taking. Traditionally, in *jus in bello* and international humanitarian law (IHL), proportionality is a norm that applies to individuals, i.e. soldiers who, when they use force, ought to behave like 'reasonable commanders'.³⁹ According to this norm, while fighting, the loss of civilian lives, injury to civilians and the damages to their property ought not to be 'excessive' in relation to the direct military advantage that is being pursued.⁴⁰ Based on this moral and legal definition, as in the case of hostage taking, proportionality is a riddle since the elements that are aggregated in this equation – i.e. human lives, on the one hand, and military advantage, on the other – are non-commensurable.⁴¹ While taking good note of this problem, I will focus my analysis on the notion of 'excess'.

My underlying assumption is that, in contradistinction to traditional *jus in bello* approaches and IHL that focus on the moral agency of the soldier, proportionality has a strong collective dimension.⁴² Indeed, first, soldiers are part of a collective and do not act alone. Second, I argue that, collective groups, the military and the government, are morally and politically responsible for making responsibility assessments. It is therefore important to describe and analyse, from the perspective of the social sciences, the decision-making process and the procedure related to targeting. Unfortunately, the analysis of decision-making processes is something in which neither the just tradition texts nor the individualist ethics of war theory is interested.

In line with this analysis of collective responsibility, I study the role of Collateral Damage Estimation (CDE) in proportionality claims. I show that CDE and, therefore, proportionality relies upon interlocking sets of expectations. I then examine the procedure within which CDE is being used. I argue that the social sciences have a role to play in analysing these interlocking sets of expectations and in assessing their function. Based on this analysis, I draw some normative implications.

CDE as a Calibration Standard

In the current definition of proportionality, the non-commensurability riddle remains unsolved.⁴³ Despite this problem, the *status quo* prevails. In practice, there are no attempts to change IHL or to modify the rules of engagement,

because, essentially, proportionality is the resulting compromise between military constraints and moral aspirations.

Historically, proportionality in warfare finds its inspiration in Grotius who argued in favor of 'proportion', however it really developed in international humanitarian law in the late 19th century and throughout the 20th century, when the term was coined.⁴⁴ It is also one of the core norms in contemporary just war thinking texts, such as in Walzer, as well as in ethics of war theory.⁴⁵

Echoing Grotius's idea of 'proportion', proportionality is a consequentialist assessment of the 'excessive' nature of harm in relation to military advantage. In practical terms, the proportionality calculus relies on the measure of CDE which operates as a 'calibration standard.'

CDE is both a fact and a norm, the two are intertwined and, precisely, co-dependent. Prima facie, the value of CDE is informational. Often set in probabilistic terms, it is a prediction of the expected number of civilian casualties caused by the strike.⁴⁶ CDE has also a normative function: it reflects what 'excess' could be. Indeed, CDE is used as a benchmark and a red flag in the decision to launch the operation. Depending on the CDE level, during its planning, the action will be signaled as potentially problematic or illegal and the firing procedure might be revised. Eventually, if it is not possible to lower the CDE in order to minimise the number of civilian casualties, the operation could be aborted.

There are no official numbers, as officially setting this threshold has legal and military consequences. It would not only expose the military to lawsuits, it could also encourage combatants to use human shields. However, according to various sources, the level of CDE as a 'calibration standard' has lowered in the US army. During the 2003 intervention in Iraq, the threshold above which a procedure to strike had to be revised was said to be 30 civilian casualties.⁴⁷ Today, this number is 'close' to 1.⁴⁸

Although its formula is kept secret, the US army also claims it uses an algorithm that aggregates civilian losses and other variables. Military units would process data about civilian casualties in probabilistic terms while attributing value to the military advantage. CDE as a calibration standard occupies a central role in this algorithmic calculation.

The firing decision and, eventually, its revision show the imbrication of individual and collective responsibility. One soldier is preparing to strike a target, that, eventually, has been selected by a military command group. In some cases, governmental leaders are also involved in the planning of strategic strikes. As he is in charge of the attack, if time is available, the soldier refers to his command, where the CDE is being made. Among the group of people who rule over the strike we also find one or several military lawyers. If the CDE is superior to the threshold that has been set *ex ante*, in case this is not an extreme emergency situation and an immediate response to an attack, the decision is revised in order to minimise

the CDE. If this appears to be impossible, the decision is referred up, waiting to be approved. If CDE is still deemed to be too important, the decision to strike moves further to the top of the hierarchy. In the US, in some very specific cases, the President has to sign the order.⁴⁹

Expecting to Expect

The evolution of the CDE threshold, above which the targeting procedure needs to be revised, is consistent with the decrease of the number of civilian deaths in aerial warfare over the last decades.⁵⁰ This evolution also shows that collective expectations about what is an acceptable level of violence and pain have changed.⁵¹ Collective expectations matter: the lowering of CDE standards stands as an example of what Janowitz showed in his classical work, i.e. the convergence of the military culture and civil society.⁵² The lowering of the CDE is also made possible by technological innovations, in this case more precise weaponry.

