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The Ethics of Harm: Violence and Just War

Introduction

Chapter 4 examined the ethics of membership and entry, and argued that international ethics begins at home. Chapter 5 addressed the ethics of humanitarianism understood as a duty of mutual aid. This chapter focuses the discussion on the negative duties to avoid or minimize harm in the context of violence between states. In particular, the chapter examines the central debates of the (European) Just War tradition (JWT). The JWT aims to regulate violence and to address the issue of when it is acceptable to harm others. The JWT is concerned with the nature of the harms that states are permitted to inflict upon outsiders. It provides a set of guidelines for determining and judging whether and when a state may have recourse to war and how it may fight that war, that is, the types of harms that are allowed and forbidden once an exemption has been granted. It aims to clarify the moral limits to states' recourse to war and the negative duties to limit harms that states can commit against other states' military forces and civilians.

The JWT is one of the first and most firmly established traditions of thought specifying the ethical obligations that states have to each other. The JWT traditionally consists of two parts: the *jus ad bellum* (or justice of war) and the *jus in bello* (the justice in war), and a third, *jus post bellum*, has recently been added. Where *jus ad bellum* refers to the occasion of going to war, *jus in bello* refers to the means - the weapons and tactics - employed by the military in warfare, and *jus*

post bellum refers to the consequences of the war. The aim of this chapter is to give a clear picture of the nature of the JWT and under what circumstances it allows and curtails permissible harms, and what ethical quandaries these arguments generate. One of the major questions in contemporary Just War thinking is whether war can be waged, and harm committed, for 'humanitarian' or cosmopolitan reasons such as defending human rights. In other words, whether under some circumstances there is a positive duty to wage war. The chapter spells out the major issues associated with the use of violence and provides an assessment of cosmopolitan and anti-cosmopolitan contributions to Just War thinking, and the chapter concludes with reflections about the adequacy of Just War thinking and its relationship to cosmopolitanism.

Pluralist, communitarian and cosmopolitan aspects are present in the JWT. This tradition invokes cosmopolitan principles insofar as it says that even during war there are duties to limit the harm done to outsiders. However, the JWT also aims to balance these rights to outsiders with rights to communal autonomy in terms of a legitimate right to self-defence.

Broadly speaking, the *jus ad bellum* tradition is generally associated with pluralism. The rules it lays down refer to times when it is legitimate for states to wage war. In this view, what are acceptable or unacceptable causes for war are formulated in terms of rules about and for states, concerning what states owe each other. The justifications for war are given not to God or humanity, but to other states. Michael Walzer (1977) calls this the legalist tradition or the 'war convention', a matter of informal but effective agreement between states. The only acceptable justifications for war in terms of the *just ad bellum* are the defence of individual state sovereignty and, arguably, the defence of the principle of a society of states itself. We can compare this with the more cosmopolitan elements of *jus in bello*, which refer explicitly to civilians and to what is owed to them in terms of harm minimization in war. The ultimate referent is humanity, and the rules about proportionality, non-combatant immunity and discrimination all refer to the rights of individuals to be exempt from harm (see Walzer 1977). The *jus in bello* principles inform, and have been codified in, international humanitarian law, such as the Geneva Conventions (see chapter 5), as well as in a number of other treaties limiting the use and deployment of certain weapons, including chemical weapons, landmines and weapons of mass destruction (WMD).

The JWT also demonstrates how arguments concerning natural duties and cosmopolitan arguments regarding universal human rights

are largely in agreement on the essential components of the JWT. It also demonstrates how the principal differences between natural duties and cosmopolitan arguments, outlined in chapter 4, re-emerge in the context of the principle of civilian immunity and the doctrine of 'supreme emergency'. For anti-cosmopolitans, the JWT reflects the limits on ethical responsibilities of states and, of course, for realists, even these ethical responsibilities are severely qualified by the prudential calculations of necessity.

However, for cosmopolitans, the use of violence for political ends is far more problematic because, as Kant observed, war is a violation of the categorical imperative. This raises the question of whether it can in fact be possible for cosmopolitans to agree with the 'sorry comforters' of the JWT. The discussion below will show that, for many cosmopolitans, it is certainly possible to endorse several, though not all, of the core JWT principles. The difference, however, is that cosmopolitans endorse these principles for cosmopolitan and not statist reasons. However, what distinguishes most cosmopolitans from other defenders of the JWT, including the pluralists and legalists, is the emphasis on the moral obligation to make war vanish from the practice of international politics. Pluralists and anti-cosmopolitans see no end to war itself, instead seeking to accommodate the necessary evil of war without surrendering entirely to its murderous logic. Whether the end of war is in fact possible, or desirable, is one of the most important issues raised by the JWT. This chapter argues that the JWT remains inadequate from a Kantian cosmopolitan perspective because it fails to address itself to the possibility of eradicating war.

What is Just War thinking?

The JWT is one amongst many approaches to thinking about the relationship between war and ethics (see Ceadel 1989). Just War thinking is common to many ethical codes and different cultures. Confucian and Islamic scholars both engaged with the questions surrounding the need to reconcile the necessity of violence with its clear breach of everyday morality. The Islamic JWT is arguably the most comprehensive rival to the European tradition. However, while it continues to provide moral guidance to Islam, it has not been incorporated into international law as the European JWT has.

For most of its history, the JWT was a matter either of theological reflection or customary international law. Since the late nineteenth century, customary international law about Just War,

and in particular about justice in war, has been codified into formal agreements and treaties. These treaties have covered everything from the state's right to make war to the banning of particular weapons, such as anti-personnel landmines. The most famous of these agreements are the Geneva Conventions which govern the treatment of captured enemy soldiers and which outlaw torture and other forms of mistreatment.¹

Many writers refer to a Just War Theory (see Elshtain 1992), thus implying that thinking about Just War forms a coherent body of thought that can be applied to specific cases in a relatively mechanistic way, a little like act or rule utilitarianism. The framework views Just War principles as relatively straightforward universal moral principles with relatively straightforward applications, involving 'a moral slide rule from which legitimate instances of the use of force can be read off whenever necessary' (Rengger 2002: 360).

Other scholars argue that this is a misreading of the nature of the doctrine and that Just War thinking should be understood as a tradition with many different contributors. A tradition in this sense is a certain set of questions which are common to many thinkers but generating no agreed-upon single answer (see Rengger 2002; Gunnell 1974). In other words, Just War thinking generates different answers to similar cases at different times. Thus, the 2003 US invasion and occupation of Iraq has been both condemned and supported by reference to the Just War doctrine. If we understand Just War as a tradition, then it becomes impossible to say which of these is the correct analysis. For this reason, therefore, debate about the JWT cannot be reduced to simply applying the 'theory' to specific cases. The JWT itself, and its core values themselves, must be treated as debatable, because it gives rise to as many ethical quandaries as it attempts to solve. While this makes some people very uneasy, it ought instead to remind us that making ethical judgements is ultimately a matter of interpretation of universal principles in particular contexts, and reflection on these contexts provokes change in the interpretation of universals. Some of these quandaries will be discussed below in more depth.

The European JWT claims a heritage at least as far back as St Augustine. It is usually argued that the JWT began as a response to Christianization of the Roman Empire. Augustine is usually cited as the first Christian to identify when it was permissible, or at least defensible, for Christians to engage in warlike activity in the service of the state. Until then, Christian Orthodoxy had been firmly pacifist. While initially concerned with duties of individual Christians, over time, Augustine's contributions evolved into a doctrine of state, providing an account of when it is acceptable for states to wage war.

According to Bellamy, it is possible to identify a number of distinct traditions of thinking about Just War: 'positive law, natural law and realism' (2006: 6). Positive law refers to the rules made by states (Walzer's legalist tradition) and corresponds to the pluralist understandings of international morality. As noted in chapter 3, natural law is Christian tradition, and a universalist framework that is not necessarily cosmopolitan in the modern or liberal sense. The moral scope of Christian laws is not restricted to any individual community and enjoins us to recognize our duties to humanity, and therefore our responsibility for providing good reasons for violating the basic commandment 'thou shalt not kill'.

The legalist tradition understands Just War to refer to the rights and duties that states have, by virtue of their 'social contract' in international society, while the Christian and natural law traditions refer to the 'higher' law ordained by God, or natural law, and by which individuals are judged. Realism, of course, refers to the discourse of necessity and the consequentialist concerns of statecraft (see chapter 1). Bellamy's categories overlap but do not correspond directly to either cosmopolitan or anti-cosmopolitan positions. While Bellamy's framework is useful, this chapter will instead employ and focus on the cosmopolitan and pluralist approaches to the JWT as they best reflect the themes of this book.

