CHAPTER 3
MORAL THEORY

UNICEF called today [11 April 2011] for an immediate end to the siege of Misrata [Libya], warning that tens of thousands of children were at risk in the conflict-ridden city. UNICEF said that intensified fighting and indiscriminate shelling has led to an increased number of children being killed in Misrata, with many others lacking food and safe water, and traumatised from the atrocities they have witnessed.

UNICEF Press Centre (2011)

The Security Council [on 17 March 2011] . . . Expressing its determination to ensure the protection of civilians and civilian populated areas [in Libya] . . . Demands the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians . . . Authorizes Member States . . . to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack . . .


This news note from the UNICEF Press Centre about armed conflict in Libya illustrates, lamentably, the extreme destructiveness of armed conflicts. It might seem odd to start a chapter entitled ‘Moral Theory’ with a particular case of armed conflict. But a main thesis is that just war theory is interrelated intrinsically both with general moral principles and particular cases.

To counterbalance overemphasis of the just cause principle, I am emphasising the last resort, proportionality and noncombatant immunity principles. In the preceding chapter, the idea of last resort is featured. For the sake of concreteness, this chapter features the idea of noncombatant immunity.¹

The preceding chapter raises the question of how the legitimacy criteria in the High-level Panel Report should be elucidated, revised or supplemented. With the aim of answering this question in later chapters, the present chapter
explores a prior question. Why should just war principles be accepted? Central to the chapter is an investigation of how just war principles can be elucidated by means of general moral principles – in particular, principles of nonmaleficence and beneficence. Some other topics discussed in this chapter are the moral relevance of particular cases, the process of moral deliberation and the problem of moral conflict.

Of course, this book is not a treatise on moral theory, so these topics of moral theory are discussed quite incompletely. In later chapters, there are additional remarks regarding topics of moral theory. The purpose is to introduce a framework of presuppositions.\(^2\)

To supplement topics from moral theory, some interrelated topics from the theory of action are discussed in Chapter 4, ‘Theory of Action’. For example, a topic crucial to the noncombatant immunity principle is discussed there: the distinction between acts performed intentionally and acts performed knowingly. Additionally, interspersed throughout this book are discussions of relevant topics from other theories – specifically, theories of human rights, global governance, nonviolence and so forth. In brief, the purpose is to root just war theory within a broad theoretical framework.

However, I am a philosopher, and I view just war theory especially through the lens of moral philosophy. By contrast, there are scholars of just war theory who view it especially through the lens of political theory. In addition to moral universalism, cosmopolitanism should embrace ideals of global governance and global citizenship. Throughout this book, the ideal of global governance is illustrated controversially by the Security Council. Eventually, in the chapters ‘Proportionality and Authority’ and ‘All Things Considered’, the ideal of global citizenship is explored. But I concentrate in this chapter on a moral conception of moral universalism. To escape the labyrinth of controversies about just war theory, a thread should be woven of moral concepts.

I. CASES AND PRINCIPLES

A. MORAL DELIBERATION CASE BY CASE

In the Outcome Document of the 2005 UN World Summit, the responsibility to protect (R2P) is endorsed by UN Member States only qualifiedly. Notably, it is stated there that ‘we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis’ (GA Res 2005: para. 139). What is meant by the qualification ‘on a case-by-case basis’? Why is R2P endorsed with this qualification?

To generalise, should the Security Council deliberate about the use of armed force only on a case-by-case basis? I want to raise a comparable
question for just war theory. Should responsible agents of all sorts deliberate morally about the use of armed force only on a case-by-case basis?

The quoted statement about R2P is also qualified by the phrase ‘in accordance with the Charter’. Recall that the Preamble of the UN Charter expresses the determination ‘to ensure, by the acceptance of principles . . . that armed force shall not be used, save in the common interest’. Should the Security Council deliberate about such collective military action by means of apposite principles? In the preceding chapter, I maintain that deliberations about the use of armed force by the Security Council ought to be governed by just war principles. In general, my aim in this book is to articulate generalised just war principles that are applicable by all sorts of responsible agents to all forms of armed conflict.

But how can the Security Council deliberate about collective military action, both on a case-by-case basis and by means of just war principles? How can responsible agents of all sorts deliberate morally about the use of armed force, both on a case-by-case basis and by means of generalised just war principles? With the aim of answering these and related questions of just war theory, I also consider some prior questions of moral theory, among which are the following. Should a just war theory include comprehensive moral principles – for instance, a principle of nonmaleficence? How are particular cases and moral principles interrelated? By what process of moral deliberation should moral principles be applied to particular cases?

To begin with, let me venture a realpolitik answer to the question of why R2P is endorsed in the Outcome Document with the qualification ‘on a case-by-case basis’. UN Member States are frequently motivated by parochial national interests. Consider the case of Darfur. The International Criminal Court (ICC) has indicted the President of Sudan, Omar al Bashir, for genocide, crimes against humanity and war crimes in Darfur. Amongst the charges by the ICC Prosecutor is the charge that, when the Sudanese Armed Forces carried out attacks against villages in Darfur, ‘on occasion, the [Sudanese] Air Force would be called upon to drop bombs on the village as a precursor to the attacks’ (ICC 2008: 4). In deliberating about the case of Darfur, should the Security Council have authorised the establishment of no-fly zones to stop such aerial bombardments?

The United States is a permanent member of the Security Council. Consider also the case of US military operations in Afghanistan. US airstrikes in Afghanistan have caused civilian casualties. Should Presidents George W. Bush and Barack Obama be indicted by the ICC for war crimes or crimes against humanity? (This is a moral question and not a legal question, since the United States has not ratified the Rome Statute of the ICC.) It might appear to be in the parochial national interests of the United States not to have the case of Darfur serve as a precedent for the case of Afghanistan.
Similarly, it might appear to be in the parochial national interests of two other permanent members of the Security Council, China and Russia, not to have the case of Darfur serve as a precedent, respectively, for the cases of Tibet and Chechnya. Apparently, if the case-by-case qualification were to be observed strictly, moral judgements about the case of Darfur would not serve as moral precedents for other cases.

Should moral judgements about a particular case serve as moral precedents for other particular cases? Setting motives of realpolitik aside, I want to investigate how such questions about the moral relevance of cases should be answered by means of moral theory. Indeed, as the cases of Darfur, Afghanistan, Tibet and Chechnya evidence, various cases can differ greatly. Hence it is not implausible to hold the thesis that real-world moral judgements about armed conflict should (usually) be made on a case-by-case basis. In contrast to this ‘casuistic thesis’, there is a ‘principlistic thesis’ – namely, that real-world moral judgements about armed conflict should be made by means of just war principles. Are these two theses compatible? With the aim of answering this question, I start with the subject of casuistry.

B. FOUNDATIONALISM

In The Abuse of Casuistry: A History of Moral Reasoning, Albert R. Jonsen and Stephen Toulmin distinguished two ways of discussing cases:

We inherit two ways of discussing ethical issues. One of these frames these issues in terms of principles, rules, and other general ideas; the other focuses on the specific features of particular kinds of moral cases. In the first way general ethical rules relate to specific moral cases in a theoretical manner, with universal rules serving as ‘axioms’ from which particular moral judgments are deduced as theorems. In the second, this relation is frankly practical, with general moral rules serving as ‘maxims’, which can be fully understood only in terms of the paradigmatic cases that define their meaning and force. (1988: 23 [emphasis in original])

Jonsen and Toulmin strived in their book to rehabilitate the historical art of casuistry, and I follow their lead here in using the word ‘casuistry’ not as a pejorative, but rather as the name of the second way of discussing cases (1988: 12–13). As the words ‘axioms’ and ‘deduced’ indicate, it is appropriate to name the first way ‘moral deductivism’. In my book, I presuppose a third way – a ‘coherentist’ way of discussing cases and principles reciprocally.

