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Just and Unjust Distributions in War:
The Moral Equality of Combatants and the
Normative Structure of War

Ewan E. Mellor

Thesis submitted for assessment with a view to
obtaining the degree of Doctor of Political and Social Sciences
of the European University Institute

Florence, April 2017

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Department of Political and Social Sciences

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10th January 2017

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Writing a thesis is a long process. In this case I have been working on the argument and ideas of the thesis in one form or another since I first encountered just war theory as an undergraduate. Along the way I have received support and encouragement from many people, without which this thesis would not have been possible. In chronological order, I first need to thank Maja Zehfuss whose undergraduate class on war, ethics, and politics, inspired me and provoked my interest in the nature of war and combatancy. It was Maja's support and encouragement and the example she set as a teacher and scholar that led me to pursue my studies at postgraduate level. Studying as a postgraduate at the Peace Research Institute of Oslo and the Australian National University I was privileged to be taught by a number of brilliant academics, Inger Skjelsbæk, Chris Reus-Smit, and Ed Aspinall among them. I also owe a particular debt of gratitude to Andrew Phillips who supervised my MA thesis in which I continued my exploration of ideas about war and identity by studying the role of private-military contractors in Iraq. My intellectual peregrinations subsequently took me to Oxford, whilst my time at Oxford was not the happiest or most successful, I was fortunate to have Eddie Keene as my supervisor and Jennifer Welsh as the Director of Graduate Studies. It was Eddie's belief in my project and his support that encouraged me to apply to the European University Institute for my PhD. It was at EUI that my path crossed with Chris again and from the start his support has been invaluable. When I presented my research proposal at the interview he immediately understood its significance and was enthusiastic about its potential, as well as being supportive of ambitious theses and big questions. As a supervisor he has been fantastic, his comments are always supportive, encouraging, and helpful, whilst also being challenging and pushing me to continually improve my arguments and my writing. Without his support this thesis would never have been attempted, let alone completed, and it certainly would be a far weaker argument. The argument has also been significantly strengthened as a result of the comments from my examiners, Professors James Pattison, Peter Sutch, and Jennifer Welsh. Whilst I realise I have not been able to incorporate all of their comments I would like to thank them for taking the time to provide such detailed and useful reports and identifying areas of weakness as well as parts of the argument that were unclear.

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ABSTRACT

This develops a defence of the principle of the moral equality of combatants against recent revisionist critiques. It does this by developing an interpretive and hermeneutical approach to the study of war and the just war tradition. This approach allows the meanings of war and of actions within war to be explored and it is on the basis of this understanding of meaning that the moral equality of combatants is defended. It shows that these meanings and distinctions cannot be recognized by the revisionists and that this is a moral and interpretive loss. The thesis develops the argument of Michael Walzer's *Spheres of Justice* and applies it to war; it demonstrates that war has a distinct meaning and that the principles for distributing identities, rights, and responsibilities in war are relative to this meaning.

The thesis begins by exploring the history of the just war tradition and the evolution of the concept of combatancy and the distinction between combatants and non-combatants in order to demonstrate how the just war tradition constitutes war as an institution. It then explores the contemporary debate and argues that whilst the traditional defences of the principle of the moral equality of combatants have been found wanting, the conclusions of the revisionists need not be accepted. To demonstrate this, the following chapters study a number of examples that highlight important and meaningful contrasts associated with both the *jus in bello* and the *jus ad bellum*. The final chapter introduces the concept of the normative structure of war and argues that the right to participate and to kill in war depends upon a public relationship of duty between soldiers and the state. The reciprocal relationships of duty are the source of the moral equality of combatants.

INTRODUCTION

“How could you be my enemy?”

But now, for the first time, I see you are a man like me. I thought of your hand-grenades, of your bayonet, of your rifle; now I see your wife and your face and our fellowship. Forgive me, comrade. We always see it too late. Why do they never tell us that you are poor devils like us, that your mothers are just as anxious as ours, and that we have the same fear of death, and the same dying and the same agony – Forgive me comrade, how could you be my enemy?¹

Trapped in a shell-hole in no-man’s land between the French and German trenches during World War I these are the words of Paul Bäumer, a young German soldier, to Gerard Duval, the French soldier whom he had killed and with whose body he shared the crater in *All Quiet on the Western Front*. The recognition of fellowship, of equality and brotherhood, and of “men who are not criminals”,² is central to the experience of war, and the final plaintive cry raises the question of what the basis for enmity and the justification for killing is when there is no personal relationship and no individual moral blame. The objective of this thesis is to understand this experience and to provide an answer to Paul’s question.

In his book *Killing in War* Jeff McMahan also begins with a discussion of World War I. He discusses the actions of Ludwig Wittgenstein who, despite his commitment to living and acting according to his ethical principles, “believed that he was morally required to fight for Austria, while his friend and mentor, Bertrand Russell, was morally required to fight *against* Austria.”³ In fact, Russell was a pacifist and was imprisoned for his refusal to support Britain’s cause; Wittgenstein, according to reports, respected Russell’s courage but believed it was towards the wrong cause.⁴ McMahan writes, correctly, that the war itself was “utterly pointless” and was based on “fatuous assertions of national pride together with a series of misjudgments about anticipatory mobilization” and the “absurdly demanding conditions” imposed on Serbia by the Austro-Hungarian Empire. For McMahan, given these circumstances, not only are Wittgenstein’s actions

¹ Erich Maria Remarque, *All Quiet on the Western Front*, trans. A. W. Wheen (New York: Fawcett Crest, 1929), p. 223.

² Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Fourth Edition (New York: Basic Books, 2006), p. 36.

³ Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009), p. 2. (Original emphasis).

⁴ *Ibid.*, pp. 1 - 2.

morally perverse, but they are morally condemnable.⁵ To knowingly participate in a war that is unjust or to believe that the justice or injustice of one's own side is irrelevant to the justice or injustice of killing one's opponents means, according to McMahan, that one is engaging in illegitimate killing, which is one of the most serious wrongs that can be committed.

Returning to Paul, trapped in his shell-hole in no-man's land, however, and condemnation seems not only misplaced, but unjust in itself. Unlike Wittgenstein, Paul did have doubts about the war, he recognized that it was an appalling waste of lives for no real end, yet his action in killing Gerard was not illegitimate, he is not morally responsible for an unjust killing. Whilst Paul condemns himself as he reflects on the tragedy and futility of the war, the reason that war is tragic is because neither Paul nor Gerard would have been morally wrong or blameworthy for killing the other. Neither of them is a criminal, they are merely enemies.

I. The Moral Equality of Combatants

The lack of individual moral blame for participation and killing the enemy in a war that is unjust reflects the principle known as the moral equality of combatants. The principle asserts that soldiers on each side in a war have the same moral and legal status and rights, regardless of which, if any, side has a just cause. It is most commonly described as reflecting the view that the *jus in bello*, the body of rules governing conduct in war and of which the combatants' privilege is a central component,⁶ is independent of the *jus ad bellum*, which are the criteria for determining whether a war is just. Combatants on both sides, therefore, possess the combatants' privilege, which is "the legal right . . . to exercise coercion and violence in a public armed conflict situation".⁷ The practical implications of the principle are described in *The Laws of War on Land: Manual Published by the Institute of International Law*, hereafter The Oxford Manual.⁸ It states that the only people entitled to commit "acts of violence" are "the armed forces of belligerent States."⁹ As such, "[i]ndividuals who form part of the belligerent armed force, if they fall into the hands of the enemy, are to be

⁵ Ibid., pp. 2 - 3.

⁶ Nathaniel Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War', *Columbia Journal of Transnational Law* 43, no. 1 (2004): 1-71, pp. 9 - 13.

⁷ W. Thomas Mallison and Sally V. Mallison, 'The Juridical Status of Privileged Combatants Under the Geneva Protocol of 1977 Concerning International Conflicts', *Law and Contemporary Problems* 42, no. 2 (1978): 4-35, p. 5.

⁸ *The Laws of War on Land: Manual Published by the Institute of International Law (Oxford Manual)*, 1880.

⁹ Ibid., Art. 1.

treated as prisoners of war”¹⁰, but “[t]he confinement of prisoners of war is not in the nature of a penalty for crime”¹¹ so “[t]he captivity of prisoners of war ceases . . . at the conclusion of peace”¹². Whilst they cannot be punished for their participation in combat, combatants can be held both morally and legally accountable for individual violations of the *jus in bello* and the laws of armed conflict. Overall the principle of the moral equality of combatants reflects the conventional wisdom about war and it is the mainstream position within the just war tradition, so much so that in *Just and Unjust Wars* Michael Walzer merely asserts that “[w]ar is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt” and provides little in the way of argument to morally justify the position.¹³

In recent years the principle has been increasingly challenged by a number of analytical moral philosophers working on just war theory.¹⁴ Within the contemporary debate the principle of the moral equality of combatants has been broken down into two linked theses: the symmetry thesis, which states that the rights of combatants in war are the same on both sides; and the independence thesis, which states that the *jus in bello*, the rights of combatants in war, is independent of the *jus ad bellum*, the justice of the war as a whole.¹⁵ These are usually, but not always, understood together and they reflect the mainstream Walzerian position in the just war tradition and are embodied in international law. The argument made by the revisionists rests primarily on a rejection of the second thesis, of the independence of the *jus in bello* from the *jus ad bellum*. They argue that it does not coincide with basic moral principles and that, in fact, combatants should be held individually accountable for participation in war. This argument leads them to reject the symmetry thesis as it has no moral basis. Much of the debate, however, has focused on the implications of this for the symmetry thesis, regarding whether or not the laws of war should be changed and considering the difficulties of attempting to institutionalize non-symmetrical laws of war. Whilst highlighting the difficulties of doing so, this in itself does not

¹⁰ *Ibid.*, Art. 21.

¹¹ *Ibid.*, Part III, Section A.

¹² *Ibid.*, Art. 73.

¹³ Walzer, *Just and Unjust Wars*, p. 21.

¹⁴ Two of the main challenges to this principle are: McMahan, *Killing in War*; David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002).

¹⁵ David Rodin and Henry Shue, ‘Introduction’, in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), p. 3.

provide a defence of the moral equality of combatants and does not engage fully with the core of the revisionist argument.

II. The Normative Structure of War

This thesis provides a defence of the principle of the moral equality of combatants against the recent revisionist challenges. It does so by exploring the meanings associated with war and demonstrating that the revisionist account of war and critique of the principle of the moral equality of combatants is incapable of recognizing these meanings and distinctions. To follow the revisionist approach would be to lose the ability to make a number of important moral judgements. In making this argument the thesis engages with the question of the relationship between the *jus in bello* and the *jus ad bellum*, or the independence thesis. It argues that the independence thesis obscures an important component of the principle of the moral equality of combatants as it does not distinguish between the various components of the *jus ad bellum*. In the just war tradition for a war to satisfy the requirements of the *jus ad bellum* a number of criteria must be met, including just cause, legitimate authority, right intention, proportionality, last resort, and reasonable likelihood of success. In the independence thesis, and in much of the contemporary debate about the moral equality of combatants, the term *jus ad bellum* is used when what is being referred to is specifically the just cause component of the *jus ad bellum*. For present purposes the two most significant of these criteria are just cause and legitimate authority and this thesis will focus on the relationship between the combatants' privilege component of the *jus in bello* and these two components of the *jus ad bellum*.

In order to explore and to develop an understanding of the meanings that exist in war as an institution a constructivist-interpretive approach is adopted.¹⁶ Drawing heavily on Hans-Georg Gadamer's hermeneutics the argument explores how war, and the actors and actions that make it up, are constituted through the language of the just war tradition itself.¹⁷ This argument demonstrates how what Walzer terms "the moral reality of war" is formed through a Gadamerian

¹⁶ Dvora Yanow and Peregrine Schwartz-Shea, 'Introduction', in *Interpretation and Method: Empirical Research Methods and the Interpretive Turn*, ed. Dvora Yanow and Peregrine Schwartz-Shea (Armonk and London: M. E. Sharpe, 2006).

¹⁷ Hans-Georg Gadamer, *Truth and Method*, trans. Joel Weinsheimer and Donald G. Marshall, Second Edition (London and New York: Continuum, 2004).

“fusion of horizons” between the horizon of the just war tradition and the horizon of the battlefield, Paul’s horizon.¹⁸

The study of meaning in war leads to an argument that draws upon Walzer’s *Spheres of Justice* to consider the way in which identities, rights, and obligations should be distributed.¹⁹ This argument follows Walzer in drawing upon a number of real-life examples from or associated with war. Each of these examples has been chosen to highlight particular meanings and moral distinctions which allow war to be understood and without which the moral vocabulary of war and the moral understanding of war would be poorer. In particular, it focuses on the distribution of political power, moral legitimacy, and the right of individual action, which correlate to the principles of legitimate authority, just cause, and the combatants’ privilege, respectively. The relationship between these principles forms what this thesis terms the normative structure of war; the normative structure of war is constitutive of the identities and meanings of the actors and actions that make up war. The moral equality of combatants is shown to be a part of the normative structure of war and a concomitant of the moral distinctions and understandings that it allows. Specifically, the combatants’ privilege is shown to depend upon the legitimate authority component of the *jus ad bellum* and not on whether or not there is a just cause. In conventional wars between states the situation of combatants on each side is symmetrical, in that their status is defined by their relationship to the legitimate authority of the state. This provides a basis for the moral equality of combatants as the right to participate in combat is independent of the justice of the cause. This independence, reflects the fact that “philosophical validation and political authorization are two entirely different things”,²⁰ in other words just cause and legitimate authority are distinct, and that they are both distinct from the right to act individually. The reasons for these distinctions reflect moral arguments about the distribution of decision making powers within the state, in particular the importance of political control of the armed forces.

An immediate question arises as to the status of those who participate in combat without legitimate authority and the meaning of their violence. By distinguishing the three principles and, in particular, recognizing the distinction between just cause and legitimate authority, and through the concept of the normative structure of war, the argument of this thesis is capable of both

¹⁸ Walzer, *Just and Unjust Wars*, p. 1; Gadamer, *Truth and Method*, p. 306.

¹⁹ Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Oxford: Basil Blackwell, 1983).

²⁰ Michael Walzer, ‘Philosophy and Democracy’, in *Thinking Politically: Essays in Political Theory*, ed. David Miller (New Haven, Conn.: Yale University Press, 2007), p. 19.

understanding the nature and meaning of other forms of conflict and yielding moral arguments about them. This allows moral sense to be made of the category of unprivileged combatants or, in the parlance of the Bush Administration, unlawful combatants; that is, those who participate in combat but are not entitled to the combatants' privilege. More importantly, the thesis demonstrates the way in which the normative structure of war is crucial to understanding the actual practices of warfare because it determines the basis of enmity and the justifications for targeting. In the context of unprivileged combatants and, more generally, other non-traditional forms of war, the argument recognizes that the basis for enmity is different and, therefore, the principles of targeting must be different, too. This allows judgements to be made about practices of warfare in the war on terror that can apply the principles of the just war tradition whilst recognizing the distinct nature of the conflict.

Overall, this thesis engages with what Graham Long calls the "meta-theory of just war theory".²¹ It studies the principles, and the relationships between them, that constitute war as an institution. To draw on a well-known distinction that is frequently made about types of rules, the argument is about the constitutive rules of war rather than the regulative rules. Constitutive rules, like the rules of a game, bring an activity, institution, identities, or practice into being; regulative rules, like the rules of the road, help regulate already existing activities in a way that does not change their essential nature.²² This distinction parallels the distinction that Walzer makes about the different types of rules in war. Those regarding who may and may not be killed and the reasons why, which are essentially constitutive and are the subject of this thesis, and those regarding how they can be killed and the types of weapons that may be used, which are largely regulative.²³ The constitutive rules in question are the requirements of just cause and legitimate authority and the concept of the combatants' privilege, in terms of to whom it applies and the implications of possessing it. The argument primarily focuses on the relationships between these constitutive rules, rather than on the nature of just cause or legitimate authority, either of which could be a thesis in itself. In order

²¹ Graham Long, 'Disputes in Just War Theory and Meta-Theory', *European Journal of Political Theory* 11, no. 2 (2012): 209–25.

²² John Gerard Ruggie, 'Introduction: What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge', in *Constructing the World Polity: Essays on International Institutionalization*, ed. John Gerard Ruggie (London: Routledge, 2002), pp. 22 - 25; John Rogers Searle, *The Construction of Social Reality* (London: Allen Lane, 1995), pp. 27 - 29 and 43 - 51.

²³ Walzer, *Just and Unjust Wars*, pp. 21 - 22.

to understand these relationships, however, the content of these concepts does need some specification and this is provided in Chapters Five and Six. Chapter Six brings together the preceding arguments and makes the case that the principle of the moral equality of combatants is part of an overall normative structure and vocabulary through which the institution of war can be understood. To lose this vocabulary and structure and to lose the ability to make the moral distinctions embedded within them would be a moral as well as an interpretive loss. It is for this reason that the revisionist argument should be rejected and the principle of the moral equality of combatants should be retained as central to the just war tradition.

III. Thesis Outline

The thesis begins with a chapter outlining the theoretical framework of the argument. This chapter draws on the work of Charles Taylor in order to introduce the concept and importance of social meaning for understanding. It then explains in detail the hermeneutical approach that is adopted and how this approach allows the apprehension of meaning. Drawing on Gadamer's concept of a "fusion of horizons" it shows the way in which understanding the meaning of actions within war requires a fusion of the horizons of the just war tradition with those of the battlefield. In order to explain the way in which the study of meaning can be the source of normative claims, the argument of *Spheres of Justice* is outlined. This shows how the correct distributions of rights and identities must be related to the social meanings that they hold. The last section of this chapter outlines in more detail the ontology of the thesis and shows how this ontology underpins the normative significance of meaning.

Chapter Two introduces the just war tradition through a historical review. The purpose of this review is to establish the idea that the just war tradition is a tradition in the hermeneutical sense and to introduce the history of the terms and ideas that make it up. This is important as hermeneutics emphasizes the linguisticity of being and the importance of prejudice as necessary for any understanding to be possible. This chapter demonstrates the way in which the just war tradition is a linguistically formed tradition and how its terms are the basis of the prejudices, or history of prior judgements and meanings, with which any war or act of war is apprehended and understood as a meaningful phenomenon. It is only by establishing the linguistic nature of the just war tradition that it is possible to see it as forming horizons and, hence, allowing a fusion of horizons.

Chapter Three focuses on the contemporary debate about the moral equality of combatants. It begins with Walzer's argument in *Just and Unjust Wars*, which provides the canonical contemporary statement of the principle. The revisionist critique of Walzer is then outlined in order to show that none of the traditional justifications of the principle, namely consent, coercion, epistemic uncertainty, and self-defence, provide sufficiently powerful moral reasons to support it. The argument for a principle of the moral *inequality* of combatants is then explained, this section focuses on the work of David Rodin and, in particular, Jeff McMahan. Whilst there are important differences between their arguments, the chapter also highlights some key similarities between them; in particular, a commitment to individualism and cosmopolitanism and a belief that war is not a distinct sphere of activity but is in fact continuous with other forms of violence and should be judged according to the same moral standards.

Chapter Four focuses on issues of *jus in bello* and meaning. The first part of the chapter explores the meaning of killing in war and the distinction between acts of war and war crimes through a consideration of the My Lai massacre. In particular, the role of Lieutenant Hugh Thompson Jr., the helicopter pilot who intervened to save several Vietnamese civilians from his fellow American soldiers but whose gunner also fired upon the only armed Viet Cong combatant that day is considered. It is shown that there is a qualitative moral difference between the acts and the way in which they are understood, the meaning that they have. Thompson was not simply a less cold-blooded killer but was engaged in an entirely different type of act with a different basis for judgement when he killed the Viet Cong combatant. A common criticism of interpretative approaches is that they are inherently conservative and cannot challenge commonly accepted meanings. The My Lai massacre is used as an example to show that this is not the case. When the events became public there was, shockingly, widespread public support for Lieutenant William Calley and his men among the US public and it could be argued that an interpretative approach must simply accept that the act was not seen as wrong. Contra this view, the chapter argues that it is the language of the just war tradition itself that provides the critical tool to withstand this conclusion precisely because the meanings of the words are not infinitely malleable. The second part of this chapter considers death in war and studies conscription and exemptions from military service and the institution of remembrance and the difference in the way in which the deaths of combatants and contractors are understood. This difference, it argues, reflects the different types of relationship that combatants and contractors have to the state and this, in turn, illustrates what

type of distributive principles should govern the distribution of having to risk one's life for the state. This section also argues that the rituals of remembrance themselves reflect a form of fusion of horizons between the present and the past and between the horizons of the just war tradition and the horizons of the battlefield.

Chapter Five considers the issues of the *jus ad bellum*, specifically the principles of just cause and legitimate authority and the relationship between them. It begins by focusing on the different deontic powers of political leaders and members of the armed forces and the way that these are embedded in international law. It argues that given these deontic powers it would be unjust to hold those who are not in a decision making role responsible for participation in an unjust war. It then looks at legitimate authority and argues that legitimate authority is morally significant as a part of the *jus ad bellum* as violence can only be justified if the group engaging in it has the ability to end the violence. This does not provide any substantive content to the concept of legitimate authority so the subsequent section explores the concept in more detail. It draws upon Jonathan Parry's argument about the role of legitimate authority in distinguishing war from other forms of violence and then upon Christopher Kutz's work to come up with a definition of legitimate authority as the sovereign decision making body of a constitutive community.²⁴ The final section focusses on just cause and the relationship between just cause and legitimate authority in order to show that there is a difference between justified violence in the form of self-defence and a just war.

Chapter Six brings together the arguments of the preceding chapters and provides the overall defence of the moral equality of combatants. Developing the argument of *Spheres of Justice* and applying it to the sphere of war, this chapter argues that the meanings of the actions of killing and being killed in war, of the identity of a combatant, and of the decision to go to war, are associated with a particular set of distributions. According to these distributions, individual combatants are not accountable for the justice of the war, instead their status depends on the nature of their relationship to a sovereign authority. The concept of a legitimate authority and its relationship to a community is explored here to define the distinction between a legitimate authority and an illegitimate authority. It shows that such a distribution is capable of making moral

²⁴ Jonathan Parry, 'Just War Theory, Legitimate Authority, and Irregular Belligerency', *Philosophia* 43, no. 41 (2015): 175–96; Christopher Kutz, 'The Difference Uniforms Make: Collective Violence in Criminal Law and War', *Philosophy and Public Affairs* 33, no. 2 (2005): 148–80.

sense of the experience of war and that it allows important moral distinctions to be drawn and judgements to be made, without which the moral understanding of war would be hampered. These distinctions and judgements, about combatants and mercenaries and acts of war and war crimes, are central to the just war tradition and the language of the just war tradition would be morally poorer if they could not be made. The normative structure of war contributes to understanding the actual practice of war as the way in which it constitutes the identities of combatant and non-combatant determines the nature and meaning of enmity, however it also contributes to understanding even non-traditional forms of conflict. This chapter studies the use of drones in the war on terror in order to show how the different normative structure of terrorism leads to different practices of warfare due to the different basis of enmity.

The thesis concludes that the principle of the moral equality of combatants forms a part of a normatively meaningful institution within which important moral distinctions can be recognized and judgements made. To reject the moral equality of combatants is to reject this institution and the concomitant distinctions. These distinctions, which are explored in the examples used in Chapters Four and Five, allow moral sense to be made of war and allow the recognition of “a moral world ... in the midst of hell”.²⁵ The distinctions between combatants and non-combatants, between acts of war and war crimes, and between war and other forms of violence, are not simply conventional. They reflect genuine moral understandings and genuine moral differences which are constituted through the just war tradition and the normative structure of war. To not be able to recognize or make these distinctions would lead to the unjust distribution of praise and of blame and to unjust judgements about those involved. This would be a genuine moral loss and should be resisted.

IV. A Note on Terminology

Before continuing it is necessary to clarify some of the terminology that will be used in the thesis, in particular the terms combatant, soldier, and war. The word combatant is used frequently through the thesis, particularly within the term the moral equality of combatants. Ultimately, both components of the term the moral equality of combatants are in question. Whilst the thesis provides a defence of the moral equality of combatants, which relates to the moral equality component, it does so by investigating the nature of combatancy and of who and what a combatant

²⁵ Walzer, *Just and Unjust Wars*, p. 36.

is. As such, the word combatant is not being used in a descriptive sense to refer to those who do participate in combat, nor is it being used in the legal sense of those who are recognized as being combatants under international law and the laws of armed conflict. Instead it is being used in a normative sense to refer to those who hold a particular public and meaningful identity, the nature of which is investigated and specified as the thesis progresses. The word soldier is also used fairly frequently, in this case it can be understood as shorthand to refer to all serving members of the armed forces of a country, including sailors and airmen. As a thesis about the just war tradition, the word war is obviously regularly used. As with the word combatant, the argument of the thesis is to a large extent about what war actually is as an institution. The word war, therefore, does not refer to the simple empirical fact of a state of armed conflict or to violence that meets some threshold of scale and nor does it refer to the legal definition of war or of armed conflict. Instead it refers to war as a meaningful institution and the thesis as a whole explores and outlines the parameters of this.

CHAPTER ONE

War, Meaning, and Hermeneutics

In the same winter the Athenians gave a funeral at the public cost to those who had first fallen in the war... Three days before the ceremony, the bones of the dead are laid out in a tent which has been erected; and their friends bring to their relatives such offerings as they please. In the funeral procession cypress coffins are borne in cars, one for each tribe; the bones of the deceased being placed in the coffin of their tribe. Among these is carried one empty bier decked for the missing, that is, for those whose bodies could not be recovered... The dead are laid in the public sepulcher in the most beautiful suburb of the city, in which those who fall in war are always buried...²⁶

Now we are engaged in a great civil war... We are met on a great battle-field of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this.

But, in a larger sense, we cannot dedicate – we cannot consecrate – we cannot hallow – this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced.²⁷

The funeral rituals for the war dead of ancient Athens two-and-a-half millennia ago and President Lincoln's address at Gettysburg to dedicate the battlefield to the memory of those who fell one-and-a-half centuries ago are still meaningful today. These acts can still be interpreted because they are constitutive of war as a meaningful institution. To say that war is a meaningful institution is to say that it exists as a part of social reality and that it is distinct from other forms of violence. Furthermore, as a meaningful institution its meaning can be understood and interpreted and has "normative consequences", including the obligation to remember those who died.²⁸ This chapter investigates the nature of the meaning of war and outlines the way in which this meaning can be identified and understood. It also explains how an identification of the meanings associated with

²⁶ Thucydides, *The Complete Writings of Thucydides: The Peloponnesian War (c. 410 BC)*, trans. R. Crawley (New York: The Modern Library, 1934), p. 102.

²⁷ Abraham Lincoln, 'The Gettysburg Address (1863)', in *Lincoln: Political Writings and Speeches*, ed. Terence Ball (Cambridge: Cambridge University Press, 2013), p. 191.

²⁸ Michael Walzer, 'Objectivity and Social Meaning', in *Thinking Politically: Essays in Political Theory*, ed. David Miller (New Haven, Conn.: Yale University Press, 2007), p. 42.

war can provide the basis for normative arguments as well as providing a defence of this approach against some common criticisms.

The first part of the chapter discusses what it means to call war a meaningful phenomenon. To do this it analyses the concept of meaning and the distinction between brute and institutional facts. Drawing on the work of John Searle it explains how institutional facts and institutions come into being and it is argued that war is an institution. This contrasts with the arguments of the revisionist just war scholars for whom war is undifferentiated from other forms of violence. This section provides the theoretical framework upon which the following two chapters rest as it argues that war is constituted as an institution by the language of the just war tradition. The second section introduces Hans-Georg Gadamer's hermeneutics as an approach which allows the meaning of war and of actions in war to be understood and interpreted. Building on Gadamer's concept of a fusion of horizons it argues that this provides a way in which the truth of the experience of war can be apprehended and made meaningful. This section underpins the two central chapters which apply the hermeneutical approach to the *jus in bello* and the *jus ad bellum* respectively. The third section of the chapter provides the basis for the normative argument made in chapter six. It argues that the understanding of meaning and the use of the hermeneutical approach allow normative judgements about war and the practice of war to be made. It does this by introducing the argument of Michael Walzer's *Spheres of Justice* in order to show how morally justifiable distributive principles for the identities, rights, and obligations of war must cohere with the socially understood meaning of those identities, rights, and obligations. The final section of this chapter draws upon Stephen K. White's concept of a weak ontology and argues that the ontology of the thesis is a form of weak ontology. It demonstrates how this ontology provides a basis for the moral significance of meaning and how this provides a defence of the interpretive approach against some common criticisms.

I. The Meaningful Reality of War

Both Pericles and Lincoln, in their orations for the war dead, recognized that the death of a soldier in war has a meaning as a public act that is distinct from that of other types of death. But what does it mean to say that war has a meaning? This section answers that question by considering the difference between 'brute' and 'institutional' or 'social' facts and how the institutions of social

reality are brought into existence. It argues that the just war tradition is a form of status function declaration through which the institution of war is brought into being and is intelligible.

War: A mountain or an institution?

Central to Searle's theory of social ontology is the distinction between brute facts and social or institutional facts. Brute facts are those which exist independently of human institutions, like the fact that one mountain is higher than another, whereas institutional facts require various institutions in order to exist as facts.²⁹ For example, to be a human being is a brute fact, to be a citizen of a particular state is an institutional fact as it is only a fact, indeed even if it is untrue it is still only comprehensible as a statement, in a context where the institutions of the state and of citizenship, and of how one can come to be a citizen, already exist. In the study of war one of the first things that it is necessary to determine is whether it is a brute fact, like a mountain, or an institution, like the state. A huge amount rests on this question and this thesis can be read in large part as a sustained argument that war is an institution and an attempt to draw out the ethical implications of this. The question of the nature of war is starting to receive more attention from scholars interested in justice and war. For example a recent exchange between Walzer and Jeff McMahan in the pages of 'Philosophia' focused on the nature of war and what this means for just war theorizing, with Walzer arguing that McMahan writes about war as if it were a peacetime activity.³⁰ Walzer has since further developed his views on the distinctive nature of war and, hence, the inapplicability of everyday moral principles to it.³¹ Elsewhere Ian Clark has engaged head on with the question of the nature of war in his *Waging War: A New Philosophical Introduction*.³²

The reason that this question is so important is because it determines the nature of just war theory and theorising itself. If war is a brute fact then it cannot be changed in terms of its nature but can, perhaps, be regulated, but if war is an institution then the question arises as to how it is

²⁹ Searle, *The Construction of Social Reality*, pp. 1 - 2.

³⁰ Michael Walzer, 'Terrorism and Just War', *Philosophia* 34, no. 1 (2006): 3-12; Jeff McMahan, 'Liability and Collective Identity: A Response to Walzer', *Philosophia* 34, no. 1 (2006): 13-17; Michael Walzer, 'Response to Jeff McMahan', *Philosophia* 34, no. 1 (2006): 19-21; Jeff McMahan, 'The Ethics of Killing in War', *Philosophia* 34, no. 1 (2006): 23-41; Michael Walzer, 'Response to McMahan's Paper', *Philosophia* 34, no. 1 (2006): 43-45; Jeff McMahan, 'Killing in War: A Reply to Walzer', *Philosophia* 34, no. 1 (2006): 47-51.

³¹ Michael Walzer, 'What Is Just War Theory About?' (War and Peace as Liberal Arts, Gaede Institute for the Liberal Arts, Westmont College, 2013).

³² Ian Clark, *Waging War: A New Philosophical Introduction*, Second Edition (Oxford: Oxford University Press, 2015).

constituted as an institution and what role the just war tradition itself plays in this. Furthermore, if it is an institution then changing the rules can fundamentally change its nature.³³ It is clear that the revisionist just war theorists see war as a brute fact or, at least, see war as a purely descriptive term to refer to some occurrences of the brute fact of violence but one that carries no additional meanings, normative or otherwise. McMahan is particularly clear on this, he writes that he finds it “extremely implausible” to believe that different moral principles apply to violence in war compared to those apply outside of war as he does not believe that war is sufficiently distinct.³⁴ In contrast, he believes:

[T]hat war is morally continuous with lesser forms of violent conflict and that the morality of individual action in war is therefore governed by the same principles that govern self- and other-defence.³⁵

David Rodin, too, argues that the moral principles that apply to war must be the same as those that apply to individual and other defence as there is no meaningful distinction between types of violence. Applying these principles to war he concludes that the circumstances of war do not meet the requirements for the legitimate use of force in self or other defence and, therefore, that war can almost never be justified.³⁶

The reason these authors understand war as a brute fact rather than as an institution is due to their “reductive individualism”.³⁷ This is not the same as methodological individualism, which merely recognizes that at base only individual human beings can act and that ideas and intentions, even collective ones, can only exist in the minds of specific individuals.³⁸ Rather, the reductive individualism of the revisionists reduces war to a set of relations between individuals and denies that the collective level of war has any moral significance. This is reflected in the use of abstract hypothetical examples by the revisionists; whilst these are derided as “weird hypotheticals” by Walzer, the function that they play in the arguments made by the revisionists is to eliminate the

³³ Searle, *The Construction of Social Reality*, pp. 27 - 28.

³⁴ McMahan, *Killing in War*, p. 36.

³⁵ Jeff McMahan, ‘Individual Liability in War: A Response to Fabre, Leveringhaus and Tadros’, *Utilitas* 24, no. 2 (2012): 278–99, p. 278.

³⁶ Rodin, *War and Self-Defense*, pp. 141 - 162.

³⁷ Seth Lazar, ‘Necessity in Self-Defense and War’, *Philosophy and Public Affairs* 40, no. 1 (2012): 3–44, pp. 23 - 25.

³⁸ John Rogers Searle, *Making the Social World: The Structure of Human Civilization* (Oxford: Oxford University Press, 2010), pp. 42 - 45.

institutional context of war.³⁹ When violence is described without any institutional context then it appears undifferentiated and undifferentiable.

As the funeral rituals and speeches indicate, war is and always has been seen as meaningful and as distinct from other forms of violence. This is because war is not like a mountain, it is not a brute fact, it is an institution. Violence is a brute fact, but the term war is not simply a descriptive term for violence that meets certain empirical characteristics, but instead refers to and constitutes a specific institution through which particular acts of violence have a particular meaning. Whilst there are many grey areas between forms of violence, and whilst the classification of violent acts is highly contested, the intensity of the contestation highlights the significance of the categorization, precisely because these are normative and meaningful categories, not simply empirical and descriptive categories. War, despite the many changes that it has undergone, involves a complex set of social, political, legal, and moral relationships between individuals and collectives in which the individuals themselves have specific identities which only exist as part of social and institutional reality.

The just war tradition and the institutionalisation of war

The idea that war is an institution is not new. Hedley Bull first described war as an institution in *The Anarchical Society* in 1977, however whilst the book as a whole was very influential, the institutional nature of war was largely ignored by subsequent scholars.⁴⁰ This has changed in recent years as two recent books by Tal Dingott Alkopher and Lacy Pejcinovic have explored the nature of war as an institution and the way that this has changed over time.⁴¹ Alkopher has particularly focused on the roles that rights play, and have played historically, in structuring war and the causes for which it has been fought and the way in which they function to justify the use of force in their defence if they are violated.⁴² Her analysis of changing conceptions of rights allows her to study the way in which “at different times and in different normative environments,

³⁹ Walzer, ‘Response to McMahan’s Paper’, p. 44; see also; Michael Walzer, ‘The Political Theory License’, *Annual Review of Political Science* 19 (2013):1–9.

⁴⁰ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, Third Edition (Houndmills: Palgrave, 1977), pp. 178 - 193.

⁴¹ Tal Dingott Alkopher, *Fighting for Rights: From Holy Wars to Humanitarian Military Interventions* (Farnham: Ashgate, 2013); Lacy Pejcinovic, *War in International Society* (London and New York: Routledge, 2013).

⁴² Alkopher, *Fighting for Rights*, pp. 7 - 25; see also; Tal Dingott Alkopher, ‘The Role of Rights in the Social Construction of Wars: From the Crusades to Humanitarian Interventions’, *Millennium: Journal of International Studies* 36, no. 1 (2007): 1–27.

war and conflict have had different meanings and functions”.⁴³ A similar argument is made by Pejcinovic in her analysis of the changing role of war as an institution in international society. She argues that as international society has evolved, so have the institutions of that society, including war. These changes in the role, function, and understanding of war have implications for both its conduct and the judgements made about it.⁴⁴ Both of these works are concerned with the history of war as an institution and the changes in the reasons for which war was fought and for which it was considered acceptable. This thesis contributes to that debate but also engages heavily with the normative literature about the justice of war and contributes to the just war tradition.

In order to understand the nature of war as an institution it is necessary to understand the process of institutionalisation. How is it that an institution and the rights and powers that go along with can come into being? Searle explains this through the concept of speech acts and the direction of fit between speech acts and the world. There are some speech acts which have a downwards direction of fit, from mind to world, as the speech act is supposed to fit the world. These are essentially descriptive in that they can be true or false in an objective sense, an example would be stating the height of a mountain.⁴⁵ For the revisionists, to describe an event as war has a downwards direction of fit as it is a descriptive term. Other speech acts, like orders and promises, have an upwards direction of fit, from world to mind. These speech acts seek to change the world so that it comes to match the content of the speech act, an example would be requesting or ordering someone to climb the mountain.⁴⁶ These are not objectively true or false however they can be satisfied if the world changes to meet the content of the speech act, in this case by the person in question climbing the mountain. This is how just war theory, and moral philosophy more generally, is understood by the revisionists. They seek to develop principles which, when applied, will change the behaviour of individuals so that a feature of the world, namely individual behaviour, will change to meet the content of the speech acts, the principles they enunciate. Finally, there are a special class of speech acts which Searle terms status function declarations. These have a double direction of fit as they change reality to meet the content of the speech act and, hence, have an upwards direction of fit, but they do so by portraying reality as already changed

⁴³ Alkopher, *Fighting for Rights*, p. 168.

⁴⁴ Pejcinovic, *War in International Society*, pp. 183 - 201.

⁴⁵ Searle, *Making the Social World*, p. 11.

⁴⁶ *Ibid.*, pp. 11 - 12.

and so simultaneously have a downwards direction of fit.⁴⁷ Status function declarations take the form of statements that ‘X counts as Y in context C’; they create a set of deontic powers, Y, which are possessed by a particular individual or object, X, in certain defined circumstances, C. An example would be to say that the first person to climb the mountain will be the leader of the group. In this case an individual, X, counts as the leader and gains the deontic powers, Y, associated with the position, in the context, C, of being the first to climb the mountain. The statement has an upwards direction of fit as it changes reality to meet the content of the speech act by creating the position of leader, however it does so by describing reality as already changed as it states the rule as a fact and so has a downwards direction of fit. The reiteration of this operation, in which a Y term from an earlier status function declaration can be an X in subsequent status function declarations, allows highly complex institutions to be developed, and for institutions to be developed within larger institutions.⁴⁸

If war is an institution then one clear way in which it comes to be institutionalised through status function declarations is through declarations of war. In a declaration of war by stating that a relationship of war exists between two states then the relationship of war is brought into existence. Clearly, not just anyone can make such a declaration; the ability to do this depends on a huge number of prior status function declarations through which states and governments have been constituted and office holders with these powers defined. It may be objected that war is rarely formally declared in the contemporary world, but whilst a formal declaration provides a clear example of how a status function declaration can bring a state of war into being, it is not necessary. Recall that a status function declaration works by stating that in context C, X counts as Y. In the case of war as a normatively meaningful institution, rather than as a legal relationship, the context does not necessarily have to, and in fact does not, include a formal declaration of war. Certain acts of violence, X, count as acts of war, Y, in particular circumstances, C. Later on in the thesis, in the discussion about the normative structure of war, the context will be specified, for the time being it is only necessary to understand that war is constituted as an institution through status function declarations and that this is fundamentally linguistic in nature.

The status function declarations that constitute war come from the discourses with which war is described and understood and a particularly important discourse is the just war tradition. It

⁴⁷ *Ibid.*, pp. 12 - 15.

⁴⁸ *Ibid.*, pp. 90 - 92.

is, as Walzer writes, the just war tradition that provides the concepts and language used to discuss and understand war, it gives “shape and structure” to the experience of war through the reiteration of judgements and arguments over time.⁴⁹ This reiteration is also the reiteration of status function declarations through which the status functions themselves are maintained.⁵⁰ Its terms are “at hand” and are the basis for the possibility of the communication of ideas and judgements about war and the acts within it.⁵¹ To say that the just war tradition is crucial in the constitution of war is not to say that all, or even most, wars are just or are fought justly, however the ability to make these judgements at all depends upon the just war tradition and the language that it provides. Any description of war, even a putatively neutral and non-normative one, must use terms like combatant and non-combatant, terms which are meaningful because they have evaluative and normative connotations as well as being descriptive. To even describe something as war is to invoke a set of meanings that go beyond empirical description precisely because it refers to an institution and a set of social relations that cannot be reduced to brute facts.

II. War and Hermeneutics

War is a meaningful institution and because war and the acts that make it up and the identities of those who participate in it are meaningful it can be interpreted. This section explains the way in which this thesis identifies and interprets the meanings of war, drawing in particular on Charles Taylor’s interpretive theory and the hermeneutics of Gadamer.

Interpreting the moral reality of war

This thesis seeks to identify and interpret what Walzer calls “the moral reality of war”, that is, the way in which war becomes normatively meaningful and through which judgments can be made and defended.⁵² It is first necessary to consider what interpretation involves and whether the moral reality of war is a suitable object of interpretation. Taylor writes that for an interpretative or hermeneutic approach to bear fruit, three things must hold. Firstly, there must be a field of objects which can be understood as making sense or nonsense. Secondly, there must be a distinction between meaning and expression, such that the same meaning can be re-expressed differently and,

⁴⁹ Walzer, *Just and Unjust Wars*, p. 15.

⁵⁰ Searle, *Making the Social World*, pp. 102 - 104.

⁵¹ Walzer, *Just and Unjust Wars*, Preface, p. xix.

⁵² *Ibid.*, pp. 1 - 47.

potentially, more clearly. Thirdly, there must be “a subject [or subjects] for whom these meanings are”.⁵³ In the context of the just war tradition this raises the question of whether the study of war meets these criteria.

As argued above, war has a meaning in the sense that it is distinguished from other forms of violence like terrorism and crime. In other words, there is clearly a field of objects within which war can be identified and through which it becomes meaningful. The last chapter of the thesis will explicitly investigate this field of meaning by considering the meaning of war and of terrorism. The acts and identities within war are also meaningful, precisely because they exist in a field of contrasts between, for example, acts of war and war crimes, or combatants, mercenaries, and non-combatants. It is because of the potential for disputes about these meanings that an interpretive approach is necessary.

There is also a distinction between meaning and expression as whilst the acts of war are inherently meaningful, this meaning can also be described and put into words. Furthermore, the description may be a clearer depiction of the meaning than the events considered as brute facts. The funeral rituals of the Athenians are the way in which they interpret the deaths of those killed in war; these rituals give a clearer expression to the meaning of the deaths than was the case before. Similarly, Lincoln’s address at Gettysburg, through its eloquence, interprets the meaning of the deaths of soldiers at Gettysburg in relation to the war itself, the identity of the nation, and the obligations of the living in a way far more powerful as well as clearer than any description of the battle. In each case this expression, or re-expression, brings to light and makes clearer the meanings of these deaths by affirming them as public acts and creating a sense of shared understanding.

Finally, there are subjects capable of interpreting the meanings of war. These subjects are the Athenian citizens, the Americans listening to Lincoln at Gettysburg, and anyone who takes an interest in war and can read the descriptions of the ceremonies for the war dead and recognise them as meaningful occasions, as well as the participants in war. More generally, any societies which engage in war or think about war are the subjects capable of interpreting its meanings.

⁵³ Charles Taylor, ‘Interpretation and the Sciences of Man’, in *Philosophy and the Human Sciences: Philosophical Papers 2*, ed. Charles Taylor (Cambridge: Cambridge University Press, 1985), pp. 15 - 16.

Whilst war is a suitable subject for an interpretive approach, it is also necessary to consider the relationship between the interpretive approach and Searle's theory of institutionalisation through status function declarations discussed earlier. This is important as there is a difference in the understanding of the nature and the role of language between Searle, on the one hand, and Taylor and Gadamer, on the other. Searle insists that language itself is not an institution and he tends to view the use of language as being transparent to the users of language. He writes that new understandings about particular social institutions, for example the development of the concept of a recession to refer to some aspects of the economic cycle, do not change the nature of the institution and are not institutional facts in themselves.⁵⁴ The underlying principle is that when humans make a status function declaration it is transparent to them, as the X, Y, and C terms are all defined.⁵⁵ For Taylor and Gadamer, on the other hand, language is not transparent in the same way. Rather than human beings coming to use language as a tool, language itself constitutes human beings and their identities, as well as imposing limits on what can and cannot be done or thought.⁵⁶ As such, it may seem that an attempt to apply interpretive approaches to Searle's concept of institutionalisation is ontologically untenable.

It is possible, however, to reconcile Searle's approach with that of interpretivism. Firstly, it is necessary to realise that, as Searle himself acknowledges, he is providing a formal analysis of the way in which institutions are created by status function declarations, not an empirical description of the process itself.⁵⁷ Therefore, many status function declarations actually reflect a long process through which a particular X comes to be recognised as a Y in a context C, rather than a single authoritative moment.⁵⁸ As such, all three of the terms involved in the status function declaration may be ambiguous and open to interpretation; in other words an interpretive approach can make clearer the meanings of the institutions that exist. Secondly, whilst Searle is right that at base all individuals can be defined in terms of their biological and neurobiological processes, in social reality these are rarely the most significant aspects of an individual's identity. In a society identities are always already institutionalised in various ways; firstly, as a citizen and then in all of the numerous identities created through prior status function declarations, a pupil, a student, an

⁵⁴ Searle, *Making the Social World*, pp. 116 - 119.

⁵⁵ *Ibid.*, pp. 61 - 89.

⁵⁶ Gadamer, *Truth and Method*, p. 416; Taylor, 'Interpretation and the Sciences of Man', p. 16.

⁵⁷ Searle, *Making the Social World*, pp. 93 - 94.

⁵⁸ *Ibid.*, pp. 94 - 96.

employee, a voter, a member of a particular club, religion, or trade union, and so on. These identities are linguistically constituted and create the frame of reference and set of possibilities within which any individual is constrained and must act. Finally, whilst language itself may not be an institution in the same way as other social institutions, it is also not as manipulable and transparent as Searle believes. As institutions are created through status function declarations particular terms become associated with both the institution and the deontic powers it possesses. Furthermore, the creation and maintenance of institutions requires “recognition or acceptance” among a large enough part of society that the institution can function and its powers are recognised.⁵⁹ Humans come into a world already rich with institutions and powers, many of which are accepted unreflectively. The ability to do things with language and to create new institutions through status function declarations is significantly constrained by the institutions and their meanings already in existence as new institutions must be comprehensible and congruent with those existing and must also gain recognition or acceptance by a sufficient number of people. It can be seen, therefore, that Searle’s understanding of language and of the constitutive role of status function declarations in creating and maintaining institutions is compatible with the interpretive and hermeneutic approach of Taylor and Gadamer.

The hermeneutics of war

In order to interpret the meanings of war and of the acts within war this thesis draws on Gadamer’s hermeneutics, as outlined in *Truth and Method*.⁶⁰ Gadamer’s hermeneutical approach is concerned with meaning and language, however Gadamer understands meaning in a particular way. For Gadamer meaning does not mean putting oneself in the position of the author of the text in order to understand what they meant, from their perspective or, more generally, putting oneself in the place of the other in order to understand them as an object of study. To do this, he argues, means to reject the truth conveyed in what is being interpreted, “[a]cknowledging the otherness of the author in this way, making him the object of objective knowledge, involves the fundamental suspension of his claim to truth.”⁶¹ Instead Gadamer draws on his theory of aesthetics as a basis for understanding meaning. In the experience of art, it is through letting the truth of the artwork

⁵⁹ Ibid., p. 104.