The Christian JWT often represents itself as a *via media* between the amoralist realism of Machiavelli and the utopianism of pacifism. From the position of the realist, the JWT provides unjustifiable limits upon statecraft. According to realists, international politics is the realm of necessity and in warfare any means must be used to achieve the ends of the state. Necessity overrides 'ethics' when it is a matter of state survival or when military forces are at risk. According to realists only the state can judge for itself when it is most prudent to wage war and what is necessary for victory. On the other hand, from the position of the pacifist, the core doctrine of the JWT only encourages war by providing the tools to justify and provide war with a veneer of legitimacy.

A division exists between those who understand the JWT to mean wars that are just and those who mean they are justifiable. For the first, they are a bit like crusades because they are fought for a just cause. For the second, Just War refers simply to the justification of war, that is, to the idea that wars, because they are so serious a breach of the normal moral code, require justification. Depending on where you sit in this debate, you can come up with very different interpretations of the core doctrines of the JWT. For example, Jean Bethke Elshstain (2003) has justified the American war against Iraq in 2003 as

a just cause because it is concerned with fighting the evil of al-Qaeda. However, even in Elstain's case, the JWT is not to be confused with Holy Wars or Crusading, which are wars designed to spread a particular faith or political system, whereas the US government claims to be spreading liberal democracy by invading Iraq.

Thus, according to Rengger (2002: 361), 'the just war tradition . . . has justice - or more accurately the opposition to injustice - as its central assumption, and assumes as a result there may be circumstances where war is preferable to peace, if peace would amount to a surrender to injustice'. For most writers, the aim of the JWT has not been to achieve 'positive' justice per se. Rather, Bellamy (2006) suggests, the emphasis is on the limitation of war. Just war writers 'share a concern that recourse to war ought to be limited and conduct of war made as humane (or as least brutal) as possible' (Bellamy 2006: 5). In recent times, this has meant restricting harms to necessitous acts, and to defining what that necessity ultimately is.

At the core of the European or Christian JWT is a set of propositions, which cover both *jus ad bellum* and *jus in bello*. The next section discusses each of these elements and some of the important qualifications and difficulties associated with each. Scholars disagree over the exact content and number of these propositions, but they are usually identified as including the following:

- *Jus ad bellum*: just cause; Right authority; Right intention; Last resort; Reasonable hope of success; Restoration of peace; and Proportionality of means and ends.
- *Jus in bello*: proportionality; Non combatant immunity; and The law of double effect.

Just ad bellum: just cause

The basic assertion of just cause is that if you intend harming someone or doing wrong to them, you had better do it for the right reason, that is, with good justification. The idea of just cause is something like an essentially contested concept.² It is agreed that one should have a just cause but not what constitutes such a cause. A just cause could be preserving order, regaining territory, or, in more recent times, protecting human rights.

According to Bellamy (2006: 122), just cause in the modern era usually consists of 'self-defense, defense of others, restoration of peace, defense of rights and the punishment of wrongdoers'. Martin Ceadal

(1989) has noted that, historically, Just War theorists did not make any real distinction between offensive and defensive action, which has meant that until the 1870s, at least, it became very easy for states to justify any warlike actions. In particular, Ceadal (1989: 11) argues that this lack of distinction gave rise to the possibility of "simultaneous ostensible justification", a situation in which both sides in a war could make an equally good case for having a "just cause". If we think of a contemporary controversial example, it might be possible to say that in 1990 Iraq had a just cause for invading Kuwait because Iraq claimed that it was redressing a past injustice (by retaking historical territory) and defending itself against an aggressive action by a neighbour (Kuwaiti oil-pricing policy). (Of course, seeing things this way requires that one takes Saddam Hussein's claims at face value or accept him as a legitimate leader, neither of which the international community was particularly inclined to do.) On the other hand, the US, Kuwait and the international community as represented by the UN claimed just cause in reference to the preservation of Kuwaiti sovereignty and rejection of the principle of violence as a means of sorting out historical disputes.

This situation has changed somewhat with the legalization of the JWT, especially since the signing of the UN Charter, which effectively ended the right of states to aggressive war. The UN Charter makes it clear that 'aggressive warfare is an illegal means for settling . . . grievances' (Ceadal 1989: 13). The UN Charter of 1945 also nominates the UN itself as the only agency that can legitimate war and assess just cause (Ceadal 1989: 13). Until this time states had claimed recourse to war, including aggressive war, as a right of statehood that accompanied sovereignty and indeed was something of a duty for the great powers. This consideration of war as a right is indicative of the difference between the legalist war convention, an agreement amongst states, and the Christian theological and natural law parts of the tradition.

For the legalists, war between states was a part of the constitution of international society, whereas, for theologians, war could only be a last resort and was never a right. Clearly, for the legalist tradition, a just cause is whatever the states party to international law agree to. The natural law tradition with regard to the JWT attempts to provide a firm benchmark that has a more transcendental moral standing because self-defence is a basic moral claim. States who violate this right are committing a moral, and not just legal, wrong.

From a legalist position, just cause ought strictly to refer only to the right of self-defence or of redressing a wrong, such as invasion of territory, because 'any use of forces or imminent threat of force by

one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act' (Walzer 1977: 62). Therefore, without a doubt, the most widely accepted cause is self-defence because, as Walzer (1977: 62) says, 'nothing but aggression can justify war'. This reflects the basic commitment of pluralist international society to the values of state sovereignty (Walzer 1977). Invading another state is a violation of sovereignty and of the international social contract. In terms of this sort of violation, two kinds of responses are legitimate or just and include 'a war of self-defence by the victim and a war of law enforcement by the victim and any other members of international society' (Walzer 1977: 62). One recent challenge to traditional just cause thinking has been the Bush administration's claim to an expanded right of self-defence which allows for preventive warfare. Preventive war is the 'initiation of military action in anticipation of harmful actions that are neither presently occurring nor imminent' (Buchanan and Keohane 2004: 1). Preventive war is distinguished from pre-emptive war because in the latter the threat is imminent or about to commence. The Bush administration claimed that its attack on Iraq in 2003 was a preventive war against a possible, but not imminent, use of weapons of mass destruction against it.

The self-defence account of just cause is clearly supported by the pluralist communitarian perspective for two reasons. First, states' borders represent the boundaries of political communities whose members have made a common life for themselves, and thus defending those boundaries is defending the rights of those individuals to that common life. Second, that common life requires an international society of states in order to be recognized. The defence of that society of states as a principle, therefore, lies in the defence of any individual state's independence 'for it is only by virtue of those rights that there is a society at all' (Walzer 1977: 59). For Rawls, a law of peoples would not support the sovereign's right to wage aggressive war. Instead, the only justifiable just cause of war for decent peoples is self-defence (1999: 92). Nevertheless, Rawls endorses the idea of defending human rights as a just cause for war in certain exceptional 'grave' circumstances. At the same time, Rawls opens the doors to aggressive wars because liberal societies cannot tolerate 'outlaw states'. The difference between Rawls and Walzer on this point is that for Walzer the international society is a regime of tolerance and the only grave circumstance that can override a right to be tolerated is the case of genocide, where the communal life that tolerance allows has in fact broken down. However, for Rawls, the liberal states have no duty to recognize the independence of outlaw states and he implies at least a duty to act against them. Thus, for Rawls, a just cause might

extend beyond defending basic human rights through to restoring or aiding the restoration of a 'decent' society.

It remains an open question as to who defines what a just cause is. From the critics' point of view, this is an inevitable consequence of the legalist focus on positive international practice. Cosmopolitans offer an account of just cause that begins not with the morality of states but with the idea of a common, universal good and the moral equality of individuals. According to Dower (1998: 18), cosmopolitanism stands outside the war convention because it offers an 'independent moral yardstick' that goes beyond what is stipulated by natural law. While cosmopolitanism has a long-standing opposition to war of all sorts, cosmopolitans are not always pacifists (though most pacifists are cosmopolitans).

Moellendorf (2002) and Caney (2005) have both ventured accounts of just cause from a cosmopolitan perspective. According to Moellendorf, the problem with the traditional account of just cause is that it gives a right of war to illegitimate states. States are human institutions which can be 'wicked, corrupt, repressive and inhumane. And where they are, there can be no ground on which to say that they have a moral right to defend themselves' (Caney 2005: 203). For the cosmopolitan, 'the right to wage war in self-defence is a right possessed only by a legitimate state' (Luban, in Caney 2005: 203). To outlaw any war of aggression and allow any war of self-defence means that states could continue to do what they please domestically, whether it be just or not. In other words, the universal right of self-defence protects unjust states from external intervention. An example might be the case of Zimbabwe, where the Mugabe government is clearly causing great suffering, but the international community is unwilling to violate Zimbabwe's rights of sovereign self-defence in order to create a more just political order.

This raises the question of what counts as legitimacy from a cosmopolitan position. For Moellendorf, it is the Rawlsian criteria of whether a state possesses a just basic structure which guarantees justice to its members (see chapters 1 and 7). Thus, Moellendorf argues that the war against Iraq in defence of Kuwait was an unjust cause because the Kuwaiti regime was unjust in its basic structure, for example, by denying the vote to women.

