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JUST WAR IN THE TWENTY- FIRST CENTURY



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A critical analysis of Michael Walzer's just war theory
in light of the changing face of war

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Preface

In 2002 the great director Roman Polanski presented to the world his newest film, the masterpiece *The Pianist*. No other single work of art would have as much influence on my development as a student of philosophy. Without that film you may not have been reading this work you are reading now. The film revolves around the life of the Polish-Jewish pianist Wladislaw Szpilman during the years of World War II. Confronted with the horrors of the German invasion of Poland, the Warsaw ghetto and the Holocaust, Szpilman finds his only solace in music and though his play inspires others to keep hope as well. A beautiful picture is given of the terrible cruelty of war, but at the same time of the ability of humans to cope with, resist and overcome such horror.

The film sparked in me a philosophical interest in the concept of war. More specifically, I became concerned with the ethics that shape our decisions about going to war and how to fight it. What could possibly justify the terrible thing that war is without going against every possible common sense? I found many answers in the tradition known as *just war*, especially in the contribution philosopher Michael Walzer made to that tradition. His work became the centrepiece of my philosophical exploration of the ethics of war. The text you are now reading is the final result of that exploration.

Even though Walzer managed to give many answers, his ideas gave rise to equally many questions about the influence contemporary characteristics of war have on the ethics we use to judge it. The further I came in my investigations, the more appreciation I developed for Walzer's thought, but also the more I realised that if it was to be used in the future, it had to be updated to reflect the contemporary face of war. This set the stage for the dual aim of this text. On the one hand I wanted to clearly restate and critically analyse Walzer's thought on war. On the other hand I wanted to review it against the backdrop of the empirical reality of present-day warfare and find out how it could be strengthened to reflect that reality. Hopefully I have succeeded in these efforts, but that I will leave up to you, the reader, to decide.

As goes for many works of scholarship, they are rarely the product of one person's mind alone. I am first and foremost indebted to my parents, as this work would never have been possible without them. They enabled and encouraged me to pursue my intellectual interests without the need to constantly keep in mind the immediate impact this would have on my career. Moreover, they always showed an interest in the progress I made and gave me that little push I needed when I felt like I was never going to see an end to the project.

I am also very grateful to the critical and constructive supervision of my work by prof.dr. Hans. Achterhuis, dr. Tsjalling. Swierstra and prof.dr. Jaap de Wilde. These three people have invested a tremendous amount of time, energy and knowledge in helping me write and improve this text. Despite his busy schedule, Hans would always make time to discuss a new idea I had picked up or provide me with new directions of inquiry when I got stuck. The discussions with him were among the most

inspiring parts of the work I have done. Tsjalling lent me his wonderful talent for logical analysis and structuring arguments, enabling me to put forward my ideas in a more lucid and compelling way. Jaap allowed me to tap his vast knowledge of international relations, ensuring that what I said actually made sense outside of the theoretical sphere of philosophy.

Finally I want to thank all my friends, relatives and colleagues for the wonderful and useful ideas they gave me and for making my work much more pleasant than it would have been without them. Studying philosophy can be a lonely enterprise, but the warm environment these people provided me with made that it never felt like I was doing things alone.

Enschede, the Netherlands

June 5, 2007

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Chapter 1 - Introduction

On October 7, 2001, American and British military forces launched an aerial bombing campaign against targets in Afghanistan. The bombings marked the beginning of the United States' worldwide 'War on Terror' and of a still ongoing armed conflict in Afghanistan. The immediate reason given for the bombings and for the ensuing war, were the terrorist attacks against the World Trade Centre and the Pentagon on September 11 of that same year. Afghanistan was accused of harbouring Al Qaeda terrorists, most notably its leader Osama Bin Laden, and of facilitating its training camps. Interestingly, the Afghan army itself had never attacked any U.S. targets, nor had the Taliban Government declared war on the U.S. For many people this raised the question whether it was right to punish the Afghan regime for acts committed by an international terrorist network. At the same time fears were raised that if nothing was done, this would give terrorist-organisations a free pass to commit war-like acts and be sheltered from repercussions behind the borders of sympathetic or rogue states.

Since the beginning of the Afghanistan War it has brought forward numerous occasions that have shocked the international community. According to Amnesty International, the displaced but resurgent Taliban have committed numerous war crimes against civilians, including abduction, murder and suicide bombing. The U.S. forces have not been immune from accusations either. Multiple sources confirm that the C.I.A. has used methods of torture against alleged terrorists. Many suspected Al Qaeda and Taliban operatives have been deported to the American-run detainment camp on Cuban soil, Guantánamo Bay, without ever having received due process. On March 4, 2007, at least twelve civilians were killed and thirty-three wounded by indiscriminate U.S. violence in a response to an earlier suicide bombing attack. Under the circumstances of extreme pressure, violence and desire for survival that are characteristic of war, how are we supposed to judge such actions?

The above cases show that it is by no means easy to make sound moral judgments about war. Yet if we wish to prevent war or at least reduce its excesses, we need more than just voice our sentiments in the hope that someone will heed them. We require an articulate ethical theory that helps distinguish why certain wars are and others are not allowed; why some practices can and others cannot be condoned. One powerful theory that can help us make moral judgements about war is known as *just war theory*. It stems from a long tradition and finds its best known contemporary advocate in Michael Walzer. With *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977), Walzer has written a classic text that for many has become *the* statement of just war theory. However elegant this text may be, though, it was written in 1977 and much has changed since. The wars Walzer devotes most attention to, World War II and Vietnam, were already quite different from the Napoleonic wars or the American Civil War. Those in turn were something else entirely than the wars St. Augustine

knew when he first wrote in the just war tradition. It is not unreasonable to hypothesise that the wars we see today, at the beginning of the 21st century, are not the same as those of the late 1970's.

If that indeed would be the case, it also becomes questionable how accurate Walzer's moral theory still is at present date. Like all moral theorists, Walzer had to make certain empirical assumptions about the phenomenon he was reflecting upon. For example, a discussion of who may legitimately be harmed on the battlefield requires assumptions about the actors one will encounter on the battlefield in the first place. The problem with such assumptions is that they are at least partly dependent on the time period in which they are made and on the state of affairs at that time. Once the assumptions underlying an ethical theory are no longer true, the theory itself may be due for a revision as well. This is especially problematic for a just war theory. Within military ethics, the tradition of just war has always occupied a middle position between political realism and more idealistic positions such as pacifism. It tries to prevent and limit warfare, but at the same time admits that sometimes war is necessary. Such a theory can neither rely on realism's scientific appeal nor employ the ideological force of pacifism. For the alternative of just war to be convincing, it needs to demonstrate its adequacy in solving the moral dilemmas posed by the empirical reality of its time.

In the past three decades much has changed. The Cold War has ended and the Soviet Union has fallen apart into several smaller states. New types of actors have arisen on the international stage. Global communication and transportation enable the coordination of acts of war in locations thousands of miles apart. The development of precision weaponry and unmanned aircraft has changed the face of a battlefield. The increased complexity of battles and weaponry has brought forth more skilled and intelligent soldiers. The list does not end here, nor were it likely to remain fixed if it did. The point is to illustrate that contemporary warfare differs from the kind of warfare that existed when Michael Walzer first wrote his theory of a just war.

1.1. The central problem

The changes in the characteristics of warfare, some of which are engendered by technology, give reason to question whether just war theory, as Walzer established it, is still—or indeed ever has been—accurate for judging contemporary armed conflict. If not, it is worth looking into the directions it might take to better reflect the present-day reality of war. In this thesis I will try to accomplish this through answering the following main question:

How does Michael Walzer's just war theory stand up to some of the salient developments that have shaped warfare in the early 21st century?

Answering this question requires a number of subquestions to be dealt with. I have studied the following questions and will discuss each one in a separate chapter:

1. *What is Michael Walzer's view of a just war?*
2. *To which immanent criticisms is this view susceptible?*
3. *Which criticisms on Walzer's view are brought up by the empirical state of affairs of 21st century warfare?*

In the concluding chapter I will try to answer the main question, using the answers found to the subquestions. To do some more constructive work than just criticise Walzer's thought, I will give some suggestions for improving on the just war project by answering a fourth question:

4. *Which revisions in just war theory are required to respond to the criticisms encountered?*

1.2. Outline

My inquiry contains both descriptive and normative, both analytical and speculative aspects. The first question aims to clearly restate Walzer's thoughts on just war. I will answer this question in chapter 2, drawing on the text of *Just and unjust wars* (2000) and on some of Walzer's later essays (1982; 2004). As Walzer's theory is part of a long standing *just war tradition*, it is only logical to place it within the context of this tradition. Ever since Suarez' contribution to the tradition in the 16th century, separate concern has been given to the justification of a war, known as *jus ad bellum*, and the justness of its conduct, known as *jus in bello*. The logical independence of the two was proposed by Christian Wolff in the 18th century and is also an important notion in Walzer's writing (Sharma, 2006). Although I will discuss the merit of this strict distinction in chapter 3, I will use the two separate categories to structure my argument throughout the chapters regardless of its merit. Hence the outline of Walzer's work in chapter 2 will be given separately for *jus ad bellum* and *jus in bello*, as will the critiques in subsequent chapters.

In chapter 3 I will answer the second question. This means that I will subject Walzer's theory to a critical analysis. In this effort I will draw upon a number of secondary texts (Coady, 2004; Lackey, 1982; Orend, 2000; Sharma, 2006).

The third question is partly empirical, though philosophical interpretation is required to judge the relevance of empirical findings for the moral perspective. To find the relevant characteristics of warfare for reviewing Walzer's theory, I will develop a framework that analyses war in terms of three structural parameters of the fighting parties: political, socio-economical and technological structure (see figure 4.1 on page 41). Using these parameters, the consequences of empirical developments in warfare that are relevant to *jus ad bellum* and *jus in bello* can be mapped out. The background of the

framework will be explained at the beginning of chapter 4. Based on the picture that arises from the analysis using the framework, I will subject Walzer's theory to further criticism in the rest of chapter 4.

In chapter 5 I will start by drawing conclusions to the thesis through answering the main question. After that I will answer the fourth question and provide some more speculative thoughts on possible improvements of just war theory.

1.3. Justification of the project

For an applied ethical theory to be effective, it needs to be convincing for the actors involved in the practice it concerns. In contrast with a scientific theory, the ethical theory cannot rely on empirical testing of its *predictions* for its success. Instead its *prescriptions* should have sufficient appeal to people's moral intuition for them to accept the theory, albeit after critical questioning of its concepts, its assumptions and its arguments. The more accurate these are considering the current practice, the more convincing the theory will be. If the empirical assumptions that Walzer uses for his just war theory no longer correspond to the reality of war, this undermines the credibility of his theory as a whole. To maintain just war theory as a serious ethical alternative, it needs to accurately reflect the state of affairs in the 21st century.

Next to this social importance, the proposed study has scholarly relevance. Careful dissection of Walzer's work against the background of just war theory provides more insight into his thought. As many scholars take his work as an authoritative statement of just war theory, a critical evaluation of the soundness of his arguments is worth conducting. Moreover, understanding the assumptions that underlie contemporary theories will enable future thinkers to articulate more clearly what they are writing about and to adapt their own theories to changes in warfare as well. Finally, I hope my proposals for adapting just war theory will give rise to new dialogue and as such develop the tradition further. The combined social and scholarly relevance made the research worth pursuing. This text is the result of that work.

Chapter 2 - Just and unjust wars

The focus of this thesis is on how the empirical reality of the way wars are being fought affects the ethics we use to judge them. To evaluate the moral problems of war I make use of an ethical theory known as *just war theory*. Although this theory comes from a long tradition, dating back to the Roman Republic, I will mainly base my analysis on its most prominent contemporary advocate: Michael Walzer.¹ In *Just and unjust wars: a moral argument with historical illustrations* (1977), Walzer provides a modern statement of the just war theory, that is, a statement drafted towards the end of the twentieth century.

After its original publication, the text has seen two new editions, each with a new preface. The first appeared in 1992, with the Gulf War fresh to memory; the second in 2000, after the Kosovo war and the Srebrenica genocide, but with minimal reference to either. Remarkably, nothing in the text has been changed or updated, except for the added prefaces. Apparently Walzer believes the changes in war do not call for a change in our ethical standards. Indeed, in *Arguing about War* (2004) he confirms that his ideas have undergone no radical changes since their conception. I *do* think that a revision of just war theory is needed to reflect the changes in the practice of war, but to sustaining that claim I will devote substantial space in chapter 4.

First, I like to turn to the question why just war theory is worth our attention in the first place. After all, there are many viable alternatives for making ethical judgments in war: political realism, pacifism and of course the general ethical theories of utilitarianism, deontology and virtue ethics. The last three may have some useful insights to offer, but war confronts us with moral dilemma's that are too specific for these general theories to be directly applicable. Some problems may, for example, involve a range where human rights hold up, but at a certain point give way to utilitarian considerations. *Pacifism*, the idea that war is *never* justified, has a theoretical elegance, but is in reality hard to accept when facing an aggressor who does not subscribe to the same theory.

¹ The exact starting point of the tradition is debated. St. Augustine is often mentioned as the first major just war thinker (e.g. Sharma, 2006; Holmes, 1989). Some trace its origins further back to Clement of Alexandria or St. Ambrose (cf. Sharma, 2006, footnote 8). James Turner Johnson considers the tradition a synthesis between classical Greco-Roman and Christian values, with Aristotle, Cicero and Augustine as its founders (cf. Orend, 2005). Neff (2005) even argues that its roots date back as far as early Greek (in the West) and Chinese (in the East) civilization. While it is probably possible to find moral considerations in the earliest records of collective fighting, I will reserve the term *just war tradition* for that line of Western thought that, starting with Augustine, set the criteria for determining the justness of the waging of and conduct in war.

*Political realism*² is the most widely accepted competing theory—or more precisely, collection of theories—which states that no primacy of ethics exists in war. Wars are waged between states that will do everything to ensure their own survival and expand their power and since there exists no overarching authority on the international stage, there are no restrictions on the acts they will undertake (Dunne & Schmidt, 2005). Walzer himself makes a strong case against this view. We may often see states act ‘immorally’ to ensure their victory or dominance over another state. Our inclination to condemn such acts, shows that to some degree we have a shared moral vocabulary, with which we make judgements about acts of war. Our moral judgements may not always change the course of action, but at least it makes sense to talk about war in ethical terms (Walzer, 2000, 3-15).

This argument has grown in force over the years and will grow further still. As ever more states transform into democracies, the moral vocabulary of the public gains in significance for determining states’ policies when it comes to war. The rise of information technology ensures that people also have access to the information needed to base their judgements on.³ I think the best hope of limiting war lies in articulating the moral intuitions that people share and in showing how these would affect real-life decisions. Herein lies the strongest point to be made for just war theory. Most people would agree that war is a horrible thing that should be prevented if possible, but that there are some atrocities that should be resisted by force. Just war theory concerns itself with the questions of what those atrocities might be and of how far we are allowed to go in stopping them. It is an approach in which war is neither always accepted nor always rejected, but scrutinised along finer lines that make case-by-case decisions possible. This approach deserves to be developed along with the changing world of warfare itself.

Of all the accounts that have been made of just war theory, Michael Walzer’s elegant interpretation is the most widely used one at present. In this chapter I will provide a restatement of Walzer’s theory against the backdrop of the just war tradition. Section 2.1 gives a brief overview of that tradition, serving as an intellectual context for Walzer’s argument. Section 2.2 is concerned with the justification of going to war, also known as *jus ad bellum*. Section 2.3 introduces the distinction between *jus ad bellum* and *jus in bello* (the rules governing the conduct during war) and outlines Walzer’s views on the latter.

² I use the term *political realism* here instead of *just realism*—as it is often called in works of international relations—to distinguish it from other types of realism common in works of philosophy, such as *metaphysical realism*.

³ The opposite can be argued as well. Although technology makes more *data* available to a larger public, this does not mean the public will be better *informed*. The process of selection and interpretation will become even more important and those able to control this process, control the information people receive. Governments have the resources to control to a high degree the information that is sent to the media, especially in war, where access to the battlefield is all but impossible without the support and protection of the (government-controlled) army.

2.1. *The just war tradition*

Just and unjust wars is not an on itself standing piece. It is rooted in a *just war tradition*. This tradition was first given shape by catholic writers such as St. Augustine of Hippo, St. Thomas Aquinas and Francisco de Vitoria. On their ecclesiastical foundations subsequent writers, most notably Hugo Grotius, built a secular just war tradition (Mosely, 2004). Although Walzer uses the work of his ideological forefathers as a basis for his own thoughts, he intentionally omits most references to them. Instead he prefers to give force to his arguments by referring to more recent thinkers and to contemporary public convictions, as he believes these to be more illuminating on the present state of the moral world (Walzer, 2000, xxviii).

