

## Philosophy in Review



# Michael Skerker, "The Moral Status of Combatants: A New Theory of Just War."

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Volume 41, Number 3, August 2021

URI: <https://id.erudit.org/iderudit/1081592ar>

DOI: <https://doi.org/10.7202/1081592ar>

[See table of contents](#)

Publisher(s)

University of Victoria

ISSN

1206-5269 (print)

1920-8936 (digital)

[Explore this journal](#)

Cite this review

Miller, S. (2021). Review of [Michael Skerker, "The Moral Status of Combatants: A New Theory of Just War."]. *Philosophy in Review*, 41(3), 212–214.  
<https://doi.org/10.7202/1081592ar>

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**Michael Skerker.** *The Moral Status of Combatants: A New Theory of Just War*. Routledge 2020. 210 pp. \$160.00 USD (Hardcover ISBN 9780367247140).

*The Moral Status of Combatants* provides a sustained and sophisticated philosophical defence of the principle of the moral equality of combatants; a principle that lies at the heart of traditional Just War Theory and of the military profession's self-understanding, but which has been rejected or heavily qualified by many contemporary academic philosophers. In doing so Skerker eschews for the most part the familiar methodology of thought experiments involving civilian self-defence scenarios favoured by revisionist just war theorists. Instead, he takes the 'institutional turn' and in doing so utilizes my teleological theory of social institutions (*The Moral Foundations of Social Institutions: A Philosophical Study*, Cambridge University Press 2009) (120-23), in conjunction with a notion of hypothetical consent (126-28).

According to this teleological theory, institutions are established to discharge collective responsibilities to provide collective goods, e.g., national security, to which members of states have joint rights and duties in part derivable from such collective goods, e.g., rights and duties of combatants to use lethal force against enemy combatants. Importantly, Skerker introduces his notion of a security standard. The security standard (129-32) is composed of two first order rules by means of which to derive the professional norms that are to be complied with, and the tactics to be utilized, by institutional actors to deliver the relevant collective goods. The first rule directs combatants to adhere to norms and tactics that reliably, effectively, proportionately, and efficiently lead to the realization of the goal of winning wars. The second rule selects the most right-respecting among these goal-determined norms and tactics. The security standard depends in part on hypothetical consent in that both these rules would be consented to by all affected parties.

Skerker aims to demonstrate that the individualist reductionist approach of most revisionist just war theorists cannot adequately accommodate the rights and duties of institutional actors and, in particular, of military combatants, and he succeeds admirably in realizing this aim. However, Skerker has a further, more specific and more ambitious aim—to utilize his notion of a security standard to defend the principle of the moral equality of combatants against the revisionists. Accordingly, combatants of a basically just state fighting an *unjust* war can, nevertheless, be objectively justified in targeting enemy combatants, notwithstanding that these enemy combatants are fighting a *just* war. That said, in Skerker's view there are some combatants fighting unjust wars who are morally culpable and do not enjoy moral equality with combatants on the other side fighting a just war, e.g., combatants who systemically violate jus in bello principles or who are fighting on behalf of a gravely unjust state (133).

Skerker's book is in three parts. In Part I he argues against reductive individualists' theories of liability, and against the assumption underlying the revisionists' claim that combatants fighting an unjust war against those fighting a just war are liable to defensive violence whereas the combatants fighting the just war are not liable. The assumption in question is that collective lethal action in war mirrors inter-personal lethal action. However, this assumption is contestable and in need of detailed justification, yet to be provided (27).

In Part II Skerker argues that only culpable individual contributions to unjust collective military actions are necessarily unjustified. How so? If a combatant performs an action that contributes to an unjust war how can this action fail to be unjust (and, other things being equal, the combatant culpable)? According to Skerker a combatant's action at the micro-level can be justified while the corporate actions to which they contribute are unjustified, and this is because 'corporate actions do