Caney argues that Moellendorf's account of just cause is too restrictive because it does not allow for a war between two unjust states that might result in a more just state of affairs, or at least a less unjust one. Caney points out that the situation in Kuwait deteriorated after Iraq's invasion. Therefore, it was possible that the intervention or defence of Kuwait was justifiable because it led to or prevented

the continuation of a situation that was worse than the one existing prior to the invasion by Iraq. In other words, 'it would be perverse to claim that a regime has no just cause simply because it has a poor human rights record if not waging war would result in an even worse human rights record' (Caney 2005: 204). Thus, from Caney's position, cosmopolitanism has three things to say about just cause:

- a that self-defence is not necessarily a priori a just cause;
- b that cosmopolitan principles apply to the legitimacy of states; and
- c that preventing a more unjust condition from emerging can provide grounds for a responsibility to act.

Nigel Dower (1998: 118) has noted that a cosmopolitan 'commitment to moral political or religious ideal' can in principle lend itself to crusades, stemming from the need to convert or promote this ideal amongst others. Thus, the danger in the cosmopolitan account of just cause is that it may actually extend the use of war beyond defence to the promotion of substantive justice, either in terms of the promotion of human rights or of a Rawlsian basic structure. Therefore, it at least raises the prospect that cosmopolitanism might support, in principle, the idea of a war to rid a country of dictatorship, such as the 2003 war against Iraq. Indeed, some liberals did support this war largely for such reasons.

In recent times, the biggest shift in just cause thinking has occurred in relation to the issue of humanitarian intervention. Humanitarian intervention is armed intervention to stop or prevent serious human rights abuses and atrocities like genocide. Humanitarian intervention represents a change in the legalist interpretation of Just War, which has focused primarily on the issue of defence against aggressive war. The idea of humanitarian intervention threatens to overturn the prohibition against aggression and replace it with a limited right of intervention (aggression). Indeed, with the emergence of the doctrine of the responsibility to protect, it seems that just cause now includes not just a right but a duty to intervene to protect civilians from major human rights abuses such as genocide. Thus, it appears there is a conflict between an emerging norm of humanitarian intervention, emphasizing human rights and a duty to protect, which sometimes might justify aggressive war, and the norm of non-aggression. (This issue is discussed in more detail below.)

Regardless of the particulars of any case for just cause, it is a necessary, but not sufficient, reason to justify war, 'because it does not require that there be good reason to believe that action will remedy the injustice, that such action is necessary to remedy the injustice, and

that greater harms will not also be done in the course of attempting to remedy the injustice' (Moellendorf 2002: 119). Thus, the cosmopolitan claim is that upholding human rights is *prima facie* a just cause, but not necessarily a sufficient cause for humanitarian intervention. For cosmopolitans and anti-cosmopolitans, a sufficient case requires the other elements of JWT. Examination of these other requirements will allow a more accurate assessment of whether cosmopolitanism contains sufficient restraints on any states' ability to use war.

'Right' intentions

A more controversial, and 'slippery', concept is that of right intention, which stems from the idea that the cause may be justified but it is not just unless undertaken in good faith or with good intention. Thus 'the emphasis in the just war tradition on right intention makes it unethical to have ulterior motives behind the decision to resort to force' (Fixdal and Smith 1998: 300). Right intent means that even though outcomes might be good, say, the deposing of Pol Pot's regime and the ending of the genocide in Cambodia by the Vietnamese, the action must also be done for the right reasons. By this clause, the intentions of the Vietnamese, if they established a client state with a friendly government, detract from the achievement and undermine any claim that the Vietnamese action could count as a Just War.

Arguably, this clause of right intention only makes sense if you believe in an everlasting soul and/or judgement in another life, or reincarnation, where one's intentions are taken into account by God. This reflects the origins of the JWT in Christian thought. Christianity recognized that war was bad and that its consequences were always bad, but, as Augustine acknowledged, war was sometimes necessary; therefore it should be fought only for good reasons. According to Fixdal and Smith (1998: 300), 'At stake is the health of the soul and prospects for eternal life . . . nothing is hidden from the deity. Therefore you must not only act well but mean well.' In this case, it would matter what one's intent was because the fate of one's immortal soul depended on it. In other words, if you are going to do bad things, and cause bad consequences, then you ought to at least do them for the right reasons.

Historically, the clause regarding intention appears to have been directed against individual state leaders or sovereigns who might be tempted to undertake a Just War for reasons of personal aggrandizement or gain, or out of hatred for enemies or neighbours. That is,

they may be able to mount a case for a just cause but their intention might be something else, such as personal or political advantage or, for instance, securing domestic political support. Right intent is not included in all Just War accounts and could arguably be included under the heading of just cause, but that would assume a congruence between cause and intent that philosophers would find troubling.

However, two important cosmopolitan theorists reject the relevance of right intent as a cosmopolitan principle justifying violence. Both Moellendorf and Caney argue that good intent is not necessary from a cosmopolitan viewpoint. Moellendorf and Caney clearly depart here from the Kantian tradition of cosmopolitanism. For Immanuel Kant, intention was everything. One should always act because one has been convinced of the Tightness of the action, and not because one may gain from that action, or simply because that is what custom or law dictates. In the arguments of both Moellendorf and Caney, the influence of Rawls overwhelms Kant, because they agree that it matters not what the intentions of states' leaders are so long as 'justice' (i.e., the basic structure) is improved upon. This reflects the liberal cosmopolitan emphasis on substantive justice. For these cosmopolitans, Just War can only be acknowledged in the context of an account of justice understood as basic structure.

However, having a good intention must surely be an important criterion when setting out to break the fundamental commandments 'do not kill' and 'do no harm'. If we are going to allow killing, then surely it must be not only for just a cause but also with the right intention. Thus, Bellamy (2006: 122), in opposition to Moellendorf and Caney, argues that 'eschewing right intention begs the question of how to justify killing in war at all'. For Bellamy, killing for the common good and not individual self-aggrandizement, whim, greed, hatred, or advantage, is the only justification that is valid. Bellamy's refutation of the liberal cosmopolitans' rejection of right intent points to his understanding of the role of Just War thinking as a restraint on state action rather than a source of encouragement or permissiveness to make war. Bellamy's case is buttressed by reflection on the relationship between intent and outcome. As we know, the path to hell is paved with good intentions, but does that mean intentions are irrelevant to outcomes? If one's intentions are good, then does this outweigh any bad consequences of one's actions, and if so at what point?

How can we think adequately about the role that intent should play? What is clear is that the outcome of the war makes it easier to question the intent and motives of those who began it. Evidence suggests that the Bush administration was intent on removing Saddam

Hussein from office for its own reasons. The main reason for thinking this is not that no weapons of mass destruction were found, but that little or no thought was given to the responsibilities of the US after removing Saddam Hussein. Had they been more concerned with the welfare of the Iraqi people, the US would have been more likely to have given greater thought to the consequences of their actions and the post-war arrangements. Had the US been genuine in its intention of liberating the Iraqis from their dictator, rather than, say, getting rid of a menace for the US, or settling a grudge left over from a previous war, then it is more likely that serious thought would have been given to the post-war situation and how to preserve order within Iraq. Instead, because the underlying intention was arguably different from the stated intention, post-war requirements were not considered until the last minute.

The contrasting case would be the Kosovo bombing campaign of 1999. In this case, NATO had to be seen to be fighting not only a Just War but to be fighting it in a just manner as well, especially because the war was undertaken in the name of human rights. Thus, if the intention was to save Albanians from genocide and in doing so to protect human rights, then the means for doing so must also be consistent with human rights as much as possible. Due to the nature of intent, a further commitment was required to help reconstruct these societies, to prevent another war, and to be humanitarian in the way the wars were fought.

Intention ultimately refers to what the agent is intending to achieve, which implies or raises the question of how they are to do it, and not just why (cause) they are doing it. Thus, intentions are important in that they relate to the consequences of an action, because they can determine the nature of the action itself.³ However, like just cause, good or right intention is not sufficient to establish a case for a Just War. The JWT also requires that further criteria be met with regard to how the war is to be fought.

Proportionality

Proportionality refers to the principle that 'the harm judged likely to result from the war is not disproportionate to the likely good to be achieved' (Ceadal 1989: 11). States should be limited to wars where winning them is not outweighed by harms incurred. The proportionality criterion is a response to the problems that arise when basic harm conventions are suspended as in war. If we are going to commit a basic

harm by engaging in war, we must restrict further harms as much as possible. States should also offer some reasons for thinking that going to war will outweigh the costs of not going to war. If the initial harm has been slight, or perhaps significantly long ago, then other means ought to be found for redress. If the harm has been major, such as to territorial integrity, then war is more likely to be justifiable.