Moral deductivism is a kind of ‘foundationalism’. According to a moral foundationalism of principles, there is a fundamental moral principle (or principles) that constitutes the foundation of a moral theory, in that it functions
as a fixed premise by means of which moral judgements can be made about cases (e.g. Bentham’s greatest-happiness principle or Kant’s categorical imperative). Moral deductivism supplements this picture of foundationalism with a concept of deduction: moral judgements about cases can be deduced logically from the fundamental moral principle (or principles).

Let me suggest that the second way of discussing cases – the casuistry of Jonsen and Toulmin – is also a kind of foundationalism, a foundationalism of paradigm cases. In the above block quotation, note especially the words ‘define’ and ‘paradigmatic cases’; paradigmatic cases define the meaning and force of maxims.

Without attempting to study in detail their lengthy book, but using some of their words, I want now to sketch a form of casuistry that I call ‘perceptual casuistry’. By analogy with our visual perceptions of physical objects, we can have ‘moral perceptions’ of paradigm cases (1988: 24). Just as we can visually perceive that a physical object is green, so we can morally perceive that a human action is wrong (or right). To avoid using the word ‘perceive’ ambiguously, let me restate this analogy. By analogy with our visual perceptions of a physical object, we can make ‘particular concrete’ moral judgements about a case (1988: 18). Perceptual casuistry is a kind of foundationalism. Such particular moral judgements about a case constitute a foundation, by means of which – through a process sometimes called ‘moral induction’ – revisable moral maxims can be obtained. In this way, moral judgements about a case can serve as moral precedents for other cases.

C. COHERENTISM

In opposition to these two foundationalist ways of discussing particular cases, moral deductivism and perceptual casuistry, I presuppose a third way, a kind of ‘coherentism’, a coherentism of principles and cases. Moral theory is controversial, and one controversy among moral theorists is that of foundationalism versus coherentism.³

According to the kind of coherentism that I am presupposing, there are moral principles, but they are not fixed or unrevisable. Indeed, they can be used to make particular moral judgements about cases. But particular moral judgements about cases can also be used to rethink, revise or supplement them. Reciprocally, they can be used to rethink, revise or supplement particular moral judgements about cases. To borrow some of John Rawls’ words regarding his coherentist notion of ‘reflective equilibrium’, moral deliberation about the use of armed force should involve a ‘process of mutual adjustment of principles and considered judgments’ about cases (1971: 20). In brief, a moral theory can be both principlistic and casuistic.

A just war theory can be both principlistic and casuistic. As Childress observed, just war principles ‘constitute a formal framework and structure
for moral debates about the use of force’ (1982: 90). Specifically, as C. A. J. Coady observed, ‘[t]he just war tradition provides the best framework for discussing the moral arguments for and against humanitarian intervention’ (2002: 5). Similarly, my view is that, ideally, the set of core just war principles constitutes a moral framework, by means of which responsible agents can determine whether a proposed use of armed force would be just or unjust. But we should not be misled by the word ‘framework’. Despite this word, which connotes rigidity, a moral framework of just war principles is not fixed or unreviseable. Just war principles can be used to make moral judgements about particular cases of armed conflict, but moral judgements about particular cases of armed conflict can also be used to rethink, revise or supplement just war principles. The aim should be to attain reflective equilibrium.

Complementary to the temporalisation of just war principles, the metaethical notion of coherentism should also be temporalised. The process of mutual adjustment of just war principles and moral judgements about cases is a temporal process. Indeed, there has been, as Johnson observed, a ‘metamorphosis of the concept of just war over time’ (1984: xxiii). It is from the particular temporal standpoint of the early years of the second decade of the twenty-first century that I am engaging in the project of revising received just war principles.

At present, then, my view is that a cosmopolitan just war theory should be SC-centric. In accordance with coherentism, acceptance by the Security Council of the five legitimacy criteria proposed in the High-level Panel Report would be compatible with moral debate about how those criteria should be revised. There can be moral debate about applications of the criteria, but there can also be moral debate about the criteria themselves. When members of the Security Council deliberate about whether to authorise the use of military force in a particular case, they could sometimes engage in a process of mutual adjustment of the criteria and their moral judgements about that particular case. While applying a criterion to a particular case, they could decide that they need to revise the criterion itself. Acceptance of the criteria by the Security Council would be compatible with principled moral disagreement about whether they should be revised.

In addition to making moral judgements about particular cases of armed conflict – for example, the case of armed conflict in Libya – we can make moral judgements about specific issues of armed conflict – that is, the specific issues of armed humanitarian intervention, pre-emptive first strikes, preventive war, weapons of mass destruction, insurgencies and counterinsurgencies, terrorism and counterterrorism, cyber warfare, private military companies, nonlethal weapons and so forth. According to coherentism, moral principles can be used to make moral judgements about specific issues, but also moral judgements about specific issues can be used to rethink, revise or supplement
moral principles. And, reciprocally, moral principles can be used to rethink, revise or supplement moral judgements about specific issues. Moral deliberation about the use of armed force should involve a process of mutual adjustment of moral principles and moral judgements about particular cases and specific issues. In this book, I am able to discuss in significant detail only an illustrative selection of specific issues.  

Coherentism extends to the meanings of terms – for instance, the terms ‘armed conflict’ and ‘noncombatant’. Provisionally, the meaning of a term might be defined casuistically, by examining a variety of paradigm cases. Provisionally, for instance, the terms ‘combatant’ and ‘noncombatant’ might be defined as follows. Combatants engage in combat; they use armed force in armed conflicts. And noncombatants do not engage in combat; they do not use armed force in armed conflicts. Frequently, such casuistical definitions of terms are somewhat ‘indeterminate’ (or ‘inexact’), because of difficult or borderline cases. Consequently, it is presupposed that meanings of terms can be elucidated, revised or supplemented – for example, by examining morally novel cases. By contrast, a foundationalist thesis about definitions is rejected – namely, that terms can be explicitly defined by means of primitive terms, whose meanings are transparent and indubitable. Notice that the terms ‘combatant’ and ‘noncombatant’ are provisionally defined above by means of terms that are themselves somewhat indeterminate – namely, ‘combat’, ‘armed force’ and ‘armed conflict’. Moral deliberation about the use of armed force should involve a process of mutual adjustment of moral principles, moral judgements about particular cases and specific issues and definitions of terms. The subject of definition is discussed further in Chapter IV, ‘Theory of Action’.

Moreover, there are problems of scale or degree. For instance, to elucidate the legitimacy criterion of ‘seriousness of threat’ adequately, the following questions need to be answered. Which kinds? How clear? How serious? The last two questions are questions of scale or degree. Moral deliberation about the use of armed force should involve a process of mutual adjustment of moral principles, moral judgements about particular cases and specific issues, definitions of terms and moral assessments of scale or degree.

Coherentism also extends to links between a moral theory and other relevant theories – for example, a theory of human action and a philosophy of time. For military actions are human actions, and the process of applying just war principles to them is a temporal process.

In theorising about the ethics of armed conflict, I presuppose coherentism.

