

# EXPLAINING THE PRINCIPLE OF *MALA IN SE*<sup>1</sup>

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*Certain methods and weapons are traditionally considered to be 'mala in se', i.e. evil in themselves. Examples are mass rape campaigns and land mines. This article examines different interpretations of the principle that belligerents ought not to use such means. Some interpretations are reductionist in the sense that they see the principle as an instance of other principles regulating conduct in war (jus in bello), namely the principles of discrimination and proportionality. I suggest a horizontal and a vertical dimension of the latter. Resort to violence can then be unjustified if (1) the persons are not liable to be attacked because they bear no (or not enough) responsibility for the relevant threat, (2) the amount of harm is disproportionate compared to what can be achieved by the resort to violent force, or (3) the kind of harm is disproportionate by making individual persons suffer in ways that no one should have to endure. I defend the vertical dimension of proportionality as a key to understanding the principle of mala in se and consider whether it leads to an absolute prohibition against such means.*

KEY WORDS: Absolutism, *jus in bello*, *mala in se*, proportionality

## Introduction

The concept of *malum in se* is explicitly or implicitly invoked in most traditional accounts of *jus in bello*, often as an independent principle: Belligerents should use 'no means *Mala in Se*' (Orend 2005: section 2.2). In the following article, 'MSP' stands for this principle. The concept originates in criminal law designating those crimes that are not merely *malum prohibitum*, i.e. evil or wrong because against the law, but 'inherently nefarious'. The similar thought in the Just War Tradition is that certain means and weapons should be ruled out by the principles of *jus in bello* not only for conventional reasons but because they are 'evil in themselves' in some objective sense. In Michael Walzer's somewhat airy formulation they constitute a 'shock to the moral conscience of mankind' (Walzer 1977: 107).

In philosophical ethics we of course want to know what is meant by 'inherently nefarious' or 'evil in itself' and what status we should assign to MSP. One strategy involves debunking the idea by claiming that 'evil in itself' is really just shorthand for actions that are ethically problematic for other reasons than any inherent badness. Consequently, we do not really need the MSP as an independent principle since it is reducible to other more basic principles in *jus in bello*. These other principles are doing the real explanatory, or at least all the justificatory, work. In the following, I examine some variants of this reductionist strategy. I find them unsuccessful and conclude that we do need some version of MSP, at least until we have a better reductionist account. Furthermore, I want to argue that a certain view of *jus in bello*, proposed by Jeff McMahan and others, is problematic because it

is in potential conflict with MSP. In the final section, I discuss briefly some reasons to favour an absolute prohibition against means *mala in se*.

### What Counts as Means *Mala in Se*?

Consider the examples of means *mala in se* given by Brian Orend in his entry on 'War' in the online *Stanford Encyclopedia of Philosophy*:

Soldiers may not use weapons or methods which are 'evil in themselves'. These include: mass rape campaigns; genocide or ethnic cleansing; using poison or treachery (like disguising soldiers to look like the Red Cross); forcing captured soldiers to fight against their own side; and using weapons whose effects cannot be controlled, like biological agents (Orend 2005: section 2.2).

These examples are very heterogeneous, a fact that is apparent in some of Orend's formulations. Genocide has been categorized as a crime against humanity, mass rape a war crime as well as a crime against humanity (see Scholz 2007), biological weapons as too uncontrollable and indiscriminate, disguised soldiers as a kind of treachery, enrolling captured soldiers as, perhaps, a kind of enforced treachery.<sup>2</sup> On the face of it, then, we should be wary to look for one common feature to explain their 'inherent nefariousness'. What I want to examine is the more modest claim that the reason why certain means should be considered *mala in se* is to be found in two other traditional *jus in bello* principles, namely the principle of discrimination and the principle of proportionality.

### *Mala in Se* as Indiscrimination

It seems clear that some weapons and methods are *mala in se* at least partly due to the fact that they totally disregard the principle of discrimination, i.e. the principle that one ought to discriminate sharply between those liable to attack (combatants/armed soldiers) and those not liable (non-combatants/civilians) in the application of military force. That is obviously one reason to condemn mass rape and ethnic cleansing: They typically have innocent civilians as their direct target. The condemnation of and ban on land mines also featured this reason as prevalent: Most victims of land mines are civilians and very many are victimized even after hostilities are over. And a very strong case can be made for a ban on cluster bombs for the same reason.<sup>3</sup>

All methods and weapons can be used to harm 'innocents', i.e. persons that are not liable to be harmed because they bear no responsibility for an unjust threat. But certain weapons are especially problematic because they *unavoidably* harm the innocent. And still more problematic are weapons and methods that *necessarily* or even *intentionally* harm the innocent. Whether a specific weapon is in fact *malum in se* for this reason is of course often debatable. It can be argued, for example, that land mines are not inherently indiscriminate if placed in clearly marked areas like the minefield that separates North and South Korea.<sup>4</sup>

