

Proxy War Ethics

C. Anthony Pfaff*

Introduction

Proxy wars are, of course, nothing new. Neither is wrestling with moral concerns that are unique to them. In its first military excursion beyond the Italian peninsula, Rome struggled with whether to provide support to the Mamertines, mercenary rulers of the town of Messene, in exchange for their opposition to Carthaginian presence in Sicily. Despite their unique position to check Carthaginian encroachment, the Mamertines had taken Messene by force and killed a number of its inhabitants to solidify their control. This fact posed a political, as well as moral, problem for the Roman senate. Part of the problem arose from the fact that a short time before, the Senate had ordered the execution of members of one of their legions who had also taken over the city of Rhegium, much like the Mamertines had done to Messene. Not only did the senate not want to validate Mamertine rule, they did not want to appear as hypocrites to a population that had witnessed the public beheadings of the renegade Roman force. In the end, the threat from Carthage was too great and the senate set aside its concerns and provided the Mamertines the assistance they requested. In doing so, they brought Rome into a wider conflict with Syracuse, which had previously sought to drive the Mamertines out.¹

As the example above suggests, proxy relationships are attractive because they permit what Andrew Mumford calls, “war on the cheap.”² Given the potential devastation Carthage could inflict from Sicily, the Romans might be forgiven for setting aside principle in the face of an existential threat. In fact, Mumford also observes that the use of proxies grew significantly after 1945 because no major power wanted to risk a direct confrontation and possibly trigger nuclear war.³ It was easier, and cheaper, to let others do the fighting, especially when important, but non-existential, interests were at stake. Of course, it does not take the threat of nuclear devastation to motivate proxy relationships. Growing assertiveness by regional state actors that threaten the international order; increasingly capable non-state actors that can project power regionally, if not globally; and a war-weary American public that will not likely endorse large-scale military commitments have motivated the U.S. government to rely more on regional partners “to uphold the balance of power in their own neighborhood.”⁴

* Research Professor, Military Profession and Ethic, Strategic Studies Institute, U.S. Army War College. The views expressed in this article are those of the author and do not necessarily reflect the official policy or position of the United States Army War College, the United States Army, the Department of Defense, or the United States Government.

¹ POLYBIUS, HISTORIES, at 1.8-1.11 (Evelyn S. Shuckburgh trans., Bloomington 1962) (1889).

² Andrew Mumford, *Proxy Warfare and the Future of Conflict*, 158 THE RUSI J. 40, 40 (April/May 2013).

³ *Id.*

⁴ John J. Mearsheimer and Stephen M. Walt, *The Case for Offshore Balancing: A Superior U.S. Grand Strategy*, 95 FOREIGN AFFAIRS 70, 73 (July/August 2016). The authors observe that an April 2016 Pew poll found that 57% of Americans believed that the U.S. should “deal with its own problems and let others deal with theirs the best they can.” *Id.* at 70. The authors further attribute this finding to frustration over failures in U.S. military and political interventions. *Id.* at 70-71.

This reliance, in fact, has involved the United States in proxy relationships in the Middle East, Europe, and to a lesser extent South East Asia, that have entangled it in conflicts in Ukraine, Syria, Yemen, Iraq, and the South China Sea. Moreover, as Andreas Krieg notes, these entanglements have allowed the United States to confront its adversaries in a way that is “off the public radar” as well as “cost-efficient.”⁵

Though there is nothing *prima facie* wrong with such limits on direct action, the current reliance on proxies has arguably had a negative impact on the United States' efficacy and moral standing, which in turn affects its attractiveness as a security partner. As Krieg observes, the reliance on proxies can suggest an unwillingness to engage in direct action, which can undermine current and potential partners' estimation of U.S. credibility. Further, when proxies engage in violations of the Law of Armed Conflict or other human rights abuses, U.S. credibility to champion these causes erodes.⁶ Thus, without a clear understanding of the ethics of proxy relationships, any strategy that relies on them risks being self-defeating. Of course, the United States is not the only world power to risk its strategic reputation and moral standing to lower the cost of war. Russia and Iran are also engaged in proxy wars of their own in the Europe and the Middle East, which has contributed to their isolation from much of the international community.

This negative impact on the United States' moral standing merits a closer examination of the ethics associated with these relationships as well as the wars to which they can lead. At the time of this writing, the United States finds itself increasingly drawn into proxy conflicts that have not only escalated but have become more intractable as a result of this involvement. Resolving these increasingly violent and paradoxically frozen conflicts is complicated by the fact that while there are relatively well defined international norms regarding when and how to fight wars, rules regarding the benefactor-proxy relationship are less developed. Rather, the ethics for the benefactor are often assimilated into those of the proxy: if the proxy's war is just, the benefactor's support for it is just as well.

As the history of proxy wars suggests, however, the moral reality is much more complicated. U.S. efforts to contain Soviet expansion through support to the South Vietnamese government led to a disastrous escalation, resulting in large scale direct engagement by U.S. forces. In the 1980s, U.S. support for Islamist proxies in Afghanistan led to the widespread distribution of donated weapons, including Stinger anti-aircraft missiles, at least some of which have since been used in other conflicts. Moreover, this support stimulated the emergence of Islamist militants capable of global terrorist operations. NATO's support for rebels in Libya, while successful in ending the conflict with the government, resulted in an ongoing and so-far intractable civil war. More recently, U.S. military support for Saudi Arabia and Iraq have risked implicating the United States in war crimes, as the armed forces associated with both these countries have directly targeted civilian populations and may have committed other gross human rights

⁵ Andreas Krieg, *Externalizing the burden of war: the Obama Doctrine and U.S. foreign policy in the Middle East*, 92 INT'L AFFAIRS 97, 104 (2016).

⁶ *Id.* at 111.

violations.⁷ These outcomes raise the question: can acting as a benefactor ever be morally permissible? This concern lies at the heart of James Pattison's assertion that proxy war "is generally impermissible and only exceptionally morally permissible," and then only when significant human rights concerns are at stake.⁸ While observing that the emerging international order is likely to give rise to more proxy wars, Seyom Brown also argues "the temptation to rely on military action by proxies should be resisted," precisely because they reinforce the kind of world order that makes proxy strategies attractive.⁹

What differentiates the ethics of proxy war from the traditional ethics of war is the additional considerations the benefactor must undertake not only in establishing the justice of its cause but also regarding the management of the moral hazards to which the proxy relationship gives rise. The addition of a benefactor in an otherwise local conflict not only raises the stakes for local actors; it can change the stakes for non-local ones as well. As the stakes change, so does the willingness of these other actors to get involved and become benefactors themselves. As they do get involved, divergent local, national, and international interests come into play making favorable resolution of the conflict difficult if not impossible.

Methodology

Part I: The Character of Proxy War. This discussion is primarily focused on determining what ethical norms should govern proxy wars and the proxy relationships that sustain them. To determine these norms, the first task to take up is providing clarity on what proxy war and proxy relationships are. As Clausewitz famously observed, understanding the nature, or as some scholars prefer, "character," of the war one is fighting is essential to victory.¹⁰ This understanding is also essential to fighting wars well, which entails not simply winning, but winning within the ethical and legal norms one has set for the conduct of war.

Generally speaking, security communities tend to perceive kinds of war in the context of the threats they face.¹¹ The U.S. security community, as an example, breaks the taxonomy of war into multiple kinds including regular, irregular, hybrid, asymmetric, and so on. In each case, the U.S. military has adopted different norms associated with their conduct. For example, the kind of

⁷Mark Mazzetti and Shuaib Almosawa, *Support for Saudi Arabia Gives U.S. Direct Role in Yemen Conflict*, N.Y. TIMES (August 24, 2016) <http://www.nytimes.com/2016/08/25/world/middleeast/yemen-saudi-arabia-hospital-bombing.html>; see also Brian Ross, Rhonda Schwartz, James Gordon Meek, and Randy Kreider, *The Torture Tapes: Iraqi troops torture and execute civilians in secret videos*, ABCNEWS.COM, May 25 2017, <http://abcnews.go.com/Blotter/deepdive/brian-ross-investigates-the-torture-tapes-47429895>.

⁸James Pattison, *The Ethics of Arming Rebels*, 29 ETHICS AND INT'L AFFAIRS 455, 456 (2015). Pattison is specifically addressing the arming of non-state actors engaged in rebellion. However, many of the lessons he derives from his analysis would apply to proxy relationships in general.

⁹Seyom Brown, *Purposes and pitfalls of war by proxy: A systemic analysis*, 27 SMALL WARS & INSURGENCIES, 243, 244 (2016) [hereinafter Brown, *Purposes and pitfalls*].

¹⁰See Colin S. Gray, *War: Continuity in Change, and Change in Continuity*, 40 PARAMETERS 5, 5 (Summer 2010) (quoting CARL VON CLAUSEWITZ, ON WAR 75 (Michael Howard and Peter Paret trans., Princeton Univ. Press, 1976)). Gray argues that Clausewitz's use of the word "nature" in this context is ambiguous. *Id.* at 6-7. In Gray's view, the nature of war – "organized violence motivated by political considerations" – is constant while its character can change. *Id.* at 6. Gray thinks Clausewitz understood this point and thus for the purposes of analysis it is better to differentiate character from nature in discussions about war. *Id.* at 6-10.

¹¹*Id.* at 6.

state-on-state conflict that characterizes regular war entails greater permissions for collateral damage and little attention to restoring civil society. Irregular conflicts, on the other hand, such as those it has fought in Iraq and Afghanistan, entail much less tolerance for civilian casualties and significant emphasis on civil society development, which frequently features as a major component to operational planning.¹²

There are, of course, practical as well as moral reasons for these differences and it is beyond the scope of this analysis to pursue them all here. The point simply is that as one alters the character of war, one changes the rules one must play by. It is the contention of this article that while proxy relationships can apply to any kind of conflict, the introduction of such a relationship alters, to some degree at least, the character of that conflict. By doing so it not only alters the conditions for victory, it also alters the obligations, permissions, and prohibitions one must observe in its conduct. The first part of this discussion, then, will specify what differentiates proxy relationships from other kinds of alliances and partnerships as well as introduce models of proxy relationships, whose differences bear on moral analysis.

Part II: Jus Ad Bellum. Since proxy wars *are* wars, moral analysis should start with the traditional Just War Theory provisions of *jus ad bellum* that include just cause, proportionality, right intention, right authority, last resort, and reasonable chance of success. Of course, not all these provisions are reflected in international law.¹³ However, they are part of a set of broader moral concerns that will be useful in crafting policy recommendations, especially where there is a relative paucity of international norms and law, as seems to be the case regarding proxy wars.¹⁴

In particular, this section will examine how the introduction of the benefactor complicates the application of *jus ad bellum* criteria. For some criteria, of course, the proxy must fulfill them, for the most part, by itself. The intervention of a benefactor will not make an unjust cause just; an illegitimate authority legitimate; or a wrong intention right. In this regard, the proxy must meet these conditions before a benefactor may morally intervene. However, as I will discuss in more detail, the intervention of a benefactor can make war more likely as well as more destructive. Thus its reasons for intervention matter and are separately subject to moral evaluation, even when the war for the proxy is just. So, for these criteria, it will be important to establish when those conditions are met so that intervention by proxy is permissible. Furthermore, the benefactor's involvement can potentially affect proportionality calculations, making ends and means that may otherwise be disproportionate become proportionate and vice versa.¹⁵ Moreover,

¹² C. Anthony Pfaff, "A Crisis of Norms: Fighting Irregular Wars Well," in *Transformations of Warfare in the Contemporary World*, eds. John C. Torpey and David Jacobson, (Philadelphia, PA: Temple University Press, 2016), 87.

¹³ MARTIN L. COOK, *THE MORAL WARRIOR: ETHICS AND SERVICE IN THE MILITARY* 28 (2004).

¹⁴ I owe this point to an anonymous reviewer. While there are certainly overlaps between Just War Theory and international law, especially international humanitarian law, they are not the same. Since there appears to be relatively little in the way of international law governing proxy wars and relationships, a broader survey of relevant moral norms would be useful in determining what sort of obligations, permissions, and prohibitions states should at least consider observing.

¹⁵ Proportionality calculations apply here in two ways. From the perspective of *jus ad bellum*, even where there is a reasonable chance of success, a proxy may not have the capability to bring a war to a reasonably rapid end, which could lead to disproportionate suffering among its citizens. From the perspective of *jus in bello*, a proxy may not have the capability to wage war justly and only be able to win if it employs disproportionate means. I will take these points up in more detail in Part II.

it can make alternatives to fighting less appealing, impacting what counts as last resort as well as affect a proxy's calculations regarding its chances for success.

Part III: Moral Hazards. Meeting Just War conditions, of course, does not exhaust the moral concerns associated with the use of proxies. The proxy relationship also introduces moral hazards that must be managed if one is to meet the range of obligations associated with proxy warfare. Moral hazards, a term that originated in economic theory, arise when some persons assume greater risk because they know other persons will bear the burden of that risk.¹⁶ For example, the provision of medical insurance can increase the cost of medical care, because, among other things, the lower cost of care for the individual encourages greater use while at the same time discourages shopping around for the best prices for the best care. The resulting incentive structure thus places pricing in control of institutions and not to normal market forces making costs very difficult to control.¹⁷ While medical insurance is arguably a good thing, failure to effectively manage its associated hazards can render it, to some degree, self-defeating.

It is easy to see how such a dynamic can emerge in a proxy relationship. Benefactors and proxies enter into these relationships precisely because they help both parties mitigate costs and risks associated with achieving their relevant interests. Because the risks are lower, the incentives to avoid war are lowered or even removed. It is thus not without some irony that President Dwight D. Eisenhower called proxy wars “the cheapest insurance in the world.”¹⁸ Much like the case with medical insurance, the introduction of the proxy relationship can encourage the kind of risk taking that not only makes war more likely, but more costly as well.

I will next discuss the character of proxy wars to illustrate how the proxy relationship raises moral concerns not present in more direct interventions.

I. THE “CHARACTER” OF PROXY WARS

Mumford defines proxy war as “indirect engagement in a conflict by third parties wishing to influence its strategic outcome.”¹⁹ “Indirect,” in this context, simply means the substitution by the proxy of forces or other capabilities that the benefactor would otherwise have to commit to achieve the intended interest. It is this indirect nature of the benefactor's involvement that distinguishes a proxy relationship from other supportive relationships, such as, for example, an alliance or partnership.²⁰ An ideal example of a proxy relationship would be the U.S. relationship

¹⁶ Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 THE AM. ECON. REV. 941, 961 (Dec., 1963); see also Matthew McCaffrey, *Moral Hazard: Kenneth Arrow vs Frank Knight and the Austrians*, MISES WIRE, March 14, 2017, <https://mises.org/blog/moral-hazard-kenneth-arrow-vs-frank-knight-and-austrians>.

¹⁷ Arrow, *supra* note 16, at 962.

¹⁸ Mumford, *supra* note 2, at 40.

¹⁹ ANDREW MUMFORD, PROXY WARFARE 11 (2013).