D. COMPREHENSIVE MORAL PRINCIPLES

Influenced by their work on the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, Jonsen and
Toulmin featured biomedical cases. Interestingly, although largely ignoring cases of armed conflict, they alluded to Walzer’s *Just and Unjust Wars* as an illustration of casuistry (Jonsen and Toulmin 1988: 13). In an early section, ‘The locus of moral certitude’, they offered some anecdotal evidence for casuistry. When the eleven members of this national commission remained on the ‘casuistical level, they usually agreed in their practical conclusions’; however, when they ‘explained their individual reasons’ for these conclusions, there were significant ‘differences of opinion’ (Jonsen and Toulmin 1988: 17–18 [emphasis in original]). Concerning ‘specific types’ of biomedical cases, they had ‘practical certitude’; however, concerning relevant moral principles, they did not have ‘theoretical certainty’ (1988: 18). That the locus of their moral certitude was cases furnishes some anecdotal evidence for casuistry.

Relegated to an endnote for one of the paragraphs from which these quotations are taken is some anecdotal evidence for coherentism:

> On a *completely* general level, it is true, the members of the commission were able to share certain agreements – for example, as to the principles of autonomy, justice, and beneficence. But these shared notions were too comprehensive and general to underwrite specific moral positions. (Jonsen and Toulmin 1988: 356 [emphasis in original])

In my book, I presuppose such comprehensive moral principles. We should morally deliberate about the use of armed force, both on the completely general level of such moral principles and on the particular level of cases of armed conflict. Admittedly, because such moral principles are so comprehensive and indeterminate, adequate moral judgements about cases cannot simply be deduced from them. Nonetheless, they can serve to elucidate just war principles. According to a coherentism of principles and cases, there can be comparable moral assuredness concerning both particular moral judgements about cases and such comprehensive moral principles.

In conclusion, let me preview how this coherentism of principles and cases pertains to my cosmopolitan just war theory. As specific moral principles about a limited domain of particular cases, just war principles are intermediate between moral judgements about particular cases in that domain and moral principles that hold comprehensively of all particular cases. On the one hand, we can make moral judgements about particular cases of armed conflict, in order to rethink, revise or supplement just war principles. On the other hand, in order to rethink, revise or supplement just war principles, we can also make use of such comprehensive moral principles as autonomy, justice and beneficence. Moral deliberation concerning the use of armed force should involve a process of mutual adjustment of comprehensive moral
principles, just war principles and moral judgements about particular cases. Additionally, this process of mutual adjustment should encompass moral judgements about specific issues, definitions of terms, moral assessments of scale or degree and relevant concepts from the theory of action and other theories. The aim should be to attain reflective equilibrium.

Specifically, in later chapters, I discuss how this coherentism of principles and cases pertains individually to the core just war principles of just cause, last resort, proportionality and noncombatant immunity.

**E. NONMALEFICENCE, BENEFICENCE, JUSTICE, AUTONOMY**

Which comprehensive moral principles should a just war theory accept? Biomedical ethics, with its extensive literature, various journals and numerous conferences, is the most developed field of applied ethics. Perhaps the most influential book in biomedical ethics is *Principles of Biomedical Ethics* by Tom Beauchamp and James Childress (2009). (The sixth edition was published in 2009 and the first edition in 1979.) In their book, there is a moral theory with four comprehensive moral principles – namely, nonmaleficence, beneficence, justice and respect for autonomy. Reflecting the Hippocratic Oath, the principle of nonmaleficence is, briefly: do no harm. But one can refrain from doing harm without doing good, and so there is need for a supplementary principle of beneficence, which is, briefly: do as much good as possible. The principle of justice is a principle of distributive justice. Finally, the principle of respect for a person’s autonomy mandates respect for that person’s own beliefs, choices and actions. Comprehensively, these four moral principles encompass all cases, including both biomedical cases and cases of armed conflict.

In my book, I presuppose comprehensive moral principles of nonmaleficence, beneficence, distributive justice and autonomy. (What is presupposed is a principle of autonomy and not a principle of respect for autonomy.) In the next two parts of this chapter, I discuss the principles of nonmaleficence and beneficence. The principles of distributive justice and autonomy are discussed in Chapter 8, ‘Proportionality and Authority’.

In addition to ideals of global governance and global citizenship, cosmopolitanism should embrace moral universalism. The Preamble of the *Universal Declaration of Human Rights* (UDHR) recognises ‘the equal and inalienable rights of all members of the human family’ (UDHR 1948). In accordance with moral universalism, these four comprehensive moral principles hold equally and inalienably of all members of the human family. Everyone, everywhere in the world, must refrain from doing harm to anyone, anywhere in the world. Everyone, everywhere in the world, must do as much good as possible for anyone, anywhere in the world. The principle of justice is a principle of global distributive justice. Everyone,
everywhere in the world, is an autonomous moral agent. The moral notion of autonomous agency is especially crucial for a political notion of global citizenship. These four principles should be endorsed by responsible agents of global governance.

II. NONMALEFICENCE

The injuring of another can be in no case just.

Plato, *The Republic* (1892b: 12)

If there are things that are bad in themselves we ought, *prima facie*, not to bring them upon others; and on this fact rests the duty of non-maleficence.


In his landmark book *The Right and the Good*, Ross advocated a ‘duty of non-maleficence’ – that is, ‘the duty not to harm others’ ([1930] 2002: 22). The moral theory that I am presupposing is influenced substantially by Ross’ moral theory, but I have no space here to examine his views thoroughly.

Using the term ‘obligation’ instead of the term ‘duty’, a comprehensive principle of nonmaleficence may be formulated provisionally thus: it is morally obligatory not to harm other persons. A moral requirement of moral universalism is that every human being, everywhere in the world, must refrain from harming any human being, anywhere in the world.

A. A TEMPORALISED NONMALEFICENCE PRINCIPLE

An agential standpoint is a temporal standpoint. From the temporal standpoint of the present, moral principles are applicable both retrospectively and prospectively. Most significantly, in order to morally constrain uses of armed force, a nonmaleficence principle should be applied prospectively. But the future is open. Present actions are fraught with risks and uncertainties. In the fog of armed conflict, military operations are often (if not always) conducted under conditions of risk and uncertainty.

Under conditions of uncertainty, we might only be able to ascertain that a proposed military action is ‘likely’ to harm other persons; and so, if we were to perform it, we would ‘seriously risk’ harming them. As the terms ‘likely’ and ‘seriously risk’ indicate, there are problems of scale or degree.

I want to emphasise that there can be principled moral disagreement about how such scale problems should be resolved. Correlative to degrees of likelihood, there are degrees of risk. However, there are no mechanical decision procedures whereby correlative degrees of likelihood and risk can be computed. Presumably, there should be a threshold (or thresholds) above
which harm is judged to be likely and below which it is not. Presumably, there should be a threshold (or thresholds) above which a risk is judged to be serious and below which it is not. Evidently, there can be principled moral disagreement about how (or whether) such thresholds should (or can) be discerned or demarcated.

My view is that the concept of ‘harming’ should be understood as encompassing both ‘actual harming’ and ‘harming seriously risked’. (Compare the concept of ‘expected utility’.) By imposing the serious risk of harm on other persons, we harm them, even if by chance or luck they are not actually harmed. (For illustrations, ponder environmental hazards.)

During the siege of Misrata, UNICEF warned (on 11 April 2011) that many ‘children were at risk [from] indiscriminate shelling’ (UNICEF Press Centre 2011). From the temporal standpoint of 11 April 2011, it is morally obligatory for Libyan Government combatants not to seriously risk killing or injuring children in Misrata by indiscriminate shelling. This moral obligation holds, even if by chance or luck no child would actually be killed or injured. To seriously risk harming is to harm.

Therefore, the comprehensive principle of nonmaleficence that I am presupposing is:

**Nonmaleficence principle.** It is morally obligatory not to actually harm or seriously risk harming other persons.

For brevity, the principle can be expressed without the words ‘actually’ and ‘or seriously risk harming’, but then it should be read as containing those words implicitly. That is, it is morally obligatory not to [actually] harm [or seriously risk harming] other persons. A moral requirement of moral universalism is that every human being, everywhere in the world, must refrain from both actually harming and seriously risking harming any human being, anywhere in the world.

