



In Defence of Necessity

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Abstract

This paper disputes Uwe Steinhoff’s view that a *jus ad bellum* requirement of necessity can be merged with a condition of proportionality. It argues that the proposed merger detracts from a conceptual and moral understanding of the structure and rationale of both the necessity and the proportionality considerations applicable in a range of moral contexts, including those of war and so-called lesser evils cases, where these conditions are intended as action-guiding.

Keywords Defence · Instrumentalist justification · *Jus ad bellum* · Lesser evil · Necessity · Proportionality

This paper disputes Uwe Steinhoff’s view (Steinhoff, 2021) that a *jus ad bellum* requirement of necessity can be merged with a condition of proportionality. At the outset I shall accept two points for the sake of argument; my interpretation of them may differ somewhat from Steinhoff’s. The first point is Steinhoff’s claim that the *jus ad bellum* condition of “just cause” refers to a set of circumstances or state-of-affairs, as opposed to an aim. Here I would emphasise that a just cause is a normative state-of-affairs that provides a reason for waging war that can ground a morally more demanding justification. To have a just cause means that waging war could be justified given a set of circumstances of a particular type (e.g., being unjustly attacked), as opposed to a set of circumstances of another type (e.g., an opportunity for expansionist territorial acquisition) that is not a just cause for war. This distinguishes circumstances that can constitute a *just* cause, as opposed to those that cannot.

The second point accepted for the sake of argument is that the set of Just War conditions is intended to be sufficient for *justified* war, so that waging war under these conditions is permissible or right, and that these conditions are meant to be action-guiding. This is compatible with Steinhoff’s view that some of the stated Just

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War conditions are not independent of one another, and that some others are inappropriate. However, a set of conditions that is intended as action-guiding should not merge morally distinguishable justificatory elements.

1 A Condition of Necessity

I have argued elsewhere (Uniacke, 2018) that the *ad bellum* condition of “last resort” can be regarded as a necessity condition that is structurally analogous to the necessity condition of self-defence.¹ (Here we can set aside whether the standard against which necessity is judged is fact-relative or agent-relative, or as Steinhoff holds, mixed.) Steinhoff (2021: 3.2.2) criticises my analysis of *ad bellum* last resort, maintaining that there are significant differences between war and individual self-defence and that not all wars are defensive. I agree on the latter two points, as is recognised in the chapter to which Steinhoff refers. What I claim there is not that last resort is equivalent to the necessity condition of self-defence, but that the *structure* of the condition of last resort is analogous to that of the necessity condition of self-defence. This subtle difference is significant. However, here I shall directly address Steinhoff’s recommended merging of *ad bellum* necessity into considerations of proportionality. I think Steinhoff’s proposed merger detracts from a conceptual and moral understanding of the structure and rationale of both the necessity and the proportionality considerations applicable in a range of moral contexts, including those of war and so-called lesser evils cases, where these conditions are intended as action-guiding. My defence of necessity as a distinguishable *ad bellum* requirement draws upon two related structural features of necessary force that are highlighted in my analysis of last resort.

2 Necessity: Structure and Rationale

The first feature is that, as applied to the use of force, a necessity requirement involves two steps: (i) Is it necessary to use force? If yes, then (ii) Is the proposed degree of force necessary? Further, it is important to the action-guiding nature of this condition that it is distinguished from a requirement of proportionate force where “proportionate” refers to a judgement of comparative (moral) value.

An *ad bellum* necessity requirement arises from a general moral directive to avoid needless harm in the pursuit of a legitimate cause. This directive applies in varying contexts, including self-defence and circumstances to which the legal defence of Necessity and its moral counterpart are relevant.² In the case of war, this moral directive is applicable to harm to combatants and to wider harm, including collateral

¹ Philosophers who regard last resort as a necessity condition include McMahan (2012); Lazar (2016); and Shue (2016).