²⁰ *Id.* at 21-22. For the purposes of this discussion, in an alliance, the allies employ direct action in pursuit of the same goal while in a partnership two or more entities provide assistance regarding interests, which do not have to be the same. The Allies and Axis powers of World War II serve as an ideal example of an alliance, as all members engaged in direct action for the purpose of defeating a common enemy. Some U.S. security cooperation relationships serve as good examples of partnerships. For example, the U.S. significantly increased its security cooperation with Egypt after the signing of the Camp David accords in part to incentivize not just its acceptance of the accords but its willingness to maintain them. See HANS BINNENDIJK, FRIENDS, FOES, AND FUTURE DIRECTIONS:

with South Vietnam prior to 1966, where it provided weapons, equipment, and advisors to the South Vietnamese to support their fight against the Viet Cong and the North as a means to check the expansion of Soviet influence.²¹

This point does not suggest that direct action by the benefactor is incompatible with proxy relationships. In fact, these relationships can be used to augment overall benefactor capabilities in ways that allow it to take direct action in pursuit of the same objective. As Mumford observes, the international coalition that ousted Libyan President Muammar Gaddafi conducted direct action against Libyan government forces while at the same time provided rebel forces with weapons and funding.²² However, the Coalition did not commit ground forces, preferring instead to let the rebels bear that particular burden. So, while air strikes did contribute to Gaddafi's defeat, the Coalition limited its risk – as well as its costs – by supporting proxies on the ground that acted as a surrogate for forces it would have otherwise had to commit. It is this use of surrogates to replace, rather than augment, benefactor assets or capabilities that characterizes the proxy relationship.

The indirect nature of proxy war suggests two models of proxy relationships: 1) where the proxy fights the benefactor's war in benefactor's place, for example, the Federal Republic of Yugoslavia use of the Serbian Republic's Army in Bosnia; and 2) where benefactor enables the proxy to fight to achieve some other goal that meets some other of their interests, such as U.S.'s early involvement in Vietnam or support for the mujahidin in Afghanistan in the 80s, both to curb expansion by the Soviet Union.

These models are morally relevant because the alignment of interests determines the conditions of the relationship that can affect its moral permissibility as well as the conditions that give rise to moral hazard. In the former, because objectives are the same, the larger interests they serve tend to align more closely. Because they align more closely, the justice of the proxy's cause transfers more directly to the permissions associated with the benefactor's intervention. In the latter, interests diverge; thus, the benefactor's reasons for intervention must also count, in some sense, as just. Moreover, where they diverge, they set conditions to corrupt and expand the conflict in ways not compatible with Just War considerations or international law.

Moreover, the proxy relationship must be *intentional*. The intentionality requirement simply means that the benefactor must intend to assist the proxy and the proxy must, in turn, intend to take advantage of this assistance. Intentionality is important to ethical analysis because it is a critical factor in determining moral responsibility. While one can hold another responsible for unintended outcomes from intentional action, what kind of blame one assigns depends on what the actor intended to do and whether he or she should have reasonably foreseen the outcome. There is a difference, for example, between murder and accidental killing. In the former case, the actor must intend the killing and thus is responsible for it. In the latter, the actor need not intend

U.S. PARTNERSHIPS IN A TURBULENT WORLD 133 (2016). Egypt's interest in accepting the assistance arguably had more to do with other security concerns not related to the accords. *Id.*

²¹ WILLIAM H. MOTT IV, MILITARY ASSISTANCE: AN EMPIRICAL PERSPECTIVE, 198-199 (1999). Of course, the deployment of large numbers of U.S. forces to South Vietnam beginning in 1966 eventually led to the U.S. carrying the primary burden for direct action, which transformed the relationship from proxy to ally. Mott, 200-201.

²² Mumford, *supra* note 19, at 25-26.

the killing and is only responsible for any oversight or omission that is causally connected to the death. They both constitute a wrongful death, but whether the actor gets the death penalty, a jail sentence, or a lighter punishment turns mostly on the outcome the actor intended.

To illustrate the importance of intent to this analysis, consider a putative proxy relationship where such intent was missing. Mumford, for example, mistakenly characterizes the 2003 U.S. invasion of Iraq as the United States acting as a proxy for Iran since the toppling of Saddam was in the Iranian interest. As he states, "The fulfillment of a strategic goal by proxy does not necessarily have to be a conscious or deliberate act."²³ In a practical sense that point may be true; however, in a moral sense it confuses judgments about what wrong, if any, was actually committed. As suggested above, unless one is a strict consequentialist, the coincidence of interest is not enough, from an ethical perspective, to hold someone responsible for all the outcomes associated with a particular act. For example, consider that in the course of combatting organized crime, police arrest all the members of a particular gang. The resulting crime-vacuum then enables other gang leaders to expand their operations. In this situation, we would not hold the police responsible for the criminal acts of the other gangs, even though their efforts at law enforcement played a causal role in enabling at least some of them.

One might, however, hold the police responsible for these subsequent criminal acts by others if they intended that by taking out the one gang leader it would benefit the other gangs. It would not be difficult to modify the story to include that the police chief is on the payroll of a rival gang leader and, as their proxy, he selects targets for investigation and arrest based on what will create opportunities for his benefactor. If this were the case, then we might judge even legitimate arrests as morally wrong, since they are intended to contribute to the additional criminal activity. The point here is that intent does not just apply to the act, it also applies to any relationships acting on that intent establishes. So in the context of the U.S. invasion of Iraq, to the extent Iran provided no support for the U.S. invasion, it would be hard to say that a proxy relationship existed. If no proxy relationship existed, then it does not make any more sense to criticize the U.S., *qua* benefactor, for benefitting Iran than it does to criticize the honest police in the example above for benefitting other criminal gangs by eliminating one.²⁴ This point does not suggest that U.S. officials might not be open to criticism for failing to fully account for the second order consequences of the Iraq invasion. It just does not make sense to criticize them as a matter of proxy war ethics.

As the post-Cold War international order continues to evolve, the character of proxy relationships will evolve as well, often in complex ways. As Brown argues, the world is becoming increasingly *polyarchic* where power is no longer in the hands of a few strong state actors, but diffused to numerous state and non-state actors as well. Such an order will continue to drive proxy relationships because even the strongest actors will no longer be able to bear the full burden of responding to the full range of challenges they face.²⁵

²³ *Id.* at 17.

²⁴ A strict consequentialist would still want to hold the U.S. (or any actor) responsible for any outcomes they should have reasonably foreseen. However, even then, the actor would be judged good or bad not just based on the bad outcomes but whether any alternatives, including not acting at all, resulted in a better, or at least less-worse, outcome.

²⁵ Brown, *Purposes and pitfalls*, *supra* note 9, at 244

Moreover, entering into such relationships creates massive opportunities for moral failure. These “opportunities” arise because the introduction of the benefactor complicates already complex and somewhat subjective decisions regarding the resort to war and, by diffusing the costs of conflict, introduces a corrupting influence that risks distorting the reasons that drive those decisions. Because benefactors are the ones who bring these moral complications, they bear the greater burden to address them. It does not follow from this point that proxies have no responsibilities. What it does mean is that most moral decisions regarding proxy wars are often in the hands of the benefactor, without whom there would be no proxy relationship to judge. In this next section, I will discuss those *jus ad bellum* conditions benefactors should consider prior to engaging in a proxy relationship.

II. *JUS AD BELLUM* CONSIDERATIONS

The moral disposition against proxy wars imposes a burden on those who would engage in them to establish clear norms and principals to govern these relationships. As discussed, in establishing these norms, it is not sufficient just to consider the justice of the proxy's resort to war. The normative relationship between benefactor and proxy is asymmetric: the justice of the proxy's cause does not ensure the justice of the benefactor's support. Further, the justice of the benefactor's support is not always dependent on the justice of the proxy's cause, as I will discuss later. So the first concern to address is the permissibility of these wars in the first place. As stated above, since proxy wars are *wars*, it makes sense to begin an assessment of their morality through the lens of *jus ad bellum*, which assesses when as a moral (if not legal) matter a state is permitted to resort to war and by extension, when other states are permitted to provide military assistance.

The asymmetry introduced by the benefactor-proxy relationships presents three morally relevant situations:

- The proxy meets all elements of *jus ad bellum* and engages in conflict; thus, benefactor support not causally related to the initiation of hostilities.
- The proxy meets all elements of *jus ad bellum* but does not initiate conflict without benefactor support.
- The proxy cannot meet all elements of *jus ad bellum* without benefactor support (like proportionality and reasonable chance of success); benefactor support causally related to hostilities.

The concern here, of course, is the role the benefactor plays in making the war come about. To the extent the war would have occurred otherwise, as in the first situation, then there are fewer moral barriers to benefactor participation. If the proxy meets the just war criteria and decides on its own to fight, then the benefactor is simply joining in an already just enterprise. If it is just to come to another's defense, it is just to come to that defense by proxy. Whether and which of these criteria apply to the benefactor I will take up later. Since the war would have happened regardless of the benefactor support, the benefactor did not affect the decision to go to war and

thus the benefactor's support is not causally related – at least not in the same way it would be in the other two situations – to the decision to go to war. The moral opportunity for the benefactor, in fact, is to ensure that the just side wins with the least harm caused to either side. This point suggests that when benefactor involvement would prolong, widen, or increase the wars' overall destructiveness it would be impermissible, regardless of the justice of the proxy's cause or the benefactor interests at stake.²⁶

More concerning are the next two situations, one where the proxy meets the criteria but does not fight absent the support of the benefactor and one where the proxy cannot meet all the just war criteria without benefactor support. In both these cases, the participation of the benefactor seems *causally* related to the proxy's resort to war in ways it is not in the first situation.

In the former, the proxy meets all the criteria, including ones related to resources like proportionality and reasonable chance of success; however, it chooses not to fight without benefactor support. We can imagine a number of reasons why this might be the case: the proxy wants to lower its cost; it is culturally risk averse; or it values the legitimacy an outside party might bring. In this case, the concern is not the reason it withholds a decision to fight absent external support; rather, the concern is that whatever the situation, the proxy did not feel the resort to war was worth it, absent whatever benefit the benefactor would bring. In such a situation, the benefactor can play a more causal role in bringing the war about, because its assistance can lower the costs or other barriers the proxy might have regarding the resort to war.

Given that it is usually better to avoid harm rather than to cause it, even in the service of justice, benefactors have to clearly establish that their involvement serves a greater good that overrides the proxy's reluctance to go it alone. War, while it might not be the worst thing, should always be a "necessary" thing. It is beyond the scope of this discussion to offer a fully developed account of necessity in this context. What is not the case, however, is that the benefactor's sense of necessity does not have to be the same as the proxy's. For the proxy, necessity turns on the nature of the aggression and the extent to which it violates its rights. In the case of a state, those rights are political sovereignty and territorial integrity. For non-state actors, it may turn on other things such as avoiding gross human rights violations or severe political marginalization.

For the benefactor, other matters of justice may be brought to bear, even if by themselves they would not constitute self-defense on the benefactor's part. For example, concerns about preserving a just international order or deterring an adversary from future aggression could justify a benefactor's intervention. Had Ukraine been in the situation where it chose not to respond to Russian-sponsored secessionists, the U.S., Europe, or some other benefactor would likely be warranted in providing the assistance necessary to enable that response because of the threat the Russians posed to the international order as well as to deter it from future such aggression elsewhere.

Because of the necessity condition, in these situations there is an extra burden on the benefactor to find alternatives to war. It may still end up being the case that the injustice suffered by the

²⁶ This provision would not preclude short-term increases in a war's scope of destructiveness if it ended the war faster. What matters is the overall harm committed. I owe this point to an anonymous reviewer.

proxy warrants the intervention, but the fact the proxy would not fight, despite being permitted and able, suggests a benefactor should proceed with caution.

The latter is a different case. The proxy has met all the conditions that it can, but not all the conditions that it must. In this situation, the proxy suffers from an injustice or aggression that would justify war; however, it simply cannot morally do anything about it because it either lacks the capability, whether as a matter of capacity or training, to fight proportionally or discriminately or it does not have a reasonable chance of success on its own. Iraqi Security Forces (ISF) after the fall of Mosul may serve as an example. Without U.S. advisors, weapons, and equipment, they would not likely have been able to go on the offensive against the Islamic State (IS). In this situation the proxy's choices are to suffer the injustice or to violate one (or more) of these other *jus ad bellum* or *jus in bello* conditions. In this case, the benefactor's intervention makes it possible not only for the proxy to address the injustice, but to do so justly. Doing so, of course, should be a condition of the benefactor's participation, regardless of the benefactor's larger interest. Next I will discuss moral demands each specific *jus ad bellum* condition entails.

A. Just Cause

State-Defense Paradigm. Most conceptions of *jus ad bellum* describe just cause in terms of self-defense, defense of another, and humanitarian intervention. In the case of self-defense and defense of another, what triggers a legitimate defense is an act of aggression understood as a violation of a state's political sovereignty and territorial integrity.²⁷ In the context of proxy wars, benefactors may not suffer an act of aggression; however, their support for a proxy that has will normally be permissible since defense of a victim of aggression is normally permissible. The U.S. government's lend-lease program prior to its entry into World War II, which provided weapons and equipment to Russia and Britain, serves as an example. Both Britain and Russia had suffered an act of aggression, and the United States was justified in providing them assistance. The fact that, for a time at least, Britain and Russia were effectively U.S. proxies is not of moral concern since their interests – defeat of Nazi Germany – were just and more or less aligned.²⁸

Benefactor and proxy interests, however, do not always align so closely. In fact, benefactors often take on proxy relationships to serve a variety of vital national interests that are not related to a particular act of aggression and thus for which the use of force would not be warranted. The United States, for example, counts as vital national interests: 1) the security of the United States, its citizens, and U.S. allies and partners; 2) a strong, innovative, and growing U.S. economy in an open international economic system that promotes opportunity and prosperity; 3) respect for universal values at home and around the world; and 4) a rules-based international order advanced by U.S. leadership that promotes peace, security, and opportunity through stronger cooperation

²⁷ MICHAEL WALZER, JUST AND UNJUST WARS 52-54 (2d ed. 1992) [hereinafter *Just and Unjust Wars*].

²⁸ Mumford, *supra* note 19, at 12

to meet global challenges.²⁹ Of those interests, only the first one could serve as a just cause for a military response.³⁰

There is nothing, of course, wrong with the pursuit of the other four interests. The U.S. government would only exceed its warrant if it pursued them by force, even if it convinced someone else to employ that force on its behalf. To the extent benefactors encourage war because it would serve an interest that would not normally justify the resort to force by potential proxies, they act immorally. This point would be true even if the cause for the proxy war was just.

For example, one can imagine a repressed population for which armed resistance is justified. The repressing government is something of an international pariah and has worked against other states' economic interests and threatens to undermine the international order. One of these states has a relationship with the repressed population and, to compel the repressing government to be less disruptive, encourages their armed rebellion. Even though the proxy's cause may be just and the benefactor's interests legitimate, instigating an armed response to serve those interests would be morally wrong as well as unlawful under international law.³¹ The reason it is wrong is that the conflict – and its associated violence and suffering – would not have otherwise occurred. Because it would not have occurred otherwise, the benefactor's interest then stands as the cause for the war. Given that it is an unjust cause for war, the instigation is unjust. Further, as I will discuss later, the fact that the violence would not have occurred otherwise suggests violation of other tenets of *jus ad bellum* as well.