Proportionality is designed to restrain states and to keep their aims within reason. But it can also, of course, lead to an escalation if the stakes are high enough - i.e., if universal perpetual peace is the result, then what is considered proportionate might be quite high. This clause can be supported by the just cause argument that the ultimate goal of a Just War is to re-establish peace. This is a particularly strong part of the legalist tradition which emphasizes maintaining order (and therefore peace) between states. In Hedley Bull's formulation, war is justified in order to maintain the egalitarian principles of sovereignty against the hierarchical one of empire or suzerainty (Bull 1983). Additionally, the peace established after the war must be preferable to the peace that would have prevailed if the war had not been fought. How big could a war become before it was disproportionate? Was the Second World War justifiable because of the peace which has lasted in Europe as a result? And was it therefore better to have had that war than not? Thus, if a war could be fought that would establish, say, a realm of peace between Europe's states that would last for 100 years, then it might be justifiable in terms of the proportionality clause. However, this type of calculation would also lead to the making of utilitarian calculations as to the cost of wars and of peace.

Ultimately, however, proportionality raises the question of proportionate for whom? From a cosmopolitan perspective, it must take into account the effects on everybody involved, not just the initiators of war but also those who are being warred against. Bellamy (2006) points out that proportionality has a cosmopolitan scope because it takes not only the costs to those who initiate war but also the costs to all parties involved or affected by the actions of war as its scope - that is, costs to all affected by the actions. The proportionality principle refers beyond the realm of state to something like a universal interest, or universal cosmopolitan concern for the overall effects of war.

Last resort

At its minimum, the last-resort measure means that states should not only resort to war as a last measure to solve their problems, but they

should delay the recourse to war as long as is possible. War should not simply be the main means for achieving foreign policy goals or, in Clausewitz's terms, the extension of foreign policy by other means. Last resort does not mean the 'exhaustion of every means short of force' (Bellamy 2006: 123). Such a goal is too demanding for most states, as war can always be put off in favour of negotiation. Rather, force must be the most *feasible* means of resolving conflict. According to Bellamy (2006: 123) 'actors must carefully evaluate all the different strategies that might bring about the desired ends, selecting force if it appears to be the only feasible strategy for securing those ends'. All reasonable peaceful means of conflict resolution must have been attempted or at least considered before recourse to war.

The criteria of last resort are particularly topical in the context of the war on terror and the recourse to the so-called preventive war against Iraq. Last resort has traditionally been understood to be reconcilable with a doctrine of pre-emption, that it is acceptable to launch an attack on another state in order to pre-empt a certain and imminent attack. The Israeli attack on their Arab neighbours during the six-day war is an example of pre-emption. Under these conditions, the Israeli attack was seen a defensible action because the Arab attack was certain to occur within a very short period, a matter of days or hours. Preventive attack, on the other hand, is intended to prevent another state from being able to attack at some uncertain and unspecified time in the future. Pre-emption occurs at the moment before a war would otherwise start. Prevention is an attempt to prevent the emergence of a possible but not certain threat which may or may not lead to war. The danger of this approach is that it opens the door to war as the first option for diffusing conflict, and as such is a potential reversal of the last-resort clause. In this sense, prevention may achieve a good result by preventing a larger war but it cannot be considered a last resort.

Legitimate authority

The origins of the rule that war can only be undertaken by a legitimate authority lie in the emergence of Westphalian states from the wreckage of the Middle Ages when private armies, mercenaries, criminals and pirates all competed and engaged in warfare. The chief result was to de-legitimize other forms of violence and to legitimate state, or sovereign, violence. For pluralists and anti-cosmopolitans, it is self-evident that the state, or the political community, should have

the right to defend itself or have just cause in self-defence, because the state is a legitimate form of political community. However, for cosmopolitans, this is not self-evident. A state's legitimate authority, and therefore its legitimacy to make war, is always conditional upon other factors. As Caney (2005: 205) notes, 'we should not simply assume without supporting argument, that there should be a world of states and hence that the authority to engage in warfare should rest with states'. The rule of legitimate authority forces us to ask who is a legitimate authority in the contemporary world? While possessing sovereignty, many states today have questionable legitimacy (see Buchanan 2000).

In contemporary debates the presence of many non-state actors, including private security forces such as Blackwater, and the use of non-conventional violence (terrorism) also challenge the criteria of the sovereign state as the only legitimate authority. Some non-state actors, such as revolutionary forces, might be considered to have more legitimacy than certain state actors. While many may object to the methods of these groups, which may fall outside the rules of *jus in bello*, they nonetheless claim legitimacy, even if that claim is not shared by everybody else. Thus, there is no prima facie reason why non-state actors cannot be considered legitimate actors and therefore bound by the rules of Just War. Because, in principle, many of these non-state actors claim to act in the common good or on behalf of a certain people, they can be distinguished from those who practise private violence and organized crime.⁴ It is possible, therefore, that legitimate authority can be given to political actors, rather than private actors, who act in the name of the common good. There is also good reason for claiming that today states have to act in a way that is legitimate in the eyes of international society as a whole, in the form of permission or under a license from the UN Security Council. This is especially so in the case of humanitarian intervention.

Reasonable chance of success

The possibility of war being fought for just cause has to be weighed with the likelihood of success. Thus, a noble, but doomed, cause, should not be undertaken. It would be wrong to engage in a noble crusade if it is unlikely to work, in part because the result would be disproportionate or would be outweighed by the harms committed. Thus, the consequences of action ought to be realistically assessed. There is no point committing one's troops to a lost cause

as it will only end in unnecessary suffering on all sides. We might think perhaps of a hypothetical war of liberation against the Chinese occupation of Tibet. By most accounts, this occupation is unjust and therefore a case could be made that war to liberate the Tibetans was justified. However, the costs and the likelihood of long-term success of that war would outweigh the cause itself. For this reason, while the cause might be just the consequences would not be just. This is a reference possibly to cosmopolitan elements as it suggests a concern to limit unnecessary suffering to all those involved. Both cosmopolitan and anti-cosmopolitan thought generally agrees that this reasonable chance of success clause is justifiable and essential to any reasonable ethics of force.

Jus in bello

Where *jus ad bellum* refers to the occasion of going to war, *jus in bello* refers to the means for fighting a war, to the weapons and tactics employed in warfare. Some writers have traditionally argued that *jus ad bellum* and *jus in bello* are logically separate. In other words, any war fought for an unjust cause cannot be considered just by any measure, no matter how well it is fought, and a war fought unjustly, but for just cause, is still an unjust war - the ends do not justify the means. For instance, NATO action against Yugoslavia over Kosovo fits this latter model because the use of certain munitions types, cluster bombs, and the targeting of civilian infrastructure cannot be considered just means for fighting a war.

The *jus in bello* principle forms the majority of international law of armed conflict, perhaps reflecting some recognition that states may be more willing to exercise restraint in how they fight the wars they do engage in. That is to say, states are not really willing to renounce war but it is more believable that they may renounce certain weapons and tactics. However, there is still plenty of evidence of states doing neither, or in some cases doing a bit of both. The US defence forces have extensive briefings and codes for their forces as well as a great number of legal resources, including the JAG (Judge Advocate General) arm. At the same time, the US continues to use methods and tactics that are outlawed by international law and that are highly controversial. Examples of these methods are cluster bombs and phosphorus bombs, and targeting practices that are less selective than target practices of other states.

Perhaps even more than *jus ad bellum*, *jus in bello* rules invoke the

idea of cosmopolitan duties. By making a clear distinction between who is a legitimate target and by urging restraint, *jus in bello* rules invoke the idea that war is not to be waged against a people as such. In the twentieth century, these *jus in bello* rules have become highly codified in international humanitarian law, representing for many the pinnacle of cosmopolitan values in the international order. However, differences remain between cosmopolitans and pluralists, especially about how to ground these rules and, ultimately, how extensive or restrictive these rules are. The crucial consequence of this difference emerges in the discussion about the extent of civilian immunity, or the discrimination principle that exempts civilians from being targeted. The two core demands of *jus in bello* are the proportionality principle and the principle of discrimination or non-combatant immunity.

Proportionality

Proportionality means that the methods used in the war must be proportional to the ends and limited to achieving the just goal of the war. The best example of this type of question is the case of the dropping of the atomic bombs on Hiroshima and Nagasaki, which brought the Second World War to an end. The dropping of these bombs was an unprecedented action as they were used against non-military targets, destroying whole cities. Could such methods of violence be justified? The US position held that this would drastically shorten the war and therefore reduce the overall number of deaths, especially of US and allied forces. Therefore, according to the US, this action was proportionate to the larger goal of ending the war. In other words, the proportions of the war had become so great that it was necessary to take this step. The more common understanding of proportionality relates to the methods of fighting between combatants, ruling out massacre of the enemy's troops.

