WAR AND THE MORAL EQUALITY OF COMBATANTS: AN ADJUSTED CONCEPTION

By

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Dedication:

To warriors

Special thanks to:

Dr. David Clark for mentoring me academically

LtCol Matthew Munroe for showing me The Well

And most of all, my wife for her love and support

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Abstract:

According to a traditional account of Just War Theory, combatants are moral equals regardless of whether they are engaged in a just or unjust war. This means, roughly, that combatants on either side of the war have the same permissions to harm combatants on the other side. Traditionally, however, the scope of this principle has not been well defined. Precisely who counts as a combatant has been left in the air. Getting clear on the scope of the equally of combatants is immensely important though, if we are to act morally in war

I: Where to Begin...

According to a traditional account of Just War Theory, combatants are moral equals regardless of whether they are engaged in a just or unjust war. This means, roughly, that combatants on either side of the war have the same permissions to harm combatants on the other side. Traditionally, however, the scope of this principle has not been well defined. Precisely who counts as a combatant has been left in the air. Getting clear on the scope of the equally of combatants is immensely important though, if we are to act morally in war.

If we only use history as a guide, the scope issue is less concerning when both sides of a conflict line up in neat rows of contradicting brightly colored uniforms, complete with flying national ensigns and bandsmen playing national songs, it would be hard to confuse either side as noncombatants. In the modern era however, this line between combatant and noncombatant cannot be drawn using easily distinguished uniforms or placement in the battle space. In fact, many modern fighters do not wear any distinguishing marking and are not claimed a nation or independent state as members of an organized armed forces. So, the question looms for the application of Just War Theory in this age of non-conventional warfare: who are the combatants that are supposed to be moral equals?

This thesis aims to answer this question. To show where we will end up, my answer to the question is an adjusted version of a tradition conception of the Moral Equality of Combatants (MEC). I call it True MEC and define it as:

> True MEC: the combination of being a combatant representing a cause greater than themselves and operating within WC willfully.

We will progress to this answer in the following way. In section II, we will lay out the landscape of war and establish the framework of Just War Theory. The concept of MEC stems from Just War Theory, so we must begin at the most

foundational concept. In section III, we will define MEC in detail and explain how it, in the context of war, establishes moral equality. After explaining what MEC is, in section IV I will briefly present what I take to be the most compelling reason to accept some version of MEC – namely, the fact that it matches how real-world warfighters feel, think, and act towards their enemies on the battlefield. After all, it would be problematic if we said MEC was true, but it did not match how warfighters actually feel, think, and act towards their enemy in real life.

Then, in section V we will turn to explaining how war is morally different from other types of "everyday violence." In subsections A and B of this same section, we will then look at two different views on how to answer the scope question of MEC, both of which fall short for some reason or another in my opinion. In sections VI and VII we land on the "best so far" version of MEC, which comes from Michael Walzer's book *Just and Unjust* Wars.

In Section IX I will present my adjusted version of MEC that I think answers the scope question posed above. We will then finish off with a historical case study that, I hope, provides validation for my conception of MEC and how it matches both the morality of MEC and the phenomenology of war itself. This thesis as a whole is motivated by the very real belief that it is not a question of "if" we will have to answer the scope question regarding who falls under MEC, but given the nature of modern war, it is a only a matter of "when" we will have to determine who can be hunted, targeted, and killed on the battlefield.

II: Just War Theory

In order to talk about combatants in any way that gives meaning to that conversation, we must first understand the realm they live in. The best way to understand the realm is to define our terms, as I was taught so well as an undergraduate student. As defined by the foundational doctrinal publication of the United States Marine Corps, *Warfighting:* "War is a violent clash of interests between or among organized groups characterized by the use of military force."[1] The second portion of the definition, stated later in the same publication, gets at the heart of war. "The essence of war is a violent struggle between two hostile, independent, and irreconcilable wills, each trying to impose itself on the other." The combined definition of war we will use for our present purposes is, then:

> *War is a violent struggle between two hostile, independent, and irreconcilable wills, each trying to impose itself on the other, between or among organized groups, and is characterized by the use of military force.*

I will not belabor the history of Just War Theory (JWT), we do not have that kind of time. Suffice it to say that the principle of MEC is intimately nested in JWT, so we must establish the foundation before diving deeper. St. Thomas Aquinas was not the first to discuss JWT, but his writings were arguably the most impactful in on the trajectory of the topic. Speaking generally, Aquinas recognized that some wars seemed arguably moral (just), while others seemed outright immoral (unjust), so he wanted to know what the defining features of each side are. Out of his writings two sets of principles emerged, *jus ad bellum* and *jus in bello,* which have become all but synonymous with JWT. Aquinas himself did not make this split explicitly, but based on his writings, and that of his successors, it is widely taken as

[1] United States Marine Corps. 2024. MCWP 6-10, Leading Marines. Washington, D.C: Department of the Navy.

uncontroversial that these two concepts were at play from the start. *Jus ad bellum* relates to the reason for going to war in the first place, while *jus in bello* refers to the conduct of those actually conducting the war. Taken from his *Summa Theologiae,* Aquinas' original three principles that constitute traditional *jus ad bellum* are:[2]

> In order for a war to be just, three things are necessary.
>
> First, the authority of the sovereign by whose command the war is to be waged.
>
> Secondly, a just cause is required, namely that those who are attacked, should be attacked because they deserve it on account of some fault.
>
> Thirdly, it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil.

Jus in bello, however, are the traditional principles that, "denote the permissibility of particular actions that compose the war, short of the war as a whole."[3] In layman's terms, *Jus in bello* aims to prevent war from devolving into outright butchery, yet it allows for certain actions that are inherent to the violent nature of war. These principles are traditionally held as:[4]

> Discrimination: Targeting noncombatants is impermissible.
>
> Proportionality: Collaterally harming noncombatants (that is, harming them foreseeably, but unintendedly) is permissible only if the harms are proportionate to the goals the attack is intended to achieve.
>
> Necessity: Collaterally harming noncombatants is permissible only if, in the pursuit of one's military objectives, the least harmful means feasible are chosen.

[2] Aquinas, St. Thomas. n.d. Summa Theologiae > Second Part of the Second Part > Question 40. Accessed June 12, 2025 https://www.newadvent.org/summa/3040.htm.
I have only taken the exact phrase of the principle from the *Summa* for the sake of brevity here. Given this essay is not solely focused on JWT I have left out the context for each principle only to move more quickly to the follow on idea of *jus ad bellum*.
[3] Lazar, Seth, "War", The Stanford Encyclopedia of Philosophy (Spring 2020 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2020/entries/war/>.
[4] Ibid.

What must be made very clear for the future of this essay is the distinct and separate nature of *jus ad bellum* and *jus in bello.* It is a tenant, of JWT that these two areas remain distinct; the evidence for this stretches all the way back to the earliest writers on JWT. As Michael Walzer states in *Just and Unjust Wars*, "These grammatical distinctions point to deep issues. *Jus ad bellum* requires us to make judgements about aggression and self-defense; *jus in bello* about the observance or violation of the customary and positive rules of engagement. The two sorts of judgement are logically independent."[5] Whether you agree with this logical independence is a fight for another day in another essay. It is a worthy fight and has been happening for hundreds of years, but the focus of our present effort is related to combatants and pre-supposes the notion that *jus ad bellum* and *jus in bello* are distinct issues. This crucial distinction between *jus ad bellum* and *jus in bello* is vital in order to not muddy the waters when answering our question about who classifies as a combatant.