How should we morally deliberate about the use of armed force in terms of this nonmaleficence principle? More sweepingly, there is the coherentist question of how we should morally deliberate about the use of armed force on a case-by-case basis, in terms of generalised just war principles and in terms of such comprehensive moral principles as the principle of nonmaleficence.

Indeed, this nonmaleficence principle is comprehensive, but it is not self-evident. For it is, or appears to be, neither conceptually transparent nor indisputably acceptable. What should be meant by the term ‘harm’? Ordinarily, the loss of a game of chess is a negative consequence that is not caused by an act of harming. Which kinds of acts that cause negative consequences to persons are acts of harming them? Arguably, the relevant
concept of ‘harm’ is a concept that is somewhat indeterminate. Arguably, there are difficult or borderline cases where it cannot be determined whether the nonmaleficence principle has been violated.

B. THE NONHARM PRINCIPLE
Characteristically, armed conflicts are highly destructive. Because they are so highly destructive, a chief function of a just war theory should be to morally constrain uses of armed force. Regularly, when armed force is used, human beings are killed or otherwise grievously harmed. Accordingly, I want to presuppose the following specification of the nonmaleficence principle:

*Nonharm principle.* It is morally obligatory not to actually harm or seriously risk harming other persons grievously.

Again, for brevity, this principle can be expressed using the words ‘actually’ and ‘or seriously risk harming’, but then it should be read as containing those words implicitly. That is, it is morally obligatory not to [actually] grievously harm [or seriously risk grievously harming] other persons.

Even though restricted to acts of grievously harming, the nonharm principle also holds comprehensively of all cases. It is a moral requirement of moral universalism that every human being, everywhere in the world, must refrain from actually grievously harming or seriously risking grievously harming any human being, anywhere in the world.

The nonharm principle is a specification of the nonmaleficence principle, but what is specification? How are moral principles specified? The relation between a moral principle and its specifications is analogous to the relation between a genus and its species. In effect, when we specify a moral principle, we limit its scope to a specific kind (or kinds) of cases, thereby circumventing problems of indeterminateness about other kinds of cases. In effect, the nonharm principle limits the scope of the nonmaleficence principle to acts of grievously harming, thereby circumventing problems of indeterminateness about acts of harming of other kinds.

As R. M. Hare explained, there is a ‘difference between universality and generality’ (1981: 41). The distinction between the universal and the particular is different from the distinction between the general and the specific. A moral principle that specifies a universal moral principle is itself a universal moral principle.

In a deontological theory, it matters whether an action is performed intentionally, but it also matters whether an action is performed knowingly, recklessly or negligently. By analogy with the definition of criminal homicide in the ALI *Model Penal Code*, I propose to specify the nonharm principle as follows. It is morally obligatory not to intentionally, knowingly, recklessly or
negligently harm other persons grievously. It is a moral requirement of moral
universalism that every human being, everywhere in the world, must refrain
from actually grievously harming or seriously risking grievously harming
any human being, anywhere in the world, whether intentionally, knowingly,
recklessly or negligently.

C. HUMAN RIGHTS THEORY
Which kinds of acts of harming other persons are acts of harming them
grievously? In paradigmatic armed conflicts, innocent persons are actually
grievously harmed in many or all of the following ways: they are killed,
raped, enslaved, tortured, arbitrarily detained, forcibly deprived of crucial
property, starved, denied essential medical care and so forth. Among the
human rights listed in the UDHR, such acts of grievously harming are
expressly prohibited: ‘Everyone has the right to life, liberty and security of
person’ (Article 3); ‘No one shall be held in slavery or servitude’ (Article 4);
‘No one shall be subjected to torture’ (Article 5); ‘No one shall be subjected
to arbitrary arrest, detention or exile’ (Article 9); ‘No one shall be arbitrarily
deprived of his property’ (Article 17); ‘Everyone has the right to . . . [basic]
food, clothing, housing and medical care’ (Article 25); and so forth (UDHR
1948).

Arguably, the concept of grievously harming is a somewhat indeterminate
concept. Rather than simply presuppose it, I want to sharpen it by means of
a theory of human rights: acts of grievously harming human beings are acts
of gravely violating their basic human rights. It is morally obligatory not to
 gravely violate the basic human rights of other persons.

Accordingly, I propose to reformulate the original nonharm principle:

*Nonharm principle.* It is morally obligatory not to actually violate
gravely or seriously risk violating gravely the basic human rights of
other persons.

It is presupposed that this formulation of the nonharm principle and the
original formulation of it are equivalent. It can be abbreviated as follows. It
is morally obligatory not to gravely violate the basic human rights of other
persons.

Moreover, the following specification is presupposed. It is morally
obligatory not to actually violate gravely or seriously risk violating gravely
the basic human rights of other persons, whether intentionally, knowingly,
recklessly or negligently. Let me provide some examples. Evidently, to
intentionally or knowingly kill noncombatants is to actually violate their
right to life. And to intentionally risk or knowingly risk killing them is to
seriously risk violating their right to life. By recklessly imposing a blockade,
responsible agents could seriously risk starving civilians. By negligence of command, military officers could seriously risk acts of rape by their soldiers. To generalise, in accordance with a recent tendency among just war theorists (Orend 2006: 5), I presuppose that a just war theory should be human-rights based, but the word ‘based’ is potentially misleading. I would reject the foundationalist thesis that there are principles of human rights that constitute (part of) the fixed and unalterable basis of a just war theory. Nonetheless, according to coherentism, a just war theory can be elucidated by interrelating it with a human rights theory. In particular, I am presupposing that the concept of ‘grievously harming’ can be elucidated by interrelating it with the concept of ‘gravely violating basic human rights’.

But which kinds of acts of violating basic human rights are acts of violating those rights gravely? As the words ‘grievously’ and ‘gravely’ indicate, there are problems of scale or degree. Moreover, the human rights expressed in the quoted UDHR articles are somewhat indeterminate, although these articles are elaborated in later human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Even though sharpened by human rights theory, the concept of grievously harming remains somewhat indeterminate.

Therefore, acceptance of the nonharm principle by diverse responsible agents is compatible with principled moral disagreement among them regarding how it should be applied to difficult cases.

D. SUBSUMPTION ARGUMENTS
How should we deliberate morally about the use of armed force in terms of the nonharm principle? To answer this question, I start with the idea of ‘subsumption’. Apparently, the deliberative process of applying moral principles to human actions involves a process of subsumption. Particular acts are subsumed under moral principles. Relatedly, more specific moral principles are subsumed under more general moral principles. For instance, the nonharm principle is subsumed under the nonmaleficence principle. Thus, according to just war theory, particular military actions or particular uses of armed force are subsumed under just war principles and just war principles are subsumed under comprehensive moral principles.

As an illustration of the idea of subsumption, let me examine a moral argument, the logical form of which is termed ‘hypothetical syllogism’:

1. If $A$ is an act of grievously harming other persons, then it is morally obligatory not to perform $A$.
2. If $A$ is an act of killing other persons, then $A$ is an act of grievously harming other persons.
3. Therefore, if $A$ is an act of killing other persons, then it is morally obligatory not to perform $A$.

The first premise of this moral argument is a compact reformulation of the nonharm principle. The second premise involves the subsumption of a more specific kind of act (killing) under a more general kind of act (grievously harming). More briefly, the conclusion can be reformulated thus: it is morally obligatory not to kill other persons. By means of this hypothetical syllogism, this more specific moral principle about killing is logically deduced from both a more general moral principle about grievously harming and the stated subsumption. I call such arguments involving processes of subsumption ‘subsumption arguments’.

