

Ends, Means, Side-Effects, and Beyond: A Comment on the Justification of the Use of Force

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I. THE QUESTION AND THE SUGGESTED ANSWER

Use of force calls — as a matter of morality as well as international law — for justification. And there are restrictions on what counts as adequate justification of the use of force. Thus, force may sometimes be used in the pursuit of a justified end. Self-defense is the paradigmatic example of an end that can justify the use of force, on the personal as well as the international level. Preventing a humanitarian crisis or bringing one to an end may also be such an end. Perhaps, in other words, under certain conditions a state can be morally justified in using force in the process of humanitarian intervention, and under certain — perhaps different — conditions, such use of force may also be lawful.

But when the UK and Australia decided — together with the USA, though perhaps for somewhat different reasons — to use force against Iraq, they did not do so in order to improve the humanitarian situation in Iraq. Rather, they used force — according to their own statements — in order to enforce Security Council Resolutions 687 and 1441, and to eliminate the threat to world peace posed by the weapons of mass destruction presumably held by Saddam Hussein. Of course, decision makers were well aware of the pre-war humanitarian situation in Iraq, and so the good humanitarian effects

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of the war¹ were not unexpected. It's just that they weren't the reasons why England (and Australia) went to war, this wasn't *their* reason for using force. Nevertheless, as time passed, and as the official justification came under harsher criticism (partly because no weapons of mass destruction were found in Iraq), supporters of the war in Iraq started referring more and more often to the good humanitarian effects of the war in Iraq as justifying the use of force there. But can this be done? We know that sometimes ends can justify means. Can side-effects do that too?

Robert Cryer and Andrew Simester answer in the negative.² Morally, Cryer and Simester argue, "[s]ometimes the end may justify the means. But the side-effect cannot."³ And this is true — or at least should be true — of international law as well. Cryer and Simester support this conclusion primarily by reference to rather common intuitive judgments about blameworthiness. If I am to avoid blame for using force, it is not sufficient that there is a (good, normative, evaluative) reason that justifies the use of force in the circumstances. Rather, this reason must also be *my* (motivating, or explaining) reason, the reason why I acted as I did. Otherwise, I am still to blame for using force.⁴ Similar points can be made in other terms, such as the following: As Cryer and Simester note, it would be *hypocritical* for an agent (a person or a state) to rely in defending its action ex-post-facto on a consideration that did not in fact play a role in bringing it to action.⁵ An action *reflects just as badly on the agent's character* when there is a justification for the use of force that the agent did not act on as when there is no such justification at all. Indeed, the presence of such a reason is — as far as the agent is concerned — a matter of luck, and so its presence cannot improve the agent's moral record.⁶

If they are to convince us that the use of force in Iraq was both lawful and morally justified, Cryer and Simester conclude, the UK and Australia had

1 Throughout I will be assuming that the war indeed had (and has) good humanitarian effects, and, more controversially, that they outweigh its bad humanitarian effects. I do not know whether this assumption is true.

2 Robert Cryer & Andrew P. Simester, *Iraq and the Use of Force: Do the Side-Effects Justify the Means?*, 7 *Theoretical Inquiries L.* 9 (2006).

3 *Id.* at 38.

4 "It is ... crucial that the two outcomes stand in a means-end relationship ... [for self-defense to apply it must be the case that] D kills V *in order to* save his own life ... the justifying outcome is *why* D acts as he does." *Id.* at 32.

5 *Id.* at 40.

6 Unless, that is, moral luck of a very dubious kind is present. I do not believe in moral luck. For some reasons, see David Enoch & Andrei Marmor, *The Case Against Moral Luck* (September 2005) (unpublished manuscript, on file with author).

better make the perhaps questionable UN-authorization case. They cannot rely on the humanitarian reasons they never acted on.