III. The Moral Equality of Combatants

With *jus ad bellum* and *jus in bello* firmly separated, the traditional definition of MEC that is associated directly, and exclusively, with *jus in bello* is:

> All combatants --- irrespective of fighting a just war or not --- have the same moral permissions to attack combatants on the other side of the war, so long as they abide by the principles of *jus in bello*.

In laymen's terms, as long as you play by the rules of *jus in bello*, you can keep playing the game of war. Historically, this definition has referred to conventional combatants fighting in conventional wars. When applied to wars stretching all the way back to the times of Achilles, combatants on either

[5] Walzer, Michael. 2015. Just and Unjust Wars: A Moral Argument with Historical Illustrations. Fifth Edition. New York, New York: Basic Books. Pg 21.

side of the conflict have been easy to distinguish in a fight, even helped by the very side of the battlefield they lined up on. Apply this definition to, say, the Battle of Saratoga in the Revolutionary War and I think it would be impossible to confuse the combatants, who were dressed in vibrant red and deep blue respectively, for some type of noncombatant. We are trying to answer this question regarding nonconventional combatants, those fighters that might not have uniforms, fight with conventional tactics, or belong to a nation-state.

This definition of MEC, like our definition of war, can trace its roots back to the old and usually unwritten codes of chivalry upheld by the warriors of old. As Walzer puts it, "Chivalry marked off knights from mere ruffians and bandits…"[6] I agree with Walzer that chivalry is not at the forefront of modern military organizations, but the moral questions that chivalry brought forth are still alive and well. The general congenial treatment of fellow knights after a battle gave way to accepted practices of how we treat prisoners of war today. The modern practice of saluting, both friendly and enemy officers, is a tradition taken directly from the age of chivalry. Even if we grant that chivalry is the origins of MEC, it doesn't answer why MEC has persisted to the modern era, nor why it quickly became applicable to even the lowest level fighter on battlefields and not just applicable to "the brass."

My take on this question is two-fold. Firstly, I think that MEC is morally correct. Second, I think that MEC matches the phenomenology of war in a way that is profound and important. Regarding this first point, we will address the moral correctness of MEC in long form as we go through versions of MEC and how it applies to our question of combatants. The crucial issue of

[6] Walzer, Michael. 2015. Just and Unjust Wars: A Moral Argument with Historical Illustrations. Fifth Edition. New York, New York: Basic Books. Pg 34.

MEC is that of a moral question, not a legal distinction or a question of blameworthiness. If MEC is true, then it puts the fighters on moral grounds that are deeper than a simple legal distinction. Even opponents to MEC agree that many unjust combatants fighting in an unjust war are legally permitted to do so and not blameworthy for their actions; this lends credence to the idea that there is some deep morality at play here. Now, plenty of highly respected philosophers do not accept MEC and my fight is not with them. McMahan, Frowe, and Tadros, just to name a few, have mounted artful and very thorny attacks on MEC, which I am not equipped to address right now.[7] For our purposes, we will take a traditional view of MEC and suppose it is true. This stance allows for plenty of philosophically interesting ground to cover since it leaves out the answer to the scope question and how to properly identify combatants on the battlefield.

IV: MEC and the Phenomenology of War

One of the first things that drew me to MEC is that it seems to match the experience of war for the combatants involved. From both my own personal experience and approximately ten years of reading, viewing, and consuming all manner of other people's personal experiences of war I realized that MEC is a consistent throughline. When warfighters talk about war, from the lowest enlisted rank or a senior staff officer, the extreme minority are those that speak of the "liability to be harmed" or the "right of the enemy to harm me."[8] Whether it is the writings from an anonymous British private in the Peninsular War writing about the French, or a German Lieutenant from WW1

[7] McMahan-*The Morality of War and the Law of War,* Frowe- *Defensive Killing*, Tadros- *To Die, To Kill, To Reason Why*; Chapter 12. Before we move on, I want to pause and say that the debate between these two camps is very involved and still hotly debated, especially as JWT saw a resurgence of popularity in the last decade or so. My fight is not to *prove* either side. I will make my views plain; I think collectivism gets it right. That said, I want to avoid being sucked into the debate over which form of MEC is proper so that we can move to the heart of the question regarding the application of MEC to combatants, both uniformed and not.

[8] In this context "liability" refers to the notion that: For X to be liable to some harm is for X to lack a moral right that protects them from that harm. In laymen's terms liability is like a shield that protects X from being harmed. If they lack liability to harm, then they lack the moral shield that ought protect them from being harmed.

writing about the Belgians, or a Marine Corps Sergeant in WW2 writing about the Japanese, or any number of other personal accounts of warfighters, the story is eerily similar: The nature of war is such that (at least) two sides are trying impose their will on each other, and consequently, each side excepts the other to do the same. Warfighters on both sides of conflicts act in a way that portrays an understanding that, so long as they stay withing the confines of *jus in bello*, they can do whatever they deem appropriate to impose their will on the enemy. As a warfighter, I alone cannot stop my enemy from trying to impose their will on me, nor would I be personally or morally offended if they tried to do so.

This is how warfighters stretching back to ancient Greece and Rome have spoken about their enemies, even if they do not use these precise terms.[9] Moreover, this description of the phenomenology of being a combatant matches the way it feels to be specially targeted in war by an enemy. It is different to know the enemy is out in the darkness *somewhere;* it is another thing entirely to know that the enemy is *specifically targeting you and your team.* Again, drawing from both my experience and from the experiences of others, both modern and historical, warfighters do not "want" to be targeted, and coming under attack makes them experience emotions like anger or fear or even hatred. But, they do not have the attitudes of someone that has been *wronged* or *violated* morally by being targeted by the enemy. The experience of the combatant comes back to the fact that the enemy combatant is part of the enemy "team," or "group," or "collective." Whichever term suits you, take your pick. This enemy, as long as they are part of the enemy squad, platoon, army, etc. can target me just like I can target them. This prevalent phenomenology of war is a primary reason those thinkers that argue against

[9] I grant that my personal reading and study of war leans dramatically towards the western way of war, but from what exposure I have to both Chinese and Japanese texts I have no reason to suppose the general phenomenology of war is similar enough to hold to my claims.

MEC seem so absurd to me. The very idea that a combatant would say, "I am not liable to be harmed by an unjustified threat" seems to go against the overwhelming amount of evidence to the contrary.

To support the claim that combatants indeed have the attitude I describe above, I have pulled a quote that I think encapsulates MEC vividly. I have no delusions of trying to pull enough examples from across the myriads of sources and writers throughout history to prove a trend, so take this example as representative of a common belief and not as me cherry-picking. This example is also presented in line with Walzer's approach of seeking examples of, "...what actually happens on battlefields and what it feels like to be there."[10]

> *[Context: Two snipers have been hunting each other for days in the intense heat of the Vietnam Highlands. Toward the end of their deadly game of cat and mouse the following is spoken]* The sniper thought as he visually picked apart the cover in front of him, "I will teach you to flaunt yourself. It is the humble man who wins here, my friend." *[After more hours of stalking and hunting, one sniper kills the other and walks up on the body to confirm the kill]* "I just had a scary thought... stop and think about it. He had to be sighting his rifle right at me in order for my bullet to pass clean through his scope and get him in the eye like that. When you get down to it, the only difference between me and him is I got to the trigger first." (From *Marine Sniper: 93 Confirmed Kills*, Authored by Charles Henderson, pg 174- 185)

I offer this vignette as a sort of "tip of the iceberg" to the overwhelming accounts of a similar nature. Michael Walzer again comments on the importance of phenomenology by saying, "We need to understand what wars and battles are, how they have been experienced over the years, and how their moral and legal rules have been worked out. That is the point of reading military history and

[10] Walzer, Michael. 2015. Just and Unjust Wars: A Moral Argument with Historical Illustrations. Fifth Edition. New York, New York: Basic Books. Pg 344.
; This example box is also not an attempt to cherry-pick examples that suite my fancy. I use these as clear examples of MEC related to us by combatants and writers that actually experienced it. I do not have the space in this essay nor the intellectual bandwidth to sift through the myriad of books, interviews, quotes, or personal stories and relay every instance of similar sentiment.

soldiers' memoirs."[11] I sympathize with this view greatly. It seems that too much of the philosophical writing on MEC, or war more generally, fails to take into account the type views expressed by our sniper. We ought not read memoirs like the above to theorize abstractly on how one side was unjustly fighting. We should instead read these types of accounts and take what they say at face value: the combatants on both sides accepted that, by virtue of being "in the army," and the fact that the enemy soldier was likewise "in the army," they both accepted that a violent exchange between them is part of the game they are playing.