Proportionality involves a minimal cosmopolitan sense of humanity through:

a basic respect for life urged on all those who engage in war. It demands economy in the use of force; that commanders should not waste the lives of their own soldiers in the pursuit of unattainable or relatively unimportant military objectives, and that they should not inflict undue and unnecessary suffering on an adversary. (Coates 1997: 227)

It should not be underestimated how 'revolutionary' this proportionality clause is. It demands that even in the midst of the breakdown of

morality that is war it is still incumbent upon warriors to minimize the harm they cause to their *adversaries*. However, proportionality is not enough as it is a very elastic and subjective term that gives great scope to individual judgement as to what is or is not proportionate. Therefore, there is general agreement that proportionality is incomplete as a *jus in bello* principle without the more explicit principle of discrimination or civilian immunity.

Discrimination and civilian immunity

This principle states that the weapons and tactics used in war must discriminate between combatants and non-combatants and that the civilian population of the enemy is never a permissible target. This rule provides a fundamental and cosmopolitan restriction on the prerogative of military commanders and politicians, because it focuses on the civilian status of human beings and demands that military commanders and politicians respect those who are not part of the war in any immediate sense. Non-combatant immunity is central to Just War thinking because were a war to ignore this principle it would become total war and lose any grounds for wider justification. As Coates (1997: 263) claims, 'How can a theory that claims to regard wars as an instrument of justice countenance the injustice involved in the systematic suppression of the rights of non-combatants?' Just War tradition must place the well-being of individuals and non-combatants at its centre or else it succumbs to *raison d'etat*. Any coherent account of Just War must accept that humanity is the ultimate moral referent and therefore necessarily place the well-being of human beings not engaged in the war (civilians) at the centre of its concern.

In order to understand the justification of non-combatant immunity, it is necessary to understand the logic of warfare itself. Warfare should be understood as an exception to the normal rules of life, whereby everybody is immune from violence. In warfare, soldiers or those engaged in aggressively hostile activity lose that immunity. Likewise, the Geneva Conventions spell out obligations to respect enemy forces outside the field of combat. The argument is that once the soldiers have been removed from the field of battle they are no longer legitimate targets; they revert to their normal status. In this way, civilian immunity should be understood as the norm from which targeting combatants is the deviation. This fits in with the natural law understanding of the JWT because it is referring not to any right of

war or right to kill civilians, but at best is a temporary lifting of the 'do no harm' principle that governs all humans.

The most obvious examples of lack of discrimination in the area of tactics are the carpet bombings of German cities and the fire bombing and atomic bombings of Japanese cities by the US during the Second World War. In pursuance of their war against Hitler, the British undertook massive bombing of Germany, destroying many cities and killing hundreds of thousands of civilians. The most famous of these was the bombing of the German city of Dresden. Dresden was especially controversial because it had no military significance at all. In the firestorm that was created by the allies, at least 100,000 people died. Likewise, the Americans, during the closing stages of the war against Japan, repeatedly bombed Tokyo and other major Japanese cities in raids that targeted cities rather than military sites. The main argument used to defend these clear breaches of the discrimination principle was that it was necessary to break the will of the people to continue fighting. By breaking the will of the people to fight, the war would be drawn to an earlier close. It was also argued these actions were necessary, and justifiable, because the war was not restricted to military forces alone but to entire societies, and therefore everyone was a potential target. In hindsight, both these practices clearly broke the immunity principle (indeed, they were also criticized at the time, especially by the Church) and are morally inadequate.

Arguments against civilian immunity usually employ a consequentialist logic - the cost of protecting civilian immunity is higher than the cost of not protecting it. So, for instance, one argument for the atomic bombings of Japan in the Second World War was that it would save lives in the long run, in particular the lives of US soldiers, by bringing the war to a speedy end and avoiding a bloody and prolonged full-scale invasion of Japan. Avoiding one form of suffering outweighs the other.

The other consequentialist argument is the more 'realist' one that in war necessity triumphs over morality. That is, military necessity can justify violating the discrimination principle. This idea stems from a belief that winning is the ultimate goal of war and if a particular military action brings about that goal more quickly, or is necessary for victory, then the non-combatant immunity is outweighed by the military action that will lead to the winning of the war.

Military necessity can be interpreted in two ways, as either the necessity of winning, or the necessity of survival or not being destroyed. The logic of this argument is that it is better to win badly than to lose and suffer the consequences. This is aggravated by a belief that a given war, or even a given battle, is one for survival and

not just victory because a given battle could perhaps be a turning point in a war and hasten the overall end. Of course, the danger of taking this line is that survival can be used to justify anything, and if the outcomes override the means then we end up with the argument that the ends justify the means. In the case of war, this could result in defending any tactic that helped achieve victory. Thus, it could be argued that the tactical use of nuclear weapons is justifiable if they bring about a greater or quicker victory, as in the Second World War.

The danger of the rhetoric of necessity is that it becomes a licence to do anything. In the contemporary context this is emphasized by the discourse of the war on terrorism, which implies that the stakes in this war are so high that it is necessary to suspend certain aspects of the Just War rules such as the ban on torture. In this type of war it is claimed we must be prepared to use anything to defend ourselves. The JWT, as Coates (1997) points out, is built upon the opposite aim - to restrain as much as possible the activities of those who go to war. The purpose of the Just War approach is to address precisely the extreme situation of warfare and spell out rules for engagement that are morally just, and to bring war within the boundaries of justice insofar as that is feasible. Coates (1997: 237) makes the point that while it is often hard to draw a line, 'a line needs to be drawn somewhere if liberty is to be preserved'. The *jus in bello* rules are defined *in extremis* and are precisely intended to overcome the argument that necessity allows for everything or anything. In terms of this logic, necessity itself does not permit the breaking of the discrimination rule and to do so would risk undermining the entire Just War project.

The fundamental issue raised by the argument of necessity is whether it is ever reasonable to target non-combatants and break the immunity clause. There are two possible arguments that qualify the non-combatant immunity principle. These are the argument of double effect, which allows for unintended civilian deaths, and supreme emergency, which allows suspending non-combatant immunity under extreme conditions.

Double effect

The law of double effect states that while it is not permissible to harm non-combatants, if such harm occurs as an unintended consequence soldiers can escape censure. The double-effect principle refers to the difference between whether the death of innocents,

or non-combatants, is intended or unintended, or foreseeable but unintentional. However, the issue is more complex than simply intentionality suggests. The real issue is whether deaths can be unintended but probable, likely or foreseen. If deaths are foreseen that adds a further complexity to making judgements because it means one has knowledge that a death will occur from one's actions even if that death is an unintended by-product. So, for instance, a passerby close to a military site is killed when the site is bombed. This is fairly clear-cut. However, the principle of double effect seems more compromised where, say, as in the December 2008 Israeli attacks on Hamas in the Gaza strip, the military targets are situated amongst a civilian population. In choosing its targets in Gaza, because of the density of the population and the Hamas tactic of firing rockets into Israel from this location, Israeli planners would know that the likelihood of civilian casualties is high. In this context civilian deaths are unintended but highly foreseeable.

Is this a legitimate consideration in terms of the double effect or should avoiding the likely death of civilians override the military goals? The dilemma facing Just War theorists is whether we are then responsible for those deaths in the same way as we would be for intended deaths, or not?

For the critics of Just War, the double-effect principle does not place enough emphasis on anticipated deaths. Rather, it focuses simply on the difference between intended and non-intended targets, and actually gives planners license to commit murder, that is, to factor-in civilian deaths even when they are not intended. The critics say that if we draw the line only at intended deaths, military planners can still get away with anticipating as many civilian deaths as they wish. In this manner, the double effect undermines the rules of discrimination and renders them insufficient if not altogether pointless (e.g., Sjoberg 2006).

Michael Walzer (1977) suggests that double effect needs to be replaced by the notion of something like due care that takes foreseeability into account. Walzer (1977: 156) argues that simply not intending civilian deaths is not enough and 'what we look for in such case is some sign of a positive commitment to save civilian lives'. The principle that should be followed is 'when it is our action that puts innocent people at risk, even if the action is justified, we are bound to do what we can to reduce those risks, even if this involves risks to our own soldiers' (Walzer 2004: 17). Thus, in many cases, Walzer argues for serious consideration to be given to choices, say, between commando raids and aerial bombardment.

The principle of civilian immunity clearly states that individuals'

moral standing trumps military goals and states' interests when it comes to fighting wars. The discrimination principle is the most clearly cosmopolitan element of the JWT because it invokes the individual human as the relevant moral focus. This point is acknowledged even from the communitarian and pluralist position. Walzer (1977: 158), for instance, claims that the argument for due care extends from an account of human rights which 'stands independently of political allegiance ... it establishes obligations that are owed, so to speak to humanity itself and particular human beings and not merely to one's fellow citizens'.