The principle of discrimination asks *who* is harmed and *if* we conclude that a method or weapon invariably harms the wrong ones (those not liable to be harmed) then we may be inclined to label that method or weapon *malum in se* on the grounds of non-discrimination. But this is clearly not the whole story. There are proportionality considerations as well. We can ask *how many* are harmed and sometimes conclude that it is far too many and therefore a disproportionate use of force. We can also ask *in what way* the individuals are harmed and

sometimes conclude that the harm is excessive or disproportionate. We should distinguish, therefore, between two kinds of (dis)proportionality. I suggest the terms *horizontal* and *vertical* disproportionality.<sup>5</sup> Horizontal proportionality is basically comparisons of the amount of harm, first of all of the numbers of harmed people, whereas vertical proportionality is about the severity of the individual harm, sometimes compared to the severity of the individual's culpability but sometimes even in isolation from this.

### ***Mala in Se* as Horizontal Disproportionality**

In the conventions and morality of *jus in bello* there clearly are limits other than the limits on *who* can be liable to attack. Certain kinds of munitions are banned not because, or only because, they are indiscriminate but because their destructiveness goes far beyond the rational military objective of neutralizing the enemy. Nuclear bombs and napalm are often indiscriminate but the particular horror they provoke is due also to the mass and long-term destruction they cause. Proportionality plays a strong role in the justifications of collateral damage, i.e. unintended harm to (innocent) civilians. Here we tend to think that the numbers count in a rather strict way. Land mines and cluster bombs are very often problematic for this reason: The sheer number of civilian casualties from the typical use of these weapons tells against them even if those casualties are unintended.

There are two objections to this horizontal disproportionality explanation of MSP.

First, one could claim that just as weapons like land mines and cluster bombs are not necessarily indiscriminate, they are not disproportionate in the horizontal sense either. One can at least *imagine* distributions of them that would not lead to excessive casualties. The explanation would then be based on a weaker claim that these weapons typically or generally lead to excessive casualties. Even if land mines and cluster bombs invariably lead to excessive casualties that might just show that it is not the weapons or methods *as such* that are evil. They are evil only in an indirect sense by being disproportionate and thus not *mala in se*.

Second, one could point out that more conventional weapons can be used in a disproportionate manner as well. And arguably this can be the case even when directed solely at combatants if these are practically defenceless. A good (i.e. bad) example would be the US attack on retreating Iraqi troops in the final stage of the first Gulf War which was later characterized as a 'turkey shoot'. Even if the Iraqi troops did not surrender and thus were legitimate targets, the ensuing all-out massacre seemed out of proportion. The scale of destruction was far beyond what was needed for military success.<sup>6</sup> In international humanitarian law this is often stated as an independent principle of *military necessity*: It is always wrong to use means and methods that are not necessary for the achievement of one's military goal. The principle of necessity has a number of interpretations and possible functions. Historically it seems to have been motivated mostly by unnecessary destruction of property and infrastructure (see Carnahan 1998) but it may also be understood as putting restrictions on the means of attack against persons. One way to account for the impermissibility of the attack on the retreating Iraqi troops would then be to judge it as unnecessary since the military objective – dislodging Iraqi forces from Kuwait – had already been accomplished.

I do not think, however, that this gives a good explanation of why we find certain means and weapons especially problematic, morally speaking. First of all, some tactics may be unnecessary but relatively harmless and thus not *mala in se* at all. The moral import, it seems, comes from indiscrimination and disproportionality. More importantly, it is simply

not always the case that the most horrible means are unnecessary. More often than not the effect of the principle will be permissive rather than restrictive because one can always *think* of 'supreme emergency' situations (at least philosophers can!) where it *would* in fact be necessary to use methods considered *mala in se*, e.g. rape or napalm.<sup>7</sup>

The problem with the necessity explanation, I think, is this: It is true that the principle of necessity in many cases *tracks* the MSP but this is a contingent fact. It does not really *explain* why certain methods are morally wrong.<sup>8</sup> It does not seem to capture the real *moral* reasons against certain means. It may well be that rape is (almost) always unnecessary but I do not think that this gives a satisfactory *explanation* of its moral wrongness.

A similar point was once made by Bernard Williams:

One does not feel easy with the man who in the course of a discussion of how to deal with political or business rivals says, 'Of course we could have them all killed, but we should lay that aside right from the beginning' (Williams 1985: 185).