Sub-Section A: The Wrong Way

Now that we have had a moment to appreciate how combatants experience war, we can turn to a classic moral case like *Bank Robber* and see how cases like this fail to capture the right phenomenology. The case is this:

> There is a bank guard guarding a typical bank on any given day. Then, a masked man comes in the front door and yells the classic, "Everyone on the ground!" He is armed with a pistol and, with all the classic pistol waving and pointing mannerisms of a seeming violent bank robber, makes his way to the teller counter to begin demanding money. Upon hearing this in the lobby, the bank guard rushes to the scene, also armed. Once the robber catches a glimpse of the guard entering the lobby, he swings his pistol around and draws down on the guard. The guard draws down on the robber and fires, just before the robber is able to pull his trigger. The robber is killed and the robbery is foiled.

In this case many would be hard pressed to say that the robber and the bank guard are moral equals. Even if the guard didn't kill the robber and instead shot the robber's pistol out of his hand like a John Wayne flick, the fact remains that they are not moral equals. The guard has a leg to stand on if he thinks, "I am not liable to be harmed by an unjustified threat." A morally depraved robber does not suddenly acquire the right to harm bank guards.

The robber is committing a crime, putting innocent people in danger, and any number of other immoral actions. While the guard is upholding the expectations of his post, putting himself in harm's way for others, and many

[11] Ibid. Pg 338.

other righteous actions. The violence in *Bank Robber* is "everyday violence" that seems to be answerable with notions like personal rights and liability to harm.[12] The robber here, is clearly liable to harm, potentially even mortal harm, because he is doing everything indicate that he will intentionally harm others. But war is not "everyday violence." It exists under unique and enormous circumstances that are simply different from other forms of violence.

Neither of our snipers from above were hunting innocent civilians, they were targeting each other in the context of war. The prevailing human trend, across all societies, to study war specifically and its ethics proves war is different enough from everyday violence. It seems compelling evidence that there is a difference regarding the type of violence in war given that every modern nation I can spring to mind separates their military and policing governing bodies. The morally distinct nature of war necessitates distinct notions of violence that match the context of war. Watering down the gore and fear and human privation of combat to a case like *Bank Robber* simply will not do.

Sub-Section B: A Quick Word on Atrocities

It is worth noting that a possible objection to MEC, could be the numerous accounts of what I will label *atrocities*, that is, accounts like the mutilation of corpses or the purposeful mistreatment of prisoners of war. These atrocities often are a result of a dehumanizing phenomenon of war where either, or both sides, commit atrocities on the other side for some reason or another. Maybe they are committed out of genuine hate, maybe they are committed due to cracking under the immense human factors of war. In either case, the atrocity is something clearly out of character for a combatant to

[12] I use this term, not, in any way, to minimize my condemnation of everyday violence such as assaults, muggings, robberies, and worse. I say "everyday" in the way that these types of violent encounters are likely to spring up in some degree in everyday life across the civilized world, as regrettable as this is. War, thankfully, does not fall into this category.

commit. These accounts of atrocities often lead to attitudes of moral superiority by one side or the other – an example of this could be American attitudes towards Japanese soldiers in the Pacific Theater after the Americans witnessed Japanese mutilation of American corpses. These types of accounts are often followed by words like, "savages," or "animals," or "barbaric," or other some such denigrating term. They seem to go beyond a judgment of military inferiority or cultural inferiority. In most cases it sounds like a judgment of moral inferiority that is directly contrary to my claim of MEC being true in large part because it matches the phenomenology of war.

I agree, this objection is a concern. My answer, however, is that these atrocities are usually in violation of some principle of *jus in bello* and are also experienced on the individual scale. Given the vast history of war, it is still the historical outlier to have atrocities committed by one side or the other. Even less common are infamous mass atrocities like the Mai Lai Massacre or the Rape of Nanking. What seems more common, especially as you progress closer and closer to the present day, is that when individual combatants commit heinous acts that are clearly outside *jus in bello* they elicit a visceral response, likely justified, by the other sides' combatants. Unlike being targeted by the enemy, there is the clear reaction of being morally *offended* or *wronged*. War is fought by humans, so it would be unfair to expect them to respond with balanced emotions and virtuous composure while in the heat of deadly combat.

Moreover, these visceral reactions to atrocities can be proof of MEC in the affirmative. Think of it like this. If MEC was false and was not practiced on the battlefields, then every act of violence committed in combat would be looked at through the lens of personal rights and obligations. This McMahan-ian style of looking at violence then puts unjust combatants on the

same moral level as those that commit atrocities, since if there is no MEC then only just combatants are permitted to do violence on other just combatants in war. In this world the unjust combatant is violating rights the same as the combatant that commits an atrocity because it is unjust violence against someone that doesn't warrant it. Whether a civilian, enemy combatant, or entire village is the victim of the violence, the violence would be morally wrong if committed by an unjust combatant in a world without MEC. But this doesn't fit reality. Combatants and civilians alike do not react to violence against combatants and atrocities in the same way. Atrocities are justifiably condemned because they are in some way *worse* than the already horror of war. An answer for why they are condemned so harshly is MEC because of the simple fact that atrocities violate the "rules of the game."

Atrocities, while unquestionably heinous, helps prove MEC because of the heightened reactions upon discovering them. When viewed through the gunpowder haze and amongst the stench of putrefaction, the charged responses to atrocities become relatable. It would be understandable for a combatant to harbor resentment towards a fellow combatant, either friendly or enemy, that commits an atrocity on someone that endures the same privations and suffering as they. Would you not resent the fellow shipwreck survivor if they poked a hole in the life raft? So, the harsh moral judgments that seem to result from discovering atrocities, either as the instigator or the retaliator, are at least understandable, and potentially morally justified.

V: Now, the Burden

This brings us to the crucial step in answering the scope question about non-conventional combatants posed in the introduction of this paper. We will spend the rest of the paper hunting down the answer to this question. In service to this answer, let us retrace ground we have covered thus far: We

have explained what MEC is and how it ties into JWT. We then explained why MEC is important in the first place by talking about the phenomenology of war and the fact that war is not an example of "everyday violence." This now brings us to the nitty-gritty of the issue. We have the burden of finding, or creating, a theory that will explain *why* the phenomenology of war is so different from cases like *Bank Robber* that it cannot be explained with talk of liability, rights, or *jus ad bellum*. To put it another way, we need to explain why war, in general, is *morally different* from *Bank Robber.* Up to this point we have simply stated that war is different from other types of violence.