² To avoid possible confusion, I use “Necessity” for the name of the legal plea and “necessity” to refer to a condition of necessity (necessary force).

harm. A necessity requirement can raise difficult practical questions in various contexts. Nonetheless, as elements of moral justification, a necessity condition principally (although not exclusively) involves empirical judgements, whereas a proportionality condition concerns a judgement of comparative value. Moreover, in the relevant sense, a judgement that x is necessary is elliptical (necessary to/for what?), whereas a judgement that x is proportionate is relational (proportionate in relation to what?)³

Judgements about whether (a degree of) force is necessary sometimes include evaluative judgements about acceptable risk and cost. It does not follow from this, however, that a necessity requirement can be merged into considerations of proportionality where proportionality concerns a judgement of comparative (moral) value. Steinhoff (2021:100) claims that I show otherwise “unwittingly” by my “revealing interpretation of [my] very own examples”. In explaining my disagreement, I shall focus on the legal defence of Necessity and its moral counterpart, which Steinhoff believes support his own position.

3 Necessity and a Necessity Condition

A plea of Necessity (sometimes called duress of circumstances) is recognised in common law jurisdictions and in continental European law. This defence is admissible to all crimes (except murder in some jurisdictions) and it can succeed when a person breaks the law in an emergency, where such action represents a value judgement that the law will endorse. The relevant value judgement for the defence is that the law-breaking in question was the lesser evil in the circumstances. I might, for example, plead Necessity for driving on an expired driver’s licence where in so doing I took a seriously injured person to hospital, or where I have damaged someone else’s property in rescuing children who were suffering acute heat exhaustion in a locked car.

Necessity is often called a “lesser evils” or, as Steinhoff says, a “balance of interests” defence. While these are useful characterisations, they should not obscure distinguishable elements of the defence. Certainly, the defence requires proportionality between, on the one hand, breaking the law in question (by, e.g., driving on an expired licence), and on the other hand, avoiding a greater harm (e.g., a seriously injured person not getting to hospital in time); but that is not all it requires. The defence requires something like just cause. (If we accept that “just cause” refers to a set of circumstances that constitutes a justificatory reason, I need not have acted *for* the justificatory reason; my law breaking might be entirely opportunistic. Nonetheless, my overt actions need to be those of someone acting for the justificatory reason.) For instance, where an injured person needs urgent hospital care, this could

³ It is possible (although I think wrong) to reject proportionality as a condition of justified defensive force while retaining a requirement that force not exceed what is necessary for defence in the circumstances. Moreover, proportionate harm might exceed equivalent harm, and in some contexts a proportionality requirement might allow for agent-relative permissions.

ground a defence for my driving on an expired licence, unlike, say, a situation in which I am running late for work and can't find a taxi, which does not ground such a defence. Moreover, as Steinhoff recognises, the defence requires that my choice was *either* break the law in question *or* do/allow something worse. Even if by driving on an expired licence I took a badly injured person to hospital, I will not have a Necessity defence if, say, there was a competent licenced driver available. The same goes for an analogous moral defence. My diverting the famous runaway trolley from Track A onto Track B, where it will kill one person, cannot be justified with reference to my avoiding killing five people trapped on Track A if there is an emergency brake that I haven't pulled.

The characterisation of Necessity as a “balance of interests” defence suggests a metaphorical set of balance scales that weigh comparative (moral) (dis)value: on one side, for example, my driving on an expired licence; and on the other side, a seriously injured person's (not) getting to hospital in time. However, the defence also requires that the agent *needs* to choose the (lesser evil) course of action on one side *if* what is on the other side is to be achieved/avoided. These conditions of proportionality and necessity do not thereby merge as a balance of interests. They are conceptually and morally distinguishable and both are required elements of the defence. In these cases, the judgement that *x* is *indispensable* in the circumstances if *y* is to be achieved/avoided is different from the judgement that, given alternatives *x* and *y*, achieving/avoiding *y* is (morally) *more important* than *x*. This distinction is clear, for instance, in the landmark English legal case of *Dudley and Stephens* (1884) in which two shipwrecked sailors killed and ate the cabin boy so that they and a third man might survive. The jury accepted the defendants' (necessity) claim that had they not acted as they did, they would not have survived long enough to be rescued and that the cabin boy (who was unconscious when killed) would have died well before them. Notwithstanding, the court rejected the claim that what they did was the lesser evil.⁴