⁶⁰ Gadamer, *Truth and Method*.

⁶¹ Ibid., p. 303.

speak that the observer can be moved, transported, and transformed.⁶² It is this change that takes place in the interpreter which is the prerequisite of genuine understanding and is the basis of what Gadamer refers to as the “fusion of horizons”.⁶³ This fusion occurs as the interpreter is always already situated within a linguistically constituted tradition and that this “is a prior condition of understanding”.⁶⁴ It is precisely because humans exist as finite and historical beings that it is not possible to transcend or objectify one’s own tradition,⁶⁵ but it is this historicity and tradition that makes any understanding possible as it is the source of prejudice. For Gadamer prejudice is not a negative feature or a constraint on judgement, but is a function of our existence in a linguistically constituted tradition and is the basis of our ability to interpret the world.⁶⁶ Prejudice just is the linguistically constituted terms and ideas, shaped by use over time, that allow the world to be understood in the first place. As such, interpretation or hermeneutics is a feature of being, rather than a method of study.⁶⁷ These prejudices provide the interpreter’s horizon; crucially, because of the historicity and finitude of the interpreter, the horizon itself is not fixed or closed. It is something into which the interpreter moves and which moves with them, “[h]orizons change for a person who is moving”.⁶⁸ The hermeneutical process is the fusion of the interpreter’s horizon with that of what they are interpreting, it is an expansion of the horizon which reflects the historical movement that takes place in understanding.⁶⁹

It may be asked whether war is an appropriate object of hermeneutical study given that Gadamer’s argument is based on aesthetics and the experience of art. As a life and death struggle it may seem trite or offensive to reduce war to a ‘text-analogue’ or an aesthetic experience, but this is to misunderstand the nature of hermeneutics as conceived by Gadamer and the crucial role that language and linguisticity play within it. Gadamer writes that “[l]anguage is not just one man’s possessions in the world; rather, on it depends the fact that man has a *world* at all”.⁷⁰ Further, “there is no point of view outside the experience of language from which it could become an

⁶² Ibid., pp. 56 - 61.

⁶³ Ibid., p. 398.

⁶⁴ Ibid., p. 308.

⁶⁵ Ibid., pp. 299 - 301.

⁶⁶ Ibid., p. 278.

⁶⁷ Hans-Georg Gadamer, ‘The Universality of the Hermeneutical Problem’, in *Philosophical Hermeneutics*, ed. and trans. David E. Linge (Berkeley: University of California Press, 1977).

⁶⁸ Gadamer, *Truth and Method*, p. 303.

⁶⁹ Ibid., p. 291.

⁷⁰ Ibid., p. 440.

object”.⁷¹ In other words, this is not the reduction of war to discourse, but the recognition that the experience of war, as with any experience, can only be mediated through language. ‘War’ does not exist as an abstract phenomenon outside of human experience and understanding, which are linguistical in nature; it is not a brute fact but an institution.

It is also necessary to consider the nature of the fusion of horizons in the study of war; what are the horizons in question and how can they be apprehended? The horizons which are the subject of this thesis are the horizon of the just war tradition and the horizon of the battlefield. The just war tradition is not the only linguistic tradition through which war is interpreted, both realism and pacifism provide alternative conceptions of war and its relationship (or lack thereof) to morality. Other discourses, such as strategy and military history, provide interpretations of other aspects of war but it is the just war tradition which constitutes the moral reality of war. As mentioned earlier, the just war tradition is the source of the language used to interpret and it gives “shape and structure” to the experience of war.⁷² Whilst pacifism rejects all war as being unjustified killing, and realism denies the relevance of moral principles to war, it is only the just war tradition that allows the recognition of “a moral world . . . in the midst of hell”.⁷³ The horizon with which the moral world of the just war tradition must be fused is that of the hell of the battlefield. As Joanna Bourke writes, war is about killing.⁷⁴ It is about individuals killing and being killed where these are deliberate actions. Understanding the moral reality of war means understanding these acts of killing, of being killed, of the decisions made about war, of what it means to be a soldier, and of what it means to fairly judge all of these. It means recognising within the rituals of the Athenians and Lincoln’s speech at Gettysburg the truth of what death in war means and the obligation of remembrance that this imposes. To recognise the relationship between the living and the dead that rituals of remembrance embody and to understand the obligation to remember those who died is to be transformed through a fusion of horizons.

⁷¹ Ibid., p. 449.

⁷² Walzer, *Just and Unjust Wars*, p. 15.

⁷³ Ibid., p. 36.

⁷⁴ Joanna Bourke, *An Intimate History of Killing: Face-To-Face Killing in Twentieth-Century Warfare* (New York: Basic Books, 1999), p. xiii.

III. War and Distributive Justice

The overall objective of this thesis is to answer Paul's question by understanding the basis of enmity and providing a defence of the principle of the moral equality of combatants. Whilst the first part of this thesis focuses on the meanings of war and of the actions within war, the second part demonstrates how this allows the normative structure of war to be understood, of which the principle of the moral equality of combatants is a part. This section of the chapter outlines how the analysis of meaning from the first part of the thesis will be used to provide the foundation for the argument about the normative structure of war later on. It does this by introducing the arguments of *Spheres of Justice* in order to illustrate the close relationship between meaning and justice.

Just and unjust distributions...

The basis of Walzer's argument in *Spheres of Justice* is that meanings matter. He argues that the correct distributive principle governing any social good depends upon the meaning of that social good for the society in question. The correct criteria for distributing a good "are intrinsic not to the good-in-itself but to the social good". As such, "[a]ll distributions are just or unjust relative to the social meanings of the goods at stake."⁷⁵ It is perhaps Walzer's training as a historian that allows him to recognise the contingency and changing meaning of different goods, which is demonstrated to great effect throughout the book as he analyses different goods and the way in which their social meaning and associated distributive criteria have changed over time.⁷⁶ This is a controversial claim and it can be broken down into two parts, in which the controversy lies in the second part. The first part of the claim is that different social goods require different distributive principles. This is an uncommon claim in philosophy, as Walzer notes, most philosophers writing on the subject seek one single principle of justice from which the correct distribution can be determined.⁷⁷ Whilst uncommon, it is not very controversial, especially given the expansive notion of what is being distributed that Walzer uses. Few would deny that punishment for crime, access to healthcare, and membership of the community in the form of citizenship, to name but a few of the distributions discussed by Walzer, must be distributed

⁷⁵ Walzer, *Spheres of Justice*, p. 9.

⁷⁶ Walzer, 'The Political Theory License'.

⁷⁷ Walzer, *Spheres of Justice*, pp. 3 - 6.

according to different principles. The controversial aspect of the claim is that the nature of what counts as a just distribution is relative to the social meaning that the thing being distributed has for the society in question.

In order to understand and defend this claim it is necessary to explore Walzer's wider approach to moral philosophy. Walzer is often described as a communitarian and, although he rejects the label, his philosophy is marked by the fact that he does take communities seriously.⁷⁸ He describes his overall approach as interpretive social criticism and he believes that social critics need to be close to the society which they are critiquing.⁷⁹ He rejects the view that it is necessary "to walk out of the cave, leave the city, climb the mountain, fashion for oneself . . . an objective and universal standpoint".⁸⁰ Instead, ethical theorising must take place from within the community, "critical distance is measured in inches".⁸¹ Walzer has written extensively on social criticism and on the model of the social critic; for him it is precisely their connection to their own society which makes their criticism so powerful.⁸² This is based on his belief that morality starts out 'thick'; he rejects the common view that there is a single, universal set of moral principles, always and everywhere applicable, which then develop in particular contexts. Instead he reverses the process and argues that "[m]orality is thick from the beginning, culturally integrated, fully resonant."⁸³ The thin or minimal morality is not the basis for all thick moralities but is instead simply the "reiterated features of particular thick moralities".⁸⁴ In times of crisis people in one society can vicariously join those in another society on the basis of these reiterations, but even this minimal morality "is not foundational".⁸⁵

The reason that this moral minimum is not foundational is, Walzer argues, because "[t]here is no neutral (unexpressive) moral language", instead there are "principles and rules that are reiterated in different times and places, and that are seen to be similar even though they are

⁷⁸ For Walzer's view of communitarianism, see: Michael Walzer, 'The Communitarian Critique of Liberalism', in *Thinking Politically: Essays in Political Theory*, ed. David Miller (New Haven, Conn.: Yale University Press, 2007).

⁷⁹ Michael Walzer, *Interpretation and Social Criticism* (Cambridge, Mass.: Harvard University Press, 1987).

⁸⁰ Walzer, *Spheres of Justice*, p. xiv.

⁸¹ Walzer, *Interpretation and Social Criticism*, p. 61.

⁸² Michael Walzer, *The Company of Critics: Social Criticism and Political Commitment in the Twentieth Century* (London: Peter Halban, 1989).

⁸³ Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame, Indiana: University of Notre Dame Press, 1994), p. 4.

⁸⁴ *Ibid.*, p. 10.

⁸⁵ *Ibid.*, p. 18.

expressed in different idioms and reflect different histories and different versions of the world.”⁸⁶ There are clear parallels here with the arguments of Taylor and Gadamer. There is no outside of or before language, people are born into a community and into a social world, words already have meanings which have accreted over a long period of time, much of the way in which language is used serves to reiterate and reinforce earlier status function declarations and to maintain the institutions of social reality. This forms the horizons and is the basis of the prejudices through which individuals come to be. It is only from within a thick morality, already “carved by many hands”, that it is possible to abstract out a thin morality, to recognise familiar features in another’s unfamiliar horizon.⁸⁷

It is within this already thick morality that questions of distribution arise. More importantly, it is within this already thick morality, and to those for whom it is home, that answers to those questions must be given. Because social goods have different meanings and play different roles in different societies, and because different principles of distribution themselves have different meanings, any criticism must understand the society; it must be social. And because individuals, their horizons, and their prejudices, are constituted by their linguisticity, and this is the prerequisite for their being able to interpret the world and make any criticism at all, social criticism always starts out thick.

It may be argued that Walzer’s argument relates to the distribution of goods within a domestic setting and that it is illegitimate to extend this to the distribution of burdens and of identities, like being a soldier. Whilst *Spheres of Justice* is best known for its discussion of the distribution of various social goods, Walzer also discusses the distribution of identity, in the form of citizenship and membership, and of burdens and harms in sections on punishment, hard work, and, briefly, on conscription. Perhaps more important is that Walzer’s primary argument focusses on the social meanings of the things being distributed and how the social meaning affects the just distributive principles. As this thesis demonstrates, to be a soldier is to hold a normatively meaningful identity, as Pericles’ and Lincoln’s orations show, death in war is understood as having a social meaning that differentiates it from other violence. Given that there are social meanings associated with these and given that it is necessary to determine in some way who should and

⁸⁶ Ibid., pp. 9 and 17.

⁸⁷ Ibid., p. 18.

should not serve, and who may and may not be targeted in war, in other words to make distributions, it is legitimate to ask how the social meanings relate to the distributive principles.

...in war

In order to apply the argument of *Spheres of Justice* to the institution of war, this thesis considers war as itself being a sphere of distributions. In war the distribution of the combatants' privilege, and the concomitant obligation to fight and kill as well as the risk of death, must be distributed amongst members of society. Those who fight must distribute death amongst the enemy. The society at war must distribute decision making power in some way. Outsiders must distribute moral responsibility for actions and decisions, including the decision to go to war. All of these distributions can be made in a just or an unjust way and this will be relative to the meaning that what is being distributed has for society. It is in this way that the hermeneutical analysis of the meaning of war will provide the basis for a normative argument in defence of the principle of the moral equality of combatants.

In order to make this argument the concept of the normative structure of war will be developed. The normative structure of war provides the overall framework in which political power, moral legitimacy, and the right to act as an individual are distributed and related to one another. In the language of the just war tradition this is the relationship between the just cause, legitimate authority, and the combatants' privilege. The normative structure of war, through the way in which it distributes rights and identities, is constitutive of enmity as it provides the normative foundation for combatancy. Combatants on either side in a war are morally equal as they are not responsible for the justice or otherwise of the cause for which the war is being fought. The normative structure of war distributes the combatants' privilege according to a particular form of political relationship between the soldier and the state. When other distributive principles are used to distribute the combatants' privilege, for example money in the case of contractors and mercenaries, or the presence of a just cause as the revisionists argue for, the distribution does not reflect the meaning of the identity being distributed. As a result, the distribution is unjust, or at least the implications of it are unjust, as it leads to an unjust distribution of who may and may not be killed and of praise and blame. It is by recognising the principles according to which the combatants' privilege and the identity of the soldier should be distributed that it becomes clear why they are morally equal and why they do no wrong in killing one another. It also shows why

the justification for killing in war cannot depend upon the individual moral responsibility of the target. The normative structure of war is itself morally important as it allows other important moral distinctions to be drawn and judgements to be made; between acts of war and war crimes, between soldiers and mercenaries, between generals and politicians, and between Paul and Gerard as men who are enemies but not criminals. It also provides a normative foundation for the distinction between combatants and non-combatants. These distinctions are important and reflect important moral values, without which the vocabulary of the just war tradition and the ability to interpret war and to judge actions within it would be poorer.

The concept of the normative structure of war is important as it makes clear the relationship between the normative principles governing war and specific practices of warfare. Through the way in which it constitutes the relationship of enmity, it determines who may be targeted and why, and this affects military practices as well as providing a basis for making normative judgements about those practices. It also allows other, non-traditional forms of conflict to be understood and for the normative differences between them and war to be recognised. This is demonstrated in the last chapter where an analysis of terrorism and the war on terror is carried out. By looking at the different normative structure that constitutes terrorism compared to that of war it is possible to understand the specific challenges that terrorism poses and the way in which military practice needs to change in order to combat it. Identifying these challenges allows moral judgements about the practices of the war on terror to be made that are both consistent with the just war tradition whilst acknowledging the changed nature of the conflict.

IV. Meaning, Morality, and Ontology

The argument of this thesis focuses on the importance of meaning in understanding, interpreting, and judging war. As a result, it is necessary to address the question of why meanings are morally significant. The relationship between meaning and morality is also bound up with an ontological argument about the nature of being. In order to explore these issues and to demonstrate why meaning is morally significant, this section draws upon Stephen K. White's concept of a weak ontology in political theorising. After delineating the contours and criteria for a felicitous weak ontology, the ontology that the argument of the thesis relies upon is explored and it shows that this ontology meets the criteria of a weak ontology. Drawing further upon White's argument regarding how a weak ontology 'prefigures' ethical argument, it is argued that this prefiguring takes the form

of an openness to the other. In particular this is the openness that is necessary for Gadamer's fusion of horizons to occur. This section will also provide a defence of the interpretive approach against the main criticism made of it, namely that it is morally relativistic as it is incapable of reflecting critically on the dominant norms and meanings within a society as, without an external or objective standard with which to compare different norms and meanings, it must accept them all as equally valid.

Interpretivism and weak ontology

In his book *Sustaining Affirmation* White introduces and develops the concept that he terms a weak ontology.⁸⁸ He does not identify the use of weak ontologies with any particular approach to political theory, in fact he goes out of his way to round up the “unusual suspects” in order to demonstrate what he believes is a phenomenon that occurs in a variety of approaches to political theory, from liberalism to post-modernism.⁸⁹ The only commonality amongst those who use a form of weak ontology is that they are on the ‘anti-’ side of the foundationalist/anti-foundationalist divide.

The starting point for any weak ontology is that it is “fundamental *and* contestable”.⁹⁰ It is based on the recognition that “all fundamental conceptualizations of self, other, and world are contestable” but “that such conceptualizations are nevertheless necessary or unavoidable for an adequately reflective ethical and political life.”⁹¹ In short, such approaches engage with what comes after the post-modernist challenge to traditional strong ontologies. Judith Butler describes the understanding of foundations in a weak ontology as “contingent and indispensable”, the necessity of foundations is recognised despite their inherent contestability.⁹² It is this recognition of contestability and contingency which is the key feature which distinguishes a weak ontology from a strong ontology.

Another central feature of a weak ontology is its resistance to the disengaged self and in its place the notion of a “stickier subject”. This takes different forms in different authors but is based around a number of existential realities which provide a figuration of human being. These

⁸⁸ Stephen K. White, *Sustaining Affirmation: The Strengths of Weak Ontology in Political Theory* (Princeton and Oxford: Princeton University Press, 2000).

⁸⁹ *Ibid.*, p. 12.

⁹⁰ *Ibid.*, p. 6.

⁹¹ *Ibid.*, p. 8.

⁹² *Ibid.*, p. 76.

existential realities are language, finitude, or the consciousness of mortality, natality, or the capacity for radical novelty despite being entangled in meaning and language, and the articulation of sources of the self, or to be a being which gives definition to itself against some background to which it is always already attached.⁹³ The existential realities are constitutive of human being whilst not having a fixed or categorical meaning, they are always historically mediated. Ultimately, White argues, that “[f]or weak ontology, human being is the negotiation of these existential realities.”⁹⁴

The argument of this thesis rests on an ontology that meets White’s criteria for a felicitous weak ontology. This ontology draws heavily on Michael Sandel’s description of humans as self-interpreting beings as well as on the arguments of Taylor, Walzer, and Gadamer. Sandel writes:

To imagine a person incapable of constitutive attachments such as these is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth. For to have character is to know that I move in a history I neither summon nor command, which carries consequences none the less for my choices and conduct . . . As a self-interpreting being, I am able to reflect on my history and in this to distance myself from it, but the distance is always precarious and provisional, the point of reflection never secured outside the history itself.⁹⁵

There are clear parallels here with Gadamer’s discussion of prejudice and historicity, as well as with Walzer’s arguments, particularly his view that:

Humanity . . . has members but no memory, and so it has no history and no culture, no customary practices, no familiar life-ways, no festivals, no shared understandings of social goods. It is human to have such things...⁹⁶

The abstract individuals of cosmopolitan political theory are incapable of understanding the meaningfulness of the occasions of Pericles’ and Lincoln’s orations; the practices and rituals of remembrance are not only unfamiliar but incomprehensible, there is no shared memory of those fellow citizens who have died in war, nor shared understanding of the obligation to remember

⁹³ Ibid., pp. 8 - 9.

⁹⁴ Ibid., p. 9.

⁹⁵ Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), p. 179.

⁹⁶ Walzer, *Thick and Thin*, p. 8.

them. In Alasdair MacIntyre's terms, the abstract individual of liberal cosmopolitan theory is a "ghost".⁹⁷

Sandel's discussion of the nature of community is also important; he rejects the instrumentalist view of community and also what he terms the sentimental view of community and which he attributes to Rawls.⁹⁸ Instead he relies on a constitutive theory of community in which:

[C]ommunity describes not just what they *have* as fellow citizens but also what they *are*, not a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity.⁹⁹

Later on he writes that a community is distinguished not by generalised feelings of benevolence or communitarian values "but a common vocabulary of discourse and a background of implicit practices and understandings."¹⁰⁰ As such, this parallels Taylor's argument that humans are "constituted by the language and culture" of their community, where "community is not simply an aggregation of individuals" but "is also constitutive of the individual".¹⁰¹ It is important to note that for Taylor, to say that community is constitutive of the individual does not only mean that community provides the material for certain identities held by the individual, where the individual is still seen as in some sense *a priori* but that the community is constitutive of the very concept of the individual and of individuality.¹⁰²

These comments touch on several of the criteria outlined by White as being a part of a weak ontology. In particular, the emphasis on language as partially constitutive of being and the idea of moving within history, which suggests a consciousness of finitude. Sandel's language in describing history as something in which one moves and which has consequences for one's conduct and his description of community as something that one is rather than simply something that one possesses parallels White's discussion of the articulation of sources of the self. As was

⁹⁷ Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, Third Edition (Notre Dame, Indiana: University of Notre Dame Press, 2007), p. 127.

⁹⁸ Sandel, *Liberalism and the Limits of Justice*, pp. 147 - 149.

⁹⁹ *Ibid.*, p. 150.

¹⁰⁰ *Ibid.*, p. 173.

¹⁰¹ Charles Taylor, 'Introduction', in *Philosophy and the Human Sciences: Philosophical Papers 2*, ed. Charles Taylor (Cambridge: Cambridge University Press, 1985), p. 8.

¹⁰² Charles Taylor, 'What Is Human Agency?', in *Human Agency and Language: Philosophical Papers 1*, ed. Charles Taylor (Cambridge: Cambridge University Press, 1985).

pointed out above, there are parallels between some of White's arguments and Taylor's arguments, this should not be surprising as it is from Taylor that White gets the term 'sources of the self' and Taylor is one of the examples that he uses to highlight a felicitous weak ontology.¹⁰³

The crucial feature that distinguishes a weak ontology from a strong ontology is that not only does it recognise its own contestability, but this contestability must "be enacted rather than just announced" within the ontology itself. It must contain within itself the necessary resources to resist naturalisation and to disrupt itself in its own unfolding.¹⁰⁴ This is where it is helpful to draw further upon Gadamer's hermeneutics. The notion of horizons is central to Gadamer's argument, these horizons being constituted by the prejudices of the interpreter; but horizons are not static, "[h]orizons change for a person who is moving".¹⁰⁵ Because the interpreter is constantly moving and because their prejudices are being constantly challenged, which is why Gadamer argues that interpretation is a feature of being rather than a method of study, they are always inherently contestable. The very process of interpretation, which emerges as a feature of the ontology, enacts the contestability of it.

The weak ontology of this thesis, outlined above, provides the basis for understanding why meaning is morally significant. The existential realities of the stickier subject dovetail with Gadamer's argument that interpretation of meaning is a feature of being. As self-interpreting beings, constituted through the negotiation of these existential realities, there is no outside of language or of meaning. To deny the importance of meaning, as mentioned above, "is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth."¹⁰⁶ More importantly, to deny the importance of meaning is to deny what it is to be human and this is an injustice in itself. Morality, as Walzer writes, is thick from the start because it is inseparable from language and meaning. To abstract from meaning is not to imagine rational agents, stripped of prejudice, but to imagine MacIntyre's ghosts or the shapes without form of T. S. Eliot's hollow men, wandering the wasteland with meaningless voices.¹⁰⁷ To deny

¹⁰³ White, *Sustaining Affirmation*, pp. 42 - 74.

¹⁰⁴ *Ibid.*, p. 8.

¹⁰⁵ Gadamer, *Truth and Method*, p. 303.

¹⁰⁶ Sandel, *Liberalism and the Limits of Justice*, p. 179.

¹⁰⁷ T. S. Eliot, 'The Hollow Men (1925)', in *The Complete Poems and Plays: 1909-1950* (San Diego: Harcourt Brace Jovanovich, 1971), pp. 56 - 59.

the humanity of others, to deny what it is that makes them self-interpreting beings, is to deny the possibility of moral argument as it denies that they are beings like oneself.

Meaning and relativism

A common criticism of interpretive approaches is that they are morally relativistic. By emphasising the constitutive role of community as the basis for norms and moral principles they are frequently accused of being incapable of reflecting critically on those norms and so are inherently conservative. Further, with no external or objective standard with which to compare the norms of different communities, or even the same community at different times, the interpretive approach must, it is claimed, accept them all as equally valid.¹⁰⁸

The weak ontology and the “stickier subject” underlying the argument of this thesis in fact do allow for critical reflection and can resist moral relativism. The subjects in this ontology are not the abstract and *a priori* individuals, the disengaged selves, of much liberal political thought. Instead, individuals are constituted through language which is inherently social and define themselves against a background of meaning. Rather than the situatedness of individuals preventing objective and external critique, it is this linguisticity which is the site of critique and the very basis of its possibility. It is precisely the moral depth, the thickness, of the linguistically constituted individual that makes criticism possible because language is the medium of criticism and to be outside of any particular society is to be outside of language. In reality it is impossible to be outside of all society and outside of language and therefore all criticism is necessarily internal, even if unreflectively so. As Walzer writes, the types of hypothetical situation put forward by some philosophers as being designed to yield objective and just outcomes already presuppose a particular view of individuality.¹⁰⁹ The individuals in these scenarios are not neutral decision makers but are already socially and linguistically constituted in the western, liberal tradition.¹¹⁰ The criticism of interpretivism, that it is incapable of objective and external critique, is shown to be false as there is no external perspective from which such objective critique could be given.

The situatedness and stickiness of the subject, their being constituted by linguisticity and meaning, is also the reason that meaning is morally significant. The moral significance of meaning

¹⁰⁸ Rodin, *War and Self-Defense*, pp. 153 - 154.

¹⁰⁹ Michael Walzer, ‘A Critique of Philosophical Conversation’, in *Thinking Politically: Essays in Political Theory*, ed. David Miller (New Haven, Conn.: Yale University Press, 2007), pp. 22 - 37.

¹¹⁰ Walzer, *Thick and Thin*, pp. 11 - 13.

is precisely because meaning is partially constitutive of identity, not only of the self but of the other. To deny the significance of meaning, to proceed with moral argument assuming that meaning and identity are superfluous and that individuals can be assumed to be *a priori* to community, is to suffer an “impoverishment of figuration” which has moral costs.¹¹¹ Subsequent chapters will outline the costs of the revisionist approach to the just war tradition, which relies upon a version of the disengaged self, by illustrating some of the moral distinctions and judgements that it is unable to recognise.

A weak ontology, unlike a strong ontology, does not provide clear and incontestable principles, instead it provides a broad orientation and it prefigures judgement, which is manifested in an orientation of openness towards others.¹¹² Specifically, it is a willingness to allow oneself to be transformed by the other, any other, through the process of the fusion of horizons. This requires a recognition of the other as a being like oneself, constituted by their own historicity, linguisticity, and community, and as having their own horizons. It is this that finally provides a defence of the interpretive approach against the charge of relativism. This capacity for self-interpretation is the source of the moral value of the individual. It is this that provides a basis for critique and judgement and avoids moral relativism. Specifically, any society or group which denies to others or to some part of the group the ability to be self-interpreting is morally deficient. There is no objective standard for determining from the outside what are the correct meanings and the correct set of distributions within a society, however if the meanings upon which the distributions are based deny the capacity of self-interpretation of some section of the society then it is unjust. To deny that others have a horizon, that they too are constituted through attachments, is to deny that they have moral value. This reflects a radical exclusion in which they are denied recognition as meaningful beings, as beings of value and possessing moral depth. This type of exclusion takes the form of massacre, genocide, ethnic cleansing, and slavery. It is not violence as such but the violence which seeks to efface the other and to deny their participation in a community of meaning. This is the contrast with the situation of Paul as he is transformed through a fusion of horizons with Gerard, whom he recognizes him as a man like himself and against whom his violence did not deny the meanings through which Gerard was constituted.

¹¹¹ White, *Sustaining Affirmation*, pp. 9 - 10.

¹¹² *Ibid.*, pp. 11 - 12.

This denial can be condemned because it denies what it is to be human; it refuses to recognise the humanity not only of the other but also of the self. To be a self-interpreting being makes the fusion of horizons necessary. It is impossible to escape one's own linguisticity and historicity so any understanding of the other necessarily requires a fusion of horizons as there is no 'outside'. As such, to refuse the fusion of horizons by denying the other's capacity for self-interpretation is simultaneously a denial of part of one's own capacity for self-interpretation and one's own humanity. In other words, because the self-interpreting nature of being is central to the approach and because this makes the fusion of horizons a necessary feature of humanity, there are grounds upon which certain claims, meanings, and distributions can be condemned, no matter how widely accepted they are within a society. An interpretive and hermeneutical approach, therefore, is not morally relativistic and does in fact contain the necessary criteria for making judgments that do not simply reproduce the status quo or the accepted norms of society.

Conclusion

The obligation to remember those who die in war and the intelligibility of remembrance rituals and speeches from different societies and times reflects the fact that war is a meaningful institution. Identifying, understanding, and interpreting the meaning of war are the tasks for the remainder of this thesis. This chapter has provided the theoretical foundations necessary for the task by outlining the way in which meaning and institutions are formed and explaining the interpretive and hermeneutical approach that subsequent chapters rely upon. It then explained the way in which war can be seen as a distributive sphere and drew on *Spheres of Justice* in order to demonstrate how understanding the meanings will allow a defence of the moral equality of combatants to be constructed. Finally, it outlined the ontology of the thesis and argue that this is a form of weak ontology based on a 'stickier subject'. It was shown that this ontology is the source of the moral importance of meaning and that it provides a defence of the approach against some common criticisms.

CHAPTER TWO

The Just War Tradition and the Constitution of War

Socrates: But you must know what treatment it is that we allege against each other when we enter upon a war, and what name we give it when we do so?

Alcibiades: I do: we say we are victims of deceit or violence or spoliation.

Soc.: Enough: how do we suffer each of these things? Try and tell me what difference there is between one way and another.

Alc.: Do you mean by that, Socrates, whether it is in a just way or an unjust way?

Soc.: Precisely.

Alc.: Why, there you have all the difference in the world.

Soc.: Well then, on which sort are you going to advise the Athenians to make war – those who are acting unjustly, or those who are doing what is just?

Alc.: That is a hard question: for even if someone decides he must go to war with those who are doing what is just, he would not admit that they are doing so.

Soc.: For that would not be lawful, I suppose?

Alc.: No, indeed; nor is it considered honorable either.¹¹³

Throughout history the use of force has been inseparable from questions about its legitimacy and justice. Whilst the types of reasons and justifications accepted have changed over the course of history, the necessity of giving reasons and justifications has not. And whilst the reasons are often made up and the justifications disingenuous and self-serving, they are needed as otherwise the use of force is unlawful and dishonorable. This chapter explores how these patterns of reasoning, of being required to make justifications, and the process of doing so have resulted, over time, in a tradition of thought about justice and war emerging: the just war tradition. The concept of a tradition of thought which will be used is defined by Alasdair MacIntyre thusly:

A tradition is an argument extended through time in which certain fundamental agreements are defined and redefined in terms of two kinds of conflict: those with critics and enemies external to the tradition who reject all or at least key parts of those fundamental agreements, and those internal, interpretative debates through which the meaning and rationale of the agreements come to be expressed and by whose progress a tradition is constituted. Such internal debates may on occasion

¹¹³ Plato, 'Alcibiades I (c. 390 BC)', in *Plato in Twelve Volumes: XII: Charmides, Alcibiades I and II, Hipparchus, The Lovers, Theages, Minos, Epinomis*, trans. W. R. M. Lamb, vol. XII, XII vols. (Cambridge, Mass.: Harvard University Press, 1979), p. 119.

destroy what had been the basis of common fundamental agreement, so that . . . a tradition divides into two or more warring components, whose adherents are transformed into external critics of each other's positions...¹¹⁴

This chapter focuses on the concept of combatancy within the just war tradition and the way in which it has been defined and redefined leading to the establishment of the principle of the moral equality of combatants. In particular, it considers the way in which combatants were normatively distinguished from non-combatants and the justification of combatancy in relation to other principles within the just war tradition. The process of defining combatancy is quintessentially a form of status function declaration, in which particular individuals are defined as having a specific identity, namely that of a combatant, with a defined set of deontic powers and rights in a particular context. The definition and redefinition of these three terms, the individuals, the deontic powers, and the context in which they apply, which makes up the just war tradition is a reiteration of the status function declarations which constitutes war as an institution. As such, the chapter demonstrates the existence of the just war tradition as well as illustrating its role in constituting war as an institution.

In order to achieve this the chapter conducts a survey of the just war tradition from Saint Augustine, who can legitimately be seen as the founder of the Christian and western just war tradition, to Emer de Vattel, with whom the principle of the moral equality of combatants is fully enunciated and the concept of combatancy takes on its modern form. The focus on the Christian and western just war tradition is not to deny the existence or significance of other, non-western, traditions of thought about justice and war; however, the Christian and western just war tradition has been particularly influential. This also recognises the fact that parts of the tradition have been both religiously and culturally particularist and exclusivist. Rather than seeking an ecumenism that has never existed, it is important to bear in mind that the just war tradition is in many respects about the exclusion of particular types of groups, actors, and forms of violence from the legitimacy accorded by just war theory. It is this exclusion that has often led to debates and changes within the tradition.

This recognition of the existence of other discourses raises the question of their role in the constitution of war as an institution and their relationship with the just war tradition. These other

¹¹⁴ Alasdair MacIntyre, *Whose Justice? Which Rationality?* (London: Duckworth, 1988), p. 12.

discourses include pacifism, which rejects all violence as unjust, and realism, which denies the significance of moral judgement to war, as well as international humanitarian law and military strategy which both have their own languages with which they interpret and understand war. This thesis focuses on the just war tradition as it is the just war tradition that constitutes the moral reality of war and which therefore is crucial to its constitution as a normatively meaningful institution, distinct from other forms of violence. Pacifism, by contrast, rejects all violence as unjust and denies that war is normatively distinct from other forms of violence. Strategy also denies the distinctiveness of war as a meaningful institution. Strategy is a fundamentally practical discourse and the precepts of strategic thought can be applied to any organised violence, it is not capable of constituting war as a distinct institution. Realism does recognise war as a distinct and meaningful institution, separate from crime, terrorism, or individual violence but, as the quote from Alcibiades illustrates, few are the people or leaders who would admit to going to war without just cause, even if the reasons they do give are hypocritical and self-serving. As the previous chapter mentioned with respect to citizenship when Searle's work on the process of institutionalisation was introduced, for claims and arguments to be recognisable and to be a part of discourse, even if they are untrue or hypocritical, requires the institutions they refer to to be in existence. In other words, whilst realism may deny the role of morality in war, the practice of giving reasons and of justifying the decision to go to war and conduct within war in terms of justice points to the significance of the just war tradition in constituting war.

The other important discourse associated with war is that of international humanitarian law. This discourse both recognises the distinctiveness of war as an institution whilst also contributing to its constitution as an institution through the development of legal principles and norms. The relationship between the just war tradition and international humanitarian law is complex, reflecting the changes in the ways in which both traditions have been understood as well as the changes in the content of the discourses. For much of the period under consideration in this chapter, the two discourses were very closely related and at times almost indistinguishable. The Peace Canons and Gratian's Decretum were both contributions to and developments of religious law and attempts to apply God's law to human behaviour. They also sought to define the rights, responsibilities, and relationships between different strata of society and the institutions of Church, Empire, and various subordinate lords. As such they contributed to what would now be known as both moral philosophy and international law, although neither of these terms is apposite for the

period in question. Similarly, both Vittoria and Grotius contributed to international law as well as to the just war tradition. By the time of Grotius there was a clearer recognition of the distinctions between international positive law, natural law, and God's law. Grotius engages with all of these and recognises, as will be demonstrated, the possibility of conflict between them. It is with Vattel and his successors that the distinction between international positive law and natural law or moral philosophy takes on its modern form. Whilst the subsequent history of international humanitarian law is hugely important in understanding the way in which war has been understood and regulated in the modern era, this body of law has taken as axiomatic the independence of the *jus in bello* from the *jus ad bellum* which is the subject of this thesis. As such the thesis does not consider the development of international humanitarian law since Vattel as the starting point of the law is the issue in question.

This chapter will highlight the way in which developments within the just war tradition have functioned as status function declarations in constituting war as an institution. This obviously raises the question of what makes a successful status function declaration. The previous chapter mentioned that it needs to be recognised and accepted by a sufficient number of people, but this is clearly too vague to be useful in identifying the difference between a successful and an unsuccessful status function declaration. In the context of the just war tradition what counts as a successful status function declaration is one that contributes to and becomes a part of the tradition itself, that is, one that contributes to the definition and redefinition of the fundamental agreements and their meaning and rationale that make up the tradition. More specifically, it is one that contributes to the vocabulary or the fields of contrast within which war is apprehended and understood. It does not need to be accepted in the sense of governing everyone, or even most people's, behaviour. Its success is based instead on its becoming a part of the tradition and contributing to the way in which that behaviour is interpreted and judged.

In studying the tradition it is important to avoid both anachronisms and imposing particular thought patterns or expectations upon authors who contributed to the tradition.¹¹⁵ One important anachronism to avoid is the use of the terms *jus ad bellum* and *jus in bello* in discussing the early tradition; despite their Latinised form, it has been demonstrated by Robert Kolb that these two

¹¹⁵ Quentin Skinner, 'Meaning and Understanding in the History of Ideas', in *Visions of Politics: Regarding Method*, ed. Quentin Skinner, vol. I, III vols. (Cambridge: Cambridge University Press, 2002), pp. 57 - 59.

terms are twentieth century inventions, although some similar terms used in a similar way can be traced back to the nineteenth century.¹¹⁶ One of the important tasks of this chapter is to trace how and why the just war tradition came to be seen as made up of these two components and how the principle of the moral equality of combatants and the independence of the *jus in bello* from the *jus ad bellum* emerged through the processes of definition and redefinition.

The chapter proceeds in four sections; section one introduces the arguments of St Augustine as he sought to reconcile war and military service with the teachings of Christianity. The second section focuses on the developments in canon law in the middle ages and the attempts to regulate violence and the respective powers of the Pope and Emperor. The third section discusses the contributions of Saint Thomas Aquinas and Francisco de Vitoria. The final section studies the development of the ideas of the laws of war in the early modern period. The chapter ends with Vattel as it is with Vattel that the principle of the moral equality of combatants emerges in a recognisably modern form, a form that is subsequently picked up by Walzer, with whom the following chapter begins.

I. Saint Augustine and the Reconciliation of Christianity and War

Saint Augustine of Hippo (354 – 430) was an important and influential churchman and theologian in his own lifetime and has subsequently come to be recognised as one of the most important Fathers of the Church. In large part this is due to his voluminous writings on a wide range of issues, his profound theological knowledge, and his erudition, but his significance also derives from the time at which he was writing, which was a time of change and confusion in both Christendom and the Roman Empire and in the relations between the two. Toleration for Catholicism within the empire only dated from the Edict of Milan of 313 and Catholicism became the official religion of the empire in Augustine's lifetime with the Edict of Thessalonica in 380. As such the church had to adapt to its new-found status as the early Christian attitude of pacifism and withdrawal from public life was no longer compatible with its position. Furthermore, the western half of the Roman Empire was in terminal decline in this period, militarily pressed on all fronts, and with Rome itself being sacked by the Visigoths in 410 and the Vandals steadily driving the Romans out of Africa. Finally, there were several heretical and schismatic movements

¹¹⁶ Robert Kolb, 'Origin of the Twin Terms Jus Ad Bellum/jus in Bello', *International Review of the Red Cross*, no. 320 (1997): 553–62.

challenging the authority of the Church at this time, including the Manicheans (a sect to which Augustine belonged before his conversion), the Donatists, the Pelagians, and the Arians, as well as those reluctant to give up the original pagan religion of Rome.

In short, this conflation of events posed a set of challenges to Christianity which required new theologically based answers and which Augustine was appropriately placed to address. Among the most pressing of these issues was the question of whether it was ever legitimate for a Christian to use force or to serve in the armed forces given the Biblical commandment 'Thou shalt not kill'. The early Christian view was that the use of force, even in self-defence, was always illegitimate. Augustine was not the first to seek to reconcile Christianity with military service, Alex Bellamy has discussed Ambrose's earlier attempts to do so, and nor should it be thought that no Christians had served in the armed forces earlier than this, indeed there is evidence of Christians serving from as early as 173.¹¹⁷ Nevertheless, Augustine was one of the first to systematically deal with this question and, given the military challenges faced by Rome in his lifetime, it took on a new urgency.

Saint Augustine's early writings

One of the earliest examples of Augustine's consideration of the subject is in his 398 *Letter to Publicola*. In this letter Augustine retains the traditional Christian prohibition on the use of force in individual self-defence but he adds an important exception which runs "unless one happens to be a soldier or public functionary acting, not for himself, but in defence of others or of the city in which he resides, if he act according to the commission lawfully given him, and in the manner becoming his office."¹¹⁸ This is a clear and explicit form of status function declaration in which the deontic powers and the right to use force are explicitly linked to an individual in a particular context. Importantly, the context is not defined in terms of the justice of the war but in terms of the public role of the individual and to their relationship to the community.

Two years later in the *Reply to Faustus the Manichean* Augustine expands on his views on war and violence. In Chapter 74 of Book XXII the evils of war are discussed, for Augustine these consist not in the death and material destruction wrought by war but in the internal attitudes it can

¹¹⁷ Alex J. Bellamy, *Just Wars: From Cicero to Iraq* (Cambridge, UK ; Malden, MA: Polity Press, 2006), pp. 23 - 25.

¹¹⁸ St. Aurelius Augustine, 'Letter XLVII, to Publicola (398)', in *The Confessions and Letters of Augustin, with a Sketch of His Life and Work*, ed. Philip Schaff, trans. Rev. Richard Stothert, Second Edition (Peabody, Mass.: Hendrickson Publishers, 1995), p. 293.

inspire, “love of violence, revengeful cruelty, fierce and implacable enmity.” He adds that “it is generally to punish these things . . . that, in obedience to God or some lawful authority, good men undertake wars.”¹¹⁹ The implications of this passage are significant. In terms of the just war tradition as a whole it introduces the idea of war as a semi-judicial process to punish the wicked. Significantly, though, obedience to lawful authority is compared to obedience to God. Chapter 75 is even more emphatic on this point. In the first place it is described as a part of the “natural order” that monarchs have the power to make war when they believe it is advisable and that soldiers should simply “perform their military duties.”¹²⁰ By making this obedience a part of the natural order then obedience to even a non-Christian king becomes comparable with obedience to God. Any ambiguity on this point, however, is removed in the final part of Chapter 75:

For there is no power but of God, who either ordains or permits. Since, therefore, a righteous man, serving it may be under an ungodly king, may do the duty belonging to his position in the State in fighting by the order of his sovereign, –for in some cases it is plainly the will of God that he should fight, and in others, where this is not so plain, it may be an unrighteous command on the part of the king, while the soldier is innocent, because his position makes obedience a duty.¹²¹

This is a fascinating statement as it turns disobedience even to ungodly kings into de facto disobedience to God. Whatever is, according to Augustine, is God’s Will and should therefore be accepted and not resisted. It is also made very clear that participation in an unjust war is not a sin and that it is only those who make the decision who bear moral responsibility for it in the eyes of God. This is also a form of status function declaration in which various deontic powers are granted to different actors, forming part of an overall institution.

Seventeen years later Augustine seems to partially qualify this requirement for absolute obedience. Writing in 417 to Boniface, then a Roman tribune in Africa, regarding the Donatist heresy which had split the church, Augustine argued that if an emperor enacted a law “against the truth of God” it is right to refuse to obey it and that the only laws that should be obeyed are those

¹¹⁹ St. A. Augustine, ‘Reply to Faustus the Manichean (400)’, in *Augustin: The Writings Against the Manicheans, and Against the Donatists*, ed. Philip Schaff, trans. Richard Rev. Stothert, Second Edition (Peabody, Mass.: Hendrickson Publishers, 1995), Book XXII: Ch. 74; p. 301.

¹²⁰ Ibid., Book XXII: Ch. 75; p. 301.

¹²¹ Ibid., Book XXII: Ch. 75; p. 301.

which are “enacted in behalf of truth.”¹²² The example he uses is the Biblical story in which King Nebuchadnezzar passed a law requiring the worship of an idol, Augustine argues that it was right for the pious to refuse to obey this law. Herbert Deane has attempted to reconcile this statement with Augustine’s other demands for absolute obedience. Focussing on the example used in the letter, he has suggested that Augustine believed that laws that were merely unjust should be obeyed, but that God’s commandments, revealed in scripture, take precedence over all human laws and customs. Laws that violated these, like requiring the worship of a false idol, should not be obeyed.¹²³ Whilst this goes some way towards resolving the tension, a lacuna remains regarding military service as the prohibition on killing was also a part of the Decalogue.

The City of God

Augustine attempts to deal with the specific question of the commandment against killing in *The City of God*, his major theological work written between 413 and 426. This was written as a reaction to Alaric’s sack of Rome in 410; many pagans blamed the adoption of Christianity and the concomitant abandonment of the traditional Roman Gods for this calamity. Augustine sought to ensure that the blame for Rome’s sack could not be pinned to the door of the church, whilst avoiding claiming divine protection for Rome, or any earthly community.¹²⁴ In this his argument parallels that in the *Letter to Publicola*, he reiterates the traditional Christian view that the use of force in individual self-defence is prohibited by divine law, but argues that divine authority makes some exceptions to its own laws. Specifically:

[H]e to whom authority is delegated, and who is but the sword in the hand of him who uses it, is not himself responsible for the death he deals. And, accordingly, they who have waged war in obedience to the divine command, or in conformity with His laws, have represented in their persons the public justice or the wisdom of government, and in this capacity have put to death wicked men; such persons have by no means violated the commandment, “Thou shalt not kill.”¹²⁵

¹²² St. Aurelius Augustine, ‘A Treatise Concerning the Correction of the Donatists (417)’, in *Augustin: The Writings Against the Manicheans, and Against the Donatists*, ed. Philip Schaff, trans. Rev. J. R. King, Second Edition (Peabody, Mass.: Hendrickson Publishers, 1995), Ch. 2, 8; p. 636.

¹²³ Herbert A. Deane, *The Political and Social Ideas of St. Augustine* (New York and London: Columbia University Press, 1963), p. 89.

¹²⁴ Janet Coleman, ‘St Augustine’, in *A History of Political Thought: From Ancient Greece to Early Christianity* (Oxford: Blackwell Publishers, 2000), p. 331.

¹²⁵ St. Aurelius Augustine, ‘The City of God (426)’, in *Augustin: City of God, Christian Doctrine*, ed. Philip Schaff, trans. Rev. Marcus Dods, Second Edition (Peabody, Mass.: Hendrickson Publishers, 1995), Book I: Ch. 21; p. 15.

This reiterates the earlier status function declaration in which the deontic power of killing is granted to specific individuals in the context of their relationship to the state but it simply raises the question anew; what if those who are killed are not “wicked men”? The puzzle deepens as the examples used by Augustine to illustrate his comment include Abraham’s willingness to sacrifice Isaac, Jephthah’s killing of his own daughter in order to fulfil his vow to God, and Samson’s killing himself along with his enemies.¹²⁶ In all of these cases those killed were not wicked. In a later passage Augustine writes that:

The soldier who has slain a man in obedience to the authority under which he is lawfully commissioned, is not accused of murder by any law of his state; nay, if he has not slain him, it is then he is accused of treason to the state, and of despising the law.¹²⁷

This passage makes no distinction between the killing of wicked men and innocent men and does not suggest that it would be right to refuse to do the latter. Richard Hartigan has suggested that this is because Augustine believed that there would not regularly be innocent people among the enemy population due to the “extremely intimate relationship which exists between individual and social morality”.¹²⁸ This seems highly unlikely, however; the main theological message of *The City of God* is that the members of the heavenly city are distributed across the world and cannot be reduced to any individual kingdom, or even to the Church itself, not least because of the importance of conversion and redemption in Augustine’s theology. Many of those who are not Christian and oppose themselves to the church will, in due course, be converted and will gain their place in the heavenly city, and many of those who profess to be Christian are actually of the earthly city. Hartigan’s other suggestion is far more plausible. For Augustine death is merely a physical evil which everyone will suffer at some point, death in this life is not to be feared by the faithful as the heavenly city awaits them, it is only the ungodly who need to fear death as damnation awaits them.¹²⁹

¹²⁶ Ibid., Book I: Ch. 21; p. 15.

¹²⁷ Ibid., Book I: Ch. 26; p. 17.

¹²⁸ Richard Shelly Hartigan, ‘Saint Augustine on War and Killing: The Problem of the Innocent’, *Journal of the History of Ideas* 27, no. 2 (1966): 195–204, p. 202.

¹²⁹ Ibid., p. 203.