By what process of moral deliberation should the nonharm principle be applied to particular cases of armed conflict? At the start of this chapter, there is a block quotation about the particular case of armed conflict during 2011 in Libya. Let me summarise, by means of a further process of subsumption, how the nonharm principle is applicable to this case. The preceding hypothetical syllogism – with the schematic letter ‘$A$’ – is a schematic moral argument. By contrast, the following is a particular moral argument about the case, the logical form of which is termed ‘modus ponens’:

1. This particular act of indiscriminate shelling is an act of killing other persons.
2. If this particular act of indiscriminate shelling is an act of killing other persons, then it is morally obligatory not to perform this particular act of indiscriminate shelling.
3. Therefore, it is morally obligatory not to perform this particular act of indiscriminate shelling.

The first premise of this moral argument stems from an observation made in April 2011 about a particular use of armed force in Misrata, Libya. The second premise is obtained by substituting the phrase ‘this particular act of indiscriminate shelling’ for the letter ‘$A$’ in the conclusion of the schematic moral argument. In this way, this particular use of armed force is subsumed under the schematic moral argument.

Presumably, subsumption arguments are, or are explicable as, deductive arguments. Usually, they are stated less tediously, but my purpose here is to exhibit clearly how the conclusion of a subsumption argument follows logically from the premises. For simplicity, I utilise logical forms from propositional logic, but some other type of logic might enable a deeper analysis – for instance, a predicate logic, deontic logic or combined deontic-modal logic (Lango 2007a). However, there is no space here to explore such complications.
E. COHERENTISM VERSUS FOUNDATIONALISM

I want to challenge a foundationalist thesis – namely, that wholly adequate moral judgements about particular cases can always be obtained entirely by means of subsumption arguments. Specifically, I am challenging a foundationalist thesis about just war principles – namely, that wholly adequate moral judgements about particular cases of armed conflict can always be obtained entirely by means of subsumption arguments with fixed just war principles as premises.

Admittedly, subsumption arguments are often necessary, but they are often not sufficient. In this book, I am defending the coherentist thesis that moral deliberation about the use of armed force should involve a process of mutual adjustment of moral judgements about particular cases and specific issues, generalised just war principles and such comprehensive moral principles as nonmaleficence and beneficence. Such moral deliberation includes not only subsumption arguments, but also arguments of other types. For instance, there are ‘best-justification arguments’ – that is, arguments from moral judgements about particular cases or specific issues to the moral principles that explain or justify those moral judgements most adequately. Mutual adjustment involves both top-down argumentation and bottom-up argumentation.

Additionally, my conception of moral deliberation includes the idea of ‘overriding’ a moral principle. Let me provide a key illustration. Fundamental to the noncombatant immunity principle is a distinction between acts performed intentionally and acts performed knowingly. Clearly, an act of killing noncombatants is an act of grievously harming them, whether it is performed intentionally or it is performed knowingly. Consider, then, the following hypothetical syllogism, which closely parallels the one above:

1. If \( A \) is an act of grievously harming other persons, then it is morally obligatory not to perform \( A \).
2. If \( A \) is an act of killing noncombatants knowingly, then \( A \) is an act of grievously harming other persons.
3. Therefore, if \( A \) is an act of killing noncombatants knowingly, then it is morally obligatory not to perform \( A \).

May the nonharm principle be overridden when noncombatants are killed knowingly (but not intentionally)?

According to the casuistic thesis, real-world moral judgements about particular cases of armed conflict should be made on a case-by-case basis. Regard, for example, the particular case of US and NATO counterinsurgency operations in Afghanistan. According to a UN report about the protection of civilians in Afghanistan during 2011, ‘410 civilian deaths resulted from the operations of Pro-Government Forces’ (UNAMA 2012: 2). From the
temporal standpoint of the year 2011, agents responsible for US and NATO counterinsurgency operations in Afghanistan should ask: may the nonharm principle be overridden when these 410 civilians are killed?

In my cosmopolitan just war theory, the standpoint of the Security Council is featured. Presumably, when the Security Council authorised military measures in the Libya case, it was anticipated, or ought to have been anticipated, that the US and NATO, by launching airstrikes against military targets, could knowingly risk, but not intend, harm to noncombatants. To countenance such harm to noncombatants, may responsible agents of global governance override the nonharm principle?

These are challenging questions for a just war theory. Each of them presupposes the idea of ‘overriding’ a moral principle. In the fourth part of this chapter, ‘Moral Deliberation’, the general subject of overriding is discussed. And in the section ‘Collaterally Damaging Noncombatants’ in Chapter 9 (‘All Things Considered’), there is a discussion of the specific subject of overriding the moral obligation not to kill noncombatants knowingly.

III. BENEFICENCE

To be beneficent, that is, to promote according to one’s means the happiness of others in need, without hoping for something in return, is every man’s duty.

Kant ([1797] 1991: 247 [453])

If there are things that are intrinsically good, it is prima facie a duty [of beneficence] to bring them into existence rather than not to do so, and to bring as much of them into existence as possible.


A. A COMPREHENSIVE PRINCIPLE OF BENEFICENCE

As these quotations illustrate, the idea of beneficence is firmly rooted in the history of ethics. In this book, I presuppose the following comprehensive moral principle of beneficence:

Beneficence principle. It is morally obligatory to attempt as much as possible to help other persons.

A moral requirement of moral universalism is that every human being, everywhere in the world, must attempt, as much as possible, to help any human being, anywhere in the world.

Whereas the nonmaleficence principle is, to use Kant’s terms, a perfect duty, this beneficence principle is, as the qualification ‘as much as possible’
implies, an imperfect duty. Similarly, Kant qualified his duty of beneficence with the phrase ‘according to one’s means’ and asked: ‘How far should a man expend his means in practicing beneficence?’ ([1797] 1991: 248 [454]). A comparable question needs to be asked about my beneficence principle: when attempting to help, how much is possible?

To repeat, I am investigating the question of principled moral disagreement – that is, the question of why well-intentioned, knowledgeable just war theorists can profoundly disagree about principles and cases. Let me stress here that there can be principled moral disagreement about how the last question should be answered. Arguably, the relevant concept of helping is a concept that is somewhat indeterminate. Arguably, there are difficult cases where it cannot be determined whether a beneficence principle has been satisfied.

Obviously, beneficent attempts can fail. Nevertheless, when we attempt, as much as possible, to help another person, we could satisfy the beneficence principle, even if our attempt were to fail. Consider a stock illustration. A person is drowning in a rip tide, so you attempt to rescue him, but you are not an expert swimmer. Before you are able to reach him, he drowns. Nonetheless, because you attempt as much as possible to rescue him, you satisfy the beneficence principle. Paraphrasing Kant, the principle mandates that we attempt to help according to our means; when we do this, we satisfy the principle, even if it proves beyond our means to help. The beneficence principle does not mandate success.

There is a problem of ‘distant strangers’ (O’Neill 1996: 113–21). Human beings have personal projects and goals. Surely, each and every human being is entitled to promote reasonably his or her own personal well-being. Truly, the beneficence principle would be overly demanding, if it morally required inordinate sacrifice of personal well-being for the well-being of others. Accordingly, I would understand Kant’s question, more explicitly, thus: given that we are entitled to expend our means somewhat in pursuit of our own well-being (and the well-being of our family and friends), how much should we expend our means in practicing beneficence to other persons? In particular, how much should we expend our means in practicing beneficence to distant strangers in foreign lands – for example, imminent victims of genocide?