Having said that, to the extent the proxy's cause is just, and the violence would have occurred independent of the proxy relationship, then it is likely, again depending on other factors I will discuss later, that providing assistance is justified. The fact that a benefactor serves its other interests as well – as long as there was no causal connection to the proxy's decision to fight – does not undermine the permissibility of the proxy relationship. I shall discuss later cases when it may be permissible to provide support to actors fighting unjust causes.

Interventions. From a Just War perspective, the state-defense paradigm, however, does not exhaust just cause. The international community, for example, is beginning to recognize a permission, if not obligation, to intervene on behalf of populations facing an imminent humanitarian catastrophe or gross violation of human rights.³² Often referred to as “Responsibility to Protect (R2P),” this emerging international norm creates space for external military interventions in violation of an existing state's sovereignty.³³ Of course, intervention does not entail a proxy relationship, but many interventions, as noted in the cases described

²⁹ The White House, *National Security Strategy*, February 2015, 2, https://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy.pdf.

³⁰ To the extent universal values apply to gross human rights violations or remedying some humanitarian crisis, upholding them could, all things being equal, qualify under the doctrine of Responsibility to Protect, which I will discuss later. I owe this point to Dr. Toby Reiner, Dickinson College.

³¹ I owe the point regarding the illegality of encouraging armed rebellion under the conditions described to an anonymous reviewer.

³² Alex J. Bellamy, *The Responsibility to Protect Turns Ten*, 29 ETHICS AND INT'L AFFAIRS, no. 2 (2015) at 161.

³³ *Id.* at 162-171. Bellamy argues that there is sufficient precedent that R2P is or is on its way to becoming an international norm, if not a part of customary international law.

above, make use of proxy relationships to achieve relevant military and political objectives. Since proxy relationships represent a kind of intervention it makes sense to apply the norms associated with interventions to proxy wars.

Michael Walzer, writing in *Just and Unjust Wars*, provides a useful starting point for understanding moral considerations for external state interventions, which include support for secessionist movements, counter-interventions in civil wars, and humanitarian interventions.³⁴ In general, Walzer argues, communities enjoy a “right to self-determination” that allows them to settle their internal differences, even violently, without external interference.³⁵ However, there are concerns of justice and human rights that may allow external parties to override this right and intervene.

In the case of secessionist causes, Walzer argues that a third party intervention is justified when the opposition movement represents a distinct community that has a demonstrated ability to defend and govern itself. As he states,

“The mere appeal to the principle of self-determination is not enough; evidence must be provided that a community actually exists whose members are committed to independence and ready and able to determine the conditions of their own existence.”³⁶

When these conditions exist, not only is a community justified to resort to arms to win its independence, other states are permitted to assist. In this context, Walzer argued that Britain would have been justified in intervening on behalf of Hungarian separatists who sought independence from the Austro-Hungarian Empire in 1848.³⁷

The fact that the British did not intervene, he acknowledges, reflected more a standard of prudence than justice. While prudence itself is not a Just War criterion, it can – and probably should be – determinative in contexts where there is a permission, rather than obligation, to go to war or intervene on another’s behalf. In the case of Hungarian independence, British intervention would have brought them into conflict not only with the Austro-Hungarian Empire, but with Russia as well, possibly escalating beyond their ability to respond. Russia did later intervene to prevent a separatist victory; however, Britain did not respond in kind. Nor is it clear they should have. A just cause, even a doomed one, does not entail a third party’s obligation to intervene. Moreover, as this example suggests, the potential for escalation should factor into the decision to intervene, a point I will take up in more detail later.

Counter-intervention. The fact of this Russian intervention does, however, raise another category for just cause: counter-intervention. Because communities have a right to self-determination, unjust external interference in civil wars or other domestic conflicts may permit a counter-intervention by another external party. From Walzer’s perspective, such counter-interventions must be limited, however, to balancing out the original, unjust, intervention otherwise one also risks violating the right to self-determination. As Walzer states, “When a state sets out to

³⁴ *Just and Unjust Wars*, *supra* note 27, at 108.

³⁵ *Just and Unjust Wars*, *supra* note 27, at 88.

³⁶ *Just and Unjust Wars*, *supra* note 27, at 93.

³⁷ *Just and Unjust Wars*, *supra* note 27, at 91-95.

maintain or restore the integrity of a local struggle, its military activity should be roughly equivalent to that of the other intervening states.”³⁸ In this context, counter-interventions have a distinct character apart from more conventional wars. Because the justification for a counter-intervention depends on a community’s right to self-determination, the goal of counter-intervention is not to win the war, but to ensure the right of the local population to determine its fate.³⁹

Taken together, however, the permissions to intervene on behalf of a legitimate secessionist movement and to counter-intervene to uphold the right to self-determination risks escalating the conflict and creating a moral impasse. If, for example, the British had counter-intervened to neutralize the effect of the Russian intervention, the Russians, in turn would be prompted to increase their assistance. For the sake of argument, imagine the Austro-Hungarian government had a just cause, in which case the Russians would be morally permitted, if not obligated, to provide this increase. Even though the Empire’s right to self-determination should limit the British response to simply offsetting the original Russian intervention, the demands of justice would permit the Russians to escalate, thus creating a cycle of intervention that had no moral conclusion. At each point in the cycle, both benefactors would have legitimate reasons to increase their assistance. Thus, to the extent the right to self-determination always entails a permission to counter-intervene, then interventions on behalf of even a just cause can be self-defeating.

The reason they are self-defeating is that Walzer’s doctrine does not require a beneficiary to have a just cause for the counter-intervention to be just. It is sufficient that there is a violation of the larger community’s right to self-determination. The problem with such a view is that it would invite Britain and Russia to continue to escalate their military assistance until there was little left of the Empire from which the Hungarians could secede.

This point has important implications for proxy wars in general. Take, for example, the evolving proxy-war in Syria, where the moderate opposition forces seek to overthrow the Asad government.⁴⁰ Taken together, this understanding of secessionist rights and right to self-determination place the U.S. and Russian interventions on morally equal footing. This moral equality makes it difficult, if not impossible, to judge then which either side *should* do, since any action or inaction comes with its own moral failings. If the United States does not escalate, its proxies will likely lose and an oppressive government will endure. Putatively from the Russian point of view, if they do not respond in kind, then Syria will have lost its right to self-determination. This apparent dilemma suggests the need to bring additional considerations to bear to resolve this impasse.

Resolving the Ethical Impasse. The first of these additional considerations is, of course, the cause for which each potential proxy fights. This point entails that, unlike in Walzer’s view, the right to

³⁸ Just and Unjust Wars, *supra* note 27, at 88.

³⁹ Just and Unjust Wars, *supra* note 27, at 100.

⁴⁰ Geraint Alun Hughes, *Syria and the perils of proxy warfare*, 25 SMALL WARS & INSURGENCIES, 522, 522-38 (2014); see also Liz Sly, *Did U.S. weapons supplied to Syrian rebels draw Russia into the conflict?*, WASH. POST (Oct. 11, 2015), https://www.washingtonpost.com/world/did-us-weapons-supplied-to-syrian-rebels-draw-russia-into-the-conflict/2015/10/11/268ce566-6dfc-11e5-91eb-27ad15c2b723_story.html?utm_term=.ffb4240b6a84.

self-determination cannot be sufficient cause to justify a counter-intervention or a proxy-relationship that supports it. Thus, to fully justify a counter-intervention the right to self-determination needs to be accompanied by a just cause on the part of the beneficiary or proxy. So if the Austro-Hungarian government had the just cause, the Russian intervention would be justified and the British counter-intervention would not. To the extent the moderate Syrian opposition is justified in its resistance to Assad's regime, a U.S. intervention would be justified and a Russian counter-intervention would not.

The second of these additional considerations is the prevention or mitigation of a humanitarian catastrophe or gross violations of human rights, which can fall under the framework of R2P. In this context, a community maintains its right to self-determination as long as it can do so within the reasonable bounds of justice. Of course, not every resort to violence or injustice warrants external intervention. However, once one side resorts to mass atrocities, genocide, or other massive violations of human rights, an external intervention would be permitted. As Walzer says, "If the dominant forces within a state are engaged in massive violations of human rights, the appeal to self-determination ... is not very attractive."⁴¹

A difficulty with this permission is that it is not always clear what constitutes a gross violation of human rights, mass atrocity, or catastrophic humanitarian conditions. For the U.S. context, the Leahy Laws (FAA Section 502B(d)(1) (22 U.S.C. 2340(d)(I)) state, "the term 'gross violations of internationally recognized human rights' includes torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person."⁴² These laws, of course, are more intended to determine when intervention – at least regarding security partnerships – is prohibited rather than permitted. On this point, the United States and international community have not been consistent. The United Nations, for instance, has endorsed R2P to justify intervention in Bosnia, Somalia, Libya, and elsewhere, but so far has not done so in Syria, despite the fact that civilian harm there has exceeded that of conflicts where they did intervene.⁴³

Part of the difficulty is, of course, political concerns of council member states who fear the costs associated with such intervention as well as setting precedents for international intervention in their own domestic affairs.⁴⁴ These are, of course, matters of prudence and it is beyond the scope of this discussion to offer a full account that would fully distinguish prudential acts from cowardice. The other part of the difficulty, however, is distinguishing a gross violation from the merely unjust. It is not only beyond the scope of this discussion to establish such a bright line, it is unlikely that a bright line is possible or perhaps even desired. There is some utility in the kind of "strategic ambiguity" associated with these terms that can give warning to those who are intent on committing the merely unjust that the international community may not view their acts in the limited way they do.

⁴¹ Just and Unjust Wars, *supra* note 27, at 101.

⁴² NINA M. SERAFINO, JUNE S. BEITTEL, LAUREN PLOCH BLANCHARD, AND LIANA ROSEN, CONG. RESEARCH SERV., R43361, "LEAHY LAW" HUMAN RIGHTS PROVISIONS AND SECURITY ASSISTANCE: ISSUE OVERVIEW 2 (2014).

⁴³ Bellamy *supra* note 33, at 170.

⁴⁴ Bellamy *supra* note 33, at 163-165.

Failure to establish a bright line, however, does not mean that one cannot give some description of a broad, somewhat dimmer, line that external parties can utilize in determining when intervention or counter-intervention is appropriate. As Walzer notes, when the “moral convictions” of ordinary men and women are shocked to the point political leaders do not need to offer an argument for a response, then it is likely the line has been crossed.⁴⁵ While one would not want to leave all decisions about the use of force to their publics, the fact that the population of a state not directly involved in the conflict experiences outrage suggests a response to that outrage is in order.

The introduction of a proxy relationship adds other considerations to decisions regarding intervention. Potential proxies decide to resort to violence based on beliefs about their capabilities, which involves beliefs about what kind of additional support they might receive. For example, it is likely that many Syrians who took up arms against Assad did so because they believed significant U.S. assistance was coming and when it did not, may have felt abandoned. Relatedly, benefactors, for their part, make decisions about providing support based on how likely they are to achieve their desired strategic outcome more than whether the proxy will be successful. For example, if Russian objectives in Ukraine were simply to prevent the government in Ukraine from developing closer relations with Western Europe, it is not important that the separatists win – or even how many losses they suffer – as long as the fight sends the right message to the government in Kiev.

To the extent these decisions are taken before the resort to force, it makes sense to set a high bar, such as those associated with gross human rights violations and humanitarian disasters. As I will discuss in the next section, it is an important tenet of Just War Theory that one does not cause more suffering than one intends to relieve. However, once a war is underway, external parties may take action to address the suffering and injustice the war brings. So where direct intervention may be prohibited prior to hostilities because of the additional suffering and injustice it risks, support via a proxy relationship post hostilities breaking out may be warranted in terms of the suffering and injustice it relieves.

In the context of a proxy relationship, then, the bar for intervention may be set slightly lower under certain conditions. As Pattison argues:

“As with humanitarian intervention, what justifies the (exceptional) right to arm the rebels is a broad and serious threat to the enjoyment of basic human rights. Most clearly, this might consist of helping rebels to overthrow an oppressive regime, to secede from a repressive majority, or to reduce the extent of the government repression.”⁴⁶

While Pattison’s bar is still relatively high, it would endorse intervention before either side crosses Walzer’s broad line of popular outrage. For Pattison, what seems to matter more than scale is that any particular support improves the overall conditions for justice and human well-being. As he states, such justifiable consequences could include bringing about greater stability, encouraging compromise or shortening the conflict, eliminating repression, as well as preventing

⁴⁵ Just and Unjust Wars, *supra* note 27, at 107.

⁴⁶ Pattison, *supra* note 8, at 463.

mass atrocities.⁴⁷ Moreover, Pattison argues, such outcomes may justify a proxy relationship even when the proxy's cause is not just. Arguing in the context of external state actors arming rebel groups, what matters is "not the justifiability of the rebel's war, but rather the justifiability of the state's arming of the rebels, which will be determined in part by the foreseeable consequences of providing such arms."⁴⁸

The interesting thing about Pattison's view is that by decoupling the justice of the benefactor's cause from the potential proxy, he creates space for justified assistance to an unjust cause. Noting that some non-state actors may be acting unjustly, for example, by armed opposition to a democratic and otherwise just government, external parties may be permitted to assist these non-state actors if it achieves some proportionately good end. So proxy relationships that encourage a more just peace settlement or protect some vulnerable population would be justified. In fact, he notes, forcing Assad to negotiate was one of the rationales offered to justify U.S. assistance to the opposition in Syria, despite the difficulty in determining any particular groups' relationship with Islamist extremists and thus the actual justice to their cause.⁴⁹ While Pattison is writing specifically in the context of rebellions, it seems this permission can be generalized to include both state and non-state actors.

Of course, in both cases, the original intervention has apparently led to a more enduring conflict, which in turn has arguably increased the civilian death toll. This fact, however, is not a concern for the justice of the cause. It is, however, a concern for the next *jus ad bellum* criterion I will discuss: proportionality.

B. Proportionality

While just cause is a necessary condition for a just war, it is not sufficient. War – including proxy war – brings destruction and that destruction has to be worth the ends to which it is directed. Russia violated Ukrainian sovereignty when it took Crimea in 2014; however, if the only way to restore that sovereignty is a general war with Russia, then perhaps, all things considered, fighting such a war would not be worth the suffering it would potentially cause. If a proxy relationship with Ukraine makes that general war more likely, then that relationship, all else considered, would be not be permitted.

Simply put, the proportionality condition that requires that a war's destructiveness must not be out of proportion to the relevant good winning the war will accomplish,⁵⁰ and, moreover, requires governments to consider whether responding to a particular act of aggression warrants the destruction the use of military force will bring.⁵¹ In this regard, proportionality is not simply a utilitarian calculation of goods and harms, but also relates to the size, duration, and target of any putative military response.⁵²

⁴⁷ *Id.* at 462-64.