I will briefly cover the intellectual creations of Walzer's predecessors in the tradition, so that we can see where his own ideas differ. The notion of *just war* was encountered already in the Roman Republic. The Romans would only enter a war if it was for defensive purposes and after it had formally been declared. These requirements were hardly restrictive (otherwise it would have been difficult for the imperialist Romans to accept them); even the most remote hint at a threat posed by a people was reason enough to start a 'defensive' war against it. The formal declaration would be issued by sending a herald to the border, who would throw a spear into enemy territory and demand surrender by the enemy. If no response came—which was common, since the herald did not really seek parley with the enemy leaders—the Roman legions would set forth across the border. In later times, the herald would not even have to travel to the frontiers of the empire, but just throw his spear onto a site of hallowed ground in the city of Rome (Meijer, 2006, 48-51, 154-5). Although the Roman idea of a just war lacks the intellectual soundness of that of later writers, it shows clear signs of restrictive laws about starting a war.

The first scholar to give serious thought to the theory of a just war was St. Augustine of Hippo. In the *City of God* Augustine argues that a war is just if it is initiated for *just cause* and under *appropriate authority*. Just cause in the thinking of Augustine is the punishment of previous wrongdoing, either by the victim or by any other state. The appropriate authority is that of the state, which prevents individual men to start 'just' wars of their own accord. An interesting side-note is that Augustine distinguishes the soldier fighting for his own reasons from the one operating under the command of his king. The latter, even if fighting for an unjust cause, is innocent by Augustine's standards, provided his loyalty to his commander is indeed his motive for fighting (Holmes, 1989, 131-3). This gives us a taste of what Walzer would later call *the moral equality of soldiers*.

Another notion often ascribed to Augustine is the requirement that a state has the *right intention* for waging war. Yet Holmes contends that this notion remains implicit in Augustine's work and that what he really means is that a state has a *good motive* for war. The difference between the two is that one's *intention* is that state of affairs that one wants to bring about, while one's *motive* is the reason *why* one wants to do so (ibid, 135-7). The first theorist to explicitly elaborate on *right intention* as a

requirement for just war was St. Thomas Aquinas. Aquinas argued that there is a difference between those effects one *intends* and those one merely *foresees*. As war typically has both good effects (the justice sought) and bad effects (the killing of people), it can only be just if the good effects are intended and the bad are not. From this Aquinas derives the famous *principle of the double effect*, to which I will come back in section 2.3 (ibid, 148-50).

The requirement of right intention solves the problem of hypocrisy about just cause, but introduces another problem: it is possible for two sides to have right intentions, so could both be just then? In the sixteenth century, Francisco de Vitoria suggested a distinction between objective and subjective justice. While two sides in a conflict may believe they are fighting a just war—and thus both have subjective justice on their side—only one side can objectively said to be just, which is the side that has the just cause. We will see a trace of this thought return in Walzer, who, even though allowing only one party in a war to have justice on its side, does not condemn the other party fighting back.

The next major contributor to just war theory was Hugo Grotius, who emphasized the difference between legality and morality in war and identified natural law as the foundation of legality. More relevant to the present text is the eighteenth-century contribution by Emerich de Vattel. He proposed that, in a *legal* sense, we view a war as just on both sides if both have the authorisation of their sovereign and have conducted the appropriate formalities. In a *moral* sense, justice can only reside with one side, but allowing that side to claim special standing because of its justice would cause greater harm than it would prevent. As in a war typically *both* parties believe to have a just cause and there is no one to judge who is right, it is better for the sake of the effects of war to consider both sides to stand in their right. This is also reason for strictly separating the laws of going to war, or *jus ad bellum*, from those about the conduct of war, or *jus in bello*. After all, if two parties are *legally* in their right to fight a war, it would be spurious to allow one of them to use different measures because his cause is *morally* just (ibid, 151-5). The two principles that have become central to *jus in bello*, are that innocent lives never be taken directly and that harm inflicted is proportional to the ends sought.

Before discussing Walzer's version of just war theory, I would like to mention an additional four requirements of *jus ad bellum* that were clearly phrased by the United States Conference of Catholic Bishops in a 1983 pastoral letter, because they explicitly capture some thoughts that were present with earlier thinkers as well. 1. Because there may be at least some justice on either side of a conflict, *comparative justice* dictates that either party limits its means to achieve its objectives. 2. War is a *last resort*, when all peaceful alternatives have been exhausted. 3. There should be some *probability of success* when taking up arms. 4. The cost of war should be *proportional* to the good expected to gain from it (ibid, 164).

2.2. The crime of war (*jus ad bellum*)

Michael Walzer takes a somewhat different approach to just war theory than his predecessors. Instead of accepting war as an instrument of policy and seeking the right grounds for using it, he asks the question what is so terrible about war that we find it morally problematic. The answer is that “people are killed with every conceivable brutality, and all sorts of people, without distinction of age, sex or moral condition, are killed.” (Walzer, 2000, 22) If people were free to choose whether to get themselves into this predicament or not—as medieval noblemen were, for example—it would not be such a poignant problem. Yet this is typically not the case. Soldiers are often compelled to doing what they do through conscription, poverty or propaganda. Civilians are victimized without having anything to do with the conflict directly (although indirectly they very well may). Forcing people into this situation where they can be harmed and killed is wrong, which has led many to consider war a crime (ibid, pp. 25-8).

This interpretation of just war theory is a typical twentieth century one. The early just war thinkers mentioned in the preceding subsection held the view that war was an instrument, either of god or man, that could justly be used to punish some evil or enforce natural law. In the nineteenth century this view made room for a more legalistic approach; war was an instrument that could be used to further state interests and was legitimate as long as certain procedures were followed. This attitude broke down, however, with the horrors of World War I’s trench warfare; an evil this great could not rightfully be used to defend just any interest at the state’s expedience. A strong presumption against war arose and also took hold of just war thinking. First in the League of Nations Covenant, later in the Kellogg-Briand pact and the UN Charter as well, war was in principle outlawed, unless serious reasons existed that justified its use (Neff, 2005, 179-84).

2.2.1. Aggression

Since 1919, the crime of war is called *aggression* and in Walzer’s view it is the *only* crime in international society. Moreover, aggression is a *singular* and undifferentiated crime, that is, it cannot be committed in different degrees. The concept of aggression is quintessential to Walzer’s theory of a justified war. Although *war* and *aggression* are closely related notions, they are not identical. Aggression can best be described as ‘the bringing about of the condition of war’—or the interruption of the condition that Walzer calls *peace-with-rights*. Either aggression is answered with force, in which case the peace is interrupted, or it is appeased, in which case some of the rights or liberties of a population are forfeit (ibid, 51-3). The important thing here is that in Walzer’s view, there are more ways to interrupt peace-with-rights than just start the fighting, thus separating aggression from war.

Aggression is the one and only thing that can justify a war and it will always justify a war, according to Walzer. The war does not have to be carried out by the aggressor’s victim. On the contrary, the member states of international society have a moral obligation to enforce justice, even if this means getting involved in war themselves. Now such a war to repel, deter or punish an aggressor cannot itself

be a case of aggression. If that were to be so, any aggressive act could initiate an endless chain of aggression, each war justified by the one that preceded it. If a state goes to war with another state, either the other state has committed aggression and therefore the second state is justified in its actions, or the second state itself is an aggressor. It is impossible for *both* states to be fighting a just war (Walzer, 2000, 59).

Having established this, there must be a set of criteria to determine whether aggression has taken place or not. Historically, three conceptions of aggression have been used for this end. The first simply refers to the initiation of hostilities and is thus objectively discernible. Using this conception no real distinction between aggression and war itself would be possible. The second conception defines aggression as the *unjustified* initiation of hostilities and in doing so introduces a normative judgment into the term. The third expands this notion to include mere *threats* of hostility as well. This requires us to not only make a normative judgment whether certain hostilities are justified or not, but also an empirical judgment whether the possibility of such hostilities poses a sufficiently serious threat to call it aggression (Holmes, 1989, 159-63).

The third notion of aggression bears some risks in it, as it is easy to call *anything* that doesn't suit oneself a threat of hostility. The Roman *causae belli* discussed earlier were all cases of aggression by Roman standards, as they always claimed a threat of unjustified hostilities from an enemy people to exist. As Walzer himself adheres to this third conception of aggression, it is important to scrutinize the exact content he gives to it. This is easier said than done. Part of the reason *Just and Unjust wars* is such a compelling statement of just war theory is the method Walzer uses for exposing his theory. Instead of providing abstract moral rules and then 'proving' them using specific examples, Walzer starts his enterprise with the specific. He uses a casuistic approach, where each case is carefully considered and subtle nuances are applied. This way the theory of a just war gradually takes shape before the eyes of the reader, leaving him with insights that may be crucial for making his own judgements.

What Walzer typically *doesn't* do, however, is make an attempt to generalise the case. He definitely presents us with valuable ideas, which can be used in a virtue-like way of moral decision making, but it requires an effort to abstract from his examples to really put together an ethical theory. Because Walzer himself has already succeeded in putting forward a strong case-by-case account of just war theory, in this text I will try as much as possible to generalise, so that the theory may be tested on new cases of and developments in warfare. Of course, by definition I will lose some of the empirical richness of Walzer's own work, but I hope to make up for that in clarity and wider applicability. If we try to summarise Walzer's *causae belli* in a few basic categories, the following acts are considered to constitute aggression.

1. Invasions and physical assaults (Walzer, 2000, 62).
2. Threatening the territorial integrity or political independence of another state (ibid, 85). The threat must cover three things to count as aggression: “a manifest intent to injure, a degree of active preparation that makes the intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk.” (ibid, 81)
3. Massive violations of human rights, such as massacres. These are considered crimes against humanity and constitute aggression as well (ibid, 101-2). The difficulty here is to determine how much a violation of which human rights qualifies to bear this name. Walzer thinks that acts that “shock the moral conscience of mankind” (ibid, 107) justify humanitarian intervention and we may take this to be the criterion for establishing a case of aggression as well.

2.2.2. Just cause

A state—or other political community—may always defend itself against aggression and a violent response may be (morally) demanded from the international society as well. These acts do not themselves constitute aggression, as goes for a select number of other violent acts. The following cases are exonerated from being called aggression.

1. A state defends itself against aggression from another state (Walzer, 2000, 62).
2. An aggressor state is punished by its victim or by members of the international society to prevent future acts of aggression (ibid, 62).
3. A pre-emptive strike is made against a state that has the manifest intention to commit unjustified aggression, is making active preparations for it and cannot be dealt with at a later time without greatly increasing the danger (ibid, 81).
4. If a group of people within a state wants to secede from the present government and form their own state, this is generally justified. The group must constitute a substantial part of the population inhabiting the territory that is to form a new state, be committed to its cause and be able to determine the conditions of its existence (ibid, 87-8).⁴
5. A state offers assistance upon request by another established and legitimate government to control internal dissension, rebellion or insurgency. The qualifying criterion is that the insurgents have not shown to represent a distinct community; in which case they would gain a political sovereignty of their own and other powers should in principle remain neutral to their struggle (ibid. 96).
6. When two parties, which have established themselves as distinct communities, are fighting a war and another state assists one of the parties with men or material, other members of

⁴ Using John Stuart Mill’s terminology, Walzer refers to these criteria as the *self-help test*.

international society may counter that assistance by assisting the other side of the conflict. The counter-intervention may do no more, however, than restore the original balance of power; it may not ensure the victory of one of the warring parties (ibid, 96-101).

7. A state intervenes in another state where violations of human rights exist that are so terrible that the people suffering from them cannot reasonably be considered a self-determining political community (ibid, 90).

These exceptions to the basic case are, in other words, the *just causes* to wage war. In his discussions of historical examples, Walzer seems to find the existence of a just cause sufficient reason to justify war. When the war is fought not as a punishment, but on behalf of the victimised people in some state, as it is in the case of counter-intervention and humanitarian intervention, he also requires that the interests of the people on whose behalf the war is fought are not harmed additionally by the benevolent power (ibid, 104). This may be taken as the requirement of a *right intention*, although only its practical manifestation matters to Walzer. Also, when the fighting concerns a certain territory, the warring power supported by the people living there is the one that stands in it right (ibid. 55-8). We can interpret this as a form of *legitimate authority*, which can only be obtained through popular support.

2.3. The conduct of war (*jus in bello*)

The theory of just war does not end with the principles of *jus ad bellum*. Even if a war is *justified*, it is not a *just war* if it is fought in an unjust manner. The rules that govern the conduct of war form the domain known as *jus in bello*. In this section I will outline and criticise Walzer's conception of those rules, just as I did with *jus ad bellum* in the previous section. The distinction between the two types of rules will be used to structure my argument throughout the chapters to come.

2.3.1. Separating two types of rules

Walzer, like those who have gone before him, advocates a strict separation between *jus ad bellum* and *jus in bello*. This means two things: the justification of the war and the justification of the means are independent from each other; people involved on either side of the war have the same rights, irrespective of the cause they fight for.

Walzer starts with the latter point and derives from this the former. In most wars "the state decrees that an army of a certain size be raised, and it sets out to find the necessary men, using all techniques of coercion and persuasion at its disposal. And the men it finds, precisely because they go to war under constraint or as a matter of conscience, can no longer moderate their battles; the battles are no longer theirs. They are political instruments, they obey orders, and the practice of war is shaped at a higher level." (Walzer, 2000, 28-9) In other words, soldiers typically cannot choose the wars they fight—nor

often whether they fight at all—but nonetheless have the duty to fight them and therefore cannot be blamed or held responsible if they fight for an unjust cause. Thus soldiers on either side of a conflict are in a similar position from a moral point of view, which endows them with the same rights (ibid, 35-7). The same holds true for civilians, although their rights are different than those of soldiers (ibid, 260). If soldiers and civilians on either side of a conflict have the same rights, irrespective of the cause that side stands for, then by necessity the rules of war that specify those rights must be independent of the justification of the war.

Asserting the equality of both sides in a war does not yet limit the practices allowed to fight it. After all, we would perfectly satisfy the equality criterion if we were to say that soldiers on all sides could do anything necessary to achieve their military objective. Walzer pays tribute to the tradition he writes in by imposing limits on the acceptable wartime behaviour of soldiers and civilians. These limits have a foundation both in utilitarianism and in human rights. The utilitarian claim is that, if we looked at all wars as one long continuum, people would be better off if their means were restricted. Though any single war may benefit from the abolition of limitations in order to bring it to a speedy end, the continuum of all wars as a whole would not (ibid, 130-2).

The human rights argument is more profound and this is the primary basis for Walzer's theory of fighting justly. It asserts that adhering to certain rules of war is not a matter of benevolence or utility, but of respecting people's rights. These rights can be summarised as follows: "no one can be forced to fight or to risk his life, no one can be threatened with war or warred against, unless through some act of his own he has surrendered or lost his rights." (ibid, 135)⁵ We will remain in the dark about the origins of these rights, as Walzer explicitly refuses to look into the matter and simply assumes their existence (ibid, 54).

Drawing on human rights, Walzer proposes a set of rules to govern conduct during war, in which he distinguishes two clusters. The first deals with the question *when* and *how* soldiers may kill. This question receives no further attention in the book, as Walzer does not find the answer crucial to war as a moral condition. "Rules specifying how and when soldiers can be killed are by no means unimportant, and yet the morality of war would not be radically transformed where they to be abolished altogether." Additionally, "they are always susceptible to the transformations brought about by social change, technological innovation, and foreign conquest." (ibid, 42)

The second cluster of rules is concerned with the question of *whom* soldiers may kill in time of war. This cluster is less susceptible to changes over time and likely has some underlying principle that places certain classes of people outside of the legitimate targets of war. These classes correlate in some way with those who are not engaged in the business of warfare (ibid, 41-3). To this cluster

⁵ Notice the similarity in structure of Walzer's *jus ad bellum* and *jus in bello* arguments. The latter treats the individual as the former treats the state. This can be explained by the fact that Walzer derives the rights of political communities ultimately from individual rights (Walzer, 2000, 53-5).

Walzer devotes a substantial part of his book, with attention for the basic delineations between those susceptible to and those immune from harm, as well as for special cases that are morally complicated. Just as I did with the theory of aggression, I will try to summarise Walzer's case-by-case approach in a number of rules.