In what follows I am not going to take issue with the picture of the historical facts and international law that Cryer and Simester present. But I am going to argue that Cryer and Simester are wrong — or at least not sufficiently clear — regarding several moral points. I am going to argue, first, that the permissibility of the use of force (as opposed to the blameworthiness of the agent using force) does not plausibly depend on the intentions of the agent using force, or on what reasons the agent acted upon; second, that the ends-means-side-effects trichotomy is not exhaustive, and that by relying on it Cryer and Simester leave out of the picture elements that are motivationally effective, normatively significant, and perhaps also relevant to the case of the use of force in Iraq; and third, that there may be reasons to doubt the moral significance of the distinction between means and side effects (and related distinctions), and that these reasons are especially powerful when the relevant agent is a state.

Before proceeding, though, let me emphasize that my arguments will all be moral rather than legal. I will not be making — nor am I competent to make — an international-law related argument. In particular, I will not be discussing the question whether the law (international or otherwise) protects actions that were performed for bad reasons, but that could have been performed for good ones. Nor will I discuss the related procedural question, whether a state can bring forward a legal argument — even a good one — that it hasn't relied on in earlier stages of the public and legal debate. These are important and interesting questions of international law, but they are both distinct from the moral question I am primarily interested in.⁷ I tend to agree with Cryer and Simester that the answer to the moral question is not legally irrelevant. But whether or not this is so, I will be confining myself to the moral discussion alone, a discussion that is interesting, I think, in its own right.

⁷ Although Cryer and Simester may be ultimately concerned with the procedural question "whether justifications deliberately not deployed may later be restored from the sidelines to render action lawful without being previously called upon," Cryer & Simester, *supra* note 2, at 12, the focus in their paper is clearly on the substantive moral arguments underpinning the answer to that procedural question. I thank Andrew Simester for a relevant clarification here.

II. ON PERMISSIBILITY AND INTENTIONS

Cryer and Simester conduct their discussion in terms of what is needed for the *justification* of the use of force, arguing that actually being motivated by the justifying reason is necessary for justification. But it is not completely clear whether they are making a point about the *permissibility* of the use of force, or about the status of the agent using force, and in particular whether the agent is *blameworthy* for using force. In the legal case, the gap between the two is perhaps not so wide, at least when legal exemptions — not relevant here — do not apply. But morally the distinction is of the utmost importance.

It has been quite convincingly argued, for instance, that the intentions of the agent — and perhaps her mental states more generally — are simply irrelevant to the permissibility of the action performed.⁸ Suppose, for instance, that it is permissible to redirect a trolley headed towards five people to a side-track where it will kill one, in order to save the five. And now, suppose that *I* redirect the trolley, not in order to save the five but in order to kill the one whom I hate. Indeed, I don't care about saving the five, or perhaps I even consider saving them the price I have to pay in order to get rid of the one. Is my redirecting the trolley in this case morally impermissible? The right thing to say, it seems, is that the action is still morally permissible, but that my motivations are morally corrupt. I did, as we say, the right thing for the wrong reason. This does not mean, of course, that I am not blameworthy. Intentions and other mental states *are* relevant for the evaluation of the agent whose mental states they are. Indeed, by redirecting the trolley for this reason I may have shown myself to be as bad as — and perhaps as morally blameworthy as — a murderer. But my action⁹ — redirecting the trolley —

8 See, e.g., Judith J. Thomson, *Physician Assisted Suicides: Two Moral Arguments*, 109 *Ethics* 497, 514-16 (1999); Judith J. Thomson, *Self-Defense*, 1991 *Phil. & Pub. Affairs* 283, 293-94. For a similar point made in the context of a discussion of the use of force in international affairs, see Frances Kamm, *Failures of Just War Theory*, 114 *Ethics* 650 (2004).

9 You may want to individuate actions partly according to the intentions with which they are performed. If so, then redirecting-the-trolley-in-order-to-save-the-five and redirecting-the-trolley-in-order-to-kill-the-one will not qualify as the same action. But according to this view it is never possible for two people to perform the same action for different reasons, a highly implausible result. And even if this view is true of some rather thick notion of action, I suspect the point in the text can still be made about an appropriately thin — but not empty — notion of action.

remains, it seems, morally permissible.¹⁰ The actual intentions with which an action is performed are, at least in cases of this kind, not relevant to the moral permissibility of the action.