CDE operates as a calibration standard within a process of deliberation. It also has a social and moral function as it conveys the image of the military and the state that is shared with society at large. This norm reflects the values of temperance, or even courage, for example, when, in order to minimise civilian casualties, pilots are willing to take more risks by flying at a lower altitude. In a different setting, Nancy Sherman also brought to light moral values from the stoic tradition that were internalised by those US officers she had taught at the Naval Academy in Annapolis.⁵³ From a meta-ethical standpoint, we also learn from these examples that virtue ethics claims imply factual assessments.

Social expectations about what is right in warfare emanate from an environment where the law plays a greater role in military affairs, and where NGOs are used in shaming campaigns when evidence of mass violence is found. The military expect non-state groups in the civilian population to expect from them to behave according to certain rules. Proportionality is, then, the moral and legal translation of interlocking expectations.

The CDE calibration which stands at the core of proportionality is the outcome of this mirroring effect of expectations. Indeed, in order for the norm of proportionality to be 'plausible', the CDE threshold must change while adapting itself to our social and moral aspirations. States expect non-state actors to expect from them to behave according to certain rules. Moreover, as allies fighting within the same coalitions, states also expect their partners to expect from them to behave according to what is considered the standard rule of proportionality. Indeed, in order for states to work within an alliance, national armies have to share some basic rules. In the case of the US and France, proportionality requirements are discussed when those two armies are involved in joint operations.⁵⁴ The US may also share some of its resources such as the algorithm

enabling the proportionality calculus with its allies.⁵⁵ These are interesting cases of norms' formation for the social sciences; sociology and/or psychology can help understand the interplay of these expectations.

An excellent illustration of the need for coordination between states and the internalised pressure of civil society in military decisions is the 2015 movie *Eye in the Sky* whose plot is centered around the decision to fire at Al-Qaida combatants planning an imminent attack, while a little girl stands in the vicinity of the house where they hide. The movie shows the role of lawyers, cabinets and the military in the decision to strike. As the decision becomes more difficult, the participants to this drama express the need to 'refer up', i.e. ask for the approval of the UK PM and the secretary of state in the US. We then move from the micro to the macro. The decision to fire involves three states, the UK which is leading the operation, the US that is executing it and Kenya which is providing information. Each nation-state has its own collective expectations which also rely on collective expectations on part of the other groups (other governments, non-state actors, international organisations or infra-state actors). These collective expectations are, then, interconnected. If we were to take this example as a case-study, it would be the role of sociologists of decision-making and sociologists of norms to describe and analyse these expectations and the 'web of meaning' they are part of.

Eventually, the decision to fire is accepted and the little girl is killed. This is made possible because Colonel Powell, the British officer in command, asks the soldier in charge of the CDE to falsify this number by providing a lower figure to what he had already found. Had the colonel not cheated, the operation would have been aborted.

Rightly so, proportionality is criticised for the arbitrary power that it gives.⁵⁶ As in the case presented in this movie, arbitrary power may even lead to abuses and even treachery. However, this needs not be always the case. As a counterbalance to arbitrary power, in the context of democracy and within a liberal international order, interlocking sets of expectations are meant to have a stabilising function. Social sciences help us better understand the links between the spheres from which the expectations emerge. Eventually, given this knowledge, expertise in the social sciences could help us in the drafting of institutional reforms that would make states' decisions more coherent with social expectations from civil society.

Moreover, social sciences can help understand whether the interpretation of proportionality by the military is compatible with the moral aspirations of the population. The military might lag behind these social changes (and it often does). In that case, social sciences can provide the tools that help us measure the appropriateness of norms as workable rules that need to respond to legitimate social expectations.⁵⁷

Rebalancing Jus in Bello

Proportionality relies on the collective expectations of a level of suffering which is deemed acceptable in the course of war. This is all the more important, and true, in a democratic context where a greater intolerance prevails vis-à-vis violence in warfare, and when transparency is a political meta-norm.