⁴⁸ *Id.* at 466.

⁴⁹ *Id.* at 465-66.

⁵⁰ Thomas Hurka "Proportionality in the Morality of War," 33 *Philosophy and Public Affairs*, no. 1 (Winter 2005), at 35.

⁵¹ Richard Norman, *Ethics, Killing and War*, (Cambridge, UK: Cambridge University Press, 1995), 119.

⁵² Christine Gray, *International Law and the Use of Force*, 3rd Edition, (Oxford: Oxford University Press, 2008), 150.

When calculating proportionality, one must first take into account that it is a forward-looking criterion. The reason it is forward-looking is that the harm committed by an act of aggression has already happened and committing additional harm in retaliation simply adds to the harm already caused. Thus committing additional harms would never be proportional if it were simply justified by a prior harm. What matters in this context is the justice the proposed act of defense would bring about. This point does not mean that the past harm does not figure into the calculation. Responding effectively to acts of aggression, for example, has a deterrent effect on future acts of aggression, so could count for responding with force.⁵³

Moreover, any application of proportionality depends on some conception of what goods count for the resort to force, what harms count against it, and how these goods and harms weigh against each other.⁵⁴ For example, it may have been a good that military spending in World War II helped the United States get out of the Depression; however, it hardly seems reasonable that an improved economy should count as a relevant benefit that justifies going to war. On the other hand, one may note that as a result of that war, Japan and Germany embraced democracy and developed into free, just, and productive societies.⁵⁵ Similarly, it may be good that military assistance to Saudi Arabia provides the U.S. economy jobs. That fact, however, does not count towards the proportionality of U.S. support for Saudi operations in Yemen, even if failure to provide that assistance would encourage the Saudis to look elsewhere for military assistance, costing U.S. jobs and reducing U.S. influence in the region.

At this point, it is useful to distinguish between sufficient and contributing causes when determining relevant harms and goods. Sufficient causes are those that fulfill the just cause condition associated with responding to an act of aggression. Contributing causes, on the other hand, do not fulfill the just cause condition, but are themselves causes of justice, which, given a sufficient cause, should count towards the proportionality of a military response.⁵⁶ Thus, while regime change in Syria may not have justified a unilateral U.S. declaration of war, once war has started, replacing that unjust regime with a just one would count towards the proportionality calculation for any U.S. decision to intervene. The importance of contributing causes is that they can, in principle, make just causes that are not proportional in themselves become proportional given their effects on other goods such as human rights and national security.⁵⁷

There likely is not one over-arching conception that accounts for all the possible relevant goods and harms. In general, goods associated with justice, especially the just aims associated with the conflict in question, would count. Examples could include incapacitating an enemy to prevent future acts of aggression or deterring future aggression by others. Other matters of justice may count as well.⁵⁸ For example, preventing a return of the Syrian government's repressive policies towards its civilians may not by itself justify war, even proxy war; however, it would count as a good not only towards the cause of the war but also toward the justification to provide assistance.

⁵³ Hurka *supra* note 50, at 43.

⁵⁴ *Id.* at 38.

⁵⁵ *Id.* at 40.

⁵⁶ *Id.* at 41.

⁵⁷ *Id.* at 42.

⁵⁸ *Id.* at 40.

Further, when calculating proportionality, one must measure it in the context of the alternatives. The “base-line” alternative is “do nothing.”⁵⁹ However, one may only consider that base-line if there are no other alternatives available. It would be insufficient to conclude that the resort to force was proportional just because it was better than the “do-nothing-base-line” if there were less costly (or at least less violent), alternatives such as sanctions or diplomatic initiatives.⁶⁰

While benefactors and proxies must meet the conditions described above, benefactors have other considerations they must take into account if a proxy war is to pass the proportionality test. First, benefactors must consider the impact of their support on the proxy’s proportionality calculation. Benefactor assistance typically lowers the proxy’s cost and thus makes its decision to go to war easier and thus more likely. Making war less costly, however, does not necessarily make it less destructive. The simple fact that benefactor support can sustain a proxy beyond its indigenous capacity to resist extends the conflict and thus increasing the resulting destruction. So, as Walzer notes, “A state contemplating intervention or counter-intervention will for prudential reasons weigh the dangers to itself, but it must also, and for moral reasons, weigh the dangers its action will impose on the people it is designed to benefit and on all other people who may be affected.”⁶¹

Of course, whether making war more likely in any particular instance constitutes a moral wrong depends on the circumstances. Making it possible for a proxy to confront injustice proportionately is arguably better than allowing it to continue to suffer. However, a concern arises when lowering the cost precludes alternatives to war the proxy and its adversary might have otherwise pursued. It is worth asking, in the context of Syria, had the rebels not believed the United States and the international community would bear some of the burdens of fighting, would they have sought some accommodation with the government that, while imperfect, may have constituted a better outcome than the chaos Syria is in today? Similarly, had the Russians not provided support to the Assad government, would it have chosen to pursue an agreement rather than continuing to fight? Of course, it is difficult, if not impossible, for any state to answer such counter-factual questions prior to intervening. While this fact may preclude attaining certainty regarding any given decision to intervene, the minimum demands of morality suggest that one must at least ask the question and undertake a good-faith effort to answer it.

Second, benefactors must consider the relevancy of their desired strategic outcome to the proportionality calculation. As discussed above, not all interests count no matter how vital an interest it may be. If it is not related to the justice of the conflict in question, it does not count. This point, however, does not mean that benefactors should not pursue a proxy relationship just because doing so serves non-contributing interests. As long as the other conditions for a just proxy war are met, there is nothing wrong with such “collateral goods.”

Having said that, it is also not the case that political, economic, and social interests that typically fall outside just war considerations can never contribute towards the proportionality of a proxy relationship. When an unjust act of aggression threatens such interests, even if indirectly,

⁵⁹ Id. at 42.

⁶⁰ Id. at 38.

⁶¹ Just and Unjust Wars, *supra* note 27, at 95.

responding to that aggression counts as a relevant good. As Thomas Hurka observes, “imagine that in 1990 Iraq had occupied both Kuwait and Saudi Arabia and stopped all their oil production. In that case the economic harm would have resulted from an unjust act of aggression, and preventing it would have been a relevant benefit of war.”⁶²

Relevant interests are not the only things that can affect the proportionality of a conflict. As suggested above, the presence of a benefactor may not only make it easier for a proxy to choose war, that presence may also make it more likely that the war will escalate as other interested parties decide it is in their interests to intervene. Escalation, however, is only one of the moral hazards that proxy relationships entail. The difficulty with these moral hazards is that they are difficult to calculate in advance and thus difficult to include in the initial proportionality calculation. Still, their effect can be to turn an initially proportional response into one that is not. The evolution of violence in Syria serves as a fair example. I will later take up the management of these moral hazards in Part III, but for the purposes of the discussion to this point, to the extent possible, benefactors must consider them when determining whether to intervene.

C. Legitimate Authority

This criterion requires that “only duly constituted public authorities may use deadly force or wage war.”⁶³ Intended to ensure that not just any political actor can commit a people to war, the criterion of legitimate authority requires that there must be some relationship between the people and that actor that grants the authority to act on their behalf.

As Walzer argues, states – and those who would represent them – derive their rights from the rights of their citizens. In this account, all persons enjoy the rights to life and liberty and thus the state – via the social contract – has an obligation to secure those rights. To secure those rights, states are entitled to space (territory) where they govern in a way that respects those rights – that is, exercise sovereignty.⁶⁴ As noted in the discussion on intervention, this protection does not have to be perfect, and even where much less than perfect, states can still be entitled to sovereign rights by virtue of self-determination. So, since a just cause for war is a response to a violation of a state’s political sovereignty and territorial integrity, then only legitimate representatives of states would constitute a legitimate authority.

This account of legitimate authority does not seem to pose a significant issue for proxy relationships between states. If the proxy constitutes a legitimate authority, then there are no additional moral barriers for the benefactor to provide assistance, assuming the benefactor is also one. However, this account would seem to pose a problem for non-state actors. While, as noted in the discussion of just cause, some non-state actors can constitute a legitimate representative of a particular population, determining when they do is difficult since they fall outside the more formal process associated with recognizing states. This point simply suggests that it is incumbent on state-benefactors to make the case that a proxy does count as a legitimate representative of the population it intends to commit to war before providing assistance.

⁶² Hurka *supra* note 50, at 42.

⁶³ Eric Patterson, *Just War Thinking: Morality and Pragmatism in the Struggle against Contemporary Threats*, (New York: Lexington Books, 2007), 23.

⁶⁴ Just and Unjust Wars, *supra* note 27, at 53-55.

However, there are non-state actors that hold and administer territory, project military force outside that territory, but have no aspirations to statehood. The Lebanese Hezbollah are an example. Their original aspiration was to represent and defend the Shia population in Lebanon.⁶⁵ In fulfilling that aspiration, Hezbollah evolved from its local beginnings into a capable proxy of Iran that has conducted operations on its behalf throughout the Middle East. In doing so, it has dragged the Lebanese into conflicts with Israel as well as with the Islamic State.⁶⁶ Because it does not act on behalf of the Lebanese government, much less Lebanon's other factions, when it does involve them in conflicts of its own making it does so without the proper authority.

While Hezbollah's domestic and regional use of force arguably fail just cause, it is worth considering whether there is space for non-state actors to be legitimate authorities where they could satisfy just cause. Consider, for example, the rationale Hezbollah's leader, Hassan Nasrallah, gave for its Syrian involvement: defense against the Islamic State and other "takfiri" groups that have an historic animosity toward Shia.⁶⁷ Given that the Syrian government is not apparently capable of effectively providing for that defense, Hezbollah's intervention may seem reasonable.

This last point raises a question: does the identity of the non-state actor matter? When it comes to states, there is a presumption of consent when a state acts to defend its population. That presumption would not hold for transnational non-state actors. For example, one could imagine another Salafist group offering to defend Syrian Shia against the IS, but only so they are in a better position to exploit that population after the conflict is resolved. On the other hand, it does not make sense to exclude assistance simply because there is no prior shared identity on which to base claims of consent. A beleaguered population is likely to welcome any assistance, regardless of the identity of the provider. It is this willingness to accept assistance that is the morally relevant concern. Since consent to be governed is what determines the legitimacy of a government, something similar should hold in the case of the transnational non-state actor. Of course, a shared identity will likely facilitate that consent, but it is not necessary. So while it may be the case that the enemy of my enemy is my friend, in cases where an actor leverages its assistance to defeat one adversary in order to place its proxy at a disadvantage, then it would fail to meet this condition.

Taken together, these points suggest five conditions for transnational non-state actor legitimacy: 1) the population in question welcomes the non-state actor's assistance; 2) that population is under physical threat; 3) there is no state alternative that can or will address that threat; 4) populations not represented by the non-state actor are not unwillingly involved in the fighting; and 5) the threat to the population is not the result of an unjust act on their part. Once these conditions are fulfilled, then a transnational non-state actor may constitute a legitimate authority. For example, Hezbollah may be entitled to defend Shia in Syria where the collapse of the government has given rise to the Islamic State, which represents a serious threat to Shia

⁶⁵ Nicholas Noe, *Voice of Hezbollah: The Statements of Sayed Hassan Nasrallah*, (London: Verso, 2007), 1-13.

⁶⁶ Jonathan Spyer, *Patterns of Subversion: Iranian Use of Proxies in the Middle East*, 20 MIDDLE EAST REV. OF INT'L AFFAIRS no.2 (Summer 2016), 31-32.

⁶⁷ Marisa Sullivan, *Hezbollah in Syria*, INSTITUTE FOR THE STUDY OF WAR, April 2014, http://www.understandingwar.org/sites/default/files/Hezbollah_Sullivan_FINAL.pdf.

populations. On the other hand, Hezbollah would not be entitled to act in Bahrain, since doing so would constitute, at a minimum, a violation of the Gulf country's right to self-determination. Further, to the extent the defense of Shia in Lebanon risks dragging Lebanon's military into an unwanted conflict with the Islamic State, its activities would be prohibited.

D. Public Declaration

The public declaration criterion "gives a potential adversary formal notice that the issue at hand is judged serious enough to warrant the use of military force and that the nation is prepared to use that force unless the issue is immediately resolved."⁶⁸ By doing so, it also gives the offending party the opportunity to right a wrong before war formally begins. Moreover, it also gives the population on whose behalf war is declared an opportunity to decide if the costs and risks are worth it, and if not, voice their opposition before it is moot. In the context of proxy wars, this obligation is clearly placed on the proxy, since it is the aggrieved party.

In fact, failure to hold a proxy relationship up to public view got the Reagan Administration in trouble when it failed to disclose that it was funneling money to the Contras in Nicaragua, who were trying to overthrow the Soviet-aligned Sandinista regime. The administration, of course, had every reason to want to keep the arrangement secret. The money was funneled off of arms transfers made to the Iranians in exchange for the release of U.S. hostages that their proxy, Hezbollah, had taken. The money had to be funneled in some way, because in the wake of the Vietnam War, Congress had prohibited U.S. military support without their specific authorization.

The consequence of that effort, of course, was the Iran-Contra scandal which resulted in almost a dozen indictments of senior U.S. officials.⁶⁹ In the Just War Tradition, however, public declaration only applies to the decision to go to war. It is not clear that it also applies to the proxy relationship. In fact, the utility of a proxy relationship is often that it allows benefactors to pursue vital interests outside of an adversary's view, and thus the public view as well. Being out of public view also allows a benefactor to better manage potential hazards like escalation since, if the assistance is covert, an adversary would not know there is something to escalate against.

Moreover, the proxy may have an interest in keeping the relationship quiet as well. Even in the context of a just cause, there can be political, cultural, and social factors that could legitimately drive the need for secrecy. For example, in the Middle East, the West is often viewed as a corrupting influence and any association with Western powers can undermine the legitimacy of a particular cause. This was certainly the concern associated with U.S. support for the Green Movement in Iran, where even moral support from the U.S. risked its legitimacy.⁷⁰ So while the movement may have made a natural proxy for U.S. interests, any U.S. support would have likely been self-defeating. Had there been external support, especially from the West, not only would

⁶⁸ COOK, *supra* note 13, at 29.

⁶⁹ Brown, *Purposes and pitfalls*, *supra* note 9, at 250-51; *see also The Legal Aftermath*, Understanding the Iran-Contra Affairs, https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/about.php. (last visited Feb. 7, 2017).

⁷⁰ Hooman Majd, *Think Again: Iran's Green Movement*, FOREIGN POLICY, January 6, 2010, <http://foreignpolicy.com/2010/01/06/think-again-irans-green-movement/>.

the government have a pretext for an even harsher crackdown, the movement would have lost support from the large number of Iranians who did not want to associate with the West. While the Green Movement protests never reached the level of war, it is worth asking had they done so, would external powers be permitted to provide assistance secretly?

In general, one should presume an obligation to make military assistance programs public, especially where a violent conflict is involved. The public has a right to know in what kinds of security-related entanglements its government is getting involved. Moreover, proxy relationships, as the Iran-Contra scandal clearly demonstrates, have a way of not staying secret and, as Vietnam also clearly demonstrates, have a way of escalating into full-blown war.