The final interesting passage in *The City of God* is where Augustine writes that Christians “are bound by no laws of war, nor military orders, to put even a conquered enemy to the sword,” even if that enemy had sinned against them.¹³⁰ This, too, qualifies the absolute obedience that Augustine elsewhere calls for. Hartigan finds it incongruous to show mercy to those who have incurred moral guilt; however, the possibility of redemption helps explain this.¹³¹ To kill those who have been defeated is to take God’s judgement into one’s own hands and to deny the possibility of the example of mercy leading to the conversion of the wicked. Furthermore, to kill not out of necessity is to demonstrate the “love of violence, revengeful cruelty” which elsewhere Augustine had condemned as the true evils of war.¹³²

Augustine’s writings span the entire terrain of the just war tradition and are the basis for much of its subsequent development. In particular, he introduces the idea of the soldier as a specific, public, and religiously sanctioned identity, with specific rights and obligations and as distinct from non-combatants. He also recognises war as a sphere of activity with its own rules and which is distinct from other forms of violence. His writings introduce the importance of the nature of the authority that can wage war, the need for a just cause, and the importance of the internal disposition of those fighting, their intention. He also makes it clear that the conduct of war is governed by rules and that even unjust enemy combatants have rights which must be respected. As subsequent sections will illustrate, it was these ideas and concepts and their definition and redefinition over time which constitute the just war tradition.

II. From Peace Canons to Canon Law

The Western Roman Empire continued its decline following Augustine’s death, eventually falling to the barbarians in 476. Subsequent centuries saw the rise and decline of the Carolingian dynasty and the translation of the imperial title to the Ottonian dynasty of Eastern Francia. The new Imperial dynasty was involved in numerous disputes with the papacy, as each sought to assert its power against the other, and this led to a significant development in the growth and sophistication of canon law and political theory, with important implications for the just war tradition. This

¹³⁰ Augustine, ‘The City of God’, Book I: Ch. 24; p. 17.

¹³¹ Hartigan, ‘Saint Augustine on War and Killing’, p. 201.

¹³² Augustine, ‘Contra Faustum’, Book XXII: Ch. 74; p. 301.

section explores these developments; the first part considers the instability following the decline of the Carolingians and the establishment of the Ottonian dynasty. In this period a lack of central authority and conflict between the empire and the papacy produced a surge of writing attempting to establish principles to control the use of violence and to determine the bounds of the authority of the state and the church. The second part will focus on the development of canon law by Gratian.

Canons and conflict

The collapse of central control and authority in Western Francia following the demise of the Carolingian dynasty resulted in power devolving to the lowest level, namely the local *milites* or knights, the lords who dominated the area immediately surrounding their own castle and preyed upon one another, the peasantry, and the church to extend their domain. The social chaos and instability and the threat to the church and her possessions that this posed led to mass religious movements which sought to impose some restraint on the actions of the *milites*.¹³³ In terms of the development of the just war tradition and the constitution of war as an institution the most important of these was the Peace of God movement.

The earliest manifestation of this movement occurred in 975 when Bishop Guy of Le Puy convoked a meeting of local religious leaders, lay lords, *milites*, and the people. The meeting called upon the *milites* to respect the possessions and lives of the church and the peasants. When the *milites* resisted these calls two of Bishop Guy's powerful relatives, who had been waiting with their forces nearby, intervened and compelled the recalcitrant *milites* to accept the restraints.¹³⁴ This use of force is significant as it demonstrates that the movement was about the legitimisation of some uses of force and the delegitimisation of other uses, rather than being opposed to all violence. In other words, it sought to institutionalise and regulate the use of force by defining the specific deontic powers of the various groups within society.

The first peace council with explicit peace canons and religious punishment for violators was the Council of Charroux, in 989. This council reiterated the demand for protection of churches and church property, ecclesiastics, and unarmed peasants and their possessions and threatened

¹³³ Georges Duby, 'Laity and the Peace of God', in *The Chivalrous Society*, trans. Cynthia Postan (London: Edward Arnold, 1977), pp. 124 - 125.

¹³⁴ James Turner Johnson, *The Quest for Peace: Three Moral Traditions in Western Cultural History* (Princeton: Princeton University Press, 1987), pp. 79 - 80.

violators with excommunication.¹³⁵ Numerous councils were held throughout Western Francia in the years leading up to the millennium and, following the example of Le Puy, these were huge public gatherings, attracting crowds of common people, local lords, the religious figures of the region, and the monks from nearby monasteries. In order to heighten the religious nature and sanctity of the councils and their canons, all of the churches, monasteries, and cathedrals of the region would bring their relics to be prominently displayed for pilgrims seeking miracles.¹³⁶ It is important to note that the councils did not deny the right of *milites* to fight amongst themselves and to resolve their differences through force; nor did it deny their right to judge and punish those under their control. As such it reified the divisions between knights and peasants “*milites et rustici*” as a moral distinction and acted as a status function declaration in which each class, *milites*, *rustici*, and clerics gained certain deontic powers with respect to one another.¹³⁷ It also redefined those entitled to use force as the context which entitled them to use force became their membership of the class of *milites* and was hereditary, rather than being based on their relationship to a superior authority.

The instability of Western Francia was in contrast to Eastern Francia, where the translation of the Imperial title to the Ottonian dynasty created a more stable and hierarchical society but one where the power of the Empire led to frequent clashes with the papacy as each sought to assert their powers vis-à-vis the other. The main manifestation of the conflict was the Investiture Contest (1075 – 1122) regarding the right of the emperor to make religious appointments and to ‘invest’ them with the signs of the religious office. Much of the literature produced at this time is of only peripheral importance to the just war tradition, but there were a few ideas that had an important effect.

The most significant document in this regard is the *Dictatus Papae* of 1075.¹³⁸ This is simply a list of twenty-seven statements regarding papal power and religious issues. It is generally

¹³⁵ R. G. D. Laffan, ed., ‘Truce of God, Proclaimed at the Council of Narbonne, August 25, 1054’, in *Select Documents of European History, 800-1492* (New York: Henry Holt, 1929), p. 19.

¹³⁶ Thomas Head and Richard Landes, ‘Introduction’, in *The Peace of God: Social Violence and Religious Response in France around the Year 1000*, ed. Thomas Head and Richard Landes (Ithaca and London: Cornell University Press, 1992), pp. 4 - 6.

¹³⁷ Duby, ‘Laity and the Peace of God’, pp. 128 - 129.

¹³⁸ Gregory VII, ‘The Dictatus Papae (1075)’, in *The Crisis of Church and State 1050-1300 with Selected Documents*, ed. Brian Tierney and John B. Morrall, trans. Sidney Z. Ehler (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1964), pp. 49 - 50.

believed to be a set of chapter headings for a collection of canons which was never completed, so the precise reasoning behind each claim is missing. Nevertheless, Brian Tierney believes that it reflects Gregory VII's considered views and the claims were reiterated in both of his depositions of Emperor Henry IV and in a letter to Bishop Hermann of Metz.¹³⁹

For present purposes there are two particularly important claims. Number twelve states that the pope may depose emperors and number twenty-seven states that "[t]he pope may absolve subjects of unjust men from their fealty."¹⁴⁰ These were both highly controversial claims and were central to the political debates of the period. The first claim provoked a large amount of debate but was never widely accepted outside of a small group of canonists, it reflects an unsuccessful status function declaration as it never contributed to the just war tradition or to the vocabulary and meanings with which war was judged. The second, however, was more significant; it is important to realise that at this time the swearing of oaths of fealty and fidelity was a hugely significant part of the social fabric.¹⁴¹ The oath bound a free vassal to his overlord and imposed obligations upon both; crucially the vassal was obliged to render military service to their lord. An oath, moreover, had a religious significance that other forms of agreement lacked. It was made in the sight of God and neither party could refuse the obligations which they had incurred without both dishonour in the eyes of society and sinning in the eyes of God and the Church, which was why only the Church could absolve an individual from the obligations of an oath.¹⁴² The importance of oaths as a particular and distinct form of obligation, imbued with ideas of the sacred, will be returned to in later chapters. For present purposes it is important to note that the right to absolve this oath of fealty, therefore, meant that the pope could, in theory, render any ruler powerless and thereby indirectly depose him. Indeed, this was precisely the implication that was accepted by several

¹³⁹ Brian Tierney, *The Crisis of Church and State 1050-1300 with Selected Documents* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1964); Gregory VII, 'Deposition of Emperor Henry V by Pope Gregory VII (1076)', in *The Crisis of Church and State 1050-1300 with Selected Documents*, ed. Brian Tierney, trans. E. Emerton (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1964); Gregory VII, 'Second Deposition of Emperor Henry V by Pope Gregory VII (1080)', in *The Crisis of Church and State 1050-1300 with Selected Documents*, ed. Brian Tierney, trans. Ephraim Emerton (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1964); Gregory VII, 'Letter of Gregory to Bishop Hermann of Metz (1081)', in *The Crisis of Church and State 1050-1300 with Selected Documents*, ed. Brian Tierney, trans. E. Emerton (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1964); p. 46 and pp. 60 - 73.

¹⁴⁰ Gregory VII, 'Dictatus Papae', pp. 49 - 50.

¹⁴¹ Joseph Canning, *A History of Medieval Political Thought, 300-1450* (London and New York: Routledge, 1996), pp. 60 - 64.

¹⁴² Janet Coleman, 'Medieval Political Ideas and Medieval Society', in *A History of Political Thought: From the Middle Ages to the Renaissance* (Oxford: Blackwell Publishers, 2000), p. 17.

subsequent authors, even whilst they denied the right of the pope to directly depose the emperor.¹⁴³ The ability of the pope to excommunicate a ruler and to absolve their subjects from fealty meant that obedience to secular authority, which had hitherto been morally required, could become morally culpable and itself carried the penalty of excommunication.¹⁴⁴

The importance of this claim stems in part from its integration into canon law by Gratian and by Aquinas' concurrence that this was a power of the pope, both discussed below. It was also claimed by subsequent popes in later political debates, for example Pope Innocent IV's deposition of Emperor Frederick II in 1245.¹⁴⁵ This reflected a redefinition of the institution of war by changing the deontic powers and the context in which they applied of the free vassals, the Pope, and secular authorities.

Gratian: harmony and discord

In the same period as this and as a result of many of the debates, arguments, and claims, there was a growth in the volume and sophistication of canon law. Amongst the canonists the most influential was Gratian and the most important contribution was his *Harmony of Discordant Canons* (*Concordia discordantium canonum*), also known as the *Decretum*, which formed the basis for canon law until the early twentieth century. Gratian's aim in this was to collate all of the extant church law in the form of canons, the writings of the Church Fathers, papal and conciliar decrees, the Bible, and Justinian's Digest, and to 'harmonise' them by resolving apparent contradictions through a dialectical method.¹⁴⁶

Gratian himself is deeply mysterious, there is no reliable evidence about the dates or place of Gratian's birth, life, or death, other than suggestions that he may have been a Camoldolese monk and a teacher of law, probably in Bologna.¹⁴⁷ The most recent scholarship has demonstrated that the *Decretum* was originally published in two versions, one shorter version which was published no later than 1139, and another longer version, with much more use of Roman Law, which is

¹⁴³ Hugoccio, 'Commentary on Dist. 96 C. 6 (1189 - 1191)', in *The Crisis of Church and State 1050-1300 with Selected Documents*, ed. and trans. Brian Tierney (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1964), pp. 122 - 123.

¹⁴⁴ Innocent IV, 'Sentence of Deposition Promulgated by Innocent IV in the General Council of Lyons (1245)', in *The Crisis of Church and State 1050-1300 with Selected Documents*, ed. Brian Tierney and John B. Morral, trans. Sidney Z. Ehler (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1964), p. 144.

¹⁴⁵ *Ibid.*, p. 144.

¹⁴⁶ Tierney, *The Crisis of Church and State*, p. 116.

¹⁴⁷ Katherine Christensen, 'Introduction', in *The Treatise on Laws (Decretum DD. 1-20), with the Ordinary Gloss* (Washington, D.C.: The Catholic University of America Press, 1993), p. x.

known to have been circulating by 1150; it has even been suggested that these versions may be the work of different authors.¹⁴⁸ As well as Gratian's main text, the *Decretum* is usually published with what is known as the 'Ordinary Gloss' which began as marginal notes written by other scholars referring to similarities elsewhere or explicating a point or word. The most significant of these glossators was Johannes Teutonicus who compiled the Ordinary Gloss sometime before 1215.¹⁴⁹

The first section of the *Decretum*, *Decretals 1-20*, is known as the *Treatise on Laws* and in it Gratian discusses the different types and sources of law. Amongst these is the law of nations; this includes "war, captivity, servitude" and here there is a gloss on the word 'servitude' which has revolutionary implications. It states that:

[I]f a war is just, one captured becomes the slave of his captor. C. 23 q. 5 c. 25. And accordingly, such a captive sins if he escapes from his master. C. 17 q. 4 c. 37. But if the war is not just, then it is permitted for captives to flee if they can. Dig. 49.15.26 (49.15.25).¹⁵⁰

This is one of the earliest suggestions in the just war tradition that there is a difference in the moral condition of soldiers fighting in just and unjust wars, with the concomitant implication that obedience to secular authority is not absolute and may even be morally culpable. Unfortunately, neither of the two canons referred to in the gloss exist in an English translation, and the references to the Digest are misleading as there is no reference to the justice of war in either of the chapters cited or, indeed, in the Digest as a whole. Whilst both refer to some of the technicalities of postliminy, the rules governing the return of those taken prisoner, they do not make a distinction between those captured in just and unjust wars.¹⁵¹

Causa XXIII is a lengthy *causa* dealing with the use of force; the text is slightly ambiguous but it does seem to be the case that again a moral difference is drawn between those fighting just

¹⁴⁸ Anders Winroth, *The Making of Gratian's Decretum* (Cambridge: Cambridge University Press, 2000), pp. 175 - 192.

¹⁴⁹ Gratian, 'Gratian and the Decretists (Twelfth Century): War and Coercion in the *Decretum* (1150)', in *The Ethics of War: Classic and Contemporary Readings*, ed. Gregory M. Reichberg, Henrik Syse, and Endre Begby (Malden, MA.; Oxford: Blackwell Publishing, 2006), p. 104.

¹⁵⁰ Gratian, *The Treatise on Laws (Decretum DD. 1-20), with the Ordinary Gloss (1150)*, trans. Augustine Thompson O. P. (Washington, D.C.: The Catholic University of America Press, 1993), gloss f to 'servitude' in D. 1 c. 9; p. 7.

¹⁵¹ Justinianus, *The Digest of Justinian (533)*, trans. Alan Watson, *Corpus Juris Civilis Digesta* (Philadelphia: University of Pennsylvania Press, 1985), 49.15.25 and 49.15.26; p. 892.

and unjust wars. Several of the canons follow Augustine in requiring obedience to authority and requiring that soldiers kill when ordered to do so, noting that it would be insubordination to refuse,¹⁵² however at one point Gratian considers whether heretics could be deprived of both their own property and their churches' property. He argues that as heretics possess things unrightfully, they can legitimately be taken away by Catholics.¹⁵³ The gloss on this passage adds that "[n]ot only heretics, but all enemies may be despoiled of their goods, provided the war is just."¹⁵⁴ This, too, seems to suggest that the treatment of those on opposing sides depends upon the justice of their cause, and that the unjust are deserving of some form of punishment. Gratian's *Decretum*, therefore, is a status function declaration in which combatancy, and the deontic powers associated with it, exist in a context defined in part by the justice of the cause, thereby redefining what it meant to be a soldier as well as redefining the institution of war.

The canonists of medieval Europe made a significant contribution to the just war tradition and the concept of combatancy. The identities of combatants, or *milites*, and other social groups became embedded in an overall religious cosmology and social order with defined deontic powers and specified contexts in which they could be exercised. In this period the powers of other actors and identities were also specified, including those of the Pope. Amongst these powers was the right to excommunicate others, including emperors, and to absolve their vassals of loyalty. This provided a way to limit the rights of combatancy to those on a particular side in a war and ultimately led to the idea that those participating in a just war had different, and greater, rights than those against whom they were fighting who faced not only punishment in the next world as a result of excommunication but could also be punished in this world.

III. Scholasticism, Justice, and War

The later middle ages saw the rise of the first universities and the development of scholasticism as a method of study. Theologians using the scholastic approach made important contributions to a number of fields, including questions of justice and war which in this period began to be treated in a much more systematic and sophisticated way. This section will consider the contributions of

¹⁵² Gratian, 'Gratian and the Decretists' C. 23 q. 4 c. 36 & C. 23 q. 5 c. 13; p. 115 and pp. 117 - 118.

¹⁵³ Ibid., C. 23 q. 7; pp. 122 - 123.

¹⁵⁴ Ibid., gloss a to 'but now' in C. 23 q. 7; pp. 122 - 123.

scholasticism to the just war tradition by exploring the work of its two leading proponents, Saint Thomas Aquinas and Francisco de Vitoria.

Aquinas: Doctor Angelicus

Saint Thomas Aquinas (1225 – 1274) is perhaps the best known and most influential figure in the just war tradition and many of his concepts and ideas have become the standard view within the tradition. Aquinas used the dialectical method popular among scholastics in order to attempt to resolve apparent contradictions between various religious authorities. He was also heavily influenced by the newly recovered works of Aristotle and he attempted to reconcile Aristotelian philosophy with Christianity.¹⁵⁵ Despite his subsequent influence on Catholic teaching he was not an entirely uncontroversial figure in his own time, with his views facing much opposition and even being proscribed after his death by the Bishop of Paris.¹⁵⁶

There are three particularly significant and lasting contributions of Aquinas to the just war tradition. The first was his answer to the question of whether it was always sinful to wage war.¹⁵⁷ In arguing that it was not he detailed the requirements necessary for a war to be just and these have since become the central criteria of what is now referred to as the *jus ad bellum*. Aquinas articulated three criteria, all of which were necessary. The first was “the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private person to declare war”. The second was “a just cause . . . namely that those who are attacked should be attacked because they deserve it on account of some fault”. Finally, “it is necessary that the belligerents should have a right intention, so that they intend the advancement of good, or the avoidance of evil”.¹⁵⁸ Whilst these principles of legitimate authority, just cause, and right intention all appear in Augustine, Aquinas’ formulation of them as distinct but equal criteria, all of which must be satisfied in order for a war to be just, remains at the core of ideas of the *jus ad bellum* to the present. By specifying the requirements for a war to be just in this way it also makes it possible to think about the relationship between these principles, both individually and collectively, and the rights

¹⁵⁵ Janet Coleman, ‘St Thomas Aquinas’, in *A History of Political Thought: From the Middle Ages to the Renaissance* (Oxford: Blackwell Publishers, 2000), pp. 81 - 84.

¹⁵⁶ *Ibid.*, p. 81.

¹⁵⁷ St. Thomas Aquinas, *Summa Theologica: First Complete American Edition in Three Volumes (1274)*, trans. Fathers of the English Dominican Province (New York: Benziger Brothers, Inc., 1947), IIa IIae: Q. 40, Art. 1.

¹⁵⁸ *Ibid.*, IIa IIae: Q. 40, Art. 1.

and responsibilities of combatants. As will be shown in subsequent chapters, understanding this relationship is at the core of contemporary debates about combatancy.

The second important contribution is Aquinas' justification for killing in self-defence. This introduces the principle of what later became known as double effect, which has been of immense significance in the subsequent just war tradition. He argues here that moral actions are judged according to the intention, rather than what is incidental. If the intention is to save one's own life and slaying the attacker is necessary but incidental then self-defence is legitimate, however if the force used is disproportionate or if the intention is to kill, rather than merely defend, then the act is illegitimate.¹⁵⁹ Aquinas deals with the Augustinian prohibition of killing in self-defence by arguing that Augustine was only referring to cases "where one man intends to kill another in order to save himself from death."¹⁶⁰ This act of sophistry allows Aquinas to reconcile Augustine's views with his own, but it is a flawed interpretation of Augustine, whose prohibition on killing in self-defence is absolute.

The final interesting contribution of Aquinas to the just war tradition was his discussion of the obedience of soldiers in his discussion on apostasy. Here he agrees with Gregory VII's claim that subjects of excommunicated rulers are absolved from their allegiance and he makes clear that this extends to soldiers.¹⁶¹ In this way Aquinas combined the ideas from the Gregorian reform with those of Gratian's *Decretum*. The legitimacy of combatancy was determined by the justice of the war but those who were in a subordinate position could be excused unless their superior had been excommunicated; ensuring that the papacy retained a say in the determination of who may and may not participate in combat.

Vitoria: the innocent and the ignorant in war

Two-and-a-half centuries after Aquinas, the next major figure in the development of the just war tradition was Francisco de Vitoria. Vitoria held the Prime Chair in Theology at Salamanca from 1526 and was at the heart of the revival of scholasticism at the time. He made a number of important contributions to the just war tradition, in particular his discussion of excuses for

¹⁵⁹ *Ibid.*, IIa IIae:Q. 64, Art. 7; p. 1471.

¹⁶⁰ *Ibid.*, IIa IIae:Q. 64, Art. 7; Rep. Obj. 1; p. 1471.

¹⁶¹ *Ibid.*, IIa IIae:Q. 12, Art. 2; pp. 1229 - 1230.

participation in an unjust war and his development of the principle of double effect which sought to understand how to apply the moral principles to the realities of war.

In 1530 he delivered a *relection* on the subject of homicide and in 1536 he delivered a commentary on Aquinas' *Summa Theologica* IIa IIae Q. 64 which referred to the same subject. Much of what he said in the *relection* simply followed the Thomistic line, however in the commentary Vitoria expands on some of Aquinas' remarks in an interesting way.¹⁶² One of the most significant contributions he makes is his development of the principle of double effect. He applies this much more widely to acts of war, beyond Aquinas' limited use of it to justify killing in self-defence. Vitoria argues that it is not illegitimate if women and children are killed as a foreseen but unintended effect of otherwise legitimate military action, for example in sieges.¹⁶³ Three years later, in *On the Law of War*, he repeated this point and added that these deaths were only legitimate if the military benefits of the action outweighed the evil effects of killing the innocent.¹⁶⁴ Whilst he adds the caveat that this is only legitimate if the war itself is just, his redefinition of this concept is crucial to the subsequent development of the just war tradition as it provides guidance for the application of the principles of the just war tradition to the practice of war.

He also considers the question of killing the enemy, some amongst whom may be innocent. This is an interesting comment as he is explicitly referring to "innocent attackers" and not to non-combatants more generally.¹⁶⁵ Vitoria rejects the idea that all enemies can be presumed guilty, at least among wars between Christians, he states that in wars against non-Christians all adult men can be judged to be guilty. In the situation of a war between Christians he argues that combatants may not be aware of the justice or otherwise of the war and that they are "obliged" to fight as "if they would not go, they would commit mortal sin." As their innocence is a result of an accidental condition, namely their ignorance of the justice of the war, and they attack "like a guilty enemy", it is legitimate to kill them.¹⁶⁶ This idea is further developed in one of his most famous works, *De*

¹⁶² Francisco de Vitoria, 'Relection on Homicide (1530)', in *On Homicide and Commentary on Summa Theologiae IIa-IIae Q. 64 (Thomas Aquinas)*, ed. and trans. John P. Doyle (Milwaukee: Marquette University Press, 1997).

¹⁶³ Francisco de Vitoria, 'Commentary on Summa Theologiae IIa-IIae Q. 64 (Thomas Aquinas) (1536)', in *On Homicide and Commentary on Summa Theologiae IIa-IIae Q. 64 (Thomas Aquinas)*, ed. and trans. John P. Doyle (Milwaukee: Marquette University Press, 1997), p. 191.

¹⁶⁴ Francisco de Vitoria, 'On the Law of War (1539)', in *Francisco de Vitoria: Political Writings*, ed. and trans. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), Q. 3, Art. 1; pp. 315 - 316.

¹⁶⁵ Vitoria, 'Commentary on Summa Theologiae IIa-IIae Q. 64 (Thomas Aquinas)', p. 189.

¹⁶⁶ *Ibid.*, p. 189.

Indis, dealing with the relations with the inhabitants of the New World. He argues here that even in a just war the enemy may be innocent as a result of ‘invincible ignorance’. This is defined as when “a man has taken every care humanly possible to find out the truth, even if he happens to be otherwise in a state of sin”, this is contrasted to vincible ignorance “which must be accompanied by some negligence to do with the particular matter in hand; for example a refusal to listen, or a refusal to believe when one has heard.”¹⁶⁷ This, too, reflects an attempt to provide practical guidance and to understand the reality of war.

His final major contribution to the just war tradition was *On the Law of War*. The first notable feature of this is the way in which he divides it up into four questions. The first is whether it is lawful for a Christian to wage war and the second regards on whose authority it may be waged. The third and fourth are the most interesting however; the third considers what the causes of a just war are and the fourth considers what Christians may lawfully do against enemies.¹⁶⁸ These last two questions separate the justice of the war and the justice of conduct within war in a way that has since become the norm within the just war tradition. The most important part of this *relection* is his consideration of when there are doubts about the justice of a war. His first statement on the matter is that “*if the war seems patently unjust to the subject, he must not fight, even if he is ordered to do so by the prince.*” In this case the prince sins by declaring war unjustly, and the subjects sin by participating.¹⁶⁹ This strong statement is subsequently moderated considerably. He emphasises that those involved in decision making must examine the question very carefully and would sin by supporting an unjust war, however those not involved in making the decision may rely on the judgement of their superiors as the prince may not be able to explain the reasons for war to everyone.¹⁷⁰ It is only if the reasons that the war is unjust are so powerful and clear that they can be perceived by everyone that it is a sin to take part.¹⁷¹ However he then argues that even if a subject has doubts about the justice of the war he is obliged to follow their prince to battle anyway as fighting with doubts is safer than risking betraying the commonwealth to the enemy. This is justified as there is a difference between doubting whether one should act, in which case one should

¹⁶⁷ Francisco de Vitoria, ‘On the American Indians (De Indis) (1539)’, in *Francisco de Vitoria: Political Writings*, ed. and trans. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), Q. 2, Art. 4, § 37; p. 26.

¹⁶⁸ Vitoria, ‘On the Law of War’, p. 295.

¹⁶⁹ *Ibid.*, Q. 2, Art. 2, § 22; p. 307; original emphasis.

¹⁷⁰ *Ibid.*, Q. 2, Art. 2, § 25; p. 308.

¹⁷¹ *Ibid.*, Q. 2, Art. 2, § 26; pp. 308 - 309.

not, and doubting the justice of the war, which is independent from taking part in it and is not a reason for refusing to act.¹⁷² This final argument is significant as it separates the justice of acting from the justice of the cause for which one is acting and it is this relationship between the justice of individual action and the justice of the overall cause which is at the heart of the contemporary debate on the moral equality of combatants. These three separate arguments, made over the space of just a few pages, make it difficult to discern exactly what Vitoria's views on the matter were, but he also raises most clearly one of the most problematic moral questions in the just war tradition.

The contributions of Aquinas and Vitoria reflect the increasing sophistication of the just war tradition, with its self-conscious referencing of earlier authors, its definition and redefinition of particular ideas and concepts, and its development in parallel with social and political changes. By the time of Vitoria justice and war was seen as a legitimate object of study in its own right, rather than only as part of a broader work, reflecting its growing importance and its full emergence as an independent tradition. The definition and redefinition of terms that occurred in this period was also the reiteration of status function declarations and contestation over the precise definitions of which individuals had which deontic powers in which circumstances. Amongst the core agreements that defined the tradition were the principle that war must have a just cause and be a response to wrongdoing, that only those charged with defence of the public realm could make war, that there was a morally meaningful distinction between soldiers and non-combatants, and that whilst it was wrong to harm non-combatants it was also necessary to have guidelines that were realistic and practical.

IV. The Just War Tradition and International Law

The sixteenth century marked a turning point in the just war tradition. Whereas it had traditionally been dominated by Catholic theologians from southern Europe, after the sixteenth century the major contributions to the tradition came from Protestant lawyers from northern Europe. Of these, by far the most influential was Hugo Grotius, whose *De Iure Belli ac Pacis* is the subject of the first part of this section. Other significant contributions to the tradition came from Samuel Pufendorf and Christian von Wolff however the most significant subsequent contribution came from Emer de Vattel, whose work will be the subject of the second part of this section.

¹⁷² Ibid., Q. 2, Art. 3, § 31; pp. 311 - 312.

Grotius and the common law among nations

Hugo Grotius (1583 – 1645) had a huge influence on the development of the law of nations and the just war tradition. Despite his influence on subsequent scholars, and perhaps one of the causes of his influence, his work is often ambiguous and seemingly contradictory. The difficulties in interpreting his work have been famously summed up by Lauterpacht, who writes that Grotius states:

[O]ften with regard to the same question, what is the law of nature, the law of nations, divine law, Mosaic law, the law of the Gospel, Roman law, the law of charity, the obligations of charity, the obligations of honour, or considerations of charity. But we often look in vain for a statement as to what is *the* law.¹⁷³

The deeper significance and importance of Grotius' work, which Lauterpacht alludes to, is in his differentiation of the different types and sources of law, and his recognition of the potential conflicts between them. His fame largely rests on his major work *De Iure Belli ac Pacis* which was first published in 1625. The Prolegomena to the text introduces and sets up the argument of the rest of the work. In it Grotius argues that "war should only be undertaken in the pursuit of rights, and once under way should be conducted according to the measure of law and honesty (*fides*) . . . with no less scrupulousness (*religio*) than we are accustomed to in courts."¹⁷⁴ The idea that war is governed by law is reinforced by his claim that there is a "common law (*ius commune*) among nations which applies to war and its conduct."¹⁷⁵ The original Latin text here reads "*ius commune quod et ad bella et in bellis*".¹⁷⁶ This may not be the immediate source of the terms *jus ad bellum* and *jus in bello* but it suggests that this way of thinking about war, as involving two sets of judgements, was becoming current. This is also suggested in the structure of the work as a whole: Book I discusses the nature of war and the distinction between public and private war; Book II considers the causes that give rise to war; and Book III deals with the conduct of war. The

¹⁷³ Hersch Lauterpacht, 'The Grotian Tradition in International Law', *The British Year Book of International Law* 23 (1946): 1–53, p. 5.

¹⁷⁴ Hugo Grotius, 'Prolegomena to the First Edition (1625)', in *The Rights of War and Peace*, ed. and trans. Richard Tuck, vol. III, III vols. (Indianapolis: Liberty Fund, 2005), p. 1752.

¹⁷⁵ *Ibid.*, p. 1753.

¹⁷⁶ Hugo Grotius, *De Iure Belli Ac Pacis Libri Tres (1631)* (Aalen: Scientia Verlag, 1993), p. 17.

organisation of the work itself reflects a particular understanding of the different components of the just war tradition as well as of the way in which they were related.

As mentioned earlier, one of Grotius' significant contributions was his discussion of the various types and sources of law. Among these he includes the idea of natural rights, which are the dictates of right reason. These acts are obligatory or forbidden in themselves, due to their own nature, and cannot be changed even by God. This differs from the voluntary divine right which can be changed by God.¹⁷⁷ As well as the voluntary divine law, there is also a voluntary human law, which is derived from human will and which includes the law of nations.¹⁷⁸

He argues that according to the law of nature "tis the first Duty of every one to preserve himself in his natural State, to seek after those things which are agreeable to Nature, and to avert those which are repugnant."¹⁷⁹ Significantly he adds in Book III that this right "does not properly arise from the other's Crime, but from the Prerogative with which Nature has invested me, of defending myself."¹⁸⁰ That self-defence is based on our own right of self-preservation and "not from the Injustice or Crime of the *Aggressor*" is important as the right of self-defence exists even when the attacker is not morally culpable. As example of this Grotius mentions being attacked by someone who is insane, who is mistaken, or "*a Soldier who carries Arms with a good Intention*".¹⁸¹

The right of self-defence also applies to states, which can wage war in defence of their rights. Whilst it is the law of nature which distinguishes between just and unjust war, the law of nations distinguishes between public and solemn war, fought between sovereigns on each side, private war, fought between individuals, and mixed war, fought between public and private actors on opposing sides.¹⁸² According to the law of nature, a war is "criminal, if begun without *just Foundation*" and those against whom a just war is waged do not have a right to lawfully defend themselves, as to do so would be equivalent to a criminal defending themselves against officers of justice.¹⁸³ As such he argues that "if they have Orders given them to take up Arms, as is usual,

¹⁷⁷ Hugo Grotius, *The Rights of War and Peace (1631)*, trans. Jean Barbeyrac, vol. I, III vols. (Indianapolis: Liberty Fund, 2005), Ch. I, X. 2; pp. 151 - 153.

¹⁷⁸ *Ibid.*, Ch. I, XIII; p. 162.

¹⁷⁹ *Ibid.*, Ch. II, I. 1; p. 180.

¹⁸⁰ Hugo Grotius, *The Rights of War and Peace (1631)*, trans. Jean Barbeyrac, vol. III, III vols. (Indianapolis: Liberty Fund, 2005), Ch. I, II. 1; p. 1186.

¹⁸¹ Hugo Grotius, *The Rights of War and Peace (1631)*, trans. Jean Barbeyrac, vol. II, III vols. (Indianapolis: Liberty Fund, 2005), Ch. I, III; p. 397; original emphasis.

¹⁸² Grotius, *The Rights of War and Peace: I*, Ch. III, I - IV; pp. 240 - 250.

¹⁸³ Grotius, *The Rights of War and Peace: II*, Ch. I, I. 3 and XVII. 1; p. 392 and pp. 417 - 418.

then if it plainly appears that the War is unlawful, it is their Duty not to meddle in it” because “*we should obey GOD rather than Man.*”¹⁸⁴ He also argues that a war cannot be just on both sides, although through invincible ignorance it may be free of moral culpability, and that according to the law of nature the just side has greater rights in war than the unjust.¹⁸⁵

All of this notwithstanding, he argues that according to the law of nations “all Wars, declared in Form . . . shall be accounted lawful, as to the outward Effects or Consequences of them.”¹⁸⁶ He adds:

Therefore in this Sense it is lawful for one Enemy to hurt another, both in Person and Goods, not only for him that makes War on a just Account, and does it within those Bounds which are prescribed by the Law of Nature, as we have said in the beginning of this Book, but on both Sides, and without Distinction; so that he cannot be punished as a Murderer, or a Thief.¹⁸⁷

He goes on to describe the killing of enemies in war as a “Right of War” in what is possibly the first legal formulation of what is now termed the combatants’ privilege.¹⁸⁸ This right does not, he continues, make the killing by those fighting an unjust war innocent, instead it is a permission which provides impunity for the action.¹⁸⁹ This redefines what it means to be a combatant by changing the deontic powers associated with the role. Grotius also wrote that the use of mercenaries is prohibited as “there is no Course of Life more abominable and to be detested, than that of mercenary Soldiers” and they do not benefit from this impunity.¹⁹⁰ This is an important development as it demonstrates that there was understood to be a moral difference between soldiers and mercenaries and it makes clear that the deontic powers of the soldier do not apply to mercenaries. In other words, the context in which an individual gained the deontic powers of the soldier was defined not in terms of the justice of the war but in terms of a specific form of relationship with the state, a form which excluded purely pecuniary relationships.

What is significant in Grotius is that impunity for participation is universalised and becomes a principle of the law of nations. Previous authors like Aquinas and Vitoria had detailed

¹⁸⁴ Ibid., Ch. XXVI, III. 1; pp. 1167 - 1168; original emphasis.

¹⁸⁵ Ibid., Ch. II, X; p. 437.

¹⁸⁶ Ibid., Ch. XVII, XIX; p. 893.

¹⁸⁷ Grotius, *The Rights of War and Peace: III*, Ch. IV, III; p. 1275.

¹⁸⁸ Ibid., Ch. IV, V. 1; pp. 1277 - 1279.

¹⁸⁹ Ibid., Ch. IV, V. 2; pp. 1279 - 1280.

¹⁹⁰ Grotius, *The Rights of War and Peace: II*, Ch. XXV, IX. 1; p. 1162.

circumstances in which soldiers could be excused for participation in an unjust war, but never as a universal principle of the law of nations. As such this marks the origin of what can be termed the legal equality of combatants.

One final significant point about Grotius is his discussion of oaths. He writes that an oath is as much a vow to God as it is to the person to whom it is made.¹⁹¹ This reiterates the religious significance of oaths and their distinction from other forms of agreement that was discussed earlier.

Vattel and the positive law of nations

Emer de Vattel (1714 – 1767) was an eighteenth century Swiss diplomat and jurist who held political office under the elector of Saxony. His contribution to the just war tradition reflected the superseding of the natural law tradition by the positive law tradition; although, as will be shown, his most significant contribution for present purposes came from his understanding of natural law. Vattel was deeply concerned with the contemporary struggle for supremacy between Britain and France. In particular he was concerned with the protection of the rights and sovereignty of small nations, like Switzerland, and as a result he supported the British against the French.¹⁹²

Due to his interest in protecting the sovereignty of small nations, Vattel rejected the naturalist idea that other states could intervene in a state to enforce the law of nature. In fact he argued that violations of the law of nature should be tolerated unless they directly infringed another nation's rights as states are "free and independent" and would not be if "others were to arrogate to themselves the right of inspecting and regulating her actions."¹⁹³ Not only were other states obliged to respect the decisions of a state, but its own citizens were similarly not permitted to judge the actions of their sovereign:

Subjects then have no right, in doubtful cases, to examine the wisdom or justice of their sovereign's commands; this examination belongs to the prince: his subjects ought to suppose (if there be a

¹⁹¹ Ibid., Ch. XIII, X.; pp. 781 - 782.

¹⁹² Béla Kapossy and Richard Whatmore, 'Introduction', in *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, ed. Béla Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008), pp. xviii - xix.

¹⁹³ Emmerich de Vattel, *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury (1758)*, trans. Anonymous (Indianapolis: Liberty Fund, 2008), Preliminaries: §9; pp. 70 - 71.

possibility of supposing it) that all his orders are just and salutary [sic]: he alone is accountable for the evil that may result from them.¹⁹⁴

In his specific discussion of war, in Book III, Vattel defines war as “*that state in which we prosecute our right by force,*” and he states that the right to make war and peace rests solely with the sovereign.¹⁹⁵ As such:

The sovereign is the real author of war, which is carried on in his name, and by his order. The troops, officers, soldiers, and, in general, all those by whose agency the sovereign makes war, are only instruments in his hands. They execute his will and not their own.¹⁹⁶

Vattel maintained the traditional view that a war could not be just on both sides according to the law of nature;¹⁹⁷ however he argued that the effects of war “are, by the voluntary law of nations, the same on both sides, independently of the justice of the cause.”¹⁹⁸ Vattel’s most original and significant claim came in Chapter XI; what is crucial to note is that this chapter was a discussion of the law of nature with respect to war, and subsequent chapters considered the voluntary law of nations. Here he argued that a sovereign who undertakes an unjust war is guilty of a crime against the enemy he unjustly attacks, “a crime against his people, whom he forces into acts of injustice, and exposes to danger, without reason or necessity”, and “a crime against mankind in general, whose peace he disturbs, and to whom he sets a pernicious example.”¹⁹⁹ He adds that the soldiers, officers, and generals are not individually responsible for the damage they do:

[A]s instruments in the hands of their sovereign . . . except in the case of a war so palpably and indisputably unjust, as not to admit a presumption of any secret reason of state that is capable of justifying it.

In any case which was:

¹⁹⁴ Ibid., Book I: Ch. IV, § 53; p. 109.

¹⁹⁵ Ibid., Book III: Ch. I, §§ 1 and 4; pp. 470 - 471.

¹⁹⁶ Ibid., Book III: Ch. II, § 6; p. 472.

¹⁹⁷ Ibid., Book III: Ch. III, § 39; p. 489.

¹⁹⁸ Ibid., Book III: Ch. IV, § 68; p. 508.

¹⁹⁹ Ibid., Book III: Ch. XI, § 184; p. 586.

[S]usceptible of doubt, the whole nation, the individuals, and especially the military, are to submit their judgement to those who hold the reins of government . . . The subjects, and in particular the military, are innocent: they have acted only from a necessary obedience.²⁰⁰

This is a revolutionary claim in the just war tradition as it made participation in an unjust war innocent according to the law of nature, rather than merely granting impunity for it according to the law of nations. In this way soldiers on opposing sides were seen as morally equal, as well as legally equal, and, as such, it introduces the principle that is now known as the moral equality of combatants. Lest there be any doubt that Vattel believed this to be a part of the law of nature, at the beginning of Chapter XII he writes:

All the doctrines that we have laid down in the preceding chapter, are evidently deduced from sound principles, – from the eternal rules of justice: they are so many sacred articles of that sacred law which nature, or the divine author of nature, has prescribed to nations.²⁰¹

With this redefinition of what it meant to be a soldier the deontic powers accorded to soldiers specifically excluded the right to refuse to participate due to the injustice of the war. Furthermore, the context in which the powers applied was defined independently of the justice of the war.

Grotius and Vattel mark two crucial stages in the development of ideas about combatancy within the just war tradition. Since the middle ages it had been accepted that those fighting in an unjust war could be doing wrong and could, in theory, be held accountable but the difficulties of doing so as well as the development of state practice meant that this was impossible. Whilst Vitoria had introduced a large number of reasons that could excuse participation in an unjust war, Grotius recognised the reality of the legal equality of combatants as state practice. Vattel, in turn, partly due to his belief in the importance of sovereignty, turned state practice into moral principle and introduced the principle of the moral equality of combatants in a recognisably modern form.

²⁰⁰ Ibid., Book III: Ch. XI, § 187; pp. 587 - 588.

²⁰¹ Ibid., Book III: Ch. XII, § 188; pp. 589 - 590.

Conclusion

The just war tradition is based on the need to reconcile the moral prohibition on killing and the use of force with the right of states to defend themselves and to use violence to enforce their rights. Throughout its history the tradition has recognised a moral difference between those entitled to use force and those against whom the use of force was prohibited. The nature and basis of this distinction have been repeatedly defined and redefined but the distinction itself has always existed in one form or another. This process of definition and redefinition has also been a process of the reiteration of status function declarations. Each new utterance has clarified, changed, or challenged some aspect of the earlier declarations; either the individuals to whom it applied, the deontic powers associated with it, or the context in which it applied, in which the context includes the relationship of the right to other principles within the just war tradition.

CHAPTER THREE

The Contemporary Debate

The Law of Nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider a wanton or unjust assailant.²⁰²

The killing of combatants in war is justifiable, both in international and in national law, only where the war itself is legal. But where a war is illegal, as a war started not only in breach of the Pact of Paris but without any sort of warning or declaration clearly is, there is nothing to justify the killing, and these murders are not to be distinguished from those of any other lawless robber bands.²⁰³

These statements by Francis Lieber, who drew up the Lieber Code to govern the use of force by Union forces during the American Civil War, and Sir Hartley Shawcross, the Chief Prosecutor for the United Kingdom at the Nuremberg Trials, reflect the two sides of the debate about the principle of the moral equality of combatants. In short, are actions committed in an unjust war, by virtue of that fact, morally condemnable?

The idea that soldiers on opposing sides are morally equal can be traced back to Vattel, as illustrated in the previous chapter, however the principle took on its contemporary form in Walzer's *Just and Unjust Wars*. In recent years a number of scholars, dissatisfied with Walzer's argument, have argued against the principle of the moral equality of combatants, among them Cecile Fabre, Helen Frowe, Jeff McMahan, James Pattison, David Rodin, and others.²⁰⁴ Whilst Gregory Reichberg notes that, as shown in the previous chapter, the moral equality of combatants has not always been a part of the just war tradition and claims that they are returning to its roots,

²⁰² *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, 1863, Art. 67.

²⁰³ *Trial of the Major War Criminals before the International Military Tribunal*, vol. XIX, XLII vols. (Nuremberg: International Military Tribunal, 1948), http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XIX.pdf, p. 458.

²⁰⁴ Cecile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012); Helen Frowe, 'Self-Defence and the Principle of Non-Combatant Immunity', *Journal of Moral Philosophy* 8, no. 4 (2011): 530–46; Jeff McMahan, 'The Morality of War and the Law of War', in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008); McMahan, *Killing in War*; James Pattison, 'When Is It Right to Fight? Just War Theory and the Individual-Centric Approach', *Ethical Theory and Moral Practice* 16, no. 1 (2013): 35–54; Rodin, *War and Self-Defense*; David Rodin, 'The Liability of Ordinary Soldiers for Crimes of Aggression', *Washington University Global Studies Law Review* 6, no. 3 (2007): 591–607; David Rodin, 'The Moral Inequality of Soldiers: Why Jus in Bello Asymmetry Is Half Right', in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008).

this thesis follows common practice and refers to these scholars as revisionists.²⁰⁵ There are many important differences in the arguments of these scholars, and over time some of them have also changed their views and developed and revised their arguments, this is most clearly the case in McMahan's work who is by far the most prolific author on these issues and who has been writing it about it for the longest. Despite these differences, there are also some important similarities between these scholars, in particular the fact that they all work in the tradition of analytical philosophy and they all adopt an individualist ontology and a broadly universalist and cosmopolitan ethical position.

Within the contemporary debate the principle of the moral equality of combatants has been broken down into two linked theses: the symmetry thesis, which states that the rights of combatants in war are the same on both sides; and the independence thesis, which states that the *jus in bello*, the rights of combatants in war, is independent of the *jus ad bellum*, the justice of the war as a whole.²⁰⁶ These are usually, but not always, understood together and they reflect the mainstream Walzerian position in the just war tradition and are embodied in international law. The argument made by the revisionists rests primarily on a rejection of the second thesis, of the independence of the *jus in bello* from the *jus ad bellum*. They argue that it does not coincide with basic moral principles and that, in fact, combatants should be held individually accountable for participation in war.²⁰⁷ Much of the debate, however, has focussed on the implications of this for the first thesis, regarding whether or not the laws of war should be changed and considering the difficulties of attempting to institutionalise non-symmetrical laws of war.²⁰⁸ It is also worth noting that whilst, since Aquinas, the *jus ad bellum* has been understood as made up of three distinct criteria, legitimate authority, just cause, and right intention, and sometimes further criteria as well, it is usually not disaggregated in this way in the contemporary debate. This is true of both Walzer and the revisionists and it sometimes makes it difficult to tell whether an author is referring to the *jus ad bellum* as a whole or to one of the criteria that make it up when the term is used.

²⁰⁵ Gregory M. Reichberg, 'Just War and Regular War: Competing Paradigms', in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008).

²⁰⁶ Rodin and Shue, 'Introduction', pp. 2 - 3.

²⁰⁷ Ibid., pp. 3 - 6.

²⁰⁸ See, for example: Christopher Kutz, 'Fearful Symmetry', in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008); Henry Shue, 'Do We Need a "Morality of War"?', in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008).

This purpose of this chapter is to explore the contemporary debate about the moral equality of combatants and to outline the revisionist argument for a principle of moral inequality, which the remainder of this thesis argues against. The first section outlines Walzer's defence of the principle and shows that this is a continuation of the just war tradition. It illustrates how his claims are forms of status function declaration which constitute war as an institution. Section two then considers the revisionist criticisms of these defences and demonstrates that none of the main defences can sustain the principle, as they can provide neither a full justification nor a full excuse for participation in an unjust war. The third section details the arguments advanced by the revisionists in favour of a principle of the moral inequality of combatants. The final section considers the relationship of the revisionists to the just war tradition as a whole. It argues that the current debate reflects what MacIntyre described as the breakdown of a tradition into two opposing components as the revisionists' arguments constitute war in a radically different way, in which it is not seen as an institution.

I. Michael Walzer and the Moral Equality of Combatants

This section outlines the argument made by Walzer about the moral equality of combatants. The first part examines the claims he makes and the justifications he provides for the principle and illustrates how these are forms of status function declaration. The second part situates his work within the just war tradition as a whole.