Supreme emergency

A supreme emergency is a situation where not merely victory but survival of a state or community is on the line. For Walzer (1977: 254), a supreme emergency exists when there is 'a threat of enslavement or extermination directed against a single nation'. Such a fear occurs 'when we face moral as well as physical extinction, the end of a way of life as well as of a set of particular lives, the disappearance of people like us' (Walzer 2004: 43). Under this situation, war becomes an all-or-nothing situation. Supreme emergency rules suggest that it is necessary to do whatever it takes to win or survive. The clear inference, though Walzer does not use the term, is to say that in cases of attempted genocide, understood as the complete physical or cultural destruction of a people or group, then civilian immunity might be legitimately compromised. Walzer makes it clear that it is only when extinction is imminent that a supreme emergency might be said to exist, that is, when all other options have failed or no other option is available. He claims 'there is fear beyond the ordinary fearfulness ... of war, and a danger to which that fear corresponds, and that this fear and danger may well require exactly those measures that the war convention bars' (1977: 251). Walzer argued that Britain faced this challenge in the early days of the Second World War when it looked as if Hitler would conquer Britain. Walzer implies that had Nazi Germany conquered Britain, then Britain would simply have ceased to exist or would have been forced into slavery, like the Eastern European states (see Bellamy 2006, and Coady 2004, for critical examination of this claim).⁵ Nonetheless, the supreme emergency exception suggests that community rights are more important than cosmopolitan human rights.

There are at least two questions raised by the use of necessity in

this context. The first is to ask whether necessity does in fact override other concerns and, if so, how or when? The second concerns the assessment of what constitutes a necessity and the point at which an action becomes necessitous. It is not clear why supreme emergency itself constitutes a reason to override the normal rules of discrimination. Why, for instance, should the survival of the community, or the communal identity, be more important or necessitous than the survival of the individuals who comprise it?

This defence of violating non-combatant immunity is clearly derived from Walzer's communitarian pluralism. Walzer's doctrine says that under some circumstances the community matters more than the (foreign) individual because 'the survival of and freedom of political communities whose members share a way of life, developed by their ancestors, to be passed on to their children, are the highest values of international society' (Walzer 1977: 254). At this junction, the contradiction and the tension at the heart of the anti-cosmopolitan position is revealed. Walzer appeals to both cosmopolitan principles, such as human rights and natural duties, which are owed to all, *and* to the highest values of international society such as communal autonomy. According to Walzer, human rights mean we cannot take innocent lives because 'it is the acknowledgment of rights that puts a stop to such calculations and forces us to realize that the destruction of the innocent, whatever its purposes, is a kind of blasphemy against our deepest moral commitments' (1977: 262). Nevertheless, communal autonomy allows us to do just that. The issue of non-combatant immunity dramatizes and crystallizes the point at which a position has to be taken in favour of the priority of the individual or the community. Walzer's defence of the supreme emergency clause, and its endorsement by others including Rawls, marks another point at which anti-cosmopolitanism sides with community over humanity.

For a number of reasons, the anti-cosmopolitan argument does not stand up. First, states are not individuals and not every person in a state is likely to suffer or be threatened by the loss of the political community in the same way. Walzer does not answer the question as to why any particular community's (cultural) existence is more important than the lives of innocent civilians. In other words, given a choice between cultural extinction and killing other civilians, why is any particular community's existence more important? Why is it not better to refrain from committing an evil than to commit one - even if that means a greater evil is committed against oneself or one's community? Walzer does not give satisfactory answers to these questions.

The most obvious limitation to relaxing the discrimination clause is that it increases the chances for abuse. It opens another avenue for state leaders to suspend the discrimination rules and leaves unanswered the question of who decides, and how, when a supreme emergency exists. As Bellamy points out, 'Any political leader, as realists would argue, can construct a plausible case that what he or she is facing is a supreme emergency. Read this way, the "exception" could be cast so broadly that the rule of non-combatant immunity would cease to offer much protection' (2004: 836). The purpose of the discrimination rule is precisely to make a distinction between Just War and massacre or murder. Relaxing the discrimination clause is to collapse that distinction.

It could be argued, then, that only a fully cosmopolitan account of Just War holds out the possibility of providing more adequate guidelines. Or, stating this another way, it is only by extending the basic cosmopolitanism of Walzer's reading of Just War, and of the JWT itself, that the JWT can resolve some of its inadequacies.

Terrorism

The attacks on the US on September 11, 2001, by terrorists of al-Qaeda have in a number of ways brought the issue of the Just War alive. The response to these attacks prompts reflection upon whether terrorism can ever be justified and whether the response to terrorism ought to be bound by the laws of the JWT. The crux of the matter is the argument concerning whether terrorists are engaging in just cause.

Beginning with the technical requirements of Just War and putting aside the issue of state terrorism, terrorists do not meet the criteria of just authority because they are non-state actors. However, it is often the case that terrorists do achieve international recognition as legitimate actors even if they do not control a state. In many cases, terrorists are also aspiring to control a state and therefore should be understood as seeking all the rights and responsibilities of statehood. This would distinguish them from criminal organizations and private violence. Such was the situation experienced by the founders of Israel who employed terrorism to gain momentum for their struggle to gain independence from Britain. To condemn political violence purely on the grounds that it is not committed by a state is to effectively de-legitimize all armed resistance and struggle, including against illegitimate states. Therefore, the right authority clause, because it

focuses on states only, cannot adequately deal with the problems of terrorism without unconditionally approving the status quo.

The argument that those who use violence for political ends, such as national liberation, use it to justify armed struggle relies most heavily on the case for a just cause. This usually takes the form that great injustices have been, or are being, perpetrated against or experienced by a certain group or people and therefore a violent struggle is required. Such arguments rely upon some form of equivalency between the state's right of self-defence and the situation of the aggrieved group.

The critical issue here arises when the armed struggle moves from targeting military or government actors to indiscriminate targeting of civilians. Terrorism against military targets, such as has been used by guerrilla fighters for at least a century, appears to be covered by most of the JWT. However, terrorism directed against civilians is covered by the law of discrimination and can never be justified in the JWT. Therefore, there is no *prima facie* reason why the rule of non-combatant immunity should not apply to non-state actors. If these actors wish to claim, as for instance the IRA did, that they are engaged in military conflict, then it follows that they ought also to be restrained by the rules of the JWT. If they are not constrained by the JWT, they run the risk of wishing to claim legitimacy as equivalent to states but without taking on the obligations that such legitimacy entails. The only argument they can therefore deploy with any consistency is a consequentialist and realist one that the end justifies the means, that the common good overrides the rights of individuals. If this is the case, then terrorists are clearly stepping outside the confine of the JWT.

Jus post bellum

The criteria with which to assess the cessation of hostilities and the movement from war to peace have been recognized as equally significant as moral considerations of war. *Jus post bellum* seeks to regulate the ending of wars, and to ease the transition from war back to peace, ensuring 'the just goal of a Just War, once won, is a more secure and more just state of affairs than existed prior to the war' (Walzer, in Orend 2000: 122). In recent years, a third component of the JWT that has been developed by Just War theorists as well as by critics (Bellamy 2006; Orend 1999, 2000, 2002; Walzer 2000, 2002; Williams and Caldwell 2006), has evolved to address the termination

and aftermath of war. Standard conceptions of a Just War may have held, as Walzer (2002: 18) explains, that a war of aggression is justly terminated when aggression is rolled back and old territories are re-established. Recent conflicts, however, demonstrate the need for more comprehensive termination and restoration, and which are guided by principles of justice (Orend 2000).

Jus post helium is clearly cosmopolitan as it is concerned with not just the return to status quo as it existed before the war, but also with the achievement of a measure of justice. This is especially so in the case of humanitarian intervention. In these cases, if the war is to be just, it must not end with the restoration of the status quo ante because 'the war is from the beginning an effort to change the regime that is responsible for the inhumanity' (Walzer 2002: 19). Walzer cites the case of Rwanda to demonstrate that if this intervention had occurred as it should have, part of its aim would have included replacement of the Hutu regime responsible for the genocide (2002: 19-20). Additionally, guidelines are required to prevent states, which take on the responsibility of a replacement of an unjust regime, from failing to submit themselves to a set of moral principles or requirements (2002: 18-20). Such a case is illustrated by Vietnam's expelling of the Khmer Rouge from Cambodia, followed by its establishment of a satellite regime (the PRK) in 1979. There needs, in short, to be an ethical 'exit strategy' from war (Orend 2005).

Humanitarian intervention

In recent years, the issue of humanitarian intervention has raised many of the issues traditionally covered by the JWT. Much of the discussion of humanitarian intervention has not expressly acknowledged this (see Fixdal and Smith 1998), focusing instead on either the legal justifications, or on the prudential and pragmatic arguments. In particular, the debate about humanitarian intervention has focused on the legal issue of whether the state or the international community has the right to violate state sovereignty.

Humanitarian intervention challenges traditional JWT criteria in a number of ways. First, humanitarian intervention raises the prospect of a shift from negative to positive cosmopolitan duties and a consequent expansion of the category of Just War. As noted above, it challenges the prohibition against aggressive war by, in its most recent formulation, proposing a duty to intervene to prevent crimes against humanity. The development of the doctrine of a responsibility

to protect suggests an emerging consensus that genocide and crimes against humanity are sufficient cause to overturn a state's right of non-intervention. Second, humanitarian intervention also raises the possibility of the emergence of a new source of legitimate authority, in the form of the UN or the international community more generally.