In some cases it is not very reassuring to be told by a person that he would not even consider doing certain things. In at least one sense he already has and his reasons may be of the wrong sort (e.g. 'after having made a detailed calculus of pros and cons we have decided not to go along with a mass rape campaign').

I think the explanation lies elsewhere. What is repulsive about certain types of anti-personnel mines and cluster bombs, for example, is not only excessive casualties, i.e. the number of people harmed and killed. At least as important is the *manner* in which they are harmed. Even if civilian casualties are unintended one can hardly claim that the particular *mutilating* effects of these weapons are unintended. This has to do with the proportion of harm done to the single individual, i.e. vertically, which will be discussed in the next section. Some people, however, obviously believe that the principle of discrimination has a strong priority over the principle of proportionality: If you are really certain about fulfilling the principle of discrimination, then you need not worry that much about the principle of proportionality. The justification of causing harm depends strongly on whether the person in question is morally culpable or not. If you are a very bad person, you 'had it coming' and if you are behaving very badly, you are not in a position to accuse others of behaving very badly.<sup>9</sup>

Much traditional human rights and just war thinking, however, has insisted that *some* ways to treat other people are morally wrong no matter whether or how guilty those people are. One way to put it is to say that some rights are immune to the question of guilt or culpability. A criminal forfeits a strictly specified scope of his basic rights, e.g. his freedom of movement. But most of his basic human rights are wholly unaffected by his criminal behaviour (in fact a charged criminal even *gains* a right to legal council). A criminal does not (or ought not) in any way forfeit his right to freedom of religion, freedom of speech, his right to bodily integrity etc.<sup>10</sup>

None of this, however, is captured by the principles of discrimination and horizontal proportionality. We have to turn to the principle of vertical proportionality for a more plausible explanation.

### ***Mala in Se* as Vertical Disproportionality**

Apart from the (horizontal) *wideness* of certain weapons' destructiveness it is also characteristic that certain weapons cause harms that are extreme in their *depth* so to speak. The principle of horizontal proportionality is *collectivist*, i.e. certain weapons are

considered disproportionate because of the *number* of people they maim and kill and/or the *amount* of material, environmental and other damage. There are, however, examples of weapons considered *mala in se* that are not captured by this horizontal, collectivist version of the principle.

Weapons and methods can be disproportionate also in a vertical, individualist sense when they attack individuals (whether they are combatants or non-combatants) in a disproportionate way. Consider the following recent example. The criticism raised by doctors working in the Gaza Strip during Israeli forces' 'Operation Boiled Lead' in December 2008 was based on the *way* the victims were harmed as well as the number and status of the victims. It was bad enough that very many civilians, including children, were maimed and killed but particular outrage and shock was provoked by the *manner* in which these children (and others) were maimed and killed. For example, the DIME (dense inert metal explosive; tungsten powder) bombs used by Israeli forces had an effect of tearing off limbs in a manner that had not been observed before:<sup>11</sup>

The amputations mostly occurred at waist height in children, generally lower in adults, and were combined with skin-deep, third-degree burns, four to six fingers upward from the amputation. Where the amputation took place, the flesh was cauterized as a result of the heat. The patients with these amputations had no shrapnel wounds, but red flashes on the abdomen and chest. The excision of large pieces of flesh was not infrequent in these patients (United Nations Human Rights Council 2009: § 902).

The relevant principle here seems to be neither that of discrimination nor that of horizontal proportionality. The literal pulverizing of limbs or half of the body would be wrong even if the principle of discrimination was met; it should be avoided not just for noncombatants – strong restraint should be shown towards combatants as well. And even if very few children were maimed in this way it still constitutes an attitude of cruelty and indifference towards their basic human worth that makes the harm disproportionate almost by definition.

The use of a number of similar weapons is restricted (by the signatories) by the 1980 annex to the Geneva Convention (weapons with non-detectable fragments, land mines, booby traps, incendiary weapons, and blinding laser weapons). The problem with these is not that they cause mass killing or destruction. It is rather the amount and manner of injury done to the individual person that is a cause for concern. The Convention explicitly terms them 'excessively injurious weapons' (United Nations 1980).

The fact that mass rape and ethnic cleansing are directed at noncombatants – thus violating the principle of discrimination – should not blind us to the fact that they too are radically disproportionate in this vertical, individualist sense. Even if rape were systematically committed only on combatants ('combat rape' as it were) it would still be nefarious (and, I am inclined to say, to the same degree). Some means are wrong in themselves even if the principle of discrimination is met, i.e. no matter whether the victims are legitimate targets for attack or not. Being subject to rape is simply something that no one can ever 'deserve' or be liable to. It would of course be hard to construct examples where mass rape could plausibly be considered *necessary* for legitimate military objectives. But again, I do not think this is the *explanation* for its being *malum in se*.