Dudley and Stephens killed and ate the cabin boy as a means of self-preservation. Here we can note that a difference between necessity and proportionality judgements is also clear in distinguishable cases, such as the Trolley example, to which the Doctrine of Double Effect (DDE) is said to apply, where a foreseen (lesser evil) outcome is incidental to achieving a greater good/avoiding a greater evil. The DDE itself includes both a necessity and a proportionality condition: if the agent could achieve the (intended) good effect without the (foreseen) bad effect, s/he should do so; and the intended good effect must be sufficiently weighty to compensate for the foreseen bad effect.⁵

When a person says, “I had to do *x* if *y* was to be avoided/achieved”, there will often have been only one way available to her for avoiding/achieving *y*. However, in my discussion of *ad bellum* last resort, I addressed the general question of whether

⁴ More generally, *R v Dudley and Stephens* (1884) 14 QBD 273 DC determined that Necessity was not a defence to murder in English law.

⁵ See Foot (1978) on the Trolley example and the DDE. For a full statement and explication of the DDE, see McIntyre (2019).

a necessity requirement could be met if, in the circumstances, there is another possible, inherently less harmful means of achieving/avoiding *y*. These are the types of examples to which Steinhoff refers. (Their relevance to Just War concerns the question of whether war could reasonably be judged necessary if there are inherently less harmful possible means of advancing a just cause, that have not been tried or exhausted.)

Say I damage your valuable antique war club by using it to smash the window of a locked car in which children are suffering acute heat exhaustion. I have a screwdriver to hand that might be up to the task. Here I might claim that it is necessary to use your war club, since time is crucial and the screwdriver is a much less reliable means of smashing toughened glass. This claims that the war club is a significantly more efficient tool for the required purpose than the screwdriver. Or in my earlier example, I am deliberating whether to drive a seriously injured person to hospital, knowing that my driver's licence has expired. I've called an ambulance, but it hasn't arrived. How long should I wait for it, given the risk to the injured person? These (sometimes difficult) judgments involve evaluative elements; nonetheless they are primarily predictive judgements about "what will or is likely to happen if". (Such judgements can also arise for the necessity condition of self-defence. If, for example, I could avoid a blow by ducking, as opposed to forcibly fending it off, would ducking still leave me exposed? Can I get away from the threat fast enough?) The judgement that compared to *x*, a possible alternative, *z*, is too risky/insufficiently reliable as a means of achieving *y*, is evaluative, but it is not thereby principally a judgement about comparative moral value. Furthermore, a judgement that (a degree of) force is unnecessary because it is *excessive* (e.g., punching someone whom I could stop with a verbal warning) is importantly different from a judgement that a degree of force is *disproportionate* compared to what it is used to achieve/avoid (e.g., breaking someone's arm to prevent her stepping into a puddle).⁶

Steinhoff's statement (2021:98, emphasis original) that a means (of achieving/avoiding something) that is "insufficiently reliable...[is] thus *disproportionate*" seems confused. (Reliability admits of degrees and of comparison, but reliability is not a relationship of proportionality.) This confusion is perhaps due to two factors. First, in some contexts "proportionate" refers to relative quantity or degree. ("Proportionality" might variously refer to size, weight, intensity, severity, or value.) Moreover, the terms "insufficient" and "excessive" can refer to considerations of necessity as well as to considerations of proportionality, and in some contexts a disproportionality of *A* in relation to *B* makes *A* insufficient for *C*. (A mundane example of the latter is when a quantity of yeast is disproportionate in relation to the quantity of flour used in baking and is thereby insufficient for achieving the required rise.⁷)

⁶ The phrase "disproportionate force" is sometimes used loosely in everyday speech to mean "excessive force". Philosophical and legal analysis and statements of action-guiding conditions should avoid this imprecision since it elides an important distinction and is potentially misleading.