Walzer's moral argument

In terms of the contemporary debate within the just war tradition Walzer's most important and contentious claim regards the moral equality of combatants. Despite the significance of this claim for his overall argument, underlying many of his subsequent claims as to who is to be held morally responsible for wars, he says relatively little about it. The two key statements he makes are that "war is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt" and that "when soldiers fight freely . . . their war is not a crime; when they fight without freedom, their war is not their crime."²⁰⁹ For Walzer, the case of combatants fighting freely applies to medieval knights seeking adventure; the crucial factor here

²⁰⁹ Walzer, *Just and Unjust Wars*, p. 21 and p. 37.

is consent.²¹⁰ While it is doubtful that this is an accurate representation of medieval knights, it is certainly not an accurate picture of war today. Walzer recognises this and argues that when the “limit of consent is breached” and men are forced to fight, war takes on a distinct moral character: it becomes “hell”.²¹¹ In each of these cases the deontic powers associated with being a combatant, including the right kill, exist in a context which does not depend on the justice of the war.

A number of slightly different arguments are put forward by Walzer to support the principle of the moral equality of combatants; however they tend to rely fundamentally on the two principles outlined in the quotes above, namely consent and coercion. Among those whose moral equality is founded upon their voluntary participation he includes mercenaries and some volunteers.²¹² Most of the time, however, war is hell as it is not:

[A] personal choice that the soldier makes on his own and for essentially private reasons. That kind of choosing effectively disappears as long as soon as fighting becomes a legal obligation and a patriotic duty.²¹³

And this is the case whether the armed forces are raised through voluntary enlistment or conscription as even volunteers fight as “political instruments.”²¹⁴ In short, modern war is based on “military servitude” of men who are unwilling to fight.²¹⁵ Soldiers on opposing sides recognise one another as moral equals, as “men who are not criminals”.²¹⁶ In this argument it is the lack of choice amongst soldiers that provides the context in which they are accorded the deontic powers of combatancy. Furthermore, the lack of choice due to coercion makes it unjust to hold them accountable for their participation.

Much later on in the book, when discussing the liability of soldiers to be targeted and the immunity granted to non-combatants, Walzer introduces a new justification for the principle of moral equality when he argues that because the class of soldiers is trained to fight, the individuals who make it up can be attacked:

²¹⁰ Ibid., p. 25.

²¹¹ Ibid., p. 28.

²¹² Ibid., pp. 27 - 28.

²¹³ Ibid., p. 28.

²¹⁴ Ibid., pp. 28 - 29.

²¹⁵ Ibid., p. 35.

²¹⁶ Ibid., p. 36.

He has been made into a dangerous man, and though his options may have been few, it is nevertheless accurate to say that he has allowed himself to be made into a dangerous man. For that reason, he finds himself endangered.²¹⁷

In short, it is by posing a danger to other people that the soldier forfeits his right not to be attacked. This is the case regardless of whether the war is just or unjust, that is, whether the danger he poses can be justified or not; it is the fact that he is dangerous that allows others to target him. In this case the deontic powers of combatancy apply in a context determined purely by the threat posed by the opponent. By stripping out the rest of the institutional features of war which make it a normatively meaningful sphere of action, and by reducing the context within which the deontic powers apply to the simple existence of a threat, it becomes impossible to distinguish between soldiers, mercenaries, and criminal gangs. This is difficult to reconcile with other aspects of his argument, where he describes soldiers as men who are not criminals and war as distinct from other forms of violence.

A large part of Walzer's work is concerned with blame; he repeatedly refers to aggressive war as a crime and is concerned with identifying who is responsible.²¹⁸ He rejects the view of war as somehow natural or accidental, or as the result of an "abstract Force."²¹⁹ Instead he argues that it is the political leaders of the state who bear sole responsibility for the crime of war. In discussing the example of generals fighting for the Germans in World War II, he argues that they may straddle the line between responsibility for the war and responsibility for the conduct of the war. Whilst particular cases may be difficult, the rough boundary between being "a servant, not a ruler" is widely recognised.²²⁰ On the question of the moral responsibility of soldiers, Walzer agrees with Vitoria; even if they have some doubt they should fight, and the responsibility lies with the king. Soldiers do always retain some freedom and in this narrow sphere they can still be held accountable for their actions, this is the sphere of the laws of war and the prohibitions on killing civilians and prisoners.²²¹ This argument creates a number of deontic powers and identities, as well as constituting war as an institution. It allocates the deontic power of being able to declare war, as well as the sole moral responsibility for doing so, with the political leaders. It defines the context

²¹⁷ *Ibid.*, pp. 144 - 145.

²¹⁸ *Ibid.*, pp. 21 - 23.

²¹⁹ *Ibid.*, pp. 30 - 31.

²²⁰ *Ibid.*, pp. 37 - 39.

²²¹ *Ibid.*, pp. 39 - 40.

within which combatants have the deontic powers of combatancy in terms of the relationship to the rulers and political leaders, and independently of the question of justice. And it provides specific deontic powers to non-combatants and prisoners, recognising a normative distinction between combatants and non-combatants and establishing the context within which combatants can be held responsible for unjust killing. In many respects this parallels the earliest formulations of the just war tradition, in Augustine, although based on a secular worldview and individual rights rather than on the Will of God.

For present purposes, the final important part of Walzer's argument is the role that individual rights play within it. He believes that it is individual rights, specifically the rights to life and liberty, which "underlie the most important judgements that we make about war."²²² The rights of states to political independence and territorial integrity, the rights that are violated in aggressive war and whose violation makes aggressive war a crime, are based "on the consent of their members". He adopts a broadly contractarian view of the basis of states' rights, although contract is used metaphorically to describe a long "process of association and mutuality." This ongoing process reflects the common life of the community which is what the state protects. Importantly, and a theme that will be returned to later, he argues that "individuals are sometimes sacrificed" to protect this common life, and the defence is legitimate as long as the sacrifices are accepted. As such, Walzer believes that "territorial integrity and political sovereignty can be defended in exactly the same way as individual life and liberty."²²³

Walzer and the just war tradition

Walzer clearly understands the just war tradition as being a tradition in the sense defined by MacIntyre. *Just and Unjust Wars* was written as a response to one particular war and the controversies it threw up, namely the Vietnam War, and it was written from the perspective of a political activist and a partisan in contemporary debates rather than an academic philosopher.²²⁴ This helps to explain both its strengths and its weaknesses. One of the important points made by Walzer is that he and his fellow activists "found a moral doctrine ready at hand" made up of "names and concepts" that were widely known, and the vocabulary of which allowed them to think and

²²² Ibid., p. 54.

²²³ Ibid., p. 54.

²²⁴ Ibid., p. xix.

communicate ideas about the Vietnam War.²²⁵ Elsewhere he writes that this is part of “our common heritage, the product of many centuries of arguing about war.”²²⁶ This is precisely the recognition of a tradition of thought and language and his work as a whole is a contribution to the tradition as it defines and redefines these common terms. This leads to a distinctive approach to the subject, which does not start with abstract rights and individuals, but with rights within particular political communities and individuals who are already citizens.²²⁷

In assessing his work it is also important to be aware of what he considers to be the purpose of just war theory. He writes that:

The moral world of war is shared not because we arrive at the same conclusions as to whose fight is just and whose fight is unjust, but because we acknowledge the same difficulties on the way to our conclusions, face the same problems, talk the same language.²²⁸

This is a radical statement, perhaps more radical than he realizes, as it denies the idea of objective principles of justice regarding war, or at least of objective principles of justice available to human cognition. Instead, the just war tradition is seen as providing the resources for asking the right questions about war and for recognizing what types of answers, evidence, and reasons are legitimate.²²⁹ Ultimately, it provides the tools for making judgments, rather than a method for finding knowledge.²³⁰ This approach to just war theory, however, also has a significant weakness. As he acknowledges, he is not attempting “to expound morality from the ground up”, he does not excavate the foundations of the ethical world but instead assumes that practical morality is detached from the foundations and can be studied independently.²³¹ Unfortunately this lack of foundations means that his defence of the moral equality of combatants is not fully coherent and, as will be shown below, not substantial enough to support the principle.

²²⁵ Ibid., p. xix.

²²⁶ Michael Walzer, *Arguing About War* (New Haven and London: Yale University Press, 2004), p. x.

²²⁷ Walzer, *Thick and Thin*.

²²⁸ Walzer, *Just and Unjust Wars*, pp. xxii - xxiii.

²²⁹ Ibid., p. xx.

²³⁰ Walzer, *Arguing About War*, pp. x - xii.

²³¹ Walzer, *Just and Unjust Wars*, p. xxiii.

II. Arguing About Walzer

There has been a surge of interest in just war theory since the publication of *Just and Unjust Wars* and in its most recent turn the debate has centred on the principle of the moral equality of combatants. In particular, a new generation of analytical philosophers has come to challenge the view that this principle is central to the just war tradition. This section will consider the major criticisms made of the principle of the moral equality of combatants. There are four main arguments put forward in defence of the principle. Two of these arguments, that combatants consent to the principle or that they have reciprocal rights of self-defence, seek to ground the principle by providing a justification for participation in an unjust war. The other two arguments are that combatants are coerced into participation or that epistemic uncertainty means combatants are unable to determine whether a war is just or not; these seek to ground the principle by excusing participation in an unjust war. The distinction between justification and excuse is important. Whereas a justification accepts responsibility for a particular action but denies that in the particular circumstances it was wrong, an excuse acknowledges that the act was wrong but denies that the actor was responsible for it.²³² This section considers these arguments and the main criticisms of them in order to demonstrate that they cannot fully support the principle. The first part considers the arguments which seek to provide justification, the second part assesses whether combatants are excused.

Justifications: consent and self-defence

There are two arguments that seek to provide a justification for the principle of the moral equality of combatants, these are consent and self-defence. Whilst the argument that combatants individually consent to their actions has been rejected, a more sophisticated theory of consent has been put forward. This states that combatants either agree to the war convention, of which the principle of moral equality is a part, or that the war convention itself is the product of agreement as to the best system of rules. The first of these arguments, the 'Boxing Match Model' of war; states that individuals, by becoming combatants, implicitly accept the right of enemy combatants to attack or kill them in exchange for the right to use force themselves.²³³ The second of these

²³² Rodin, *War and Self-Defense*, pp. 26 - 29.

²³³ , pp. 51 - 57 McMahan, *Killing in War*; Thomas Hurka, 'Liability and Just Cause', *Ethics and International Affairs* 21, no. 2 (2007): 199-218, pp. 210 - 215.

arguments holds that the war convention provides the morally best set of rules and laws that are possible and that it is, or should be, accepted by the participants.²³⁴ In either case, the consent to the rules is seen as including a waiver of the right not to be attacked. The focus on consent, whether actual or hypothetical, means the justification can only apply to volunteer armed forces in relatively free countries, as consent is incompatible with conscription.²³⁵ Even in all-volunteer armed forces it has been argued that many of those who volunteer come from the poorest and most deprived parts of the community, with the fewest choices, and so consent may not be fully free.²³⁶ Given that the principle of moral equality is supposed to apply to all combatants in all armies, the consent argument cannot provide the full justification necessary. More significantly from a revisionist perspective, war, unlike boxing, is not an activity with a value-free outcome. It is unclear how mutual consent can justify participation in an activity in which the overall character is unjust or why combatants on the just side should consent to waiving their right not to be attacked, even if they accept that there may be a risk of being unjustly attacked.²³⁷

The argument that the principle of the moral equality of combatants is justified by the right of self-defence has intuitive plausibility as combatants are armed and pose a threat to one another and so have a right to use force in self- or other-defence.²³⁸ Walzer relies on the force of this intuition when he describes combatants as dangerous men, and argues that this is the basis of their liability to attack.²³⁹ This argument has been criticised and rejected by McMahan and Rodin. They argue that to justify the principle of moral equality on the basis of self-defence would be tantamount to arguing that in the domestic realm a mugger who attacks a victim would have the right to use force if the victim justly defends themselves, or if a police officer intervenes to prevent the attack.²⁴⁰ Furthermore, the scope of the legitimate use of force in war is substantially broader than in conventional self-defence, including the right to use force against those who are not posing a direct threat at the time.

²³⁴ , pp. 57 - 62 Yitzhak Benbaji, 'The Moral Power of Soldiers to Undertake the Duty of Obedience', *Ethics* 122, no. 1 (2011): 43–73, pp. 93 - 97 Shue, 'Do We Need a "Morality of War"?'

²³⁵ Hurka, 'Liability and Just Cause', pp. 210 - 211.

²³⁶ *Ibid.*, pp. 213 - 215.

²³⁷ McMahan, *Killing in War*, p. 57.

²³⁸ *Ibid.*, pp. 38 - 51.

²³⁹ Walzer, *Just and Unjust Wars*, pp. 144 - 147.

²⁴⁰ McMahan, *Killing in War*, p. 21.

Excuses: coercion and epistemic uncertainty

There are two arguments which, rather than seeking to justify the principle of the moral equality of combatants, instead argue that soldiers are excused for participating in an unjust war, either as a result of coercion or due to epistemic constraints. The argument that combatants are coerced to fight is the main argument that Walzer relies upon to ground the principle of the moral equality of combatants.²⁴¹ The fact of coercion denies combatants' individual moral responsibility for the war; this is the 'Gladiatorial Model' of war.²⁴² There are several problems with this argument, however. The main problem is that it does not seem applicable in the contemporary western world, with largely volunteer armies and relatively minor punishments for refusing to follow orders (the punishments, namely a period of imprisonment, are not sufficiently severe to excuse the unjust killing of another person).²⁴³ Even if coercion were more severe, it is not clear that it would entitle combatants to use force against one another. A plausible conclusion is that combatants would gain the right to resist the coercion by defending themselves against those coercing them, including using lethal force against their own officers and political leaders.²⁴⁴

Another argument that is often put forward to defend the principle of the moral equality of combatants is that of epistemic uncertainty; this is the argument that Walzer puts forward when he discusses Vitoria.²⁴⁵ The argument about epistemic uncertainty is based on the (alleged) inability of combatants to determine the justice of a war. Recognising that the decision to go to war is complex, involving competing moral, legal, and empirical claims, that governments will often have access to more information than is released, that governments may lie or misrepresent the facts, and that combatants may not have the time, maturity, or education to be able to assess the information that is available, it is often argued that combatants should not be held responsible for the justice of the war.²⁴⁶ This argument is problematic as, while it may apply to some combatants, it cannot apply to all. Some combatants will be aware or will suspect that the war is unjust, or should be aware as the information is easily available. In short, epistemic uncertainty cannot

²⁴¹ Walzer, *Just and Unjust Wars*, p. 35.

²⁴² McMahan, *Killing in War*, pp. 58 - 59.

²⁴³ , pp. 171 - 172 Rodin, *War and Self-Defense*.

²⁴⁴ , p. 173 *ibid.*; Cheney Ryan, 'Democratic Duty and the Moral Dilemmas of Soldiers', *Ethics* 122, no. 1 (2011): 10-42, p. 39.

²⁴⁵ Walzer, *Just and Unjust Wars*, pp. 39 - 40.

²⁴⁶ Judith Lichtenberg, 'How to Judge Soldiers Whose Cause Is Unjust?', in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008).

ground a full excuse to all combatants in an unjust war, and even those who are excused may only have a partial excuse, depending on what they knew and could have been reasonably expected to find out.²⁴⁷ Furthermore, this argument defends the symmetry thesis on the basis of the difficulty of institutionalising non-symmetrical laws of war, rather than the independence thesis, which is the deeper moral claim about the justification for killing in war. As will be shown below, both McMahan and Rodin have also put forward proposals for institutional mechanisms to try to reduce or eliminate epistemic uncertainty in order to make non-symmetrical laws of war more plausible. Whilst these proposals may be unworkable, it is incumbent upon the proponents of the epistemic uncertainty argument to engage with these proposals and demonstrate that they are unworkable.

III. The Revisionists and the Moral Inequality of Combatants

As argued above, all of the main arguments generally put forward to defend the principle of the moral equality of combatants have been largely discredited but it is also necessary to consider the positive claims and arguments put forward by the revisionists in recent years. The purpose of this section is to put forward concisely the strongest case that can be made to support the revisionist argument. There are a number of scholars in the field, all of whom have made distinct and original contributions, however this section will focus on the works of McMahan and Rodin and, in particular, on each of their key books, 'Killing in War' and 'War and Self-Defense' respectively, which are where they put forward their most extended and considered arguments. Whilst there are significant differences between the two scholars, two important common starting points can be discerned in their work. Firstly, they both adopt an individualist approach, in that they reduce war to the actions of individuals and judge those actions in individual terms. Secondly, and as a consequence of their individualism, they both structure their arguments around the principle that an individual can only be legitimately harmed if they are liable to that harm and that can only be based upon the individual being morally responsible for an unjust threat.

McMahan: 'Killing in War'

'Killing in War' is McMahan's most influential work in the debate about the moral equality of combatants, however he has been writing on this subject for far longer and many of his ideas have

²⁴⁷ Ibid., pp. 122 - 124.

changed over time.²⁴⁸ The main consistent argument in his work is that the only basis for liability to harm in war is “moral responsibility for an objectively unjustified threat of harm”.²⁴⁹ His interpretation of this is interesting and controversial; he has argued, for example, that one does not need be posing a direct and imminent threat in order to be sufficiently morally responsible for an unjust threat to be liable for defensive harm, up to and including lethal harm.²⁵⁰ In the context of war this means that he is prepared to countenance the use of force against non-combatants and prisoners if they are sufficiently morally responsible for an unjust threat²⁵¹ and he has also argued that not every combatant taking part in an unjust war will be sufficiently morally responsible for the threat they are posing to be liable for harm.²⁵² In ‘Killing in War’ he has retreated somewhat from this position, he argues here that in general all combatants on the unjust side will be sufficiently morally responsible for the injustice of the threat they pose as to be liable to harm.²⁵³ He also argues that the majority of non-combatants in the unjust state will not be sufficiently responsible for the threat to be liable to harm.²⁵⁴ Furthermore, for pragmatic reasons, to avoid unnecessary civilian deaths, and to prevent reprisals and escalation, he is willing to accept the absolute prohibition on killing non-combatants and prisoners, even those few who do reach the threshold of liability for harm.²⁵⁵ It is important to remember, however, that this is a pragmatic accommodation to the risks and does not change the moral status of the individuals. It has been argued by Lazar, however, in an extended review of the book, that the way in which he defines moral responsibility cannot sustain the argument that most unjust combatants will be liable whilst most non-combatants will not be. The line of moral responsibility does not fall neatly between the two categories of individual and any attempt to draw the line in such a way as to include the majority of unjust combatants will end up including many non-combatants, too, which McMahan wants to avoid and any definition which excludes all non-combatants will also have to exclude

²⁴⁸ His earliest articles are: Jeff McMahan and Robert McKim, ‘The Just War and the Gulf War’, *Canadian Journal of Philosophy* 23, no. 4 (1993): 501–41; Jeff McMahan, ‘Innocence, Self-Defense and Killing in War’, *The Journal of Political Philosophy* 2, no. 3 (1994): 193–221.

²⁴⁹ McMahan, *Killing in War*, p. 35.

²⁵⁰ McMahan, ‘The Ethics of Killing in War’, pp. 31 - 33.

²⁵¹ McMahan, ‘The Morality of War and the Law of War’, p. 22.

²⁵² McMahan, ‘The Ethics of Killing in War’, p. 25.

²⁵³ McMahan, *Killing in War*, pp. 182 - 188.

²⁵⁴ *Ibid.*, pp. 221 - 231.

²⁵⁵ McMahan, ‘The Morality of War and the Law of War’, pp. 32 - 33.

many unjust combatants and this brings McMahan's argument perilously close to contingent pacifism, a position he rejects.²⁵⁶

The converse of the argument that moral responsibility for an unjust threat is the only grounds of liability is that soldiers fighting a just war can never be legitimately targeted as they do not pose an unjust threat. The only exception to this is if they are individually committing acts that are themselves unjust, for example using excessive and disproportionate force, or attacking civilians who are not liable to attack.²⁵⁷ As such, the killing of any just combatant is morally wrong and tantamount to murder. Furthermore, McMahan reinterprets the doctrine of double-effect, which traditionally allowed the use of force against a military target if it would cause expected but unintended harm to non-combatants so long as steps were taken to minimise this harm and the harm was not disproportionate to the military gain expected. McMahan argues that in an unjust war there is no good effect that can counteract the harm to the non-combatants; military advantage can only count as a moral good if it is contributing to a morally good cause, by definition in an unjust war this is not the case therefore any harm to non-combatants caused by unjust combatants is morally wrong.²⁵⁸

Due to his belief that only individual moral responsibility for an objectively unjust threat can ground liability to attack, and his view that soldiers should be held morally responsible for their individual actions, he proposes some legal changes that would begin to institutionalise some aspects of his view. In particular he argues that accommodation should be made for selective conscientious objection in order to allow soldiers to refuse to fight in wars that they believe to be unjust. He believes that this could lead to increased resistance to unjust wars, "particularly from the military" and the concomitant risks of "humiliation and failure" which may restrain governments' actions. This would particularly be the case in democratic countries.²⁵⁹

In an earlier essay McMahan argues that there is a distinction between the morality of war and the laws of war, this corresponds to the difference between the independence thesis (that the *jus in bello* is independent of the *jus ad bellum*) and the symmetry thesis (that the laws of war should be the same for both sides) respectively.²⁶⁰ Given the lack of a court or other body capable

²⁵⁶ Seth Lazar, 'The Responsibility Dilemma for Killing in War: A Review Essay', *Philosophy and Public Affairs* 38, no. 2 (2010): 180–213.

²⁵⁷ McMahan, 'The Ethics of Killing in War', p. 28.

²⁵⁸ McMahan, *Killing in War*, pp. 15 - 32.

²⁵⁹ *Ibid.*, p. 7.

²⁶⁰ *Ibid.*, pp. 33 - 36.

of giving authoritative and epistemically reliable judgements about the justice of a particular war, and also for pragmatic reasons associated with encouraging compliance with the laws of war by both parties, he concedes that the laws of armed conflict currently in existence may be the best morally available.²⁶¹ In short, he accepts that the legal equality of combatants may be necessary and inevitable, although where the law and ethical principles conflict he thinks soldiers should follow the ethical principles, even if violating the law.²⁶² Whilst parts of this argument resemble the Grotian view that was described earlier as the principle of the legal equality of combatants, there are some important distinctions stemming from the different status accorded the circumstances which make legal equality a practical necessity.

For McMahan legal equality is decidedly a second best option, necessary due to a morally flawed international system. To this end he also proposes a radical transformation of the system in order to make it morally better. By establishing a global court of ethicists, philosophers, and lawyers and developing a much more sophisticated body of international law and principles of *jus ad bellum* it would be possible to determine the justice of any war.²⁶³ Such a system he sees as morally desirable and it would allow the laws of war to be brought into closer coherence with what he terms the “deep morality of war”.²⁶⁴

For Grotius, however, the existence of multiple, independent, sovereign states, was morally desirable and a good in itself. He saw the principle of the legal equality of combatants as a logical consequence of the lack of an overarching judicial body capable of passing judgement on the justice of particular wars. But this lack of an overarching judicial body was a necessary corollary of a system that was independently morally valuable as he believed that “the publick Powers are to be esteemed by us, as ordained by GOD himself”.²⁶⁵ As such, Grotius’ view is much closer to the principle of moral equality than that of McMahan, as for Grotius the principle of legal equality is morally endorsed as it is part of a morally good order, rather than being merely tolerated as part of a morally deficient order.

²⁶¹ Ibid., pp. 27 - 33.

²⁶² Ibid., pp. 31 - 38.

²⁶³ Ibid., pp. 41 - 43.

²⁶⁴ McMahan, ‘The Ethics of Killing in War’, p. 38.

²⁶⁵ Grotius, *The Rights of War and Peace: I*, Ch. IV, IV; p. 345.

Rodin: *War and Self-Defense*

'War and Self-Defense' is a radical and politically cosmopolitan argument that rejects the view that wars of national defence can be just and argues instead that military force can only be justified as a form of cosmopolitan law enforcement. The basis of the argument is a closely argued definition and defence of the principle of individual self-defence and a rejection of the idea that national defence is analogous in a morally relevant way.

Given its importance in his overall argument it is necessary to start with his understanding of individual self-defence. He argues that there are four "entities" involved and that the right of self-defence emerges from the normative relationships between them. These entities are the subject who holds the right, the content, which is the defensive act itself, the object or individual against whom the right is held, and the end of the right, which is the value being protected.²⁶⁶

His account of the right of individual self-defence emphasises both that it is a right and that it is based on rights and he therefore rejects the other common justifications for a right of self-defence based on the arguments from forced-choice and the consequentialist argument.²⁶⁷ The central part of his argument is his focus "on the normative relationship between the aggressor and defender rather than simply on the status of the aggressor's right to life."²⁶⁸ As such, and based on Hohfeld's jural concepts, which are the core of his argument, the attacker's loss of their right to life and the defender's gain of a right to kill are simply the same fact of the normative relationship described in different ways.²⁶⁹ This focus on the relationship also explains how the forfeiture of the right to life and the gaining of the right to kill are also limited by the normative relationship. This normative relationship or "negative bond", as he describes it, creates a moral inequality between the two parties at the instant of the attack due to the fault of the attacker.²⁷⁰

The concept of fault is crucial to the structure of his argument as it both justifies and limits the right to self-defence in ways that lead Rodin to depart significantly from the mainstream legal and philosophical position. It justifies self-defence as it is the basis of the moral inequality whereby one party may kill the other, but not *vice versa*. It limits self-defence to cases in which the attacker is morally responsible for the threat posed. This parallels the argument made by

²⁶⁶ Rodin, *War and Self-Defense*, pp. 35 - 36 and p. 99.

²⁶⁷ *Ibid.*, pp. 46 - 69.

²⁶⁸ *Ibid.*, p. 74.

²⁶⁹ *Ibid.*, pp. 17 - 21.

²⁷⁰ *Ibid.*, p. 78.

McMahan about individual responsibility, but also leads Rodin to part company with other scholars who have written on individual self-defence, as he believes that there is no right of self-defence against the innocent threat or innocent aggressor.²⁷¹ These are the hypothetical examples where someone is innocently posing a threat to someone else, for example through being given mind-altering drugs or thrown down a well at the victim. Had they chosen to do so, they would be morally responsible and would be liable to defensive harm, however as they have not chosen to do so and are not morally responsible for the threat that they pose, they cannot be harmed defensively. This clearly parallels the argument made by McMahan that innocent non-combatants cannot use defensive force against just combatants whose acts meet the requirement of double-effect, and this poses the same problem with respect to the ‘ought implies can’ requirement. This is the requirement that people can only be morally required to act in particular ways if it is possible for them to do so; however the instinct to defend oneself and one’s family is so strong and natural that to condemn people for doing so violates this requirement.

Having set out and explained the right of individual self-defence, Rodin then goes on to consider the right of national defence. From the very beginning of the just war tradition the right of the defence of the political community was considered one of the central just causes for war. It remains central to most just war theorists and, under current international law, the defence of political independence and territorial integrity is also the only legitimate cause of war without UN Security Council authorisation. This right is frequently justified on the basis that it is analogous to, or can be reduced to, the right of individual self-defence. It will be recalled that Walzer argues that “territorial integrity and political sovereignty can be defended in exactly the same way as individual life and liberty”.²⁷²

Each of these approaches, reduction to the individual and analogy of individual to the state, can be applied to each of Rodin’s components of the right to self-defence; namely, the subject, the object, and the end of the right. This leads to eight different possible structures of a right to national defence justified on the basis of the right of individual self-defence.²⁷³ Rodin goes on to consider and reject all of these possibilities in turn. In short, he demonstrates “that having the end of

²⁷¹ Ibid., pp. 79 - 83.

²⁷² Walzer, *Just and Unjust Wars*, p. 54.

²⁷³ Rodin, *War and Self-Defense*, p. 125.

protecting the lives of citizens is neither a necessary nor a sufficient condition for a military action to be a legitimate act of national-defense”.²⁷⁴ He then considers conditional threats in order to argue against the view that a ‘bloodless invasion’, an attack on a country’s territorial integrity which does not directly threaten the lives of any of its citizens, can be a legitimate reason to fight in self-defence. Here he argues that unless the value of what is being extorted through the conditional threat is sufficiently great, then it is impermissible to use force in defence as to do so is disproportionate to the actual threat faced.²⁷⁵

The full force of his argument is brought to bear on the question of whether the defence of the common life of citizens and of the community can be a sufficient value to justify the use of force in its defence.²⁷⁶ He rejects at the outset any interpretation of the common life which “attributes to the common life a moral value prior to, and independent of, the value of the individuals who compose it.” He argues that it cannot be accepted “that the common life is a source of value independent of its value for individual persons.”²⁷⁷

He goes on to consider various ways in which the common life could be considered valuable and which may ground the legitimacy of the use of force to defend it. The first is based on Hobbesian social contract theory and the value of the community in providing order as a minimum value necessary for the provision of all other goods within society. He argues that in fact the problem with such an argument is that it suggests the need to achieve a world state in order to abolish the state of nature between states in the way that the state abolishes the state of nature between individuals. He also notes, following Hobbes, that if order is the only value in question, then it can be provided by any state; rather than fighting in defence of a particular state, individuals should simply accept the authority of whoever seems best able to provide a minimum degree of order at a particular time.²⁷⁸

He then considers the argument that it is the value of the common lives shared by members of the state and the defence of this value which grounds the right to national defence. Rodin is unconvinced by this argument as, in his view, “it brings us perilously close to a relativism of

²⁷⁴ Ibid., p. 132.

²⁷⁵ Ibid., pp. 132 - 138; for a rebuttal, see: Uwe Steinhoff, ‘Rodin on Self-Defense and the “Myth” of National Self-Defense: A Refutation’, *Philosophia* 41, no. 4 (2013): 1017–36.

²⁷⁶ Rodin, *War and Self-Defense*, pp. 142 - 163.

²⁷⁷ Ibid., p. 143.

²⁷⁸ Ibid., pp. 144 - 147.

value.²⁷⁹ His central argument is that there is an important difference between subjective and objective values; subjective values are those that are only held or recognised within a particular community, objective values are recognised, or at least potentially recognisable, universally, by all people who are willing to consider things objectively.²⁸⁰ He believes that the value of a common life is inherently subjective and only recognisable within that common life and so cannot sufficiently ground the objective right of defence (given that the right of national defence, if it exists, must be held by all states he believes that the right must be objective).²⁸¹ This rejection seems too hasty. It is certainly plausible to argue that individuals can recognise that a common life is valuable to others, even if that particular common life is not valuable to them. Analogously, it is possible to recognise particular family relationships as being of particular moral value and imposing particular obligations on those that share them, without everyone being part of the same family. It may be accepted, for example, that a parent has an obligation to accept potentially quite high risks to save their child from danger whereas a stranger should perhaps accept some risk, but is not required to accept the same risks as the parent. What needs to be 'objective', or at least universalisable, is the shared experience of having and valuing a common life, not the particular contents of any specific common life. A stronger argument against the value of the common life as being sufficient to ground the right of national defence is that not all common lives are in fact valuable. If the character of the communities is not morally valuable as they are corrupt, brutal, unjust, and oppressive, he does not believe that there is anything which can justify the use of force in their defence.²⁸² He questions why non-democratic states can be considered as representing the values of autonomy and self-determination as he does not believe these have any substantive content outside of democratic processes.²⁸³

Finally he notes that many of the arguments for national defence justify it in reference to the value of community; however, as he points out:

If it is the value of communities (or the realm of collective autonomy that they make possible) which serves as the end of national-defense, then it is unclear why those rights should be attributed to

²⁷⁹ Ibid., p. 151.

²⁸⁰ Ibid., pp. 151 - 152.

²⁸¹ Ibid., p. 152.

²⁸² Ibid., pp. 152 - 154.

²⁸³ Ibid., pp. 154 - 159.

states, whose relationship to these communities is often one of ambivalence and sometimes one of antagonism.²⁸⁴

Even the concept of ‘community’ itself is problematic and Rodin does not believe it is possible to identify in any clear way which types of community should be entitled to use force in their own defence and on what basis.²⁸⁵

Rodin ultimately concludes that there is no moral right of national defence. He does not believe that it is possible to bridge the gap between the collective level and the individual level in a morally plausible or satisfactory way as he does not see how a right that may be held against a collective entity, the opposing state, translates into a right held against individual members of that state, namely its soldiers, and certainly not the right to use lethal force against them.²⁸⁶ The only way to bridge this gap is to conceive of the right held against the individual combatants not as a form of defence but as punishment and this requires holding the individual soldiers morally responsible for the justice of the war in which they participate.²⁸⁷ As such he rejects the principle of the moral equality of combatants and rejects the view that soldiers fighting in an unjust war have any right to kill.²⁸⁸ Rather than there being a right of defence against attack, he suggests that instead what exists is a right of punishment of the guilty. Given that judgement and punishment must be objective, neutral, and non-partisan, which is impossible if the states doing the punishing are also parties to the conflict, he argues for a form of global governance and the transformation of war into law enforcement.²⁸⁹

IV. A Tradition Divided?

This chapter has surveyed the major debate within contemporary just war thinking about the principle of the moral equality of combatants and has outlined the main arguments put forward by the proponents of the idea that combatants should be held responsible for participation in an unjust war. The question arises, however, as to whether this is a debate internal to the just war tradition or whether it represents what MacIntyre describes as the destruction of a tradition “into two or

²⁸⁴ Ibid., p. 160.

²⁸⁵ Ibid., pp. 159 - 163.

²⁸⁶ Ibid., pp. 163 - 165.

²⁸⁷ Ibid., pp. 165 - 174.

²⁸⁸ Ibid., p. 174.

²⁸⁹ Ibid., pp. 174 - 189.

more warring components”.²⁹⁰ This section argues that whilst there are some commonalities between the arguments of the revisionists and some earlier scholars within the just war tradition, nevertheless the current debate reflects the breakdown of the tradition into two distinct components. The first part considers their denial of combatancy and war as institutions; the second part considers their attempt to institutionalise war as law enforcement.

The revisionists and the institution of combatancy

As the previous chapter demonstrated, a central feature of the just war tradition is the idea of combatancy as a specific institution and of the combatant as a specific identity. Whilst there has been, and remains, much disagreement about all three components of the institution, namely which individuals, the extent and nature of the deontic powers they possess, and the context in which they possess them, this reflects a form interpretive debate within the tradition itself. The revisionist argument, however, denies the concept of combatancy as a separate institution carrying specific deontic powers and normatively distinct from non-combatants. Both McMahan and Rodin deny that the collective level in war has any moral relevance and justify the use of force on the same basis as it would be legitimate within domestic society. As such there are no deontic powers associated with combatancy beyond those rights of self and other defence possessed by all individuals. Furthermore, the context in which these powers can be exercised is universal, in the sense that anyone can exercise the right to self and other defence at any time in response to an unjust threat. Whilst these rights are still institutions in the sense defined by Searle, and are still created by status function declarations, there is no specific identity or institution of combatant with additional rights that exist in a specific context.

This is a significant departure from the just war tradition. Whilst many earlier scholars had argued that a part of the context in which the deontic powers of combatancy could be exercised included the requirement that the war be just, including Gratian, Aquinas, and Vitoria, these earlier scholars still recognised combatants as a distinct identity and recognised the collective nature of war. For example, both Gratian and Aquinas understood combatancy as being constituted in part through the fealty of a knight to his lord, the right to participate in combat was limited to a particular class within an overall social cosmology. Whilst knights should refuse to participate in unjust wars, or if their oath of fealty had been dissolved by the pope, the right to participate in

²⁹⁰ MacIntyre, *Whose Justice? Which Rationality?*, p. 12.

combat was not simply the same as the right to act in self and other defence, and nor did it apply universally. Vitoria, too, at times linked the context in which the deontic powers of combatancy could be exercised to the justice of the war as a whole, but again he saw these deontic powers as being different to those of self and other defence and as being partially defined by the context of the relationship of the combatant to the sovereign.

These differences abolish combatancy as an institution and abolish the combatant as an identity. In their place are undifferentiated individuals all of whom have exactly the same right to use force in self and other defence against an unjust attack, in any context, whether war or peace. As such, the revisionist argument goes beyond the process of defining and redefining the concept of combatancy and instead abolishes it as an institution, this reflects a major split from the just war tradition and the establishment of a new approach to questions of violence and justice.

From war to law enforcement

As has been shown, the revisionist argument departs radically from the just war tradition as it denies that either combatancy or war are specific institutions, but the revisionists do not reject the institutionalisation of violence altogether. Both McMahan and Rodin seek to transform war into a form of global law enforcement through the creation of a global government or court which would have the sole right to use force in order to enforce the law. Whilst the ideas they propose differ in a number of ways, what they have in common is a belief that the political authority of such a body should be derived from its ability to come to the correct moral judgements regarding particular conflicts. Rodin, for example, argues that the authority of a global government to carry out punishment depends upon its being impartial and independent in order to make objective judgements.²⁹¹ McMahan believes that a global court could have the authority to make binding decisions about the justice or otherwise of conflicts only if it was established in such a way as to ensure that its judgements were epistemically reliable.²⁹² If political authority is based on the ability to determine moral truth the traditional distinction between legitimate authority and just cause in the *jus ad bellum* component of the just war tradition is dissolved. Their argument, therefore, stands in direct contrast to Walzer's claim that "philosophical validation and political

²⁹¹ Rodin, *War and Self-Defense*, pp. 174 - 189.

²⁹² McMahan, 'The Morality of War and the Law of War', pp. 41 - 43.

authorization are two entirely different things” and his rejection of the way in which philosophical claims are used to displace the decision making process of politics.²⁹³

The transformation of war into law enforcement is effectively the abolition of war. The revisionists reject the idea of war as a specific or distinct institution within the international system. This reflects their second major break with the just war tradition. By viewing war as morally continuous with other forms of violence and by reducing it to the individual level, the revisionists see war neither as a context within which particular deontic powers can be exercised, nor as a specific institution brought into existence through the exercise of deontic powers. Whereas the just war tradition has contributed to the constitution of war as an institution, the revisionist argument denies that it is a specific institution and constitutes it as merely violence like all other violence. By denying that war is a separate institution, the term war is purely an empirical description of some instances of violence; this is why Chapter One argued that, for the revisionists, to say that something is a war is seen as having a downwards direction of fit. The remainder of this thesis seeks to demonstrate that war is not morally continuous with other forms of violence and is a normatively meaningful institution which is distinct from law enforcement.

Conclusion

This chapter explored the recent debates in the just war tradition. Starting with Walzer’s *Just and Unjust Wars* it explored how the relationship between the soldier and the state and between soldiers on opposing sides has been understood and what arguments have been marshalled in favour of the various views. It has been shown that whilst central, indeed canonical, to the just war tradition, Walzer’s statements about the moral equality of combatants and his fairly brief arguments in defence of the principle are unconvincing. The reductive individualism of the revisionist just war theorists, as well as their philosophical acumen, coming, as they do, from a much more rigorous and “austere” tradition of moral philosophy has cast doubts on the sustainability of Walzer’s claims.²⁹⁴ Subsequently a detailed analysis of two of the main revisionists’ arguments was undertaken. A strong version of their claims was put forward in order to provide a basis for a critique in subsequent chapters. Central to their arguments is a view that war is not a distinct sphere of moral activity; it is continuous with other forms of violence and can be judged according

²⁹³ Walzer, ‘Philosophy and Democracy’, p. 19.

²⁹⁴ Lazar, ‘The Responsibility Dilemma for Killing in War’, p. 180.

to the same moral criteria. These criteria require reducing it to individual actions and focussing on the individual rights and duties involved. The final section argued that the claims of the revisionists represent such a profound break with the just war tradition that the tradition itself has split into two components.

CHAPTER FOUR

Jus in bello: Killing and Being Killed in War

Theirs not to make reply,
Theirs not to reason why,
Theirs but to do and die:
Into the valley of Death
Rode the six hundred.

...

Honour the charge they made,
Honour the Light Brigade,
Noble Six Hundred.²⁹⁵

Joanna Bourke writes that “[t]he characteristic act of men at war is not dying, it is killing.”²⁹⁶ This is only half correct, what is characteristic of warfare is killing and being killed; in war death does not come from age or illness but is a result of deliberate action by another person, it involves the distribution of harms. To understand warfare and the experience of war it is necessary to understand this killing and being killed, the doing and the dying, which make it up. Specifically, it is necessary to understand the meanings of these actions in order to understand how they are distinct from other forms of violence and how they should be distributed; that is the subject of this chapter.

The act of killing in war has been written about extensively. In some cases, it seems that soldiers find it difficult to kill, even when under fire, due to the gravity of the act, and training needs to be designed to overcome this natural reluctance.²⁹⁷ In other cases killing seems too easy, and the history of warfare is as much a history of war crimes, massacres, and barbarity.²⁹⁸ The distinction between war and massacre is essential to understanding the meaning of killing in war. Or, rather, it is the different meanings of these killings that allow war to be distinguished from

²⁹⁵ Alfred Lord Tennyson, ‘The Charge of the Light Brigade (1854)’, in *The Oxford Book of War Poetry*, ed. Jon Stallworthy (Oxford: Oxford University Press, 2008), p. 115.

²⁹⁶ Bourke, *An Intimate History of Killing*, p. xiii.

²⁹⁷ Ibid.; Lt. Col. Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Boston: Little, Brown and Company, 1996).

²⁹⁸ Omer Bartov, *The Eastern Front, 1941-45: German Troops and the Barbarisation of Warfare* (Houndmills: MacMillan, 1985); Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York: Harper Collins, 1992).

massacre. This means resisting the idea that war is just massacre writ large and recognising that there are distinct meanings of different actions. These meanings are embodied in the language and vocabulary that are used to describe the events and actions in question.

There is also a particular meaning associated with soldiers who are killed in war. This is the meaning that it is reflected in rituals of remembrance and in war cemeteries which honour those who fell in battle. This remembrance is specific and particularistic and it reflects the social understanding of what it means to be a soldier and the relationship between the soldier and the community. The public nature of remembrance reflects the public nature of the identity of the soldier as well as the public nature of their deaths. The specificities of remembrance, particularly considering those whose deaths are not remembered, highlights the different meanings that death in war can have.

The objective of this chapter is to understand the meanings of the doing and the dying and of the honour accorded those who die in war and to explore how this meaning is related to the ways in which the actions are distributed. In other words, to understand the meaning of the actions and harms associated with the combatants' privilege, which is the core component of the *jus in bello*.²⁹⁹ In particular it demonstrates that actions and identities in war exist within what Taylor terms "a field of meanings" which allows them to be understood and interpreted.³⁰⁰ It also shows that these meanings are related to the different principles of distribution by which identities, and the rights and responsibilities associated with them, are distributed. To do this it draws upon Gadamer's hermeneutics and the importance of the concept of the fusion of horizons as the basis for the understanding of meaning. It is by fusing the horizons of the just war tradition, as outlined in the previous two chapters, with the horizons of war and of the battlefield that it becomes possible to understand the "moral reality of war".³⁰¹ This allows it to demonstrate that there is a genuine moral cost to the revisionist approach as it is incapable of recognizing this moral reality or the field of meanings within which it exists.

The chapter proceeds in four sections all of which consider one aspect of the distribution of harms in warfare. The first two consider the meaning of killing in war and the infliction of

²⁹⁹ Berman, 'Privileging Combat?', pp. 9 - 13.

³⁰⁰ Taylor, 'Interpretation and the Sciences of Man', p. 22.

³⁰¹ Walzer, *Just and Unjust Wars*, p. 1.

harm, and the last two consider the meaning of being killed in war, or being exposed to harm. Each section uses examples that have been chosen either to illuminate a particular contrast, and therefore to highlight the field of meanings within which war is understood, or to illustrate the different way in which the just war tradition and the revisionist approach understand killing and death in war. It is important that all of these examples are real examples from war and reflect the genuine dilemmas, understandings, and actions that occur in war. It is a contention of this chapter that the just war tradition provides a more persuasive and compelling understanding of the actions within war and what they mean than the revisionist account can provide. The revisionist account, it is shown, cannot make important moral distinctions or recognize important contrasts that are crucial to the moral understanding of war.

Section one analyses the My Lai massacre during the Vietnam War. This section considers the different meanings of acts of war and war crimes. Section two considers the doctrine of double effect and the killing of noncombatants in the just war tradition and the practice of war. It explores the different ways in which the traditional and revisionist approaches understand this and how as a result, they come to different conclusions. Section three explores the meaning of being required to risk one's life in war through an analysis of conscription. It demonstrates the way in which conscription is not necessarily about equalizing the risks of war among the population but about controlling and determining who faces those risks. The final section focuses on rituals of remembrance. This section illustrates the different ways in which the deaths of combatants and contractors are understood. Whilst there is an obligation to remember combatants based on the meaning of their death in war, the lack of remembrance of contractors reflects the fact that their identity is constituted by a different principle of distribution. In each section the first part outlines the examples and illustrates the existence of a field of meanings whilst the second part considers the examples in the light of the just war tradition and Gadamer's concept of a fusion of horizons in order to understand the truth of the meanings within them and the relationship of these meanings to the principles of distribution involved.

I. The My Lai Massacre: War and War Crimes

As Thomas Nagel argues, no sophisticated moral theory is needed in order to condemn the My Lai massacre and similar events as war crimes and atrocities.³⁰² Whilst a lesser known episode in the

³⁰² Thomas Nagel, 'War and Massacre', *Philosophy and Public Affairs* 1, no. 2 (1972): 123–44, p. 123.

events of My Lai, no sophisticated moral theory is required to recognise that Lieutenant Hugh Thompson Jr., the helicopter pilot who intervened in the massacre and who ordered his gunner to hold Lieutenant William Calley's troops off whilst he saved the last remaining villagers of My Lai and evacuated them to safety, deserves the highest praise.³⁰³ Thompson, however, was a participant in an unjust war and killed enemy combatants. This section analyses the contrasting meanings of his actions compared to those of Calley. The first part outlines the events and their meanings, the second part demonstrates how Gadamer's fusion of horizons allows the moral difference between the actions to be understood and allows Calley's actions to be condemned, even against those who sought to defend him.

Meaning, morality, and massacre in My Lai

On the morning of 16th March 1968 Lt. William Calley led his troops of 'C' (Charlie) Company into the hamlet of My Lai, in South Vietnam. Within a few hours almost all of the inhabitants were dead, massacred by Calley and his men. The dead included the elderly, men, women, children, and babies. Some had been raped. Some had been tortured. All were unarmed. In total 504 people were killed.³⁰⁴

On the morning of 16th March 1968 Lt. Hugh Thompson, Jr. flew his helicopter over My Lai to provide reconnaissance before the attack by Charlie Company. As they flew over the hamlet they saw a young military aged male carrying a gun running out of the hamlet, this was the only armed Viet Cong member seen that day. He ordered his gunner to attack.³⁰⁵

As it happened, the gunner was new and inexperienced and missed but, had they killed him, what would have been the moral and meaningful difference between their acts and those of Charlie Company? This may seem a strange question to ask, but it is raised directly by the revisionist argument. The young man whom Thompson and his crew attempted to kill did not bear individual moral responsibility for posing an unjust threat which, according to McMahan, is the only justification for killing.

³⁰³ Michael Bilton and Kevin Sim, *Four Hours in My Lai* (New York: Viking, 1992), pp. 103 - 104.

³⁰⁴ Trent Angers, *The Forgotten Hero of My Lai: The Hugh Thompson Story* (Lafayette: Acadian House, 1999), pp. 101 - 121.

³⁰⁵ Hugh Thompson, 'Hugh Thompson's Story' (My Lai 25 Years After: Facing the Darkness, Healing the Wounds, Tulane University, New Orleans, December 1994), http://law2.umkc.edu/faculty/projects/ftrials/mylai/MyL_hero.html.