The principles of discrimination and horizontal proportionality (including necessity), then, account for important aspects of the idea of means *mala in se*. But certain means can meet both and still be unjustified. No doubt, mass rape invariably violates both principles.

But there would be something obscene in saying ‘if you can make sure only to subject it to those liable to attack and in a proportionate manner, and only when it is really necessary, then go along with it’. We (I) want something along much stricter deontological lines. Being the *kind* of action it is, rape could not even be considered:

Rape is ruled out here not so much because of all the pain it produces, or because it is aimed at civilians, but because the rape itself is rights-violative, a disgusting disregard for the humanity of the woman raped: a coercive violation of her bodily integrity and her entitlement to choose her own sex partners. (Orend 2001: 18)

Such disregard for a person’s humanity would not be mitigated by the fact that the person in question was liable to other forms of attack. The important function of MSP is to provide important protections not only for noncombatants but for combatants as well, and not only of just combatants but of unjust combatants as well. This is in line with the reading of certain international conventions offered by Jeremy Waldron:

The Geneva Conventions, like the Convention Against Torture and the International Covenant, respond to a strongly felt and well established sense that certain abuses are beyond the pale, whether one is dealing with criminal suspects, political dissidents, or military detainees, and that they remain beyond the pale even in emergency situations or situations of armed conflict. There are certain things that are not to be done to human beings and these international instruments represent our acknowledgment by treaty of that fact (Waldron 2005: 1694).

So far, this is little more than a *statement* of the deontological stance towards the MSP. On the face of it, the principles of discrimination and horizontal proportionality capture only parts of what is meant by denouncing an act for the reason that it is evil in itself.

I will now go on to say a little more about an *explanation* of *why* such means are ‘ruled out’ or ‘beyond the pale’ in virtue of their being vertically disproportionate. I will then discuss a more relativist view of MSP which will lead me to some comments about absolutism in the final section.

### Limited and Total Liability

To sum up: Resort to violent force can go too far if (1) the persons are not *liable* to be attacked because they bear no (or not enough) responsibility for the relevant threat, (2) the *amount* of harm is unnecessary or otherwise disproportionate compared to what can be achieved by the resort to violent force, or (3) the *kind* of harm is disproportionate by making individual persons suffer in ways that no one should have to endure.

Why are there limits to the kinds of harm that an individual can justifiably be exposed to? According to a classic humanist view (owing a lot to Kant) the reason is that *all* persons possess a basic or ‘deep’ humanity or human worth that ought to be acknowledged and never to be violated. According to Anthony Coates, we have to conceptualize the enemy in a way that does not imply a total degradation of his human worth:

The enemy remains part of a moral community that unites potential and even actual belligerents. The ethical conduct of war depends on this fundamental sense of solidarity among belligerents. In short, what is at work here is a *limited* concept of the enemy. The enemy is never an enemy in totality. (Coates 2006: 215, emphasis in original)

We can insist that the liability of our enemies can never be *total*. There must be some, even if minimal, sphere of inviolability that MSP is meant to protect.<sup>12</sup> Means *mala in se* disregard these limits and make the enemy subject to whatever means will eliminate him or her. In that way they are counter to a basic tenet of just war thinking, namely that we should eliminate enmity rather than eliminate the enemy. There is a similar line of thought in Thomas Nagel's now classic article on 'War and Massacre'. He also claims that hostilities are generally not total. In running for political office, for example, one ought to direct one's attacks at the opponent's *policies*, not elements of his personal life through which he may be much more vulnerable, e.g. his sex life, his wife's alcohol abuse or foolish acts in his youth. Even if it was *necessary* for winning, one should not do it (Nagel wrote this forty years ago and it is now outdated). Similarly, military attacks should be directed at the soldier *qua* soldier, even if he may be more vulnerable to attacks directed at the *person* who happens to be a soldier: 'Hostility or aggression should be directed at its true object. This means both that it should be directed at the person or persons who provoke it and that it should aim more specifically at what is provocative about them' (Nagel 1972: 135). This becomes even more significant, of course, if we see the distinction between combatants and noncombatants in a diachronic perspective: Soldiers are typically soldiers only for a limited period of time and will soon move into civilian lines again. Weapons and means that cause permanent, irreversible injuries are too indiscriminate in this regard. In Brian Orend's words:

[T]he reasoning which distinguishes between legitimate and illegitimate weapons is very similar to the reasoning which generates the combatant/noncombatant distinction. For example, there is a legal ban on bullets which contain glass shards. These shards are essentially impossible to detect. If the soldier survives the shot, and the bullet is removed by surgery, odds are that the glass shards will remain in his body. These shards can produce massive internal injuries, long after the soldier has ceased to be 'a dangerous man' to the other side. (Orend 2001: 17)

Similarly, mass rape and ethnic cleansing, even directed solely at combatants, would be 'off the mark', so to speak. They are attacks on something with which we do not have any rational quarrel: the victim's bodily integrity, sexuality, self worth, ethnicity and so on. It is telling also that it is out of the question to defend such atrocities by invoking the doctrine of double effect: The violation of the victim's bodily integrity, etc. is not an unintentional side effect of mass rape campaigns but an essential part of their purpose.