not scale down to the individual contributory level retaining the physical and moral character of the macro action' (85). Skerker invokes my notion of a joint mechanism (*Social Action: A Teleological Account*) and says that 'when using their joint mechanism provided power to vote or issue or transfer an order, the resultant corporate intention may not reflect the personal intention of *any* of the participants' (87). Taken one way this is correct. For instance, under certain conditions an outcome that no one voted for can be the output of a voting mechanism. However, taken another way this is incorrect. For all (or most) of the participants in a joint mechanism are (typically) committed to the output of the application of the mechanism whatever that outcome is, notwithstanding that they might, for instance, have voted for a different outcome. Accordingly, if the individuals participate in good faith in the joint mechanism and, therefore, accept the outcome of its application then they are (other things being equal) collectively responsible for this outcome. This is consistent with Skerker's claim that the resulting so-called 'corporate intention' is not merely the aggregation of the intended inputs to the mechanism. However, contra corporatist theorists such as French and Pettit cited by Skerker, it does not imply that there is an irreducibly corporate intention, which attaches to the organization per se. Rather it suggests a form of relational individualism not hitherto contemplated by revisionists. Naturally, as Skerker suggests (85) joint responsibility for the outcome of a joint mechanism might be attenuated or even evaporate, in the case of large numbers of participants and very indirect relationships to the output of the mechanism.

In Part III Skerker outlines his security standard and utilizes it to identify important military norms. He argues that combatants and non-combatants are not wronged by norm compliant military action. Regarding combatants he says, '[b]y enlisting, an individual expressly identifies himself to adversary armed services as one of those people who can be targeted in a future war according to military norms' (165). He further argues that '[c]ombatants have permission from all those affected to engage in those *in bello*-compliant actions without attention to the justice of the war or operation. These actions are objectively justified since they are in response to a duty to obey lawful orders as an expression of their collective moral responsibility to contribute to the security of their states' (196). Skerker's argument in relation to the *jus in bello* principles is plausible but why would it not also apply to the *jus ad bellum* principles, including the principle of a just cause? Certainly, there is the problem of determining in many instances whether waging war is just, given the complexity of the considerations in play. Naturally, in complex collective decision-making of the kind involved in a state deciding whether to wage war there needs to be an institutional decision-making procedure in place and that procedure cannot be held hostage to the subjective judgements of multiple combatants who are to wage it. Giving combatants, in effect, a veto on whether to deploy would be inconsistent with the constitutive norms of Skerker's security standard. In accordance with the first order rule requiring effectiveness, there is a norm of obedience such that combatants must deploy if they receive orders to do so via the chain of command, emanating, ultimately, from their legitimate political leaders.

Granted that Skerker has demonstrated that combatants have a duty to deploy if ordered to do so, why is this duty not overridden in the case of a manifestly unjust war, which is, nevertheless, a war they are ordered to wage by a legitimate political authority of a basically just state? Skerker's counter-argument is that '[t]he norm of obedience has this caveat free form because adherence to this norm is the only way to protect any political entity over time in the event that selective conscientious objection is practically untenable and no just and effective global government exists to keep the peace' (183). Here Skerker invokes the analogy of proceduralist criminal justice adjudications in adversarial systems that operate in terms of admissible evidence and correctness/incorrectness in a 'fact-relevant sense relative to their professional norms (FRPN)' (185). Thus, a judge who excludes

inadmissible inculpatory evidence and acquits a defendant is FRPN correct, even if the defendant is guilty. Moreover, the FRPN-related reason overrides the reason to adhere to the total fact-relative standard. Accordingly, the judge's decision is objectively justified. By analogy, combatants are objectively justified in operating in accordance with FRPN standards and ought to obey orders to deploy, even if the war is unjust according to the total fact-relative standard.

Notwithstanding its sophistication, Skerker's institutional proceduralist conception has a weakness, namely, the necessarily subjective judgements of political leaders. These judgements are made: (i) about their own and their enemies' future, somewhat indeterminate, actions (ii) in the service (in large part) of underspecified, partialist goals, (e.g., *our* national interest)—even if made under the broad constraints of the *general* principles of Just War Theory—and (iii) under conditions of very significant uncertainty (e.g., what are the consequences of waging *this* war?). Their decisions to wage war are not analogous to judges' adjudications in well-functioning criminal justice systems, since judges' decisions are, by contrast, relatively objective; for they consist in impartial applications of relatively precisely defined laws in the light of precedent and the already established facts. Accordingly, combatants cannot rely on the correctness of the decisions of their political leaders to anything like the same extent as, for instance, correctional officials who incarcerate those convicted of crimes can rely on the adjudications of judges. Perhaps Skerker's proceduralist conception could be strengthened and, therefore, the military norm of obedience correspondingly strengthened, by requiring that the political leaders be democratically elected, given that this might provide some assurance that their decision to wage war had the support of the citizenry in whose name, and for whose security, the war was to be fought. This requirement might relieve some of the residual tension between the military norm of obedience, on the one hand, and the moral obligation not to participate in an unjust war, on the other.

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