1. Regardless of the causes for which different groups fight in a war, the soldiers involved on all sides are to be considered moral equals (ibid, 36, 127).
2. Killings in war should be both necessary for and proportional to war's ends (ibid, 130).
3. Soldiers lose their rights to life and liberty, but gain the right to kill enemy soldiers and the right of 'benevolent quarantine' upon surrender (ibid, 36, 46).
4. Non-combatants are *prima facie* inviolable targets. Civilians are to be considered non-combatants, except when they are what Walzer calls *munitions workers*, engaged directly and actively in the production of the things soldiers need to fight (ibid, 145-6).
5. Non-combatant deaths resulting from acts of war are acceptable if justified by the *principle of the double effect* (i.e. the act is legitimate and has a good direct effect, the deaths are unintended and proportional to the good effect) and every measure has been taken to minimize foreseeable civilian casualties (ibid, 152-6).⁶

2.3.2. Special topics

Aside from the basic case for the rules of warfare, Walzer covers a number of special topics. I will not mention all of them here, as in some cases the conclusion simply is that the basic case holds up. For example, when discussing terrorism, Walzer finds that the random killings of civilians to coerce one's enemy into submission is immoral, as the citizens targeted are not actively involved in the war business and their deaths are not unintentional (ibid, 197-206). Although the chapter on the subject in *Just and Unjust Wars* is worth reading for Walzer's eloquent case discussions, in the end the rules of war do not seem to have changed. Likewise, Walzer condemns sieges in which citizens of a besieged city are not offered free exit, assassinations of government officials, reprisals and nuclear anti-city attacks (and the threat thereof) (ibid, 160-170; 198-203; 207-22; 269-83). The special cases in which the rules *do* have to be bent are *guerrilla warfare* and something which Walzer calls *supreme emergency*.

⁶ Walzer's statement of the *principle of the double effect* differs from the way it is typically formulated, as for example by Uniacke (1998). She states that an act is justified by the principle if its bad effect is unintended, not disproportionate to the intended good effect and unavoidable. Another requirement both Uniacke and Walzer omit, but which is usually included, is that the good effect is a direct result of the act under consideration and not a result of the bad effect (McIntyre, 2006)

Guerrilla warfare is a type of warfare where the fighters on one side disguise themselves as ordinary civilians.⁷ Most of the time they are perfectly undistinguishable from other civilians among whom they live, but at any moment they may take up their arms and attack, only to quickly disappear again afterwards. This creates two morally problematic classes: that of the guerrilla fighters and that of the civilians among whom they hide themselves. To start with the first, the difficulty is to determine whether the guerrillas are to be considered soldiers or civilians. If they are soldiers, they cannot be punished for their attacks and should be offered quarter upon surrender; at the same time, they become liable to being shot at any time if necessary. If, on the other hand, they are civilians, they have no right to do the things they do and should receive their due punishment under criminal law. While the guerrillas themselves try to take the best of both worlds, we cannot accept this in our judgements (Walzer, 178-9).

Walzer resolves the issue by considering guerrilla fighters as ordinary criminals when they dress up as civilians. A soldier should be clearly identifiable as such and openly bear his arms, if he wants to make a claim to his war rights *as a soldier* (ibid, 182-4). As long as the guerrillas do not disguise themselves as civilians *while they fight*, but only use villages as places of retreat where the villagers protect their identity, they have the same rights ordinary soldiers would have. It is precisely the support from a population, organised in the form of a state in most cases, which makes a soldier a political instrument that is not responsible for the wars it fights. The same support exists for guerrilla fighters, signified by the active protection the civilian population offers them—although it is not always easy to ascertain whether this protection is given voluntarily. The popular support turns guerrilla-fighters *de facto* into soldiers, provided that they are at least identifiable as such while engaged in combat (ibid, 184-6).

While civilian protection actually emphasises the soldier-like nature of guerrilla fighters and endows them with the rights that come with it, it also changes the nature of the civilians providing the protection. The defining characteristic of a civilian, rendering him morally immune to harm, is that he stands aside from the war business. Yet the civilians supporting and providing cover for guerrilla fighters *do* get involved in the war. Still, Walzer maintains that their civilian rights remain in place. Their liberties may be restricted and some measures may be taken to let the anti-guerrilla soldiers try to isolate their enemies, but neither their rights nor their lives are forfeit (ibid, 186-8). Only when

⁷ Walzer comments that guerrillas in fact can take on a double disguise. The first disguise is simple, where the fighters 'hide' themselves in civilian attire, in order not to be immediately identified as a threat. The second disguise is more complicated and exists only when the guerrillas operate in a country that has surrendered to its invaders. Through the act of surrender, the country's officials have agreed to offer enemy soldiers benevolent quarantine, where in return the enemy can relax its rule and allow public life to pick up its normal course. Thus the soldiers who are stationed within the country no longer suspect an attack and will likely let down their guard. This makes the political disguise of surrender even more effective for the guerrilla fighters than the physical one (Walzer, 2000, 177).

villages are directly used as fire-bases by guerrilla warriors and the villagers do neither flee nor drive out the guerrilla's, then they effectively choose to turn their village into a battlefield; for the soldiers under fire cannot be expected to sit idly while being attacked. The civilians in a *battlefield-village* do not become legitimate targets of war, but their deaths are more easily justified than those of ordinary civilians (ibid, 191-3).

The concept of *supreme emergency* is perhaps the most criticised notion from the entire book (Coady, 2004, 777-8; Holmes, 1989, 167-75; Lackey, 1982, 541-2; Orend, 2000, 127-33). The case Walzer wants to make is that a situation may arise in which a state is allowed to drop the restrictions imposed by the war convention and to adopt the rule of *necessity*, which basically implies: 'anything goes'. Such a situation would be a *supreme emergency*. Walzer rightly realises that war always has the air of emergency around it, where people run great risks and winning seems vitally important—otherwise people would not be risking their lives in the first place. Yet "there is a fear beyond the ordinary fearfulness (...) of war, and a danger to which that fear corresponds, (...) that may well require exactly those measures that the war convention bars." (ibid, 251). Of course this description needs to be elaborated, as we want some guidelines to determine when exactly this kind of fear would arise.

Walzer asks that in order to speak of a supreme emergency, two conditions be met.

1. The danger to a state (or other political community) must be very serious.
2. The threat of that danger must be imminent.

Both criteria are subject to interpretation and should be carefully examined. Walzer himself provides the case of Nazism as an example of a danger so serious that it—when also an imminent threat—justified breaking the war convention. The reason is that Nazism "challenged [the highest values of international society] on a grand scale", those values being "the survival and freedom of political communities—whose members share a way of life, developed by their ancestors, to be passed on to their children." To avert this challenge it might be acceptable to harm a few innocents, for "it is possible to live in a world where individuals are sometimes murdered, but a world where entire peoples are enslaved or massacred is literally unbearable." (ibid, 254) Although Walzer stresses the importance of imminence before a threat can be called a supreme emergency, he does not discuss when a threat may be considered imminent. Finally, the measures allowed in case of a supreme emergency must be a last resort; alternatives must have been exhausted already (ibid, 254-5).

If we incorporate the special cases discussed in this subsection into Walzer's theory of *jus in bello*, we obtain a classification of people, specifying to what degree different categories of people may be subjected to harm or risk during war. The more involved someone is, the more likely he may legitimately be harmed. Table 2.1 gives an overview of the four classes of violability.

Category	Involvement in fighting	Violability
Soldiers	Posing a direct threat	Can be attacked and killed if necessary and not disproportionate
Civilians protecting actively fighting guerrillas	Enabling a direct threat	Cannot be targeted <i>as civilians</i> , but can more easily be killed in the heat of battle than ordinary civilians. ⁸
Munitions workers	Posing a distant, indirect threat	Can only be killed if active at work and with no alternative available
Other civilians	Not posing a threat	Are immune, unless harm is justified by the <i>principle of the double effect</i> and every measure is taken to reduce it, or if there exists a case of <i>supreme emergency</i> .

Table 2.1: Four levels of violability

2.4. Conclusion

In this chapter I have provided an overview of Michael Walzer's just war theory. This highly valuable contribution to the ethics of war provides a strong alternative to political realism and pacifism, by appealing to both the notion that war is horrible and should be prevented and the notion that some terrible cases call for a forceful response. The theory proposes a strict separation between the justification of a war and the rules of fighting it, drawing on the moral equality of soldiers and civilians on both sides. Since soldiers on all sides in an armed conflict are in fact *victims* who do not make the wars they fight, their rights and duties exist irrespective of the cause they fight for. Moreover, the rules about the circumstances under which it is justified to wage a war are logically independent from the rules specifying the allowable conduct by different actors during a war.

The main argument to justify a war is to defend against, punish or in some cases prevent an act of *aggression* by another state. Aggression is defined as the interruption of a condition called *peace with rights*. Typically there must exist material evidence that a state has breached this condition in order to justify a war against that state. If the threat of aggression is serious and imminent enough that further delay would harm the safety of the threatened country, this suffices as a *just cause*. Also the gross violation of human rights by a state's government is a cause for war, even if no threat to other states exists. Forceful action against the aggressor state, i.e. war, can be taken both by the attacked state itself and by other members of the international community. Contrary to his ideological predecessors, Walzer hardly pays any attention at all to other requirements that would make a war just, such as that it be waged under legitimate authority and be proportional to the ends sought.

⁸ The civilians protecting guerrillas who use their village as a fire base are not legitimate targets of war, which is why they cannot be attacked *as civilians*. There may be much uncertainty, however, which people residing in the village are guerrillas and which are just villagers. In such cases, the civilians can be targeted *as unknown hostiles* without committing a moral obscenity (Walzer, 2000, 192-3).

Drawing on *human rights*, Walzer proposes a number of rules for the conduct of warfare. Once the fighting has started, civilians have a *prima facie* inviolability from being harmed. Their deaths can only be justified as *collateral damage*, using an amended version of the *doctrine of the double effect*. Alternatively, if they are not entirely uninvolved in the war business but work as *munitions workers* in war factories, they may legitimately be killed in an attack against those factories. In case of guerrilla warfare, civilians protecting guerrilla fighters lose their rights once their village has turned into a war zone and they have been warned in advance. As opposed to civilians, soldiers are not immune from harm, but their deaths must be both necessary and proportionate to the military goal sought if they are to be justified. Soldiers that have surrendered gain the right of *benevolent quarantine* by their enemies. Walzer considers one special case which he calls *supreme emergency*. When the existence of a political community is imminently threatened by a horrendous evil, it may set aside the rules of war to secure its victory.

Altogether, Walzer's theory of a just war constitutes a valuable instrument for moral decision making about and in time of war. That is not to say that it is not liable to criticism. In the following two chapters I will subject his ideas about *jus ad bellum* and *jus in bello* first to immanent and then to empirical criticism.

Chapter 3 - Walzer's theory under scrutiny

In the previous chapter I provided a brief overview of the just war tradition and against that background laid out Michael Walzer's theory of a just war. In the following sections I will first discuss the separation between *jus ad bellum* and *jus in bello* and then subject the to criticism content Walzer gives to either of them in separate sections.

3.1. The rules' foundation

I will start my discussion at the strict separation of *jus ad bellum* and *jus in bello*. I think Walzer makes a strong point in claiming the moral equality of soldiers. Throughout history soldiers have mostly fought for reasons other than their vigorous support of the cause that justifies their war. Even when they *did* fight for that cause, propaganda or financial gain typically played a major role in motivating them. Thus soldier are drawn into a war and fortune decides which side they are on, which would provide little reason to endow soldiers on one side with different rights than those on the other.

3.1.1. The moral equality of soldiers

Both Lackey (1982) and Orend (2000) have criticised the *moral-equality-of-soldiers-thesis*. Lackey primarily objects to the idea that soldiers are liable to be killed by other soldiers, just because of their job and regardless of the cause they fight for. He asserts that "a possessor of a moral right cannot lose that right unless he does something immoral to lose it, and unless we endorse complete pacifism we cannot hold that a person is doing something immoral merely by becoming a soldier." (Lackey, 1982, 541) The thought underlying this statement seems to be that an individual's right (not to be killed) is inalienable, except if the individual does *something immoral*. The error here is that not only doing something *immoral* can deprive an individual of his rights and that not anything immoral will deprive him of *all* his rights. There are many cases where people can gain or lose rights by morally sound choices,⁹ as are there many instances of immoral behaviour that will only deprive their perpetrator of

⁹ For example, under Dutch labour laws, a company worker who is also a member of the employees' council has a right not to be fired under the same circumstances where other workers could lose their job. The reason is that company executives are thus denied the possibility of blackmailing council members to get their policies approved. When someone voluntarily steps down from the employees' council, he loses his right not to be fired, but it would be difficult to argue that he has done something immoral (Bakels, Asscher-Vonk & Fase, 2003, 305).

some of his rights.¹⁰ With soldiers it is just the same; by becoming a soldier, one willingly gives up some rights and gains others.

This reply is based on different premises than the ones Walzer uses though. One of the pervasive notions of *Just and unjust wars* is that soldiers are *not* free to choose their occupation. Walzer emphasises again and again that soldiers are to be considered victims: victims of their own ignorance; of state propaganda and indoctrination; of conscription; of threats by the state (Walzer, 2000, 36-7). In this case it becomes difficult to maintain that the soldiers have done *anything at all* that deprives them of their right not to be killed. However, usually the measures that force people to become soldiers, also force them to fight. Once the fighting has started, we can no longer blame one soldier that he kills another; for he is forced to do so or he knows that his enemy will be forced to kill him instead.

So we are presented with a situation where we would like people to have a right not to be killed, but where it is in practice impossible to maintain. Then this right no longer has much meaning and its violation is no longer a crime. That crime has been committed long before, not on the battlefield, but at the moment someone is forced into soldiering. Whether there are circumstances in which such a violation is justified is a complex topic in itself and one I will not discuss in this text. But the conclusion for now has to be that soldiers can be a legitimate target of their enemy counterparts, whether they fight voluntarily or under pressure. If they fight voluntarily, they willingly accept the risk of being killed; if they don't, their rights have been violated already and can no longer be maintained on the battlefield.

Orend (2000) shares Lackey's criticism, but also rejects Walzer's claim that soldiers cannot be held responsible for the wars they fight. I would say this depends largely on the type of soldier under consideration. Under Walzer's assumption that a soldier is a *victim*, I am inclined to agree with him that soldiers should not be held responsible for the wars they fight, except for the cases when the war is so blatantly unjust that any reasonable person should understand it and has the real choice of not fighting—yet I find it hard to think of such an example. The typical victim-soldier is simply incapable of comprehending the wars he (or she) fights in and thus unable to make a moral decision about it; the soldier's decision space instead is limited to his conduct during the war.

What is surprising, is that Walzer applies the same reasoning to officers and, albeit somewhat hesitantly, even to generals. Contrary to the common soldier, an officer is often highly educated, must have shown a considerable degree of insight and when he moves higher into the ranks necessarily is better informed about not just the means but also the ends sought with the war. He has willingly accepted his promotion from the rank and file, with which comes a degree of power, status and freedom. Even though he originally may have been conscripted, as an officer he no longer is the kind of victim he used to be. With this new position also comes a new kind of responsibility. Officers are

¹⁰ For example, a convicted thief loses his right to move around freely for the duration of his sentence, but he keeps his rights to life and personal integrity.

not just responsible for their own actions, but also for those of the troops they command. As they participate in the planning of a campaign, they are given the additional burden of taking every effort possible in minimising the civilian casualties resulting from those campaigns.

Apparently, the increased responsibility of officers in Walzer's view only concerns the *jus in bello*. They have an obligation to make sure that the war convention is upheld even if it is not their own actions that actually would violate the convention. Yet he does not say anything about the overall responsibility officers have for the wars to which they lend their service. That is remarkable in light of the fact that the whole reason *soldiers* lack this responsibility is that they are *victims*; an assumption that does not hold for *officers*. These are the people who can and should question the moral value of their orders. Their actions may still be excusable if they are put under severe pressure or if they are misinformed, but in general I would say the responsibility of a soldier for his wars increases gradually with the amount of information he receives, with his level of understanding and with his autonomy to make decisions. To overcome this weakness in Walzer's theory a distinction in responsibility should be made between ranks. In the next chapter we will see, however, that present-day warfare also introduces new qualities in soldiers that may affect their accountability.

3.1.2. Means and ends

For now we can maintain the moral-equality-of-soldiers-thesis on most levels. Walzer believes that this also implies that the ends and means of a conflict must be independent from each other altogether. I do not see why this should be necessarily so (Walzer, 2000, 127-8). We could perfectly well conceive a war over some limited goal, say the punishment of a small border raid, where the instruments and actions allowed are drastically reduced because the goal simply does not justify a stronger response. The only requirement is that we keep the allowed means the same on both sides. I believe this is a weakness in Walzer's theory.