⁷ Note that the quantity of yeast is insufficient for the required rise because it is disproportionate in relation to the quantity of flour used: the quantity of yeast is not insufficiently reliable and *thus* disproportionate.

However, in the moral contexts in focus, there are important differences in the respective criteria by which insufficiency is judged as regards necessity as opposed to proportionality. A means of achieving/avoiding y that is insufficiently reliable risks *falling short of what is needed* to achieve/avoid y ; and a means that is excessive *goes beyond what is needed* to achieve/avoid y . By contrast, a means that is disproportionate in the relevant sense is *not* (morally) *outweighed* by *what* it achieves/avoids.⁸

A second possible source of confusion involves a shift in the respective reference points that are compared in judgements of necessity and of proportionality. When, for example, I judge that I need to use your antique war club to smash the car window even though I have a screwdriver to hand, I am comparing the *efficiency* of the club and the screwdriver as means of smashing toughened glass in an emergency. (In the same way, when I choose an electric mixer as more efficient for whipping cream than a hand whisk, this comparison has nothing to do with proportionality.) By contrast, when I ask myself whether it would be proportionate to smash the car window with your antique war club, I am comparing the damage to the car and your war club on the one hand, with the plight of the children on the other.

A point I take from Steinhoff's analysis (2021: 97-98) is that these types of examples assume a prior evaluative judgement: namely, that *either* of the alternative means under consideration would be proportionate (a lesser evil) in relation to the (greater) harm to be avoided. For instance, in deliberating whether to use your antique war club when I have a screwdriver to hand, I assume that breaking the glass with either the war club or the screwdriver would be proportionate in relation to rescuing the children. Nonetheless, here the salient question is whether a screwdriver is sufficiently reliable for smashing toughened glass in this emergency, and hence whether I *need* to use your war club.

Even if Steinhoff were to accept my analysis of the above examples, I take his claim to be that necessity is not an independent *moral* condition of either Just War or lesser evil examples. As set out in my analysis above, the requirements of necessity and proportionality sometimes interact with each other in these contexts; these two requirements can be relevant at various justificatory stages, and either one can morally constrain the other. (Harmful force that is necessary in the circumstances is permissible only if it is proportionate in relation to what it achieves/avoids; and harmful force that is proportionate in relation to what it achieves/avoids is permissible only if it is necessary.) It does not follow from this that a moral requirement of necessity (necessary force) can be subsumed under considerations of proportionality. It would

⁸ Normally we do not regard harmful force as disproportionate in the sense of being *insufficiently* morally weighty compared with what it achieves/avoids. If, for example, I can rescue the children by simply unlocking the car door, this would be proportionate. The same is true of defensive harm. If I can fend off lethal injury by ducking, this would be proportionate. (Note the role of a necessity requirement in the above examples. Any harm I do by, say, unlocking the car door, or by ducking, is well below a threshold of what would be disproportionate harm in relation to what it achieves/avoids. Nonetheless, a greater degree of harm would be unjustified because unnecessary.) Force that is intended as punishment, however, might be regarded as disproportionate because either insufficiently or excessively weighty in relation to its cause.

be proportionate that I use your war club to smash the car window to rescue the children, but it is unnecessary if, say, I also have a house brick that would be equally or more efficient at smashing the glass in time. In *that* case, by using the brick as the less valuable of the two available implements, I am avoiding unnecessary harm. Here we can ask: Why would it matter if I were to damage your valuable war club by using it to smash the glass, instead of using the brick? The answer is straightforward: because it is unnecessary.