Sub-Section A: Politics and Combatants

So, now that we have established the burden we must bear, arrive at the first defender of MEC, Christorpher Kutz. According to Kutz' paper "The Difference Uniforms Make" a key relation in MEC is the relation of the combatant to the political status of citizen to some government or nation.[13] To Kutz, the fighter is inherently linked to these political or governing bodies in such a way that both *jus ad bellum* and *jus in bello* fall within the scope of political power.

Citing numerous examples from International Humanitarian Law (IHL) and the various tribunals and conventions that make up this body of work, Kutz lays out three factors that determine if a groups violent actions fall within the scope of IHL, or the pollical realm more broadly. These factors are: the existence of an internal order able to regulate the actions of the members of a group, that the group aims be related to an act of national liberation or self-determination in line with the First Protocol[14], and that the groups' aim

[13] Kutz, Christopher (2005). The Difference Uniforms Make: Collective Violence in Criminal Law and War. Philosophy and Public Affairs 33 (2):148-180.

[14] This refers to the 1977 amendment to the Geneva Conventions in which it addresses, "armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes." Kutz pg 151.

have a degree of success that outweighs the disturbance of the peace of that nation/state. Without these three components the violence is criminal and not political, meaning that it is not subject to *jus ad bellum* or *jus in bello*.

With regard to the first criterion, it seems very traditional with respect to allowing violence among groups. When we talk about historical cases later on, this aspect is indeed crucial in my estimation. The last criteria though, falls into the realm of theorists who "...aren't thinking of war at all" as Michael Walzer puts it. Regarding the success criterion, Kutz openly acknowledges the difficulty of properly identifying a cause that could be successful, but doesn't go far enough in my book.

In the vast eras of military history there are untold scores of violent military actions that seemed doomed, but ended up as victories. Moreover, this success criterion seems to imbue the combatant with a crippling fatalism if actually applied on the battlefield. I doubt the Gallic warriors at Alesia under Vercingetorix felt that their valiant last stand against Julius Casaer was "merely criminal," according to Kutz, because they faced no real chance of success. The choice of Vercingetorix and his Gallic warriors to fight, and continue fighting, Juluis Caesar despite the steamrolling campaign waged against them still falls squarely in line with *jus in bello* principles and certainly does not make the Gauls legal criminals for failing to meet this criterion of pollical action.

Moreover, this criterion comes into direct conflict with one of the most traditionally unifying concepts among combatants: a fight against the odds. Again, relying on testimonies, accounts, and personal experiences spanning across eras and nations the idea that combatants on the field are going to cease combat because their planned actions do not pass the degree of success criterion does not match how combatants act in war. If the action is in line with *jus in bello*, that is, not an atrocity, there is no reason to

deems them "criminals" for a daring mission or risky gamble.[15] It also creates problems for units and commanders that take great risk in order to capitalize on potential great success, another common thread in history and a ideal leadership trait traditionally held among combatants[16]. Do those fighters that fail the success criterion then become criminals because their actions now fall outside pollical action? This seems to be the implication, which means the combatants are no longer protected by IHL or the other legally binding documents signed by modern nations; which means they are no longer afforded the rights and privileges normally afforded combatants under *jus in bello*.

The lines of *jus in bello* and *jus ad bellum* get blurred in this version of MEC. The possibility that combatants themselves have to worry about the degree of success of their overall war-aims sounds like we are trying to shoehorn some of the third principle of *jus ad bellum* on the warfighters. It seems a junior enlisted soldier, even if fighting a clearly unjust invader, will have to contemplate the degree of success in resisting this invader before the squeeze of a trigger, lest she run the risk of being branded a criminal by her enemy and tried as a citizen engaging in civil unrest. This situation seems very probable if a Kutz-ian view of MEC is true.

Lastly, Kutz' second principle about group violence turns on, "the character of its aims." He clarifies this point by citing examples of violence that would count as MEC under his view like liberation from an oppressor, self determination as a nation, or defensive war in general. I think that the character of a groups aims matters a great deal regarding MEC.

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[15] One example of this would be the failed 1942 raid on Deppe in WW by the Allies. The risky gamble of the raid would certainly fail the success criterion posed by Kutz. So, this raid would fail to count as political action and the combatants, both planners and actual fighters, are to be counted as criminals acting outside of sanctioned political violence. Upon killing or capturing well over half the Allied criminals, the Germans, then, would have no obligation to treat them as POWs. Treatment of criminals in the Third Reich is well documented and we can assume these Allied criminals would prefer to be protected under MEC and the obligations it demands of the Germans.

[16] It would be too lengthy to cite the mention of "seizing initiative" or "being audacious" in sources as far back as the Iliad or Sun Tzu.

In fact, I will argue that the nature of the groups reason for fighting is central to MEC being applied. But Kutz is too restrictive. The German panzer trooper racing through the Ardennes to capture Paris in WW2 is subject to MEC the same as the valiant ancient Greek fighter defending the Peloponnese against the hordes of invading Persian oppressors. By limited the approved political aims to self-determination and liberation it seems like Kutz is trying to stovepipe *jus ad bellum* into *jus in bello*. This violates JWT at the outset and risks making criminals of many fighters that abided by *jus in bello*, despite their war being unjust.[17] We cannot properly speak about MEC if, at the outset, we start to twist JWT and grey the lines between the politics of war and how combatants behave in war.

Sub-Section B: A Moral Question ≠ A Legal Answer

The language of "criminals" and "political aims" fuels my disagreement philosophers who speak of war in legalistic terms and use language that either potentially, or overtly, slips into the realm of *jus ad bellum*. A great example of this overly legal approach to MEC is Chapter 5 from *War by Agreement* by Yitzhak Benbaji and Daniel Statman. Here they argue for MEC from a contractarian approach by first saying, "The guiding idea of contractarianism is that moral rights can be traded by accepting social roles....By accepting this legal regime, soldiers allow each other to undertake the duty of obedience, that is, to become instruments of their state."[18]

Their conclusion at the end of the chapter is in support of MEC in that unjust combatants and just combatants alike are equally permitted to do

[17] I must say though, that I agree with Kutz' overall idea that strict uniforms or formal membership to an organized nation state do not "make" a combatant. These ideas will come up in the examples from the Peninsular War and it would be unfair to Kutz not to point out that I agree with the end result of his paper regarding this topic. Since he is arguing from a general MEC viewpoint, it is not shocking that I can find common ground even if I disagree with major portions of how he arrived at the conclusion.

[18] Benbaji, Yitzhak & Statman, Daniel (2019). War by Agreement: A Contractarian Ethics of War. Oxford, United Kingdom: Oxford University Press. Edited by Daniel Statman. Pg 117

violence on each other. Their rationale for this conclusion relies heavily on the notion of "obedient armies" that answer to some form of overt political power stemming from "decent and self-interested states"[19]. The obedient armies on both sides of the war, then, both do the will of their respective governments because it is in the combatants' best interest to obey a governing body, rather than be subject to pure anarchy which provides no legal protection to those that do violence. They say, "The first task in defending [MEC]in, then, to show that in minimally just symmetrical anarchy, the legal equality of combatants meets the terms of mutually benefit and fairness."[20] With respect to this quote, I am not interested in their political concepts of a "minimally just symmetrical anarchy." My issue is with the "legal equality" part.

This chapter indeed, supports MEC, but scaffolding it uses to support the conclusion is wrong. MEC is not a legal theory, it is a moral one. MEC does not exist *because* by a legal decree of nation-states giving legal authority to armies to carry out violence on other armies. Nor is the individual combatant imbued with a *legal right* to do harm to his enemy, and vice versa. The morality of war comes first and MEC is the moral truth that we have developed legal systems to both acknowledge and uphold.