This weakness may be attributed to Walzer's notion of aggression as a *singular, undifferentiated* crime. After all, if we refuse to distinguish different types of war as different types of crimes, there is no reason to 'match' the means allowed to the ends sought; the ends are (morally) always the same and so are the means. But if we instead conceive different types or levels of crimes, we can develop a more sophisticated theory of war. In chapter 5 I will suggest an outline for such a theory, but first I want to scrutinise the other principles of Walzer's war convention.

One major point, though not a deviation from earlier just war theory, is that Walzer virtually ignores the *weapons* that may be used to kill in war. I find the reasoning behind this flawed. Walzer points at the historical insignificance of specific weapons or procedures, such as the use of feathered instead of unfeathered arrows, the breaking off of fighting at sunset, the preceding of an army by a herald carrying a red flag or the prohibition of ambushes. These cases may indeed be trivial, but the prohibition of using biological and chemical weapons is not, because these weapons kill in a manner we think unacceptable; unacceptable not because of their effectiveness, but unacceptable because of

their brutality to their victims (Orend, 2000, 122-3). If we must accept that killing in war is necessary, then the rules should help us make this as humane as possible; if an enemy can be incapacitated by just harming him, killing should be refrained from altogether. Just as the rules of war stipulate that soldiers do not inflict harm unnecessarily, they should prohibit that they inflict unnecessary harm.

Do we really need rules like these? There are two good reasons we do. The first is, that in the face of defeat, the realm of *military necessity* starts to gain an enormous appeal. Just as it may draw generals to cause deaths of innocent people in order to accomplish their missions, it may compel them to use weapons or tactics they would normally condemn. The second reason is that weapons do not become available in war when the fighting starts, but require a long process of research, development, production and training. The potential means by which the war is fought, have often been selected a long time before it broke out. The rules that determine which weapons are allowed on the battlefield will help guide the development of new weapons.

3.2. Just war's requirements (jus ad bellum)

We can now turn to discussing Walzer's theory of aggression. What first catches the eye is that some of the requirements earlier just war theorists set for justifying a war hardly receive any attention from Walzer.

3.2.1. Traditional requirements

The requirements of *right intention* and *legitimate authority* are only called for implicitly. The former shows in Walzer's coverage of interventions and counter-interventions, in which the intervening parties are not allowed to prolong the war in order to pursue their own political interests (ibid, 104). The latter can be observed in cases where Walzer asks whether certain governments or guerrilla movements are legitimate. His conclusion tends to be that a political body is only justified in waging a defensive war if the people living in the territory over which it claims sovereignty recognise it as their sovereign. There is something to be said in favour of not considering the concepts of legitimate authority and right intention any deeper. It is hard to find any war where the parties involved were not fighting with mixed intentions and even if some state were to enter a war under completely false pretences, there would be no reason to condemn it if it actually helped a people in distress without further harming them. Regarding legitimate authority, Walzer's interpretation based on popular support indeed seems to offer the best account of the principle when small wars between an aggressor and a defender are concerned. However, in complex cases involving humanitarian intervention or counter-intervention, a more formal notion of legitimate authority is required. As Kofi Annan (1998) argues in a famous speech, there must be some checks on states willing to unilaterally embark on a war of intervention. For such cases serious study must be made of where the legitimate authority lies.

The requirement that a war be *formally declared* is mentioned nowhere in Walzer's text. Instead a war is considered to have commenced once the fighting begins, provided that it is more than just an uproar (ibid, 178-9). This is probably the most realistic way to look upon war, especially in an age where many wars are fought between peoples or groups not formally recognised as states; how could a formally non-existent entity make any formal declaration? It would, again, be prudent to require that a *state* involved in anything other than a war of self-defence formally declares its intent. This allows the other members of international society to judge in advance whether war is indeed justified and not some form of imperialism, which would be much more difficult once the muddy reality of acts and counter-acts has come to be.

The notion of *proportionality*, as mentioned by the Catholic Bishops in their pastoral letter (cf. Holmes, 1989, 164), receives only minimal attention from Walzer when it comes to the choice whether to pursue war or not (but is discussed more extensively in his consideration of the means allowed to fight it). In any of the cases where there is a just cause for war, Walzer believes the instrument of war to be proportional to the ends sought. He does, however, set clear limits to its use; once the original goals are achieved, the war may not be pursued any further to bring some additional benefits about. Thus a counter-intervention should stop when the *status quo ante bellum* has been restored and a defensive war against an aggressor state ends with the driving out of the aggressor and its sufficient punishment to deter future wars (ibid, 119-21). Only seldom is the complete conquest and political reconstruction of the aggressor state acceptable; that is when the criminal nature of the aggressive regime constitutes a continued threat to the international rights of political sovereignty and territorial integrity, as it was believed to be in Nazi Germany (ibid, 111-6).

Walzer's caution here is in order, as it can prevent small conflicts from escalating. Only too often is a party, fighting an originally just war, tempted by its own success to stretch its aims for continuing to fight. Once the original goals have been achieved, that war has ended; any further fighting constitutes a new war and should be judged by itself.¹¹ I do not believe this covers the concept of *proportionality*, though. If both *war* and *aggression* are taken as singular notions, that is, without distinguishing different degrees of them, it is just too dangerous to state that 'aggression justifies war' without taking proportionality into account. Almost any war brings about suffering for the population of the territory on which it is fought, and this grief should be carefully weighed against the good being sought through

¹¹ This does not mean that the continuation of the war cannot be just. For example, a state might be attacked as punishment for its aggression. Once this aim has sufficiently been attained to deter future aggression, but massive violations of human rights by the punished state come to light, this can be a good reason to continue the war until the oppressive (and aggressive) leaders of that state have been overthrown and the people have formed a new government. There have been fought two wars here, though: one of punishment and one of humanitarian intervention, even if there has been no clear break in the fighting. Both wars should be judged by their own causes.

the war. Especially for the more speculative of 'just causes', proportionality is a valuable benchmark for assessing if war is indeed the right solution.

Another issue completely ignored by Walzer, is whether a war actually has a *probability of success*. Within Walzer's paradigm, an important principle underlying the different reasons to justify war, is that the violent response to any form of aggression deters most states from committing aggression in the first place (ibid, 67-8). Here the chance of actually driving out an aggressor or dethroning an oppressive ruler is secondary to inflicting some serious harm; the latter sends out the message that any state committing aggression, even though it may not be stopped entirely from doing so, will face serious resistance and suffer casualties. I think this would be a strong case if we could be fairly sure that the deterrence held up all the time, but in reality it does not. In reality, sticking to this principle means getting one's soldiers involved in a hopeless struggle, where they may die fighting for their rights, but unable to protect those rights. This cannot reasonably be asked from anyone. Therefore, in my opinion, the traditional requirement that a war must have some realistic chance of success to be justified should be maintained.

A last principle, again mostly ignored by Walzer, is that war only be used as a *last resort*, when all other measures have been exhausted. He does not seem to deny its importance, as on p. 84 he states that "one always wants to see diplomacy tried before the resort to war, so that we are sure that war is the last resort." This is, however, the only mention of the principle and it is not explicitly stated as a requirement for a war to be justified. Moreover, it is curious that he gives virtually no consideration to other means to achieve the desired result. He objects to the possibility of non-violent resistance, as this might entail surrendering to an oppressive foreign regime governing by terrorist means, but that does not exhaust the ways of prevention and punishment; diplomatic pressure, economic sanctions and naming and shaming may very well force an aggressor to withdraw and deter it from future aggression. I do not wish to say that war should always be a last resort, as sometimes it may well be more benign to a people than economic sanctions would be, but in some cases the alternatives to war are clearly preferable. A solid theory of just war needs to define and elaborate these cases.

The one traditional requirement of just war theory that takes up virtually all the space Walzer devotes to *jus ad bellum* is that of *just cause*. I have little need to discuss its coverage, as I can agree to most of the cases Walzer makes. Only on a more general level will I criticise it in the next subsection. There is, however, one cause I want to revisit briefly at this point, which is that of *humanitarian intervention*. The criterion provided to judge whether this cause exists, is whether the acts of some regime "shock the moral conscience of mankind" (ibid, 107). The problematic quality of this criterion is that not all people's consciences are alike and some are more easily shocked than others. Taken together with the risk that a state carries out an imperialist campaign under the flag of humanitarianism,¹² we should be

¹² For one of the many examples of this very real risk, see Walzer's coverage of America's 1898 humanitarian intervention in Cuba (Walzer, 2000, 102-6).

very careful in calling human rights violations acts of aggression. Only the most obvious violations that would be condemned by most people anywhere in the world qualify here. Acts that may possibly be justified from one or another cultural vantage point can be denounced, be combated through diplomacy, but do not justify the taking-up of arms. It is of the utmost importance that we appeal to this form of aggression sparingly and do not simply include any dictatorship or restriction of people's rights. It "is not our purpose in international society (...) to establish liberal or democratic communities," Walzer writes, "but only independent ones." (ibid. 94) Even with this caveat, I think it is very difficult to determine when the 'moral conscience of mankind'—if such a thing at all exists—is shocked.

3.2.2. Weaknesses in the theory of aggression

So far I have summarised and discussed Walzer's theory of a just war and reviewed it against the backdrop of the tradition of which it is part. One of my salient points of criticism has to do with the definition of aggression as a *singular, undifferentiated* crime, on which I will expand in this subsection. Walzer considers all forms of aggression to be instances of the same crime that all deserve a violent response (ibid, 51-2). The reason he provides is that "all aggressive acts (...) justify forceful resistance, and force cannot be used between nations, without putting life itself at risk. (...) Aggression is a singular and undifferentiated crime because, in all its forms, it challenges rights that are worth dying for. (...) The rights in question are (...) territorial integrity and political sovereignty." (ibid, 52-53) Moreover, "if [the rights of states] cannot be upheld (at least sometimes) international society collapses into a state of war or is transformed into universal tyranny." (ibid, 59)

I want to carefully consider this argument here. It has a number of weaknesses. The claim that all aggressive acts have in common that they justify forceful resistance is made too hastily. The whole point of classifying an act as *aggression*, is to enable the 'law enforcers'—here the international community—to take appropriate action against it. Hence an act cannot be classified as aggression by the response it justifies, since that response can only follow *after* classification. Even if we were to use other criteria to determine whether aggression has taken place or not, it still seems unreasonable to argue that it always justifies the same forceful resistance. This would be like saying that all domestic crimes against someone's personal integrity are in fact instances of one singular concept, therefore justifying the same punishment. We would be placing assault on the same footing with murder, without regard for the seriousness of the crime committed. Traditional just war theorists used the notion of *proportionality* to weigh the gravity of an act against that of its punishment, but Walzer seems to have abandoned this notion (at least in the *ad bellum* domain).

The second part of the argument is potentially stronger. Walzer has shown himself an advocate of strong responses to acts that violate important rights and has little compassion for neutral positions (ibid. 233-8). If all acts that fall under the umbrella of *aggression* indeed violate rights worth dying for, they would all incite war by Walzer's standards. In war people do get killed, so any form of

aggression indirectly challenges life itself. In that case, all offenders may indirectly be murderers indeed. It is debatable, however, whether the rights of territorial integrity and political sovereignty—the paramount rights Walzer thinks are worth dying for—always should be defended to the death. With the evolutionary approach Walzer takes to both of these rights, the rightful claim to a piece of land can change in time (ibid. 55-7). Moreover, more than one group can have a legitimate reason to identify with a certain territory. Though such cases do in fact often result in a violent struggle, the inhabitants of a territory may choose the path of peaceful coexistence as well. There must be other factors that determine the importance to defend territorial integrity and political sovereignty.

Even *if* all rights under attack are worth dying for, it does not mean we should all die. Nor does it mean that the attackers should all die. There are degrees of acceptable sacrifice, but it is unlikely that the entire population of a country would give their lives to drive out an invader. Some forms of aggression will make more of us willing to fight to the death than other forms will, and then the singularity of the crime cannot be maintained.

Lastly, the argument that international society would collapse if we could not respond to acts of aggression, simply seems untrue to me. Just as in domestic society not every criminal needs to be caught in order to maintain a system of justice, there is no need to punish every act of aggression to maintain it internationally. Nor is this an argument for treating all forms of aggression the same. In domestic society, we have more and less severe punishments, tailored to crimes that hurt society more and less or that are more and less difficult to deter. Even though the range of acts that may constitute *aggression* in international society is narrower than that of *crime* in domestic society, I see no reason not to have a system of tailored responses in the former.

Walzer argues that the reason that any ‘crime’ threatens the system with collapse is that “there are no policemen. (...) [That] means that the ‘citizens’ of international society must rely on themselves and on one another.” (ibid, 59) Yet even without a police one can have laws that specify how ‘citizens’ should behave in their effort to punish and deter aggressor states. If we think there is any point at all in laying out the rules of war, then there is no reason not to differentiate between different forms of aggression. Once this has been done, states can be set different limits to the responses they give to different types of aggression. Walzer’s theory provides a strong basis for developing a system like this, but unfortunately does not follow up on it. In chapter 5 I will outline a *multiform* concept of aggression.

3.3. Categories of people (*jus in bello*)

With the caveat that Walzer has made an omission on the part of weapons, we can turn to the domain of *jus in bello*; in Walzer’s theory the rules that primarily specify *whom* may be killed in a war. Here we encounter a problem with the foundation of Walzer’s ethics. He claims to base it on *human rights*, especially the rights “to life and liberty”, but then fails to elaborate on how people get those rights (Walzer, 2000, 54). There have been countless debates over rights and their origins and it is

understandable that Walzer does not want to repeat these. Yet the use of human rights as an *argument* for the rules of war loses its force in this way. The rules of war specify what may and may not be done to people and so do human rights; the one does not explain more than the other. I am intuitively inclined to agree that people cannot just be killed or harmed—though their *liberty* is a more difficult case—and I am not alone in doing so. This may be enough of a basis for a common morality, which is in fact not *rights-based* but *conventionalist*, as Orend (2000) calls it. One implication is that we must concede that it has no force for cultures in which other moral intuitions prevail. Another is that more credit must be given to alternative views that are part of our moral intuitions, even if they conflict with human rights.

While soldiers fighting on both sides of a conflict are to be considered as moral equals, soldiers and civilians are to be treated as unequals. I think this distinction is appealing, for if it were not made, anybody could be killed for any reason and there would be no justice in war. The way in which the line is drawn is open to questioning though. Walzer advocates a strict separation between the rights of soldiers and civilians and a more blurry distinction between civilians involved in the conflict in different ways. These categories seem rooted in a type of war which is primarily being fought by soldiers, on battlefields away from civic life. Whenever civilians *do* somehow get involved, this is seen more as an accident creating some tough decisions, than as a typical characteristic of warfare. Such wars are by no means extinct, but in modern wars all kinds of military personnel, civilian contractors and government officials play more or less vital roles in its conduct—a topic to which I will devote more attention in the next chapter.

We must ask ourselves if, in the light of these considerations, Walzer's delineations are viable. The notion that soldiers consciously give up certain rights and gain others seems correct. If *they* would remain inviolable targets, a battle would become impossible. Moreover, they know what they get in to, so they are prepared for their fate. Their loss of rights is defensible even if they are not entirely (or not at all) autonomous in their decision to join the army, as they can always surrender and are entitled to benevolent quarantine. The immunity of totally innocent citizens also seems right, as they have done nothing to deserve to be harmed, are completely unprepared and have no means of escaping or defending themselves against harm (the defending is the task of the army). Only the in-between-categories raise difficulties.

Munitions workers—the people producing weapons and bullets for the army—cannot defend themselves, have had no military training and do not possess the war rights of soldiers. Yet they are (or at least could be) aware of the importance of their work for the military apparatus and thus of their attractiveness as a target for enemy attacks. In this respect their position is somewhat similar to that of soldiers; through their work they knowingly pose a threat to the enemy, albeit an indirect threat. The main difference is that they do not bear arms themselves and that we therefore tend to assign civilian standing to the munitions workers. But what if we would transfer all military production facilities to the domain of the army and let the production be done by soldiers, or assign the workers the status of

soldiers *while at work*? Not much would change, except that it would be harder to get hold of sufficient factory personnel. Now, however, it would not be so difficult to weigh the interests of the workers against the importance of the factory as a military target. An attack on a production facility would be just another attack on a vital part of the opposing army, where soldiers get killed. If the munitions workers are unwilling to take this risk, they should find another occupation, just like a soldier could have chosen a different profession.