There is a difference, however, between avoiding public exposure and avoiding the kind of legal oversight that guarantees public interests are taken into account. As suggested above, there may be legitimate, even humanitarian, reasons not to disclose publically a proxy relationship. However, overriding a *prima facie* obligation for public transparency does not entail overriding an obligation for public accountability. Failure to understand – or perhaps care about – this distinction is precisely the mistake the Reagan administration made. The point here is that where there is a legitimate intermediary, such as a legislative body that can represent public interests, and which can provide oversight secretly, then when human rights and well-being are concerned, governments may be permitted to keep a proxy relationship secret.

E. Right Intention

The criterion of right intention requires that “force may be used only in a truly just cause and solely for that purpose.”⁷¹ Right intention arises out of the intuition that killing can only be justified if done for the right reasons, regardless of what good may result. Killing out of hatred, envy, or personal or communal gain, for example, is wrong, regardless if it also constitutes an act of defense.⁷² Imagine, for example, someone intervenes in a violent robbery and kills the would-be robber before any theft or other harm occurs. While arguably preventing violence against innocents is a good thing, one’s judgment regarding the intervention depends, in part, on the intent of the one who intervened. It is one thing if the one who intervened did so just to defend the would-be victims from attack. It is another thing, however, if it turns out that the one who intervened knew the robber, held a grudge for some past wrong and saw the robbery as an opportunity to kill the robber and make it look like an act of defense. While the victims of the robbery might not mind the outcome, one would be hard pressed to say that their rescuer acted rightly given the immoral intent behind the intervention.

In addition to being an important component in moral assessment, right intention has an instrumental aspect as well. Decisions about war are corporate, in so much as they represent decisions by a number of individuals who may have very different reasons for supporting or rejecting a decision to go to war. Therefore, a common understanding of what counts as right intent is critical to prevent unjust “mission creep” as one party (or both) attempt to realize an otherwise unjust cause as they are trying to realize the just one.

⁷¹ Patterson *supra* note 63, at 23.

⁷² Bellamy *supra* note 33, at 122.

Some just war scholars have argued that right intention, for all its intuitiveness, cannot be meaningfully applied in practice.⁷³ As the above example suggests, it is not always possible to know why people act, regardless of what they say about the act. It would not have been hard to imagine the person who intervened claiming to act to defend the would-be victims, whatever the actual intent. From a practical standpoint, there would be no way to discern if the intervener were lying. This epistemic concern is magnified in the case of corporate decisions, especially in international relations, where there are often so many people who participate that there is just not one clear intent.

While these epistemic concerns are legitimate, when coupled with the requirement to publically declare, announcing one's intent regarding decisions to go to war still serves a useful moral purpose. As suggested above, it is not morally sufficient to declare that one is going to war, one must also declare why. Otherwise, the enemy will not know what grievance it should respond to and the public will not be able to evaluate whether the grievance is worth killing and dying for. Moreover, when actions and intent seem to deviate from the stated cause, the public –or at least their representatives – will have reasons to intervene and ensure whatever fighting occurs is for the right reasons. As Cook notes, “Once hostilities commence, there is always the temptation to forget what cause warranted the use of force and to press on to achieve other purposes – purposes that, had they been offered as justifications for the use of force prior to the conflict, would have clearly been seen as unjustifiable.”⁷⁴

This account of right intention can pose difficulties for proxy relationships, especially given that benefactors typically have other reasons for intervening apart from the actual cause of the war. Russian intervention in Ukraine may be a paradigmatic example. While Russia has portrayed its support for separatist groups in eastern Ukraine as an effort to protect the ethnic Russian population from an oppressive pro-Western government in Kiev,⁷⁵ arguably its larger concern is preventing Ukraine from further aligning itself with the West, especially forming closer ties with the European Union.⁷⁶

Fortunately, the criterion of right intent does not require one to discern which intent actually motivated the Russian intervention. Nor does it require one to insist that only one intent count. It is perfectly plausible that the Russian government intends both to protect ethnic Russians as well as prevent Ukraine's drift to the West. If ethnic Russians were in fact under attack from the Ukrainian government, then Russia would likely have just cause for intervention, even if their doing so also prevented Ukraine from drawing closer to the West.⁷⁷ Regarding intent, the question to ask then is, absent the interest in Ukraine's relationship with the West, would the Russian government have intervened? If the answer is no, then Russia would fail the intent test, since their concern about Ukraine's foreign relations would not constitute either a sufficient or contributing cause. If the answer were yes, then Russia may pass the right intent “test,” but once

⁷³ BRIAN OREND, *THE MORALITY OF WAR* 46-47 (2d ed. 2006)..

⁷⁴ COOK, *supra* note 13, at 29-30.

⁷⁵ Geraint A. Hughes, *Ukraine: Europe's New Proxy War?*, 1 FLETCHER SECURITY REVIEW 106, 106 (2014).

⁷⁶ Robert McMahon, *Ukraine in Crisis*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/ukraine/ukraine-crisis/p32540>.

⁷⁷ For the record, I do not claim that the ethnic Russian population in Ukraine was under severe physical threat by the Ukrainian government prior to Russian intervention.

the threat to the Russian population was removed, no further force would be permitted regardless of Ukraine's foreign policy.

As discussed previously, however, benefactor and proxy intent, like their respective causes, do not need to perfectly align. When they do not align, the benefactor needs to take into account additional considerations.

The first consideration is the relationship between the benefactor's and the proxy's intent. While different, the question to ask here is whether fulfillment of the proxy's intent would realize the benefactor's? Would, for example, a South Vietnamese victory have met the U.S. intent of preventing Soviet expansion? In the case of Ukraine, we might ask whether a separatist victory would forestall Ukraine's drift to the West? If the answer is no to both, then this misalignment creates political space for escalation, mission creep, and possibly a protracted or expanded conflict as it may be in the benefactor's interest to keep the conflict going until its intent were realized. While I will discuss these moral hazards in the next section, right intention does require benefactors to manage these hazards and restrict their support to realizing the proxy's intent. Proxy and benefactor intents do not need to be the same, but to the extent possible, the realization of the former should entail the realization of the latter.

The second consideration is the nature of the benefactor's intent itself. As the examples above show, not just any intent should count. Preventing Ukraine's drift to the West is arguably a violation of Ukraine's sovereignty so should not count as just intent to justify the Russian intervention. Preventing Soviet expansion in Asia might, at least in the context of the Cold War, but only to the extent one can characterize U.S. assistance as an effort to secure South Vietnamese sovereignty against communist aggression. As with just cause, sorting out which ones count in the moral calculation and which ones do not can be difficult.

Here Hurka's distinction of sufficient and contributing causes provides a useful starting point. It seems reasonable that if a contributing cause can make an otherwise disproportionate response to a just cause proportionate, then it seems reasonable to conclude a "contributing" intent could justify a benefactor's support to a proxy as long as that proxy had a "sufficient" intent. For example, assuming the opposition in Syria had sufficient cause, a contributing cause, such as the removal of a corrupt and oppressive regime, could count as a contributing cause to justify a benefactors' intervention by proxy.

Of course, right intention does not include a threshold the way proportionality does. However, it does seem reasonable to conclude that given a sufficient right intention, contributing ones that also entail some cause of justice, could enable third party participation in pursuit of those contributing causes. Thus, benefactors may be justified in supporting a proxy even though their intent, by itself, would not justify fighting. As long as the proxy's does and the benefactor's intent serves a cause of justice, then the benefactor would be permitted to provide support.

F. Last Resort

The criterion of last resort requires that one has pursued all non-violent alternatives to address a grievance before going to war.⁷⁸ A pacifist, of course, would argue that last resort is incoherent since there are always non-violent alternatives. In the context of the just war tradition, however, one is only required to weigh the alternatives that will address the grievance that drives the conflict. While one calculates proportionality relative to a base-line “do nothing” option, one fulfills last-resort based on alternatives that “do something.”⁷⁹ Last resort ensures that one considers all non-violent measures that could resolve the conflict before resorting to war. If no non-violent measures are available, last resort is fulfilled.

In the context of proxy wars, last resort does not hold equally for benefactor and proxy. To the extent that the benefactor is not directly engaged, that suggests it always has alternatives to fighting. In this context, benefactors should carefully consider whether to provide support, especially if it makes the proxy more likely to resort to war. Having said that, it would not make sense, in general, to hold a benefactor to the last resort criterion when the proxy has met it. Since *jus ad bellum* allows for the coming to another's defense through direct action, it would also permit coming to another's defense through indirect action.

The presence of a benefactor, however, can change the belligerents' calculations as well as how they view the conflict. Because of that possibility, benefactors are obligated to seek ways to open up peaceful, just alternatives. For example, the United States has tried on several occasions to establish a peace process between the Saudis and the Houthi rebels they are fighting.⁸⁰ While those efforts have not been fully successful, they serve as an example of the kind of efforts benefactors should undertake when political conditions allow.

G. Reasonable Chance of Success

This criterion requires that “arms may not be used in a futile cause or in a case where disproportionate measures are required to achieve success.”⁸¹ This point seems in some sense counter-intuitive, at least from a moral point of view. The idea of a heroic, yet futile, defense against some great evil appeals to one's sense of what is supererogatory and what should, in fact, be praised rather than blamed. However, it is one thing for individuals to sacrifice themselves and another to obligate others to sacrifice, especially without their consent. Modern wars, even limited ones, almost always entail the death and suffering of innocents at least some of whom, such as children, could not possibly give their consent. As Cook asks, “if you are going to do all that damage and cause death, are you likely to get what you want as a result?”⁸² If the answer is no, or even just “extremely unlikely,” then fighting is not justified. Destruction for destruction's sake does not hold up well as a moral good, even when the cause is just.

Like the other *jus ad bellum* criteria, reasonable chance of success poses an interesting challenge for proxy warfare. Where benefactor and proxy have different ends, they have differing chances

⁷⁸ OREND, *supra* note 73, at 57.

⁷⁹ Patterson *supra* note 63, at 23.

⁸⁰ Mark Mazzetti and Eric Schmitt, *Quiet Support for Saudis Entangles U.S. in Yemen* *NEW YORK TIMES* (March 13, 2016), <http://www.nytimes.com/2016/03/14/world/middleeast/yemen-saudi-us.html>.

⁸¹ Patterson *supra* note 63, at 23.

⁸² COOK, *supra* note 13, at 31.

of success in achieving those ends. If they have differing chances of success, then it is possible that one may fulfill this condition and the other may not. Given that the “dominoes” did not fall after Vietnam, one may argue that the United States did successfully contain Soviet expansion, even though many senior officials at the time did not believe the war in Vietnam could be won.⁸³ Conversely, we can imagine a situation where the proxy can succeed, but this does not realize the benefactor’s objective. The Saudi military, as well as the pro-Hadi Yemenis, may eventually succeed against the Houthis in Yemen, but they may have little success containing Iran.

So, in cases where the benefactor cannot meet the condition but the proxy can, it might be permissible, all other things being equal, for the benefactor to provide assistance, as long as no other harm or moral hazard results from doing so. In such circumstances, it is worth questioning whether that relationship should be considered a proxy relationship. Simply supporting a cause does not entail a proxy relationship: the benefactor has to seek some strategic outcome as well. If the benefactor is not likely to achieve the outcome it seeks, the relationship essentially collapses into one of direct support. In that case, the moral merits of the support must be judged in terms of the recipient’s cause.

In the case where the proxy fails the criteria, but the benefactor does not, then it would typically be wrong for the benefactor to provide assistance. This failure is clear where the benefactor’s interest is insufficient to justify war. If the proxy is unlikely to succeed, it makes no moral sense to commit it to the destruction of war in service to a cause that does not justify it. It may be less clear where the benefactor’s interest is sufficient to justify war; however, in such cases, they have no moral need for the proxy relationship. Pattison’s caveat regarding humanitarian concerns would, however, apply. If the benefactor’s support can serve some humanitarian end, especially if that end relieves suffering on the proxy it would have otherwise experienced, then the benefactor would be permitted to provide support, even if the proxy cannot fulfil the reasonable chance of success criterion.

What follows from this analysis is that benefactors should intervene with proxy success in mind. While there may be good operational and political reasons to limit assistance, as was done in Syria, it makes no moral sense to provide proxies with insufficient assistance to meet their political objectives. Doing so just prolongs the fight and the suffering.

It is worth mentioning that what counts as a reasonable chance can be subjective as well as context sensitive, and thus beyond the scope of this discussion to fully explore. However, that point does not mean one cannot hold a particular judgment up to some standard. At a minimum, judgments about a reasonable chance for success should account for the necessary connections between the actions one will take and the ends one intends to achieve. Accounting for these connections does not mean one must know they will work – victory does not have to be certain. One should know, or at least have an idea, of *how* they will work. Just as it makes no sense for a mechanic to rotate a car’s tires when it does not start, it makes no sense to use force – or support the use of force – if there is not sufficient indication doing so will resolve the conflict favorably. In the context of conventional war-fighting, there is typically a necessary connection between destroying the enemy’s military and winning the war. Therefore, acts, or support for acts, that

⁸³ John Nichols, *McNamara Was ‘Wrong, Terribly Wrong’ About Vietnam*, *THE NATION* (July 7, 2009), <https://www.thenation.com/article/mcnamara-was-wrong-terribly-wrong-about-vietnam/>.

lead to the destruction of those forces would count as necessarily connected even if one was uncertain such destruction was possible. In irregular warfare this connection is not as clear; however, it should still be possible to account for how one's assistance or direct engagement will contribute to victory.⁸⁴

Performing such a calculation may be more difficult for the benefactor, especially regarding strategic objectives for which the proxy relationship only contributes a part or for which there is no necessary connection between the combination of a benefactor's efforts and the objective's realization. In cases where that necessary connection does not exist, benefactors may still be permitted to provide support if 1) the proxy has met the *jus ad bellum* conditions and 2) the support provided does not place the proxy at any additional risk.

This last point provides a natural segue into the next section. The fact that a benefactor and proxy can meet all the conditions of *jus ad bellum* does not exhaust the benefactor's moral responsibilities. While war, in general, is filled with moral hazard, the benefactor-proxy relationship sets conditions for moral hazard that must be managed as the conflict proceeds.

H. Better State of Peace

While a "better state of peace" is not a part of *jus ad bellum* conditions it is morally relevant to proxy relationships. The decision to go to war entails, at least from a moral perspective, determining whether the sought result yields a better state of peace than the one experienced prior to the onset of hostilities.⁸⁵ Originating largely with Augustine, this criterion requires one to consider the *jus post bellum* requirements successful war-waging necessarily entails.⁸⁶ The assumption behind this criterion is that the political order prior to the conflict was in some sense unjust – and thus unstable – otherwise war would not have occurred. Thus, the end of war should not simply be the imposition of one's will on the enemy, but the imposition of a particular will that includes remedying the political order so that future war with that enemy is unlikely. In this view, the terms that ended World War I were a colossal failure and the terms that ended World War II a qualified success.