Based on the analysis of firing procedures and assessments of collateral damage, we learn that the current lowering of CDE as a threshold has important consequences: it has a balancing effect on *jus in bello*. By emphasising the value of civilian lives, proportionality reinforces the norm of distinction that obliges those who fight to discriminate between civilians and combatants, and creates a new balance within *jus in bello*. Rebalancing *jus in bello* also reduces the non-commensurability gap as proportionality, gradually, moves towards a new norm of necessity where the decision to pursue the military advantage is allowed only if the lives of civilians are preserved. The development of new weaponry and non-lethal or less lethal weapons could also, in practice, favor this evolution.

Collective expectations about the use of proportionality could also lead to discriminate between different categories of civilian lives. As the movie *Eye in the Sky* illustrates very well, the death of a child is expected to be more moving and dramatic than that of an adult.

It could be argued that, morally, children's lives are more worthy than those of adults, because of the greater life expectancy of the former vis-à-vis the latter, because their lives matter more for the future of our society and because children require protection and care.

It could also be argued that 'we', within civil society, expect these values to be differentiated. What could be the legal consequences of this state of affairs, how would this translate in legal terms? It is regrettable that, within international humanitarian law, age is not being taken into account in the proportionality calculus. Yet, it would seem important to incorporate some of our most fundamental moral, social and psychological intuitions in the amendment of proportionality. Given what we know about social and moral expectations and their impact on the military and state decision, we could and should place some efforts in reforming IHL, thus reinforcing the plausibility of the legal norm of proportionality.

It is also important to avoid any mischaracterisation of Western strategic doctrines that orient the use of force in warfare. Civilian casualties in Syria can fuel the anger of Muslim citizens in the UK, the US and France, especially if that Western armies give the impression that the value they attribute to the lives of Muslims is inferior to that of other civilians.

Finally, the norm of proportionality should also take into account collective expectations set in cultural terms. In order for this norm to be universal, it is important to know what are the standards of measurement of the worthiness of human lives in different countries and in other contexts than the Western world. In this case as well, empirical knowledge about social and moral expectations and the value of lives in other cultural settings is important to reshape proportionality and make it more coherent from a normative perspective and therefore plausible.

Conclusion: Setting the Political Conditions for Plausible Norms

I argue in favor of a 'grounded normativism', i.e. an approach that combines the normative with the empirical and that is a remedy to the 'flight from reality' that is sometimes characteristic of contemporary scholarship.⁵⁸ In this approach, facts and norms are co-dependent and this co-dependency takes two forms. First, sociologically, facts and norms are co-dependent since norms originate in society. Second, echoing Ogien's thesis, I argue that this co-dependence is valid epistemically and, as a consequence, it is true normatively.

As we study social norms as 'social constructs', we can also discuss norms from a normative perspective. This is consistent with John Stuart Mill's epistemology and theory of morality, as, indeed, Mill emphasised the crucial role of social sciences in what he called the 'art of morality.'⁵⁹ Social sciences help us to understand what are, based on who we are, the legitimate goals that we pursue. Social explanations are important because they help uncover the moral claims that emerge within different social spheres of society. Since I have argued that, in order for a society to be cohesive and in order to maintain political stability, moral norms need to make sense within different spheres, this monitoring of social and moral norms is indispensable.

Social sciences are important because they put to test moral claims. For example, in the case of hostage-taking, more attention ought to be paid to the effects of ransoms on the future plans of hostage takers: we should thoroughly examine the answers that *a priori* seem obvious to those who argue that compromising has necessarily nefarious consequences. Social sciences also help us better understand why some rules are misunderstood. In the case of proportionality, this rule is often depicted in the media, in terms of retributive justice, as *lex talionis* or *tit for tat*. This is clearly a mischaracterisation which creates false expectations. As plausible norms need to be meaningful to those who apply them and who witness their use, we also need to learn from this discrepancy between the definition of the norm and its interpretation. If proportionality goes so much against some widely shared normative intuitions, it might lack plausibility and we may envisage the need to reform this rule. The rebalancing of *jus in bello* and the discrimination between civilian lives go in this direction.

I have argued that the prevailing unidimensionality in the fields of the ethics of war, both in the just war tradition and in ethics of war theory, is problematic. I have stressed the importance of overcoming the difference between the macro perspective of the just war tradition that focuses on the morality of anthropomorphised states and the ethics of war theory's vision of the moral agency of soldiers. The difference between the macro and the micro collapses when we explore a third level. At the meso level, rules of war also need to make sense in those spheres, within the state itself (in the military or in policy circles) or outside the state (within NGOs or other communities).