Incorporating production facilities into the army may be an easy solution if it is clear that the facility serves no other purpose. Many services and facilities are used in both military and civic life: food production, communication networks, steel factories, infrastructure development, etc. Just for sheer numbers it would be impossible to turn all employees in these businesses into soldiers and public life would come to a halt if we asked them all to accept mortal risks. Walzer only considers the example of people employed in food production and concludes that they maintain their inviolability as civilians. I think this is the right principle, with one caveat. If the facility under consideration is of great *tactical* importance to the army, that is to say the army gains its superiority through it, the party exploiting it is morally obliged to separate it from civic facilities and to have it run by soldiers. Otherwise it puts its civilians at unnecessary risk, as the enemy cannot reasonably be asked to ignore it as a target. I can hardly imagine a case where food production fits into this profile, but satellite communication services, for example, may well give a high-tech army its edge. These services are to be maintained separately for the army and run by soldiers, who willingly accept the risks involved with their jobs.

A question related to this problem is what we should do when some government is *not* willing to separate its military and civic services of tactical importance. In fact it may be using its civilians as a cover for its military apparatus. Actions of this type are not without precedence; civilians have been used as human shields for military sites, mosques or community centres have been built on top of rocket launching facilities, soldiers have protected themselves against enemy fire by letting enemy civilians walk ahead of them, etc. None of these cases constitute a direct threat or harmful act against civilians, but their lives are put at risk nonetheless. Is this in itself an act of *aggression* that justifies a war of humanitarian intervention? I would say that is too strong a word, as actions like these do not 'shock the moral conscience of mankind'. They are immoral though, and must be judged like other violations of *jus in bello*. Just as no one should be forced to fight, no one should be forced to become the target of fighting.

The last category of people that has a special standing in Walzer's theory is that of civilians supporting guerrilla fighters. The classification of this group seems based on a traditional view of war, where guerrilla warfare is an exception to the rule, moving the battlefield from some barren lands into populated areas. My comment would not be that these exceptions have disappeared and are no longer relevant, but instead that they have turned into the rule. Looking at recent wars like that in Kosovo and Iraq, the streets of major cities have become the primary battling grounds. On top of that, modern technologies make it possible to conduct a war from a safe distance and if desired from a town or

city.¹³ More extensive attention will be given to these empirical considerations in chapter 4. For now I just want to stress the contemporary importance of guerrilla-like warfare. This gives reason to carefully consider the position of civilians supporting guerrilla-fighters.

The general idea regarding civilians in a guerrilla war, as presented in *Just and Unjust Wars*, is that they maintain their prima facie inviolability, although they may be subjected to commonly accepted policing techniques. This is consistent with the way we tend to deal with accomplices of criminals in domestic society; they may be punished for their complicity, but not be murdered. If the guerrilla fighters under civilian protection have not obtained soldier status, the case is the same, both morally and legally. If they *are* to be considered soldiers—they bear arms openly and wear uniforms while on active duty and they have some legitimacy as political instruments—the analogy is still applicable. Civilians should not get in the way of soldiers, just as they should not get in the way of the police. If they protect fighters by providing shelter and cover, we may consider them to be committing a crime *while the conflict lasts*. Just like soldiers are liable to be killed in time of war but cannot be tried for their killings after the war is over, civilians protecting guerrilla fighters can be arrested, detained and interrogated as criminals during a conflict but not thereafter.

The case Walzer makes for civilians who let their towns be used as a fire base is convincing as well. Once the town becomes an imminent threat, we can no longer demand that it is handled with a velvet glove. There should be some notion of proportionality here though. A lone soldier firing from the village perimeter does not call for a full-scale attack and it would be hard to ever justify sweeping-clean a city of a few million residents. Even if the city harbours missile launching facilities scattered throughout its residential areas, much care must be taken if they are to be destroyed. A guideline for proportionality might be that the threat issued by the town or city should be at least as great in terms of human lives as the casualty cost of eliminating it.¹⁴ Thus the citizens pay a price for allowing their township to be used as a military attack base; the risk of their lives to the same degree they cause risk to the lives of others.

¹³ Long-distance city-against-city warfare actually saw its first occurrence during World War II, with the bombings of London and Antwerp by German V1 and V2 missiles. There they were used to spread terror, however, and not so much to attack targets of tactical importance. Moreover, developments in information and communication technologies have increased the scope of military actions that can be carried out from a safe distance, behind civilian cover.

¹⁴ This sounds like a utilitarian calculation, but here utility is subordinate to rights. The basic case is still the inviolability of civilians and the right of soldiers to defend themselves. Yet if towns and cities are used as fire bases, lives are put at risk no matter what. Then we want some criterion to decide whose lives must be protected and lacking anything better, it may as well be utility.

3.3.1. Supreme emergency under scrutiny

As a final part of my critical review of Walzer's *jus in bello*, I must discuss the concept of *supreme emergency*. This is where the theory is most vulnerable, as the consistency of the human rights approach is breached and the door to the realm of *necessity* is unlocked. Now Walzer's refusal to elaborate on the origin of human rights becomes an advantage. Had he offered a solid theoretical foundation for human rights, it might have been difficult to deviate from it in case of a 'supreme emergency'. By using the term *human rights* for nothing more than our common moral intuition that people cannot just be killed or harmed, however, a little more manoeuvring space is available as long as it fits within our intuitions.

I think supreme emergency can be defended on this ground. We should ask ourselves if there could ever be a point where we would go against the idea of human rights we have established, in order to prevent some great evil. Say, for example, that the end of the world is nigh and that only the killing of a single innocent human being can save us all from this doom.¹⁵ Very few people—perhaps not even the human being to be sacrificed—would contend that we should save the single life and let the rest of mankind be destroyed. Now this would be an extreme example, but I want to use it only to establish the possibility of breaking rights for a greater good. Once we have established the possibility, the question should not be *if* but *when* we may break them.

Walzer uses high-sounding and ominous descriptions of the threats that may constitute a supreme emergency. The only example he provides is the threat of Hitler's Germany early in World War II, where England resorted to terror bombing of German cities to escape defeat—an action normally banned by the rules of war. He may well be right here, but the problem is that Nazism was such an extreme horror indeed—as evidenced by the genocide against millions of Jews—that it would be hard to find any other case of supreme emergency to match it. Hitler's reign meant a combination of unlimited hunger for expansion, genocide, military overweight and no conventional way of stopping it. This provides us with little of a clue about what the borderline case for supreme emergency would look like. The more general statement Walzer makes is that he considers "the survival and freedom of political communities" the highest values of international society, and imminent threat to them brings about the rule of necessity (ibid, 254).

While the specific case of Nazism is (maybe too easily) convincing, the general idea of which it is an example is not. The rights of political communities should not be taken lightly, but by no means are all important. After all, Nazi Germany was a political community as well and the British bombardments on its cities certainly formed a major threat to its existence (as they were meant to). Do we want to say that this gave Hitler's generals sufficient reason to put any morality they upheld aside and fight the British by any means necessary? I certainly do not hope so. The problem with political communities is

¹⁵ This would be an extreme variant of the *ticking time bomb scenario*, discussed by, amongst others, Michael Walzer (1973, 166-7).

that they may be good or evil, legitimate or illegitimate, aggressive or passive. Not all of them possess an a priori entitlement to survive and certainly not if this would go against the rights of many innocent civilians.

Recognising this dilemma, Brian Orend (2000, 127-34) suggests a different interpretation of Walzer. In his reading of Walzer's theory, a case of emergency requires not just a serious and imminent threat to a political community, but also that the threat is "unusual and horrifying" (ibid, 129). The interpretation draws upon some of the phrases Walzer employs when discussing Nazism. For example, "it is possible to live in a world where individuals are sometimes murdered, but a world where entire peoples are enslaved or massacred is literally unbearable." (Walzer, 2000, 254) Walzer is not conclusive about whether he intends such horrors to be a defining characteristic of supreme emergency or just an example of what might happen when a political community is violated. In *Just and Unjust Wars* he hints at the former (ibid, 273), but in *Arguing about War* he states that it is primarily the continuity of the community that matters (Walzer, 2004, 40-50).

Ignoring whether Orend's interpretation of Walzer is correct, I like to consider Orend's proposal for its own merit. As we saw, the *political community criterion* had the disadvantage that not every political community can count on our support, let alone make us want to set aside the rules of war to protect it. Does it help us if we add to it the requirement that the threat under consideration is unusual and horrifying? If we do, we face the problem of defining what *unusual and horrifying* means. While Orend and Walzer talk about enslavement and massacre, someone with a different cultural background may find the idea of women's rights unusual and horrifying. This interpretation lacks substance to distinguish it from ordinary threats we may face in time of war. The concept of supreme emergency is valuable for articulating our moral intuition that there exists a situation where we are willing to drop the absolute respect for human rights that we hold in such high regard under normal circumstances, but without a more substantial definition of the concept it carries little force for making actual judgments in time of war.

We may ask why Walzer does not make an attempt at defining *supreme emergency* more precisely and at providing material criteria to determine whether one has arisen. Perhaps the reason is that he prefers that it never be positively established, as supreme emergency allows for horrible measures to be taken against the innocent. In *Arguing about War* (2004) he speaks of the destruction of a political community's ongoing existence as the worst threat it may fear and if that threat is imminent and inescapable by other means, the community's leaders may do what is necessary to fight for its survival. This *what is necessary* can be so terrible, that perhaps it is better not to describe the actual characteristics of the situation that could excuse it; for that might give politicians a foothold to justify something terrible that could otherwise have been avoided, had the rights of the innocent been upheld more strictly. This position is understandable but unsatisfactory. By giving a positive definition of supreme emergency we are not leading the way to the violation of human rights. Instead we are affirming how high the threshold for violation is and that it is almost never crossed. If supreme

emergency is to provide an exit from the rules of war, everything must be done to make clear that this exit will always be closed save in the most extreme cases.

Leaving aside the exact definition of a supreme emergency, there is another important question still that has to be answered. What are, if any, the limits of our morally allowable behaviour once supreme emergency has occurred? Walzer is quite clear on the subject: "Can soldiers and statesmen override the rights of innocent people for the sake of their own political community? I am inclined to answer this question affirmatively. (...) Faced with some ultimate horror, their options exhausted, they will do what they must to save their own people" (Walzer, 2000, 254) He often refers to this type of decision as 'the rule of necessity'. At any rate, the assertion underlying phrases like these is that once we are in a supreme emergency, we have left the realm of morality and now *anything goes*.¹⁶

I have to object strongly to this reasoning. Although I have argued before that it is indeed conceivable that at some point we have to lift the strict requirements the war convention imposes on us, there is *no* point where we have left the moral realm entirely. As long as humans are still capable of making decisions, they are capable of reflecting on the morality of these decisions. To recognise the concept of supreme emergency only means to acknowledge that the set of rights-based ethical principles does not have universal validity. It may just be that when faced with a supreme emergency, we should use a different set of ethical principles for this reflection.

Keeping supreme emergencies within the moral realm solves another problem to which Orend (2000) has called attention. There is a certain ambivalence in Walzer's words when talking about the actors in a case of supreme emergency. On the one hand they do what is necessary, supported by the just war theory, but on the other hand they seem unable to do *right* in his eyes.¹⁷ Perhaps this is the way Walzer tries to deal with the tragic character of some—or most—of the decisions made in time of war. Yet it leaves us in doubt about how to treat the people that carry the burden of responsibility. If they acted outside of the moral realm, then indeed, we may be able to say that what they did was necessary, but once we have re-entered the world of morality their actions deserve no praise. By keeping *any* decision within the moral realm, we will always be able to judge whether someone has done right or wrong, was justified in his actions or not. We still may not like the consequences—consequentialism often is about choosing the lesser evil—but at least we can honour the people who rightly chose them.

¹⁶ The final section of Walzer's (2000, 263-8) chapter on supreme emergency is titled *The Limits of Calculation*, suggesting that our allowable behaviour under supreme emergency is limited indeed. It is not, however, at least not in Walzer's view. The section discusses the case of the nuclear bombing of Hiroshima, where Walzer argues that in fact no supreme emergency existed. He does not contend that *if* a supreme emergency *had* existed, the bombing would have been immoral.

¹⁷ The remark also applies to politicians who order a pre-emptive strike to defend their country against an actual and imminent threat, or to commanders who knowingly but unintentionally kill civilians justified by the doctrine of the double effect.

3.4. Conclusion

Although Walzer has given an eloquent exposition of just war theory in the twentieth century, there are a few points of criticism that can be raised against his argument. My primary objection against Walzer's *jus ad bellum* is that he puts forward *aggression* as a *singular, undifferentiated* concept. This makes it impossible to distinguish between different kinds of war and thus impossible to determine how much force is a morally appropriate response. Combined with the absence of a thorough discussion of proportionality, this can turn the theory into a dangerous framework for justifying needless violence (although Walzer certainly has not intended it to be). A more refined concept of aggression which allows for the notion of proportionality would certainly benefit the theory.

Additionally, Walzer deviates from the path set by his predecessors in the just war tradition by primarily concentrating on the requirement of *just cause*. The other traditional criteria are left out or discussed only implicitly, which I think is problematic in the case of *legitimate authority*, *formal declaration*, *proportionality* and *probability of success*. The requirement that a war be waged under *legitimate authority* may seem trivial today, as the era of private wars between princes has long passed, but in wars that are not fought in immediate self-defence it would still have a merit to uphold. In wars of humanitarian intervention or in pre-emptive strikes, appointing a clear authority, e.g. the U.N. Security Council, may help ascertain whether aggression has been committed and a forceful response is justified. Similarly it still has value to require that a just war be *formally declared*, as to that the international community can judge for itself whether the other criteria are satisfied. *Proportionality* is perhaps the most serious omission, given that Walzer makes no finer differentiation between types of warfare. If war is one single instrument that cannot be used in different degrees, it is imperative that we weigh its good effects against its bad effects before deciding to start one. Finally, leaving out the requirement that war be waged with some *probability of success* may lead the defenders of a political community to risk their lives for a futile cause, which is undesirable.

In his coverage of *jus in bello* Walzer bases much of his argument on *human rights*. He fails to explain, however, how these rights come into existence and what moral force they possess. We are left with the impression that human rights as Walzer uses them are no more than an implicit convention in Western culture. This is in itself not a problem, since shared intuitions can be a good foundation for an ethical theory. The corollary is that such a theory will have little appeal to those who were raised in different cultures. Based on human rights Walzer proposes a strict distinction between soldiers and civilians. As an in-between-category he introduces *munitions workers*, but it is unclear what really separates them from the class of soldiers. Though Walzer's discussion of who may and who may not be harmed in time of war is elaborate and thorough, his theory lacks systematic discussion of the *weapons* allowed to fight. There are good arguments to include rules about these in the theory, as they can have significant influence of the harm inflicted on the battlefield.

As a final point I have to reflect on the concept of *supreme emergency*. Herein Walzer puts forward a powerful idea that corresponds to our moral intuitions; there is a point where the threat of losing a war to a thoroughly evil enemy is so great, that one is allowed to break with the war convention in order to survive. However, besides placing too great a value on the survival of political communities, Walzer also contends that once a case of supreme emergency is established, we leave the moral realm and enter that of necessity. In my opinion this opens the door for any party that is losing a war to appeal to ‘necessity’ and put aside the whole theory of *jus in bello*. It would be much better if material criteria were used to determine the existence of a supreme emergency and to provide guidelines for the different—but not empty—space of morality we would enter in this case. This would prevent us from using the concept in situations where it is not applicable and from exploiting its laxness to commit the most horrible crimes against the innocent. I will explore this further in subsection 5.3.4.

Chapter 4 - The changing face of war

In the preceding chapter I subjected Michael Walzer's theory of a just war to critical analysis. My criticism concerned the logical structure of his argument and was not limited to a certain time or place in history. The theory has another kind of liability as well, however. It may not be as accurate in evaluating today's wars as it was at the time of its first publication, and even then Walzer's assumptions about the characteristics of war may not entirely have reflected the empirical reality. Walzer claims his thoughts are not vulnerable to empirical changes in the way wars are being fought but in this chapter I will argue that they are. The past three decades have shown so many changes in wars that we need to significantly adjust our ethical views to them. This chapter serves to uncover the flaws in Walzer's thought when applied to present day warfare

4.1. A framework of warfare

To evaluate Walzer's theory in light of the present day character of warfare, we must first establish the factors that make up this character. In other words, we must determine which facts are and which are not relevant when talking about war and its changing face. Several frameworks have been developed to accomplish this task, but none of them seems to have sufficient power to explain what happens in wars today from a moral point of view. In this section I will draw on two of these frameworks to build a new one that is up to the task.

If we refer back to chapter two, we may recall what the most important moral questions were Michael Walzer asked about war. In his discussion of *jus ad bellum*, it was which acts constituted aggression and justified a war in response. For *jus in bello*, it was what the rights of combatants and non-combatants were in time of war, as well as what tactics were and were not allowable. Then a framework that is relevant for making moral decisions should elucidate what kind of war-like acts we may expect from which political entities and which individuals we will encounter using what means on the battlefield.