Suppose it were permissible to resort to the use of force in Iraq for reasons of humanitarian intervention. And suppose further that this was not the reason for which the UK actually used force. Suppose it used force, rather, for some insufficient or inappropriate reason (like the unsubstantiated claims about weapons of mass destruction, or in order to remain on President Bush's good side, for example). Does this make the use of force by the UK morally impermissible? The answer, I suggest, is analogous to the one given above. The use of force is still morally permissible,¹¹ but the UK may very well be blameworthy for having used force for such reasons.

Whether the agent's intentions are relevant to the moral permissibility of her action is controversial, of course, and though I find the trolley example above quite convincing, I do not want to pretend I have conclusively argued for a negative answer to this question. Let me just say, then, that in what follows I will be understanding Cryer and Simester's talk of the justification of the use of force as raising questions about when states are morally blameworthy, and legally responsible, for the use of force, rather than questions about its moral permissibility. Only thus understood is it plausible, I think, to assume, as Cryer and Simester do, that it is necessary for justification that the justifying reasons also play a motivating role in bringing the agent to action. Though Cryer and Simester do not discuss this distinction explicitly, and though the term "justification" may perhaps suggest a discussion of moral permissibility, still it seems to me this understanding of justification, as primarily about blameworthiness and responsibility, not permissibility, is closer to what Cryer and Simester

10 What should be the *legal* status of such actions? This is a complicated question to which I do not have an answer. (Indeed, I do not even know what the law *does* say on the status of such actions; I suspect that different jurisdictions treat this question differently, and that even within jurisdictions this question is given different answers in different contexts.) The answer will depend on many considerations, of which the moral status of the action is but one. Other considerations include the proper role of the criminal law, the extent to which similar bad intentions are likely to lead to impermissible actions in other contexts, and so on.

11 Once again, I am unsure what would be the status of such use of force as a matter of (now international) law, or what it should be. The discussion in the text is limited to the moral question.

have in mind.¹² And anyway it is the one that makes the question more interesting.¹³

III. ENDS, MEANS, SIDE-EFFECTS, AND MORE

I turn now to my main criticism of Cryer and Simester's discussion. In this section I argue — following the work of Frances Kamm — that the ends-means-side-effects trichotomy is not exhaustive, and that the motivational structures that the trichotomy misses are actually quite important. First, I focus attention (in Section III.A) on a motivational structure that escapes the trichotomy. I then argue (in Section III.B) that the difference between this motivational structure and the ones that Cryer and Simester have in mind is normatively significant, and quite possibly relevant for the justification of the use of force in Iraq. I then (in Section III.C) briefly discuss a reply to this line of thought hinted at by Cryer and Simester.

A. The Trichotomy Is Not Exhaustive: Motivation

Ends are what we act *for*, we act *in order to* achieve ends. Means are what we aim at achieving because of their role in bringing about (or sustaining) our ends, or perhaps other means to our ends. Side-effects are consequences of our actions that are neither our ends nor our means. They are, though possibly foreseen,¹⁴ nevertheless motivationally inert. They have no role to play in what brings us to action.¹⁵

But now consider the following case: I buy a car in order to have a convenient way to get to work and drive my daughter to kindergarten. And I get a good bargain — I buy it for a reasonably low price. The fact that the price is low — that it isn't over what I intended to spend, or that it is

12 As evidenced by their saying things like "the harm was justifiable but not actually justified." Cryer & Simester, *supra* note 2, at 39.

13 Even if the moral permissibility of an action is a function of (among other things) the agent's intentions, still it seems to me that the discussion in the following section can stand, only now with regard to moral permissibility rather than moral blameworthiness or responsibility.