Subsequently, after making several passes over the village, Thompson and his crew realized that something was wrong, that there were no combatants being killed. When they saw a number of civilians heading towards a bunker whilst being pursued by some of Charlie Company's troops, Thompson landed his helicopter between the civilians and the troops and asked what was going on. Upon being told that the troops intended to throw a hand grenade into the bunker in order to kill the civilians, he ordered them to stop and ordered his gunner to train his gun on the American soldiers and to prevent them from murdering the civilians. In the meantime he approached the bunker and persuaded the civilians to come out and then requested assistance from other helicopter pilots to evacuate them from the village.³⁰⁶

This episode is discussed by Fabre where she praises Thompson's actions; she also argues that not only should soldiers in an unjust war intervene to save civilians, but they should also intervene to protect combatants fighting in a just war.³⁰⁷ She explicitly argues that combatants fighting in an unjust war have no more right to kill those fighting in a just war, even in self-defence, than to kill innocent non-combatants. Even more strongly, she states that the principle that mandates that combatants in an unjust war should use force against their own side in order to defend non-combatants, as Thompson threatened to do, also mandates them to do the same in defence of combatants on the just side.³⁰⁸ As such, his actions on the morning of the My Lai massacre and in subsequent months, when he participated in several operations in which armed Viet Cong combatants were killed, are no more justified according to Fabre than Calley's actions at My Lai.³⁰⁹

It is not the case, however, that killing combatants in a war that lacks a just cause and killing non-combatants reflects simply a different level of barbarism and brutality. It is not the case that Thompson is "a murderer . . . though not one without a drop of human kindness."³¹⁰ Thompson is not a murderer at all. The same goes for Ronald Ridenhour, the G.I. who helped expose the My Lai massacre by gathering evidence and information and writing to a number of US politicians and Pentagon officials.³¹¹ He had a similar helicopter reconnaissance role to Thompson and has acknowledged that in a four month period he and his crew killed 36 people, all

³⁰⁶ Angers, *The Forgotten Hero of My Lai*, pp. 123 - 129.

³⁰⁷ Fabre, *Cosmopolitan War*, pp. 80 - 81.

³⁰⁸ *Ibid.*, p. 81.

³⁰⁹ Angers, *The Forgotten Hero of My Lai*, pp. 144 - 147.

³¹⁰ Walzer, *Just and Unjust Wars*, p. 38.

³¹¹ Angers, *The Forgotten Hero of My Lai*, pp. 151 - 154.

of them armed Viet Cong combatants. By contrast, the crew who had performed the same mission in the same place for the preceding eight months killed over 700 people and he believes this discrepancy is because the earlier crew did not care whom they killed and made no effort to discriminate between combatants and non-combatants.³¹² The discrimination between combatants and non-combatants does not make him and his crew slightly less vile murderers than the previous crew. They are not murderers at all.

The ability to distinguish between these acts as not simply being different in the degree of cruelty and criminality but different in kind is essential to be able to make sense of war. A world without the ability to distinguish between these types of actions would be morally poorer. The difference between these acts is not to do with the intent behind them; in all of the cases the intention was to kill and under domestic criminal law it is the intent to kill that distinguishes murder from manslaughter. Rather, the difference reflects the different meanings of the acts and of the identities of the people involved, meanings which are socially constructed and intersubjective. It is the existence of war as a social institution and the distribution of the identities and associated deontic powers that it creates that is the basis of these meanings.

The fusion of horizons and the role of language

The moral difference between the actions of Calley, and those who defended him, and Thompson can be understood through Gadamer's fusion of horizons. It will be recalled that for Gadamer the fusion of horizons involves accepting one's own historicity and prejudices as "a prior condition of understanding".³¹³ Understanding is the fusion and expansion of the horizon formed by these prejudices through the encounter with the other, in which the other is not turned into an object of study but in which the interpreter allows him or herself to be transformed by the truth of the experience of the other.³¹⁴ In this case the horizon is formed by the just war tradition which provides the prejudices, in the form of the language, terms, and concepts, which make understanding and judgement possible. In other words, it is the language that is available that allows actions to be described, interpreted, and understood.

³¹² Ron Ridenhour, 'Ron Ridenhour's Story' (My Lai 25 Years After: Facing the Darkness, Healing the Wounds, Tulane University, New Orleans, December 1994), http://law2.umkc.edu/faculty/projects/ftrials/mylai/MyI_hero.html.

³¹³ Gadamer, *Truth and Method*, p. 308.

³¹⁴ *Ibid.*, p. 301 - 306.

The importance of the role of language and prejudice as the basis of understanding is illustrated by their misuse in the reaction to the My Lai massacre. The army report into My Lai was a whitewash and a cover-up which exonerated the majority of the participants. It was only through the actions of Ridenhour and the journalist Seymour Hersh that the events became public knowledge and were brought to the attention of the military high command and Congress.³¹⁵ During the initial investigation then Major Colin Powell (the future Chairman of the Joint Chiefs of Staff and subsequently Secretary of State under George W. Bush) wrote a report describing relations between American soldiers and the Vietnamese civilian population as “excellent”, due to the soldiers’ receiving two and a half hours of training on civic affairs and the Geneva Conventions.³¹⁶ The only individual prosecuted for the massacre was Calley, the full investigation had recommended the prosecution of several more participants in the massacre but military prosecutors dropped these charges. Following the guilty verdict there were widespread demonstrations of popular support within the US for Calley and a common belief that he has done nothing wrong and was being made a scapegoat.³¹⁷ This support crossed the political divide; then Governor of Georgia and future President Jimmy Carter organised an ‘American Fighting Men’s Day’ and urged Georgians to drive for a week with their headlights on, in order to “honor the flag as ‘Rusty’ [Calley] had done”.³¹⁸ Despite Calley being sentenced to life-imprisonment he was immediately released and placed under house arrest during his appeal on the orders of President Nixon. Over time the sentence was reduced to 20 years, and then reduced further to 10 years by the Secretary of the Army. Ultimately, Calley spent less than three and a half years in prison.³¹⁹ On the other hand, Thompson was ostracised by the armed forces which he served, was threatened with being court-martialled by the Chairman of the House Armed Services Committee, and was given no recognition for his bravery, he also reportedly received death threats for his actions.³²⁰ Similarly, Ridenhour was investigated by a private investigator on the explicit orders of President Nixon.³²¹ It was only in 1998 that Thompson and his crew members were eventually awarded the

³¹⁵ Seymour M. Hersh, *Cover-Up: The Army’s Secret Investigation of the Massacre at My Lai 4* (New York: Random House, 1972).

³¹⁶ Bilton and Sim, *Four Hours in My Lai*, p. 213.

³¹⁷ *Ibid.*, pp. 338 - 341.

³¹⁸ *Ibid.*, p. 340.

³¹⁹ *Ibid.*, pp. 241 - 250.

³²⁰ Angers, *The Forgotten Hero of My Lai*, pp. 175 - 176.

³²¹ Bilton and Sim, *Four Hours in My Lai*, pp. 321 - 322.

Soldier's Medal, in one case posthumously, and publicly and officially recognised and praised for their actions.³²²

Much of this reaction and the defence of Calley and his men rested on claims that he was being made a scapegoat, that he was following orders, that the civilians of My Lai had been involved in attacks on US troops, and that he was concerned about the safety of his men.³²³ This reaction could be seen as a challenge to the validity of the hermeneutic approach in one of two ways. Either, the hermeneutic approach must accept the truth of the experience of Calley, his men, and those who defended them and who believed that the events of My Lai were not wrong, which is an unpalatable position or the events of My Lai can be condemned but the hermeneutic approach must be abandoned rather than fuse horizons with Calley and his supporters. However, when correctly understood the hermeneutic approach does in fact contain the resources necessary to condemn My Lai, despite the shameful attitudes of the day.

It is precisely Gadamer's concepts of prejudice and of the linguisticity of understanding that provides the resources and tools necessary to condemn Calley and make moral judgements. Any description of what occurred at My Lai has to begin with language and with the prejudices it contains. In this case it must start with the language of the just war tradition and the meanings that its terms have accreted over time.

Rape.

Torture.

Murder.

Massacre.

Killing unarmed men, women, children, infants, and the elderly.

These words do not have just any meaning, they cannot be used to mean whatever the speaker wants them to mean. Words are not just signs that can be arbitrarily assigned another meaning because language is not detached from the subject under consideration but is constitutive of its being.³²⁴ The language of the just war tradition is constitutive of the institution and the moral reality of war. Given that war is an institution constituted through the language of the just war tradition, there is simply no way of describing the events of My Lai that can assimilate it to an act

³²² Kendrick Oliver, *The My Lai Massacre in American History and Memory* (Manchester: Manchester University Press, 2006), p. 251.

³²³ Angers, *The Forgotten Hero of My Lai*, pp. 177 - 185.

³²⁴ Gadamer, *Truth and Method*, p. 416.

of war without doing violence to language or dissimulating about the events. The fusion of horizons must start with one's participation in a community of language and tradition; this is why Gadamer describes it as an ontological feature of being rather than a method study.³²⁵ Those who defended Calley could only do so by denying the meaning of the language they used and thereby denying their own participation in a community.³²⁶ In other words, they did violence to and denied a part of their own humanity as well as to the humanity of the victims.

Any description of the actions of Thompson and of Ridenhour when they participated in combat must also start with the language of the just war tradition.

Killing combatants.

Discriminating between combatants and non-combatants.

Seeking aid for the injured.

Protecting non-combatants.

These words and terms are also constitutive of the institution and meanings of war but in this case they are congruent with the meaning of the institution and with the identities and deontic powers constituted by the just war tradition. Calley and Charlie Company's indiscriminate killing of non-combatants was an unjust distribution of violence as it was based on the "love of violence, revengeful cruelty, fierce and implacable enmity" condemned by Augustine.³²⁷ To kill non-combatants is to violate the deontic rights, including the right to life, which they hold. Thompson and his crew's actions, on the other hand, precisely distributed harm according to the principles of the just war tradition and respected the deontic rights and obligations of both non-combatants and combatants.

The ontology and, in particular, the role of language in hermeneutics provides an answer to the criticism that it is conservative and lacks a critical edge. Language itself is the critical tool as it is language, and the meaning that it embodies, which makes possible the criticism of contemporary complacencies. Critical distance is gained through understanding the history of the tradition; the history of the arguments, judgements, questions, and answers, that make it up. The ability to step back into this history and draw upon it as a resource allows both the distance necessary for criticism whilst also maintaining the connection that Walzer stresses is necessary for

³²⁵ Gadamer, 'The Universality of the Hermeneutical Problem'.

³²⁶ Walzer, *Just and Unjust Wars*, Preface: pp. xxii - xxiii.

³²⁷ Augustine, 'Contra Faustum', Book XXII: Ch. 74; p. 301.

that criticism to make sense.³²⁸ In other words, even when words are misused, as in the case of those who believed My Lai was a legitimate act of war, the history of those words and of past judgements allows this misuse to be detected and corrected. As such, it is Gadamer's prejudice which, rather than preventing critical thought and judgement actually is the condition of its possibility, by opening up the past as a space to step into to gain distance from the present.

II. The Principle of Discrimination: Identity and Liability

Central to the just war tradition and to the revisionist account of war is the importance of the principle of discrimination. In order to be just, military practice must discriminate between legitimate and illegitimate targets, it must discriminate between those who may be harmed and those who may not, but what this actually means in terms of military practice depends upon the way in which harm in war is conceived. What is it that makes someone a legitimate target of attack and makes someone else immune from attack? This section considers the bombing of Dresden by British and American forces during World War II and the murder of large numbers of members of the clergy in Republican held areas of Spain at the beginning of the Spanish Civil War. The first part outlines the two examples and argues that both the conventional and revisionist approach to the just war tradition would condemn the bombing of Dresden but for very different reasons. It then elucidates this point by arguing that whilst the murder of clergy in the Spanish Civil War is clearly unjust according to the traditionalist account of the just war tradition, the revisionist account would consider it legitimate. The second part assesses the different meanings that the two approaches attach to harm in war and demonstrates that the revisionist account is not congruent with what war is as a social practice.

The bombing of Dresden and the massacre of the clergy

On the night of 13th February 1945 and in the early hours of the following morning over seven hundred heavy bombers of the Royal Air Force dropped more than two-and-a-half thousand tons of bombs on the city of Dresden.³²⁹ The bombers came in two waves, three hours apart, to ensure that the second wave would disrupt any rescue effort, and they dropped a mix of high explosive

³²⁸ Walzer, *Interpretation and Social Criticism*, pp. 35 - 66.

³²⁹ 'Historical Analysis of the 14-15 February Bombings of Dresden' (USAF Historical Division, Research Studies Institute, Air University, 1945), <http://www.afhso.af.mil/shared/media/document/AFD-110208-030.pdf>, p. 3.

bombs to destroy buildings and incendiaries to set the city aflame.³³⁰ The area targeted for bombing was the medieval residential city centre, with narrow streets and many wooden buildings which would provide fuel for the incendiaries.³³¹ The incendiary bombing of the city centre led to a fire-storm in which it is estimated that 25,000 civilians perished.³³² Dresden did contain a number of factories producing *matériel* for the German war effort and was also an important railway marshalling point. However, whilst the bombing did cause some damage and disruption to Dresden's industry, this had not been its primary target; instead the objective was the destruction of residential property, damaging morale, and to cause chaos by creating refugees.³³³

On 17th July 1936 General Franco issued his *pronunciamiento* and led an armed uprising against the Spanish Republic which led to the beginning of the Spanish Civil War. In the immediate aftermath of the attempted coup hundreds of clerics, monks, nuns, and others associated with the Catholic Church were killed by the defenders of the Republic.³³⁴ It is undoubtedly true that the Catholic Church in Spain at the time was totally opposed to democracy and to the Republic and actively supported the fascist cause and used its influence to encourage others to join the fascists and to legitimise the coup in the eyes of the faithful.³³⁵

This illustrates how the different ways in which liability to attack is understood leads to very different judgements about military practice as principles like discrimination and double effect have very different practical implications. A central feature of the just war tradition is non-combatant immunity and, concomitantly, the principle of discrimination between combatants and non-combatants. From the perspective of the just war tradition, the bombing of Dresden is therefore unjust and a violation of the *jus in bello* as it killed non-combatants, not as a foreseen but unintended consequence of military action which was otherwise legitimate and in which the civilian casualties were proportionate to the military advantage, but as the intended targets. For exactly the same reason, the just war tradition would see the killing of clerics as unjust as the

³³⁰ Sebastian Cox, 'The Dresden Raids: Why and How', in *Firestorm: The Bombing of Dresden, 1945*, ed. Paul Addison and Jeremy A. Crang (London: Pimlico, 2006), pp. 29 - 30.

³³¹ *Ibid.*, pp. 40 - 42.

³³² Sönke Neitzel, 'The City under Attack', in *Firestorm: The Bombing of Dresden, 1945*, ed. Paul Addison and Jeremy A. Crang (London: Pimlico, 2006), p. 75.

³³³ 'Historical Analysis of the 14-15 February Bombings of Dresden', pp. 17 - 18.

³³⁴ Hilari Ragner, *Gunpowder and Incense: The Catholic Church and the Spanish Civil War*, trans. Gerald Howson (Oxford: Routledge, 2007), pp. 126 - 29.

³³⁵ Julián Casanova, 'Franco, the Catholic Church and the Martyrs', in *The Spanish Civil War: Exhuming A Buried Past*, ed. Anindya Raychaudhuri (Cardiff: University of Wales Press, 2013), pp. 9 - 11.

clerics, whatever their moral failings and support for fascism, were non-combatants. When they were killed their deaths were not incidental to an otherwise legitimate military goal, but were the intention of the act itself.

The revisionists would condemn the bombing of Dresden for different reasons than in the mainstream just war tradition. McMahan rejects the moral significance of the distinction between combatants and non-combatants and replaces it with individual liability as the basis for determining whether someone can be targeted or not and therefore the principle of discrimination becomes discrimination between those who are morally responsible for an unjust threat and those who are not. Whilst McMahan does not discuss the bombing of Dresden he is emphatic on the injustice of the atomic bombing of Hiroshima and Nagasaki and the principles he uses to condemn these attacks would, presumably, also apply to the bombing of Dresden.³³⁶ His likely condemnation of the Dresden bombing would not be based on a belief that it is wrong in principle to attack non-combatants but that those non-combatants who were attacked in Dresden were not (all) liable to harm and no attempt was made to discriminate between those who were and those who were not. Even in his more recent work where he comes closer to accepting a prohibition on the targeting of non-combatants this is based on the argument that the vast majority will not be sufficiently morally responsible to be legitimate targets, not on the basis that they should be immune from targeting by virtue of their status as non-combatants.³³⁷ It might be argued that if both the just war tradition and the revisionists would condemn the bombing of Dresden then the reasoning behind each is less important, there is an over-lapping consensus which can be the basis for moral understanding. The reasoning is important, however, as in other cases it will not lead to consensus. For example, the logic of the revisionist argument would not be able to condemn the killing of clerics in the Spanish Civil War. Many of the clerics killed, especially the more senior ones, were individually morally responsible for posing an unjust threat due to their position in society and their encouragement of fascism and of Franco's coup. According to McMahan's argument, in which harm can only be inflicted against those who are morally responsible for posing an unjust threat, they would be legitimate targets and no wrong was done in killing them. In fact, killing them is morally no different than the killing of fascist soldiers in combat and may even be

³³⁶ McMahan, *Killing in War*, p. 16.

³³⁷ *Ibid.*, pp. 221 - 235.

morally better as, being educated and literate and presumably familiar with the Catholic just war tradition, they are even less likely to be excused than soldiers.

War as an institution is not a mechanism for assessing individual moral responsibility, still less for distributing harms on this basis. The meaning and justice of actions in war are connected to the identities that individuals hold and to the deontic powers that go along with them. The fascist-sympathising clerics may well have been legitimate subjects for prosecution and punishment by the courts due to their actions, and the legal system is the right way to do this; it is precisely the role of the legal system to assess individual responsibility and to distribute harms on that basis. The barrel of a gun, no matter how just the cause of the person holding it and no matter how much the individual facing it is responsible for injustice, is not. It is not the distribution of moral responsibility that determines the legitimate distribution of harm in war, but the distribution of identities.

Interpretivism and the distribution of harm in war

The idea that harm, up to and including death which is the most serious harm of all, should not be distributed according to the moral responsibility of the individuals involved is deeply counter-intuitive. It is this counter-intuitiveness which animates the revisionists' arguments and gives them their persuasive power but it is precisely this attempt to make one single distributive principle key across all domains that Walzer describes as "tyranny" in *Spheres of Justice*.³³⁸ Whilst much of his argument focuses on the threat posed by money becoming the key to distribution in domains in which it does not belong, the principle that different domains require different principles of distribution is what is important. To understand the correct principle of distribution of harm in war and why it is not individual moral responsibility it is necessary to consider the actual meaning of the harm that is distributed in war.

In war, harm is not inflicted on individuals as individuals, but is politically mediated. The harms inflicted on individuals have a collective aim, the attempt to compel the enemy state to submit. This collective aim depersonalises the harms such that they become a public act. The soldier, as a public identity, is a legitimate target for public harms. Non-combatants retain their private identity and therefore to harm them to achieve a public end is to distribute harm in the wrong way. For the same reason, the harms that can be inflicted on soldiers are limited to

³³⁸ Walzer, *Spheres of Justice*, pp. 17 - 20.

preventing them participating in the public act of combat. When they are captured and therefore no longer capable of participating the right to inflict harm ends, no matter how much individual moral responsibility they bear for the posing of an unjust threat.

The idea that the principle for the distribution of harms should be the distribution of moral responsibility is superficially attractive and intuitively appealing when violence is thought about in purely individual terms. War, however, is a social institution and cannot be reduced to individual actions. The distribution of harm according to individual moral responsibility in war is unjust as a distributive principle as it does not reflect the meaning of the action, for either the perpetrator, the recipient, or their respective societies.

The relationship between combatants and non-combatants is morally meaningful but cannot be reduced to individual morality. To attempt to reduce the relationships to individual morality is to attempt to transcend and objectify the tradition through which these identities come to be.³³⁹ The denial of the prejudices which make understanding possible does not turn one into an “ideally free and rational agent” but instead is a loss of character and moral depth.³⁴⁰ To attempt to transcend the just war tradition is to deny one’s own and one’s enemy’s participation in the tradition and therefore to deny the basis for understanding and for a fusion of horizons. Given that interpretation is a feature of being, this denial is also a denial of one’s own and one’s enemy’s humanity and can be condemned on that basis.

The infliction of harm within war does not preclude a fusion of horizons and understanding; this is the understanding of the enemy as a man or woman who is not a criminal and that harm is not being inflicted due to their individual moral character but due to their identity. Without the distinction between combatants and non-combatants war does not make sense as an institution as it becomes a relationship between individuals.

A key principle of interpretive approaches, Taylor argues, is that “[m]eaning is of something . . . we can distinguish between a given element – situation, action, or whatever – and its meaning.”³⁴¹ In other words, two (or more) descriptions are always possible, one of which describes the substrate and is given in empirical or brute data terms, and one of which is given in terms of meaning.³⁴² The revisionist argument describes the actions in war in brute data terms of

³³⁹ Gadamer, *Truth and Method*, p. 301.

³⁴⁰ Sandel, *Liberalism and the Limits of Justice*, p. 179.

³⁴¹ Taylor, ‘Interpretation and the Sciences of Man’, p. 22.

³⁴² *Ibid.*, p. 22.

individual action and individual responsibility; however, what Taylor writes about the practice of negotiating is also true about the practice of war, it “cannot be conceived as a set of individual actions” instead it is a form of “social relation, mutual action”.³⁴³ The description of actions within war in individual terms denies the reality of social meanings and institutions. It also denies the social relations that exist between combatants and non-combatants and hence cannot recognise that discrimination between combatants and non-combatants is foundational to war as a practice and institution.

III. Sacrifice: Conscription and Commutation

In war a specific part of the population, namely members of the armed forces, are required to risk and perhaps give their lives on the basis of decisions made by the government. This is the ultimate sacrifice. Given that it is widely believed that one of the key roles of the state is to protect its members it is necessary to justify how some of those members can be required to make this sacrifice and the basis for determining who must do so and how to distribute this requirement. Historically, one common way to determine who must make this sacrifice is through conscription, which, at least in theory, universalises the risk (in fact conscription only universalizes the risk amongst those liable to it, always the young and almost always men). The armed forces, however, have always had to compete for labour with other industries, even in war time, and so in practice there has always been selection and exemption from within the pool of eligible men and women. In the nineteenth century one common basis for exemption from military service was the payment of a commutation fee, to pay for the costs of recruiting a replacement. By the twentieth century the most common basis for exemption was for skilled workers in specific critical industries in order to maintain production to support the war effort. These two forms of exemption were understood very differently, with the former being deeply controversial and unpopular whilst the latter was widely accepted as legitimate. This section analyses the contrasting reactions to these forms of exemption from military service. The first part outlines examples of these two exemptions and shows that the reaction to these exemptions reflects the social meaning of military service. The second part introduces the concept of sacrifice, as developed by Paul Kahn, and uses a fusion of horizons to understand the meaning of sacrifice. There are, of course, arguments that conscription itself is morally wrong and the basis for exemption is irrelevant compared to the

³⁴³ Ibid., p. 36.

injustice of the policy. Whilst acknowledging that this is an important debate, this section will not engage with it. Instead, its purpose is to show that in the examples in question an important feature of the debate was the basis for exemption, not the policy of conscription itself.

The meaning of military service

On the morning of 13th July 1863 demonstrations and protests against the draft broke out in New York, these quickly degenerated into violent riots. By July 17th, when regiments of the Union Army reached the city to suppress the riots, 105 people were dead, many African-American men had been lynched, and an orphanage for African-American children had been razed, although miraculously it was evacuated and the mob refrained from attacking the children.³⁴⁴ The reasons for the riot were complex and, as the victims and the viciousness of the crimes suggest, were partly motivated by racial hatred (although this was related to opposition to the draft, only male citizens were subject to the draft and the Supreme Court decision in *Dred Scott v. Sandford* of 1857 held that no black individuals, whether free or enslaved, could be a citizen, this led to resentment due to the perception that the white population were being required to bear the burden of a war that was seen as benefitting the black population).³⁴⁵ One crucial motivation was the draft act, which the initial demonstrations had been opposed to, and the injustice contained within the act which allowed men drafted to pay a \$300 commutation fee.³⁴⁶ This fee was used to pay for a replacement for the now exempted draftee, however the fee was too high for most poor and working class men to afford.³⁴⁷ In effect the commutation fee granted the wealthy an exemption from military service by virtue of nothing other than their wealth.

When the Conscription Act was introduced in Britain in 1916 it immediately exempted whole categories of people from military service.³⁴⁸ These men, all working in various protected industries like agriculture, mining, and armaments, were also entitled to wear a particular badge and were provided a certificate to demonstrate to others that they were working in war industries

³⁴⁴ Iver Bernstein, *The New York City Draft Riots: Their Significance for American Society and Politics in the Age of the Civil War* (Oxford: Oxford University Press, 1990), p. 5; Leslie M. Harris, *In The Shadow of Slavery: African Americans in New York City, 1626-1863* (Chicago: University of Chicago Press, 2003), pp. 280 - 286.

³⁴⁵ Bernstein, *The New York City Draft Riots*, p. 9; Harris, *In The Shadow of Slavery*, pp. 273 - 274.

³⁴⁶ James W. Geary, 'Civil War Conscription in the North: A Historiographical Review', *Civil War History* 32, no. 3 (1986): 208-28, p. 209.

³⁴⁷ Bernstein, *The New York City Draft Riots*, pp. 8 - 9.

³⁴⁸ William Grist Hawtin, *The Law and Practice of Military Conscription under the Military Service Acts* (London: Harrison and Sons, 1917), pp. 41 - 46.

and were exempt from service.³⁴⁹ The objectives of the various acts introduced throughout the war were to simultaneously maintain both recruitment levels for the armed forces and also sufficient staffing levels in industries important to the war effort.³⁵⁰ They allowed all those working in industries under the Ministry of Munitions to be granted exemptions as well as allowing government departments to issue exemptions to classes of men whom it was believed were more valuable in their original occupations. It also allowed individual men to apply for exemption on the basis of the importance of the work they were engaged in.³⁵¹ These acts allowed the government to control who served in the armed forces and who had to face the risks of war. Despite these exemptions there was no widespread opposition to the conscription acts and no resentment of those who were exempted.

The reason for these different reactions to conscription and to the principles of exemption allowed during the American Civil War and World War I is because military service has a meaning and the principles of distribution of the requirement to serve and exemptions from this requirement must reflect the meaning. This meaning reflects the risks involved in military service, specifically the risk of being killed in war.

The distribution of risk and the meaning of sacrifice

The different reactions to the conscription acts in the American Civil War and World War I reflect the social understanding of sacrifice as meaningful and of the principles that should govern its distribution. In political theory it is common to argue that one of the key reasons for the formation of states was to ensure the provision of security against external threats. Physical security is the chief good, without which no other goods can exist or be maintained, but the provision of physical security requires that some individuals accept greater risks and insecurity by, essentially, interposing themselves between the threat and the threatened. Furthermore, the state not only ensures the physical security of its citizens, but it also ensures its own security in terms of protecting its territorial integrity and political independence, in these cases no individuals' physical security may be immediately threatened, but some will be required to accept risks to defend the

³⁴⁹ Ralph James Q. Adams and Philip P. Poirier, *The Conscription Controversy in Great Britain, 1900-18* (Houndmills: MacMillan, 1987), p. 90.

³⁵⁰ *Ibid.*, pp. 89 - 92.

³⁵¹ Hawtin, *The Law and Practice of Military Conscription under the Military Service Acts*, pp. 42 - 43 and pp. 50 - 51.

state, this is the ‘bloodless invasion’ scenario discussed by Rodin.³⁵² Thomas Hobbes recognised and faced this dilemma head on; for him individual physical security is so important that nothing can override it. In war, therefore, there will be “a running away” as soldiers not only naturally want to protect themselves but also have a right to do so that overrides any obligation to the sovereign, the Leviathan, to fight.³⁵³ In reality no state could achieve or maintain security if soldiers were entitled to run away and save their own lives; for Hobbes this is also not a problem as he believes that people should subject themselves to whichever power seems able to protect their lives.³⁵⁴

Any state that takes seriously its obligation to ensure its own and its citizens’ security, and any theory that sees security as an important good to be both created and distributed by the state, must come to terms with the dilemma that this simultaneously requires the creation and distribution of insecurity for some. Further, it is important to recognise quite what is at stake here; this is not a question of taxation or laws which may impose some burdens on citizens in order to provide a good for others. In the case of the provision of security and insecurity individuals can be required to risk and even give their lives on behalf of the state. This is the ‘ultimate sacrifice’, it does not seem possible to justify this by reference to the overall costs and benefits an individual receives or will receive. Death is not a cost that is commensurable to other benefits, and certainly not to potential future benefits; as Kahn argues, “[t]here is no deduction of practical reason that concludes with my death.”³⁵⁵

For Kahn, understanding the experience of politics requires an understanding of the role of sacrifice and its relationship to sovereignty.³⁵⁶ Sacrifice is not a concept that can be encompassed within liberal political theory as it cannot be assimilated to a rational act.³⁵⁷ For Kahn this demonstrates the need for a political theology, drawing on Carl Schmitt’s work of the same title, to demonstrate how political concepts are secularised forms of theological concepts.³⁵⁸ What he means by this is not that religious doctrine does or should govern the internal constitution of the

³⁵² Rodin, *War and Self-Defense*, pp. 131 - 133.

³⁵³ Thomas Hobbes, *Leviathan (1651)*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1991), Ch. XXI, p. 151.

³⁵⁴ *Ibid.*, Ch. XXI, pp. 153 - 154.

³⁵⁵ Paul W. Kahn, *Putting Liberalism in Its Place* (Princeton: Princeton University Press, 2008), p. 247.

³⁵⁶ *Ibid.*; Paul W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011).

³⁵⁷ Kahn, *Political Theology*, pp. 155 - 158.

³⁵⁸ *Ibid.*, pp. 1 - 30.

state, but that the historical process of secularisation, of removing the church from the public sphere (and removing politics from the church), should not be mistaken for the removal of the idea of the sacred from public life. Instead, the state itself takes on elements of the sacred and of faith; without these elements neither the willingness of some to sacrifice themselves for the state, nor the act of that sacrifice itself, can be understood.³⁵⁹

By using Gadamer's concept of a fusion of horizons it is possible to understand the social meaning of sacrifice. In this case it is necessary to fuse the horizons of the just war tradition, particularly its role in constituting the soldier as a social and public identity, with the sacrifice made by the soldier in war. Understanding the experience of sacrifice and allowing oneself to be transformed by the understanding means recognising that sacrifice is meaningful because it reflects public, particularistic, and constitutive attachments. As Sandel argues, community is not something that people have, but something that they are, and it is not based on relationships that are chosen, but those that are already given.³⁶⁰ The meaning of the act of sacrifice and the community on whose behalf the sacrifice occurs are mutually constitutive. To understand oneself as a member of a community as a constitutive part of one's identity is to recognise the sacrifice made by others in the past as part of the history which has consequences for one's choices and conduct.³⁶¹ At the same time, to make the ultimate sacrifice is precisely to recognise the consequences which membership in a community may have for one's choices and conduct. It is for this reason that allowing people to pay to avoid military service is an unjust distribution of risk. Allowing the payment of a commutation fee turns membership of the community into a voluntary association, such that it is "merely an attribute" of identity.³⁶²

The revisionist argument contains the resources to condemn the policy of allowing individuals to pay a commutation fee to avoid military service as the policy, in practice, grants additional rights to a part of the population for no defensible reason. However, the revisionist argument cannot account for the deeper meaning of sacrifice and its relationship to identity. For Rodin, for example, there is no normative reason to defend the state; the state, and sovereignty itself, is seen as having no moral value and therefore it is not legitimate to use force to defend it.³⁶³

³⁵⁹ Ibid., pp. 31 - 61.

³⁶⁰ Sandel, *Liberalism and the Limits of Justice*, p. 150.

³⁶¹ Ibid., p. 179.

³⁶² Ibid., p. 150.

³⁶³ Rodin, *War and Self-Defense*, pp. 142 - 163.

Similarly, McMahan conflates membership of the state as a community with membership of political parties as his argument cannot account for the difference between constitutive and voluntary attachments.³⁶⁴ In other words, whilst the revisionist argument is capable of recognising the injustice of a system of conscription in which the well-off can buy an exemption, it also views membership of the community as a voluntary association. It cannot, therefore, recognise the obligation to serve that the meaning of sacrifice reflects. The different principles of distribution, one in which money plays a central and distorting role and one in which sacrifice for a constitutively meaningful community determines the basis of military service, are invisible to an approach that ignores the relational and collective aspect of war.

IV. Remembrance: Soldiers and Contractors

One of the most important ways in which the social understanding of death in war is mediated is through rituals of remembrance. The public remembrance of the deaths of normal combatants, rather than military leaders, is a relatively recent phenomenon, dating from the late nineteenth century and World War I; remembrance is also selective in terms of who is remembered and why. This section compares the institutionalised remembrance of soldiers to the lack of such remembrance for private military contractors. It argues that this difference reflects the different social meanings that their deaths have and is due to the nature of their relationship to the state. The first part considers the details of rituals of remembrance and the meanings that these reflect. The second part argues that rituals of remembrance are themselves a form of fusion of horizons.

Institutionalised and instrumentalised remembrance

On the 11th November 1920, accompanied by the honours usually reserved for a Field Marshal or Admiral, the body of an unknown British soldier from the trenches of World War I was carried through the streets of London on a gun carriage and interred in Westminster Abbey. A few days earlier, on 7th November, the bodies of four soldiers who could be positively identified as British but for whom there was no way of individually identifying them had been disinterred from the battlefields of France and Belgium. One of those bodies had been randomly selected and

³⁶⁴ McMahan, *Killing in War*, pp. 79 - 84.

transported to Britain.³⁶⁵ At Calais the troops lined the streets and the coffin was accompanied by senior British and French military officers. When the warship carrying the coffin approached Dover it was met with a nineteen-gun salute, traditionally only accorded Admirals. The train to London stopped at every station en route and was laden with flowers.³⁶⁶ In London King George V accompanied the gun carriage carrying the Unknown Soldier, followed by the Archbishop of Canterbury, the Prime Minister, and other dignitaries.³⁶⁷ On the way to Westminster Abbey the cortège stopped in Whitehall for the Cenotaph to be unveiled and wreaths laid. Following the recital of the Lord's Prayer, when Big Ben struck eleven, the whole of the United Kingdom stopped in silence for two minutes, one to remember those who fought and returned and one for those who fell.³⁶⁸ To this day a two-minute silence is observed on the closest Sunday to 11th November and wreaths are laid at the Cenotaph, but now those who fought and died in all subsequent wars are also remembered.

On 31st March 2004 a convoy travelling through Fallujah was ambushed and the four private military contractors working for the firm then known as Blackwater were killed. Their bodies were burned, dragged through the city, and finally hung from a bridge. The group that attacked them filmed and took photographs, which were widely circulated, of the desecration of the bodies and of them hanging from the bridge.³⁶⁹ On 1st April Brigadier General Mark Kimmitt, the Deputy Director of Coalition Operations in Iraq, promised an overwhelming response to pacify the city.³⁷⁰ The reaction was swift and bloody. On 4th April the First Battle of Fallujah began as American forces attacked and besieged the city for three weeks to root out the insurgent groups responsible for the attack on the contractors. Several hundred Iraqis were killed in the battle, both insurgents and non-combatants, as well as a number of American soldiers.³⁷¹

The contractors ambushed in Fallujah are unusual, however. Many other contractors, including numerous US citizens, were killed in Iraq yet their deaths passed unremarked,

³⁶⁵ Neil Hanson, *The Unknown Soldier: The Story of the Missing of the Great War* (London: Corgi Books, 2007), pp. 431 - 436.

³⁶⁶ *Ibid.*, pp. 437 - 442.

³⁶⁷ *Ibid.*, pp. 456 - 458.

³⁶⁸ *Ibid.*, pp. 450 - 454.

³⁶⁹ Jeffrey Gettleman, 'Enraged Mob in Falluja Kills 4 American Contractors', *New York Times*, 31 March 2004, <http://www.nytimes.com/2004/03/31/international/worldspecial/31CND-IRAQ.html>.

³⁷⁰ Brigadier General Mark Kimmitt and Dan Senor, 'Coalition Provisional Authority Briefing', News Transcript, (1 April 2004), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2400>.

³⁷¹ Carter Malkasian, 'The First Battle for Fallujah', in *War in Iraq: Planning and Execution*, ed. Thomas G. Mahnken and Thomas A. Keane (London and New York: Routledge, 2007), pp. 170 - 175.

unremembered, and unrevenged. This reflects the difference between institutionalised and instrumentalised remembrance. Whilst the remembrance of the deaths of soldiers is institutionalised, the deaths of contractors are only remembered for instrumental reasons, particularly to justify actions which will lead to the deaths of soldiers. There are no war memorials for contractors, their names appear on no official websites and are not read out in Parliament, their families do not receive a letter from the Prime Minister or the Secretary of State for Defense. All of these things are expected and are institutionalised for soldiers who are killed. Yet contractors, even those who are of the same nationality as the government employing them and even those who are former members of the armed forces, are only remembered for instrumental reasons. Despite this difference in remembrance of soldiers and contractors, there is no public demand for change. Were a government to be seen to be not making efforts to remember and track the names of its own soldiers who are killed it would be castigated, yet when the same occurs with contractors, even those of the same nationality as the government employing them, there is no public backlash. On the contrary, the frequent conflation of contractors and mercenaries suggests that many people would be appalled at remembering contractors in the same way as soldiers.

The distribution of remembrance and the constitution of identity

The difference in the way in which soldiers and contractors are remembered reflects the fact that their deaths are understood differently and have different social meanings. These different meanings are due to the different relationships that define the identities of the soldier and the contractor and the different principles of distribution which govern the relationships, namely a public oath or a private contract.

Soldiers are remembered because the rituals of remembrance are themselves a form of fusion of horizons in which the death of the soldiers in the service of the state becomes a part of the identity of the community, a part of the horizon through which the world is interpreted. In this way the relationship to those soldiers becomes a “constitutive attachment” and their deaths a part of the “history [which is] . . . neither summon[ed] nor command[ed], which carries consequences nonetheless for . . . choices and conduct”.³⁷² Remembrance is “necessarily particular” because it is the remembrance of the common life of society.³⁷³

³⁷² Sandel, *Liberalism and the Limits of Justice*, p. 179.

³⁷³ Walzer, *Thick and Thin*, p. 8.

In order to understand the way in which rituals of remembrance are a fusion of horizons and are constitutive of identity, it is useful to draw on the work of Benedict Anderson. He describes newspaper reading as a “mass ceremony”, a ritual, carried out simultaneously by millions of anonymous individuals; but the anonymous millions are both linked and limited by language.³⁷⁴ This mass ceremony is what allows individuals to imagine the national community. The annual ritual of remembrance is even more significant in this respect. The unknown but national soldier provides a focus that both links and limits the anonymous millions taking part to members of the national community. But the anonymity of the Unknown Soldier allows the anonymous millions to simultaneously imagine that it is *their* husband, father, brother, son, friend, or ancestor that is represented.³⁷⁵ It allows those taking part to not only recognise an impersonal, anonymous, link between each other, but also to recognise a personal link to the soldier and the nation. These rituals allow the sacrifice of the soldier to be understood as constitutive of the identity of the nation and as forming part its horizon. Most importantly the participation in rituals of remembrance is to be situated within a tradition which is not “something other, something alien.” Through this participation the tradition, the identity of the community, and the meaning and value of the sacrifices of the past through which the community has come to be become “part of us”.³⁷⁶ As such, the understanding of sacrifice is not “a subjective act” but occurs through “participating in an event of tradition . . . in which past and present are constantly mediated”.³⁷⁷

The different social meanings of the deaths of soldiers and contractors and the fact that the deaths of soldiers are remembered and form part of the horizon of the community reflects the different identities they hold. By joining the armed forces and swearing the oath of enlistment the soldier takes on a public and social identity; as the US Army Field Manual states, they “became a soldier”.³⁷⁸ As a soldier they have an obligation to risk their lives when ordered to do so and their death is the result of decisions taken by the sovereign. Contractors, however, have a contractual relationship to the state. When they act they act as private individuals, though employed by the state, as they do not have a social or public identity that carries particular deontic powers and

³⁷⁴ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (New York and London: Verso, 2006), p. 35 and p. 44.

³⁷⁵ Hanson, *The Unknown Soldier*, p. 163.

³⁷⁶ Gadamer, *Truth and Method*, p. 283.

³⁷⁷ *Ibid.*, p. 291.

³⁷⁸ *The Soldier's Guide: FM 7-21.13* (Washington, D.C.: Department of the Army, 2003), http://www.smdc.army.mil/2008/CSM/docs/FM7_21_13.pdf, Section 1-3.

obligations. They risk their lives because of the financial incentives offered by the state rather than in a public capacity and due to the obligations incumbent upon their identity. Contractors are not the same as mercenaries in legal terms because they do not meet the specific legal definition of a mercenary; they are often nationals or residents of the country employing them and they are usually not recruited specifically to take part in hostilities, both of which are core components of the definition of a mercenary under international law;³⁷⁹ however from the perspective of social meaning the two are the same as in each case the principle by which the role is distributed and according to which they risk their lives is contractual. This is why the two are so often conflated and why contractors are regarded with the same moral disdain as mercenaries have traditionally been.

What is important in the difference between soldiers and mercenaries or contractors is the meaning of the identity and, concomitantly, the meaning of their actions. This meaning is determined by the relationship they have to the state and cannot be reduced to individual motivation. On an individual basis contractors may be deeply patriotic and committed to the state for which they fight and may believe it to be fighting a just war; it may indeed even be fighting a just war, however the nature of the relationship remains one of private contract. Combatants may also have a variety of motivations for joining the armed forces, not all of them noble, and these motivations may include a financial motivation due to the pay and opportunities that the armed forces provide. Furthermore, there is nothing wrong with the state paying soldiers well or offering additional pay to those who serve in front-line combat or other hazardous roles. The distinction between soldiers and mercenaries or contractors does not rest on individual motivation but on the nature of the relationship to the state and this distinction is “the common property of the society”, it is “constitutive of the social matrix in which individuals find themselves and act”.³⁸⁰ “The language [of the just war tradition] is constitutive of the reality [of war]” and it is through this language that the distinction between soldiers and contractors is constituted, prior to and independent of the motivations of any individual soldier or contractor.³⁸¹

The argument of the revisionists cannot make or recognise the moral distinction between soldiers and contractors. The focus on the purely individual level of war means that the revisionist

³⁷⁹ *Convention for the Elimination of Mercenarism in Africa*, 1977 Art. 1, 1 (b) and 1 (d); *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, 1989 Art. 1, 1 (a) and Art. 3, 1.

³⁸⁰ Taylor, ‘Interpretation and the Sciences of Man’, p. 36.

³⁸¹ *Ibid.*, p. 34.

argument is blind to the relational nature of the identities held by soldiers and contractors and cannot account for the different meaningful identities that they hold. The revisionist account cannot, therefore, recognize that the deaths of contractors and mercenaries in war are meaningfully different and therefore cannot account for the difference between the institutionalized remembrance of soldiers and the instrumentalised remembrance of contractors. It also cannot recognize that the actions of soldiers and contractors should be judged by different standards due to the different meaning of their identities. It is not that the use of contractors is intrinsically unjust but that due to the different distributive principle which constitutes their identity, they cannot be judged in the same way that soldiers are. For example, a small and militarily weak state which is unjustly attacked by a much more militarily powerful neighbor may be justified in resorting to the use of contractors or mercenaries in order to bolster their defence. But for this to be legitimate it must be a last resort, contractors should not be used to allow the government to avoid having to justify the deaths of soldiers and should not be used simply because the population is not willing to accept the sacrifices involved in defence. In such cases it suggests that the costs of the war are seen as outweighing the benefits and it is unjust to outsource the costs to others whilst seeking to retain the benefits. To do so is to fight a war which its own beneficiaries believe is too costly and is therefore disproportionate, hence unjust.

It may be legitimate for the small state in the example above to use contractors as a last resort and where this is a genuine attempt to improve their defence rather than an attempt to avoid bearing the costs of the war. Nevertheless, the actions of contractors continue to have a different meaning from those of soldiers and, due to the different relationship that they have to the state, contractors can be judged according to different standards than soldiers. In particular, contractors can be held morally responsible for participation in an unjust war. In the example above, if the militarily powerful state had also used contractors in their unjust attack, the contractors could be held responsible for their participation whilst the soldiers of that state would not be held morally responsible. Rather than being double standards, this difference in judgement reflects the different meanings of the identities and the different relationships that they hold. Precisely because contractors only have a contractual relationship with the state, their rights, responsibilities, and obligations differ from soldiers whose relationship is based on a public oath and the holding of a public identity. This public identity means that their deaths are public acts, they have died on behalf of the state and for the state's benefit and the obligation to risk one's life is one of the

deontic powers associated with being a soldier. This creates a concomitant obligation to remember those deaths, for which the state is responsible, and the rituals of remembrance are the way in which the state bears and recognizes the costs of the war. Contractors, as private actors, do not die on behalf of the state, even if it is the state that is paying them, and there is no obligation to remember them. This means that the costs of war are privatized which, as discussed above, distorts the proportionality calculus. The revisionist account cannot recognise the moral significance of the difference between soldiers and contractors, however this distinction has existed throughout the just war tradition and is reflected to this day in the contrast between institutionalized and instrumentalised remembrance.

Conclusion

This chapter has shown that killing and being killed in war have distinct normative meanings that allow them to be understood. These meanings both determine and are determined by the principles of distribution for the identities and deontic powers involved. Whilst the revisionist argument is that all distributions in war, of identities, rights, obligations, harms, and so on, should be justified solely by reference to individual moral responsibility, this chapter has shown this not to be the case and that such a distribution does not allow a number of important moral distinctions and judgements to be made. This inability to make or recognize these moral distinctions and judgements is the cost of the “impoverishment of figuration” associated with the disengaged self of liberal political theory.³⁸²

³⁸² White, *Sustaining Affirmation*, pp. 9 - 10.

CHAPTER FIVE

Jus ad bellum: Legitimate Authority and Just Cause

...

But they that fought for England,
Following a falling star,
Alas, alas for England
They have their graves afar.

And they that rule in England,
In stately conclave met,
Alas, alas for England
They have no graves as yet.³⁸³

The idea that political leaders have different responsibilities and should therefore be judged differently than soldiers is common. Whilst soldiers are remembered and mourned, politicians are condemned for engaging in futile, pointless, and unjust wars. For example, after the death of the one-hundredth British soldier in Iraq vigils were held by anti-war protestors at which the names of all one hundred soldiers were read out.³⁸⁴ For the protestors the soldiers should be remembered as their deaths were as much the responsibility of the politicians that sent them as all of the other deaths in Iraq. This chapter explores the basis for this social understanding of the different roles by assessing the relationship between legitimate authority and just cause within the *jus ad bellum*. In particular, it looks at the distribution of responsibility for the decision to go to war. As with the previous chapter, this chapter draws on real-life examples to highlight the existence of a field of contrast in which meanings can be differentiated and identified. Whilst the previous chapter focussed on issues associated with the *jus in bello* and the conduct of war, this chapter addresses issues associated with the *jus ad bellum* and decisions about and responsibility for the justice of a war.

To begin with it is necessary to outline the key elements of the *jus ad bellum*. As will be recalled from Chapter Two, Aquinas outlined three core criteria that must be met in order for a

³⁸³ G. K. Chesterton, 'Elegy in a Country Churchyard', in *The Oxford Book of War Poetry*, ed. Jon Stallworthy (Oxford: Oxford University Press, 2008), p. 236.