The heuristic function of the social sciences also has a political dimension. Social sciences are tools that can be used to discuss the legitimacy of the rules of war. Rules of war are not detached from society and are not meant to regulate the behavior of abstract individuals cut from their social ties. Plausible norms of warfare are collective rules that must be in accordance with fundamental social demands expressed in a democratic public space or within civil society.

In order to organise a public and democratic discussion about warfare, we have a political responsibility in making facts available to those persons who debate about the rules of war. This responsibility lies also in academia. Knowledge should also circulate between disciplines: it is the epistemic responsibility of academics to break down the existing barriers between normative theories and social sciences, in order to make more plausible and valuable arguments about norms of warfare.

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NOTES

1

Ogien, 'La philosophie morale', 2004.

2

McMahan, 'The Ethics', 2004.

3

See as well, G.A. Cohen's argument on 'fundamental principles' which echoes McMahan claim on 'deep morality' and its opposition to 'rules of regulation.' Cohen, *Rescuing Justice and Equality*, 2008 p. 265. On Cohen and McMahan: Elster, 'How Outlandish', 2001 p. 246.

4

Walzer, *Just and Unjust Wars*, 1992 p.133, Emphasis added. McMahan, art. cit., p. 732. In his article, McMahan also constantly refers to the notion of plausibility.

5

Id. Nota bene, Walzer is both a philosopher and a political scientist.

6

The micro / macro distinction as well as the relation between the two are important methodological questions in the social sciences. Alexander, Giesen, and Munch *The Micro Macro Link*, 1987. In the discipline of international relations (IR), this question is predominant throughout the history of the discipline. Among others, see: Waltz. *Man, the State and War*, 1959. Rosenau, *Turbulence*, 1990.

7

Authors from the just war tradition, rightly so, refer to history. However, most often, they use 'historical illustrations' as in the case of Walzer. Analytical philosophers tend to prefer 'thought experiments' to history, although they could use some historical 'anecdotes' to illustrate their point.

8

A norm is a rule that is a response to a sum of collective expectations. This is one of its fundamental aspects. Gibbs, 'Norms: The Problem', 1965.

9

I borrow this expression from Margaret Gilbert who argues that collective responsibility is grounded on interlocking sets of expectations. Gilbert, 'Who's to Blame?', 2006.

10

There might be some similarities between the two but the structural difference between holism and individualism remains. Pattison, 'The Case', 2018.

11

This was Grotius's project, that has inspired the 'rationalist' school of international relations, also referred to as the 'English school.' See Bull, *The Anarchical Society*, 1977. Bull, Kingsbury, and Roberts, *Grotius and International Relations*, 1992. On the rationalist school, see: Wight, *International Theory*, 1991.

12

See for example da Legnano's treatise written in the 14th century which is less restrictive than most of the 17th century classics. da Legnano, *de Bello, de Represallis et de Duello*, 1995.

13

Gentili, *De Iure Belli*, 1993, p.12.

14

Haggenmacher, *Grotius et la doctrine* 1983 pp.399–401.

15

Ibid.

16

Pagden and Lawrance, *Vitoria: Political Writings*, 1992 p.308. I am indebted to Pablo Kalmanovitz for pointing at this exception in just war tradition classics.

17

Ibid., p.302.

18

Walzer, as a political theorist, in many respects, gives normative priority to the community and not to the state. However, this not the case in his work on the laws of war where he belongs to the just war tradition and, as such is a sovereignist.

19

Grotius discusses the case of pirates. He treats them as pariahs. Since they do not abide by the laws of war, princes are not bound by the law when they fight them. Grotius, *De jure Praedae Commentarius* 1950.

20

Within this debate, Alexander Wendt, stands as an exception, as he has argued, epistemologically and politically, in favor of a personification of the state. Wendt, 'The State as Person', 2004). See the response to Wendt's claims: Luoma-Aho, 'Political Theology', 2009. Outside the field of IR, in philosophy, social theory and epistemology, from the perspective of methodological individualism, see: List and Pettit, *Group Agency* 2011.

21

Zohar, 'War Individualist Ethics', 1993. On individualism in neo-liberal politics: Barry, *Why Social Justice Matters* 2005.

22

Luttwak, 'Toward post-Heroic Warfare', 1995.

23

McMahan, art. cit.

24

McMahan addresses these questions. However, he does not take into account that wars happen in a political context and that armies are social institutions. Soldiers are not merely individual moral agents. McMahan, *Killing in War*, 2009.