14 I will be discussing foreseen side-effects. The cases I will be discussing are not cases where the agent is unaware of some aspect of the objective state of affairs, but rather cases where the aspects the agent *is* aware of purportedly do not have the appropriate place in the agent's motivational make-up. The discussion of the "objective" or "subjective" understanding of justification-defenses in criminal law (alluded to by Cryer & Simester, *supra* note 2, at 32), is thus irrelevant here.

15 I comment on — and modify — this characterization of side-effects below.

a really good bargain — is certainly not motivationally inert, it is a part of the motivational story explaining why it is that I buy the car. We can safely assume, for instance, that had the price been significantly higher, I would not have bought the car. So paying the low price for the car is not merely a side-effect of my action, a motivationally inert consequence. Nor is it my end or means to my end — the low price will not help me get to work or drive my daughter to kindergarten. How are we to think, then, of the motivational structure present in this perfectly ordinary case?

Borrowing Frances Kamm's terminology,¹⁶ let us say that the low price was not something I intended (as an end or a means),¹⁷ but was rather *a condition of my action*. Intuitively speaking, I did not buy the car *in order to* pay a low price. But I did buy the car partly *because* the price was low. Similarly, in Kamm's Party Case,¹⁸ I throw a party in order to entertain my friends, but would not have thrown the party if I had to clean up after it all by myself. Knowing that my friends will feel obliged to help me clean up, I throw the party not *in order to* make them feel so obliged, but *because* they will (at least in the sense that I wouldn't have thrown the party if they weren't going to feel so obliged). This is not something I intend to bring about as an end or a means, but it is not motivationally inert — it is a condition of my action.

The ends-means-side-effects trichotomy, then, fails to exhaust the motivational structures of action.¹⁹

16 See Frances Kamm, *The Doctrine of Triple Effect and Why a Rational Agent Need Not Intend the Means to His End, I*, 74 Proceedings of the Aristotelian Society 21 (2000).

17 Can we not say — perhaps somewhat artificially — that I *did* intend to pay a low price, as a (causal or perhaps constitutive) means to my general, background, always-present aim of saving money or accumulating wealth? Perhaps so, but then this will not change anything that follows. For every occurrence of "condition of action" below feel free to replace "a means to a different, general, standing end." The rest of my argument can proceed, it seems to me, without change. On this point see also *id.* at 27.

18 *Id.* at 16.

19 It is not clear what exactly the term "side-effects" denotes. It may be used to refer to effects that are motivationally inert. This is how I use the term, and it is in this sense of "side-effect" that the ends-means-side-effects trichotomy is not exhaustive. But the term "side-effects" may also be used to refer to all unintended effects, all effects that are neither ends nor means of the relevant agent. If so, the trichotomy is exhaustive as a matter of analytical truth, but this does not challenge the point above, which should then be stated as follows: Not all side-effects (in this more inclusive sense) are motivationally inert. Because to my ears this last sentence sounds awkward, I will continue to use "side-effects" to mean effects that are motivationally inert, reserving "conditions of action" for motivationally effective yet unintended effects.

B. The Trichotomy Is Not Exhaustive: Normativity

Consider the car example again, and suppose I want to defend the rationality of the purchase. I want to convince a friend, say, that buying the car was the prudent thing for me to do. At least — as we are now understanding talk of justification as talk of blameworthiness rather than permissibility — I am trying to convince her that I was not irrational in buying the car, that I am not rationally at fault for buying it. One of the facts it will be natural for me to refer to is the low price of the car. This aspect — unintended, but still motivationally effective — is normatively relevant, it is a part of my justification for buying the car, it is a part of what makes buying the car the rational thing for me to have done. So conditions of actions can be normatively as well as motivationally effective.