Third, humanitarian intervention raises questions about *jus in bello* because it draws attention to the increased duty of states to fight justly. If the war is being fought for humanitarian reasons, then it must be more responsible in its methods. The NATO campaign in Kosovo provides a good example because of the use of certain targeting practices by the US and of certain sorts of munitions, such as cluster bombs and depleted uranium warheads. Both of these weapons represent threats to non-combatants, including after the cessation of hostilities. Their use in so-called humanitarian interventions threatens to undermine the legitimacy of the war because of the harm they can do to non-combatants.

Despite these challenges, there is no reason why any case for humanitarian intervention should not also meet the other criteria of Just War - proportionality, last resort and reasonable chance of success. This has been recognized by the ICISS criteria for military action (see ICISS; also Bellamy 2008).

That said, a number of other issues are raised by humanitarian intervention that don't necessarily fit within the confines of the JWT. For defenders of humanitarian intervention on human rights grounds, the biggest issue is whether it is possible to justify denying some people their human rights in order to save others. On one hand, this is simply a case of proportionality. On the other hand, it could be seen as a case of basic principles in conflict. Humanitarian intervention presents a case where the values of harm avoidance and of humanitarianism may come into conflict. To uphold humanitarian values some people may have to be harmed, including in all likelihood some innocent people. This is a crucial test case for cosmopolitan values and for cosmopolitan states, and it speaks to the very meaning of how cosmopolitanism is to be realized in a world of states. The case of Kosovo provides one of the most interesting examples because the NATO allies had to make a judgement on what the anticipated reaction of the Serb leadership would be. Many argued that the expulsion of Kosovo Albanians from their homes was directly the result of the NATO intervention, or was at least hastened or made worse by that intervention. This suggests that the harm of intervening was greater and that things would have been better had NATO not intervened (see Bellamy 2006 for an alternative reading).

Humanitarian intervention has received qualified support from both

cosmopolitan and anti-cosmopolitan writers. To be sure, some such as Jackson reaffirm the pluralist account, and the privileging of order over justice. For Jackson (2000: 291), 'the stability of international society . . . is more important, indeed far more important, than minority rights and humanitarian protections'. However, others usually associated with pluralist concerns, such as Walzer and Rawls, argue that under certain conditions humanitarianism provides a just cause for war. For Walzer, humanitarian intervention is justified in order to protect the victims of severe human right violations, or more commonly severe persecution, and genocide in particular. For Walzer (2004: 81), this is consistent with his pluralism because 'the victims of tyranny, ideological zeal, ethnic hatred . . . are not determining anything for themselves'. That is, these individuals are being denied the capacity for self-determination and to make a common life for themselves. Therefore, it is in fact required or obligatory for outsiders to intervene in this context, and 'whenever the filthy work can be stopped it should be stopped' (Walzer 2004: 81). This does not necessarily involve a rejection of non-intervention as the basic norm, but only a slight qualification of it. Intervention is not justified to uphold, for instance, the right of freedom of speech, or religion, or even individual liberty. According to Walzer, it is only the collective right of self-determination or, more specifically, the communal right to existence, which provides the grounds for denying the sovereignty of a larger collective. It is surely this qualification that separates Walzer from the other pluralists such as Jackson because it distinguishes him as a communitarian rather than a statist. For Jackson, it is not communal autonomy that is primary but rather the institutional structure of the modern state and the society of states, which provides the only viable form of world order and therefore the possibility of any international ethics at all.

In contrast to the qualified support of pluralists, cosmopolitan writers have a different set of ethical issues to address. Cosmopolitans reject the pluralist claim that order is sufficient justification for not intervening. For example, Caney (2005: 240) argues that 'Appeals to international order are . . . incomplete and need to be supplemented by an argument showing that the international system is fair and morally legitimate.'

Simon Caney argues that cosmopolitan approaches to humanitarian intervention have two forms, the standard and the liberal egalitarian arguments. The standard argument involves four assumptions:

- 1: all persons have fundamental interests
- 2: political institutions do not have value except insofar as they respect these interests

- 3: external agents have duties to protect people's fundamental interests
- 4: External intervention is occasionally required as an effective means for protecting these interests. (2005: 233)

The liberal egalitarian model claims that 'persons have political human rights ... and economic human rights ... political institutions ... have worth only so far as they protect these values ... given that all persons have duties to respect and protect these human rights it follows that intervention is justified when it could successfully protect these rights' (Caney 2005: 235). In keeping with this logic, Moellendorf claims that 'just cause for the use of military force exists if and only if the intervention is directed toward advancing justice in the basic structure of the state or the international effects of its domestic policy' (2002: 159). Thus, cosmopolitan law overrides the state's automatic right of self-defence (norm of non-intervention). This does not in itself justify any particular intervention; instead, it removes the automatic presumption of sovereign inviolability from intervention.

Ultimately, if the intervention is going to cause more harm than it prevents, then it is not justifiable. For cosmopolitans, humanitarian intervention therefore also needs to meet the other criteria of Just War, especially proportionality, last resort, right authority and reasonable chance of success. Caney makes his cosmopolitan case for humanitarian intervention in such terms of just cause, proportionality, least awful measure, reasonable chance of meeting success and legitimate authority. He reformulates each of these with cosmopolitan components (see below). According to Caney (2005: 251), there are five conditions that must be met for an act of humanitarian intervention to be considered legitimate:

- 1 When it is against a regime that is violating human rights (both economic and social).
- 2 Proportionality; the costs cannot be 'disproportionate in comparison to internal wrongs' which the intervention is addressing.
- 3 Humanitarian intervention resorted to only when least awful options have been considered. For instance, it could be argued that economic sanctions, or doing nothing, could both result in more awful results than humanitarian intervention. In other words, the different costs of different harms have to be measured, including the harm of doing nothing.
- 4 Humanitarian intervention must have a reasonable chance of meeting its objective, that is, of preventing the violation of human rights or preventing a worse violation of human rights than might otherwise occur.

- 5 Right authority. Ideally, this means an 'impartial transnational political authority'. (Caney disagrees with Moellendorf on this clause, and argues that in the absence of such a legitimatizing authority the intervenors require 'as wide and ecumenical a coalition of support as possible'.)

Caney's revision of the Just War clauses in relation to humanitarian intervention serves two functions. First, it serves to deflect or diffuse the possibility of a cosmopolitan crusade to enforce a human rights regime universally. It also, by placing rights as the basic criteria, employs wider criteria than Moellendorf's argument. By making conformity with a Rawlsian basic structure as the criteria, Moellendorf's argument opens the door to an interventionary, crusading foreign policy that is incompatible with cosmopolitan values identified by Kant, for example. In contrast, Caney's reinterpretation of the Just War clauses provides evidence of the underlying flexibility and adaptability of Just War thinking, and in particular of its uses as a brake on war. Caney's approach to humanitarian intervention is much closer to the spirit of Just War thinking because it recognizes that while justice might require the use of force on occasion, this should be the exception rather than the rule. Overall, however, liberal cosmopolitans see the JWT as a means for achieving justice or, at the very least, they see achieving justice as the ultimate, and only, justification for warfare.

Kantian cosmopolitans such as David Held, Jürgen Habermas and Andrew Linklater all argue that the Just War provisions seeking to limit recourse to war are incomplete until they are legitimized in a cosmopolitan institutional and legal framework. Under such a framework, the use of violence becomes an instrument of law and not foreign policy. As such, it is also constrained by that law and is made more accountable. Within this framework, doubts about intentions and causes are minimized by the specification and legalization of the legitimate use of force according to cosmopolitan rules. In this form, violations of human rights, including the targeting of civilians by terrorists and states, are to be treated as criminal offences subject to the law.

The thrust of the argument here is to focus on the procedural and democratic legitimacy of international institutions which authorize the use of force. In the meantime, this means that humanitarian and other interventions must approximate legitimacy not just in terms of their possible consequences, say, the removal of a dictator, but in terms of degree to which they can command an authoritative international consensus and not just a 'coalition of the willing' (see Habermas 1999: 2003).

Finally, humanitarian intervention raises the question of whether a greater harm or injustice may be committed by not acting. Is doing nothing or failing to act the same as committing harm? If by not doing something, a bad result occurs, such as a death, are we responsible in the same way as if we ourselves directly cause the death? Certainly, the history of international inaction suggests that most states have few qualms about doing nothing, thus endorsing inaction as a morally acceptable practice. However, on the other hand, it is clear that most traditions of ethical thought argue that the principle of mutual aid, or beneficence, means that if we can act without causing serious harm to ourselves then we would be wrong not to act to help another. This suggests that mutual aid provides an answer to the question of the moral justification of humanitarian intervention in general.