Nagel and Orend sees proportionality as analogous to discrimination: The reason why some means are *mala in se* is that they are directed at the wrong (sub)entity, namely the person rather than the soldier. Certain means are *mala in se* mainly by being *unfair* (indiscriminate). The view I defend is more similar to Coates': Certain means should be avoided due to a principle of *charity*. Even unjust combatants should not be deliberately harmed in ways that *maim* them, not so much because it is a misdirected harm, but simply because it degrades them and permanently injures their basic capacities for a life worth living.

The vertical metaphor implies that there ought to be limits to the *depth* of the harm that we inflict on even very bad people. There comes a point where we destroy the 'basis' of humanity in the victim (as well as the perpetrator) that it is imperative to uphold.

If all this strikes the reader as naïve, they should remind themselves of some of the many instances where total enmity has successfully been converted into limited enmity,

typically accompanied with a sense of regret. One can think of the relationship between the US and Japan during and after WWII, race relations in South Africa during and after the Apartheid regime and many others. Many have seen the Taliban as the face of evil, an object of total hostility and certainly far beyond negotiation. But it is more than likely that the long and bitter conflict in Afghanistan is going to end up in some sort of negotiated agreement with the Taliban anyway, i.e. a situation of limited enmity.

This, however, only means that limited enmity might always be a pragmatic possibility. It does not say that total liability could not sometimes be justified. There are strong defenders of the view that certain terrorist acts imply a *total* forfeiture of rights even to the most basic human dignity. For example, Jeff McMahan has argued that if a person in a 'ticking bomb' scenario is undoubtedly responsible for an unjust and potentially catastrophic threat, then his liability is in principle limitless:<sup>13</sup>

In the ticking bomb case, the torture of the terrorist could be justified as a matter of preventive justice. Because of his own previous wrongful action and his present wrongful refusal to avert the effects of his earlier act, he is morally responsible for having made it inevitable either that millions of innocent people will be killed or that he will be tortured. Justice requires that what is, for us, an unavoidable harm be distributed to him rather than being allowed to be inflicted by him upon the innocent. While the fact that the harm we inflict is much the lesser of the two evils effectively guarantees that our action is proportionate, it is not a necessary condition of the permissibility of our action. We would be justified in torturing the terrorist even if all we would thereby avert was the equivalent torture of only one innocent person which the terrorist's previous action had made otherwise inevitable. It is, indeed, a commonplace in the theory of justified defence that a person acting culpably can be liable to suffer a *greater* harm than that which the defensive action averts (McMahan 2008b: 118, emphasis in original).

It is notable that McMahan is not talking about an *ex post* excuse for torture here. It is not only that horizontal proportionality considerations give an *excuse* for torture even though we acknowledge that no one can be *liable* to torture. McMahan's reasons why we would be *justified* in an exception to the rule against torture seem to be twofold: (1) because of the forced choice between torture and the slaughter of millions the agent (of torture) is really acting *defensively* and out of *necessity*; (2) because of his moral responsibility for a threat to the (rather fanciful) *millions* of innocent people, the victim (of torture) has *forfeited* his rights, including his right not to be tortured, maimed and killed.

I find both reasons problematic. The first reason is problematic because it implies a conception of defensive action that is at best unconventional. The standard case of defensive action is when a direct threat is repelled by *eliminating* the threat with lethal force. But in the ticking bomb scenario the threat cannot be eliminated directly. What we contemplate is 'instrumental' or 'opportunistic' agency.<sup>14</sup> We use the terrorist's vulnerability to torture opportunistically or as an instrument to avert the threat indirectly. The action does not seem to have the *directness* of a threat that can justifiably be eliminated. McMahan would probably argue that in this example instrumental harmful agency nevertheless shares the necessity and urgency of eliminative agency. I am uncertain about the plausibility of this, though, and hence turn to the second reason which is of central concern here.