Compounding the problem of distant strangers, there is a problem of state borders. Comparable to the question about distant strangers in foreign lands, there is this question: how much should we expend our means in practicing beneficence to distant strangers in our own country – for instance, those who lack medical insurance? As a US citizen residing in New York, Montreal is less distant from me than Phoenix. Surely, a beneficence principle should not be inclusive of more distant compatriots in Phoenix, but exclusive of less distant foreigners in Montreal. In accordance with moral universalism,
it is presupposed (roughly) that the distinction between distant foreigners and distant compatriots is not (usually) morally relevant (Fabre 2012: 31–8).

To summarise, a cosmopolitan just war theory is a morally universalist theory. The beneficence principle should hold equally and inalienably of all members of the human family, regardless of state borders and no matter how distant. It is morally obligatory to attempt to help other persons anywhere in the world, as much as it is possible to do so.

B. THE COUNTERHARM PRINCIPLE

By reflecting on the idea of beneficence, duties to do or promote good can be distinguished from duties to prevent or remove harm. Help can be promotive or protective. Accordingly, I want to presuppose a specification of the comprehensive beneficence principle – namely, that it is morally obligatory to attempt, as much as possible, to stop other persons from harming people grievously.

Since the term ‘harm’ encompasses both actual harm and harm seriously risked, the presupposed principle is, more explicitly, this:

Counterharm principle. It is morally obligatory to attempt as much as possible to stop other persons from actually harming or seriously risking harming people grievously.

For brevity, the principle can be expressed without the words ‘actually’ and ‘or seriously risk harming’, but then it should be read as containing those words implicitly. That is, it is morally obligatory to attempt, as much as possible, to stop other persons from [actually] harming [or seriously risking harming] people grievously. The term ‘stop’ is used broadly to include both acts of preventing and acts of removing.

Similarly, William Frankena’s ‘principle of beneficence’ includes the following parts: ‘One ought to prevent evil or harm’ and ‘One ought to remove evil’ (1973: 47). But these moral requirements of beneficence are broader than the counterharm principle. For some harms to other persons that one ought to prevent or remove occur naturally (e.g. because of hurricanes or floods) and some harms to other persons that one ought to prevent or remove occur humanly (e.g. by raping or kidnapping). By contrast, the counterharm principle specifically morally obligates agents to stop other persons from grievously harming people.

There are controversies among moral theorists about the moral import of two interrelated distinctions – that between killing and letting die and that between doing and allowing. The nonharm principle morally obligates us not to ‘do’ grievous harm to people. Does it also morally obligate us not to ‘allow’ people to be grievously harmed? Indeed, it is dubious whether
this question should be answered affirmatively. By contrast, the counterharm principle morally obligates us to stop other persons from grievously harming people. Even if it cannot be said that we ‘harm’ people grievously by ‘letting’ them be killed by other persons, the counterharm principle morally obligates us to attempt, as much as possible, to stop such killing.

Rather than simply presupposing the concept of grievously harming, I am sharpening it by means of a theory of human rights. Because people are grievously harmed when their basic human rights are gravely violated, we are morally obligated by the counterharm principle to attempt, as much as possible, to stop other persons from gravely violating basic human rights.

Accordingly, I propose to reformulate the stated counterharm principle:

**Counterharm principle.** It is morally obligatory to attempt as much as possible to stop other persons from actually violating gravely or seriously risking gravely violating people’s basic human rights.

It is presupposed that this formulation of the counterharm principle and the original formulation are equivalent. It can be abbreviated as follows. It is morally obligatory to attempt as much as possible to stop other persons from gravely violating people’s basic human rights.

Also, the formulations can be expressed without the qualifying phrase ‘as much as possible’, but then they should be understood as implicitly qualified by that phrase.

Furthermore, the following specifications are presupposed. It is morally obligatory to attempt, as much as possible, to stop other persons from intentionally, knowingly, recklessly or negligently harming people grievously. It is morally obligatory to attempt, as much as possible, to stop other persons from gravely violating people’s basic human rights, whether intentionally, knowingly, recklessly or negligently.

**C. HUMAN RIGHTS AND HUMAN DUTIES**

Moral theory is controversial. There are controversies among moral philosophers about the stringency of beneficence. The view of W. D. Ross is that: ‘Non-maleficence is apprehended as a duty distinct from that of beneficence, and as a duty of a more stringent character’ ([1930] 2002: 21). (His view is discussed further in Chapter 9, ‘All Things Considered’.) Using his language, let me summarise a more sceptical view: whereas nonmaleficence is apprehended as a moral obligation, beneficence is apprehended as a moral ideal; and moral obligations are more stringent than moral ideals. In terms of this sceptical view, let me voice an objection to the counterharm principle. That principle is a specification of the beneficence principle. Because beneficence is only a moral ideal, we would be morally
praiseworthy if we were to counter grievous harm as much as possible, but we are under no moral obligation to do so.

In light of such controversy, I have to presuppose the counterharm principle. Indeed, that principle can be derived by a subsumption argument from the beneficence principle, but I also have to presuppose the beneficence principle. Such top-down reasoning by itself is disputable.

In accordance with coherentism, the counterharm principle can be elucidated by interrelating it with a human rights theory. Human rights entail correlative human duties. Henry Shue has advocated a ‘tripartite typology of duties’ – namely, duties to ‘avoid depriving’, duties to ‘protect from deprivation’ and duties to ‘aid the deprived’ (1996: 52 [emphasis in original]). For example, correlative to the right to life, there is a tripartite typology of duties: the duty to avoid taking people’s lives, the duty to protect people from threats to their lives and the duty to aid people in preserving their lives. In general, correlative to each basic human right, there is such a tripartite typology of duties. In particular, correlative to each basic human right, there is the duty to protect people from violations of that basic human right. The counterharm principle can be supported by a human rights theory that includes this conception of a tripartite typology of duties. But human rights theory is also controversial.

D. COUNTERING GRIEVOUS HARM

Instructively, Gilbert Ryle distinguished between verbs of ‘achievement’ (or ‘success’) and verbs of ‘activity’ (or ‘process’) (1949: 149–53). I am regimenting uses of the verbs ‘stop’ and ‘counter’ as follows. The verb ‘stop’ is an achievement verb, whereas the verb ‘counter’ is a process verb. When we stop an attack, what we achieve is the state of affairs ‘that the attack is stopped’. By contrast, when we counter an attack – for instance, by launching a counterattack – we engage in a process that might not be successful. A counterattack might fail to stop an attack.

As its name suggests, the counterharm principle morally obligates agents to ‘counter’ grievous harm. It is morally obligatory (as much as possible) to counter grave violations of basic human rights. Of course, when we act so as to counter such violations, we might (wholly or partly) fail to stop them. For example, a targeted military operation to rescue hostages of Somali pirates might fail; in February 2012, two of sixteen hostages were killed in such a rescue operation by the Danish Navy (Goodman 2012). Again paraphrasing Kant, the counterharm principle mandates that we counter grievous harm according to our means. When we do this, we satisfy the principle, even if we fail to stop the grievous harm. What is morally obligatory is to engage, as much as possible, in the process of countering grievous harm.

Therefore, it is essential that the stated formulations of the counterharm
principle are qualified by the verb ‘attempt’, which is a verb of process. When we engage in the process of attempting to stop an attack, our attempt might fail; the resultant state of affairs might be ‘that the attack is not stopped’. What is morally obligatory is to engage, as much as possible, in the process of attempting to stop other persons from grievously harming people. But the counterharm principle does not mandate success.