In the buying-the-car example the relevant norms were norms of prudence. But the same goes for morality. To see that, consider a variation on the self-defense example employed by Cryer and Simester. Cryer and Simester are right in claiming that if I use force against someone in circumstances that objectively can ground a claim to self-defense, but my own motivation for using force against him has nothing to do with self-defense (I hit him because I hate him, and only for that reason), then I am as morally blameworthy as someone who uses force when the circumstances cannot ground a claim to self-defense.²⁰ But for our purposes a different example is relevant.²¹ Suppose Dave wants to kill Bob because he (Dave) hates him (Bob). But suppose also that Dave would never commit murder, because he knows that it is morally wrong to commit murder. As it happens, Dave notices one morning that Bob is about to seriously and unjustifiably assault Andy. Assume further that Dave doesn't care for Andy, and is not at all motivated to help him. But Dave sees the opportunity here, and kills Bob, thus defending Andy.²² Dave does not kill Bob in order to defend Andy but rather in order to get rid of a person he hates — had he not hated Bob, he would not have interfered, or so we can assume. This, of course, is not a motivation protected by self- or other-defense

20 Cryer & Simester, *supra* note 2, at 32. Again, this does not mean my action is impermissible, as the use of force would be in circumstances where a self-defense claim cannot be grounded.

21 See Kamm's discussion of "The Unintended Greater Good" in Kamm, *supra* note 16, Sec. VI, and her "Massacre Case" in *id.* at 39.

22 We can construct an analogous two-person example, with only self-defense (and not other-defense) being relevant, but then we would have to stipulate that Dave doesn't care about saving his own life, and while this is certainly possible, it makes the example, I think, less compelling.

justifications. However, saving Andy was not motivationally inert here. It was a condition of Dave's action. If it weren't for these circumstances, Dave would not have killed Bob.²³

Is this condition of action normatively relevant? In particular, is Dave here as morally blameworthy as someone committing murder when no self- or other-defense circumstances affect his relevant motivations? Granted, Dave is at least somewhat blameworthy, perhaps for wanting Bob killed, or for being willing to act on that desire, or something of the sort. But he is not *as* blameworthy as someone who would go ahead and kill Bob without any regard to what is morally permissible in the circumstances.²⁴ Indeed, it may be argued that Dave, though perhaps not a wonderful person, is not morally blameworthy at all for his action, because his actions and motivations here were constrained in the appropriate way by the demands of morality — he would not have killed Bob, we are assuming, unless it was morally permissible in the circumstances to do so.²⁵

It seems to me clear, then, that conditions of actions can be both motivationally effective and — when they are — also morally relevant. They make a difference to the blameworthiness (or indeed praiseworthiness) of agents whose motivational make-up incorporates them. Notice that I do not claim here that conditions of action are normatively significant in the same ways or to the same extent as intended ends (or means) are. There are probably important differences here, and I do not have a general theory at hand that explains or even enumerates them.²⁶ I am making the weaker point,

23 Notice that this is *not* a typical case of motivational over-determination, where two motives are each sufficient to bring the agent to action. The fact that killing Bob would save Andy is not sufficient to bring Dave to action. It's just that this is *necessary* for Dave to act on the other motive: getting rid of a person he hates.

24 Would Dave enjoy the *legal* protection of the self- and other-defense justification? From what I understand, this legal question is controversial. In the text, though, I confine myself to the moral one.

25 Barbara Herman, for instance, thinks this is at least one of the typical — and perfectly appropriate — motivational roles that are and should be played by the moral law. See Barbara Herman, *The Practice of Moral Judgment* 14 (1993).

26 For an attempt to flesh out some of the related complexities, and for many more kinds of cases, see Kamm, *supra* note 16; See also Frances M. Kamm, *Toward the Essence of Nonconsequentialism*, in *Fact and Value: Essays on Ethics and Metaphysics for Judith Jarvis Thomson* 155 (Alex Byrne et al. eds., 2001). Note that nothing in my argument in the text depends on the specific ways in which Kamm puts to use the distinction between conditions of actions, side-effects and means. In particular, my argument does not depend on the plausibility of Kamm's Doctrine of Triple Effect (which she too ends up rejecting) or on Kamm's claim that the

namely, that (good) conditions of actions are not normatively irrelevant in the way that (good) side-effects presumably are.