³⁸⁴ 'Vigils to Mark 100th Iraq Death', *BBC News*, 1 February 2006, http://news.bbc.co.uk/2/hi/uk_news/4668690.stm.

war to be just and these three criteria remain central in most accounts of just war theory. The three criteria are: that the war be waged by a legitimate authority, as the decision to go to war cannot be made by just anybody; that there be a just cause for the war, due to the wrong-doing of the enemy; and that there be a right intention amongst those who do go to war, such that they are not doing it for pleasure, bloodlust, or out of malice, but with a Christian compassion and a desire to achieve a just peace.³⁸⁵ Whilst these are the three core criteria there are also a number of other, subordinate, criteria that many just war scholars believe must be met in order for a war to be just. Whilst these vary somewhat between different authors, the main ones are that war only be waged as a last resort or out of necessity, that there be a reasonable prospect of success, and that the costs of war in terms of the death and destruction caused through war, both the deaths of one's own citizens, but also the death inflicted on the enemy, be proportionate to the overall good to be achieved through the resort to arms.³⁸⁶

Right intention, whilst certainly important, is about the internal disposition of those going to war and is therefore both difficult to assess and has few external consequences. As such this chapter does not consider it in any detail. Instead it focuses on the other two core criteria of legitimate authority and just cause. The subordinate criteria are also not directly assessed. This is for the same reason that Walzer argues that the questions of who may and may not be killed in war and why are more fundamental than those of the types of weapons that may be used.³⁸⁷ Whilst the former are constitutive rules, the latter are regulative. Similarly, the questions of legitimate authority and just cause are constitutive of war as an institution whilst those of last resort and so on are regulative. Furthermore, the important issue is who is responsible for making the decisions and judgements about proportionality and likelihood of success and the basis for that decision making power; as such these other criteria are subsumed by the question of the relationship between just cause and legitimate authority.

The chapter proceeds in four sections, which focus on various aspects just cause, legitimate authority, and the relationship between them. The first two sections focus on issues of responsibility and decision making power, the second two focus on the distinction between war and other forms of violence and the way in which legitimate authority and just cause structure the

³⁸⁵ Aquinas, *Summa Theologica*, IIa IIae: Q. 40, Art. 1.

³⁸⁶ American Catholic Bishops, 'The Challenge of Peace: God's Promise and Our Response (1983)', in *Just War Theory*, ed. Jean Bethke Elshtain (Oxford: Basil Blackwell, 1992), pp. 98 - 101.

³⁸⁷ Walzer, *Just and Unjust Wars*, pp. 41 - 42.

meanings of violence. Section one looks at the distribution of criminal responsibility for war crimes and for waging aggressive war. It explores considers the current legal framework and examines the combatants' privilege and the way it has evolved as well as its relationship with the main components of the *jus ad bellum*, the justice of the cause and legitimate authority. It also draws upon Searle's arguments about the constitution of institutions and considers the deontic powers of both soldiers and political leaders in order to argue that it is unjust to hold soldiers morally responsible for the justice of the war given the current deontic powers associated with combatancy. Section two considers the distribution of decision making authority within the state by looking at civil-military relations. It argues that it is morally important that the state maintains control over the armed forces due to the moral requirement to be able to end, as well as to initiate, violence. The third section analyses the distinction between unjust war and crime, drawing on Jonathan Parry's work it argues that it is the presence of a legitimate authority that distinguishes between different types of violence and it demonstrates how this affects the meaning of those forms of violence. The final section also looks at the distinction between war and other forms of violence, in this case it looks at the distinction between just war and other justified violence. This section demonstrates that there can be justified violence that is not war, but that this violence has a different meaning and is judged by different standards.

I. Criminal Responsibility: War Crimes and the Crime of War

Waging an unjust war is one of the worst crimes a political leader can commit. As Vattel writes, not only is it a crime against those who are attacked, but it is "a crime against his people, whom he forces into acts of injustice, and exposes to danger, without reason or necessity", and "a crime against mankind in general, whose peace he disturbs, and to whom he sets a pernicious example."³⁸⁸ Whilst the sovereign who initiates an unjust war is clearly accountable and should be held responsible for doing so, under international law individual soldiers are not responsible for the injustice of the war and can only be held legally accountable for individual violations of the laws of armed conflict, that is, violations of the *jus in bello*. This section will examine this contrast by looking at the different charges faced by the senior Nazis prosecuted at Nuremberg, some of whom were held accountable for their role in planning an illegal war, and those against Adolf Eichmann who sentenced to death for his role in the Holocaust but was not charged simply for his

³⁸⁸ Vattel, *The Law of Nations*, Book III: Ch. XI, § 184; p. 586.

participation in World War II. The first part of this section will look at these cases and the broader legal framework that governs war crimes and the crime of war. The second part argues that the difference in the types of charges faced by the senior Nazis prosecuted at Nuremberg and Eichmann reflects the different meanings of their identities.

The Nuremberg Trials and Eichmann in Jerusalem

On the morning of 16th October 1946 US Army Master Sergeant John C. Woods assisted by Joseph Malta, an Army Military Policeman carried out the hangings of ten senior Nazi figures who had been found guilty and condemned to death at the Nuremberg Trials. There were numerous charges against those found guilty including, in several cases, waging an aggressive war. Those who held decision making power in the planning of the war were condemned and held accountable for that fact.³⁸⁹

On the night of 31st May 1963 Shalom Nagar carried out the hanging of Adolf Eichmann. Eichmann had been captured by Israeli agents in Argentina and was prosecuted for a litany of crimes associated with his role in administering the Holocaust. He was rightly condemned and held accountable for his role in the Holocaust, however he was not prosecuted for his role and participation in World War II itself, despite its manifest injustice and despite his senior rank.³⁹⁰

This distinction between those who can and cannot be held accountable for the crime of waging an aggressive war is repeated in the Rome Statute establishing the International Criminal Court. Anybody who is within the jurisdiction of the court can be prosecuted for genocide, war crimes, and crimes against humanity³⁹¹ but the crime of aggression, which the International Criminal Court is currently unable to prosecute as the amendment which defines the crime has not yet entered into force, can only be committed “by a person in a position effectively to exercise control over or to direct the political or military action of a State”.³⁹² Neither participation in an illegal war nor acts of violence within an illegal war that are not themselves violations of the laws of armed conflict can be prosecuted.

³⁸⁹ John Marcus, ‘Nuremberg Executioner Says, “It Was a Pleasure”’, *Los Angeles Times*, 24 November 1996, http://articles.latimes.com/1996-11-24/news/mn-2456_1_nuremberg-documents.

³⁹⁰ Chana Ya’ar, “I Heard the Gurgle of Strangling”, *Arutz Sheva*, 11 February 2012, <http://www.israelnationalnews.com/News/News.aspx/152642>.

³⁹¹ *Rome Statute of the International Criminal Court* (The Hague: International Criminal Court, 2011) Part 3, Art. 25, 1 - 3.

³⁹² *Ibid.* Part 3, Art. 25, 3 bis.

The law distinguishes between political leaders and the armed forces and assigns responsibility for different types of crime accordingly. This distribution of responsibility and of criminal liability reflects the meanings of the actions and decisions which the responsibility is for. Walzer uses the example of Hitler's generals to elucidate the difference between those who can be held responsible for the decision to go to war and those who cannot. He argues that "[g]enerals may well straddle the line" between responsibility for the war and responsibility for the conduct of the war and that this "suggests that we know pretty well where it should be drawn", although his comments on Rommel suggest that he is inclined to view even generals as responsible only for the conduct of war and not its initiation.³⁹³

In the laws of armed conflict, the right to participate in combat without fear of prosecution is known as the combatants' privilege and it is simply the legal embodiment of the principle of the moral equality of combatants. The combatants' privilege extends even to Eichmann and provides immunity for any actions that were directly associated with the war and were not in themselves crimes against humanity or war crimes. Those who hold decision making power and who take part in the decision making process, however, can be held legally accountable for their decisions. A key objective of the Nuremberg Trials was to determine who in fact had held decision making power and contributed to the decisions that initiated World War II and to assess their degree of culpability. In the end, not all of those charged with responsibility for planning an illegal war were found guilty of this crime as the judges decided they were not sufficiently responsible.³⁹⁴

The corollary of this legal construction of combatancy through the combatants' privilege is the existence of unprivileged combatants or, as the Bush Administration referred to them, "illegal combatants". This category is unavoidable and simply refers to those who lack the combatants' privilege because they do not meet the criteria to be classified as combatants under the laws of armed conflict but who, nevertheless, participate in combat.³⁹⁵ These criteria were initially laid down in the Brussels Declaration of 1874 and were repeated in the 1899 and 1907 Hague Declarations and the 1949 Geneva Conventions. In the Brussels Declaration the criteria were as follows:

³⁹³ Walzer, *Just and Unjust Wars*, pp. 37 - 41.

³⁹⁴ 'Nazi Conspiracy and Aggression: Opinion and Judgement' (Washington, D.C.: Office of the United States Chief of Counsel for Prosecution of Axis Criminality, 1947), http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Nazi-opinion-judgment.pdf, pp. 105 - 166.

³⁹⁵ Berman, 'Privileging Combat?', pp. 13 - 15.

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognizable at a distance;
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war.³⁹⁶

This defined combatants according to the common practice of state armed forces and denied combatants status to those who did not meet the criteria. Following the experience of World War II and the role of resistance and partisan groups within it, the 1949 Geneva Conventions expanded the criteria for being considered a privileged combatants and, hence, being entitled to POW status. Crucially, those entitled to POW status now included members of “organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied”.³⁹⁷ However, immediately following this statement, a caveat was added that those organized resistance groups must meet the four criteria mentioned earlier. This caveat limited the impact of the extension of privileged combatancy as it essentially required resistance movements to act like conventional armed forces, nullifying their chief advantage.³⁹⁸ Combatancy, therefore, became based upon the factualist principle of conformity with the legal criteria.³⁹⁹

The years following World War II saw the decline of European empires and numerous anti-colonial and independence wars. The experience of these largely guerrilla wars and, in particular, of the Vietnam War led to demands to revise the laws of armed conflict to recognise participants in these conflicts, ultimately leading to the Additional Protocols of 1977. These transformed the laws of armed conflict in order to make the legitimacy of participation in war, in at least some cases, dependent upon the (presumed) justice of the war. Additional Protocol I extends the definition of international armed conflict embodied in Common Article 2 of the four Geneva Conventions of 1949 to specifically include “conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right

³⁹⁶ *Brussels Conference*, 1874, Art. 9.

³⁹⁷ *Convention (III) Relative to the Treatment of Prisoners of War (Geneva III)*, 1949, Art. 4, § A, para. 2.

³⁹⁸ Berman, ‘Privileging Combat?’, pp. 39 - 43.

³⁹⁹ *Ibid.*, pp. 16 - 19.

of self-determination”.⁴⁰⁰ As such this extension meant that the application of the laws of armed conflict, and the protections and privileges thereby granted, were in some cases dependent upon the cause for which one party was fighting and not simply on the factual existence of an armed conflict.⁴⁰¹ It also meant that these types of conflicts would no longer be considered as non-international armed conflicts, to which far fewer protections and privileges applied. The second major innovation came in the definition of a combatant entitled to POW status as the traditional criteria were loosened in order to encompass guerrilla fighters. Whilst it stated that “combatants are obliged to distinguish themselves from the civilian population” it added that:

Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.⁴⁰²

However, it then went on to say:

This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.⁴⁰³

As such this protocol granted additional, unequal, legal rights to some types of combatants on the assumption that these combatants would be fighting in wars that were likely to be just. By granting these rights unequally, and by specifically requiring “the regular, uniformed armed units” to follow the existing practice, it sought to protect the military advantages of guerrilla fighters vis-à-vis their regular opponents and thereby to assist independence and anti-colonial struggles. This development was deeply controversial and as a result several states, including the US, refused to ratify the Additional Protocols, although many of them did sign them, and many other states added

⁴⁰⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1977, Art. 1, para. 4.

⁴⁰¹ Berman, ‘Privileging Combat?’, pp. 15 - 23.

⁴⁰² *Protocol I*, Art. 44, para. 3.

⁴⁰³ *Ibid.* Art. 44, para. 7.

lengthy reservations upon ratification. As a result combatancy was partially redefined away from the strictly factualist principles of the past along a more normative basis.⁴⁰⁴

The importance of the legal definition of a combatant is that it simultaneously defines who is not a combatant and who is therefore not entitled to participate in combat. Individuals who do not meet the criteria for being a combatant but who participate in combat anyway are not entitled to POW status if captured by the enemy. They are entitled to the protections granted by Common Article 3 of the Geneva Conventions, which prohibits torture, degrading treatment, and punishment without trial, something which the US shamefully ignored in the case of those held at Guantanamo Bay.⁴⁰⁵ Unlike POWs, however, they may be prosecuted, and punished if found guilty, simply for participating in war and they can be charged with murder if they were involved in killing any enemy soldier, even if they did not violate the laws of armed conflict.⁴⁰⁶

The meaning of combatancy

The revisionist account of just war theory would not view the distinction between Eichmann and those prosecuted at Nuremberg in the same way. For the revisionists, no soldier participating in a just war has done anything to make them liable to defensive harm by their opponents, unless they are individually committing war crimes, harming those who are not liable to harm, or using excessive and disproportionate force.⁴⁰⁷ To harm these soldiers is therefore to harm people who are not liable to be harmed, which is a clear moral wrong. As a result, for the revisionists, military commanders in an unjust war involved in the planning and administration of military operations would be just as responsible for contributing to the deaths of those not liable to be harmed as Eichmann was for contributing to the deaths of those killed in the Holocaust. This part argues that the distribution of responsibility for the justice or injustice of a war must follow the distribution of deontic powers with respect to the decision to go to war.

The decision to go to war creates a new set of relationships between two polities. As argued in Chapter One, it is a clear example of a status function declaration as it brings into existence a

⁴⁰⁴ Berman, 'Privileging Combat?', pp. 15 - 23.

⁴⁰⁵ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I)*, 1949; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II)*, 1949; *Geneva III*; *Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Geneva IV)*, 1949; all Art. 3.

⁴⁰⁶ Berman, 'Privileging Combat?', p. 14.

⁴⁰⁷ McMahan, *Killing in War*, p. 16.

new set of relationships and institutions simply through the assertion that they exist. It creates a set of social, political, legal, and moral relationships between both the states and the individuals within them. The power to create these new relationships rests on prior status function declarations which have established these powers and associated them with a specific institution. In this case the institution is sovereignty and therefore the deontic power to make the decision to go to war and to create these relationships lies with the sovereign.

The crucial issue in the distribution of criminal responsibility for the decision to go to war is that it must reflect the distribution of decision making power within the state and, hence, the distribution of deontic powers through status function declarations and through the holding of the institutional identities thereby constituted. Where a parliament or legislative body must vote to authorise the use of force, every single member of the body can be held individually morally responsible for their own vote, and those who vote in favour of an unjust and illegal war are morally responsible for it and should be prosecuted. In states where the decision is reserved to a cabinet or a smaller group then only the members of said group can be held accountable. Even in dictatorial regimes, like Nazi Germany, there will usually be a group of people involved in the decision to launch a war. Ultimately it is an empirical question as to who is involved in the decision making process and one of the roles of criminal trials is precisely to determine who, and to what extent, can be held responsible. In situations where the military leadership do have a decision making role, rather than a purely advisory role, then they can also be held responsible but no matter how senior an individual is in the armed forces, they cannot be held liable for waging an unjust war unless they had decision making power.

It is unjust to hold individual soldiers accountable for participation in an unjust war as they lack the deontic power to make the decision to initiate a war; in other words, they are not responsible. This is not simply the empirical claim that individual soldiers do not make the decision to go to war, which is true, but is the deeper normative claim that individual soldiers do not have the right to make such a decision. The institutional identity of the soldier does not include the deontic power to create the relationship of war and therefore to hold them liable for the decision is to commit injustice as it distributes responsibility in the wrong way.

Christopher Kutz discusses the correct distribution of criminal responsibility for participation in an unjust war in his article on inculpation and exculpation. His argument is interesting, particularly

as he recognises the collective nature of the decision to go to war and the distinctiveness of political communities as compared to, for example, criminal organisations.⁴⁰⁸ Although he is clearly sympathetic to the predicament of soldiers required to participate in wars they believe to be unjust, he argues that they can in principle be held liable for doing so, although he also grants significant scope for excuses for doing so on the basis of epistemic constraints and what he calls “moral luck”.⁴⁰⁹ He also argues that those who participate in guerrilla warfare and who do not distinguish themselves from the population, as is required by the laws of armed conflict, should be considered legitimate combatants if the war they are participating in is just.⁴¹⁰ His argument reflects a common conflation of the main *jus ad bellum* criteria into one single judgement. It is necessary to disaggregate the criteria of just cause and legitimate authority and understand the relationship of combatancy to each of these independently. In the examples he gives, Sergeant Blue’s actions are based on the decision of a legitimate authority, namely the government of Imperioland. Gray’s actions, however, have no legitimate authority to authorise them and are instead justified by her own belief in the justice of the cause for which she is fighting. Whereas in Blue’s case the decision is made by a state, Gray makes the decision to fight herself on the basis of her own assessment of the justice of the cause.⁴¹¹

The decision to go to war, however, is inherently political. Even in a just war it exposes the population to danger and to the risks and costs of war and it imposes the obligation of sacrifice upon soldiers. The decision about how much blood and treasure it is worth expending for a particular end cannot be made independently by a succession of individuals, not even by the individuals whose blood is to be shed. War is fought for public ends and the sacrifice of soldiers is a public act therefore the decision to go to war must be a public decision made by political leaders.

II. Legitimate Authority: Beginning and Ending War

War is not simply the occurrence of violence of a particular scale and peace is not simply its absence. War is a relationship between two or more parties that must be brought into being and brought to an end. An important component of the initiating and ending of war is ensuring that

⁴⁰⁸ Kutz, ‘The Difference Uniforms Make’, pp. 176 - 178.

⁴⁰⁹ Ibid., pp. 174 - 176.

⁴¹⁰ Ibid., p. 179.

⁴¹¹ Ibid., pp. 149 - 151.

these decisions are respected by others, in particular by the armed forces. This section will draw upon the civil-military relations literature to argue that legitimate authority is morally significant as it is necessary for beginning and ending wars.

War and peace

On 18th September 1931 a small group of junior officers in the Japanese Army stationed in Manchuria detonated a bomb close to the Japanese owned South Manchuria Railway. The explosion was to be blamed on Chinese forces and used to justify an invasion of the whole of Manchuria. Japanese politicians in Tokyo were not seeking a war and ordered the armed forces based in Manchuria not to escalate the situation. Instead the commander of those forces launched a military operation along the length of the railway capturing numerous Chinese cities. The Japanese Government, incapable of standing up to the armed forces ended up supporting the annexation and sending additional troops resulting in the annexation of the whole of Manchuria.⁴¹²

Throughout 2014, during the South Sudanese Civil War, ceasefires were agreed between the parties but these were invariably violated within days of being agreed and eventually broke down. In 2015 a peace agreement was reached between the forces of President Kiir and those of his former deputy Riek Machar. That peace treaty has also broken down and the county has returned to violence with numerous groups and militias, nominally allied to one or other of Kiir or Machar, paying little attention to agreements.⁴¹³ Similar stories could be told about numerous conflicts around the world, where ceasefires are ignored, peace treaties break down, and groups factionalise and split and continue fighting.

What both of these cases have in common is that the government has lost control of the ability to initiate and end wars, destroying the principle of control of the armed forces. By usurping the authority of the government, the armed forces and rebel groups involved have arrogated to themselves the right to decide when, for what reasons, and in what circumstances to begin and end violence. This is unjust in itself as the principles governing the distribution of decision making power within those societies have been overturned and other principles, in these cases simply the

⁴¹² Robert H. Ferrell, 'The Mukden Incident, September 18-19, 1931', *The Journal of Modern History* 27, no. 1 (1955): 66-72.

⁴¹³ 'South Sudan Marks Two Years of Ruinous War', *Al Jazeera English*, 15 December 2015, <http://www.aljazeera.com/news/2015/12/south-sudan-marks-years-ruinous-civil-war-151215060303380.html>.

power of the armed forces and rebel groups, have replaced them. As Walzer writes, it is a form of tyranny when the distributive principles appropriate in one sphere come to dominate in another.⁴¹⁴

One of the reasons for the significance of legitimate authority is the importance of ending war. This is often overlooked in the literature but, as the examples above illustrate, when legitimate authority is lacking there is no way to end violence. Any group that seeks or claims the right to use violence to pursue its ends must, as an absolute minimum, have the ability to control and to end the violence. It is easy to initiate violence, it is much more difficult to bring it to an end, but without the ability to end it no violence can be just. If the group cannot end the violence, they cannot make any assessment of its likely costs and therefore cannot meet the proportionality requirement. They also cannot meet the requirement that there be a reasonable prospect of success as success requires an end to the violence when the objectives have been achieved. Finally, to be just those who go to war must seek peace, to initiate violence which cannot be stopped violates this requirement, too.

The ability to end violence requires an authority that can make decisions which will be respected by the armed forces. Even if the armed forces believe that a ceasefire will allow the enemy an opportunity to regroup, or that continuing the war will lead to a more favourable outcome, they are required to accept the decision. Where legitimate authority is lacking and various parts of the armed forces or breakaway rebel groups continue fighting then they are no longer fighting a war. Instead they fight as individuals and can be held individually morally accountable for their participation and for the justice of the cause.

Legitimate authority, the armed forces, and the 'right to be wrong'

The debate about the distribution of decision making authority between the government and the armed forces, particularly with regards to subjects on which the armed forces possesses particular knowledge, is a central theme of the civil-military relations literature. A key principle within this literature, however, is that the expertise of the military does not give them a claim to decision making authority. The government "has a right to be wrong".⁴¹⁵ The role of the armed forces, or at least of the most senior officers involved in giving such advice, is to give clear, unbiased, and impartial advice and information to the political leadership, it is not to make decisions about the

⁴¹⁴ Walzer, *Spheres of Justice*, pp. 312 - 322.

⁴¹⁵ Peter D. Feaver, 'Civil-Military Relations', *Annual Review of Political Science* 2, no. 1 (1999): 211-41, p. 216.

use of force. The military commanders, and the military as a whole, are required to obey and to accept the decision of the government even if they disagree with it and if their advice was not followed.⁴¹⁶ In other words, the correct distributive principle for the decision to use force according to the civil-military relations literature is political authority. The justification for this is the cardinal principle of maintaining civilian control over the armed forces. Given the potential power of the armed forces it is necessary that they be formally subordinated to the political process.

The moral principles underlying the civil-military relations literature, namely the subordination of the armed forces to civilian control, are so basic and taken for granted that it is often not reflected upon in the literature itself but it is worth considering these principles in order to demonstrate their importance and value and to illustrate how they would be undermined by allowing the armed forces decision making authority. The armed forces, by design, possess a huge amount of power within society. They are heavily armed, highly trained, and well-organised, and, increasingly in western countries, are made up of long-serving regular soldiers rather than conscripts which means they are somewhat separate from society as a whole. Without this power they could not fulfil their role, however the power itself makes them a potential threat to their own society and its civil structures as, in pure physical terms, no other organisation within the state can counter them. The subordination of the armed forces to the government and their acceptance of the legitimacy of the decisions made by the government is therefore essential if they are not to be a threat to the state. The subordination of the armed forces to political control means they must accept as legitimate even decisions with which they disagree or which they think are wrong. It is not the role of the armed forces to overrule the government on issues of war and peace, no matter how much their expertise leads them to believe the government is in error. Instead, their role is to provide clear, unbiased, and impartial advice on issues within the scope of their expertise to the government and political leaders, but to accept the decision of the government even if their advice was not followed. This reflects the meaning and nature of political power and decision making as it is not distributed on the basis of technical expertise, even when that technical expertise is the basis for moral decisions, but political authority. The concomitant of the subordination of the armed forces to civilian control is that the armed forces cannot be held morally, much less criminally, responsible for the decisions made by the government. Whilst the armed forces, or

⁴¹⁶ Richard B. Myers and Richard H. Kohn, 'Salute and Disobey? The Civil-Military Balance, Before Iraq and After Response', *Foreign Affairs* 86, no. 5 (2007): 147-56, p. 148.

those members of it involved in advising the government, can be held responsible for giving bad advice or, worse, deliberately giving the wrong advice, they cannot be held responsible for simply for giving advice, whether it is followed or not.

III. Injustice, War, and Crime

Violence takes many forms, war, terrorism, crime, violent repression, and so on. It is the contention of this thesis that war is normatively distinct from other forms of violence. In order for this to be the case it is necessary to be able to distinguish war from those other forms of violence. This section will draw upon Jonathan Parry's argument in order to highlight the role of legitimate authority in distinguishing war from non-war. It considers two examples of unjust violence in order to illustrate the difference that the presence of legitimate authority makes. The first part examines the invasion of Iraq, as an example of an unjust war, and the violence perpetrated by Los Zetas drug cartel in Mexico as an example of unjust criminal violence. It demonstrates that whilst both are unjust, the violence itself has a different meaning. The second part considers how these different meanings lead to different judgments about the violence and those who participate in it.

Shock and Awe: Iraq and Mexico

On 20th March 2003 the US, UK, and their allies launched the invasion of Iraq. The initial stage consisted of a massive aerial bombardment of key governmental and military installations, a strategy of shock and awe, to attempt to utterly overwhelm the ability of the Iraqi regime and military to resist and to destroy critical elements in the structure of the armed forces.⁴¹⁷

On 13th May 2012 49 decapitated and mutilated bodies were discovered by the side a road close to Monterrey in Mexico along with a spray-painted sign claiming responsibility by Los Zetas, one of the most violent and powerful drug cartels in Mexico at the time. A key strategy of Los Zetas, which led to continually escalating violence and the barbarization of drug warfare, was the use of extreme violence on a large scale, the torture of rivals, and the public display of the mutilated bodies of their victims. This, too, was a form of shock and awe, an attempt to so terrify their opponents as to overwhelm their willingness and ability to fight.⁴¹⁸

⁴¹⁷ Jaime Holguin, "Shock And Awe" Throttles Iraq', *CBS News*, 22 March 2003, <http://www.cbsnews.com/news/shock-and-awe-throttles-iraq/>.

⁴¹⁸ David Agren, 'Authorities Find 49 Bodies Dumped on Mexican Highway', *USA Today*, 14 May 2012, <http://usatoday30.usatoday.com/news/world/story/2012-05-13/monterrey-mexico-bodies/54936080/1>.

The Iraq War was unjust. For all the many sins of Saddam Hussein's barbaric Ba'athist regime, he did not pose a direct threat to the sovereignty, political independence, or territorial integrity of any other state. He did not have any links to global terrorist organizations, like al-Qaeda, who posed an international threat. And he was not producing or stockpiling weapons of mass destruction with which he could threaten other states. There was no just cause for the invasion of Iraq by the US and the UK and their allies and the complete lack of and indifference to post-invasion planning not only exacerbated the situation, which quickly descended into sectarian violence, but demonstrates the lack of a right intention amongst those who decided on war.

Los Zetas campaign of violence is criminal and unjustified. Even though many of their victims are members of rival cartels, who are equally violent and brutal, and these victims may well be individually liable for posing an unjust threat of harm to others, this negates neither the criminality nor the injustice of Los Zetas. None of these groups or their members has a right to use force against each other or against anyone else except in immediate self-defence. Even if the membership of the various cartels is purely consensual, which is unlikely, and even if the members accepted the risks of violence that membership entailed, this would not change the nature or the injustice of their actions.

Although both the invasion of Iraq and the violence of Los Zetas were unjustified campaigns of organized violence, one was war and one was not. This is not just a semantic difference but reflects the different meanings of the violence and their relationship to a legitimate authority. The principle of legitimate authority is a core part of the *jus ad bellum*; indeed, Aquinas listed it first when outlining the criteria necessary for a war to be just.⁴¹⁹ Despite its centrality to the just war tradition it has received surprisingly little attention in the recent just war literature, although this is beginning to change.

Amongst the recent contributions that have considered legitimate authority are two articles that take diametrically opposing views. Cecile Fabre has argued that the requirement of having a legitimate authority should be dropped altogether as a requirement of the *jus ad bellum*.⁴²⁰ For

⁴¹⁹ Aquinas, *Summa Theologica*, IIa IIae: Q. 40, Art. 1.

⁴²⁰ Cecile Fabre, 'Cosmopolitanism, Just War Theory and Legitimate Authority', *International Affairs* 84, no. 5 (2008): 963–76.

Fabre, all individuals have the right to use force to defend themselves or others and whether or not they possess legitimate authority is irrelevant to this fundamental interest.⁴²¹ Furthermore, as part of her understanding of the state, she does not believe that the state or state officials can possess rights that are not also possessed by individuals. If the state has a legitimate authority to make war then so do all of the individuals within it.⁴²² This is the individualist and reductionist approach to just war theory taken to its extreme, in which meaning is stripped away and all violence is judged by the same standards. In this case, the violence committed by soldiers in the Iraq War is no different to than that committed by Los Zetas, the presence or absence of a legitimate authority is irrelevant.

Interestingly, her argument implicitly recognizes the central claim of the opposing argument, put forward by Jonathan Parry, that the crucial feature of legitimate authority is in distinguishing war from other forms of violence.⁴²³ Parry accepts what he terms the discontinuity thesis, namely that “war is morally disanalogous from ordinary cases of violence” and he points out that this creates a “demarcation requirement”.⁴²⁴ This is the ability to distinguish between the violence that counts as war and the violence that does not count as war, without a demarcation criteria it is impossible to determine whether a particular act of violence counts as war or not and therefore how it should be morally judged.⁴²⁵ For Parry, legitimate authority solves the demarcation requirement as only violence waged by a legitimate authority count as war. In other words, the requirement for a legitimate authority is not just a requirement of the *jus ad bellum* to determine whether or not a war is just, but has a deeper role in determining whether it is even war in the first place. For Parry, the fact that the Iraq War was waged by legitimate authorities would provide the key differentiating feature from the violence of Los Zetas. Furthermore, the fact that Iraq War was a war means it is morally distinct from the violence of Los Zetas and would be judged by different standards.

⁴²¹ Ibid., p. 969.

⁴²² Fabre, *Cosmopolitan War*, p. 55.

⁴²³ Parry, ‘Just War Theory, Legitimate Authority, and Irregular Belligerency’.

⁴²⁴ Ibid., p. 181.

⁴²⁵ Ibid., pp. 181 - 182.

Legitimate authority and the meaning of violence

Parry clearly identifies a central problem that the just war tradition and any argument which, like this one, is committed to the discontinuity thesis must address. This is the problem which McMahan thinks it is extremely implausible to be able to find a solution to.⁴²⁶ Notwithstanding McMahan's skepticism, Parry provides a clear and lucid answer to this problem and identifies a way of differentiating different forms of violence. His paper identifies the normative consequences that are claimed to follow from the existence of a legitimate authority but, as he himself notes, he does not tackle the evaluative question of if and in what circumstances these consequences do in fact follow.⁴²⁷ In other words, why is legitimate authority morally significant, what counts as a legitimate authority, and what distinguishes these from other authorities that lack legitimacy. Ultimately, whilst the requirement for a legitimate authority solves the demarcation requirement of distinguishing war from other forms of violence, it creates its own demarcation requirement regarding how to distinguish legitimate authorities from other types of actor.

One potential answer to the question of the importance of legitimate authority would emphasise that it is important to restrict war making authority to a small number of actors simply because war is so destructive. The fewer the number of actors entitled to wage war the fewer the likely number of wars, but this argument says nothing about the character and type of actor that should have this right. It also tends towards an argument in favour of global government. Rodin argues that the same reasons that lead individuals to contract out of the state of nature to avoid violence should also lead states to contract out of their state of nature to form a global government to avoid the violence of war.⁴²⁸ Following the same logic, if it argued that to restrict the number of wars it is necessary to restrict the number of actors entitled to wage wars, then to eliminate war altogether there should be no actors entitled to wage war and one global government that would police and enforce the laws. Whilst initially intuitively plausible, this argument cannot do the necessary moral work to demonstrate the importance of legitimate authority or to define what a legitimate authority is.

The crucial feature of a legitimate authority and what makes legitimate authority both morally significant as well as providing the basis for distinguishing legitimate authorities from

⁴²⁶ McMahan, *Killing in War*, p. 36.

⁴²⁷ Parry, 'Just War Theory, Legitimate Authority, and Irregular Belligerency', pp. 191 - 194.

⁴²⁸ Rodin, *War and Self-Defense*, pp. 144 - 149.

other groups is related to the nature of the group and its aims and objectives. Christopher Kutz addresses this question regarding the relationship between a group's objectives and their right to participate in violence. He argues that groups which are clearly political, in the sense of aiming for a new internal ordering of society, are the types of group which potentially could have the right to use violence to achieve their aims.⁴²⁹ McMahan is scathing about this; he describes the idea that a politically motivated group, by virtue of their motivation, can be entitled to use force against others who are not even members of the group as alchemy. He argues that the way it is formulated by Kutz, such an argument could apply to political parties, who clearly have political goals related to the internal ordering of their society.⁴³⁰ Whilst the way in which Kutz defines politically motivated groups is flawed as it is too broad, his argument is along the right lines. A legitimate authority is the sovereign decision making body of a constitutive community. That is, a community which is constitutive of the identity of its members and which has a history which has consequences for its members' choices and conduct.⁴³¹ A community which has a "memory, and so it has [a] history and [a] culture . . . customary practices . . . familiar life-ways . . . festivals . . . [and] shared understandings of social goods." A community that allows its members to be human.⁴³² A community that is the source of the prejudices which form its members' horizons. A community, in short, that is thick and "has been carved by many hands."⁴³³

This type of community has a moral significance because it is constitutive of its members' identities. It is this constitutive role that distinguishes it from other types of groups, like political parties. As a constitutive community it does not merely protect its members' pre-existing interests and rights, instead it provides a negotiation of the existential realities which constitute human being and through which it is even possible to conceive of individuals, interests, and rights in the first place.⁴³⁴

The USA and the UK are constitutive communities of this sort. Their war in Iraq, whilst unjust, was nevertheless a war, and the members of their armed forces who participated in it are not comparable to the members of a criminal gang invading another gang's turf. In arguing that legitimate authority should be rejected, Fabre points out that there can often be widespread

⁴²⁹ Kutz, 'The Difference Uniforms Make', pp. 176 - 177.

⁴³⁰ McMahan, *Killing in War*, pp. 82 - 83.

⁴³¹ Sandel, *Liberalism and the Limits of Justice*, p. 179.

⁴³² Walzer, *Thick and Thin*, p. 8.

⁴³³ *Ibid.*, p. 18.

⁴³⁴ White, *Sustaining Affirmation*, p. 9.

disagreement within states about whether a particular war is just. Using the Iraq war as an example she argues that the massive protests against the war that took place in Britain before the invasion illustrate that even democratic authorization (given that the majority of MPs voted in favour of the war) is not a source of legitimate authority as the government may not speak for those on whose behalf the war is waged.⁴³⁵ This is to misunderstand what a constitutive community is; it is a community of shared meanings but it is important to note that, as Taylor argues, the existence of shared meanings is not the same as shared values or a consensus of opinions.⁴³⁶ In order for there to be disagreement, at least disagreement in which each side is intelligible to the other, there must be a shared understanding of the importance of what is being disagreed about as well as a shared vocabulary in which the disagreement can be conducted. The disagreement about the Iraq war was precisely a disagreement of this type, the intensity of the disagreement reflected the shared discourse in which it was conducted.

Los Zetas are not a constitutive community of this type and their violence is not war. Their acts of violence are criminal and the individuals who carry them out are individually morally responsible for their actions and should be prosecuted and held legally accountable. Los Zetas is not a community that is the source of the prejudices that make up its members' horizons, it has no shared practices or meanings, and when it takes up arms against the Mexican state itself it is denying to others the capacity to be self-interpreting beings by denying their horizons and constitutive attachments.

IV. War and Self-Defence

The previous section illustrated the importance of legitimate authority for solving the demarcation requirement for distinguishing war from other forms of violence and argued that the moral significance of a legitimate authority was due it being a constitutive community. This section will address a point raised by Fabre and mentioned in the previous section. Whilst she does not use this terminology, her argument is that legitimate authority should be dropped as a requirement of the *jus ad bellum* because there is no need for a demarcation requirement between different forms of just violence. In other words, because she rejects the idea that war is morally disanalogous with other forms of violence she not only sees the demarcation requirement as superfluous, but as unjust

⁴³⁵ Fabre, 'Cosmopolitanism, Just War Theory and Legitimate Authority', p. 973.

⁴³⁶ Taylor, 'Interpretation and the Sciences of Man', pp. 36 - 37.

in itself as it imposes an unnecessary requirement on those who have a just cause to use violence. This section challenges this view, it demonstrates that there can be both morally just violence as well as just war, but that they have different meanings.

Just war and justified violence

On the night of 1st April 1982 the initial stages of the Argentine invasion of the Falkland Islands began and by the end of the following day the Governor of the Falkland Islands had surrendered to the Argentinians. In response a British naval taskforce set sail and by 14th June 1982 and at a cost of 255 British lives and 649 Argentinian lives had recaptured the islands.⁴³⁷

On April 9th 1943, in response to the steady transportation of the population of the ghetto to concentration camps, the residents of the Warsaw Ghetto rose up against the Germans. In the violence that followed over the following month, before the uprising was eventually crushed by the forces of Nazi Germany, the Jewish population fought tenaciously. By the time of the eventual defeat of the inhabitants of the ghetto the ghetto itself was largely flattened, destroyed by the Germans in room-to-room fighting.⁴³⁸

Both of these are examples of justified violence. In the first case, the British fought a just war of defence against the Argentinians. In the second case, the Jewish population of the Warsaw Ghetto engaged in a mass exercise of the right of self- and other-defence, but their actions did not constitute war. The fact that it was not war does not, however, mean that their actions were any less legitimate or justified. Whilst there is a normatively meaningful difference between war and self-defence neither one is necessarily more justified than the other. In the examples above, due to the stakes involved, the Warsaw Ghetto Uprising was even more justified than the British defence of the Falkland Islands. In both cases the threshold for the use of justified violence was passed but in the case of the Warsaw Ghetto, in the face of the Holocaust and the attempt to entirely destroy the Jewish people, the justification was more powerful.

For Fabre, the Warsaw Ghetto Uprising would also be an act of war. She argues that cosmopolitanism requires that all individuals must have the same rights and to deny any individuals rights for irrelevant reasons is unjust. The legitimate authority requirement in the just

⁴³⁷ 'The Falklands War: Timeline', *The Telegraph*, 14 June 2016, <http://www.telegraph.co.uk/news/2016/06/14/the-falklands-war-timeline/>.

⁴³⁸ Israel Gutman, *Resistance: The Warsaw Ghetto Uprising* (Boston and New York: Mariner Books, 1994).

war tradition cannot be met by all groups or individuals and as the requirement is irrelevant to the right of individuals to defend themselves and others it is unjust and should be rejected.⁴³⁹ However, even from a cosmopolitan perspective, it can be seen that this argument only makes sense based on a prior moral commitment, namely that war can only be justified in direct defence of individual rights. If war is simply another name for individual self-defence and is justified in exactly the same way, then the requirement of legitimate authority prevents individuals from exercising this right, however if war is distinct from self-defence then it is possible to recognize both the individual right of self-defence which can be exercised by all individuals in defence of their own or others' rights without requiring a legitimate authority as well as recognizing the requirement that war be waged only by a legitimate authority.

Just cause and legitimate authority

Rodin is right, war is not analogous to or reducible to individual self-defence.⁴⁴⁰ The justification for self-defence and the justification for war are distinct, with the latter being more limited than the former. In the Warsaw Ghetto Uprising the immediate just cause was self and other defence on the part of the Jewish population. Whilst there was coordination of the resistance at some levels, the residents of the ghetto acted out of immediate necessity and this was an example of a mass exercise of the right of self-defence, albeit a slightly more extended version of self-defence than in civil society due to the fact that there was no opportunity to flee and there was no police force ready to step in and restore order and apprehend the guilty.

The Falkland Islanders, in contrast, did not face the risk of extermination. Whilst the Argentinians sought control over the islands, they did not seek to enslave or destroy the population. Whilst the initial invasion did cost lives as the contingent of British soldiers stationed there fought the Argentinian invaders, this comes closer to a case of a "bloodless invasion".⁴⁴¹ If the Argentinians had been willing to guarantee the rights of the islanders and to offer safe passage and compensation to those who wanted to leave the islands and move elsewhere then it would be very difficult to justify the war as a form of self-defence. Nevertheless, the British war to retake the islands was just. It was just as the Argentinian invasion was a violation of British sovereignty and

⁴³⁹ Fabre, 'Cosmopolitanism, Just War Theory and Legitimate Authority', p. 969.

⁴⁴⁰ Rodin, *War and Self-Defense*, pp. 122 - 140.

⁴⁴¹ *Ibid.*, pp. 131 - 133.

territorial integrity. By violating these the Argentinians violated the rights of all British citizens, not only those of the Falkland Islanders. To invade is to use force to impose new distributive principles regarding the territory, decision making power, and membership of a community. This is tyranny and it is in defence of these shared meanings and in opposition to this tyranny that it is just to wage a war of national defence.

Whilst both the Warsaw Ghetto Uprising and the British war to retake the Falklands were just, they have distinct meanings. In the Warsaw Ghetto the Jewish fighters were exercising their individual rights, although acting collectively. There was an individual relationship of moral liability on the part of the German soldiers and of moral innocence on the part of the Jewish fighters, enmity and the right to use force are derived from this relationship. As in all cases of individual self-defence, they can be judged individually regarding both the justice of the cause, in other words was there actually a threat to life that warranted the lethal use of force, as well as their individual actions, meaning whether their actions were proportionate to the threat. In the case of the Warsaw Ghetto there was a very clear and very direct threat and their actions were proportionate to it; the Jewish fighters can be morally praised as heroes for standing up to injustice. In the Falklands War the British servicemen and women who took part were not themselves responsible for the justice of the war. Their actions, rather than reflecting an individual relationship, reflect a political relationship between the states of Argentina and the United Kingdom and enmity is derived from the identity of being a member of the armed forces.

To deny that the Jewish fighters were fighting a war, or that they even could fight a war as they lacked a legitimate authority, is not to deny them the right to self-defence. Because war is a political relationship between two constitutive communities, the requirement of legitimate authority is not irrelevant. Everyone has a right to use force in self-defence against an unjust violent threat posed by others, but this violence is not war. Only a constitutive community can wage a war of national defence as only a constitutive community has the necessary shared meanings whose violation in the form of an invasion constitutes tyranny even when there is no direct threat to the lives or basic rights of its citizens.

Interestingly, whilst Fabre denies the distinction between war and other forms of violence, she also wants to defend the right of defence in the context of a bloodless invasion. She argues that sovereignty is not sufficiently important to justify the use of lethal force in its defence but it would justify non-lethal resistance. If the reaction to non-lethal resistance is the use of

disproportionate and lethal force by the invaders, then those resisting have the right to use lethal violence in their own defence. She goes on to argue that if it can be predicted that the response to non-lethal and proportionate resistance will be lethal force, there is then a right to immediately use lethal force in defence.⁴⁴² In this way she tries to simultaneously justify the right of national defence when no individual's basic rights are being threatened whilst maintaining her central argument that it is only in defence of these basic rights that lethal force can be justified. As Anna Stilz points out, it is unclear what right there is to begin this process of escalation and to put one's fellow citizens at risk, given the low value that Fabre places on sovereignty in the first place.⁴⁴³ Furthermore, it is unclear what the reaction of the defenders should be if the invaders respond to non-violent resistance with proportionate, non-lethal, force. In this case there is still no threat to the basic rights of the defenders so there is no justification for lethal violence on their part.

The violation of the shared meanings of a constitutive community provides a justification for the use of defensive violence that is distinct from and not reducible to the defence of individuals' basic rights. It is this that distinguishes just war from other forms of justified violence and it is this that makes legitimate authority as well as the existence of a just cause a requirement for a war to be just. This does not, however, deny to individuals the right to defend themselves against unjustified violence.

Conclusion

This chapter has explored the nature of war as a meaningful institution by illustrating the way in which it exists within a field of contrasts of other forms of violence. In doing so it has also outlined the nature of two of the key criteria of the *jus ad bellum*; namely, legitimate authority and just cause. It has built upon Parry's work to show that it is legitimate authority which is crucial in distinguishing war from other forms of violence and it has defined a legitimate authority as the sovereign decision making body for a constitutive community. It subsequently argued that violence could be just even if it was not war because there was no legitimate authority but that this type of violence had a different meaning than war, as well as a more limited set of justifications.

⁴⁴² Cecile Fabre, 'Rights, Justice and War: A Reply', *Law and Philosophy* 33, no. 3 (2014): 391–425, p. 406.

⁴⁴³ Anna Stilz, 'Authority, Self-Determination, and Community in Cosmopolitan War', *Law and Philosophy* 33, no. 3 (2014): 309–35, p. 322.

CHAPTER SIX

The Normative Structure of War and the Moral Equality of Combatants

[E]very soldier is a weapon bearer, so all must be prepared personally to make the decision to engage an enemy or to place themselves in harm's way. All British soldiers share the legal right and duty to fight and if necessary, kill, according to their orders, and an unlimited liability to give their lives in doing so.

...

Soldiers will be called upon to make personal sacrifices - including the ultimate sacrifice - in the service of the Nation.⁴⁴⁴

The previous chapters have explored the meaning of war and of actions within war and the way that these meanings are related to the principles that should govern the distribution of identities and the associated deontic powers. It is now necessary to bring these arguments together in order to show how they allow war to be understood and interpreted as a normatively meaningful institution and provide a defence for the principle of the moral equality of combatants. To achieve this, this chapter introduces and develops the concept of the normative structure of war, this reflects the way in which war is constituted as an institution and is summed up by the Military Covenant of the British Army. The normative structure of war is the relationship between the combatants' privilege, the justice of the cause, and the legitimate authority. The relationship between them in the normative structure of war maintains the correct distributive principles and allows important moral distinctions to be made. In the normative structure of war, the combatants' privilege is dependent upon there being a relationship of a particular type between the combatant and the legitimate authority and not on the existence of a just cause. This relationship constitutes the identity of the soldier and the meaning of their actions and allows them to be distinguished from other actors. It also allows war to be distinguished from other forms of violence and helps elucidate the nature and meaning of war and of these other forms of violence.

The first section of the chapter summarises the argument of the previous chapters and emphasises the significance of the distinctions, or fields of contrast, that were made and the importance of the distributive principles in interpreting war. The second section introduces the

⁴⁴⁴ Claire Taylor, *Armed Forces Covenant* (London: House of Commons Library, 2014), www.parliament.uk/briefing-papers/SN05979.pdf, pp. 2 - 3.

normative structure of war and shows how it is supported by the arguments of the forgoing chapters. The third section shows how the normative structure of war provides a basis for the principle of the moral equality of combatants. The final section investigates conflicts where the normative structure is not the same on both sides using the war on terror as an example.

I. Just and Unjust Distributions in War

War is a sphere of distributions. Distributions of rights, of responsibilities, of identities, and ultimately of killing and being killed. The previous two chapters have explored the meaning of these rights, responsibilities, and identities that make up war and has shown how these exist in a field of contrasts and are related to different distributive principles. This section brings these arguments together and explicitly links them to duty as the key distributive principle in war. Part one looks at the relationship between war, meaning, and distributive justice. Part two focusses on duty as the key distributive principle in war.

War, meaning, and distributive justice

In Chapter One, John Searle's argument about status function declarations was drawn upon to explain how the language of the just war tradition constitutes war as an institution. It will be recalled that for Searle, a status function declaration is a statement of the form 'X counts as Y in context C'.⁴⁴⁵ This has a double direction of fit as it changes reality to match the content of the statement but it does so by describing reality as already changed.⁴⁴⁶ It is now necessary to specify the context, C, in which certain acts of violence, X, count as war, Y. An important aspect of the context is the distributive principles by which the deontic powers associated with Y are distributed. In less formal terms, an individual counts as a soldier and has the rights responsibilities of a soldier when the identity of the soldier is distributed in a particular way, namely through a relationship of duty embodied in a formal, public oath to a legitimate authority. The importance of oaths as a form of relationship was introduced in Chapter Two. Oaths were understood as a sacred relationship made in the sight of God; those who failed to fulfil the obligations of their oath not only brought dishonour upon themselves but sinned in the eyes of God and the Church.⁴⁴⁷ As Paul

⁴⁴⁵ Searle, *Making the Social World*, p. 10.