It is not hard to see how such a requirement can complicate the benefactor-proxy relationship. For all sorts of political, cultural, and practical reasons proxies and benefactors may not share the same attitudes towards *jus post bellum* requirements or the same capabilities to meet those requirements. It is beyond the scope of this discussion to fully articulate all the possible *jus post bellum* conditions belligerents should meet; however, the benefactor should hold the proxy responsible for meeting these conditions.⁸⁷ To the extent the proxy is unable to meet these conditions, benefactors would be responsible for providing additional resources to ensure that their proxies can.

III. MORAL HAZARDS

⁸⁴ Pfaff, *supra* note 12, at 83.

⁸⁵ COOK, *supra* note 13, at 31.

⁸⁶ Gregory M. Reichberg, Henrik Syse, and Endre Begby, eds. *The Ethics of War: Classic and Contemporary Readings*, (Malden, MA: Blackwell Publishing, 2006), 77-80.

⁸⁷See OREND, *supra* note 73, at 160-90 for a comprehensive discussion of *jus post bellum*.

As discussed earlier, moral hazards arise when one assumes greater risk because one is able to distribute some of that risk to either a benefactor or a proxy. In doing so, one risks creating self-defeating incentives because one will not experience the full range of harms those risks entail. These incentives are self-defeating in at least two ways: 1) encouraging more risk taking inappropriately expands the scope of the conflict and 2) taking those risks results in greater suffering or violations of moral norms. The presence of moral hazard does not directly impact the permissibility of a particular proxy relationship. However, failure to manage these hazards can effectively transform an otherwise permissible intervention into one that is impermissible.

As the examples discussed have shown, these hazards arise because of variations in benefactor and proxy interests, will, and capabilities. Moreover, these variations can lead to divergent interests and overly optimistic estimates about the true cost of war that can drag both parties into a conflict they might otherwise have avoided. Even if one could not avoid the conflict, the introduction of a proxy relationship can motivate others to join in the fight, thus escalating it. Moreover, once the fighting has started, the proxy's failure to abide by *jus in bello* norms can implicate the benefactor in war crimes and other atrocities. Finally, these moral hazards can have an impact well after the conflict is over as military equipment no longer needed for the fight diffuses into other militant and criminal hands, making conflict more likely, or perhaps just more brutal, elsewhere.

A. Diverging Interests

As the examples cited so far illustrate, benefactor and proxy interests often diverge. For example, U.S. interest in containing Russian aggression differs from Ukraine's interest in reclaiming Crimea. Divergence is especially prevalent in Syria, where external military assistance risks exacerbating factionalism among the opposition.⁸⁸ There are, in fact, numerous reports of U.S. supported rebels cooperating with Assad's regime and the Islamists as they sort through the complex milieu of interests that characterize the Syrian civil war.⁸⁹ As Krieg notes, "Regardless of the degree of cooperation between patron and surrogate on the strategic or operational level, surrogates are ultimately autonomous actors who always have an agenda of their own to pursue – an agenda which may overlap only marginally with U.S. foreign policy."⁹⁰ However, as Pattison argues, not only can these interests diverge, sometimes they should. Thus, this divergence is not *prima facie* impermissible.

This divergence can become impermissible, however, when pursuing one party's interest undermines achieving the other party's. This concern applies primarily to the benefactor, especially under the second model of proxy relationships, where the benefactor's interest may diverge far enough that it is sufficient for the proxy to fight for the benefactor to realize its interests. If one accepts that fighting for its own sake is a moral wrong, then a benefactor should not withhold sufficient assistance for the proxy to successfully resolve the conflict, whatever greater good the benefactor is achieving. It would also be generally impermissible for the proxy

⁸⁸ Hughes, *supra* note 40, at 528.

⁸⁹ Elliot Friedland & Ryan Serabian, Clarion Project, *Who's Who in the Syrian Civil War*, CLARION PROJECT, Feb. 20, 2017, <https://clarionproject.org/whos-who-in-the-syrian-civil-war/>.

⁹⁰ Krieg, *supra* note 5, at 109-110.

to undermine the benefactor's interest; however, since it is the proxy's ability to facilitate that interest that is often the condition for benefactor support, it is hard to imagine a scenario where they would be incentivized to do so.

The primary concern here is that once one party in the proxy relationship has achieved its objective, its will to bear the cost of fighting reasonably wanes. If the party who wants to opt out is the proxy, the chances for moral hazard are small. Since, presumably, the proxy is bearing the burden of the fighting, its departure from the conflict simply forces the benefactor to find alternative means to realize its strategic objective. Unless the failure to achieve that objective will lead to greater violence than continued fighting would represent, then the right answer is for the benefactor to abandon the conflict as well.

The benefactor opting out, however, can also create moral hazard. To the extent the absence of benefactor support places the proxy in a position where it is no longer able to successfully resolve the conflict, then arguably the benefactor has set conditions for an unjust resolution to the conflict, given the presumption of justice for the proxy's cause. To the extent the benefactor's support encouraged or enabled the proxy's resort to arms, the moral hazard is amplified as the benefactor bears responsibility for the unjust suffering that will follow. This point does not suggest that benefactors should never opt out once in. What it does suggest is that their reasons for opting out will have to have greater moral weight than the harm caused by their withdrawal. For example, withdrawing support because a proxy cannot or will not abide by just war norms is likely justified; however, withdrawing to save on costs may not be, depending on the impact on the proxy.

B. Under-Estimating Costs and Risks of Violence

As noted earlier, proxy relationships have sometimes been characterized as the "cheapest insurance in the world." These relationships allow both benefactors and proxies to mitigate their costs while still addressing their security needs: or so the theory goes.⁹¹ With this reduction in cost, however, often comes an increased readiness on both sides of the relationship to accept risk. For benefactors, the proxy's direct involvement allows them to address more distant security threats, especially when the urgency for the benefactor to engage directly lags.⁹² A key feature of U.S. security policy, especially as applied to its counter-terror campaigns, has been the idea that it is better to "fight them over there than over here."⁹³ The implied assumption with such a policy is that without intervention, the United States will eventually have to fight, except then the fighting will be closer to home and much more costly. With that consideration in mind, getting someone else to fight them over there is, arguably, a much better option.

For proxies, the benefactor's support can fill capability gaps that they would have otherwise had to fill themselves. Filling these gaps, of course, reduces the proxy's costs and thus makes the resort to war more likely. This dynamic seemed to be the case at the outset of the Syrian civil war, where some rebels may have interpreted pledges of U.S. support as sufficient to make the

⁹¹ Mumford, *supra* note 19, at 100.

⁹² Krieg, *supra* note 5, at 102.

⁹³ *Bush Warns of Iran's Influence Over Iraq*, FOX NEWS (August 29, 2007), <http://www.foxnews.com/story/2007/08/29/bush-warns-iran-influence-over-iraq.html>. Accessed February 7, 2017.

cost of war bearable.⁹⁴ Without such a pledge – and the support that followed – it is not clear that the rebellion would have started much less lasted very long.

The best way to mitigate the effects of this moral hazard is for both sides to consider not just the total costs of the conflict, but the cost of the conflict if they had to wage it themselves. As noted in the discussion on proportionality, benefactors who enable a conflict are obligated to consider the costs to anyone who would be affected by it. The same, of course, is true for the proxy. Underestimation entails a potential mismatch between the total cost of the fight and the political will by either party to fight it that must be addressed before the fighting starts. Addressing this concern entails an obligation on both sides to consider what would happen if the other quit. If the answer to that question is unacceptable, then so is fighting in the first place.

This point does not entail that either benefactor or proxy must be able to realize their interests alone as a condition for the permissibility of the relationship. If it did, then there would be no need for the relationship in the first place. What it does mean is that both benefactor and proxy should consider if the consequences of the other's withdrawal in the future is worth risking the present. Even then, it could still be permissible to proceed, but, as a practical matter, that decision rests on how trustworthy they perceive the other. Ethical decision-making does not have to be risk free.

C. Escalation

Related to the concern of underestimating the actual costs of a conflict is the potential for escalation the proxy relationship engenders. This concern is exacerbated when both sides directly involved in a conflict have benefactors of their own. In fact, one study concluded that “in the 114 civil wars between 1946 and 2002 where at least 900 people were killed, no rebel group was transferred major conventional weapons without the government also receiving arms from another source.”⁹⁵ This point suggests that escalation in proxy conflicts is more often the rule rather than the exception.

The fact that a proxy conflict escalates does not necessarily mean that the proxy relationship somehow becomes unjust. Given that such support meets the *jus ad bellum* criteria discussed above and that both parties in the relationship successfully manage the associated moral hazards, the fault of the escalation arguably lies with the side that responded. Thus the risk of escalation does not morally prohibit intervention, especially when the supported side faces some massive rights violation, as the Syrian opposition did when Assad's troops used military force against unarmed protests in 2011.⁹⁶ As Pattison notes, “those facing violations of their basic human rights still retain their right of self-defense, irrespective of how others will react to the exercise of that right.”⁹⁷

⁹⁴ Josh Rogin, *Syrian Rebels See U.S. Abandoning Them*, BLOOMBERG VIEW (December 12, 2014), <https://www.bloomberg.com/view/articles/2014-12-12/syrian-rebels-see-us-abandoning-them>.

⁹⁵ Pattison, *supra* note 8, at 463.

⁹⁶ Hughes, *supra* note 40, at 523.

⁹⁷ Pattison, *supra* note 8, at 463.

Given the importance of proportionality to judgments regarding the justice of any particular conflict, however, benefactors and proxies must manage the potential for escalation. The difficulty in managing escalation, however, results from the dilemma inherent in such relationships: in the face of proxy failure, the benefactor must choose between abandoning its strategic objective and becoming more involved in a conflict that, by itself, was not originally worth involving itself directly. Abandoning the objective means abandoning the proxy, which can yield a “serious decline in the credibility of its commitments worldwide.”⁹⁸ Given the importance of credibility in international relations, especially in matters of security, benefactors will often choose incremental increases that gradually escalate the conflict, especially when that assistance is public. In this way, winning a small war in a far-off place becomes a vital, and perhaps existential, national interest. This last point underscores the importance of incorporating the potential cost of escalation prior to deciding to resort to war.

U.S involvement in Vietnam underscores the importance of this point. Initially a proxy war, where the U.S. support was limited to equipment and advisors, it ended with almost ten years of direct U.S. engagement that left more than 60,000 U.S. soldiers killed and 300,000 wounded.⁹⁹ Moreover, this commitment did not happen all at once, but rather gradually. As the United States provided more sophisticated assistance, securing that assistance required the presence of more Americans, who then required additional forces to provide them security. Providing that security obviously led to the deployment of additional troops. As Communist capabilities increased, this security force expanded its “defensive” operations until they were indistinguishable from offensive ones. Moreover, as political instability forced the South Vietnamese military to take on domestic law enforcement tasks, the United States became the primary counterinsurgent force on the battlefield.¹⁰⁰

As the Vietnam example also suggests, escalation can lead to more destruction without bringing one closer to realizing one’s political or military objectives. Thus, escalation for escalation’s sake is immoral. Escalating to “send a message” or “show resolve” makes no moral sense outside a necessary link to resolving the conflict. To avoid pointless escalation, benefactors must account for “escalation dominance” that assures their ability to out-escalate the enemy. Dominance, in this context, does not simply entail military force. As Herman Kahn notes,

“Escalation dominance is a complex concept in which the military calculations are only one element. Other elements are the assurance, morale, commitment, resolve, internal discipline, and so on of both principals and their allies.”¹⁰¹

So benefactors must consider not just what they can and will do, but what the opponent, especially another benefactor, can and will do in response. This point seems obvious from the perspective of military planning: one should always consider enemy capabilities and likely responses before acting. At the strategic level, however, this consideration is sometimes left out. In the context of Ukraine, for example, there has been strong disagreement whether the United States and NATO should provide lethal military assistance. According to press reports, while the

⁹⁸ Brown, *Purposes and pitfalls*, *supra* note 9, at 247-48.

⁹⁹ Brown, *Purposes and pitfalls*, *supra* note 9, at 248

¹⁰⁰ Brown, *Purposes and pitfalls*, *supra* note 9, at 248

¹⁰¹ Herman Kahn, *On Escalation: Metaphors and Scenarios*, (New York: Praeger, 1965), 23.

Administration at the time expressed concern regarding getting in a “tit-for-tat” with Russia, key members of Congress as well as the Secretaries of State and Defense supported providing Ukraine’s military with anti-armor systems and small arms along with other non-lethal assistance.¹⁰²

The point here is not to settle whether the United States should provide lethal assistance to Ukrainian forces; rather, it is to settle what it should consider for such assistance to be ethical. Ukraine’s relationship to the West is much more important to Russia than it is to the West for a variety of political, security, cultural, and historical concerns.¹⁰³ Given Russia’s likely stronger will as well as the proximity that permits greater rapidity in providing assistance, or even military forces should the conflict escalate that far, Russia arguably has escalation dominance. Thus, the United States and NATO have perhaps wisely refrained from escalating the conflict by providing lethal assistance to Ukraine’s military. The point here is not that providing lethal military assistance is immoral; rather, the point is that doing so without first establishing escalation dominance would be.

One concern here, of course, is that the adversary or the adversary’s benefactor may not share the same understanding of cost and benefit as one does. In such circumstances, it is possible that the adversary will escalate despite its apparent irrationality. Establishing escalation dominance is one thing; communicating it in a way that the adversary factors it into its own calculations is another. Rather than undermining the importance of this criteria, it underscores it. Establishing escalation dominance also does not mean escalation will not happen. What it does do is ensure one is prepared for that contingency and not in the awkward position of supporting a proxy who cannot win. That is how conflicts become frozen.

In such contests, the ability to impose costs must be considered in relation to the opponent’s ability to bear them as well as one’s own willingness to bear the costs the opponent will impose in return. To the extent one cannot impose more cost than the enemy is willing to bear or that they can impose more than one can, it is worth asking whether one should impose a cost at all. As Kahn also notes, “That side which has least to lose by eruption, or fears eruption the least, will automatically have an element of escalation dominance.”¹⁰⁴

This point again suggests that as an ethical rule of thumb it makes sense for benefactors and proxies to assess the cost of a proxy war as though they were to fight it without the benefit of the proxy relationship. For benefactors, such a calculation will help determine the cost of escalation dominance since, for the benefactor, the logical end of continued escalation is direct involvement, since indirect measures always have their limits. For proxies, it will help them assess the chances that the benefactor will abandon them when the cost of escalation gets too high.

¹⁰² Barbara Starr and Laura Koran, *U.S. Shifts Stance on Military Aid to Ukraine*, CNN (February 2, 2015), <http://www.cnn.com/2015/02/02/politics/us-ukraine-lethal-aid/index.html>. Accessed 1 February 2017. See also Peter Foster, *US to Increase Military Aid to Ukraine Including Humvees and Drones*, THE GUARDIAN (March 11, 2015), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11465222/US-to-increase-military-aid-to-Ukraine-including-Humvees-and-drones.html>.

¹⁰³ Hughes, *supra* note 75, at 112.

¹⁰⁴ Kahn *supra* note 101, 290.