How does this conclusion fare in the face of the considerations mentioned in Section I against the normative significance of side-effects? The main line of thought there was, remember, that if a reason was not *my* reason, if it played no role in bringing me to action, then it cannot absolve my moral record. Here is one way in which Cryer and Simester express this idea: "And we should not permit a state, hypocritically, to avail itself of a convenient defense by which it was not motivated."²⁷ I agree that if a reason played *no* role in bringing the agent to action, the agent cannot in good faith rely on it *ex-post-facto* in order to clear his or her moral record (and conscience). But conditions of action do play a motivational role, as we have seen. So there need be nothing hypocritical about an agent citing them in an attempt to avoid blame, just as there is nothing hypocritical in my citing the car's price when justifying buying it or in Dave's relying on the fact that his killing Bob defended Andy in an attempt to avoid moral blame for killing Bob. Similarly, Dave's killing Bob does not reflect *as* badly on his character as would his killing Bob without any regard to the moral prohibition on murder. And the presence of the other-defense circumstances is not, from Dave's point of view, merely a matter of luck, for it played a crucial role in bringing him to action; indeed, he would not have gone ahead and killed Bob if these circumstances had not been present.

The intuitive reasons to think that side-effects cannot justify an action (in the sense of clearing the agent's moral record) thus do not apply to unintended conditions of actions. Perhaps, then, good side-effects cannot justify the means, but this does not mean that only ends can. So can good conditions of actions.

How, if at all, is any of this relevant for the use of force in Iraq? This is a historical question about the motivational make-up of the relevant agents (states, or perhaps state officials), to which I do not have an answer. But notice that the quotations that Cryer and Simester bring easily lend themselves to an interpretation consistent with the theoretical discussion above, and even suggest its relevance. Consider the following quote from Prime Minister Blair:

The moral case against war has a moral answer: it is the moral case for removing Saddam. It is not the reason we act. That must be according

category of conditions of actions allows her to present an adequate analysis of the Loop Trolley case.

²⁷ Cryer & Simester, *supra* note 2, at 40.

to the United Nations mandate on Weapons of Mass Destruction. But it is the reason, frankly, why if we do have to act, we should do so with a clear conscience.²⁸

At least one way of understanding this paragraph is as follows: Our end in using force in Iraq, Blair says, is the one having to do with UN authorization and weapons of mass destruction. Humanitarian intervention is not the reason why we will use force, we would not have used force only for that purpose. But given the moral case against the war, nor would we have used force *only* on the basis of the UN-authorization argument. The expected good humanitarian effects of the war are thus a condition of our using force, they are not motivationally inert, and so neither are they normatively irrelevant.²⁹ Thus understood, Blair's claim is exactly analogous to the one Dave can make in the example above, and quite possibly just as sound.³⁰

Pace Cryer and Simester, then, unintended conditions of actions can justify the means.³¹ And in the case of using force in Iraq, perhaps — if Blair's statements were both sincere and accurate, and if the (expected) good

28 Prime Minister Tony Blair, I want to solve the Iraq issue via the United Nations, Speech to Labour's Local Government, Women's and Youth Conferences, SECC, Glasgow (Feb. 15, 2003), *available at* <http://www.labour.org.uk/tbglasgow> (last visited Jan. 31, 2005), *cited in* Cryer & Simester, *supra* note 2, at 14 n.17.

29 Another, closely related, reading of Blair's statement is as distinguishing between the legal right to use force and the moral justification to do so. It is, of course, possible to have a legal right to do something one is nevertheless morally unjustified in doing. Perhaps Blair here is grounding the legal right to use force in the UN authorization, and making the further point that because of the good humanitarian consequences, it is morally justified to realize this legal right. On this reading too, the good humanitarian effects of the war in Iraq are neither motivationally inert nor normatively irrelevant.