While the JWT provides useful guidelines for assessing the recourse to humanitarian intervention, it does not actually provide an adequate justification. Such a moral justification, as Terry Nardin (2002b) notes, must come from outside the JWT. This raises the possibility that, in keeping with the discussion of humanitarianism in the previous chapter, humanitarian intervention should be understood as a form of mutual aid. This chapter has demonstrated that mutual aid has played little role in the discussion about Just War or humanitarian intervention. However, as in the discussion of humanitarianism more generally, mutual aid is a useful term in helping to overcome the limitations of rights thinking and of justice-based arguments. The advantage of using mutual aid in the context of the JWT is that it permits action in the aid of others, outsiders, while limiting the nature of that assistance, preventing it from turning into imperialism or an over-permissive criteria of justification. Thus, humanitarian intervention should be understood as acts of assistance rather than of 'justice' in the strict sense. The purpose of military action against another country is to stop violence or prevent it being used against 'innocents' (Nardin 2002b), and not to impose a just basic structure.

The Kantian principle of mutual aid could be interpreted as supporting a practice of humanitarian intervention. To do so, however, it would have to be able to reconcile the duty of aid with the necessity of killing and, therefore, of using others as means to an end. As Nardin explains, this is possible because mutual aid (or what he calls common morality) allows us 'to defend the rights of others when those rights are threatened' (Nardin 2002b: 65). Defending these rights on occasion requires the use of violence because mutual aid is a duty 'to employ force against the violent if their victims cannot otherwise be protected' (Donagan, in Nardin 2002b: 66). In other words, humanitarian intervention is primarily an action of self-defence

undertaken by others on the victim's behalf. Such a Kantian view dictates that any interventions be limited to the minimum force and engagement necessary to cease attacks or persecution. It is not clear, however, if that duty then also extends to a duty of reconstruction or a *just post bellum*. This suggests that projects such as spreading liberal democracy, or a 'just basic structure', fall outside the purview of humanitarian intervention or indeed the JWT in general.

The limitations of JWT

For as long as there has been a JWT there have been critics of the tradition. The most long-standing critical frameworks are pacificism and realism. Pacifists reject entirely the possibility of an ethical use of violence. On the other hand, realists reject the possibility of restraining violence of ethical reasons. However, between these two positions there have been others, including the Kantian cosmopolitans who reject the solution to the ethics of violence offered by the JWT. This section briefly discusses some of the criticism of the JWT itself and in particular its claim to represent an acceptable compromise between the violence of war and ethics.

The first major objection to the JWT is that it fails in its aim of providing a brake on states' actions and in limiting the instances and the manner of the use of force. Instead, it is argued that the effect of the JWT is to legitimate war and in particular the ethics of military necessity. Thus, as Anthony Burke (2004: 330) argues, 'moral discourses are part of the warrior's political armoury; they are party of war's machinery, not a rod in its wheels'. Burke suggests that 'Just War theory invokes concepts like "proportionality" and the "double effect" to remove thousands of people from the space of moral concern' (2004: 352). Therefore, the JWT is 'not completely adequate to the problem and phenomenon of war' (332).

In the absence of standards that ultimately aim to avoid the use of force, the JWT seems to continue to encourage the legitimation and entrenchment of the use of war by states. The basic argument here is that by trying to make tame and civilize war, we also contribute to its permanence. In other words, international 'legal efforts to regulate war have often come to sanction the behaviour they were ostensibly designed to prevent' (Jochnick and Normand 1994: 51, 58). This sets up a tension or a feedback loop where war is further defended on the grounds that it can be made just or fought humanely. Jochnick and Normand claim that 'the laws of war have been formulated

deliberately to privilege military necessity at the cost of Humanitarian values. As a result the rules of war have facilitated rather than restrained wartime violence' (1994: 50).

The liberal cosmopolitanism of Moellendorf et al. is not exempt from the charge that 'the rule of law helps protect the entire structure of war-making from more fundamental challenges' (Jochnick and Normand 1994: 58). Liberal cosmopolitanism gives licence for liberal interventionism, because there is a *prima facie* case for war whenever there exists a society with an unjust basic structure. Likewise, Buchanan and Keohane (2004) offer an institutional cosmopolitan proposal for a regime, which makes preventive intervention in cases of massive violations of basic human rights conditional on a higher degree of cosmopolitan accountability. The aim of this model is to provide cosmopolitan elements which update Just War thinking but which also improve upon it by granting human rights priority over sovereignty. However, the rider that comes with Buchanan's and Keohane's argument is that liberal states will have special privileges as a result of their higher degree of internal legitimacy. The problem here is that not only does this invoke a hierarchical conception of international order (Reus Smit 2005) but also that it continues the same trajectory of the JWT by further institutionalizing the right of war. Buchanan and Keohane share a relatively sanguine view of the role and legitimacy of force in international life. So long as decisions to use force are reached through a specified procedure, and its use is limited by ethical constraints, the use of force is both normatively right and practically effective (Buchanan and Keohane 2004: 82).

These criticisms reveal the differences between Kantian and liberal (Rawlsian) cosmopolitanism. The Kantian claim is that, by legitimating war and its associated roles, the JWT serves to perpetuate war not limit it. Specifically, the JWT does not envisage a means to work for perpetual peace or to make war obsolete. In so doing, the JWT continues to provide a justification for warfare itself and not just individual wars.

Returning to Kant's perpetual peace, we recall that he argued that war presented a basic violation of the categorical imperative because it reduces people to the means of others' ends and prevents the exercise of universal freedom. In this light, the cosmopolitan aim is to make warfare impossible. Putting it differently, the aim of cosmopolitan theory is perpetual peace, which is not just a break in the cycle of violence but an end of it. The liberal cosmopolitan theorists who grapple with the problem of Just War have in many cases forgotten or denied this purpose. The goal ought not to be that of making violence and war more acceptable, but to see it ended. If war was seen

as basically unjust and a problem to be eradicated, then it would generate different outcomes. The Kantian solution was to create peace through the example of the pacific federation, not through force or conversion (Kant 1795/1983).

Anthony Burke argues that the JWT needs to be replaced by the ideal of 'ethical peace', which works not to limit strategic violence but eradicate it (2004: 349). Ethical peace is more in keeping with Kant's moral vision because it 'imagines a universal moral community in which no ethical obligation can be traded away in times of emergency, and no humans can be put in mortal danger so that others may be safe' (Burke 2004: 333). The central clauses of the JWT would need to be rethought so as to facilitate this vision and not the vision of 'just' war. The value of ethical peace is not restricted to *jus ad bellum* but includes the *jus in bello* principles. In this context, the bar for acceptable violence needs to be raised so that the law of double effect no longer applies and proportionality is rejected, meaning that all 'avoidable death and suffering are condemned and prosecuted' (Burke 2004: 344). An account of ethical peace would be informed by a more robust cosmopolitan harm principle which would 'declare the illegality of *avoidable* harm' (Burke 2004: 551). For instance, in the case of the January 2009 Israeli attacks on the Gaza strip (and the Hamas attacks on Israel), ethical peace would have made such an action impossible without a clear case that it was necessitous, and not just prudent or expedient. This argument is also consistent with the feminist ethics of care which would seek to raise the bar so that any actor seeking to use war for political purposes would be accountable for *all* the harm they cause (Sjoberg 2006).

Following the line of argument suggested at the conclusion of the last section, a Kantian approach to the JWT would posit only a right of self-defence as just cause. Self-defence allows states and communities to defend their autonomy against violence but also to come to the aid of the 'innocent' victims of aggression abroad. Thus, humanitarian intervention should be understood as a defensive rather than an aggressive just cause if undertaken in this limited way. Such a formulation prevents the abuse of the JWT by those wishing to justify wars of conquest or liberal reform, while still allowing a cosmopolitan response to needs of foreign victims.

Conclusion

This chapter has discussed the content and purpose of the JWT from both cosmopolitan and pluralist positions. It has demonstrated the

contradiction that lies at the heart of the pluralist account of Just War and international ethical life and demonstrated that this contradiction can only be resolved by employing a cosmopolitan framework. At the same time, while states may use the JWT to justify a variety of actions, Bellamy is most likely correct that the JWT as it is most commonly interpreted provides little ammunition for states to wage aggressive wars. In this way, the JWT is compatible with cosmopolitanism. However, this chapter has also demonstrated that liberal cosmopolitanism as offered by Moellendorf and Caney remains insufficient from a Kantian perspective because it opens the way for wars of liberation and this implies at least a continued legitimacy for interstate war as long as cosmopolitan goals are upheld.

At the same time, critiques of the JWT demonstrate that higher thresholds should be set to further constrain the use of force and seek to find a way out of the cycle of legitimating and entrenching war. Thus, the JWT provides many useful ways of thinking about the ethics of war but it does not exhaust them. To be truly consistent with a cosmopolitan ethics, and indeed with the pluralist concern with cultural autonomy, all communities must be able to be secured from the threat of arbitrary violence from outsiders and domestic sources. The rights of communities and individuals can only be guaranteed when war itself has become illegitimate.