To this last point, Steinhoff might respond that my using your war club instead of the brick would (also) be disproportionate, since damaging the war club is not the lesser evil in relation to using the less valuable brick. But this response shifts points of comparison (what sits on either side of the metaphorical balance scales) and it blurs the distinction between a moral directive not to do unnecessary harm in pursuit of a legitimate cause (e.g., by smashing the car window with your war club instead of using a brick, or by punching someone when a verbal warning would suffice), as opposed to a moral directive not to do disproportionate harm in pursuit of a legitimate cause (e.g., by smashing the car window with either a brick or your war club to retrieve wilting flowers, or by breaking someone's arm to prevent her stepping into a puddle).

In relation to the conditions of *jus ad bellum*, the judgement that a just cause is sufficiently morally weighty that resort to war would be a proportionate response does not answer the question of whether war would be necessary. (Are inherently less harmful measures unavailable or inadequate?) If waging war would be a proportionate response, war is justified only if it is necessary. And in the other direction, the judgement that waging war would be necessary to address a just cause does not answer the question of whether war would be a proportionate response. If, for example, the force that would be necessary to repel wrongful external interference would cause massive loss of life and destruction, the question arises: Would the scale of these harms be proportionate to the wrongful interference thereby resisted?

4 Necessity: An Instrumentalist Condition

Unlike a judgement of proportionality, a judgement that *x* is necessary in the circumstances if *y* is to be avoided/achieved is an *instrumentalist* one. Accordingly, the second feature of an *ad bellum* requirement of necessity to highlight is its role in a morally more demanding, instrumentalist justification of war.

The instrumentalist nature of *ad bellum* justification is obvious where a war's nominated rationale is, for example, defence, or humanitarian intervention, or recovery of persons or property, or restoration of sovereignty: the war is to *fend off*, or to *protect*, or to *recover* or to *restore*. Whether the war that is waged can achieve these things, and to what extent, is relevant to its *ad bellum* justification. The instrumentalist nature of the justification is less obvious if we allow, as some Just War theorists do, that just wars can be punitive, and further, that punishment can legitimately be imposed for its own sake (simply as a penalty for wrongdoing) and not (also) as, say, a deterrent. Nonetheless, it is *war* (as opposed to punishment) that must be justified instrumentally. To illustrate this latter point

with a homely example: I do not punish you by, say, deliberately damaging your property if by so doing I unintentionally do you a favour. (You are delighted by the outcome; and it is I, not you, who suffers.) The same goes for war as punishment: to succeed as punishment, war must harm or penalise those against whom it is waged.

If we accept Steinhoff's claim that a just cause is a state-of-affairs, as opposed to an aim, nonetheless *jus ad bellum* requires that war have a (justificatory) purpose: war cannot be justified simply as a belligerent response to a wrong. However, as a possible counter claim, we might consider that some United States authorities publicly invoked a "right of retaliation" following the terrorist attacks in New York and Washington on September 11, 2001, as a basis for waging war against al-Qaeda in Afghanistan. I am very sceptical about an *unspecified* right of retaliation against wrongful attack, as opposed to a right to a specific type of retaliation, such as defensive or punitive retaliation. However, I shall set that aside and allow that, conceived purely as a return of harm or injury, retaliation could arguably come close to a non-instrumentalist rationale for waging war. Nevertheless, even in this (marginal) case, the justification for war is instrumentalist: since retaliation is an intended *return* of harm or injury, waging war will be retaliation only if the party against whom it is waged is thereby harmed or injured.

In conclusion, the central points about *ad bellum* necessity that I have emphasised here can be summarised as follows. A condition that requires that, to be justified, war must be necessary, is action-guiding in three morally important ways. It directs our attention to answering the question "necessary to/for what?", as an essential element of an instrumentalist moral justification of waging war; at the same time, it requires that we give due consideration to alternative means, and that we do so with reference to a general moral directive to avoid unnecessary harm in addressing a legitimate cause.

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