⁴⁴⁶ *Ibid.*, pp. 11 - 12.

⁴⁴⁷ Coleman, 'Medieval Political Ideas', p. 17.

Kahn argues and was discussed in Chapter Four, the removal of religion from the public sphere does not mean the removal of ideas of the sacred.⁴⁴⁸ The importance of the oath between the soldier and the state and the distinction between an oath and a private contract reflects this continuing importance of the sacred. It is the oath and the duty which it embodies, including the duty of sacrifice, which is the distributive principle or the context, C, that defines an individual as a soldier. Conversely, when the distributive principle is financial then an individual does not count as a soldier, even if they engage in the same activities; instead they are a contractor or mercenary as the distributive principle, the context, is different. To return to the formal language; if X counts as Y in context C, then X counts as Z in a different context, C₂. It is important to note that it is the context, C, that is important in this statement, not the empirical characteristics of the X, Y, or Z terms.

Principles of distribution, therefore, are not merely important in relation to the meaning of what is being distributed, but can themselves change and determine that meaning. As Sandel writes, the principles of distribution or exchange “leave their mark”; they “affect the goods they exchange” and “express and promote certain attitudes toward the goods being exchanged.”⁴⁴⁹ This relationship between distributive principles, the things which they distribute, and the implications this has for meaning provides the link between ontology and normativity. Chapter Two demonstrated that the just war tradition is made up of the reiteration of status function declarations and that through these a whole complex of meanings, institutions, and identities comes into being which collectively constitute war as an institution. The meanings associated with war allow moral judgements to be made about it and the actions within it. These judgements in turn contribute to the just war tradition as they repeat the status function declarations that make it up.

The existence of different distributive principles is one of the ways in which a field of contrasts, and hence meaning, comes to exist. Identifying these distributive principles provides a way to distinguish between and to define the identities based upon them. Importantly, this allows greater conceptual clarity about identities than through attempting to define specific empirical characteristics or according to legal definitions. These different distributive principles include the relationship of duty, which defines the soldier, a financial relationship, which defines a contractor

⁴⁴⁸ Kahn, *Political Theology*, pp. 31 - 61.

⁴⁴⁹ Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (London: Allen Lane, 2012), p. 9.

or mercenary, and acting as an individual out of a belief in the justice of the cause, which defines a terrorist or freedom fighter.

It is important to note here that this is not to argue that only soldiers have a right to use force and that contractors and those who fight out of their own belief in the justice of the cause are always wrong and unjust. Instead the point is that they are not soldiers and the criteria by which their actions should be judged are not the same as for soldiers. The trite saying that one man's terrorist is another man's freedom fighter masks a deeper truth. Freedom fighters and terrorists both act as a result of their individual belief in the justice of the cause. Disputes about whether a particular person is a terrorist or a freedom fighter often reflect a disagreement about whether they are fighting for a just cause, but demonstrate an agreement that this is the criteria by which they should be judged. Soldiers, however, are neither freedom fighters nor terrorists and the criteria by which their actions should be judged is not whether the war itself is just.

The conduct of war, too, is a sphere of distribution and distributive principles. To kill enemy soldiers in battle is to respect the public identity that they hold and their relationship and subordination to their own state, as well as their state's sovereignty. To kill civilians or prisoners, whether out of hatred, anger, a belief that they are morally responsible for posing an unjust threat, or as a result of orders to do so, is to distribute killing for reasons and according to distributive principles that are unjust within war as institution. Again, there may be circumstances in which killing a civilian or prisoner is legitimate. If they are posing an imminent and unjust threat to the life of the soldier or someone else then the use of force can be justified as an act of self or other defence but such an act is not an act of war and the basis for assessing it is distinct from the basis for assessing acts in war because acts in war are not reducible to self and other defence. Even wars of national defence cannot be reduced or analogised to self or other defence as it is not individuals directly that are being protected but the sovereignty of the state.

Duty and the military covenant

Central to the argument of this thesis is the concept of identity and the way in which identities are formed through the nature and type of relationships that constitute them, this is the "stickier subject" described by White.⁴⁵⁰ It is this focus on identities as intersubjective and meaningful features of social reality that allows different types of violence to be distinguished as they exist

⁴⁵⁰ White, *Sustaining Affirmation*, pp. 8 - 10.

within a field of meaning. The key constitutive feature in the identity of the soldier is the concept of duty, not in the Kantian sense or in the way it is used in moral philosophy, but in a political and particularistic sense. This is the sense in which Admiral Nelson declared “England expects every man to do his duty” and is explicitly defined in the Military Covenant. Walzer frequently uses the term ‘military servitude’ which has the same implication in terms of describing the nature of the relationship of subordination between soldiers and their political leaders.⁴⁵¹

The role of the soldier is precisely to obey all lawful orders and to both kill and to put themselves in extreme personal danger when ordered to do so. It is this conception of duty which is central in constituting war as a distinct institution. The requirement to take extreme personal risks is reflected in the career of Hugh Thompson, discussed in Chapter Four. He flew a small, light, spotter helicopter in Vietnam. He and his crew were required to fly in low in order to deliberately draw enemy fire so that other, larger and better armed, helicopters could then target the enemy position. This was a risky job and his helicopter was hit by enemy fire a number of times, with one crash landing resulting in Thompson being badly injured and invalided out of Vietnam.⁴⁵² The important point is that the state has the right to require soldiers to undertake these roles and soldiers cannot refuse. No private contract could require someone to deliberately put themselves in harm’s way to such a degree because such a contractual term would be seen as unenforceable. This is similar to the argument of Paul Kahn, when he argues that “[t]here is no deduction of practical reason that concludes with my death.”⁴⁵³ The related ideas of duty and sacrifice, he contends, cannot be encompassed in contractual terms, which are predicated on the assumption of rational individuals acting in self-interest.

The concept of duty also resolves the dichotomy between consent and coercion. As argued in Chapter Three, two of the main traditional defences of the principle of the moral equality of combatants are that soldiers either consent to the principle or they act under coercion. The argument from consent is empirically untenable and insufficient as a moral defence as the outcome of war is not value neutral, so it cannot be analogized to a boxing match. The argument from coercion is also empirically untrue in contemporary western armed forces and, if it were true, may provide an excuse for participation in an unjust war, but not a justification, however it would justify

⁴⁵¹ Walzer, *Just and Unjust Wars*, p. 35.

⁴⁵² Angers, *The Forgotten Hero of My Lai*; Chapter Eight, pp. 135 - 154.

⁴⁵³ Kahn, *Putting Liberalism in Its Place*, p. 247.

the use of force by those coerced against those doing the coercing. Duty, as a principle, does not suffer these empirical shortcomings and nor does it lead to unpalatable conclusions or rely on war being value neutral.

Duty, as the constitutive distributive principle in the identity of the soldier, also makes sense of the specific features of the rituals of remembrance, which were discussed in Chapter Four. Remembrance reflects the obligation of the state and society to remember those whose deaths they are responsible for because they acted out of duty and made “the ultimate sacrifice . . . in the service of the nation”.⁴⁵⁴ Contractors who are killed whilst working for the state are not acting out of duty. Conversely, non-nationals who are members of the armed forces, like the Gurkhas or some members of the US armed forces who serve whilst seeking citizenship, are nevertheless acting out of duty and their deaths are remembered for that reason. In other words, whilst the specific features of remembrance, in terms of who is and who is not remembered, may seem unclear when described in strictly empirical terms; by looking at them in terms of meaning and understanding duty as constitutive of meaning a whole host of unspoken and implicit understandings becomes clear.

Ultimately, duty allows the identity of both the soldier and the state to be understood. The state is unique as an institution in being able to demand of its members that they kill and die in its service and to have this duty legally recognised and enforceable. It is incredibly rare, outside the realms of moral philosophy, for soldiers’ duty to the state to be challenged. Even in wars that are deeply controversial domestically, like British involvement in the 2003 war in Iraq, anti-war protestors remembered the soldiers who were killed in Iraq, precisely because these deaths were the responsibility of the government.⁴⁵⁵

To be a soldier and to kill on behalf of the state represents a civic role, like serving on a jury or voting, it is not something that should be bought and sold. Whilst soldiers need to be paid, and jurors compensated for their time, the roles themselves should not be treated as commodities. It is wrong both for individuals to sell to the state their ability and willingness to kill and for the state to simply hire people to kill on its behalf. Sandel writes about the so-called ‘life-settlement industry’ in which investors buy life insurance policies from elderly people who no longer want them. The investor continues to pay the premiums and collects the payout when the original

⁴⁵⁴ Taylor, *Armed Forces Covenant*, p. 3.

⁴⁵⁵ ‘Vigils to Mark 100th Iraq Death’.

policy-holder dies. The original policy-holder gets a substantial sum of money immediately, rather than merely having to let the insurance policy lapse. Both parties in this case benefit and the contracts are entered into freely. Yet, Sandel notes, these transactions are morally troubling; they do not reflect the understanding of the role life-insurance is supposed to play nor do they value life in the right way.⁴⁵⁶ The use of private military contractors gives rise to similar moral qualms. Whilst both sides may benefit from the transaction, the contractor gets a well-paid job and the state avoids using its own personnel, the transaction also undermines other values. In particular, it undermines the idea that military service is a public role and that the death of those who serve in combat is more than a private event but instead is something for which the government must be accountable and, more generally, that society as a whole should remember.

II. The Normative Structure of War

Having summarised the main argument thus far and introduced and explained the importance of duty, it is now necessary to introduce the major conceptual contribution of this thesis, the normative structure of war. This is the frame work that will subsequently be used to provide the moral defence of the principle of the moral equality of combatants and will provide more definite contours of war was an institution and the difference between war and other forms of violence. This section begins with a discussion of what is meant by a normative structure and how this relates to war. It subsequently outlines the normative structure of war and illustrates how this allows both war and other forms of violence to be identified and understood.

Normative structures and war

In *Just and Unjust Wars* Walzer writes that he is not going to investigate the foundation of the just war tradition, but rather to explore the superstructure, to provide a “tour of the rooms”.⁴⁵⁷ Whilst he provides an architectural survey, this thesis surveys the substructure and the foundations upon which the rest of the edifice is built. These are the principles and the relationships between them which together structure war and allow it to be recognised. As was argued in Chapter One, the concept of the normative structure is related to, and is a form of, what Graham Long describes as the meta-theory of just war theory. Long argues that this meta-theory must explore what the

⁴⁵⁶ Sandel, *What Money Can't Buy: The Moral Limits of Markets*, pp. 131 - 162.

⁴⁵⁷ Walzer, *Just and Unjust Wars*, Preface, p. xxiii.

different components of the just war tradition are supposed to do and how they should be related to one another.⁴⁵⁸

A normative structure relates individual actions to principles and principles to one another in such a way as to allow judgements to be made and meanings to be interpreted. Just as utilitarianism provides a basis for judging individual actions according to whether they contribute to overall utility, and Kantian deontology provides a basis for judging individual actions according to whether they are in accordance with the categorical imperative, a normative structure defines the terms and principles on the basis of which individual actions should be judged in a particular institution. Unlike utilitarianism or Kantianism, however, a normative structure is not universal, it does not define all other institutions by reference to itself.

This is why the argument of *Spheres of Justice* is so useful. All of the spheres discussed in the book, political authority, the free market, the community and membership within it, and so on, can also be described as institutions in the way in which the term is meant here, and they are constituted by a normative structure. As Walzer demonstrates, what is right in one sphere, or institution, may not be right in another and the standards by which actions and behaviour are judged in one are not necessarily the same in others. The most radical and important claim in the book is Walzer's rejection of the idea that there is any one single, central, principle which is the source of or which provides the basis and justification for all of the other distributive principles.⁴⁵⁹ This parallels what was said above about the normative structure of war not being universal and not defining or judging all institutions and all actions by a single standard. In a similar vein Walzer argues elsewhere that there are no "*a priori* definitions of murder, deception, and betrayal" and that there is no way to avoid dependence on "socially created meanings" for these definitions.⁴⁶⁰

Ultimately, a normative structure is a configuration of or relationship between individuals, the things they are distributing, and a distributive principle. Different configurations or distributive principles create different normative structures. It is in this way that a field of contrasts and, hence, meaning comes into existence. The different potential configurations give rise to different meanings and by understanding a particular configuration it becomes possible to interpret the institution and the practices which it gives rise to.

⁴⁵⁸ Long, 'Disputes in Just War Theory and Meta-Theory'.

⁴⁵⁹ Walzer, *Spheres of Justice*, pp. 3 - 6.

⁴⁶⁰ Walzer, *Interpretation and Social Criticism*, p. 25.

It is only by understanding the sphere of distribution in terms of the meaning it has for those within it, those party to the distributions, that the just distributive principles can be identified. Similarly, it is only by understanding an institution, like war, in terms of the specific normative structure that constitutes it and the identities of those who participate in it that moral judgements about actions within it can be formed. In the case of war and the debate between those who support and oppose the principle of the moral equality of combatants this is an important point. The revisionists believe that there is a single, central, moral principle, based on individual moral responsibility for posing an unjust threat and the individual right of self and other defence, which all violence must be judged against and which provides the basis for judgement in all circumstances. Many of those who defend the principle of the moral equality of combatants also believe that there is one single principle by which all violence should be judged but believe that other issues, like epistemic constraints on soldiers or the impracticability of institutionalising the moral inequality of soldiers in the laws of armed combat, mean that it does not apply to war and the battlefield in the same way that it does in other cases of violence.⁴⁶¹ This thesis argues that this is not the case, that there is no universal standard, and that the correct criteria for morally judging violence depends upon the sphere, or institution, within which that violence takes place and its concomitant meaning.

The normative structure of war

The contemporary debate within the just war tradition is sometimes posited as being a debate about the nature of the relationship between the *jus ad bellum* and the *jus in bello*, with the revisionists arguing that the latter is dependent on the former and the traditionalists arguing that the two are independent. This way of framing the debate is not helpful as it obscures the main issues. The current debate is really focussed on the relationship between the combatants' privilege, as part of the *jus in bello*, and the just cause component of the *jus ad bellum*. From this perspective the revisionist argument seems persuasive; the right to use violence must be justified by the existence of a just cause, however the *jus ad bellum* is not solely made up of, or reducible to, the justice of the cause. Another component of the *jus ad bellum* is the requirement for there to be a legitimate

⁴⁶¹ Shue, 'Do We Need a "Morality of War"?'; Lichtenberg, 'How to Judge Soldiers Whose Cause Is Unjust?'; Dan Zupan, 'A Presumption of the Moral Equality of Combatants: A Citizen-Soldier's Perspective', in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008).

authority. The question of authority is largely ignored by the revisionists and when it is discussed it is simply made a hand-maiden of justice; legitimate only when it results in just decisions and illegitimate otherwise. This effacing of legitimate authority as a distinct criterion of the *jus ad bellum* in its own right is deeply problematic as it denies the collective and political nature of war. By reintroducing this as a distinct criterion, rather than reducing the *jus ad bellum* to the just cause, the nature of the debate and of the relationship between the *jus in bello* and the *jus ad bellum* is transformed.

As argued in the previous chapter, a legitimate authority is the sovereign decision making body for a constitutive community. A central question is how to distinguish a legitimate authority from an illegitimate authority. The definition of a legitimate authority provides the ability to distinguish between legitimate authorities and illegitimate authorities. A group is not, or is no longer, a legitimate authority if there is no sovereign decision making body or no constitutive community. In the previous chapter the example of the breakdown of the ceasefires and peace treaties in South Sudan was used. In this case there was clearly no sovereign decision making body as individual political and military leaders acted on their own initiative. Another example from the previous chapter was Los Zetas drug cartel in Mexico. In this case they could effectively enforce obedience throughout the group, however they are not a constitutive community and so are not a legitimate authority. The crucial basis of the distinction between a legitimate authority and an illegitimate authority is the relationship between the sovereign decision making body and the constitutive community. As was argued in Chapter One, the moral foundation of this argument is that it is unjust to deny to others the right to their own meanings. Not only does this deny the value of the other as a self-interpreting being, it is also a denial of the humanity of the self as it is a refusal of the fusion of horizons, something which is a feature of being. A state that denies to its own citizens or to a part of them the right to their own meanings, their right to be self-interpreting beings, is, to that extent, unjust. It was further argued in Chapter Five that the reason it is unjust to invade another state is because it is an attempt to impose, by force, a new set of distributions and meanings on a society; as Walzer argues, this is tyranny. Where the state itself is denying to its own population or a part of it the right to be self-interpreting beings this is tyranny. In such a case the state itself is attempting to destroy the constitutive community of which it is supposed to be the guarantor and it is not a legitimate authority.

This allows a number of issues to be interpreted and understood. For example, in anti-colonial wars the subjugated population themselves form a constitutive community that is distinct from the constitutive community of the imperial power. If an anti-imperial group emerges and has a leadership structure that performs the role of a sovereign decision making body for the constitutive community of the colonized population then they can fight a war against the colonial state. In this case there are two distinct constitutive communities with two distinct legitimate authorities. Given that legitimate authority fulfils the demarcation requirement for distinguishing war from other forms of violence the conflict between them would be a war. Similarly, where a state denies the right of its own population or a part of it to be self-interpreting beings the link between the sovereign decision making body and the constitutive community is broken. Nazi Germany was not the sovereign decision making body for the Jewish population of Germany; the policies of Nazi Germany broke that link meaning that the Jewish population were under no obligation to recognize the Nazi regime as a legitimate authority. Not only were the Nazis not a legitimate authority with respect to the Jewish population or other groups whom they sought to destroy, but the actions of the Nazis justified the use of force by the Jewish people in self-defence. As was discussed in the section on the Warsaw Ghetto Uprising, even without a legitimate authority the use of force can still be justified in self-defence but it does not constitute war. There are also cases where a government's actions towards the entirety of its population mean that it is no longer a legitimate authority at all. The Khmer Rouge regime in Cambodia would be an example where their policies denied the meanings and the right to be self-interpreting beings to the entire population of the country. In such a case the government is not a legitimate authority at all, not only do the population have a right to defend themselves against the government but the government, having broken the relationship with any constitutive community, is not capable of fighting a war. Any violence perpetrated by such a government, whether in invading another country or in defence as a result of invasion, is not war and is not distinct from other forms of violence. Those who participate can be judged for both their individual actions as well as according to the justice or otherwise of the cause. In most cases like this it is likely that the majority of participants would be excused given that such a regime will be deeply violent and repressive, but the basis of excuse is the recognition that the act itself was morally wrong.

War and the actions war have a meaning. Given these meanings some principles for distributing rights, responsibilities, identities, and the acts of killing and being killed, are inappropriate. The central distributive principle for the institution of war is a particular type of relationship between the combatant and the state, or the legitimate authority; namely, duty. The actions of the combatant, the combatants' privilege, and the *jus in bello* as a whole are not independent of the *jus ad bellum*. But nor do they depend upon the justice of the cause or whether the enemy is individually morally responsible for posing an unjust threat. The combatants' privilege depends upon the legitimate authority and the legitimate authority is responsible for the justice of the cause; but the lack of a just cause does not negate the existence of the legitimate authority or alter the moral judgement of the individual combatants' actions. This relationship between the just cause, legitimate authority, and combatants' privilege is the normative structure of war.

The normative structure of war distinguishes war from other forms of violence. It links individuals, the rights, responsibilities, and identities being distributed, and the distributive principle of duty. It forms the context, C, of the status function declaration which constitutes war. As such, an act of violence, X, counts as an act of war, Y, rather than murder, when it occurs within the normative structure of war. It is in this way that war comes into being as an institution of social reality rather than being just a brute fact. It is within this institutional framework, which is maintained through the reiteration of status function declarations in the just war tradition, that it is possible to interpret war and acts within it and to recognise and make moral distinctions between acts of war and war crimes, mercenaries and soldiers, soldiers and governments, and war and self-defence. These distinctions cannot be made from the revisionist account of war and this is one of the moral costs of the "impoverishment of figuration" that is a result of the revisionists' reliance on the disengaged self.⁴⁶²

The previous two chapters explored various contrasts in the *jus in bello* and the *jus ad bellum* to demonstrate the importance of meaning when making moral judgments about war. These contrasts can now be interpreted and understood in the light of the normative structure of war and it can be seen that they emerge from this structure.

⁴⁶² White, *Sustaining Affirmation*, pp. 9 - 10.

III. The Moral Equality of Combatants

The previous section introduced the concept of the normative structure of war as the way in which the just cause, legitimate authority, and combatants' privilege are related to one another with duty as the key distributive principles. This section demonstrates how the normative structure of war provides a defence for the principle of the moral equality of combatants. The first part demonstrates how the reciprocal role of duty is the foundation of the moral equality of combatants. The second part explores the limits of duty through the concept of blocked exchanges.

Duty and the moral equality of combatants

The normative structure of war is based on a set of relationships between political leaders and combatants which defines who is responsible for what in the context of war. The central component of the normative structure of war is the relationship of duty between soldiers and the state and the political leaders. It is this relationship of duty, in which both soldiers individually and the armed forces as an institution are prohibited from acting independently or overruling or ignoring the decisions of the political leaders, which means that they cannot be held responsible for the decision to go to war. Because they are not responsible for this decision they are also not morally responsible for its justice or injustice. It is important to realise here that this is not an argument that soldiers simply do not make the decision to go to war, nor that they are not capable of making the decision wisely. The argument here is more far-reaching as it states that soldiers do not have the right to make that decision and are instead required to accept the decision made by the government; it is for this reason that it is wrong to hold them morally responsible for the decision to go to war. In war it is the equal non-responsibility of soldiers on either side for the justice or injustice of the war in which they are participating that is the foundation of the moral equality of combatants.

This argument allows the question posed by Paul at the beginning of the thesis and, more generally, the question of the nature, basis, and meaning of enmity in warfare, to be answered. Enmity is not based on individual moral liability, nor threat, nor even potential threat, but on holding the status of a soldier, defined in terms of the nature of the relationship between the soldier and the state. The argument also provides a moral foundation for the laws of armed conflict, particularly regarding the status and treatment of prisoners of war, that does not rely simply on the

mutual self-interest of the warring parties or on the idea that these are the rules that potential combatants would develop behind a veil of ignorance.⁴⁶³

The treatment of POWs is not, and should not, be punitive because they have done nothing for which they are morally culpable and, hence, nothing for which they can be punished. As the Oxford Manual states, “[t]he confinement of prisoners of war is not in the nature of a penalty for crime” because they have committed no crime, at least, not simply through participating in combat.⁴⁶⁴ Their treatment should be the same whether they are new and reluctant conscript who has not yet fired their rifle in combat or a crack sniper responsible for dozens of kills. They are held not because of what they have done but because of what they are, because of their status, and their detention is not punitive but preventive. They are held simply to prevent them from participating in combat and they are released at the end of the war as there is no combat for them to return to.

The limits of duty and blocked exchanges

A key question that remains to be addressed is with respect to the limits of duty. Specifically, why does the relationship of duty justify the killing of enemy soldiers independent of the justice of the war and yet not justify killing enemy civilians when ordered to do so, even in a just war and when the civilians in question are morally responsible for posing an unjust threat? The answer to this question reflects the meaning of war and the actions within it, in Walzer’s terms the killing of civilians or prisoners is a blocked exchange.⁴⁶⁵ A blocked exchange is simply an exchange that is not permitted to be made through a certain distributive principle, Walzer uses the term in relation to the market and the use of money as a medium of exchange and defines blocked exchanges as including things like the sale of human beings as property, the sale of criminal justice, of political office, as well as the sale of criminal services and so on.⁴⁶⁶ These provide the limits of what money can, and should be able to, buy.

The terms itself can be used more widely than in reference to the market and can be used to describe any distributive principle outside its proper bounds. In war, one of these blocked exchanges is the duty to follow orders to kill civilians or prisoners or to commit other war crimes

⁴⁶³ Benbaji, ‘The Moral Power of Soldiers to Undertake the Duty of Obedience’.

⁴⁶⁴ *Oxford Manual*, Part III, Section A.

⁴⁶⁵ Walzer, *Spheres of Justice*, p. 100.

⁴⁶⁶ *Ibid.*, pp. 100 - 103.

like torture, rape, or the use of prohibited weapons. Whilst duty itself is the appropriate distributive principle in war as an institution there are limits to duty and there are some orders that it is unjust to give and unjust to follow; in the same way that money is the appropriate distributive principle in the market but there are some things that it is unjust to buy and to sell. These limitations are not arbitrary but reflect the meaning of war and of duty. Whilst not arbitrary, these blocked exchanges are also not natural, in the sense of being pre-given. As Walzer demonstrates in *Spheres of Justice*, blocked exchanges are relative to the meanings of what is being distributed and change over time as meanings and institutions change, they are also relative to the meanings of the distributive principles themselves.

In the case of war these meanings and the associated blocked exchanges have emerged with the just war tradition and through what MacIntyre describes as the “internal, interpretative debates” by which it progresses.⁴⁶⁷ Chapter Two outlined the development of the just war tradition and some of the ways in which it has changed. Whilst some meanings have remained relatively stable, for example the normative distinction between combatants and non-combatants, others have changed over time. Some of these changes include the evolution of the doctrine of double-effect and the debates about and changing understanding of the power of the Pope to absolve oaths of loyalty. At various times in history these would have been associated with different blocked exchanges and no doubt, as the just war tradition extends into the future, other meanings will change and new blocked exchanges will emerge, however they will emerge from within the tradition and will be based on changing intersubjective meanings rather than on abstract and external moral principles. Whilst the nature of blocked exchanges will change over time, the stability of the main blocked exchanges associated with war illustrates the stability of the just war tradition and the way in which it constitutes the moral reality of war through the reiteration of status function declarations. The key blocked exchanges associated with war include the use of mercenaries or contractors, soldiers acting according to their own moral beliefs and deciding whether to fight or to cease fighting on that basis, soldiers killing civilians or prisoners out of hatred or malice or for any private reason, and also soldiers killing civilians or prisoners as a result of orders to do so. These have emerged over a long period of time and reflect widely shared understandings about war and the actions within it and, in particular, about what it means to be a soldier.

⁴⁶⁷ MacIntyre, *Whose Justice? Which Rationality?*, p. 12.

War is not a sphere for the distribution of punishment or for the distribution of harms on the basis of individual moral responsibility. Whilst there may well be specific non-combatants who, due to their role in initiating or prolonging a war are deserving of punishment, the proper forum for determining this and for distributing the punishment is the courts. It is precisely because war is not the appropriate sphere for assessing guilt and distributing punishment that the killing of non-combatants is a blocked exchange.

An important implication of this argument is that the moral equality of combatants does not derive directly from their relationship of combatants to one another, instead it emerges indirectly through the nature of the relationship they have to their respective states. It is the equal and reciprocal non-responsibility for the justice of the war, derived from the equal and reciprocal duty to the state, that gives rise to the moral equality of combatants. As such, the moral equality of combatants is derivative from and depends upon other facts. From this it can also be seen that in cases where some of those other facts do not hold, the moral equality of combatants may not hold either. The strength of this argument, however, is that it provides a framework in which these non-traditional types of conflict can be identified and understood.

IV. Asymmetrically Normatively Structured Conflicts

A potential objection to the argument in defence of the principle of the moral equality of combatants presented above is that even if it were true in conventional wars of the past, like the two world wars, fought largely between mass standing armies, these are increasingly not the types of war or conflict that occur in the contemporary world. In recent decades, and especially since the end of the Cold War, there has been a proliferation of non-traditional types of conflict, as well as of terminology to describe these conflicts, including non-trinitarian warfare, new wars, risk-transfer war.⁴⁶⁸ To add to this lexicon this part will introduce the, admittedly infelicitous, term of asymmetrically normatively structured conflicts.

This term will be used to describe conflicts in which the normative structure on each side is not the same. This is the problem of “irregular belligerency” discussed by Parry.⁴⁶⁹ To reiterate

⁴⁶⁸ Martin van Creveld, *The Transformation of War* (New York: The Free Press, 1991); Mary Kaldor, *New and Old Wars: Organised Violence in a Global Era*, Third Edition (Malden, MA.: Polity Press, 2012); Martin Shaw, *The New Western Way of War: Risk-Transfer War and Its Crisis in Iraq* (Cambridge: Polity, 2005).

⁴⁶⁹ Parry, ‘Just War Theory, Legitimate Authority, and Irregular Belligerency’, pp. 185 - 189.

the argument, the combatants' privilege within the normative structure of war is dependent upon two things: firstly, that there is a legitimate authority responsible for making the decision to go to war and on whose behalf the soldiers act; and secondly, that the relationship between the soldiers and the legitimate authority is defined by duty. When either or both of these elements are lacking, those participating in conflict do not have the combatants' privilege and their actions are not independent of the cause for which they are fighting. This was highlighted in the previous chapter in the sections that discussed the violence of Los Zetas in Mexico and the Warsaw Ghetto Uprising. In both cases it is appropriate to judge the individuals involved not only according to their actions but according to the reasons for which they were fighting. This section will consider another example of an asymmetrically normatively structured conflict, namely the war on terror, and will demonstrate how this affects the understanding as well as the conduct of the violence.

The war on terror

Since the attacks of 11th September and, more generally, the emergence of transnational Islamist terrorist groups willing and capable of inflicting serious attacks in western countries and whose objective is to kill large numbers of civilians, the response has been a war on terror waged by the US and its allies. The war on terror is difficult to define clearly as it has come to refer to an incredibly broad set of events, not all of which are directly related to terrorism. These include the invasion of Afghanistan in direct response to the 11th September attacks, the invasion of Iraq on what turned out to be false claims that Iraq was developing weapons of mass destruction, as well as the prolonged insurgency in Iraq afterwards, the extension of strikes and counter-terrorist operations to Pakistan, Yemen, Somalia, and elsewhere, as well as the panoply of anti-terrorism legislation and the increased powers for the security services in western countries. More recently the emergence of the Islamic State, holding territory in Syria and Iraq and committing horrific acts, including genocide and the sexual slavery of non-Muslim women within its territory, as well as inspiring and coordinating major terrorist attacks internationally, has given fresh impetus to the war on terror.

Since the start of the war on terror, but especially under the Obama Administration, a policy of targeted strikes against suspected terrorists, largely carried out using Unmanned Aerial Vehicles, or drones, has become common. Clearly one part of the explanation of the increase in the use of drones is simply the technological and material fact that they are now available and

effective, which simply was not the case even in the early years of the war on terror. Furthermore, the policy of targeted killing is, in part, shaped by the existence and capabilities of drones as, in contrast to fighter planes or cruise missiles which were used to conduct air strikes in the past, they can loiter over an area for hours or days, tracking and identifying targets, rather than having to be scrambled from a carrier or airbase potentially a long time away whenever a target of convenience appears. They also tend to carry missiles with a smaller warhead than those carried by fighter planes, and significantly smaller than those on cruise missiles. This makes a policy targeting individuals more feasible as, whilst civilian casualties can still occur, the blast radius is smaller and so far fewer are likely to be affected.

The development of drones and the controversy regarding their use has spawned a burgeoning literature debating their legality, morality, and effectiveness.⁴⁷⁰ What is particularly important for present purposes are the actual policies governing the use of drones, for which the Living Under Drones report is by far the best source. Despite some of the problems with the specific figures, an impressive amount of research has been done by scholars and journalists on the policies related to the use of drones and this research provides a basis for understanding the policies. The research available suggests that drone strikes can be disaggregated into at least three categories, governed by different policies. These three types of drone strikes have different implications and raise different questions.

The first, and perhaps best known, types of strike are the personality strikes.⁴⁷¹ These are strikes on a specific individual who is being targeted due to evidence linking them directly to militant activity and who is believed to pose a threat to the US or its allies. Whilst these are often

⁴⁷⁰ Kenneth Anderson, 'Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is A "Legal Geography of War"', American University: Washington College of Law, 2011; Laurie R. Blank, 'Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications', *William Mitchell Law Review* 38, no. 5 (2012): 1655–1700; Megan Braun and Daniel R. Brunstter, 'Rethinking the Criterion for Assessing CIA-Targeted Killings: Drones, Proportionality and Jus Ad Vim', *Journal of Military Ethics* 12, no. 4 (2013): 304–24; Daniel R. Brunstter and Megan Braun, 'The Implications of Drones on the Just War Tradition', *Ethics and International Affairs* 25, no. 3 (2011): 337–58; Jennifer C. Daskal, 'The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone', *University of Pennsylvania Law Review*, 2013, 1165–1234; Sarah Kreps and John Kaag, 'The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis', *Polity* 44, no. 2 (2012): 260–85; David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Self-Defence?', *European Journal of International Law* 16, no. 2 (2005): 171–212; Jeremy Waldron, 'Justifying Targeted Killing With a Neutral Principle?', in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. Claire Finkelstein, Jens David Ohlin, and Andrew Altman (Oxford: Oxford University Press, 2012).

⁴⁷¹ Stanford International Human Rights and Conflict Resolution Clinic and Global Justice Clinic at NYU School of Law, 'Living Under Drones', 2012, <http://www.livingunderdrones.org/report/>, pp. 12 - 13.

portrayed by the administration and the military as strikes on senior leaders or individuals involved in serious and imminent terrorist operations, the evidence suggests that the majority of those targeted are low level members with little role in ongoing operations.⁴⁷² Personality strikes target people as individuals, due to the individual threat that they pose, or are believed to pose, rather than due to their status. Precisely because these people are targeted as individuals and not as combatants, and because these strikes frequently occur far from the 'hot' battlefield, often in third countries including Pakistan, Yemen, and Somalia, they do not fit easily into the conventional laws of armed conflict. They also pose serious problems to International Human Rights Law under which such strikes are tantamount to extra-judicial execution. Whilst lethal strikes may be permitted under International Human Rights Law, they would need to meet much stricter imminence criteria, and many of the lower level militants targeted would not be seen as posing a sufficiently serious threat to justify the use of lethal force.

The second type of attack is the signature strike. These strikes target unknown and unidentified individuals based on a pattern of activity that is believed to be associated with membership of a militant organisation.⁴⁷³ The US has never acknowledged these types of strikes and has never detailed the criteria for assessing whether behaviour is suspicious enough to warrant targeting and killing; however, the joke within the US State Department that if the CIA saw three men exercising in a field they would consider it a terrorist training camp suggests that there were concerns that the criteria were not discriminating enough.⁴⁷⁴ This type of strike also reflects an attempt to develop new practices of warfare to deal with the of terrorism. In this case, the signature criteria according to which suspects are identified serve as a proxy for combatant status. Because they are not formally combatants and cannot be identified according to the formal criteria for being a combatant, it is necessary to find some other way of identifying targets. This, too, is problematic from the perspective of both the laws of war and international human rights law, especially as it is unclear what criteria are being used to identify people as targets.

⁴⁷² Philip Alston, 'The CIA and Targeted Killings Beyond Borders', *Harvard National Security Journal* 2, no. 2 (2011): 283–446, pp. 332 - 333.

⁴⁷³ Stanford International Human Rights and Conflict Resolution Clinic and Global Justice Clinic at NYU School of Law, 'Living Under Drones', pp. 12 - 13; Micah Zenko, 'Targeted Killings and Signature Strikes', *Politics, Power, and Preventive Action*, 16 July 2012, <http://blogs.cfr.org/zenko/2012/07/16/targeted-killings-and-signature-strikes/>.

⁴⁷⁴ Jo Becker and Scott Shane, 'Secret "Kill List" Proves a Test of Obama's Principles and Will', *New York Times*, 29 May 2012, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.htm>.

The third type of attack is the double-tap strike. In these attacks a drone will conduct a personality or signature strike and will then remain in the area and a second strike (and potentially more follow-up strikes) will be carried out against those who come to the aid of the victims of the first strike.⁴⁷⁵ As a result, researchers and journalists have learnt that locals will often wait a substantial period of time before going to the site of a drone strike, delaying aid from reaching any injured survivors.⁴⁷⁶ These types of strikes make no effort to distinguish between combatants and non-combatants and seem to be designed specifically to ensure that those originally targeted will be killed, either in the follow up strike or through lack of medical care. These strikes have also never been officially acknowledged by the US so it is impossible to ascertain how and under what body of law these strikes are justified or what the decision making procedure is for authorising such a strike. This type of strike, too, can be seen as a reaction to the threat of terrorism. Given that the threat is posed by specific individuals and given that it is frequently impossible to capture the individuals, the policy here is designed to ensure that the individuals targeted are killed and can no longer pose a threat.

Another important feature of the policy of drone use is the way in which ‘militants’ are defined, both in targeting and in post-strike analysis. According to the available reports the US assumes that all ‘combat-age males’ who are killed in a strike are militants and are therefore legitimate targets unless there is conclusive proof subsequently, that is, post-mortem, that they were not.⁴⁷⁷ It is easy to see why the US would adopt such a policy, not only due to the difficulties of determining who is and is not a combatant or militant given that they do not distinguish themselves from the civilian population by carrying arms openly and “having a fixed distinctive sign visible at a distance”,⁴⁷⁸ but also based on the assumption that people in the same location as terrorists are “probably up to no good” and because it flatters the civilian casualty figures.⁴⁷⁹ This is also a deeply problematic assumption and it is at the heart of the targeting paradigm for the use of drones, for all of the types of strike discussed above. The leaks from within the US administration and articles defending the use of drones often mention the sophisticated software that guides the drone pilots and which estimates collateral damage in order to allow them to

⁴⁷⁵ Stanford International Human Rights and Conflict Resolution Clinic and Global Justice Clinic at NYU School of Law, ‘Living Under Drones’, pp. 74 - 76.

⁴⁷⁶ *Ibid.*, pp. 74 - 76.

⁴⁷⁷ Becker and Shane, ‘Secret “Kill List” Proves a Test of Obama’s Principles and Will’.

⁴⁷⁸ *Geneva III*, Art. 4 (2).

⁴⁷⁹ Becker and Shane, ‘Secret “Kill List” Proves a Test of Obama’s Principles and Will’.

determine whether a particular strike is legitimate or not⁴⁸⁰ but if the assumption that all combat-age males are legitimate targets is programmed into this software then it seems to provide little more than a facade for indiscriminate killing.

The war on terror and the normative structure of violence

A key feature of the use of drones in the war on terror has been the move away from status based targeting and the development of alternative targeting criteria, either identity or characteristics that serve as a proxy for status. This has also been one of the most controversial aspects of the war on terror and the drone warfare programme, with the individualized targeting, in particular, often being seen as similar to assassination or execution without due process. This part argues that the individualization of targeting reflects the nature of the conflict and can be justified accordingly.

As mentioned previously, those who fight without a legitimate authority can be judged according to the cause for which they fight. Terrorists use violence because they believe that there is a just cause for the use of violence, this is one of the features that distinguishes terrorist violence from criminal violence as terrorist violence has political or ideological objectives, but it does not have a legitimate authority. Whether they act as lone-wolves having self-radicalised, are part of a small cell inspired by events elsewhere, or are taking instructions from a larger group, there is no legitimate authority. What is distinctive about the ideology of groups like al 'Qaeda and the Islamic State, or ISIS, is that not only are they not a legitimate authority but they also encourage their followers and supporters to carry out attacks anywhere and at any time, without direct orders from the group. As a result, their followers and supporters pose a direct threat as individuals, rather than as a result of their status. This has profound implications for the conduct of warfare, reflected in the drone warfare programme. To target someone as an individual requires identifying the features that make them a threat and a legitimate target. As terrorists justify their own participation in violence on the basis of their belief in the justice of the cause, in other words they believe that the combatants' privilege is dependent on the justice of the cause, it is reasonable to use this belief as the basis for targeting criteria. Enmity, therefore, becomes based on identity, defined by beliefs and actions, rather than on status. Furthermore, whilst targeting does not follow

⁴⁸⁰ Gregory S. McNeal, 'Are Targeted Killings Unlawful? A Case Study in Empirical Claims Without Empirical Evidence', in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. Claire Finkelstein, Jens David Ohlin, and Andrew Altman (Oxford: Oxford University Press, 2012).

the traditional status based targeting of war, it also does not follow the individualized targeting of criminal law or international human rights law. Terrorists pose a threat because of their belief that their cause gives them a right to use violence. They can therefore be targeted on this basis even if they are not posing a direct threat of harm to anyone at the time, which would be the requirement according to international human rights law. In other words, enmity and the legitimacy of targeting depends upon the way in which one justifies one's use of violence. For soldiers this justification is the relationship of duty to a legitimate authority and the public status and identity of being a soldier, which leads to status based targeting. For those, like terrorists, who justify their individual participation in violence on the basis of what they believe to be the justice of their cause, it is this belief that is the basis for enmity and which justifies being targeted. It is important to note, though, that it is not just individual beliefs that matter, but the intersubjective meaning of actions. Soldiers may well believe that they are fighting a just war, however they fight because they are a soldier and not on the basis of these beliefs and will cease fighting when ordered to do so. When they kill, they do so as a soldier and on behalf of their legitimate authority. Terrorists, by contrast, may well act as part of a larger group from which they take direction, but this is not a legitimate authority so they act as individuals. When they kill they kill as an individual and can be both judged and targeted accordingly.

This section has shown how the war on terror can be understood using the concept of the normative structure of war. By looking at the relationships between the authorization to use force, or the legitimate authority, the individual use of force, or the combatants' privilege, and the reason for the use of force, or the justice of the cause, it is possible to understand different types of violence. It is also possible to understand asymmetrically normatively structured conflicts and to explore the way in which this asymmetry affects both the conduct of violence as well as the understanding of the meaning of the violence.

Conclusion

War is an institution of social reality and it has its own structure, its own meanings, and its own distributions. As an institution it can be distinguished from criminal violence, terrorism, and self-defence. As an institution it and the actions within it are also judged by different criteria than other forms of violence. An understanding of the normative structure of war reveals that it is not

“alchemy” to distinguish between war and other forms of violence.⁴⁸¹ These differences reveal themselves through the different moral judgements made about different forms of violence, reflecting the different distributive principles within them. Duty, as a distributive principle, provides the basis for the moral equality of combatants in war through the reciprocal non-responsibility for the justice of the war on either side however when there is no relationship of duty or when there is no legitimate authority the criteria for judgment change. This makes it possible to identify distinct forms of violence and to judge them appropriately.

⁴⁸¹ McMahan, *Killing in War*, p. 82.

CONCLUSION

Just and Unjust Judgements in War

He fell in October 1918, on a day that was so quiet and still on the whole front, that the army report confined itself to the single sentence: All quiet on the Western Front.

He had fallen forward and lay on the earth as though sleeping. Turning him over one saw that he could not have suffered long; his face had an expression of calm, as though almost glad the end had come.⁴⁸²

To pass judgement on others, to condemn or commend, is a difficult thing to do. It requires a knowledge of the facts, of the appropriate moral principles and standards of judgement, and a knowledge of the context, as well as an ability to relate these to one another. Judgement is difficult because it is morally fraught. To judge wrongly, to distribute praise and blame to the wrong people or for the wrong reasons, is an act of injustice in itself. Despite its difficulty, judgement is inescapable. It is a necessary feature of interpretation and criticism, reflecting the fact that all humans are social critics of one form or another. This is an important point; humans are *social* critics. Humans exist in a society and the very nature of their being is formed by its language and meanings. These form both the first subject and are the immediate source of criticism. Over time, the language and meanings and the history of judgements that reiterate and reinterpret those meanings come to form a tradition, a body of thought that extends across time and which embodies a set of values and constitutes an institution or a set of institutions. A tradition provides the resources and vocabulary to identify and describe, interpret and judge, the institutions and identities it relates to.

This thesis has explored the basis for judgment in war. It has developed a defence of the principle of the moral equality of combatants and has thereby demonstrated why it is wrong to judge soldiers according to the justice of the war. Paul's death, at the end of *All Quiet on the Western Front*, is no less tragic and no different in meaning than Gerard's, despite the fact that they fought on opposing sides. To judge Paul's actions, his participation in the war, his killing of Gerard, and his death, requires an understanding of the nature of war as a meaningful institution.

In order to understand war as an institution and to provide a defence of the principle of the moral equality of combatants, this thesis has drawn upon the just war tradition. It demonstrated

⁴⁸² Remarque, *All Quiet on the Western Front*, p. 296.

that the just war tradition and the history of judgements which make it up is constitutive of war as a meaningful institution and of the identities of those who participate in it. By understanding these meanings, it becomes possible to identify the principles for distributing the identities and actions in war and to establish the basis for the just distribution of judgement in war.

The conclusion of the thesis, in defence of the principle of the moral equality of combatants, is a reiteration of the just war tradition, however it has also contributed to the further development of the just war tradition and to what MacIntyre describes as the “internal, interpretative debates through which the meaning and rationale of the agreements come to be expressed and by whose progress a tradition is constituted.”⁴⁸³ It has done this by identifying the moral foundations of the principle and of the nature of combatancy and, hence, the limits upon it, as well as by illustrating how the moral foundations of combatancy are the source of and justification for the principle of the moral equality of combatants. Furthermore, the thesis has demonstrated that an understanding of the just war tradition, of the nature and meaning of combatancy, and of the foundations and limits of the principle of the moral equality of combatants, allows other, non-traditional, forms of violence to be understood, interpreted, and judged. This thesis has also contributed to the development of an interpretive and hermeneutical approach to the study of war. Whilst the approach is similar to that of Walzer in *Just and Unjust Wars* and draws heavily upon both this and Walzer’s other works, this thesis has developed more rigorous theoretical underpinnings for the approach. By developing and applying arguments from Walzer’s later works to the study of war, the thesis has also been able to provide a much more robust defence of the principle of the moral equality of combatants. Perhaps most importantly, and at the base of the other contributions, the thesis has contributed to an understanding of the ontology of war. It has defined what war is as an institution and has identified what it is that both constitutes war as war and allows it to be normatively and meaningfully differentiated from other forms of violence. As such, it has answered McMahan’s charge of the “implausibility” of distinguishing war from other forms of violence.⁴⁸⁴

⁴⁸³ MacIntyre, *Whose Justice? Which Rationality?*, p. 12.

⁴⁸⁴ McMahan, *Killing in War*, p. 36.

I. War, Meaning, and Morality

In Chapter One, Searle's argument about the distinction between brute facts and institutional facts was introduced. The question was posed as to whether war was more like a mountain or an institution and it was stated that war was an institution and that the rest of the thesis would seek to demonstrate this and to explore the implications of it. In order to understand the institutional facts of war it was necessary to identify the context, C, in which certain acts, X, count as acts of war, Y; and the context in which some individuals count as soldiers. Given that institutional facts are intersubjectively shared understandings of meanings, the thesis has eschewed the use of abstract hypothetical examples favoured by the revisionists and analytical philosophy. The problem with the use of hypothetical examples is not that they are unrealistic in terms of their substance and content, although frequently they are, but that by their very nature they ignore and abstract from meaning and intersubjective understandings, which are central features of human and social reality. Instead, Charles Taylor's work was drawn upon to develop an interpretive approach that drew upon real and specific examples and cases. The use of real examples and the focus on meaning as constituted through language provided the basis for a hermeneutical approach, based on the work of Gadamer, which fused the horizons of the just war tradition with those of the battlefield. This argument is based on what White terms a weak ontology. The starting point for a weak ontology is that it recognises that foundations are both necessary for moral argument but are inherently contestable. It rejects the disengaged self of liberal political theory and replaces it with a "stickier subject" which is based on the negotiation of a number of existential realities, including language, finitude, natality, and the articulation of sources of the self.⁴⁸⁵ Drawing heavily on Sandel and Walzer it was demonstrated that the argument of the thesis rests on a weak ontology. It was subsequently shown that this ontology provided a moral basis for the argument and contained the internal resources to resist moral relativism. In particular, the idea of humans as self-interpreting beings means that interpretation and the fusion of horizons becomes a feature of being, rather than just a method of study. It is this that is the source of the moral value of the individual and it is therefore unjust to deny to others their capacity for self-interpretation or to deny that they have meanings that constitute their identity.