The framework I use tries to answer these questions, reasoning from three structural dimensions: the political, the socio-economical and the technological. These three dimensions can be mapped out for the combating parties and each of them has its own influence on the moral reality of warfare. Moreover, the symmetries and asymmetries between the structural characteristics of the parties involved will also influence the shape of war. How I developed the relationship between these structural factors and the relevant issues for *jus ad bellum* and *jus in bello* will be discussed in the upcoming subsections. The resulting framework is displayed schematically in figure 4.1.

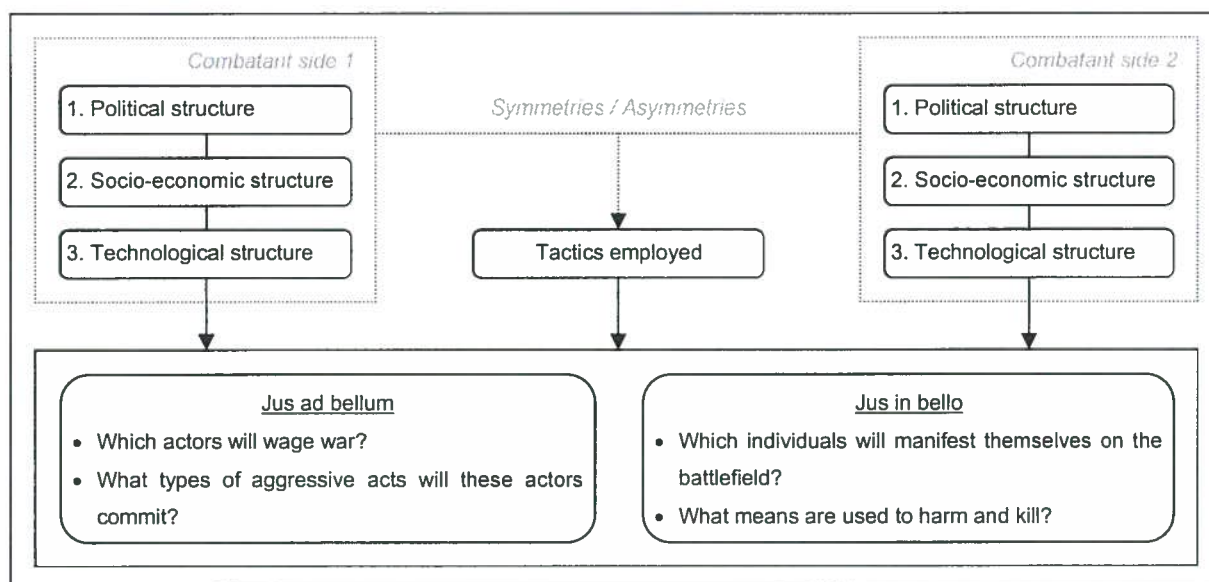


Figure 4.1: A framework of warfare in three dimensions

4.1.1. War in three waves

The framework presented draws upon the work of Alvin and Heidi Toffler and that of Thomas Hammes. I want to start with the perspective offered by the Tofflers in their book *War and Anti-War* (1993). In this work they use a socio-economical framework developed earlier in *The Third Wave* (Toffler, 1980) and apply it to warfare, reasoning that “throughout history, the way men and women make war has reflected the way they work.” (Toffler & Toffler, 1993, 35) The framework, coined *wavefront analysis*, posits that civilisation has developed in three ‘waves’, gradually spreading over the world. Each of these waves finds its origin in a revolution, but the adoption of the social and economic systems that define them has by no means been revolutionary. Instead, while the *third wave* has already taken shape, the *second wave* is still rolling over some parts of the globe. Now what are these waves and which revolution caused them to happen?

The *first wave* originated with the agricultural revolution some ten thousand years ago. As opposed to their nomadic predecessors, agricultural people became sedentary, their lives based on the land and revolving around the village. First wave societies were de-centrally organised with hierarchical local structures dependent on birth and showed a simple division of labour (Toffler, 1980, 21-2). According to the Tofflers, *war* first arose with first wave societies, as those were able to produce and store an economic surplus worth fighting over, as well as to support and organise an army. The fighting of earlier societies does not qualify as war by their definition. Characteristic of first wave warfare is that its objective was mostly economic and no professional armies were used. Instead farmers were taken from their work on the land for one or two months to fight and after the war they were rewarded with lands or part of the spoils (Toffler & Toffler, 1993, 35-40).

The *second wave* of civilisation was triggered by the industrial revolution, in the seventeenth century. The mining of fossil fuels and their transformation into energy by the steam engine enabled the

development of machines performing various functions. They in turn created a system of mass production, arranged in a host of industries, requiring a system of mass distribution as well. Together, the energy system, the production system and the distribution system formed the industrial *technosphere*. Large corporations came into existence as the centrepiece of economic life, with paper bureaucracies, telephone and telegraph communication infrastructures and mass media to support them. Key to all these processes was standardisation (Toffler, 1980, 21-36).

Second wave warfare shared many characteristics of domestic life in the industrial era. Just as wealth was created through mass production, war was made through mass destruction. World War I is the typical second wave war, but the Napoleonic wars and the American Civil War already showed many of the same signs. Entire peoples were levied to join the fighting and once developed, the railroad could carry them to the front in large numbers quickly. They used standardised arms and bullets that took much of the warrior's art out of battle. Standardisation found its way into military training and doctrine as well, thus making the soldier easily expendable. Large bureaucracies were used to administer the armies and for coordination the telephone and telegraph were adopted as well. Second wave warfare most closely resembled the notion of *total war*, where everything is put into the service of the military machine and only the total defeat of the enemy means victory (Toffler & Toffler, 1993, 41-7).

The third wave, according to the Tofflers, is the one that will describe most advanced Western countries in the 21st century. Its early signs became visible in the late 1950's and early 1960's already, though. Slowly, the second wave industrial economies were being transformed into knowledge economies. That is not to say industry became obsolete, but production efficiency was more and more dependent on knowledge and intelligent usage of other production factors (resources, labour and capital), than on the sheer availability of those factors. Mass production—so characteristic for the second wave—was made obsolete by 'smart' machines that could automatically introduce variation in their products.

To operate the knowledge economy, the class of specialised knowledge workers grew vastly in relation to that of industrial labourers. Because specialisation requires considerable investment of time and money, the third wave worker obtained a position quite different from his easy-to-replace predecessor. Also, the fraction of workers engaged in supporting or service activities grew in relation to that engaged in the primary production process. Where the large industrial factories had brought great numbers of workers together under a single roof, the knowledge enterprises of the third wave scattered them again. Since their work could be done from a distance and communication technologies allowed for easy coordination, jobs became decentralised into small business units that could operate more flexibly. This was not just a luxury, but a necessity instead, as environments changed ever more rapidly and firms were required to constantly innovate to stay ahead. While business was conducted more decentralised, at the same time different systems were integrated and a large communications infrastructure facilitated it all (Toffler & Toffler, 1993, 64-72). The Internet may be third wave society

in its extreme, where every individual is tapped into one large integrated network, performing his own specialised task in the system.¹⁸

Just as with the first two waves, third wave warfare reflects many of the characteristics of third wave economies. At this point I do not want to go into detail about all the characteristics the Tofflers attribute to third wave war, as I am only giving an outline of their framework. The morally relevant changes in war will be covered once I have established a more comprehensive framework. What I can say here is that, like in domestic society, Western military powers have abandoned the doctrine of *levee en masse*; instead warfare has become a domain where the actual fighting is done by only a small part of the army, where the majority of workers in its service perform specialised supporting tasks. They operate in decentralised units and now can support soldiers in the field real-time through sophisticated communications infrastructure. Some of this infrastructure is shared with civilian users, reflecting the level of integration third wave economies show (ibid, 73-93).

4.1.2. War in four generations

The Tofflers' framework is valuable for analysing the development of civilisations and linking a society's means of production to its means of destruction. It is too broad, however, to explain the differences between wars we have witnessed within the span of a single wave. For example, both the First and Second World War were fought in the industrial era and between industrialised powers, but these two wars showed much dissimilarity. It becomes even murkier still, when a conflict involves parties in different waves of development. While the Tofflers acknowledge that conflicts between different wave societies are likely to occur, they come little further than to say that "at least a dozen different mixes and matches of war forms are possible, each with endless possible variations." (ibid, 98) If we are to say something sensible about the direction 21st-century warfare is going to take, we need to be more specific than that.

In *The Sling and The Stone* (2004) military veteran Col. Thomas X. Hammes provides a different framework of warfare. He distinguishes four generations in the evolution of *modern* warfare. The classification is based, not on the type of society waging a war, but on the dominant tactics adopted to win it. That is not to say that society is irrelevant. On the contrary, each generation required a number of social, economic and technological conditions to take shape. Just as with the Tofflers' waves of civilisation, the generations of warfare are not established overnight. Instead they gradually spread while more and more societies make them their own form of war. I will quickly go through the highlights of each generation.

¹⁸ Note that when Alvin Toffler originally published his three-wave-paradigm, the World Wide Web did not exist. When he wrote *War and Anti-War*, it had only just been opened to the public and was not used in normal business or public life.

Hammes does not consider *pre-modern* warfare and therefore his framework only starts in the late eighteenth century. The *first generation* of modern war (1GW) coincides with early second-wave warfare and forms a contrast with medieval war. The development of the nation state and the patriotism associated with it, allowed for a massive levy from the population of a state to create large armies. Improvements in agriculture and transportation—especially over water—were needed to sustain and supply armies of this size. Where medieval warfare had been a chivalrous activity that required some skill from its fighters, the introduction of standardised muskets practically enabled any man to fight. Thus the tactical superiority of an army was most of all determined by the manpower it was able to deploy in the field and large line and column battles became the norm of warfare (Hammes, 2004, 16-8).

Only when the industrial era came to its full extent was *second generation warfare* (2GW) developed. The industrial production capacities made available a virtually limitless supply of firearms and bullets. No longer was it sufficient to amass as many soldiers in the field as possible, but they had to be supplied with massive firepower as well. The introduction of the railroad ensured such a constant supply. Where first generation wars were still somewhat mobile, with mass assaults of one army on the other being able to force a breakthrough, second generation war was literally fought by the meter. Since the available firepower was much greater than what any armour of the time could withstand, wars became entrenched, with no side being able to approach the other without losing great numbers of troops first. Defence became the main tactic of this generation, with production, supply and telegraphic coordination being the key elements of success (ibid, 18-22).

The trenches of World War I seemed to have warfare into a necessary stalemate, which could only be breached at enormous human cost. World War II introduced new technologies to the battlefield, however, such as the tank, the aircraft and long range artillery. Each of these provided a relatively 'cheap' way to breach the defence lines of second generation war. Hence the *third generation* (3GW) was born, being quick and flexible maneuver war. Early in World War II the Germans were very successful in this tactic, overwhelming the allied forces. One factor other than technology Hammes mentions as explanation for this success, is the political will that existed in Nazi Germany, contrasted with the lack of political will in Britain and France. Though he is not explicit about whether political will is characteristic for third generation warfare, it is important to note its importance in general. A state whose people are united and have the will to spend their resources on developing tactics that bring a military advantage has a head start on a state lacking such a will (ibid, 23-31).

The current stage of modern war has emerged with *fourth generation warfare* (4GW), first conducted successfully by Mao Tse-Tung in Communist China of the 1920's and the 1930's. So actually the fourth generation was around before the third generation had reached its summit. Mao's approach to 4GW became best known as *guerrilla war* or *people's war*. Faced with a situation where it was impossible to attain true military superiority—Mao's Communist insurgents were numerically smaller and materially worse equipped than their Nationalist enemies—he adopted a strategy that avoided

direct confrontation and used the people as a resource and power base to conduct strikes and undermine the political support of his enemies. This is in essence what 4GW is about; using all available *networks*—political, social, economic and military—to convince the enemy's political decision makers that their strategic goals are either unachievable or too costly for the perceived benefit (ibid, 2-3; 44-55).

4.1.3. War in three dimensions

Based on the two frameworks discussed above, a synthesis can be made that sheds light on the morally relevant characteristics of war. The most important lesson the Tofflers teach us, is that the way we make war reflects the way we make wealth. The socio-economical, political and technological structure that is the basis of a society can be projected onto the wars that society fights. However, this keeps open many options for the adoption of specific tactics to be used and roles to be played by specific actors. Hammes has shown us that within the span of the second wave only we have seen three generations of warfare that have displayed quite different ways of fighting. Thus the basic structure of a society will provide us some insight in the wars that society fights, but doesn't explain its characteristics exhaustively.

The basic structure enables the use of certain tactics and politicians and strategists are inclined to use *those* tactics that give them an edge over their enemies. Especially if asymmetries exist between the warring powers, these can be exploited by certain tactics. Fighting against the feudal societies, the first nation-states found an edge in the massing of manpower on the battlefield to overwhelm their enemies. In the age of raw firepower, it was hardly possible to attain an edge, so warfare became defensive, entrenched, not allowing the enemy to advance without suffering massive casualties. The technological and political superiority of Nazi Germany over its opponents incited them to adopt the tactic of the *blitzkrieg*. 4GW by definition entails the exploitation of structural asymmetries to win wars on the political level. The technologically and economically superior powers are likely to seek quick victories on the battlefield, while their enemies will try the opposite, protracting war over time, avoiding direct confrontation and using networks to hurt the enemy indirectly and so undermine his political will to continue the fighting.

Put together, I think we can explain the morally relevant characteristics of warfare using a framework that views war in three underlying dimensions. These dimensions are not independent. For example the socio-economical structure underlying a military power can be a determinant for the level of technological advancement as well. However, each of these dimensions has its individual consequences for the morally relevant facts we will encounter in any war. The dimensions can be different for the various sides involved in a conflict. If that is the case, some form of asymmetrical warfare will arise. Different asymmetries lead to different tactics, though, and therefore to different wars. In a technologically asymmetric war, we may expect to see the 'inferior' side evade clear and open combat and use covert, guerrilla-like tactics instead. In a politically asymmetric war on the other

hand, there could be a much greater role for propaganda or the use of terrorist methods to demoralise the enemy's home front. The following three dimensions define a war in the proposed framework.

1. *The political structures of the fighting parties.* We can ask what control the people of a country or territory have over the wars being fought (supposedly) on their behalf. In a democracy this control would be fairly large, whereas in a dictatorship it is virtually nonexistent. Also of relevance is the type of political entities the warring parties are and thus the recognition they get on the international stage.
2. *The socio-economical structures of the fighting parties.* Where the political structures tell something about the way decisions are made, the social structure tells something about the way they are implemented. Does a society have a high degree of specialisation? Is warfare the job of a professional elite, a warrior class or is an entire people expected to be involved? What are the means of production used by the warring society?
3. *The technological structures of the fighting parties.* Are the means of war primarily high-tech or low-tech? 'High-tech' is taken to mean that the operation of the instruments of battle requires a large degree of specialisation and training and that the instruments themselves are typically capital-intensive, produced by a dedicated industry that spends heavily on innovation. 'Low-tech' means that simple, commonly available tools and weapons are used.

Now that we have established a framework to analyse the morally relevant characteristics of war (for a schematic overview, refer back to figure 4.1), we can apply this to depict contemporary warfare and see what challenges to Walzer's just war theory it poses. In the upcoming three sections, I will examine how each of the dimensions has developed, in each case separately considering the consequences for *jus ad bellum* and *jus in bello*.

4.2. Political structure

The political dimension primarily has consequences for the domain of *jus ad bellum*. The political structures people use to organise themselves determine which entities will wage war against other entities. For example, in the Middle Ages wars were fought between princes who brought their feudally dependent noblemen to the battlefield. From the treaty of Westphalia in 1648 onwards, warfare in the Western world primarily became the domain of states (Howard, 1976). Different political structures may commit different types of war-like acts. The massive armies raised by Napoleon in the late eighteenth century were much more suitable to mount a full scale invasion than are the decentralised cells of a terrorist network like Al Qaeda. In the first three upcoming subsections I will consider the consequences of the political dimension for *jus ad bellum*. In the final

subsection before the conclusion I will argue that there are also some consequences of the political structures, and especially the asymmetries between them, to be found in the domain of *jus in bello*.

4.2.1. Non-state actors (*jus ad bellum*)

One of the basic assumptions of *political realism* is that wars are fought between states. Domestically, the state has the monopoly on the use of force and the sovereignty to make its own laws. Outside its borders exists a narchy, in which different states compete for power and security. Because of their competitiveness, it is difficult for states to agree on universal principles, except for the principle that they should not interfere in one another's domestic affairs. Domestically, all kinds of actors can play a meaningful political role, but internationally non-state actors do not have a place of their own. (Dunne & Schmidt, 2005, 172-4).