Benbaji and Statman's description of dividing the moral labor of war so that some moral burden falls on the nation-state and some moral burden falls on those actually carrying out the war is not wrong.[21] In fact, as a framework for how western militaries have operated since the times of Gaius Marius and his famous miliary reforms of 107 BC, I think Benbaji and Statman have struck gold.[22] They pretty effectively summarize the established norm of civil

[19] Ibid, Pg 134.
[20] Ibid, Pg 117.
[21] Benbaji, Yitzhak & Statman, Daniel (2019). War by Agreement: A Contractarian Ethics of War. Oxford, United Kingdom: Oxford University Press. Edited by Daniel Statman. Pg 131.
[22] Dupuy, Trevor, Colonel USA (Ret.). 1984. The Evolution of Weapons and Warfare. Fairfax, Virginia: Hero Books. Pg 22.

control of the military that has become nearly ubiquitous among modern nations. Where they use the term *contractarianism* we can insert the notion of *jus ad bellum* and *jus in bello* and come to similar conclusions regarding this "division of moral labor"[23]. The contracts and legal backing of how the system works only serves to support the already held moral concepts of *jus ad bellum* and *jus in bello*, which of course encompasses MEC inherently. So, can we force the square legal peg into the round hole of MEC? Yes, but as any amateur carpenter knows, we will have gaps at the edges of that hole because the legal answer is missing the deeper question at play: It is actually morally permissible, not legally permissible, to kill the enemy across from me in combat?

VI: The Best So Far

The actual reasons why MEC is morally true is not that it matches the legal views of war, but something that Michael Walzer calls the War Convention. In his most famous book among military professionals of the modern era, *Just and Unjust Wars*, Michael Walzer creates the notion of the War Convention (WC) to better explain how we got MEC and how the morality of MEC can be found in the conventions of war. WC also matches the phenomenology of war; which as I have said earlier, should be a factor we do not overlook for this subject matter. I am not a fan of armchair ethics with respect to war and Walzer initially sucked me in with his similar approach to war. WC also makes vividly clear the distinction between *jus ad bellum* and *jus in bello*, which again, is a lacking feature in other versions of MEC. So off the bat, WC has a lot going for it.

We cannot have a muddled MEC that relies on moral support from outside the realm of *jus in bello* because MEC by its very nature relies only on

[23] Benbaji, Yitzhak & Statman, Daniel (2019). War by Agreement: A Contractarian Ethics of War. Oxford, United Kingdom: Oxford University Press. Edited by Daniel Statman. Pg 131.

abiding by the principles of *jus in bello*. There is a deeper morality at play here, one shared by the combatants themselves and understood by those operating withing the harsh and dangerous world of war. In chapter 3 of his book, Walzer says:[24]

> I propose to call the set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements that shape our judgements of military conduct *the war convention*.

This definition is careful to not conflate the outputs of war like the various Geneva Conventions, or the IHL, or national legislation passed a result of a war ending. Rather it stems from the idea that, "The common law of combat is developed through a kind of practical casuistry."[25] The application of ethics by combatants under the most severe conditions is a way glimpse the real moral issues at play in war. This is the biggest reason that WC seems the most correct regarding the morality of war. WC is the first theory that outright acknowledges the importance of decisions made by combatants actually engaged in war and the impact their actions have on the judgments we make about war.

Walzer's WC is able to illustrate that MEC has been part of this tradition by using individuals from history, like Field Marshal Erwin Rommel and General Robert E. Lee as examples. Despite being on the unjust side of their respective wars were respected during their time and in history for upholding MEC. They are examples of WC in action and clear cases studies of the distinct realm of *jus in bello* from *jus ad bellum*. According to Kutz, Rommel fails to live up to the second criterion of political action, fighting for self-determination or liberation, and yet multiple sources from both

[24] Walzer, Michael. 2015. Just and Unjust Wars: A Moral Argument with Historical Illustrations. Fifth Edition. New York, New York: Basic Books. Pg. 44.
[25] Ibid. Pg. 45.

sides of the war point to his faithful upholding of MEC as part of WC.[26] His contemporaries and history clearly paint Rommel as a combatant, despite him failing Kutz' criterion for just this test.

Robert E. Lee, likewise, should fail Kutz' test of combatant scope due to him failing the degree of success criterion. But the question is, did Lee ever have a degree of success? Or did Lee only fail the third criterion of political action after losing Gettysburg in 1863? Or did he fail this criterion after losing Sharpsburg 1862 in, but then regain the degree of success after continuing to fight, only *truly* failing this third criterion at his final loss at Appomattox in 1865? These questions point to a weakness of this Kutz-ian criterion. Only through the eyes of history can we judge the degree of success with any certainty, but this is no way to determine who is afforded the rights and privileges of MEC. How can we expect warfighters to act with conviction under fire if they know that, ultimately, it is the powers that are subject to *jus ad bellum* that hold their status at combatants in their hands? Under WC all combatants, while acting in accordance with the norms of *jus in bello*, which encompasses MEC mind you, are combatants.

The fact that WC respects the nature of war and allows for flawed human judgements made during the heat of combat not only shows charity to what those combatants that have suffered combat, it matches the experience of those that have seen war. This does not imply that morality is "grey" in war or that moral judgments become less firm in combat, however. What WC allows for is that the determination of right or wrong conduct is taken alongside the nature of war and within the context in which the choice was made. It is unfair to combatants to compare war to cases like *Bank Robber* or the infamous trolley case. These sanitized cases might be well suited to talk about things

[26] Kurkowski, Franz. 2010. Das Afrika Korps: Erwin Rommel and the Germans in Africa, 1941-1943. Mechanicsburg, Pennsylvania: Stackpole Books. Pg.101-103

like rights or self-defense, but the phenomenology of war is not like these isolated cases. Like WC states, we cannot view war apart from all the concepts that shape our judgements when pressed to make decisions in the hellscape of combat.

Moreover, WC gives pinpoints the morally relevant difference between *Bank Robber* and war. According to WC, there is a convention according to which combatants are moral equals, but no such convention exists for cases like *Bank Robber* that makes the police and the robber moral equals. As we will see in the next section and the upcoming historical cases from the Peninsular War there is no "policing convention" or "bank robber convention" that can answer morally relevant questions in *Bank Robber.* WC, however, can offer us generations worth of decisions made by combatants that offer a clear notion of MEC.

VII: Convention Itself

WC is a part of JWT, broadly speaking, and it is related directly to *jus in bello*, not *jus ad bellum*. Off the bat, this is a point in favor of WC for not flirting the line between these two arenas. Specifically related to *jus in bello* however, the three principles that constitute the traditional *jus in bello* notion are not enough to encompass all the norms and traditions that fall within WC. For example, allowing combatants to surrender is large stakeholder in WC throughout history both before and after Aquinas penned the famous *jus in bello* principles.[27] Examples like this show that WC is well suited to matching the phenomenology and morality of war because it not in lockstep with the limited words JWT has to say on the matter. WC grew to encompass the humane treatment of troops once combatants realized it was morally right to do so.

[27] Walzer, Michael. 2015. Just and Unjust Wars: A Moral Argument with Historical Illustrations. Fifth Edition. New York, New York: Basic Books. Pg. 46.