In order to identify the intersubjective understandings that constitute war as an institution, Chapter Two introduced and analysed the just war tradition. It explored the way in which the twin

⁴⁸⁵ White, *Sustaining Affirmation*, pp. 8 - 10.

concepts of combatancy and non-combatancy have evolved within the tradition. Whilst the principle of the moral equality of combatants has not always been a part of the tradition, the idea that there is a normative and meaningful distinction between combatants and non-combatants has been central to the tradition from the start. Much of the internal and interpretative debate within the tradition has been about the nature of this distinction and the meaning of combatancy and the chapter mapped how the idea that soldiers should be held accountable for the justice of the war began to emerge with Pope Gregory VII and with Gratian. It argued that over time, through the works of Aquinas and Vitoria, more and more excusing and justifying factors were identified for individual participation in an unjust war, culminating in Grotius' introduction of the idea of the legal equality of combatants. It was with Vattel and the emergence of the positive law of nations that the principle of the moral equality of combatants fully emerged in a recognisable form. This chapter also explored the way in which the just war tradition came to understand the *jus in bello* and the *jus ad bellum* as distinct spheres of judgement. The evolution of the principle of the moral equality of combatants has gone hand in hand with the separation of the *jus in bello* from the *jus ad bellum* and it is both of these issues that are now in question.

Chapter Three introduced the contemporary debate about the principle of the moral equality of combatants and the relationship between the *jus in bello* and the *jus ad bellum*. It firstly outlined the mainstream view, based on Walzer's argument that "[w]ar is always judged twice" and the associated belief that the *jus in bello* is independent of the *jus ad bellum*.⁴⁸⁶ It then considered the main objections to this argument and, in particular, to some of the most common defences of the principle of the moral equality of combatants, including that soldiers consent to the principle, the diametrically opposed claim that they are coerced, the argument that the epistemic uncertainty faced by soldiers excuses their participation in unjust wars, and the claim that the moral equality of combatants can be justified as a form of reciprocal self-defence. None of these defences, it was argued, are sufficiently substantial to support the principle of the moral equality of combatants. This chapter went on to analyse the main arguments of two of the most prominent revisionist scholars, Jeff McMahan and David Rodin. It was shown how their arguments are derived from an individualist perspective that denies the significance of meaning and which sees war as indistinguishable from other forms of violence.

⁴⁸⁶ Walzer, *Just and Unjust Wars*, p. 21.

Chapters Four and Five substantiated the claim that war is in fact distinct from other forms of violence. These chapters used an interpretive and casuistical approach in order to identify and understand the meanings of actions and institutions. They also reflected the hermeneutical circle as they sought to understand the institutions of war and combatancy, the whole, through the study of examples and cases, the parts, however the understanding of these cases and examples was, in turn, informed by the understanding of the whole. In each chapter a number of examples that highlighted important normative and meaningful contrasts in war were explored. Chapter Four focussed on issues associated with the *jus in bello*. These included the distinction between acts of war and war crimes; the principle of discrimination and the contrast between identity and liability as justifications for targeting and the way in which these differing justifications changed the practice of discrimination; the concept of sacrifice in war and the different ways in which the requirement to sacrifice and commutation from this requirement can be distributed; and the ways in which the deaths of soldiers and contractors or mercenaries are understood. Each example highlighted the limitations of the revisionist account in understanding intuitively important moral judgments about war. In the case of the My Lai massacre the revisionist account would recognise the injustice of Calley and his men and the heroism of Hugh Thompson for intervening, but the praise for Thompson would be tempered by the fact that he participated in an unjust war and killed, or contributed to the deaths, of enemy soldiers who were not morally liable to harm. When discussing the targeting of non-combatants, it was shown that both the just war tradition and the revisionist argument would condemn the mass, indiscriminate, bombing of cities that occurred in World War II. They would do so for different reasons, though, with the just war tradition condemning it due to the normative difference it recognises between combatants and non-combatants in which the latter, simply by virtue of their status, are immune from attack. The revisionist argument focuses on individual liability for posing an unjust threat in war and would condemn the bombing of cities as no attempt is made to differentiate between those who are and are not responsible for posing an unjust threat. This means that in a different context the revisionist account would accept the killing of non-combatants, like priests and religious figures in the Spanish Civil War, if it could be demonstrated that they bore sufficient individual responsibility for posing an unjust threat. In the context of conscription, it was shown that the revisionist argument cannot accommodate the meaning of sacrifice or the concept of community that it is predicated on. The revisionist argument contains the resources to criticise a policy of allowing

payment of a commutation fee in order to be exempted from military service, as this grants an additional and unequal right to those wealthy enough to afford it. The reason that allowing payment of a commutation fee is morally troubling, however, is not simply that it grants an additional right to the well-off but that it turns membership of the community into a mere attribute of identity. The individualist ontology of the revisionists cannot recognise the concept of a constitutive community as they view community in largely instrumentalist terms. Finally, it demonstrated that the difference between contractors or mercenaries and soldiers and the different meanings that attach to their deaths is reflected in the difference between the institutionalised remembrance of soldiers and the instrumentalised remembrance of contractors. The revisionist argument cannot understand the rituals of remembrance as reflecting a participation in a tradition through which the identity of the community comes to be and the sacrifices of the past become a part of the community's horizons.

Chapter Five focussed on issues associated with the *jus ad bellum*, in particular the concepts of legitimate authority and just cause and the relationship between them. It started by contrasting the trials of Nazi leaders at Nuremberg with the trial of Eichmann in Jerusalem. This section demonstrated that the different crimes that they were charged with, with the Nazi leadership being prosecuted for planning an illegal war as well as with crimes against humanity, whereas Eichmann was prosecuted for his contribution to the Holocaust, reflects the different deontic powers associated with political leaders and soldiers. It would be unjust to hold someone, even someone as evil as Eichmann, responsible for participation in an unjust war as the deontic powers associated with being a soldier preclude them from deciding whether or not to participate based on their belief in the justice or otherwise of the war. The second section also addressed the question of the distribution of decision making power and made an argument about the importance of legitimate authority and of the subordination of the armed forces to governmental control. It emphasised the importance of the subordination of the armed forces on the basis that it is morally essential to be able to end violence. Any group that claims a right to initiate and to use violence must have the ability to control and to end the violence. No matter how just the cause, no violence can be justified if there is no ability to end the violence as it is, by definition, disproportionate. Furthermore, if the group cannot end the violence then the justice of the cause is irrelevant as the violence may continue after the just objectives have been met. The chapter then looked at the importance of legitimate authority in distinguishing war from other forms of violence, even when

they are unjust. Building upon Jonathan Parry's work it argued that it is the existence of a legitimate authority that distinguishes war from other violence. It then also drew upon Christopher Kutz's argument in order to more fully delineate what distinguishes a legitimate authority. It argued that a legitimate authority is the sovereign decision making body of a constitutive community. It is that distinguishes the violence of soldiers in an unjust war, like Iraq, from the violence of a drugs gang fighting for territory. The final section of the chapter looked at two examples of justified violence to address Fabre's concern that the requirement of legitimate authority is unjust as not all groups or individuals can meet the requirement and the requirement itself is irrelevant to their substantive interest in being able to defend themselves. It argued that the British defence of the Falkland Islands and the Warsaw Ghetto Uprising are both examples of justified violence. In contrast to Fabre's individualist approach, in which violence can only be justified in defence of individual rights, this section emphasised the different reasons that can justify war compared to those that can justify individual self-defence. For Fabre these reasons must be the same and therefore the requirement of legitimate authority would prevent individuals exercising their right of self-defence. By demonstrating that the types of reason that can justify war are distinct than those that justify self-defence it is possible to require legitimate authority for war without denying individuals the right to defend themselves. To this end it argued that only a constitutive community can wage a just war as it is only a constitutive community that has the shared meanings whose violation is a just cause for war.

The final chapter brought the arguments of the thesis together to provide a defence of the principle of the moral equality of combatants. This chapter argued that duty was the central distributive principle in defining combatancy and that this duty is embodied in the formal, public oath that all members of the armed forces swear. It is through this oath that they become a soldier as a public and normatively meaningful identity. Duty is the distributive principle that defines the meaning of war; both for distributing the identity of the soldier and for distributing the requirement to kill and to be killed in war. Other distributive principles, including individual moral liability, personal choice, a financial relationship based on private contract, or expertise, are unjust distributive principles within the sphere of war. The concept of the normative structure of war was then introduced. This relates the combatants' privilege to the just cause and the legitimate authority components of the *jus ad bellum*. These three elements of the normative structure of war are held together by the relationship of duty between the soldier and the legitimate authority. The

normative structure of war allows war and the meanings within it to be interpreted and judged and allows the moral distinctions and contrasts that were introduced in the previous chapters to be understood. Ultimately it is this normative structure that provides the context, the C, within which certain acts of violence count as war. The normative structure of war and the relationship of duty are the reason why soldiers are not morally responsible for the justice or otherwise of the war in which they participate. When the normative structure of war is the same on either side the reciprocal relationships of duty are the basis of the moral equality of combatants. Soldiers on either side are not responsible for the justice of the war and therefore are morally equal. A major strength of the concept of the normative structure of war is that it allows other forms of conflict to be understood and judged. By focusing on the distributive principle and the relationship between the just cause, legitimate authority, and combatants' privilege it is possible to differentiate different types of conflict and to identify the criteria for morally assessing them. Furthermore, the concept of the normative structure of war is the basis for understanding combatancy and constitutes enmity, as such it affects the actual practice of violence. This was demonstrated by considering the war on terror in which the lack of a legitimate authority means that not only can terrorists be judged on the basis of the cause for which they fight, as well as on their actions, but they must be targeted as individuals due to the threat they pose rather than according to the traditional status-based targeting of war.

II. Understanding War

The major contribution of this thesis is that it provides a new way of understanding and interpreting war as a meaningful institution. By focussing on the importance of meaning and its relationship to identity it has created space to identify and distinguish war from other forms of violence, something that McMahan believes is "extremely implausible".⁴⁸⁷ Furthermore, through identifying the meanings that constitute war and the field of contrasts within which they exist it has also made it possible to identify and distinguish other forms of violence and to understand what it is that makes them distinct. This ability to distinguish different forms of violence according to their meanings, as well as to understand the different ways by which they should be judged, substantially furthers the understanding of violence, domestically and internationally. It also opens up significant new avenues for research; in Chapter Six the concept of asymmetrically normatively

⁴⁸⁷ McMahan, *Killing in War*, p. 36.

structured conflicts was introduced and the war on terror was discussed as an example of this type of conflict. Future research will engage with these non-traditional forms of conflict in much more detail in order to both improve understanding as well as to help establish moral guidelines for these conflicts and to investigate how to apply the moral principles of the just war tradition to conflicts that are not wars in the conventional sense.

The major conceptual innovation of this thesis is developing the concept of the normative structure of war to relate the combatants' privilege to the just cause and legitimate authority with duty as the key distributive principle. As was demonstrated, this concept can be used to identify and understand other forms of violence with different normative structures. Being able to identify other forms of violence and to distinguish their normative structure means that the appropriate standards of judgement can be identified as well as allowing the practices of violence to be understood. The normative structure of war also makes it possible to see how even on the same side in a war, different standards of judgement may be applicable to different people according to their identity. In particular, the moral approbation of private military contractors and mercenaries can be understood in a way that sees it as based on the nature of their identity rather than focussing on the legal definition of a mercenary or basing the condemnation on assumptions about individual motivation. The importance of the concept of the normative structure of war is that it is the whole within the hermeneutical circle of which the examples used were the parts.

This thesis has also provided an important contribution to the just war tradition by showing that it is constitutive rather than merely regulative of war as a meaningful institution. The language of the just war tradition, and the distinctions and contrasts that it makes, are the basis of the moral reality of war. Understanding the just war tradition in this way allows its continuing relevance to be understood, not as a source of immutable truths and principles that can be extracted from the canon to be applied to contemporary conflicts, but as an ongoing conversation through which practices of violence and the institution of war are constantly interpreted and reinterpreted. In this way the thesis has contributed to what Cian O'Driscoll terms the historical approach to just war theory whilst avoiding some of the major pitfalls he identifies within it.⁴⁸⁸ This also reflects the idea of just war theory as a social practice, as described by John Kelsay.⁴⁸⁹ For Kelsay, just war

⁴⁸⁸ Cian O'Driscoll, 'Divisions Within the Ranks? The Just War Tradition and the Use and Abuse of History', *Ethics and International Affairs* 27, no. 1 (2013): 47–65.

⁴⁸⁹ John Kelsay, 'Just War Thinking as a Social Practice', *Ethics and International Affairs* 27, no. 1 (2013): 67–86.

theory allows for “structured participation in a public conversation about the use of military force.”⁴⁹⁰ This public conversation is the way in which the just war tradition continues and develops through the reiteration and redefinition of its terms and concepts which then become available for use by, they are “at hand”, for subsequent generations.⁴⁹¹

By demonstrating the nature of the relationship between the just war tradition and the practices of war and violence this thesis has also convincingly demonstrated the role and importance of norms in international relations, even in a sphere where they might be expected to play a lesser role. A similar point can be made about the importance of intersubjectivity and shared meanings. It might be thought that war is precisely the sphere at which intersubjectivity breaks down and that it reflects the absence of shared meanings and understanding, however violence, conflict, and war are social practices and they have a meaning that can be interpreted and shared, even by those on opposing sides.

The emphasis on meaning in the argument of the thesis has introduced a new and hitherto largely ignored concept to the study of war. Whilst Walzer, in *Just and Unjust Wars*, discussed the importance of the vocabulary of the just war tradition, his approach deliberately explored only the superstructure of the just war tradition. More recent work in the just war tradition, by those both critical of and supportive of the principle of the moral equality of combatants, has attempted to develop arguments that are based on either the application of abstract principles, in the case of the revisionists and analytical philosophers, or the search for some empirical constant to try to understand war or to differentiate it from other forms of violence, for example the presumed consent argument put forward by Yitzakh Benbaji or the argument that soldiers are epistemically constrained made by Judith Lichtenberg.⁴⁹² The interpretive approach introduced in this thesis provides a new way to study and to think about war and opens up a number of possibilities for future research as both other forms of violence and types of conflict as well as the nature of the identities of other actors involved in violence could be explored with such an approach. In this way the value of interpretivism to normative theory more generally has been established and, by introducing Gadamer’s hermeneutics, interpretivism has been defended against the charges of relativism and conservatism.

⁴⁹⁰ Ibid., p. 68.

⁴⁹¹ Walzer, *Just and Unjust Wars*, Preface, p. xix.

⁴⁹² Benbaji, ‘The Moral Power of Soldiers to Undertake the Duty of Obedience’; Lichtenberg, ‘How to Judge Soldiers Whose Cause Is Unjust?’

Ultimately, this thesis has demonstrated how a number of important and intuitive moral beliefs about and understandings of war can be understood and justified consistently. It has shown that the revisionist argument is not capable of recognising many of these distinctions and that this loss of meaning hinders the understanding of war. This is the moral loss that White identifies as These distinctions, between war and war crimes, between political authority and technical expertise, between soldiers and mercenaries, and so on, are the moral reality of war. They are what make war intelligible and allow it to be judged. There is no “deep morality of war” behind these distinctions as to go behind these distinctions is to go behind the language that constitutes them and that constitutes individuals as self-interpreting beings.⁴⁹³ To efface these distinctions by abstracting from meaning is both a moral loss and a hindrance to understanding. This thesis demonstrates why this is so by using historical illustrations that highlight these distinctions to make a moral argument.

The final major strength of the interpretive approach, as developed in this thesis, and one of the main contributions it makes, is that it relates the meta-theory of just war theory to the actual practices of warfare. The relationship between the *jus ad bellum* and the *jus in bello*, which may at first appear to be highly abstract, in fact allows the actual practice of combat to be interpreted and understood. This relationship constitutes combatancy and provides the basis for determining who is and is not a combatant. As such, it determines the nature and meaning of enmity and provides an answer to Paul’s question.

III. “How could you be my enemy?”

The thesis opened with the image of Paul Bäumer, in a shell hole in no-man’s land, crying out in despair the question “how could you be my enemy?” to the body of Gerard Duval, the French soldier whom he had killed. The argument of the thesis has explored the meaning of war as a social institution constituted by the just war tradition. In order to answer Paul’s question, it is necessary to fuse the horizon of the just war tradition with the horizon of the battlefield, with Paul’s horizon, dominated by Gerard’s accusatory eyes and the jagged rim of the shell hole in which he is trapped.

Paul and Gerard are enemies, but they are not criminals. Paul has killed, but he is not a murderer. The war in which he is fighting is unjust, but he is not blameworthy.

⁴⁹³ McMahan, *Killing in War*, p. 38.

The basis of their enmity is their shared relationship of duty to opposing states and their shared participation in a tradition in which combatancy is a public identity distributed on the basis of duty. To judge them in a different way, to judge them by different standards, to hold them morally accountable for the justice of the war in which they participate, to argue that Gerard's death is morally indistinguishable from murder, is to distribute judgment for the wrong reasons. It is to judge unjustly.

IV. *Im Westen nichts neues*

At the end of the film of *All Quiet on the Western Front*, Paul, in the battered remains of a German trench in the dying days of the war, stands up and reaches out for a butterfly that has landed close by. At that instant a shot rings out and Paul falls dead, killed by a French marksman. Paul's death, in a moment of human tenderness, is a microcosm of the tragedy of war. To understand war is to understand the nature and meaning of this tragedy and to understand that the hellishness of war is that such individual tragedies go unremarked and unnoticed: *Im Westen nichts Neues*.

Bibliography

- Adams, Ralph James Q., and Philip P. Poirier. *The Conscription Controversy in Great Britain, 1900-18*. Houndmills: MacMillan, 1987.
- Agren, David. 'Authorities Find 49 Bodies Dumped on Mexican Highway'. *USA Today*. 14 May 2012. <http://usatoday30.usatoday.com/news/world/story/2012-05-13/monterrey-mexico-bodies/54936080/1>.
- Alkopher, Tal Dingott. *Fighting for Rights: From Holy Wars to Humanitarian Military Interventions*. Farnham: Ashgate, 2013.
- . 'The Role of Rights in the Social Construction of Wars: From the Crusades to Humanitarian Interventions'. *Millennium: Journal of International Studies* 36, no. 1 (2007): 1–27.
- Alston, Philip. 'The CIA and Targeted Killings Beyond Borders'. *Harvard National Security Journal* 2, no. 2 (2011): 283–446.
- American Catholic Bishops. 'The Challenge of Peace: God's Promise and Our Response (1983)'. In *Just War Theory*, edited by Jean Bethke Elshtain. Oxford: Basil Blackwell, 1992.
- Anderson, Benedict. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. New York and London: Verso, 2006.
- Anderson, Kenneth. 'Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is A "Legal Geography of War"'. American University: Washington College of Law, 2011.
- Angers, Trent. *The Forgotten Hero of My Lai: The Hugh Thompson Story*. Lafayette: Acadian House, 1999.
- Aquinas, St. Thomas. *Summa Theologica: First Complete American Edition in Three Volumes (1274)*. Translated by Fathers of the English Dominican Province. New York: Benziger Brothers, Inc., 1947.
- Augustine, St. A. 'Reply to Faustus the Manichean (400)'. In *Augustin: The Writings Against the Manicheans, and Against the Donatists*, edited by Philip Schaff, translated by Richard Rev. Stothert, Second Edition. Peabody, Mass.: Hendrickson Publishers, 1995.
- Augustine, St. Aurelius. 'A Treatise Concerning the Correction of the Donatists (417)'. In *Augustin: The Writings Against the Manicheans, and Against the Donatists*, edited by Philip Schaff, translated by Rev. J. R. King, Second Edition. Peabody, Mass.: Hendrickson Publishers, 1995.
- . 'Letter XLVII, to Publicola (398)'. In *The Confessions and Letters of Augustin, with a Sketch of His Life and Work*, edited by Philip Schaff, translated by Rev. Richard Stothert, Second Edition. Peabody, Mass.: Hendrickson Publishers, 1995.
- . 'The City of God (426)'. In *Augustin: City of God, Christian Doctrine*, edited by Philip Schaff, translated by Rev. Marcus Dods, Second Edition. Peabody, Mass.: Hendrickson Publishers, 1995.
- Bartov, Omer. *The Eastern Front, 1941-45: German Troops and the Barbarisation of Warfare*. Houndmills: MacMillan, 1985.
- Becker, Jo, and Scott Shane. 'Secret "Kill List" Proves a Test of Obama's Principles and Will'. *New York Times*. 29 May 2012. <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.htm>.

- Bellamy, Alex J. *Just Wars: From Cicero to Iraq*. Cambridge, UK ; Malden, MA: Polity Press, 2006.
- Benbaji, Yitzhak. 'The Moral Power of Soldiers to Undertake the Duty of Obedience'. *Ethics* 122, no. 1 (2011): 43–73.
- Berman, Nathaniel. 'Privileging Combat? Contemporary Conflict and the Legal Construction of War'. *Columbia Journal of Transnational Law* 43, no. 1 (2004): 1–71.
- Bernstein, Iver. *The New York City Draft Riots: Their Significance for American Society and Politics in the Age of the Civil War*. Oxford: Oxford University Press, 1990.
- Bilton, Michael, and Kevin Sim. *Four Hours in My Lai*. New York: Viking, 1992.
- Blank, Laurie R. 'Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications'. *William Mitchell Law Review* 38, no. 5 (2012): 1655–1700.
- Bourke, Joanna. *An Intimate History of Killing: Face-To-Face Killing in Twentieth-Century Warfare*. New York: Basic Books, 1999.
- Braun, Megan, and Daniel R. Brunstter. 'Rethinking the Criterion for Assessing CIA-Targeted Killings: Drones, Proportionality and Jus Ad Vim'. *Journal of Military Ethics* 12, no. 4 (2013): 304–24.
- Browning, Christopher R. *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*. New York: Harper Collins, 1992.
- Brunstter, Daniel R., and Megan Braun. 'The Implications of Drones on the Just War Tradition'. *Ethics and International Affairs* 25, no. 3 (2011): 337–58.
- Brussels Conference, 1874*.
- Bull, Hedley. *The Anarchical Society: A Study of Order in World Politics*. Third Edition. Houndmills: Palgrave, 1977.
- Canning, Joseph. *A History of Medieval Political Thought, 300-1450*. London and New York: Routledge, 1996.
- Casanova, Julián. 'Franco, the Catholic Church and the Martyrs'. In *The Spanish Civil War: Exhuming A Buried Past*, edited by Anindya Raychaudhuri. Cardiff: University of Wales Press, 2013.
- Chesterton, G. K. 'Elegy in a Country Churchyard'. In *The Oxford Book of War Poetry*, edited by Jon Stallworthy. Oxford: Oxford University Press, 2008.
- Christensen, Katherine. 'Introduction'. In *The Treatise on Laws (Decretum DD. 1-20), with the Ordinary Gloss*. Washington, D.C.: The Catholic University of America Press, 1993.
- Clark, Ian. *Waging War: A New Philosophical Introduction*. Second Edition. Oxford: Oxford University Press, 2015.
- Coleman, Janet. 'Medieval Political Ideas and Medieval Society'. In *A History of Political Thought: From the Middle Ages to the Renaissance*. Oxford: Blackwell Publishers, 2000.
- . 'St Augustine'. In *A History of Political Thought: From Ancient Greece to Early Christianity*. Oxford: Blackwell Publishers, 2000.
- . 'St Thomas Aquinas'. In *A History of Political Thought: From the Middle Ages to the Renaissance*. Oxford: Blackwell Publishers, 2000.
- Convention for the Elimination of Mercenarism in Africa, 1977*.
- Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I), 1949*.
- Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II), 1949*.

- Convention (III) Relative to the Treatment of Prisoners of War (Geneva III)*, 1949.
- Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Geneva IV)*, 1949.
- Cox, Sebastian. 'The Dresden Raids: Why and How'. In *Firestorm: The Bombing of Dresden, 1945*, edited by Paul Addison and Jeremy A. Crang. London: Pimlico, 2006.
- Creveld, Martin van. *The Transformation of War*. New York: The Free Press, 1991.
- Daskal, Jennifer C. 'The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone'. *University of Pennsylvania Law Review*, 2013, 1165–1234.
- Deane, Herbert A. *The Political and Social Ideas of St. Augustine*. New York and London: Columbia University Press, 1963.
- Duby, Georges. 'Laity and the Peace of God'. In *The Chivalrous Society*, translated by Cynthia Postan. London: Edward Arnold, 1977.
- Eliot, T. S. 'The Hollow Men (1925)'. In *The Complete Poems and Plays: 1909-1950*. San Diego: Harcourt Brace Jovanovich, 1971.
- Fabre, Cecile. 'Cosmopolitanism, Just War Theory and Legitimate Authority'. *International Affairs* 84, no. 5 (2008): 963–76.
- . *Cosmopolitan War*. Oxford: Oxford University Press, 2012.
- . 'Rights, Justice and War: A Reply'. *Law and Philosophy* 33, no. 3 (2014): 391–425.
- Feaver, Peter D. 'Civil-Military Relations'. *Annual Review of Political Science* 2, no. 1 (1999): 211–41.
- Ferrell, Robert H. 'The Mukden Incident, September 18-19, 1931'. *The Journal of Modern History* 27, no. 1 (1955): 66–72.
- Frowe, Helen. 'Self-Defence and the Principle of Non-Combatant Immunity'. *Journal of Moral Philosophy* 8, no. 4 (2011): 530–46.
- Gadamer, Hans-Georg. 'The Universality of the Hermeneutical Problem'. In *Philosophical Hermeneutics*, edited and translated by David E. Linge. Berkeley: University of California Press, 1977.
- . *Truth and Method*. Translated by Joel Weinsheimer and Donald G. Marshall. Second Edition. London and New York: Continuum, 2004.
- Geary, James W. 'Civil War Conscription in the North: A Historiographical Review'. *Civil War History* 32, no. 3 (1986): 208–28.
- Gettleman, Jeffrey. 'Enraged Mob in Falluja Kills 4 American Contractors'. *New York Times*. 31 March 2004. <http://www.nytimes.com/2004/03/31/international/worldspecial/31CND-IRAQ.html>.
- Gratian. 'Gratian and the Decretists (Twelfth Century): War and Coercion in the Decretum (1150)'. In *The Ethics of War: Classic and Contemporary Readings*, edited by Gregory M. Reichberg, Henrik Syse, and Endre Begby. Malden, MA.; Oxford: Blackwell Publishing, 2006.
- . *The Treatise on Laws (Decretum DD. 1-20), with the Ordinary Gloss (1150)*. Translated by Augustine Thompson O. P. Washington, D.C.: The Catholic University of America Press, 1993.
- Gregory VII. 'Deposition of Emperor Henry V by Pope Gregory VII (1076)'. In *The Crisis of Church and State 1050-1300 with Selected Documents*, edited by Brian Tierney, translated by E. Emerton. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1964.

- . ‘Letter of Gregory to Bishop Hermann of Metz (1081)’. In *The Crisis of Church and State 1050-1300 with Selected Documents*, edited by Brian Tierney, translated by E. Emerton. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1964.
- . ‘Second Deposition of Emperor Henry V by Pope Gregory VII (1080)’. In *The Crisis of Church and State 1050-1300 with Selected Documents*, edited by Brian Tierney, translated by Ephraim Emerton. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1964.
- . ‘The Dictatus Papae (1075)’. In *The Crisis of Church and State 1050-1300 with Selected Documents*, edited by Brian Tierney and John B. Morral, translated by Sidney Z. Ehler. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1964.
- Grossman, Lt. Col. Dave. *On Killing: The Psychological Cost of Learning to Kill in War and Society*. Boston: Little, Brown and Company, 1996.
- Grotius, Hugo. *De Iure Belli Ac Pacis Libri Tres (1631)*. Aalen: Scientia Verlag, 1993.
- . ‘Prolegomena to the First Edition (1625)’. In *The Rights of War and Peace*, edited and translated by Richard Tuck, Vol. III. Indianapolis: Liberty Fund, 2005.
- . *The Rights of War and Peace (1631)*. Translated by Jean Barbeyrac. Vol. I. III vols. Indianapolis: Liberty Fund, 2005.
- . *The Rights of War and Peace (1631)*. Translated by Jean Barbeyrac. Vol. III. III vols. Indianapolis: Liberty Fund, 2005.
- . *The Rights of War and Peace (1631)*. Translated by Jean Barbeyrac. Vol. II. III vols. Indianapolis: Liberty Fund, 2005.
- Gutman, Israel. *Resistance: The Warsaw Ghetto Uprising*. Boston and New York: Mariner Books, 1994.
- Hanson, Neil. *The Unknown Soldier: The Story of the Missing of the Great War*. London: Corgi Books, 2007.
- Harris, Leslie M. *In The Shadow of Slavery: African Americans in New York City, 1626-1863*. Chicago: University of Chicago Press, 2003.
- Hartigan, Richard Shelly. ‘Saint Augustine on War and Killing: The Problem of the Innocent’. *Journal of the History of Ideas* 27, no. 2 (1966): 195–204.
- Hawtin, William Grist. *The Law and Practice of Military Conscription under the Military Service Acts*. London: Harrison and Sons, 1917.
- Head, Thomas, and Richard Landes. ‘Introduction’. In *The Peace of God: Social Violence and Religious Response in France around the Year 1000*, edited by Thomas Head and Richard Landes. Ithaca and London: Cornell University Press, 1992.
- Hersh, Seymour M. *Cover-Up: The Army’s Secret Investigation of the Massacre at My Lai 4*. New York: Random House, 1972.
- ‘Historical Analysis of the 14-15 February Bombings of Dresden’. USAF Historical Division, Research Studies Institute, Air University, 1945.
<http://www.afhso.af.mil/shared/media/document/AFD-110208-030.pdf>.
- Hobbes, Thomas. *Leviathan (1651)*. Edited by Richard Tuck. Cambridge: Cambridge University Press, 1991.
- Holguin, Jaime. ‘“Shock And Awe” Throttles Iraq’. *CBS News*. 22 March 2003.
<http://www.cbsnews.com/news/shock-and-awe-throttles-iraq/>.

- Hugoccio. 'Commentary on Dist. 96 C. 6 (1189 - 1191)'. In *The Crisis of Church and State 1050-1300 with Selected Documents*, edited and translated by Brian Tierney. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1964.
- Hurka, Thomas. 'Liability and Just Cause'. *Ethics and International Affairs* 21, no. 2 (2007): 199–218.
- Innocent IV. 'Sentence of Deposition Promulgated by Innocent IV in the General Council of Lyons (1245)'. In *The Crisis of Church and State 1050-1300 with Selected Documents*, edited by Brian Tierney and John B. Morral, translated by Sidney Z. Ehler. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1964.
- Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, 1863.
- International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, 1989.
- Johnson, James Turner. *The Quest for Peace: Three Moral Traditions in Western Cultural History*. Princeton: Princeton University Press, 1987.
- Justinianus. *The Digest of Justinian (533)*. Translated by Alan Watson. Corpus Juris Civilis Digesta. Philadelphia: University of Pennsylvania Press, 1985.
- Kahn, Paul W. *Political Theology: Four New Chapters on the Concept of Sovereignty*. New York: Columbia University Press, 2011.
- . *Putting Liberalism in Its Place*. Princeton: Princeton University Press, 2008.
- Kaldor, Mary. *New and Old Wars: Organised Violence in a Global Era*. Third Edition. Malden, MA.: Polity Press, 2012.
- Kaposy, Béla, and Richard Whatmore. 'Introduction'. In *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, edited by Béla Kaposy and Richard Whatmore. Indianapolis: Liberty Fund, 2008.
- Kelsay, John. 'Just War Thinking as a Social Practice'. *Ethics and International Affairs* 27, no. 1 (2013): 67–86.
- Kimmitt, Brigadier General Mark, and Dan Senior. 'Coalition Provisional Authority Briefing'. News Transcript, 1 April 2004.
<http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2400>.
- Kolb, Robert. 'Origin of the Twin Terms Jus Ad Bellum/jus in Bello'. *International Review of the Red Cross*, no. 320 (1997): 553–62.
- Kreps, Sarah, and John Kaag. 'The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis'. *Polity* 44, no. 2 (2012): 260–85.
- Kretzmer, David. 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Self-Defence?' *European Journal of International Law* 16, no. 2 (2005): 171–212.
- Kutz, Christopher. 'Fearful Symmetry'. In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue. Oxford: Oxford University Press, 2008.
- . 'The Difference Uniforms Make: Collective Violence in Criminal Law and War'. *Philosophy and Public Affairs* 33, no. 2 (2005): 148–80.
- Laffan, R. G. D., ed. 'Truce of God, Proclaimed at the Council of Narbonne, August 25, 1054'. In *Select Documents of European History, 800-1492*. New York: Henry Holt, 1929.

- Lauterpacht, Hersch. 'The Grotian Tradition in International Law'. *The British Year Book of International Law* 23 (1946): 1–53.
- Lazar, Seth. 'Necessity in Self-Defense and War'. *Philosophy and Public Affairs* 40, no. 1 (2012): 3–44.
- . 'The Responsibility Dilemma for Killing in War: A Review Essay'. *Philosophy and Public Affairs* 38, no. 2 (2010): 180–213.
- Lichtenberg, Judith. 'How to Judge Soldiers Whose Cause Is Unjust?' In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue. Oxford: Oxford University Press, 2008.
- Lincoln, Abraham. 'The Gettysburg Address (1863)'. In *Lincoln: Political Writings and Speeches*, edited by Terence Ball. Cambridge: Cambridge University Press, 2013.
- Long, Graham. 'Disputes in Just War Theory and Meta-Theory'. *European Journal of Political Theory* 11, no. 2 (2012): 209–25.
- MacIntyre, Alasdair. *After Virtue: A Study in Moral Theory*. Third Edition. Notre Dame, Indiana: University of Notre Dame Press, 2007.
- . *Whose Justice? Which Rationality?* London: Duckworth, 1988.
- Malkasian, Carter. 'The First Battle for Fallujah'. In *War in Iraq: Planning and Execution*, edited by Thomas G. Mahnken and Thomas A. Keaney. London and New York: Routledge, 2007.
- Mallison, W. Thomas, and Sally V. Mallison. 'The Juridical Status of Privileged Combatants Under the Geneva Protocol of 1977 Concerning International Conflicts'. *Law and Contemporary Problems* 42, no. 2 (1978): 4–35.
- Marcus, John. 'Nuremberg Executioner Says, "It Was a Pleasure"'. *Los Angeles Times*. 24 November 1996. http://articles.latimes.com/1996-11-24/news/mn-2456_1_nuremberg-documents.
- McMahan, Jeff. 'Individual Liability in War: A Response to Fabre, Leveringhaus and Tadros'. *Utilitas* 24, no. 2 (2012): 278–99.
- . 'Innocence, Self-Defense and Killing in War'. *The Journal of Political Philosophy* 2, no. 3 (1994): 193–221.
- . *Killing in War*. Oxford: Clarendon Press, 2009.
- . 'Killing in War: A Reply to Walzer'. *Philosophia* 34, no. 1 (2006): 47–51.
- . 'Liability and Collective Identity: A Response to Walzer'. *Philosophia* 34, no. 1 (2006): 13–17.
- . 'The Ethics of Killing in War'. *Philosophia* 34, no. 1 (2006): 23–41.
- . 'The Morality of War and the Law of War'. In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue. Oxford: Oxford University Press, 2008.
- McMahan, Jeff, and Robert McKim. 'The Just War and the Gulf War'. *Canadian Journal of Philosophy* 23, no. 4 (1993): 501–41.
- McNeal, Gregory S. 'Are Targeted Killings Unlawful? A Case Study in Empirical Claims Without Empirical Evidence'. In *Targeted Killings: Law and Morality in an Asymmetrical World*, edited by Claire Finkelstein, Jens David Ohlin, and Andrew Altman. Oxford: Oxford University Press, 2012.
- Myers, Richard B., and Richard H. Kohn. 'Salute and Disobey? The Civil-Military Balance, Before Iraq and After Response'. *Foreign Affairs* 86, no. 5 (2007): 147–56.

- Nagel, Thomas. 'War and Massacre'. *Philosophy and Public Affairs* 1, no. 2 (1972): 123–44.
- 'Nazi Conspiracy and Aggression: Opinion and Judgement'. Washington, D.C.: Office of the United States Chief of Counsel for Prosecution of Axis Criminality, 1947.
http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Nazi-opinion-judgment.pdf.
- Neitzel, Sönke. 'The City under Attack'. In *Firestorm: The Bombing of Dresden, 1945*, edited by Paul Addison and Jeremy A. Crang. London: Pimlico, 2006.
- O'Driscoll, Cian. 'Divisions Within the Ranks? The Just War Tradition and the Use and Abuse of History'. *Ethics and International Affairs* 27, no. 1 (2013): 47–65.
- Oliver, Kendrick. *The My Lai Massacre in American History and Memory*. Manchester: Manchester University Press, 2006.
- Parry, Jonathan. 'Just War Theory, Legitimate Authority, and Irregular Belligerency'. *Philosophia* 43, no. 41 (2015): 175–96.
- Pattison, James. 'When Is It Right to Fight? Just War Theory and the Individual-Centric Approach'. *Ethical Theory and Moral Practice* 16, no. 1 (2013): 35–54.
- Pejcinovic, Lacy. *War in International Society*. London and New York: Routledge, 2013.
- Plato. 'Alcibiades I (c. 390 BC)'. In *Plato in Twelve Volumes: XII: Charmides, Alcibiades I and II, Hipparchus, The Lovers, Theages, Minos, Epinomis*, translated by W. R. M. Lamb, Vol. XII. Cambridge, Mass.: Harvard University Press, 1979.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1977.
- Raguer, Hilari. *Gunpowder and Incense: The Catholic Church and the Spanish Civil War*. Translated by Gerald Howson. Oxford: Routledge, 2007.
- Reichberg, Gregory M. 'Just War and Regular War: Competing Paradigms'. In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue. Oxford: Oxford University Press, 2008.
- Remarque, Erich Maria. *All Quiet on the Western Front*. Translated by A. W. Wheen. New York: Fawcett Crest, 1929.
- Ridenhour, Ron. 'Ron Ridenhour's Story'. presented at the My Lai 25 Years After: Facing the Darkness, Healing the Wounds, Tulane University, New Orleans, December 1994.
http://law2.umkc.edu/faculty/projects/ftrials/mylai/Myl_hero.html.
- Rodin, David. 'The Liability of Ordinary Soldiers for Crimes of Aggression'. *Washington University Global Studies Law Review* 6, no. 3 (2007): 591–607.
- . 'The Moral Inequality of Soldiers: Why Jus in Bello Asymmetry Is Half Right'. In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue. Oxford: Oxford University Press, 2008.
- . *War and Self-Defense*. Oxford: Clarendon Press, 2002.
- Rodin, David, and Henry Shue. 'Introduction'. In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue. Oxford: Oxford University Press, 2008.
- Rome Statute of the International Criminal Court*. The Hague: International Criminal Court, 2011.
- Ruggie, John Gerard. 'Introduction: What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge'. In *Constructing the World Polity: Essays on*

- International Institutionalization*, edited by John Gerard Ruggie. London: Routledge, 2002.
- Ryan, Cheney. 'Democratic Duty and the Moral Dilemmas of Soldiers'. *Ethics* 122, no. 1 (2011): 10–42.
- Sandel, Michael J. *Liberalism and the Limits of Justice*. Cambridge: Cambridge University Press, 1982.
- . *What Money Can't Buy: The Moral Limits of Markets*. London: Allen Lane, 2012.
- Searle, John Rogers. *Making the Social World: The Structure of Human Civilization*. Oxford: Oxford University Press, 2010.
- . *The Construction of Social Reality*. London: Allen Lane, 1995.
- Shaw, Martin. *The New Western Way of War: Risk-Transfer War and Its Crisis in Iraq*. Cambridge: Polity, 2005.
- Shue, Henry. 'Do We Need a "Morality of War"?' In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue. Oxford: Oxford University Press, 2008.
- Skinner, Quentin. 'Meaning and Understanding in the History of Ideas'. In *Visions of Politics: Regarding Method*, edited by Quentin Skinner, Vol. I. Cambridge: Cambridge University Press, 2002.
- 'South Sudan Marks Two Years of Ruinous War'. *Al Jazeera English*. 15 December 2015. <http://www.aljazeera.com/news/2015/12/south-sudan-marks-years-ruinous-civil-war-151215060303380.html>.
- Stanford International Human Rights and Conflict Resolution Clinic, and Global Justice Clinic at NYU School of Law. 'Living Under Drones', 2012. <http://www.livingunderdrones.org/report/>.
- Steinhoff, Uwe. 'Rodin on Self-Defense and the "Myth" of National Self-Defense: A Refutation'. *Philosophia* 41, no. 4 (2013): 1017–36.
- Stilz, Anna. 'Authority, Self-Determination, and Community in Cosmopolitan War'. *Law and Philosophy* 33, no. 3 (2014): 309–35.
- Taylor, Charles. 'Interpretation and the Sciences of Man'. In *Philosophy and the Human Sciences: Philosophical Papers 2*, edited by Charles Taylor. Cambridge: Cambridge University Press, 1985.
- . 'Introduction'. In *Philosophy and the Human Sciences: Philosophical Papers 2*, edited by Charles Taylor. Cambridge: Cambridge University Press, 1985.
- . 'What Is Human Agency?' In *Human Agency and Language: Philosophical Papers 1*, edited by Charles Taylor. Cambridge: Cambridge University Press, 1985.
- Taylor, Claire. *Armed Forces Covenant*. London: House of Commons Library, 2014. www.parliament.uk/briefing-papers/SN05979.pdf.
- Tennyson, Alfred Lord. 'The Charge of the Light Brigade (1854)'. In *The Oxford Book of War Poetry*, edited by Jon Stallworthy. Oxford: Oxford University Press, 2008.
- 'The Falklands War: Timeline'. *The Telegraph*. 14 June 2016. <http://www.telegraph.co.uk/news/2016/06/14/the-falklands-war-timeline/>.
- The Laws of War on Land: Manual Published by the Institute of International Law (Oxford Manual)*, 1880.

- The Soldier's Guide: FM 7-21.13*. Washington, D.C.: Department of the Army, 2003.
http://www.smdc.army.mil/2008/CSM/docs/FM7_21_13.pdf.
- Thompson, Hugh. 'Hugh Thompson's Story'. presented at the My Lai 25 Years After: Facing the Darkness, Healing the Wounds, Tulane University, New Orleans, December 1994.
http://law2.umkc.edu/faculty/projects/ftrials/mylai/Myl_hero.html.
- Thucydides. *The Complete Writings of Thucydides: The Peloponnesian War (c. 410 BC)*. Translated by R. Crawley. New York: The Modern Library, 1934.
- Tierney, Brian. *The Crisis of Church and State 1050-1300 with Selected Documents*. Englewood Cliffs, N.J: Prentice-Hall, Inc., 1964.
- Trial of the Major War Criminals before the International Military Tribunal*. Vol. XIX. XLII vols. Nuremberg: International Military Tribunal, 1948.
http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XIX.pdf.
- Vattel, Emmerich de. *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury (1758)*. Translated by Anonymous. Indianapolis: Liberty Fund, 2008.
- 'Vigils to Mark 100th Iraq Death'. *BBC News*. 1 February 2006.
http://news.bbc.co.uk/2/hi/uk_news/4668690.stm.
- Vitoria, Francisco de. 'Commentary on Summa Theologiae Ila-IIae Q. 64 (Thomas Aquinas) (1536)'. In *On Homicide and Commentary on Summa Theologiae Ila-IIae Q. 64 (Thomas Aquinas)*, edited and translated by John P. Doyle. Milwaukee: Marquette University Press, 1997.
- . 'On the American Indians (De Indis) (1539)'. In *Francisco de Vitoria: Political Writings*, edited and translated by Anthony Pagden and Jeremy Lawrance. Cambridge: Cambridge University Press, 1991.
- . 'On the Law of War (1539)'. In *Francisco de Vitoria: Political Writings*, edited and translated by Anthony Pagden and Jeremy Lawrance. Cambridge: Cambridge University Press, 1991.
- . 'Relection on Homicide (1530)'. In *On Homicide and Commentary on Summa Theologiae Ila-IIae Q. 64 (Thomas Aquinas)*, edited and translated by John P. Doyle. Milwaukee: Marquette University Press, 1997.
- Waldron, Jeremy. 'Justifying Targeted Killing With a Neutral Principle?' In *Targeted Killings: Law and Morality in an Asymmetrical World*, edited by Claire Finkelstein, Jens David Ohlin, and Andrew Altman. Oxford: Oxford University Press, 2012.
- Walzer, Michael. 'A Critique of Philosophical Conversation'. In *Thinking Politically: Essays in Political Theory*, edited by David Miller. New Haven, Conn.: Yale University Press, 2007.
- . *Arguing About War*. New Haven and London: Yale University Press, 2004.
- . *Interpretation and Social Criticism*. Cambridge, Mass.: Harvard University Press, 1987.
- . *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. Fourth Edition. New York: Basic Books, 2006.
- . 'Objectivity and Social Meaning'. In *Thinking Politically: Essays in Political Theory*, edited by David Miller. New Haven, Conn.: Yale University Press, 2007.
- . 'Philosophy and Democracy'. In *Thinking Politically: Essays in Political Theory*, edited by David Miller. New Haven, Conn.: Yale University Press, 2007.

- . ‘Response to Jeff McMahan’. *Philosophia* 34, no. 1 (2006): 19–21.
- . ‘Response to McMahan’s Paper’. *Philosophia* 34, no. 1 (2006): 43–45.
- . *Spheres of Justice: A Defence of Pluralism and Equality*. Oxford: Basil Blackwell, 1983.
- . ‘Terrorism and Just War’. *Philosophia* 34, no. 1 (2006): 3–12.
- . ‘The Communitarian Critique of Liberalism’. In *Thinking Politically: Essays in Political Theory*, edited by David Miller. New Haven, Conn.: Yale University Press, 2007.
- . *The Company of Critics: Social Criticism and Political Commitment in the Twentieth Century*. London: Peter Halban, 1989.
- . ‘The Political Theory License’. *Annual Review of Political Science* 19 (2013): 1–9.
- . *Thick and Thin: Moral Argument at Home and Abroad*. Notre Dame, Indiana: University of Notre Dame Press, 1994.
- . ‘What Is Just War Theory About?’ Gaede Institute for the Liberal Arts, Westmont College, 2013.
- White, Stephen K. *Sustaining Affirmation: The Strengths of Weak Ontology in Political Theory*. Princeton and Oxford: Princeton University Press, 2000.
- Winroth, Anders. *The Making of Gratian’s Decretum*. Cambridge: Cambridge University Press, 2000.
- Ya’ar, Chana. “‘I Heard the Gurgle of Strangling’”. *Arutz Sheva*. 11 February 2012. <http://www.israelnationalnews.com/News/News.aspx/152642>.
- Yanow, Dvora, and Peregrine Schwartz-Shea. ‘Introduction’. In *Interpretation and Method: Empirical Research Methods and the Interpretive Turn*, edited by Dvora Yanow and Peregrine Schwartz-Shea. Armonk and London: M. E. Sharpe, 2006.
- Zenko, Micah. ‘Targeted Killings and Signature Strikes’. *Politics, Power, and Preventive Action*, 16 July 2012. <http://blogs.cfr.org/zenko/2012/07/16/targeted-killings-and-signature-strikes/>.
- Zupan, Dan. ‘A Presumption of the Moral Equality of Combatants: A Citizen-Soldier’s Perspective’. In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue. Oxford: Oxford University Press, 2008.