30 The quotes from Straw and Howard, cited by Cryer & Simester, *supra* note 2, at 18-19, can also, I think, be understood along similar lines.

31 Cryer & Simester, *supra* note 2, at 37, do allow good side-effects to play some normative role, in offsetting the normative weight of bad (expected) side-effects. But note, first, that the point in the text is much stronger: In the other-defense case, a condition of action (considered by Cryer and Simester to be a side-effect) can actually justify the means directly, not just by offsetting the negative effect of bad side-effects. And second, it is not clear to me how Cryer & Simester can allow side-effects to play such a role consistently with their main thesis and the way they argue for it. For if it is hypocritical for an agent to rely on considerations that did not in fact lead him to action, why would it be less hypocritical for him to rely on such considerations when attempting to reject the claim that his action was unjustified because of its bad side-effects? It seems to me that what Cryer and Simester must say here is that such good side-effects count — even just in offsetting the weight of bad side-effects — only when they were not completely motivationally inert, that is,

humanitarian consequences of the war in Iraq outweighed the (expected) bad ones — they actually did.

C. Normative Relevance of the Right Kind?

In a footnote,³² Cryer and Simester concede that the motivational and normative domain may be more complex than the rest of their paper seems to assume. But, they say, these complexities are not relevant to their argument:

But we may accept [that the motivational structure of actions can be richer and more complex than the trichotomy suggests] without undermining the point made in the text: because [the good humanitarian side-effects] are not the *end* for which those States acted, the humanitarian benefits cannot justify the choice to invade Iraq. Even if they play *a* role in the decision to invade, it is not the right *kind* of role: they are simply in the wrong place in the (admittedly complex) motivational structure in those States' actions.

Let me make the following points in reply.

First, throughout their paper Cryer and Simester motivate their thesis by characterizing the good humanitarian effects of the war as motivationally inert. And this is significant, because once it is conceded that they were not motivationally inert, that they did play some motivational role, Cryer and Simester may no longer be able to supply a philosophical rationale for their thesis. Indeed, I think this is the case, for the reasons given above, in Section III.B.

Second, Cryer and Simester do not say anything about what "the right kind of role" is. It is therefore difficult to evaluate their claim that ends and perhaps means do have the right kind of role and conditions of actions do not, or indeed that humanitarian considerations did not play the right kind of role in the decision to use force in Iraq. At the very least, then, Cryer and Simester's suggestion is importantly incomplete.³³

Third, and most importantly, the examples above show, I think, that the motivational role of (some) unintended conditions of action *is* of the right kind to absolve agents from blame for actions performed with unjustified

when they were conditions of action rather than side-effects. But this, I have argued, allows them to play a role also in directly justifying means, as argued in the text.

³² *Id.* at 37 n.111.

³³ This is a statement of fact and a request for more details, not a criticism. Filling in the gaps may have required the kind of detailed discussion of these matters that Cryer and Simester could not have been reasonably expected to engage in here.

intentions. Unless they can either reject the analysis of the self- (or other-) defense example from Section III.B above or reject the analogy between that example and the case of the use of force in Iraq, Cryer and Simester cannot plausibly make the case that good conditions of actions cannot justify the means.

Let me not overstate this point. How exactly the normative significance of conditions of actions is to be taken into account, balanced against that of ends, means, side-effects and possibly other motivational structures, and so on, remains to be investigated.³⁴ The preliminary discussion here does not attempt a comprehensive answer to such questions. It just shows that conditions of action have the kind of moral significance Cryer and Simester think side-effects — *all* side-effects — lack. And let me also remind you that the discussion here is only moral. For all I have said, it is possible that the law — or perhaps just international law — should not recognize a justification based on such conditions of action. This legal claim is undoubtedly a part of what Cryer and Simester want to defend. If the argumentation above works, however, their analogous moral claim cannot withstand criticism.