For all their differences, political realism and just war theory—or at least the way Walzer sees it—seem to agree on this assumption of *statism*. It underlies the traditional requirement that a war be formally declared under a legitimate authority. Although Walzer has not adopted this element of the just war tradition, statism is pervasive in his work as well. In many instances Walzer discusses what states may and may not do, rarely considering the possibility of a non-state actor playing a primary role in a war. Whenever a non-state actor is allowed on the battlefield in Walzer's account, this is usually an insurgent group, seeking to claim authority over a certain territory. Whether the group is to be allowed belligerent rights, depends on the public support it gets in the territory to which it lays claim (Walzer, 2000, 96). Here the insurgents assume state-like properties; they have some kind of territory over which they obtain legitimate authority through the consent given by the people who live there; these people form a political community, of which the territorial integrity and political sovereignty are supreme. In fact, they are states in every respect but that they have been formally recognised by other states. If the insurgents do *not* have sufficient popular support and hence are denied belligerent rights, they are no more than a rabble and as such a domestic affair of the state in which they are located. This way of looking at the actors that may be involved in a war does not provide an adequate reflection of today's reality.

4.2.2. Sub-state actors (*jus ad bellum*)

Since the end of World War II a number of sub-state as well as supra-state actors have gained in importance on the international stage. Many present-day wars are waged by sub-state factions the likes of Al Qaeda and Hezbollah. According to the Uppsala Conflict Data Program, of all the armed conflicts fought since 1946, the number of intra-state conflicts has greatly exceeded the number of wars between states. Since the 1970's the gap has become even larger (Harbom & Wallensteen, 2005). This puts forward the question if and how these conflicts should be considered from the just war viewpoint.

If the *realist* assumption that intra-state violence is a matter of state sovereignty held, this would not be an issue. Wars not fought between states would simply not be considered *war* in the proper sense of the word (this was the typical outlook on war during the nineteenth century). However, armed struggles between factions within the borders of a state display the same characteristics that Walzer thinks makes war morally problematic. People are killed just as brutally as in inter-state war—or even more so, one might argue, since states can more easily be held accountable for their wartime acts than non-state groups can—and the same persuasive and coercive methods are used to make people fight. Yet Walzer's theory of aggression does not provide for 'aggressive' acts committed by one non-state faction against the other. His discussion is limited to the case of an insurgency by a substantial, territorially identifiable group against the government of the state (Walzer, 2000, 91-7). This does not help us in cases like the present-day Iraq war, where Sunnis and Shiites, each with their own strongholds spread across the country, fight one another. How are we to determine when one of these factions commits an act of aggression?¹⁹

The problem becomes worse when we consider the international dimension of warfare by sub-state organisations. If one state invades the territory of another, this is considered *aggression* and the international community may attack the aggressor state in return to deter further violence. However, if a sub-state actor conducts an attack against a target *outside* of the borders of its own state, how should other states respond? If they attack the state harbouring the aggressive faction, they violate that state's sovereignty and thus commit an act of aggression of their own. However, that state's regime may be of such a nature that it feels no need to respond to the threat emanating from within its territory itself. Thus the attacked state's territorial integrity is violated without any punitive or deterrent action being taken. The problematic quality of sub-state actors is, that it is unclear whom to hold responsible for a war and against whom to direct punitive measurements.

A case in point is the 2006 war between Israel and Lebanon. The events leading to this war consisted of a border raid against Israel by the Lebanon-based faction Hezbollah, capturing two Israeli soldiers and killing three others. Israel mounted a rescue attempt that failed, after which it launched an open war campaign against Lebanese infrastructure throughout the country. According to some interpretations, this war was initiated by Hezbollah. From a just war perspective, Israel could legitimately defend itself against the aggression and wage a punitive war in return. But it is unclear whether the punishment may be directed towards Lebanon in its entirety, or only towards those regions where Hezbollah is active, or only there where it has strong public support.

In Walzer's view, only states can commit aggression and that leaves us in the dark in the cases where war-like acts are committed by sub-state actors. In a recent article in *Filosofie Magazine* he contends

¹⁹ In legal terms, non-state actors cannot commit 'aggression'. I use the term here in the moral sense, denoting the kinds of acts that, when committed by states, Walzer considers just cause to go to war, as discussed in chapter 2.

that in the case of Lebanon, the Lebanese are responsible for disarming Hezbollah and since they didn't, Israel had every right to wage war on them (Heuts, 2006). This view fits within Walzer's general worldview in which states are the basic units of international society and any organisation always falls under the responsibility of one state or the other. I seriously doubt whether this is a realistic way of dealing with paramilitary organisations like Hezbollah. Especially in weak or failed states, the official government often does not have the power to control the factions operating from its territory. One could argue that such governments do not fulfil the most basic requirement of statehood, i.e. providing security within its own borders, and thus should not be regarded as the true representative body of the state. This ignores that a government may very well have the popular support of the people living within a territory but not the military power to resist a violent dissenting minority. Neither holding that government responsible for everything that happens within its borders nor considering it illegitimate because of its inefficacy seems satisfying as an answer.

Another type of non-state actor I want to discuss is that of *secret services* or *intelligence agencies*. These are in no way a new phenomenon, but they do make an interesting case. Secret services may conduct covert operations such as abduction, unlawful detainment and interrogation and even assassination. For example, the American CIA has been accused by different press sources of abduction of suspected terrorists and of assassination of high-ranking Al Qaeda leaders (c.f. Wikipedia contributors, 2007). I do not wish to go into detail about the controversial issue whether these accusations are true or not. Instead I want to argue that *if* such accusations are in some cases true, the agencies involved form a problematic group. On the one hand they can be seen as the policy instrument of (part of) an official state's government. On the other hand their existence or involvement in particular operations is often denied. Hence they allow a state to engage in war-like activities without allowing the international community to judge whether that state has indeed committed aggression.

In Walzer's thought, the justification of a war always requires the clear establishment of a just cause, i.e. aggression committed by a state. With regard to any uncertainty surrounding the existence of this cause, it is better to err on the side of caution. This view is evidenced by his discussion of pre-emptive strikes. He writes: "what the lawyers consider 'hostile acts short of war', even if these involve violence, are not too quickly to be taken as signs of an intent to make war." (Walzer, 2000, 80) I think we can extrapolate this attitude to other types of uncertainty: just as we should be careful to say that a sufficient threat exists to justify a first strike, we should also be careful to say that a war-like act by a secret service can be attributed to a sovereign state. If members of the international community plan to wage a war against the state suspected of exploiting the service that committed the act, the burden of proof lies with them. A sophisticated theory of a just war might specify what exactly that burden entails and who is to judge whether it has been satisfied.

A final example of problematic sub-state actors is provided by international terrorist networks, of which Al Qaeda is best known. The acts of such networks are of such a nature that they do very well

be regarded as war-like. Modern communication technologies, especially the internet, enable them to coordinate worldwide attacks by decentralised units and without a clear central base of operation. Here it is even more difficult to fit these organisations into the just war framework. Not only do they pose the political question of who is responsible for their actions, they also introduce an empirical difficulty of ascertaining from where they operate. While paramilitary organisations like Hezbollah can often clearly be linked to a certain territory, this is much more difficult for a terrorist network. Hence any forcible response by the international community directed at what is considered a 'base' of the network is of a somewhat speculative nature. In this sense terrorist cells combine the difficulties posed by paramilitary organisations and secret services. The burden of proof that a terrorist network operates from within a certain state lies with the international actors planning to wage a war against it. Even if that burden is taken seriously, there still remains the problem of whom to hold responsible for the operations and against whom an attack may be directed. It is highly challenging to incorporate this type of actors in the just war framework.

4.2.3. Supra-state actors (*jus ad bellum*)

Similar concerns arise when a supra-state actor gets involved in military affairs. In his essays on the 2003 Iraq war, Walzer seems to have little regard for the United Nations (U.N.) as an independent actor. His thoughts primarily revolve around the responsibilities of international society and each of its individual members, where the U.N. are no more than a tool to organise the society (Walzer, 2004, 143-68). An explanation may be, though, that the U.N. we have seen in operation for the past half century has not always been the most effective of organisations. About the existing global organisations Walzer remarks: "[they] are weak; their decision mechanisms are uncertain and slow, their powers of enforcement are difficult to bring to bear and, at best, only partially effective." (ibid, 179)

If we imagine a different system of world politics, Walzer is much more enthusiastic about the potential of organisations like the U.N. He himself envisions a system of global pluralism, in which international political organisations are backed up by regional organisations and by the associations of civic society. In this system the U.N. would have a strong military force at its disposal for humanitarian intervention and peacekeeping operations, but its deployment must be approved by the Security Council or large majority of the General Assembly. The civic associations would involve individuals in world politics, thus ensuring a more legitimate basis for U.N. decisions. The regional organisations prevent the rise of a universal tyranny from the centre, as they offer competing centres of power. Although Walzer does not discuss to what degree this new U.N. would take over the rights of states in terms of warfare, he establishes that it at least can wage war. It obtains a kind of *legitimate authority* ordinarily reserved for states or state-like actors (ibid, 185-91).

In today's world, we are far from a system of global pluralism. Yet we *do* have an, arguably weak, U.N. which *does* assume a sort of legitimacy in deciding whether force should be applied here or

there. This supra-national body in effect takes over part of the sovereignty of its member states and claims to be a legitimate authority in itself. It is difficult to ascertain whether it is indeed legitimate in Walzer's sense of the word as long as the system of global pluralism does not yet exist. It is one thing to determine which government the people of a territory recognise as their own; it is quite another to find out to what degree they are loyal to their government's commitment to a higher authority. For evidence we only have to look at the outcome of the Dutch and French referenda concerning a European 'constitution' in 2005.

It could be argued that a UN war would almost never be unjust, because of the broad international support required to initiate it, but then perhaps a more compelling example could be the military North Atlantic Treaty Organisation (NATO). When a body such as NATO issues a war, who is to be held responsible? Legally speaking the member-states are collectively responsible for the actions of their overarching body. But if NATO would start an unjustified war against some third state, would it be reasonable to wage a war in return against, say, Luxembourg or Iceland? These countries may have only a marginal influence on NATO policy and not make the most substantial contributions to its military efforts, yet are fully responsible for it. What could be alternative ways to consider issues of responsibility in the warfare by supra-state actors? Should a greater burden be placed on the members supporting a war most vigorously? On those that actually contribute to the military action materially? These are important questions at the beginning of the 21st century and Walzer's just war theory as of yet fails to provide satisfactory answers to them. If international society is neatly divided in politically autonomous units called *states*, it is much easier to establish that one of them has committed an act of aggression against another. Yet the reality is that some wars are waged in name of a collective in which states participate more or less. Just war theory should provide guidelines for judging in matters where the responsibility for acts of war is not so easily determined.

4.2.4. Democracies and authoritarian regimes (*jus in bello*)

The political structures of the fighting parties primarily, but not exclusively, influence the domain of *jus ad bellum*. Some types of structures are vulnerable to particular measures of war. An interesting case in point is the weakness of democracies against tactics that undermine the public support of a war. The withdrawal of the United States in the Vietnam War was for a large part the result of internal public pressure that rose along with the casualty count on the American side. Here the U.S. was not so much defeated because its army was overwhelmed, but because its political will was broken. According to Hammes (2004) this is precisely the point of *fourth generation warfare*; to use all available networks to destroy one's adversary's political will.

Present day democracies display a similar vulnerability to acts of terrorism. For example, the 2004 terrorist attacks on Madrid's subways, killing 191 civilians, arguably led to the withdrawal of Spanish troops in Iraq. They swung the then upcoming elections in favour of socialist leader Zapatero, who pledged to withdraw Spanish troops immediately if he was elected into office. Whether the bombings

can be directly attributed to the Iraqi insurgency or not, they show that democratic countries are vulnerable to attacks that undermine political support for the war effort.

At the same time it is not likely that one democracy will use terrorist measures against another to undermine its political will. The spirit of the public in a democracy is precisely of the kind that does not accept the use of 'immoral' acts to promote its own interest. Even though the American public was demoralised by its own army's body count, it was outraged by the uncovering of the My Lai massacre, in which U.S. soldiers had committed atrocities against Vietnamese civilians. More recently the unlawful detainment of 'suspected terrorists' in America's off-shore camp Guantanamo Bay has met with heavy popular resistance. This suggests that an authoritarian regime or non-state organisation can obtain a tactical advantage against a democracy by exploiting terrorist acts to undermine its enemy's public support.

The occurrence of wars between democratic and non-democratic countries is certainly not a new phenomenon. One of the earliest documented wars, the Peloponnesian war, was fought between democratic Athens and aristocratic Sparta. Yet in the information and communication age there are many more opportunities to take advantage of the political structure of one's adversary using fourth generation warfare. As illustrated by Hammes (2004) the mass media provide warring powers, states or not, with excellent tools to bring across messages to their own population and to that of their enemies. This creates a kind of 'media warfare' where the fight is not so much between soldiers trying to kill opposing soldiers, but between broadcasters trying to kill the opposing decision makers' will to continue fighting.

The availability of the kind of tactics described in itself does not provide a point of criticism against Walzer's theory. In his discussion of terrorism he clearly shows that it is immoral to use indiscriminate violence against civilians who have done nothing to become liable to be harmed or killed. I am sympathetic to this condemnation, but we face a reality in which some groups in fact do resort to terrorism—and for sound tactical reasons, as I have shown. A very interesting question associated with this observation is whether the group or state that falls victim to terrorist attacks is entitled to respond in kind, thus breaking the war convention itself to fight the terrorists. Walzer does not address this question, but it voices a sentiment that may be held by a rather large part of the population. It is even evidenced by the shape of just war theory in earlier times. During the Middle Ages the Christian knights were obligated only to respect their Christian adversaries; there were no rules stipulating how they were supposed to behave against heathens (Neff, 2005). Should we make similar distinctions in our own time? Are we, for example, allowed to use torture against known terrorists, where against regular soldiers we should respect the war convention? Or are we allowed to drop the strict distinction between soldiers and civilians if we are up against a society that does not make these distinctions

itself?²⁰ These are difficult questions and unfortunately Walzer does not give them attention in his work.

4.3. Socio-economical structure

In their three-wave framework, the Tofflers related the means of destruction of a society to its means of production. One characteristic of third wave societies is their level of integration; many functions are performed in 'networks'. For example, where a trend of industrial society was for large companies to cover as much of the value creation process of its products as possible, late 20th century corporations have tried to return to their core businesses, while outsourcing other aspects of the value chain. The knowledge society is still developing further; meanwhile the World Wide Web connects every company, individual and organisation in the Western world. This further increases the decentralisation of production processes, as an ever larger part of them does not involve physical products, but instead 'intellectual' products that are easily exchanged over long distances. Smaller, decentralised organisations are more capable of performing their specific task, as they can focus on just their area of expertise instead of on all business functions together. Also, modern economies show many forms of collaboration between different types of actors, such as governments with private firms or corporations with universities (Nooteboom, 1998, 18-29). These developments are reflected in the way third wave societies make war and give rise to some important criticism of Walzer's *jus in bello*.

4.3.1. Involvement of civilians in the military effort (*jus in bello*)

The importance of networks is far from limited to domestic society. Western armies increasingly make use of private service companies to perform specialised tasks. The technological edge the American army has over any other army in the world springs from its enormous annual budget for research and development (already \$40 billion in 1993). This research is not conducted solely, or even mostly, on military sites, but instead in research departments of universities and in private corporations—together forming the so-called *military industrial complex*. Some of the most sophisticated weapons of today are not just developed and produced by civilians in their research facilities and factories, but require the continued support of specialists for their operation. Also, many functions of the army, such as maintenance and logistics, are these days outsourced to private companies specialised in the task. All these trends point to a high degree of civilian involvement in 21st century warfare (Toffler & Toffler, 1993, 166-9).

Where on the one hand we see civil-military collaboration in advanced Western societies, on the other hand Thomas Hammes (2004) points at the importance for successful insurgencies to mobilise large

²⁰ The distinction between soldiers and civilians only arose effectively as late as the seventeenth century; the time when professional armies were formed as a class apart from civil society (Howard, 1976, 54).

parts of the people for their cause. These people perform all kinds of supportive functions like providing financial support or safe shelter to the fighters, smuggling arms, circulating communiqués or sabotaging government attempts to quell the insurgency. They are precisely what gives a guerrilla movement its tactical advantage and thus cannot be seen separately from the military. In the case of international terrorism the integration between civil and military functions goes even further. The Islamic Jihad, for example, recruits civilians to conduct suicide bombings. In fact, terrorist organisations have no official class of 'soldiers' that distinguishes itself from other members.