It is also worth noting with respect to conventions broadly speaking, that a just convention is better than an unjust convention. While this might seem obvious, the point is that a just convention is more likely to fix out moral rights and duties with respect to something precisely because it is a just convention. An unjust convention would off less reason to follow it is we knew that the convention itself was unjust. A small example of this could be "Minding your P's and Q's" when at a social gathering. The convention of having good manners, like saying, "thank you" or not spitting you food on the table, seems to have moral pull because these conventions are rooting in just and moral behavior. We want to be good people, so we want to say, "thank you" when someone passes us the salt. The convention itself is not moral, but the choice to follow the convention is motivated by moral desires. If a convention sprang into existence where instead of saying, "thank you" we verbally accosted the chef after dinner, we would likely feel less compelled to follow it because it seems to lack the same moral pull of saying, "thank you."[28] In the same way that society has continued to choose to say, "thank you" to show good manners, combatants have chosen MEC as part of WC to make war slightly less hellish.

It should also be pointed out, that regardless of the just or unjust nature of a convention, that WC is similar to other conventions in that everyone need not know all the details of WC before taking part in in it, or to be morally bound by WC. To illustrate this claim, imagine that someone who have never played poker before walks up to a table in Las Vegas. He sits down and begins to mimic his fellow poker players, though he does not know why he

[28] While it might seem silly, the myriad of faddish trends that sweep social media might be another example of unjust conventions lacking the same moral pull of a just convention. Similarly, in a scene from the 2021 film *Dune* comes to mind. In it a character spits on the table directly in front of a noble duke and all present, save the spitter are aghast. What they don't know is on that alien planet spitting is a genuine and deeply held convention of showing trust and gratitude. Once they realized this, they accepted the spit with grace. The convention of spitting is, by itself, not just or unjust, but once paired with the just disposition of showing gratitude, it is imbued with moral weight.

does any of the actions he mimics. In the end, our new player plays 5 hands and comes out 5 dollars down. Our new player has no conception of the mundane conventions of poker, yet is still playing poker. Here is a case where someone does not know the convention, but is still subject to it by virtue of being at the table, in this case. Regardless of the morality of the convention, you can take part either knowingly or unknowingly.

Without attempting to summarize thousands of years of military history in a few sentences, it would seem that combatants have been doing the same thing regarding WC. We can trace with relative accuracy the actions of combatants going back to ancient times. The "...articulated norms, customs, professional codes, legal precepts, religious and philosophical principles..." that Walzer includes in his conception of WC seem to be obeyed by nearly all combatants in any given situation. Remembering our section on atrocities, those that violate *jus in bello* by committing atrocities thereby violate WC because it encompasses more ground than just the three specific principles of *jus in bello*. And this tracks through history. Of all the countless millions that have been combatants in history, it is very doubtful that they *all* knew WC and what that meant regarding they duty to uphold MEC in combat. Any yet, like our unknowing poker player, those countless millions generally "played the game by the same rules." We are speaking in generalities of course, but this is an interesting through line regarding conventions and history nonetheless. It lends support to the idea that every combatant does not need to know the intricacies of WC, or know what *jus in bello* is, or even know that MEC exists in order to abide by the moral duties that these concepts entail. So regardless of intimate knowledge of a convention's details, we can be subject to the rights and duties that the convention upholds and displays.

What we will do in a minute is create a bridge between the fact that WC seems to include MEC and the idea that MEC is, indeed, moral. WC is a

convention that clearly morally important, so in order to make this bridging move we will rely on the fact that conventions which are indeed morally necessary or valuable generate moral rights and duties.[29] To briefly touch on this concept's validity, we turn to an example of a morally necessary convention outside of war that is the catalyst for real moral action: the hand sign for, "I'm choking!" We all know it, two hands around your throat and usually a strained look on your face. When we see this convention, we are motivated to help the person avoid death from the fact that we are morally compelled not to simply leave a suffering person to choke and die. I think it safe to say that we would call you immoral if you saw a lady giving the sign for "I'm choking!" in the bread aisle of the grocery store, and then simply turned and walked the other direction.

You are not morally obligated to know the Heimlich Maneuver, nor are you morally obligated to put yourself in mortal danger in the bread aisle, but you surely have the moral duty to help, in some way, commensurate with your capabilities. In this vein of thinking, we needed a convention to express the moral duty of helping someone who is choking in public. As a society we agreed on the now instantly recognizable hand sign, but it could have been some other hand sign of course. The actual placement of the hands is not important morally; what matters is that a convention was morally necessary to generate the proper moral response of others helping those that choke. This line of logic could also be applied to other such morally necessary conventions that humans have adopted, albeit with much more debate regarding the details of the necessity, or morality, or duties entailed.[30] It seems that there are at least some conventions that are morally necessary or

[30] Some examples that seem, at least, to be good candidates for this exercise are: the convention that "every man's house is his castle," or the convention of not being able to sue an individual for trying to administer CPR, or even the convention that persons under arrest are read their Miranda Rights. These are all, of course, highly debatable conventions and I did not want to enter a debate about such thorny topic in the body of the essay so as not to detract from the direction of the paragraph. I hope the concept is easy to follow however.

valuable because they create a way for humans to put into practice an already held moral judgement. If we did not have the hand sign convention for, "I'm choking!" then it seems very likely we would have created some other convention to achieve the same effect moral response.

The same logic can be applied to the relationship between MEC and WC, according to Walzer. The important bridging move is between the following two notions: 1) It is part of WC that all combatants are subject to MEC, and, 2) combatants are morally permitted to attack, target, etc. one another under MEC. MEC is the morality right notion that upholds the morally motivated conventions of, "it is good to let surrendering troops surrender" or "it is wrong to slit the throats of wounded enemy fighters." So, to support these morally right judgments, the convention of MEC becomes the method for reinforcing and motivating right conduct in combatants. Thanks to WC we have an answer for how MEC fits into combat that not only fits the way combatants experience war, but also an answer doesn't relegate MEC to a nonmoral convention like the rules of poker. In war there is great moral weight in the fact that WC has MEC as part of the way we fight wars.

VIII: Now, the Question of Combatants

So far, in our quest to answer the question of who the sphere of MEC applies to we have established that MEC is part of JWT, so long as the combatants abide by *jus in bello*. We have given some reasons why MEC is morally correct, notably that war is governed by the same morally relevant issues as individual cases of violence and the fact that MEC matches the phenomenology of war. We even went over some examples of combatants speaking about MEC from history. We then debunked some ways of getting MEC that did not speak of war in the right way, either blurring the line between *jus ad bellum* or coming at the matter from too legalistic perspective. We then settled on Walzer's account of WC as the best explanation of how we get MEC. In discussing WC, we explained that conventions can be morally necessary or

valuable in that they generate moral duties to uphold those conventions. Because MEC is moral, and because WC speaks of this morality in a way that matches the phenomenology of combatants throughout history, we now have a firm foundation upon which to answer the question regarding non-conventional combatants. The answer to who belongs withing the scope of MEC is this: Some non-conventional combatants will have MEC. Some non-conventional combatants will not have MEC. In the next section we will break down how a combatant can fall into either answer to the scope question. An analogy for the type of answer we are after is this: The convention of driving on the right side of the road applies to cars, motorcycles, trucks, etc., but not to pedestrians on the road. In the context of war, we are trying to see if non-conventional combatants are like cars, which are bound to the conventions of driving, or if they are like pedestrians and exist in the same realm, but are not bound by the convention.

IX: The Heart of MEC

To truly understand MEC and how it applies to non-conventional combatants I think it boils down to the relation of three ideas we have spoken about in this essay. To recall the definition of MEC we have been using:

> All combatants --- irrespective of fighting a just war or not --- have the same moral permissions to attack combatants on the other side of the war, so long as they abide by the principles of *jus in bello*.

We have spoken *at length* about how war is different than everyday violence and given a strong case for how WC explains the reason we have such conventions like *jus in bello* and MEC. But we have not pinpointed how someone actually acquires MEC, especially if they are not a combatant dressed in the vibrant red uniform of 18th century British soldiers. I think it comes down

to this:

> True MEC: the combination of being a combatant representing a cause greater than themselves and operating within WC willfully.