This point does not mean that benefactors or proxies should engage in a relationship only if they can go it alone. Rather, the point is that both should consider if the consequences of bearing all the costs in the future is worth risking whatever conditions they experience in the present. Even if they cannot bear those costs, it could still be permissible to proceed; however, that decision rests on how trustworthy actors perceive the other to be. Ethical decision-making does not have to be risk free: it just has to be prudent.

D. Diffusion Problem

Related to escalation is what Pattison refers to as the “diffusion problem.” The concern here is that the capabilities one may provide a proxy may not stay with the proxy. Arguably, a proxy has an interest in maintaining and utilizing support in the way intended by the benefactor. However, after the conflict is resolved it is often the case that weapons and equipment are sold or traded to other groups or the proxy utilizes these weapons in ways that respond to new security concerns, but which fall outside the terms of the proxy relationship. This diffusion can thus create new conditions for instability. As Pattison notes, the diffusion of weapons in a post-conflict environment can lead to “higher homicide rates, more violent crime, and further conflict.”¹⁰⁵

Such diffusion does not always wait for the conflict to end. As Krieg notes, conflict fuels economies through corrupt activities that serve local actors whose primary interests are often amassing wealth, influence, and power and who are not concerned with a swift and successful end to the conflict. As a result, “Money, commodities, and arms provided by the patron, particularly to non-state surrogates, might be diverted into the hands of individual strongmen, tribal, rebel or ideological leaders attempting to strengthen their personal standing vis a vis partners and competitors.”¹⁰⁶

Probably the best example of the hazards associated with this concern is the spread of Stinger anti-aircraft missiles the United States provided to the *mujahideen* following the Soviet withdrawal in Afghanistan in 1989. After the conflict ended, these missiles were found as far afield as Bosnia, Iran, Kashmir, Tunisia, and the Palestinian territories. To control this diffusion, the U.S. government initiated a \$65 Million buy-back program; however, only a small fraction have been recovered and a reported 300 to 600 missiles remain unaccounted for.¹⁰⁷

There is, of course, no one way to manage this particular moral hazard. However, when managing moral hazards it is typically better to be proactive than reactive. Benefactors should pay attention in advance to how they are going to control the distribution of assistance, especially lethal assistance, as well as prevent its diffusion when the conflict is resolved.

E. Dirty Hands

As Pattison notes, it should be the concern of every putative benefactor that its proxies fight in accordance with the principles of *jus in bello*.¹⁰⁸ Though the relationship between the support

¹⁰⁵ Pattison, *supra* note 8, at 460.

¹⁰⁶ Krieg, *supra* note 5, at 102.

¹⁰⁷ Mumford, *supra* note 19, at 109.

¹⁰⁸ Pattison, *supra* note 8, at 463.

from the benefactor and any violation of *jus in bello* by the proxy may be indirect, the causal nature of that relationship implicates benefactors in whatever crimes the proxy commits, especially when benefactors are reckless in how they provide assistance.

When the stakes are high, however, concerns about possible implications can often feel more like a luxury than a limitation. When the fate of nations is involved, it can seem irresponsible on the part of leadership to sacrifice the well-being of their state's citizens because some partners do not fight by the same rules they do. Moreover, as a matter of practice, war is brutal and brutalizing. Not only is it unreasonable to expect any war to be crime free, but it is also even more unrealistic to expect to be able to hold someone else's soldiers accountable for every violation.

This last point raises the question, of course, when is a benefactor responsible for a proxy's actions? International law requires that for a state to be accountable, the action in question must be performed by an "organ" of the state. For an entity to be an organ of the state, it must have some status under that state's internal law. However, the fact a state does not recognize an actor as such does not allow it to avoid responsibility. To the extent an actor is under the instruction, direction, or control of a state organ, its actions may be attributed to that state. So a state that created, funded, and directed a militia, for example, would be responsible for that militia's action.¹⁰⁹

This legal standard is different than the moral one argued for here. The moral standard simply requires that there be a causal relationship between the action of the benefactor and any harm done by the proxy. In this regard, to the extent that benefactor support enables a proxy's operations, then the benefactor is responsible for any harms associated with those operations. The legal standard, however, requires that the benefactor also have "effective control" over a proxy's operations. So where the moral standard requires the relationship be intentional, it does not entail that the benefactor intend the harms to be responsible for them. Under this reading of international law, not only must the benefactor-proxy relationship be intentional, but benefactors have to also intend the harm, or at least have a sufficient degree of control over the actor that they could prevent it or hold the proxy accountable.¹¹⁰

International law is a little less clear, or at least less helpful, in determining what constitutes "effective control." For example, in the case of U.S. support to the Contras, the International Court of Justice found that while the United States had "financed, organized, trained, supplied, equipped and armed" the Contras, it was not ultimately responsible for Contra violations of international humanitarian law, which included killing of unarmed civilians.¹¹¹ The reason it was not responsible was because it did not have effective control over Contra operations. To have

¹⁰⁹ Oona A. Hathaway, Emily Chertoff, Lara Dominguez, Zachary Manfredi, and Peter Tzeng, *Ensuring Responsibility: Common Article 1 and State Responsibility*, 95 TEXAS LAW REVIEW 3, 9 (March 2017). According to Hathaway et. al, "The International Law Commissions 2001 Draft Articles on State responsibility are currently the most authoritative statement on state responsibility in international law."

¹¹⁰ Id. at 11. Hathaway, et al's proposal to close this gap is to note there are positive duties implicit in the 1949 Geneva Conventions that argue each signatory has a "duty to respect" the provisions of the convention. This positive duty implies a legal requirement to act to ensure the provisions of the convention are upheld. In the context of proxy conflict this obligation could take the form of withholding lethal assistance or more overt interference with a proxy to prevent operations that would lead to a violation.

¹¹¹ Id. at 12.

effective control, the court held that there needed to be a “direct link” between U.S. support and any particular operation that included direction from a U.S. source. The court held this position despite, according to the case, a manual the United States provided the Contras advising them to “shoot civilians attempting to leave a town, neutralize local judges and officials, hire professional criminals to carry out ‘jobs,’ and provoke violence at mass demonstrations to create ‘martyrs.’”¹¹² For there to be effective control, any direction from the United States had to apply to a specific operation and include instructing the Contras to commit unlawful acts.¹¹³

This view of effective control is not the only one. Following the Federal Republic of Yugoslavia (FRY) Army’s use of proxies against Bosnia-Herzegovina, the International Criminal Tribunal for Yugoslavia (ICTY) applied a standard of effective control that did not require specific orders relating to a violation. In a case that involved the Serbian Republic’s Army (VRS), a non-state actor, the court had to determine whether their acts could be attributed to the FRY, despite there not being any evidence of specific direction from them. The court, noting that the relevant degree of control necessary for attribution can vary from case to case, found that what was important was whether the FRY exerted “overall control” of the VRS. Noting that the FRY transferred officers to serve in the VRS; paid their salaries; had the same military objectives; provided financial and logistical support; and “directed and supervised the activities and operations of the VRS,” the court found that the standard for effective control had been reached.¹¹⁴

The difficulty with either standard of effective control is not just that they set the bar very high. They also establish perverse incentives that encourage states to employ proxies while discouraging them from moderating proxy behavior, since any attempt at moderation could imply effective control.¹¹⁵ Arguably, had the FRY just provided support and not direction, the FRY leadership may not have been found accountable for VRS atrocities.

From the moral point of view, however, what matters is typically the intentional causal role one plays in bringing about the harm. From the perspective of Just War Theory, here both intent and cause are important. There is a difference between causing harm and allowing it where the former entails a moral responsibility and the latter does not. As Pattison notes, having a causal role in some harm would implicate a benefactor and would therefore constitute a moral wrong. Allowing harm, however, can be permissible given other prudential considerations, especially if preventing it would lead to even greater harms.¹¹⁶

As this standard of responsibility suggests, given an intentional relationship between benefactor and proxy, and given a causal relationship between benefactor support and proxy actions, a benefactor can be held responsible for the proxy’s actions. The moral standard described here may be a little less clear than the legal one, but perhaps a little more helpful. It certainly is the case that establishing causation entails difficulties of its own. The simple fact of providing support does not mean that support is causally connected to any harms caused by the proxies. The U.S., for example, has provided targeting information to the Saudis for targets whose

¹¹² Id.

¹¹³ Id. at 13.

¹¹⁴ Id. at 19-20.

¹¹⁵ Id. at 25-26.

¹¹⁶ Pattison, *supra* note 8, at 463.

execution would not involve harm to civilians. The fact the Saudis attack other targets where civilians are harmed does not necessarily mean the United States should cease providing information on targets where they are not harmed.

As the Saudi case suggests, there are also other reasons a proxy's strict adherence to *jus in bello* may be difficult to achieve. In some cases, proxies may not share the same commitment to *jus in bello* norms. In others, as is more likely in the Saudi case, they may share – or at least acknowledge – those norms but not be capable of consistently fighting in accordance with them.¹¹⁷ When these conditions are present, the chance that benefactor assistance will enable moral harm is high. So while acting on this concern may feel like a luxury, managing this potential harm is critical to ensuring the continued moral permissibility of the proxy relationship.

The default position, of course, should be that if a proxy will not or cannot uphold *jus in bello* norms, then a benefactor should withhold support. While it would be easy to settle the argument here, it can sometimes be the case that failure to provide such support could lead to greater moral harms, especially when the proxy meets the conditions for *jus ad bellum*. Take, for example, U.S. support for the Iraqi Security Forces (ISF) against the Islamic State (IS). If the United States did cease support at the report of atrocities, such as those reportedly committed by the Emergency Response Division,¹¹⁸ arguably the IS would still be in place. And people would suffer. And the conflict would go on, or worse, resolve favorably for the IS. This point suggests that while the presence of *jus in bello* violations should prompt the benefactor to do something, it does not necessarily determine that it should fully withdraw its support. In fact, the report notes that the United States has withheld direct support from the ERD precisely because of concerns about abuse.

The question remains, then, what should the benefactor do? Walzer observes that often great goods are accompanied by great harms. It is not just that doing good sometimes can entail some collateral harm, but rather to achieve the good, sometimes one must *do* wrong. Further, he argues, such situations are not occasional instances from which the political or military leader can walk away. Rather it is the condition of governing and, one could add, fighting. In fact, he argues, to govern is to give up one's innocence since governing innocently is not just impossible, it is *irresponsible*.¹¹⁹ The same is likely true for soldiering.

The question then is, how does one give up one's innocence responsibly? One could accept the utilitarian calculation and argue that as long as one creates more good than harm, the political or military leader has done no wrong. However, such a standard sets conditions for greater harms that are not permissible. For example, Walzer describes a ticking time bomb scenario where a

¹¹⁷ There are, of course, a number of reasons a proxy force may not have the capability to fight in accordance with the laws of land warfare that could range from poor training, inappropriate tactics or equipment, or a culture that place a priority on things like revenge over humane treatment of prisoners and detainees.

¹¹⁸ Brian Ross, Rhonda Schwartz, James Gordon Meek, and Randy Kreider, *The Torture Tapes: Iraqi Troops Torture and Execute Civilians in Secret Videos*, ABC NEWS (May 2017), http://abcnews.go.com/Blotter/deepdive/brian-ross-investigates-the-torture-tapes-47429895?utm_source=Sailthru&utm_medium=email&utm_campaign=New%20Campaign&utm_term=%2ASituati on%20Report.

¹¹⁹ Michael Walzer, *Political Action: The Problem of Dirty Hands*, in WAR AND MORAL RESPONSIBILITY 63, 63 (Marshall Cohen, Thomas Nagel, and Thomas Scanlon ed., 1973) [hereinafter Walzer, *Dirty Hands*].

politician orders the torture of a bomber so that he will give up the locations of the bombs so that lives can be saved. As long as the suffering of the bomber is exceeded by the well-being of the individuals saved, the torture would be justified on utilitarian grounds. Because it is justified, the utilitarian calculation solves the concern by letting leaders keep their innocence. Because their act realized the greater good, they have done no wrong.

One difficulty with this view is that it only concerns itself with consequences. It does not concern itself with how those consequences come about. As such, no particular measure would be morally off-limits. If rounding up members of a certain community and interning them regardless of their guilt or innocence maximized utility and prevented future bombings, then that is what the leader *should* do.

The concern here is two-fold. First, as a citizen, one can never be sure when one will be disadvantaged by a policy justified purely in terms of its consequences. So as a matter of prudence, it is worthwhile to impose limits in advance on the kinds of things utilitarianism can justify.¹²⁰ Second, even when one is not the loser in a utilitarian calculation, some measures, like torture, conflict with other strongly-held moral intuitions that are hard to give up and remain committed to other moral values and ideals, such as those related to human dignity. Thus, whether certain measures are sometimes necessary, we still want to be able to maintain that they are still wrong. As Walzer states, "The notion of dirty hands derives from an effort to refuse 'absolutism' without denying the reality of the moral dilemma."¹²¹ So while it may not make moral sense to absolutely prohibit proxy relationships where dirty hands is a concern, one still needs a framework for addressing the wrongs done and the harms committed.

Walzer's remedy is for politicians to acknowledge the wrong and the community to hold them accountable for it, which would include the imposition of some sanction that is commensurate with the nature of the crime. It is, in fact, the politician's willingness to be held responsible that consummates the sacrifice. As Walzer notes, in cases of civil disobedience, when an individual violates the laws of the state for moral reasons, the state still provides punishment. In "dirty hands" cases, where an individual breaks moral rules for reasons of state, there is no one to provide the punishment.¹²² The answer then, is to provide the punishment to the state, or at least the individual who committed evil on behalf of the state.¹²³

How one would go about holding a state responsible for international law violations is beyond the scope of this discussion. Currently, there is no international sovereign capable of enforcing

¹²⁰ A strict utilitarian would argue that such limits are themselves justified by utility theory, which also requires taking the longest view one can and mitigating any bad consequences. The difficulty is that while utility theory encourages such a process of deliberation, in the end, it still does not rule any particular act out, thus leaving individual rights (among other things) at the mercy of the leadership's reflective abilities.

¹²¹ Walzer, *Dirty Hands*, *supra* note 118, at 64.

¹²² Walzer, *Dirty Hands*, *supra* note 118, at 81.

¹²³ This point brings up concerns regarding the differences between moral obligations between individuals and those between states. Arguably from Walzer's perspective, even when acts are done on behalf of a state and done with the approval of that state's relevant institutions, it is still an individual or individuals who decide to act and thus are morally responsible for its consequences. Of course, how those institutions function to diffuse decision-making impacts responsibility and can mitigate any particular individual's liability; however, it still makes sense to discuss to what norms one would hold agents of the state or the state itself. What kinds of punishments would apply and to whom would obviously be considered on a case by case basis.

such accountability, and there are arguably good reasons there should not be one. Moreover, as the discussion regarding the ICJ indicates, international law is not far enough along in this regard to account for all the relevant moral concerns. Having said that, a state that was self-policing and held officials accountable in some way would meet the standard for accountability argued for here. In a mature and ethical democracy, for example, political and military leaders who make the kinds of hard choices discussed here should expect to be held accountable for those choices.¹²⁴

However, it would be naïve to conclude that the relevant political or military leaders would be eager to submit to judgment and will certainly be incentivized to cover up any wrongdoing. Moreover, when the state cannot or will not hold its leaders accountable, it is even less likely that it would welcome an external agency to do so on its behalf. So, perhaps the best conclusion to draw from this analysis is that only extraordinary circumstances could justify support to proxies who violate *jus in bello* – or any other feature of International Humanitarian Law and International Human Rights Law.