The forfeiture view is problematic, I think, because it neglects the principle of vertical proportionality. McMahan does seem to imply that torturing the terrorist is proportionate

in a *narrow* sense as well. But this is because he understands narrow proportionality as a formal demand of 'answering in kind', so to speak ('we would be justified in torturing the terrorist even if all we would thereby avert was the equivalent torture of only one innocent person'). My view is that vertical proportionality should be understood as a bulwark against answering in certain kinds, e.g. torture. There must be *some* limit to how far we can go in attacking this single individual even if he has forfeited his right not to be attacked or his right to liberty and even for the noble purpose of averting harm and protecting rights. The culpable terrorist 'can be liable to suffer a greater harm than that which the defensive action averts' only up (or rather *down*) to a point.

Returning to the example of mass rape campaigns, it has of course invariably been the case that they have been conducted for the most abhorrent purposes, thus entailing a blatant disregard for the just cause principle of *jus ad bellum*.<sup>15</sup> But the abhorrent purposes alone were not what made this policy a crime against humanity. It was of course the fact that they were pursued by the specific means of *rape* that made it so. And the inherent evil of rape would not be nullified or outweighed had the cause been just and the victim culpable. Consider the following example:

*Interrogational Rape*

Intelligence officers have captured a suicide bomber who knows the identities and positions of a number of other suicide bombers who will carry out their missions in a few hours. We know from experience that she is resilient enough to 'conventional' torture not to provide us with this information in time. But due to being a former rape victim and because of her religious beliefs we know that she will be much more terrorized by threats of rape than threats of torture.<sup>16</sup>

It seems to follow from McMahan's argument that it would sometimes be justified to use 'interrogational rape' if it was 'necessary' and the stakes were high enough (again, in principle; one could of course think of very many practical concerns). Once again, my claim would be that morally speaking the right not to be raped is among the rights that one cannot *forfeit*, no matter how grave one's culpability.

### **Absolutism in Practice**

Thus, I tend to see torture and rape as belonging to a class of actions that are never justified. I will now briefly consider in what sense this implies an absolute prohibition against (certain) means *mala in se*.

There are two different ways to explain why certain means should be 'ruled out' or 'beyond the pale'. One is *victim-oriented*: the most basic rights rule out extreme kinds of suffering as something that no human being should be exposed to and certain kinds of treatment are atrocious because they degrade the victim's status as a human being. This is what happens when people are regarded as animals, instruments or demons, a process typically preceding the use of means *mala in se*. The other is *agent-oriented*: the most basic rights rule out certain acts towards others that no decent or virtuous or compassionate human being would do (Waldron 2008).

The idea is that being tortured, raped or exposed to incendiary weapons amounts to degradation and suffering that no human being can reasonably be expected to endure. And instigating or committing torture, rape or incendiary bombing seems necessarily to involve being 'guided by evil' in a way that is not characteristic in standard self-defence

scenarios in which we use lethal force without aiming at unbearable suffering and degradation. In contrast, the whole *point* of torture and mass rape campaigns is to degrade, to humiliate and to inflict pain that is indeed unbearable; if it was not, we would have to 'improve' our rape and torture procedures to make them sufficiently degrading, inhuman and painful. And that is what being guided by evil means: to identify what we have the strongest possible reasons to shun and then go on using it as our action guide (see Nagel 1986: 181ff).

Does this imply absolutism? That is, do we mean that certain kinds of suffering and degradation are something that no human being should *ever* be exposed to and that this is something that no decent or virtuous or compassionate human being would *ever* do, no matter what and 'whatever the consequences'? There is a vast literature on this, of course, and I will not try to settle the general dispute here.<sup>17</sup> I will restrict myself to a critique of a certain, characteristic move in the discussion about torture and – by implication – other candidates for means *mala in se*. The move is indicated in the title of the article by McMahan quoted above: 'Torture in Principle and in Practice'. McMahan's argument is meant to be 'purely moral' and in the final part of the article just quoted he accepts that conventions in international law may be best served by an absolute prohibition of certain practices.

Surely, the political fact that these norms are backed up by international conventions does in itself make them more robust. Breaking hard-won conventions like these constitutes a threat to stability and peace. A practice like interrogational rape would, for one thing, certainly go against a widespread, international consensus against 'cruel, inhuman or degrading treatment or punishment'.<sup>18</sup> The UN convention very clearly states an *absolute* ban: 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture' (UN 1985: Article 2.2).<sup>19</sup> From the context, I find it obvious that exactly the same goes for cruel, inhuman or degrading treatment or punishment (it is a convention against torture *and other forms of* cruel, inhuman and degrading treatment or punishment) and therefore it does not matter whether interrogational rape would qualify as torture in some creative definition like the one presented in the notorious 'Bybee Memo' from 2002, according to which rape would only qualify as torture if it led to death, organ failure, or serious impairment of body functions.<sup>20</sup>