E. MORAL CONFLICT

By what process of moral deliberation should the counterharm principle be applied to cases of armed conflict? To begin with, let me illustrate the role of the principle in subsumption arguments. Frequently, in the conduct of a military operation, enemy combatants kill noncombatants. Evidently, acts of stopping enemy combatants from killing noncombatants comprise a specific kind that is subsumed under a general kind – namely, acts of stopping other persons from grievously harming people. Utilising this subsumption and the counterharm principle, a subsumption argument can be constructed, the conclusion of which is that it is morally obligatory to attempt to stop enemy combatants from killing noncombatants.

In particular cases of armed conflict, there can be moral conflict. For an illustration, let me summarise some subsumption arguments about the Libya case. From the temporal standpoint of 11 April 2011, consider a particular act by the crew of a Libyan Government tank of firing a shell indiscriminately into Misrata. Given that this particular act would (actually) kill (or seriously risk killing) noncombatants in Misrata, it is morally obligatory to attempt to stop the tank crew from performing it.

Now suppose that there are some noncombatants who are close to the tank and envisage a pilot of a NATO aircraft contemplating an airstrike against the tank. Under the circumstances, the pilot cannot intentionally kill the tank crew, without also knowingly killing those nearby noncombatants. Evidently, acts of killing nearby noncombatants knowingly comprise a specific kind that is subsumed under a general kind – namely, acts of grievously harming other persons. Utilising this subsumption and the nonharm principle, a subsumption argument can be constructed, the conclusion of which is that it is morally obligatory not to kill the nearby noncombatants knowingly. (Such a subsumption argument is discussed above in the section entitled ‘Coherentism Versus Foundationalism’.)

Therefore, the pilot is ensnared in a moral dilemma. One of the horns is that it is morally obligatory to attempt to stop the tank crew from killing noncombatants in Misrata, and the other horn is that it is morally obligatory not to knowingly kill the noncombatants who are close to the tank. To satisfy one of these moral obligations is to violate the other. Can such moral dilemmas be resolved?
IV. MORAL DELIBERATION

War is always a matter of doing evil in the hope that good may come of it.

B. H. Liddell Hart (1967: 379)

Characteristically, in armed conflicts, our adversaries perform acts that are highly destructive. In stopping them from performing such acts, we could perform acts that are highly destructive. In stopping them from harming people grievously, we could harm people grievously. In stopping them from killing our noncombatants, we could kill their noncombatants. Consequently, we could be ensnared in various sorts of moral dilemmas. How should these moral dilemmas of armed conflict be resolved? This is a challenging question for a cosmopolitan just war theory, one that is addressed in Chapter 9, ‘All Things Considered’.

A. MAY A MORAL PRINCIPLE BE OVERRIDDEN?

The process of moral deliberation is a temporal process. It is from a particular temporal standpoint that we deliberate morally about a particular case. From the temporal standpoint of 11 April 2011, the pilot is ensnared in this moral dilemma about the Libya case.

To generalise, from particular temporal standpoints, we engage in moral deliberation about particular cases of armed conflict. Paradigmatically, we encounter moral conflict between the nonharm principle and the counterharm principle. Therefore, some challenging questions for a just war theory are as follows. To obviate moral conflict between these two comprehensive moral principles, may we override the nonharm principle? To resolve such moral dilemmas as the one about the Libya case, may we override the nonharm principle?

I am exploring the question of why well-intentioned, knowledgeable just war theorists can profoundly disagree about principles and cases, but there can also be principled moral disagreement between just war theorists and theorists of other sorts. In introductory works about the ethics of war and peace, just war theory is standardly contrasted with pacifism (Dower 2009). Of course, there is no single pacifist theory that is unanimously accepted, but instead there are various pacifist theories (Cady 2010). Arguably, a pacifist theory ought to endorse the nonharm principle absolutely. Let me raise some contrasting questions that are challenging for such a pacifist theory. To obviate moral conflict between the nonharm principle and the counterharm principle, may the counterharm principle be overridden? To resolve such moral dilemmas as the one about the Libya case, may the counterharm principle be overridden? A main
point is that when there is moral conflict between two moral principles, there can be principled moral disagreement about which of them may be overridden.

B. PRIMA FACIE MORAL PRINCIPLES

The nonharm principle should not be construed as an absolute moral principle. Instead, it should be construed as a prima facie moral principle. More generally, a main thesis is that the four comprehensive moral principles – and such specifications of them as the nonharm principle and the counterharm principle – are prima facie moral principles.

Similarly, the duties of nonmaleficence and beneficence are, according to W. D. Ross, prima facie duties. Also, Beauchamp and Childress interpret their four principles as prima facie principles (2009: 15). (The threat-seriousness criterion contains the phrase ‘justify prima facie’, but the term ‘prima facie’ there has a different sense.)

An absolute moral obligation must never be violated, it must always be fulfilled, whatever the consequences, whatever the circumstances and, as John Finnis, Joseph Boyle, Jr and Germain Grisez add, whatever the good intentions (1987: 77).

By contrast, a prima facie moral obligation need not always be fulfilled; instead, sometimes it may be violated. Roughly, we ‘fulfill’ the moral obligation to perform an action by performing it, and we ‘violate’ the moral obligation to perform an action by refraining from performing it.

More exactly, I propose to interpret the term ‘prima facie’ in terms of ideas of moral presumption and burden of proof (Childress 1982: 64–73). For example, when we deliberate about whether to harm other persons grievously, we have to make the moral presumption that we must not. To override this moral presumption, we have the burden of proving that we may.

Central to the meaning of the term ‘prima facie’ is the following conception. So long as this burden of proof has not been satisfied, what we morally presume to be our obligation actually is our obligation. So long as the burden of proof has not been satisfied, we are morally obligated not to harm other persons grievously. Accordingly, instead of saying ‘to override the moral presumption that the nonharm principle holds’, we can also say, more briefly, ‘to override the nonharm principle’.

A key point is that there should be a set of necessary and sufficient moral criteria for determining whether this burden of proof has been satisfied.

C. WHY ACCEPT JUST WAR PRINCIPLES?

In the preceding chapter, I raised the question of how the legitimacy criteria in the High-level Panel Report should be elucidated, revised or
supplemented. With the aim of answering this question in later chapters, I am exploring the question of why just war principles should be accepted in this chapter.

Let me summarise my answer to this last question. Just war principles morally constrain responsible agents from using armed force unjustly. When we morally deliberate about whether to harm other persons grievously by the use of armed force, we have to make the moral presumption that they must not. To override this moral presumption, we have the burden of proving that we may.

A main thesis is that the core just war principles of just cause, last resort, proportionality and noncombatant immunity are moral criteria for determining whether this burden of proof has been satisfied.

Indeed, these four principles might be supported by subsumption arguments. Even if illuminating, such subsumption arguments would not be adequate. They do not fully answer the question of why just war principles should be accepted. Briefly, the four core just war principles should be accepted, so that the nonharm principle may be overridden.

Each core just war principle by itself is a necessary – but not a sufficient – moral criterion for determining whether the nonharm principle may be overridden. For example, suppose that, in a particular case, it has been proven that the just cause principle is satisfied. There is still the burden of proving that the ancillary just war principles are satisfied.

D. AN EPISTEMIC STANDARD

To satisfy such burdens of proof, there is need for sufficient evidence. What standard of evidence should a just war theory accept?

In domestic jurisprudence, there are different standards of evidence. ‘Because of the close connection between law and morality’, Lawrence Crocker maintained, ‘the law’s burden concepts have particular application to various sorts of moral disputes as well as to ethical theory’ (2008: 272). Is there a legal concept of burden of proof that has particular application to just war theory?

In a criminal trial, the defendant is presumed to be innocent, and the prosecution has the burden of proving that the defendant is guilty. This burden of proof is subject to a very strong standard: there must be no reasonable doubt that the defendant is guilty.