25

On state as an 'artificial person', see: Rodin, *War & Self-Defense*, 2002 p. 182. Rodin's theory of self-defense (ad bellum) is derived from a theory of rights (17–34).

26

Among others, see: Meisels and Waldron, *Debating Targeted Killings*, 2020.

27

I will develop this point in the third part of the article.

28

As in Graham Allison's famous analysis of the Cuba missile crisis, we need to understand within the state what are the different groups involved in the escalation of the crisis. Allison, *Essence of Decision*, 1971.

29

On the political art of measurement and value attribution to human lives, see: Colonomos, *Un prix à la vie*, 2020.

30

Allen, *Hostages and Hostage Taking*, 2011.

31

Kosto, *Hostages*, 2012. See 'Chapter 7 Hostageship Interpreted, from the Middle Ages to the Age of Terrorism', pp. 199–225. Colonomos, 'Hostageship', 2018.

32

The Talmud (Bava Batra 8b) explicitly mentions that the community ought to pay ransoms. In accordance with these solidarist community values, Maimonides also wrote letters exhorting his fellow Jews to collect money in order to redeem captives. However, there are limits as the Mishna (Gittin 4:6) says 'captives should not be ransomed for more than their value, for the sake of the general welfare.'

33

Shortland, *Kidnap. Inside the Ransom Business*, 2019.

34

Hayes 'Negotiations with Terrorists', 2002. Brandt and Sandler, 'Hostage taking', 2009. Lapan and Sandler, 'To Bargain or Not', 1988.

35

For a more detailed discussion: Colonomos, 'A Cooperative Globalist Approach', 2017.

36

Kratochwil, 'On the Notion', 1982.

37

Morgenthau, *In Defense*, 1951.

38

On rationalism, see above. Wight, *op. cit.*

39

'Reasonable commander' is the terminology used in legal texts, manuals and doctrines when referring to proportionality. Ethics of war theorists, at least implicitly, consider that agents, and particularly those who use force, ought to be morally rational. In *jus ad bellum* and international law, states are involved in the proportionality calculus. However, I concentrate my argument on *jus in bello* while highlighting its collective dimension.

40

In international humanitarian see Article 57 (2) (a) (iii) of the 1949 Additional Protocol. See Rule 14 of customary IHL and the 1977 Protocol 1 of the 1977 Geneva Conventions 51 (5) b. In the field of ethics: Hurka, 'Proportionality', 2005.

41

Colonomos, 'Proportionality as a Political Norm' 2017. Colonomos, *Un prix à la vie*, *op. cit.*.

42

Crawford, 'Individual and Collective Responsibility', 2007. Colonomos, 'Proportionality as a Political Norm', *art. cit.*

43

This is general problem of proportionality in the law beyond the realm of warfare. Endicott, 'Proportionality' 2014.

44

Grotius, *The Laws of War and Peace*. Book II, Chapter xxiv, V, Precautions against Rashly Engaging in War: "Wherefore in all cases of deliberation, the proportion, which the means and the end bear to each other, is to be duly weighed, by comparing them together." Newton and May, *Proportionality*, 2014.

45

Walzer, *op. cit.* Hurka, 'Proportionality' *art. cit.*

46

On CDE and the 'bugslat' program, see Crawford, *Accountability for Killings*, 2013.

47

Interviews with Human Rights Watch lawyers, New York, 2005.

48

Interviews with JAG s, CLAMO, Charlottesville, 2016. See in the case of targeted killings: McNeal, 'Targeted Killings', 2014.

49

Id.

50

Crawford, *Accountability for Killings* op. cit., p.349. Thomas, *The Ethics of Destruction*, 2001 pp. 147–180.

51

Pfaff, 'A Crisis of Norms', 2016. More generally, see the debate on Steven Pinker's work and his book Pinker, *The Better Angels*, 2012.

52

Janowitz, *The Professional Soldier*, 1960.

53

Sherman, *Stoic Warriors*, 2007.

54

Interviews with JAGS, Pentagon, March 2016, French Ministry of Defense, Paris, May 2018.

55

Id.

56

Endicott, 'Proportionality', *op.cit.* p.340.

57

Gibbs, 'Norms – the Problem' *art. cit.*

58

Shapiro, *The Flight from Reality*, 2005.

59

Mill, *Philosophy of Scientific Method*, 1950. See 'Book IV, Chapter 9, Of the Logic of Practice, or Art; Including Morality and Policy', pp.352–358.