This version of MEC, I think, is what truly matches the way combatants view each other in war. Combatants realize that their enemy is fighting for a cause that is contrary to their own; this could be a national cause or a simple cause like, "their platoon wants to take the hill I am on." This ties back to the nature of war. At the outset, there must be irreconcilable wills that are trying to impose their will on either side for war to exist in the first place. Once we have loggerheads between the sides, then WC governs how the sides fight and try to kill each other. To this end, if one of the combatants willfully operates outside WC, then they are not afforded MEC because they are spoiling the game for the rest of the team. If we don't play by the rules, then war is butchery. It devolves to bloodlust for bloodlust's sake; that is not war. And lastly, being part of a chain of command is the simple idea that combatants are not individual mercenaries, they are part of a group that serves not just each other, but the cause they fight for.

To the individual level, combatants might disagree with the cause or have personal hatred towards the enemy, or disagree with the war as a whole, or any other such normal human reaction to war and combat. But what brings it back from the brink of butchery is that they recognize their enemy is going through the same thing as they. Both sides are combatants fighting within the context of war, so there is a certain level of acknowledgement, maybe even respect, that goes both ways. I hesitate to say chivalric respect, because that might be too strong a word in all cases of war, but the idea is there. Historically, this proves true as well, our case study on from the Napoleonic War period will add credence to this claim.

Tying this back to the analogy of pedestrians and cars with regard to the driving convention, if the combatant abides by the conditions of True MEC, then they are a car, not a pedestrian. They would exist on the road and be subject to the duties and privileges of being a car. As we will see in our case study, non-conventional combatants not only *can* be afforded the protections and duties of True Mec, they often do everything in their power to fulfill as many, "articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements" from WC as possible. The outlier are those non-conventional fighters that intentionally act outside of WC and end up reaping what they sow by not being protected under MEC as combatants.

X: A Trip to Spain

Now, I must say that I am not offering a history lesson on the Peninsular War. As military historian I have some personal interest in this time period that inspired me to use it as the case study for True MEC in practice. Some scene setting is required, but I will leave it up to your own historical curiosity to fill in the blanks of history that, unfortunately, we do not have time for here. The main character of our case study is the Spanish guerrilla fighter, or *guerrilleros* in the original Spanish. These peasants and farmers turned fighter came out of the hills, in many cases literally, as a result of the French invasion of Spain in January 1808 under the famed Napoleon Bonaparte. The Spanish government, which until the invasion was an ally of fellow Catholic nation France, quickly abdicated its throne to Napoleon, renounced its governmental powers formally to France, and loses formal control over much of its army. By May of 1808 Napoleon's brother is the King of Spain, formally titles Josef I of Spain.

Also in May, the first popular uprising of the peasantry against the French occurs in Madrid, later called the 2nd of May Uprising; this uprising

failed to impact military operations in Madrid, but it did result in hundreds of peasants dead at the hands of the French.[31] I am careful not to use the term "guerrilla" or, heaven forbid "combatant," yet because we are trying to answer the scope question of MEC. I do not think that the first uprising of the local population on 2 May 1808 satisfies any of the conditions of WC, or *jus in bello*, or True MEC. It does tip the scales however, because after this first incident all bets are off in Spain. From here until the end of the war, Spanish *guerrilleros* become serious contenders in the war, so much so that Napoleon refers to the tactical problem they present as his "Spanish Ulcer"[32]

By late 1808 Britain has landed in Portugal, but remain indifferent to the growing number of *guerrillero* bands that began forming across all of Spain to violently revolt against the 250,000 soldier army Napoleon has just deployed across the Spanish frontier. Fast forward a few months and the *guerrilleros* are now conducting coordinated attacks and raids on French columns, logistics hubs, and garrisons. Their tactics are hit and run, they have no formal staging areas, and they blend into the local population when not doing harm to their enemies. These bands all have their own individually elected, or self-appointed, leaders and as we fast forward farther to 1809 and early 1810, they begin doing things that make them a perfect case study for our question of who falls under MEC and why WC is the best way to speak about the morality of war.

As the war progressed, these bands, without explicit coordination between themselves, began doing things like: exchanging formal correspondence with French Officers regarding the treatment of civilians in the area, organizing chains of command among themselves, using self-given military rank

[31] Fraser, Ronald. 2008. *Napoleon's Cursed War: Spanish Popular Resistance in the Peninsular War*, 1808 - 1814. New York, New York: New Left Books.
I highly recommend this book for more details on this war. I have condensed *much* of the timeline and the author provides many details I wish I had time to speak about.
[32] Ibid, Pg. 25

titles, conducting formal prisoner exchanges, and donning homemade uniforms(though in small numbers and only in battle).[33] Keep in mind we are talking about fighters that started out as *literal* farmers with pitchforks and less than a year later they are conducting flag of truce meetings with French Generals while carrying captured French weapons into battle. This seems like a good point to point out the flaw of a Kutz-ian notion of MEC again. Not only do the *guerrilleros* egregiously fail the degree of success criterion at the outset, it is never clear when, or if, they *guerrilleros* could even formulate what this looks like for them. If success is pushing the French out of Spain and reestablishing the now exiled government, that is virtually impossible. From band-to-band and region-to-region the degree of success was essentially bipolar. For some *guerrilleros* bands they roamed free due to lack of French presence. In other areas the bands were savagely crushed because of the legitimate power of the French army.

Kutz says that success cannot be more civil disruption than prior to the conflict, nor should the resistance cause more civil disruption that the occupation force. There is a strong case that the order brought on by French occupation was less disruptive than the continual imposition of martial law that resulted in the suppression of the *guerrilleros*. So, Kutz' notion of MEC does not track to what actually happened in Spain and would classify the *guerrilleros* as criminals, not combatants. The French would not be conducting prisoner exchanges with an enemy they saw as an outlaw band of criminals. The French would hang them upon capture, like they did with countless other designated criminals they encountered in the Peninsular War.[34]

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[33] Laqueur, Walter. 1976. *Guerrilla: A Historical and Critical Study*. Boston, MA: Little Brown and Company. Pg.30 - 39
Esdaile, Charles J. 1988. *The Spanish Army in the Peninsular War*. Manchester, UK: Manchester University Press. Pg. 162.
Esdaile, Charles J. 2004. Fighting Napoleon: Guerrillas, Bandits, and Adventurers in Spain, 1808 - 1814. New Haven: Yale University Press. Pg 173 - 175.

[34] Esdaile, Charles J. 2004. Fighting Napoleon: Guerrillas, Bandits, and Adventurers in Spain, 1808 - 1814. New Haven: Yale University Press. Pg. 146 - 150.

Jumping over to Benbaji and Statman's take on MEC and the *guerrilleros* likewise fail to rate MEC. There simply is no formally recognized governing body that the *guerrilleros* can be "obedient soldiers" to. The government in exile, The Junta Suprema, was toothless and to every other diplomat besides those part of the Junta realized the truth: that the former Spanish government no longer existed. If there was to be a new government it would have to wait until the end of hostilities. So, the *guerrilleros* had no civil control, no formal legal relationship to even the Junta, and certainly did not belong to a legally established army of any sort. The British army, of course, stands as the exemplar of Benbaji and Statman's case for MEC. They meet all the legal, governmental, and relational requirements to be formally benighted "combatants" under their contractarian view. But the *guerrilleros*? Certainly not. And yet, the French refer to the *guerrillero* leaders as "commanders" or by the *guerrillero* leader's own self-given rank in written correspondence.[35] Again, the French are under no legal or international pressure to correspond with, or even alone acknowledge, these self-appointed "Coronels" or "Comandante" in the same way they would refer to a British Colonel.