By contrast, for civil trials, there is usually a far weaker standard of the preponderance of the evidence. Roughly, plaintiffs in such trials have the burden of proving that their claims are ‘more likely than not’, even if by an iota (Crocker 2008: 275).

To satisfy burdens of proving that just war principles are satisfied, the standard of ‘beyond a reasonable doubt’ is too strong (ICISS 2001a: 35).
An armed conflict is a historical event, and historical evidence about past historical events is obtained crucially through the testimony of historical documents. A present or imminent armed conflict is history in the making or history about to be made. Evidence about a present or imminent armed conflict is also obtained crucially through testimony – for instance, the testimony of journalists, diplomats, spies and turncoats. And such testimony is itself often hearsay. In a criminal trial, there is time to corroborate testimony by witnesses about the guilt of the defendant; there is time to prove guilt beyond a reasonable doubt. By contrast, a present or imminent armed conflict is, paradigmatically, an emergency. There might not be time to prove that a military action is just beyond a reasonable doubt.

On the other hand, the standard of ‘preponderance of the evidence’ is too weak.

In order to morally constrain uses of armed force effectively, there is need for an intermediate standard of evidence. For some civil trials, there is an intermediate standard of ‘clear and convincing evidence’. Roughly, in such a trial, there is the burden of proving that the claim is ‘highly likely’ (Crocker 2008: 276). Between the extremes of ‘beyond a reasonable doubt’ and ‘more likely than not’, there is the intermediate of ‘highly likely’.

Analogously, a main thesis is that moral deliberation in just war theory should be governed by a standard of clear and convincing evidence:

Epistemic standard. The burden of proof must be satisfied by clear and convincing evidence.

Admittedly, the legal concepts of ‘beyond a reasonable doubt’, ‘preponderance of the evidence’ and ‘clear and convincing evidence’ are somewhat indeterminate. For each of these concepts, there are paradigm cases, but there are also difficult or borderline cases. Analogously, my presupposed concept of ‘clear and convincing evidence’ is somewhat indeterminate. Frequently, to obtain evidence that is clear and convincing, the particular circumstances of a particular case have to be examined quite closely. The standard of clear and convincing evidence is not a mechanical decision procedure. Consequently, acceptance of this epistemic standard by diverse responsible agents is compatible with principled moral disagreement among them regarding difficult cases.

Let me raise again a key question. How can we deliberate morally about the use of armed force, both on a case-by-case basis and in terms of generalised just war principles? In domestic jurisprudence, there is an analogous question. How can judges deliberate, both on a case-by-case basis and in terms of legal principles and statutory laws? Hopefully, these analogies with domestic jurisprudence serve to illuminate the main thesis
that, in addition to being principlistic, a cosmopolitan just war theory should be casuistic.

**E. A SPECIFICITY STANDARD**

Interrelated with the epistemic standard, there is a standard of specificity. Our real-world moral judgements about particular cases can be complicated and controversial when we consider all of the morally relevant details. When we apply just war principles to a particular military action, we have to specify morally relevant details sufficiently. And when we apply the last resort principle to an alternative nonmilitary measure, we also have to specify morally relevant details sufficiently. From a particular temporal standpoint, when we plan a military action or an alternative nonmilitary measure, we must envisage adequately the morally relevant details. Paradigmatically, various morally relevant details are entangled in historical cases, and a present or imminent case is history in the making or history about to be made.

Accordingly, a main thesis is that the process of applying just war principles to military actions and alternative nonmilitary measures should be governed by a moral requirement of specificity:

*Specificity standard.* The military action or nonmilitary measure must be sufficiently detailed.

How much detail and what sort of detail would be sufficient? This question can be answered fully only on a case-by-case basis. Of course, acceptance of this specificity standard by diverse responsible agents is compatible with principled moral disagreement among them regarding difficult cases.

The specificity standard and the epistemic standard are interrelated. To satisfy the various burdens of proving with clear and convincing evidence that a particular military action is just, that military action must be sufficiently detailed.

**F. FORMULATING JUST WAR PRINCIPLES AS CONDITIONAL PROHIBITIONS**

To say that it is morally obligatory not to grievously harm other persons is equivalent to saying that grievously harming them is morally prohibited. (‘It is morally obligatory not to do A’ is equivalent to ‘it is morally prohibited to do A’.) The nonharm principle is a moral prohibition.

I propose to formulate just war principles as moral prohibitions. Consider, for instance, the following provisional formulation of a just cause principle: it is morally obligatory not to perform a military action, if there is not a just cause. Notice the word ‘if’ in this principle. What is morally prohibited is
the performance of the military action, ‘if’ – that is, on the condition that – there is not a just cause. In short, the just cause principle is a ‘conditional prohibition’. (By contrast, a pacifist could affirm a moral prohibition that is unconditional – namely, that it is morally obligatory not to perform a military action.)

In later chapters, each core just war principle is formulated canonically as a conditional prohibition. For another example, consider the following provisional formulation of a last resort principle: it is morally obligatory not to perform a military action, if every reasonable nonmilitary measure has not been attempted.

When we morally deliberate about whether to harm other persons grievously by means of a particular military action, we have to make the moral presumption that we must not. To override this moral presumption, we have the burden of proving that the core just war principles are satisfied. What should be meant here by ‘satisfy a just war principle’?

A just war principle is a moral prohibition. We satisfy it when we satisfy the burden of proving that it does not morally prohibit the military action. More exactly, it is a conditional prohibition. We satisfy it when we satisfy the burden of proving that the condition does not obtain. For instance, to establish that a military action is not morally prohibited by the stated just cause principle, we have the burden of proving that the stated condition does not obtain – that is, we have the burden of proving that there is a just cause. Also, to establish that the military action is not morally prohibited by the stated last resort principle, we have the burden of proving that the stated condition does not obtain – that is, we have the burden of proving that every reasonable nonmilitary measure has been attempted.

A main thesis is that each core just war principle is a necessary – but not a sufficient – moral criterion for determining whether the nonharm principle may be overridden. By formulating the core just war principles as conditional prohibitions, my purpose is to clarify and support this thesis.

A moral prohibition is different from a moral permission. (‘It is morally permissible to do $A$’ is equivalent to ‘it is not morally obligatory not to do $A$’.) Significantly, a conditional prohibition is different from a conditional permission. Consider the following schematic conditional prohibition. It is morally obligatory not to do $A$, if $C$ is not the case. Given this conditional prohibition, it does not follow (conceptually or logically) that it is not morally obligatory not to do $A$, if $C$ is the case. That is, it does not follow (conceptually or logically) that it is morally permissible to do $A$, if $C$ is the case. For instance, given the stated just cause principle, it does not follow (conceptually or logically) that it is morally permissible to perform the military action, if there is a just cause. Also, given the stated last resort principle, it does not follow (conceptually or logically) that it is morally
permissible to perform the military action, if every reasonable nonmilitary measure has been attempted.

In Chapter 9, ‘All Things Considered’, I investigate the process of moral deliberation, whereby the four core just war principles are applied to particular cases conjointly.

NOTES

2. For a contrasting way of interrelating moral theory and the ethics of war and peace, see Norman (1995).
3. An instructive article relevant to this controversy is Hare (1996).
4. The specific issue of nonlethal weapons is thus interrelated with the idea of noncombatant immunity in Lango (2010c).
5. The philosophy of time and just war principles are interrelated in Lango (2004).
6. A classic article about basing just war theory on human rights theory is Luban (1980). Human rights theory is interrelated with the ethics of war in Rodin (2002).
7. For such a view, see Gert et al. (1997: 82–3). Also, see Beauchamp and Childress (2009: 198).
8. That conception is discussed more fully in Lango (2012).