Resorts to means *mala in se* generally imply a violation of international conventions as well as national law or constitutional principles. This brings a particular moral dimension into *political* violations of MSP. But how absolute is an international convention or a constitution from a moral point of view? Well, it depends a lot on the expressive function of constitutions and laws in general. Do we want them to be expressive of certain values, e.g. the basic liberal values of non-brutality and respect for human rights? If so, they are not *merely* conventions and we cannot (normatively speaking) evade the costs and inconveniences of them by simply not ratifying them or denouncing them in states of emergency. And if this is the case then political leaders should *not* be expected to accept 'dirty hands' in the protection of national security. Compared to the individual case, political leaders ought to accept much *higher* risks and costs in order to maintain these values, because failure to do so would not only be an individual misgiving but a betrayal of the basic liberal ideal of political legitimacy and the rule of law.

Still, we might want to ask if the MSP could *in principle* be infringed even if it would never be the case in practice. The question is, however, whether this really makes sense

when we reflect a little more concretely about torture or mass rape or other means *mala in se* in the context of political conflicts like war or counter-terrorism. The problem is that they cannot be thought of as isolated and exceptional because they are *essentially institutional*. A torture scenario is not something that we stumble upon before we have made it part of intelligence procedures, training of intelligence officers, equipment of detention facilities and so on (Shue 2006).

I guess we can always say that 'in theory' we could justify mass rape in exceptional circumstances of a forced choice between evils, but what kind of a theory is that? It seems to be a theory that disregards the essential features of the action in question. Mass rape campaigns are *campaigns*, i.e. resulting from a policy involving logistics and infrastructure, instigating the perpetrators, etc. It is like contemplating what we would do if we stumbled upon munitions with glass shards or napalm bombs and had no other means of defence. The sad fact is that weapons like that do not fall into our laps without pre-meditation and guidance by their evil effects.

### Conclusion

Do we need a principle of no means *mala in se*? It may seem as if I offer an alternative reductionist strategy: MSP should be reduced to the vertical interpretation of the principle of proportionality. That, however, would certainly be an overstatement. I use the vertical interpretation to point out that traditional explanations from discrimination and proportionality are insufficient. But I am not confident enough about my interpretation to offer a principle of vertical proportionality as an alternative to the MSP and there could still be important aspects of MSP that are captured better by the traditional principles. Until we have a better systematic understanding of the seemingly rather compound MSP, we ought to hold on to it to the extent that we think it contains important restrictions on the conduct of war.

Should we consider MSP to be absolute? To be specific: Should we accept military defeat to an unjust and evil enemy 'just' to abide by an absolute prohibition of means *mala in se*? I think the answer is yes but it is based on two important premises. First of all, what I am talking about is absolute prohibitions as *a matter of policy*, and resorts to the means *mala in se* discussed here are essentially a matter of policy. Therefore, fanciful 'domestic' examples are of limited relevance. The standard example is a person who has his back pushed against the wall by an evil aggressor and is able to defend himself only by using a means *malum in se*, e.g. pouring concentrated acid over the aggressor. Even if we admit that he may be *excused* or even justified in this it does not follow that governments can make it a matter of policy to allow national protection by all means necessary. A more apt analogue here would be the person who constantly carries with him a bucket of concentrated acid 'just in case' a situation would arise in which other means of defence would be ineffective. The response is that he ought to take on the *risks* implied by not constantly carrying a bucket of acid because otherwise he would betray his status as a non-brutal and peace-loving fellow human being.

This brings me to the second premise, which is that in the real world we are always talking about *probabilities* and acceptance of *risks* of misfortunes and calamities, not acceptance of factual ones.<sup>21</sup> The right question is not 'Should we accept defeat to an evil aggressor just because we find the only way to stop him evil in itself?' We should ask

instead, 'Should we accept a *risk* that we will be defeated by an evil aggressor even though we *may* be able to *lower* that risk by building up an arsenal of weapons *mala in se*?<sup>22</sup>

In the end, the best answer to the question whether we should accept military defeat to or terroristic attacks from an unjust and evil enemy 'just' to abide by an absolute prohibition of means *mala in se* may be to deny its relevance: The real world differs from thought experiments like the 'ticking bomb' and 'supreme emergency', because there is *always* another way, i.e. other possible strategies than torture of captured terrorists or resort to 'dirty' weapons. I even find it a very well-founded presumption that non-torturing and non-terrorist means are more effective in the long run, but the primary reason is about political virtues: We should pursue and optimize these non-evil means because they are the ones we can stand up for. Chances are that we can get as brilliant in deploying them as the most talented torturer or rapist in his.