Enter WC and true MEC. Simply put, the *guerrilleros* that did everything in their power to operate within WC were nearly instantly afforded MEC by the French. The *guerrilleros* did not use the same line infantry tactics as the French at the outset of the war, but even the French acknowledged that their hit and run fighting was the only way they could fight.[36] This note should not overshadow fact that the bands did not *have* to take prisoners, or conduct flag of truce meetings, etc. The *guerrillero* is under no pressure, except morally, to act like a combatant to the extent possible. Moreover, it might

[35] Laqueur, Walter. 1976. *Guerrilla: A Historical and Critical Study*. Boston, MA: Little Brown and Company. Pg. 37
[36] Fraser, Ronald. 2008. *Napoleon's Cursed War: Spanish Popular Resistance in the Peninsular War*, 1808 - 1814. New York, New York: New Left Books. Pg. 337

even argued that operating within WC hindered their ability to kill larger numbers of Frenchmen. They certainly could have caused more chaos and death for Frenchmen if they took no quarter, or poisoned the water supplies, or mutilated corpses; but on the whole they didn't.

The few infamous bands of *guerrilleros* that did commit atrocities, where, not shockingly, treated as criminals by the French when caught alive. There are unfortunately an infamous few bands of *guerrilleros* that became well-known for their explicit and intentional criminal actions. Some of these bands openly mutilated French corpses in order to tempt the French into retaliating on the civilian population, then when the French did so, they used this as ammunition to call out the brutality of the French.[37] These bands are also cited as blatantly extorting the local populace for food, gold and supplies, in order to stock their own personal coffers. The locals, according to both French and Spanish sources, apparently hated these bands worse that the French because of the clear betrayal of ideals.[38] The locals expected the Frenchy occupier to take war supplies, but to be exploited by their, possibly literal, former neighbor was a bridge too far. These infamous bands saw the power vacuum of Spain as a chance to extort, in some cases, their literal neighbors not to fight the invader but to establish miniature kingdoms of their own.

These, essentially, gang-lords were treated as criminals by the French and British alike precisely because they failed to abide by WC and acted for an immoral cause. They were not operating withing the context of war, but used war as a convenient excuse to impose suffering on civilians for person gain. The respectable bands, we will call them, may not have been fighting for a definite king, or nation, or legal doctrine, but they were clearly

[37] Fraser, Ronald. 2008. *Napoleon's Cursed War: Spanish Popular Resistance in the Peninsular War*, 1808 - 1814. New York, New York: New Left Books. Pg. 411

[38] Ibid. Pg 401.

fighting for some ideal of "Spain" or "self-determination" or "Galicia" or "Madrid." The French knew which bands fought for some ideal and which were criminal bands by the very fact that the respectable bands didn't commit atrocities or extort the local civilian populace.[39] Among the criminal bands acts like increasing personal wealth, attempting to establish new fiefdoms in the power vacuum of Spain, or simply to preying upon already destitute civilian targets for pleasure were commonplace. Later in the war, when the British army was sweeping North to the French border, many *guerrillero* bands were offered full recognition in the British army complete with British provided uniforms, arms, and rank equivalence.[40] It should come as no shock that the criminal bands did not accept this formal recognition, instead choosing to remain outlaws, and therefore not protected under any moral obligations related combatants, in the eyes of the British, French, and Spanish locals alike.

During the war the French marshals, moreover, did not receive any explicit guidance from Napoleon regarding treatment of the *guerrilleros*.[41] So, the trend that the French treated *guerrillero* bands differently based on their adherence to WC can really be seen as further proof that WC not only matches the phenomenology of war, but also matches the moral judgments we make about those fighting in the war. If you play the game, you get the privileges of MEC. If you violate the rules, you are not a moral equal. This

[39] Esdaile, Charles J. 1988. *The Spanish Army in the Peninsular War*. Manchester, UK: Manchester University Press. Pg. 176.
[40] Esdaile, Charles J. 2004. *Fighting Napoleon: Guerrillas, Bandits, and Adventurers in Spain, 1808 – 1814*. New Haven: Yale University Press. Pg. 174 - 175
[41] Fraser, Ronald. 2008. *Napoleon's Cursed War: Spanish Popular Resistance in the Peninsular War*, 1808 - 1814. New York, New York: New Left Books. Pg. 421 – 422.
He did often write to his marshals about his disappointment regarding the effectiveness of the guerrilleros against his army. His guidance to his commanders was essentially, "fix the problem" with no further context. Either willingly, or because his mind was occupied with his Eastern Theater, Napoleon gave wide autonomy to his marshals regarding the Spanish Ulcer and how they saw to treat the malignancy.

brings us to the application of true MEC to the *guerrilleros*. To remind us of the definition, I have stated it again:

> True MEC: the combination of being a combatant representing a cause greater than themselves and operating within WC willfully.

With respect to the *guerrilleros* bands that did operate within WC it is important to note that conventions like chains of command, or obedience to civil authority, or operating within *jus in bello* are all encompassed. It is not that I take issue with the general guiding features of Kutz' or Benbaji and Statman's notions of MEC. It is that MEC is not *just* the aspects they argue for. As we can see with the *guerrilleros*, it is intentional striving to adhere to the long standing and generally accepted morally important conventions of war that the French saw them, at minimum, not as criminals. In some cases, the French even were told, face to face by *guerrillero* leaders during the flag of truce meetings what the *guerrillero* was fighting for. The French also saw by how the various bands treated both French combatants and civilians that there was a clear difference between a *guerrillero* trying to fight a war and a *guerrillero* committing atrocities or crimes.

Once again, we lean on the phenomenology of war to back our moral judgements of how combatants treat each other. It makes sense that the French treated the *guerrilleros* as combatants when they fought for a cause that was minimally not immoral and when they acted within WC to the extent possible. It also makes sense that the British shared the French opinions about the bands of *guerrilleros* committing atrocities and labeled them criminals later in the war, once the French were being pushed out of Spain. Combatants know when the enemy, or supposed allies, are not playing by the rules and it seems a trend throughout history to call them out for it. While WC, as described in *Just and Unjust Wars* does not give a definition of MEC like I have created with True MEC, it seems

like proper logical step to say that WC leads directly to True MEC with respect to non-conventional combatants. If the combatant abides by True MEC, which entails abiding to WC, then the non-conventional fighter is afforded the same rights and privileges of MEC of a fully uniformed and equipped soldier of Napoleon's own *Vieille garde.*

XI: Concluding Thoughts

I am a professional warfighter. I am also hopeful that I never have to go to war. However, there is a famous saying among my profession, "Hope is never a course of action." So, I accept the reality that war is likely in the future, either for me or for other warfighters yet to come. MEC, therefore is close to my heart. The even harsher reality is this: If war occurs in the future, it will certainly include non-conventional combatants. It is not a question of "if" we will have to answer the question regarding who falls under the protections and duties of MEC, it is a question of "when". I did not embark on this essay to answer a question about who falls under MEC just as a philosophical exercise. Selfishly, I might be subject to True MEC someday in the future and I want to make damn sure that when I give the order to kill my enemy that the order is moral. So, at the end of it all, if I have argued for a correct version of MEC, great. If not, then I have at least opened the door for someone else to further the discussion so that we might make the conduct of war even slightly less hellish.

"It is well that war is so terrible, or we would grow too fond of it"

-Lee

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