IV. THE INTENDING-FORESEEING DISTINCTION AND THE STATE

Let me conclude with the following nagging worry. The distinction between intending (ends or means) and foreseeing (side-effects), as well as the traditional Doctrine of Double Effect based on it, has been under harsh criticism for a while now. If this and similar distinctions cannot be made to work, perhaps we will have to conclude that the difference between intending and foreseeing, or perhaps between means and side-effects, does not mark a morally significant difference. Granted, we should not rush to this conclusion, as it will require a rather extensive revision of common-sense morality. But nor should we exclude this conclusion as unacceptable from the start. And if none of these distinctions can ultimately be defended, the kind of distinctions Cryer and Simester employ — between ends (that can justify means) and side-effects and perhaps also conditions of action (that cannot) — are not likely to do any better.

This, of course, is a perfectly general problem, and Cryer and Simester are entitled to leave it for another occasion. But there may be some reason to think that such distinctions are especially problematic when — as in Cryer and Simester's argument — they are applied to state action.

³⁴ For some details here, see Kamm, *supra* note 16.

One common objection to the distinction between intending and foreseeing (with regard to moral permissibility) is that permissibility does not seem to be a function of intentions (as explained in Section III.B above). This objection seems powerful enough in general, but it seems even more powerful when the relevant agent is the state. Let us assume some difficulties away — assume states have something worth calling mental states, and that we can find out about them reasonably reliably.³⁵ The question remains — why accord them normative significance of the relevant kind? With regard to individuals there is perhaps some intuitive plausibility to the thought that there is something particularly good about the good will, that even when consequences turn bad "like a jewel, [the good will] would still shine by itself, as something that has its full worth in itself."³⁶ Or perhaps it may be thought that there is something particularly bad about the bad will, and so that the intentions of the agent are relevant for the permissibility of the action. But given the nature of decision-making procedures at the state level, it is hard to say similar things about the good or bad will of the state. Mental states attributable to a state are a complex and somewhat artificial function of mental states of individuals, institutional settings, political compromises, and so on. Even if mental states of individuals are relevant for the permissibility of actions, it is hard to believe that those mental states had by states have this moral significance. So this objection to the traditional distinction between intending and foreseeing and related distinctions seems to apply especially forcefully to the state.

Or consider another common objection, now not so much to the distinction between the mental states of intending and foreseeing as to the causal or semi-causal distinction between means and side-effects. According to the traditional distinction, we are, in a sense, more responsible for the means we intend than for the side-effects we merely foresee. But then it seems as if invoking the distinction is really just a way of evading responsibility. If you perform an action knowing that it will bring about certain side-effects, how can you not be responsible for them? And why would you be responsible for them any less than you are for the intended aspects of the situation? Again, this is a general objection,³⁷ but it seems especially pressing when the relevant agent is the state. This is so because there may be some plausibility to the view that individuals should be concerned primarily with their own actions and

35 As Cryer and Simester claim. Cryer & Simester, *supra* note 2, at 41 n.116.

36 Immanuel Kant, *Groundwork of the Metaphysics of Morals* 8 (Mary Gregor ed., 1997) (1785).

37 For recurrent — and extremely impatient — statements of this objection, see John Harris, *The Doctrine of Triple Effect and Why a Rational Agent Need Not Intend the Means to his End, II*, 74 *Proceedings of the Aristotelian Society* 41 (2000).

intentions, beyond which they should just let chips fall where they may. But a similar view about the state seems highly implausible. States — and statesmen and stateswomen — are exactly the kind of agents who are not allowed to let chips fall where they may, who are required to take all consequences into account, who indeed cannot escape responsibility for expected consequences of their actions.

This is all, of course, extremely sketchy, and I hope to discuss these matters at length elsewhere. But it seems that at least a suspicion regarding the application to state action of such distinctions as the distinction between intending and foreseeing will not be premature. If this suspicion cannot be adequately dealt with, then it follows that all expected consequences of state action are relevant — in the same ways and to the same extent — in morally evaluating it. And if this is so then even (expected good) side-effects — not only conditions of actions — can justify the means.