## NOTES

1. A very early version of this article was presented at the conference on the Ethics of War in Copenhagen, 19–20 August 2010. For their useful comments, I owe thanks to the conference participants, especially Frances Kamm, Jeff McMahan, David Rodin, and Cheyney Ryan.
2. The poison example is a bit odd. From the context it seems that Orend (2005) does not have chemical warfare in mind but rather assassination of enemies with poison. Based on my scattered acquaintance with the Classics it seems to be a traditional view that poisoning cases are an act of conspicuous cowardice and therefore inherently evil. I am unsure what to make of this view but in any case I consider it of marginal relevance to contemporary warfare.
3. Especially considering the recent example of massive use of these weapons in Lebanon in 2006 where it was obvious that the great majority of victims would be civilians. See Archer (2007).
4. I owe this point to an anonymous referee for the Journal.
5. Jeff McMahan (and others) distinguishes between *wide* and *narrow* proportionality but since he links narrow proportionality strongly to the question of culpability, I want to distinguish matters in a way somewhat different from his. See McMahan (2009: 20–32 et passim) and McMahan (2011).
6. One *could* argue that since the Iraqi troops were in practice defenceless, they did not pose a threat and were thus *innocent* in the literary sense of the word ('non-threatening', see Fullinwider 2001). Attacking them would then be indiscriminate. However, this 'traditional' principle of discrimination has been forcefully criticized by McMahan (2004, 2009) and others.
7. The term 'supreme emergency' was coined by Walzer (1977: ch. 16). For an excellent critique see Coady (2004). See also Coady (2009).
8. I am indebted to an anonymous referee for pressing me on this point.
9. Former vice president Dick Cheney stated this view brilliantly in one of his memorable interviews, in which he commented thusly on the detainment of prisoners without a court-ruling: 'The important thing here to understand is that the people that are at Guantanamo are bad people. I mean, these are terrorists *for the most part*' (Fox News 14/6 2005, emphasis mine; quoted in *Founders v. Bush*, <http://www.foundersvbush.com/liberty.html>). Again, there are two pressing questions here. (1) Discrimination: are we

certain that these are in fact the bad people (this being unusually hard to determine since they are not given a fair trial)? (2) Vertical proportionality: even if a certain individual is indeed a very bad one, is it morally right to treat him in this manner?

10. The ban on 'cruel and unusual punishment' in The English Bill of Rights of 1689 was an early legal acknowledgement of this. Article 5 of the Universal Declaration on Human Rights states that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment' (it does not say 'No one, except bad people'). See United Nations (1948).
11. I am aware that the Israel Defence Forces denied the use of DIME bombs but it seems to me that there is sufficient evidence that they were lying about this (See United Nations Human Rights Council 2009).
12. It goes without saying that the concept of inviolability is normative. It does not claim that the sphere in question *cannot* be violated.
13. See Davis (2012) and Majima (2012) for two recent discussions of torture and 'ticking bomb' examples within the pages of this journal.
14. 'Instrumental agency' is the term used by Kaufman (2008), while 'opportunistic agency' is due to Quinn (1989). See also McMahan (2009: 170–73); and see Kaufman (2008) for further criticism of the 'distributive justice' theory of self-defence.
15. There were, apparently, five 'patterns of rape' in former Yugoslavia in the early 1990s: terror, conquest, rape as an end in itself, ethnic cleansing (by forcing raped women to give birth to Serbian babies) and sexual enslavement (see Scholz 2007: 277–80).
16. I use the female pronoun here since the majority of victims of war rape have been women.
17. Among the best discussions are Donagan (1977, ch. 5 & 6); Fried (1978, ch. 1); and Bennett (1995, esp. ch. 10 & 11).
18. This is the formulation in the UN Convention against Torture (UN 1985). Similar formulations can be found in the European Convention on Human Rights and many national constitutions.
19. The absoluteness of these restrictions seems to have come as a surprise to some of its signatories. The Bush administration, for example, became busy denouncing the torture convention exactly when the exceptional circumstances of 11 September 2001 occurred.
20. The memo was part of the justification of 'water boarding' and other forms of torture at US detention facilities. See Luban (2005: 1453ff).
21. I owe a lot in these considerations to an unpublished article by David Rdin, 'Explaining the Absolute Prohibition of Torture' (2010).
22. There is a domestic analogue to this in our handling of traffic risks. The right question is not 'Do you really accept to have your children gruesomely killed by a drunk truck driver just for the convenience of transporting yourselves by car?' What we accept is a certain *risk* to have our children gruesomely killed by drunk truck drivers, maybe because we (perhaps being overly optimistic) think that we can lower the risk somewhat by driving carefully rather than abandoning car driving altogether.

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