This standard is, of course, a high one, but not an impossible one. Given the indirect nature of the fight to the benefactor, prohibitions against getting one's hands dirty should be observed. Moreover, it is not entirely unrealistic to expect a state, especially a democratic one, to hold its leaders accountable for the legal and moral transgressions they commit. While not directly related to dirty hands, the dozen or so indictments handed down in the wake of the Iran-Contra Scandal suggest that such accountability is possible, if not consistent.

As suggested above, every rule has an exception, so the next matter to take up is what kind of extraordinary circumstances would justify getting one's hands dirty? Pattison has already argued that it is permissible to support a proxy fighting for an unjust cause if doing so realizes a greater humanitarian good.¹²⁵ By extension it seems reasonable to further conclude that support to a proxy who violates *jus in bello* could also be justified if such support also realizes a greater humanitarian good than might have occurred had the proxy not received support. However, not just any humanitarian good should count to justify overriding *jus in bello* commitments; otherwise, one is left with the same utilitarian standard previously rejected.

¹²⁴ The point that leaders should expect to be held accountable does not, of course, only apply in mature democracies. My point here is that such democracies tend to have the institutional capability and disposition for such accountability not found in more authoritarian regimes.

¹²⁵ Pattison's argument is similar to Walzer's Supreme Emergency doctrine, that permits *jus in bello* violations to avoid a harm that is grave in terms of the human suffering caused by losing the war and imminent, such that there are no alternatives and no time to come up with alternatives. Based on this doctrine, Walzer argued that British bombing of German cities was permissible during World War II when there was no other way for the British to wage war against the Nazis, given that capitulation would have represented a grave harm not only to Britain, but to Europe as well. Once the U.S. entered the war and Britain was no longer the sole nation fighting the Nazis, Supreme Emergency conditions no longer held and future indiscriminate bombing of Germany was no longer permitted. Similarly, it may make moral sense to support a proxy who violates *jus in bello* norms as long as the harm avoided by doing so is sufficiently grave and imminent, at least in the sense there is no other way to avoid it. Also of interest to this discussion, Sir Arthur "Bomber" Harris was one of the few British generals not honored after the war suggesting some kind of accountability and recognition of the bombing as unjust, though necessary. See Just and Unjust Wars, *supra* note 27, at 251-58.

Perhaps the right standard to apply here is the same one Walzer applied to interventions in general: when the public's moral convictions are shocked to the point additional argument for intervention is unnecessary, it makes sense to permit some tolerance for *jus in bello* violations. For example, while the ISF's human rights record may be inconsistent and their use of force sometimes disproportionate and indiscriminate,¹²⁶ their violations are intuitively far outweighed by IS's atrocities and the ongoing threat it represents. Further, given that an ISF defeat could lead to a permanent IS presence that would entail further gross human rights abuses, it seems that the good of an ISF victory outweighs the harms committed in its pursuit.

This justification is not simply a utilitarian calculation. The harms the ERD has reportedly committed, for example, are still wrong. The question at hand though is whether, all other things considered, those wrongs should prohibit the intervention of a benefactor. When Walzer's threshold of public moral outrage is crossed, it seems that political and military leaders would be irresponsible if they did not do something. To the extent support for the ISF appears to be the most effective something to do, it makes moral sense not to hold U.S. officials individually accountable for the harms the ERD has committed. This point, however, does not suggest their moral responsibilities are exhausted.

Their first responsibility is to ensure *someone* is held accountable. Their second is to continue to use their influence and leverage to moderate the proxy's actions and reduce, if not eliminate, violations. Doing so is, of course, difficult. As mentioned above, enforcing one's rules in someone else's military is no easy task. Moreover, it can take time to go from many violations, to few, to none. Influencing that process indirectly is neither easy nor efficient. The benefactors' leverage, of course, is the support they provide. Having said that, it is worth noting that the Iraqi Ministry of Interior has opened an investigation into the ERD's reported abuses.¹²⁷ Whether that investigation will result in anyone being held accountable remains to be seen.

Of course, simply withholding all support until the proxy holds violators accountable can create its own set of moral hazards. As suggested earlier, making the ISF's response to the Islamic State less efficient is in no one's interest. However, it is possible to discriminate who within a proxy's military receives assistance and what kind of assistance they receive. As noted above, those concerns have limited the kind of support the United States has provided to the ERD. So as a general rule, organizations within a partner's military forces that have been associated with *jus in bello* violations should probably not receive lethal assistance or, to the extent possible, should only receive lethal assistance that is defensive in nature. This withholding can occur while providing other units that have not committed violations – or failed to hold to account persons who have – the assistance they need to continue the fight. This kind of selective support may not end abuses, but it should moderate the proxy's behavior and incentivize adhering to *jus in bello* norms. One example may be U.S. support for Saudi operations in Yemen, where the United States has withheld targeting information when it could not be assured the means the Saudis

¹²⁶ Human Rights Watch, WORLD REPORT 2017, <https://www.hrw.org/world-report/2017/country-chapters/iraq#950b3d>.

¹²⁷ Qassim Abdul-Zahra, *Iraqi Forces Release Videos It Says Counters Claims of Abuse*, WASHINGTON POST, (May 25, 2017), https://www.washingtonpost.com/world/middle-east/iraqi-forces-release-videos-countering-claims-of-abuse/2017/05/25/50014308-414d-11e7-b29f-f40ffcd2ddb_story.html?utm_term=.b7871fd159bc.

employed would be sufficiently proportionate and discriminate.¹²⁸ This selective withholding probably represents the minimum benefactors should do in such situations; however, in general benefactors should look to use the maximum leverage they have to ensure proxies enforce *jus in bello* norms.

Recognizing that perfect compliance with *jus in bello* norms is an elusive and unlikely goal, this analysis would permit a benefactor-proxy relationship when the following conditions hold:

- Proxy leadership intends to abide by *jus in bello* norms and hold violators accountable and have taken some credible steps to do so.
- A greater injustice will arise if the proxy fails than the injustice represented by its *jus in bello* violations.
- The benefactor must take extra measures to mediate the likelihood of *jus in bello* violations.

Supporting a proxy who routinely violates *jus in bello* rules should be rare. However, when the stakes are sufficiently high and the conditions for *jus ad bellum* are met, such support may be permitted if the state, or those acting on its behalf, can be held accountable for the harms caused. If such accountability is not feasible, then such support may be permitted if it avoids some humanitarian catastrophe or gross violation of human rights. Even when permitted, however, benefactors are never absolved of the responsibility to do their best to limit violations and bring violators to account.

Conclusion

As this discussion suggests, proxy wars are not only going to feature more prominently in international conflict, they are likely to become more complicated and thus more difficult to resolve. While the bi-polar Cold War world certainly had its fair share of proxy wars, the emerging polyarchic order proliferates not only the number and kind of actors that can serve as benefactors and proxies, but most importantly, it increases the need for such relationships.

Given this likely increase in need, then the moral presumption against proxy relationships is just wishful thinking. While there is something unseemly about getting someone else to do one's dirty work, responsible national leaders are not going to set aside certain vital national interests over academic squeamishness. It is tempting, as Pattison does, to hold the moral bar high and justify proxy wars only by virtue of the gross human rights violations and humanitarian crises they avoid or remedy. It is equally tempting to give into realism and allow leaders the space to do what they *can*, rather than what they *should*. Both choices, however, are unsatisfying. The former precludes too much and the latter too little.

Of course, human rights and humanitarian concerns should feature prominently in one's judgments regarding war. In fact, wars are only justified by a violation of some kind of right. Such violations do not have to rise to the level of atrocity to justify fighting; they simply have to rise to the level of aggression, for which there is no non-violent alternative for resolution. In the

¹²⁸ Missy Ryan, *Civilian Casualties in Yemen Bring Charges of U.S. Responsibility for Saudi Actions*, WASHINGTON POST (October 3, 2016), <https://www.hrw.org/world-report/2017/country-chapters/iraq#950b3d>.

context of such aggression, others are certainly permitted to come to the defense of the aggrieved. However, this permission does not entail an obligation, so calculations regarding intervention are and should be constrained by matters of prudence. Thus it makes sense for external parties to enter into proxy relationships that serve other interests as well as lower the costs of realizing them.

Entering into such relationships, however, creates massive opportunities for moral failure. These “opportunities” arise because the introduction of the benefactor complicates already complex and somewhat subjective decisions regarding the resort to war and introduces a corrupting influence that risks distorting the reasons that drive those decisions. Because benefactors are the ones who bring these moral complications, they bear the greater burden to address them. This point does not mean that proxies have no responsibilities. What it does mean is that most moral decisions regarding proxy wars are often in the hands of the benefactor, without whom there would be no proxy relationship to judge.

Decisions about cause, especially where non-state actors are involved, require judgments about legitimacy, territory, and sovereignty that may not have a clear answer. Further, judgments about proportionality, reasonable chance for success, and last resort require judgments about future costs and alternatives that are difficult, if not impossible, to anticipate. The introduction of the benefactor, however, can affect these judgments by conveying legitimacy as well as reducing costs and providing additional capabilities that make the fight seem just *and* prudent. While doing so may appear to be to the advantage of the proxy, the reality is often more complex.

The difficulty is that benefactors can convey these advantages while at the same time unintentionally offsetting them. The introduction of a benefactor does not lower costs as much as it complicates their calculation. Given the propensity for escalation, frozen conflict, and diffusion inherent in proxy wars, it is hard to know, as Syria's conflict shows, how costly a conflict will be. Given that increased uncertainty, it is further not clear how good an insurance policy proxy relationships really are. Moreover, even without a benefactor, one can never know if one has tried all possible alternatives. Given the typical urgency of decisions to resort to war, however, the introduction of the benefactor is likely to make non-violent, but costly, alternatives seem unattractive.

Proxy relationships do not just make judgments to go to war more likely. They also risk corrupting those judgments. The divergent interests inherent in any proxy relationship raise the risk not only of going to war to serve unjust ends; they also raise the risk of expanding the fighting as the parties involved attempt to realize multiple, and sometimes exclusive, goals. To make matters more complicated, benefactors and proxies never really know – or at least sometimes misinterpret – the other's interests and intentions. If that divergence is not clear, both parties risk making bad judgments and commitments that could prolong the conflict and undermine the just cause for which it is fought.

Further, the fact there are conditions where proxy relationships may be kept secret, suggests that there are also conditions where this permission for secrecy will be abused. Thus, the presumption should be to be open about such relationships, and if good cause requires otherwise, ensure it is subject to proper oversight. If one is in doubt, a good rule of thumb is the “Washington Post

Test.” This test simply asks, if the relationship became public, what would the public’s reaction be? If that reaction would likely be negative, then one should think twice before keeping the relationship a secret.

Secrecy, however, is not the only feature of proxy-relationships vulnerable to abuse. The indirect nature of the relationship means not only that benefactors can get someone to do their dirty work, it means they can get someone to do their dirty work without getting their hands dirty. As previously discussed, the bar that international law sets regarding state responsibility for a proxy’s actions is not only high, it is limited in its application as it applies only to proxies who are non-state actors. As a result, it does not account for all our moral intuitions: there are some things we just want to judge wrong even if we sometimes judge them as also necessary. Reconciling these competing intuitions requires some kind of accountability if one is to maintain the moral legitimacy of the proxy relationship.

Thus proxy relationships can make apparently just wars more likely and messier. Given that the purpose of the Just War Tradition is to prevent war or limit the suffering it causes, the proxy relationship risks undermining that tradition even as it conforms to it. It would be wrong, as suggested at the outset, to conclude proxy relationships are never justified or only justified to avoid some great human rights or humanitarian catastrophe. Rather, benefactors and proxies must be aware of how the relationship affects *jus ad bellum* judgments and act accordingly.

Acting accordingly entails a number of measures both benefactor and proxy should take to ensure their war is just and its moral hazards are effectively managed. First among these is to ensure their causes, interests, and intentions align in a way that if the benefactors’ cause counts as a reason to enter into a proxy relationship, it contributes to matters of justice. Of course, benefactors are permitted to consider non-contributing interests; however, they only count towards the overall prudence of the relationship. Absent a legitimate contributing cause, they are insufficient to justify a proxy relationship absent some act of aggression that puts a non-contributing interest at risk.

All these considerations combined suggest the following norms that should guide proxy relationships:¹²⁹

- Benefactors bear the greater moral burden to ensure conformity to *jus ad bellum* and *jus in bello* norms. Because of this burden, benefactors should make good faith efforts not just to seek non-violent solutions first but to ensure the option for such solutions is always open.
- Where the proxy has resorted to war and has a just cause, benefactor intervention is permissible to the extent it is prudent.
- Where proxy’s just resort to war depends on benefactor intervention, the benefactor’s cause must also be in some sense just as well as necessary. While it may not be a direct

¹²⁹ This list is not intended to be exhaustive.

response to aggression against itself, it must serve some overriding good such as preserving a just international order or deterring future aggression.

- In cases where the proxy's cause is unjust, benefactors may intervene only to avoid some gross violation of human rights, humanitarian disaster, or set conditions for a rapid and just resolution to the conflict.
- Benefactor's causes, interests, and intentions should align in a way that the realization of the proxy's cause either realizes the benefactor's or at least ends the need for the proxy relationship. When the proxy wins, the proxy relationship should end and transform into something that contributes to order rather than set conditions for future chaos.
- Benefactors must articulate a reasonable connection between the assistance they provide and the political objectives they and any putative proxy would achieve.
- Benefactors should enable proxies to fight justly and take measures to minimize costs to all affected parties.
- Where abandoning a proxy who fights unjustly creates more harm than good, benefactors should take extra measures to hold violators accountable and ensure *jus in bello* norms are upheld.
- Benefactors should account for all costs to those affected by the war. Because such cost projections are unreliable both parties must prepare in advance to favorably end any escalation and limit any diffusion of military assistance to the hands of other bad actors.
- Benefactors and proxies may keep their relationship secret, but must subject it to reasonable oversight.

Even with these norms in mind, current history clearly demonstrates how perilous proxy relationships are. At the time of this writing, conflicts in Syria and Ukraine are frozen, yet escalating. Saudi operations in Yemen continue to implicate the United States and undermine its moral credibility, despite legitimate efforts to manage this particular moral hazard. Meanwhile, the complicated proxy relationships Iraqi Shia militias have with not just their own government but the Iranians will continue to impede state consolidation as well as profoundly affect implementation of U.S. security cooperation and assistance programs after IS's defeat. States need not necessarily avoid such relationships; instead, they should establish, promulgate, and follow norms that treat partners as ends not means, align interests with the greater good, and reduce the suffering wars inevitably bring.