The levels of integration between the army on the one hand and civilians and their organisations on the other, stands in stark contrast with the strict separation between soldiers and civilians Walzer proposes. Interestingly, the soldier-civilian distinction is a quite modern invention. In medieval wars, about which Aquinas and Vitoria wrote their theses, no such distinction existed. Wars were fought by noblemen, supported by a team of assistants. During peacetime, the noblemen managed their lands and only for the duration of a campaign did they provide military service to their liege lord. Only with the rise of professional standing armies in the seventeenth century the separate category of *soldier* arose. The soldier was in permanent service of the army, without having to provide for his own subsistence in time of peace. Civilians may still have rendered services for the army, but the fighting was left to the professionals (Howard, 1976, 1-4; 54-7)

During this time it began to make sense to distinguish soldiers from civilians. Soldiers were actively involved in the war business, posing an immediate threat to their adversarial counterparts on the battlefield. Civilians on the other hand were innocent in regard of the war and constituted no identifiable direct threat. During the twentieth century the special standing of civilians as inviolable for acts of war was further strengthened in the just war tradition and also legally established in the fourth Geneva convention.

Walzer strictly adheres to the moral distinction between soldiers and civilians, although he does provide an in-between-category of *munitions workers*. The latter are directly involved in the war business, although they do not manifest themselves on the battlefield. They are liable to be harmed only while active at work. In light of the far-reaching levels of integration encountered in contemporary warfare, Walzer's distinction between *civilians*, *munitions workers* and *soldiers* seems rather simplistic to me. The main characteristic from which munitions workers derived their violability, was that they were the ones that enabled the army to fight. We might interpret this as saying that munitions workers gave an army its lethality and its tactical superiority. For modern armies, both high-tech and low-tech, superiority is no longer gained from having the most bullets, but from obtaining better information and being able to effectively organise networks. The civilians involved play a key role in their success. Yet it would be at least controversial to say that, for example, a satellite receiver station is a legitimate military target, as its products are used by, among others, the army. Especially the fact that such services are employed in domestic life as well as in war, make it hard to put their employees 'at the front line' when the fighting breaks out.

It would go too far to abandon the civilian-soldier distinction altogether. I think the concept of *noncombatant immunity* is one of the chief achievements of just war theory. Yet in Walzer's statement of the principle the assumption is made that the line between the categories can be drawn fairly easily, an assumption that does not hold in early twenty-first century warfare. To cope with the level of integration of modern society and its implication for the involvement of civilians in warfare, a theory of *jus in bello* must be able to distinguish between different classes of actors in the war effort. I think a more fine-grained distinction is possible than just between soldiers and civilians, with munitions workers as the middle category.

4.3.2. City warfare (*jus in bello*)

Battles from ancient times up to the twentieth century have mainly been fought in the open field, at sea or in the air. They have often been catastrophic for villages in the countryside where wars raged and destruction and plunder was omnipresent. Villagers had to flee to the safety of well-defended cities or to areas not affected by the wars. However, the towns were rarely the primary location of the fighting. Cities have been besieged for as long as they have existed and often their conquest has marked victory in the war, but again, their streets were not the scene for most of the battles. A probable explanation is that, prior to the industrial era, cities could be fairly well defended against attacks from the outside, but once the walls were breached further resistance became futile.

After the end of the Cold War, we have witnessed a change in *where* wars are fought. An ongoing social development is that a growing population lives increasingly in cities, as opposed to on the land or in small towns. Suddenly the *city* seems to have become the dominant background for the actual fighting. The ongoing war between Somalian warlords takes place mostly in the streets of Mogadishu. In Iraq, the American forces had little difficulty in reaching and entering Baghdad in 2003, but still have not been able to quell the resistance. Quite different cases are offered by Belgrade in 1999 and Beirut in 2006. Both cities were considered of tactical importance by respectively the NATO and Israel, but neither saw a soldier enter during the conflicts concerned. All important targets were eliminated through air strikes, causing massive collateral damage along the way.

Of course battles in cities are not really a new phenomenon. The razing of Carthage by the Roman republic in 146 B.C, the capture and sack of Constantinople in 1204 and the battle of Stalingrad in 1942 show that city war is a thing of all times. However, with the exception of Stalingrad, these battles all were the crown upon a larger campaign, where the capture or destruction of an important city meant victory in war. What is new is that guerrilla tactics developed during the twentieth century now make it possible to wage a protracted war against the backdrop of a city. Without a very strong military or police presence, the densely populated urban areas provide the necessities of life, intelligence and concealment in which the guerrillas can thrive (Hammes, 2004, 184). Thus it is actually in their interest to lure the enemy into the city and only start resisting once the city seems to have been taken.

Where on the one hand guerrilla fighters find it in their interest to start a sustained struggle in the cities, something has also changed on the other side as well. In traditional wars, the goal of fighting was the overthrow of the enemy. In contemporary wars Western powers wage, however, the goal can be better described as *recreating life* in the disputed territory. That is, they try to establish a new sovereign regime that better serves their interests or ideologies. Characteristic for this kind of warfare is that eliminating or disarming the enemy is not sufficient. Instead the 'enemy' population must be won over, an effort that is undermined by guerrilla resistance (Negri & Hardt, 2004, 18-25). Thus both sides in a conflict find it in their interest to sustain the struggle and the resistance forces are the ones deciding the location.

In his texts Walzer gives no special attention to city warfare. This is unfortunate, because this increasingly important type of warfare brings up questions of its own. How should the civilian population of a city be treated if the city becomes the battlefield. In his discussion of guerrilla warfare Walzer argues that when a *village* is attacked because it shelters guerrilla fighters, the villagers should be warned in advance so they can leave their town for the duration of the attack. This solution is hard to maintain for protracted war in the streets of a city. We cannot expect the one point seven million citizens of Mogadishu to leave their homes for years as long as a struggle is going on in their city. The doctrine of the double effect (in its amended form by Walzer) doesn't provide a satisfactory answer either. It is a useful framework for judging the acceptability of civilian casualties in an incidental attack, weighed against the military benefit. If civilians are confronted with violence around their homes every day, however, such calculations are no longer reasonable. Forces advance and retreat neighbourhood by neighbourhood and with every change in the balance of power civilians die. Just war theory should give an account of how the rules of war are to be applied in cases where the battlefield and the residential areas are one and the same.

4.4. Technological structure

The third and final structural dimension I will consider is that of technological structure. The consequences of the fighting parties' technological structures and the asymmetries between them are to be located in the domain of *jus in bello*. To understand these consequences I make use of an analytical concept from the field of philosophy of technology. This is the distinction between *tools* and *machines*, which has been developed by philosophers like Gilles Deleuze, Bruno Latour and Lewis Mumford. A tool is only an instrument an individual may use, but a machine is a social system that ties together the tools and their users. Where a tool is just material, a machine encompasses all social and cultural aspects of its social organisation. Only through its embedding in a machine the tool becomes productive. The machine always precedes the tool (Achterhuis, 1992, 243-4).

4.4.1. The technological promise (*jus in bello*)

With regard to war, we may look upon weapons, communication technologies and transport vehicles as tools. These technologies are meaningless without their systems of social organisation. For example, the introduction of the machine gun on the battlefield in the late nineteenth century required much more than just the production of the tool itself. A mass production system for ammunition had to be organised and all this material had to be transported to the battlefield. The society from which this system sprung forth had to have developed a high degree of standardisation. Also, one might say that a moral acceptance of mass killing was necessary to allow for the use of the machine gun. Together all these aspects formed the machine in which the machine gun fulfilled its purpose.

Now, if we look at technological changes in warfare and their moral implications, it is not just the tools we should be looking at, but the whole machine of which the technology is part. Only then can we obtain a full grasp of the impact certain technologies have. There is an additional reason to study the machine instead of the tool. Our ethical reflection on new weapons and other technologies is itself part of the machine. So by articulating the moral consequences of new tools in their social and cultural organisations, we can actually influence the machine itself. For instance, the treaty to ban landmines can be regarded as part of the machine in which landmines are used as tools. Because their use is no longer morally accepted, the machine could make one of its own tools obsolete.

An interesting development has been that the war machines of Western states, the USA in particular, have set their minds to developing ever more 'clean' weapons. Where the cold war was a race to build the biggest bomb, the challenge of the post-cold-war-period has been to develop weapons that can hit their targets with the highest accuracy, causing as little collateral damage as possible. Three developments embody this technological promise:

1. nonlethal weapons;
2. the *revolution in military affairs*;
3. information warfare.

Nonlethal weapons

Nonlethal weapons are weapons that rely on other means than gross physical destruction to incapacitate their targets. Their effects to humans and materiel are either reversible, or they affect other objects in their area of influence than traditional weapons. Though by no means completely new, they have been given new emphasis since the Vietnam War (where anti-plant defoliants, one type of nonlethal weapon, were used to reveal guerrilla hideouts) and are considered of growing importance in the post-Cold War era. Bunker (1996) has compiled an extensive reference list of nonlethal weapons. Not all of these have been put into actual use, but they have at least been seriously considered for employment by armies or been published in scientific journals. To take some interesting examples from the list:

“Acoustic bullets are high power, very low frequency waves emitted from one to two meter antenna dishes that result in blunt object trauma from waves generated in front of the target.” (p. 1)

“Biodegrading microbes produce acids or enzymes which can be tailored to degrade almost anything, even concrete and metal.” (p. 10)

“A prophet hologram is the projection of the image of an ancient god over an enemy capital whose public communications have been seized and used against it in a massive psychological operation.” (p. 15)

Now these examples may sound bizarre and in the present-day reality be no more than science fiction, but they clearly illustrate one line of thinking in both the military and its research industry. This line does not just consider weapons for their tactical advantage, but for their moral implications as well. It is worthwhile to pause for a moment and briefly think about these moral implications. The state or actor that uses nonlethal weapons in its arsenal is implicitly asserting its moral superiority over its enemy. This may be necessary to convince its own national support base or the civilian population of the area it operates in of its benevolent nature, but it is unlikely to directly affect the attitude of its adversary's fighters. What good does it do to take up a moral standard beyond the requirements of just war theory if one's opponent does not adhere to that same standard?

If we look at Walzer's theory of a just war, one line of thought is that nonlethal weapons might affect our standards of *jus in bello*. Walzer argues that we must very carefully distinguish between different classes of people (e.g. combatants and non-combatants, or a more subtle delineation) in deciding if they are liable to be killed in war; need we be as careful when the question is just whether they are liable to be hurt or frightened? In one way, no. Terror bombing a city to force the enemy to submit to one's will is clearly an immoral practice in Walzer's book (except in cases of supreme emergency). Hardly the same can be said of bombing a city with pamphlets to induce the same effect. In this sense, nonlethal weapons open a whole new range of permissible acts of war to achieve ends previously unattainable. Yet as long as at least one of the parties involved in a conflict adheres to conventional weapons, war is still likely to involve bloodshed. A soldier fighting with optical or acoustic ammunition may not be able to kill, but is liable to be killed nevertheless, as is the hapless civilian who gets caught in the crossfire.

Imagine the following thought experiment. A highly sophisticated Western army enters a foreign city to find and 'eliminate' enemy soldiers hiding there. Our high-tech army does not use conventional weapons, but only nonlethal weapons that cause no permanent injury. Once an enemy soldier is sighted, he is 'fired' upon, regardless of whether civilians are in the line of fire or not. After all, we might reason, any civilian that is hit is just inconvenienced for a while, which seems an acceptable sacrifice to attain the military goal of subduing the resistance. The enemy soldiers, however, are not

likely just to surrender as long as they have the means to fight back, even if those means *do* mean that civilians get killed. Now it seems unreasonable to place all the blame for these civilian casualties on the resistance fighters. The attacking army deliberately chooses a battle scene where civilians can get killed if firing between the parties occurs; and firing is likely to occur. Hence I think that in this sense the use of nonlethal weapons does not soften the *jus in bello* requirements, but in fact sharpens them. An army employing these technologies should not just avoid killing innocents itself, but should put in every effort to avoid *situations* where innocents can get killed. Thus nonlethal weapons have both tactical and moral advantages, but they do not elevate their users to a moral superiority allowing them to do as they like.

The revolution in military affairs

Another development in the technology of warfare, embraced especially by the United States Army, is the so-called *revolution in military affairs* (RMA). This notion entails the exploitation of socio-economical and technological asymmetries to the tactical advantage of the more developed power. It is based on three premises (Hardt & Negri, 2004, 41).

1. New technologies offer the possibility of a new form of combat.
2. The paradigm of war as a predictable mass conflict ended along with the Cold War.
3. The United States has an overwhelming dominance in military power over other nation-states.

The first premise has partly been illustrated in the preceding paragraphs. More to the point here, Hardt and Negri envision a kind of warfare that maximises the use of technology and intelligence and minimises the risk to soldiers. Air power is deployed on a large scale, supported by marine power and missiles. The ground troops mainly play a role in coordinating attacks and gathering intelligence, as well as performing special operations (Hardt & Negri, 2004, 56-63). The paradigmatic case is probably the 1999 Kosovo war, which exclusively consisted of aircraft operations until Milosevic had actually surrendered and accepted terms and which resulted in zero casualties on the NATO side. We have seen the second premise confirmed earlier in this chapter. The third premise may very well be true, but only makes sense from an American point of view. I would rather paraphrase it as the assumption that there are large differences between the military power of international actors and that many wars will therefore be asymmetric in character. There is some controversy over whether the RMA is indeed revolutionary or even feasible, but if it is, it effectively enables a risk-free war for the side employing it.

Of course it is a noble cause to keep one's soldiers from getting harmed as much as possible. The real question is: at what cost? In Vietnam the Americans used a tactic where as soon as they encountered hostility from a village they would call for air strikes, while their infantry took cover. The civilian casualties and the material damage caused were enormous and Walzer rightly condemns this practice.

Soldiers should not be allowed to risk more civilian casualties to keep themselves safe (Walzer, 2000, 188-96). In his later essay on the Kosovo war he arrives at a similar conclusion; ground soldiers should have been sent in earlier, not just after the real fighting was over. This meant taking risks but also protecting cities and civilians (Walzer, 2004, 99-103).

Even if the low-risk RMA approach yields no more civilian casualties than conventional warfare, we should still consider what this means for the ethics of war. If one party in a conflict can make itself virtually impervious to harm, where the other side puts its soldiers' lives at risk, a serious imbalance arises. The stronger power would be much more comfortable starting a war than the weaker would and it would have little incentive to end it. Hardt and Negri (2004, 60-1) remark that wars bloodiness and horror serves to compel combatants to seek a quick end to it. Taking away this incentive may well be more cruel than maintaining war as a condition where soldiers fight and get killed.

The RMA creates another imbalance as well. We must understand that the precision weaponry used for tactical air strikes is very expensive and therefore only available to the sophisticated armies of Western powers.²¹ Previously, the economic advantage of these powers only netted them a tactical advantage, but now it seems to provide them with a moral advantage as well. If we were to apply some strict criterion of proportionality (none of which Walzer proposes), we may conceive a military action to be morally acceptable from one side in a conflict, but not from the other. For example, if the United States has a smart missile that can destroy an Iraqi weapons factory, but the Iraqi only can achieve the same in the USA by destroying a residential area along with it, would the US be justified in its actions but not Iraq? This would make the rules of *jus in bello* hard to accept for non-Western powers and therefore difficult to maintain with any pretence of universality.

Information warfare

One important part of technological innovation for military purpose is conducted in the domain of information and communication technology. In its *Joint Vision 2020*, the U.S. Department of Defence (DOD) addresses *information superiority* as the primary technological focus point of its competitive advantage (Joint Chiefs of Staff, 2000). Other sources even speak of a newly emerging form of war called *information warfare*. Of course, information has always been important to warfare. The commander knowing better the movement of enemy troops, the characteristics of the terrain he fights on and the morale in the enemy camp, has a decisive tactical advantage. Yet through technological innovation, the scope of what is possible with information alone has vastly increased.

Toffler and Toffler (1993) describe *information warfare* (also described as *knowledge warfare* or *command and control warfare*) as war in which "each side will try to shape enemy actions by

²¹ We may include some very large non-Western powers such as China and Russia as well, because due to their sheer size they would have the ability to develop a limited arsenal of high-tech weapons. No developments in this direction are showing yet.

manipulating the flow of intelligence and information.” This involves acquiring, processing, distributing and protecting information, while selectively denying or distributing it to adversaries and/or allies. The ‘production’ of information consists partly of surveillance operations in the field, but is also for a large part research and development. Where research done by the military used to spin off many innovations in the civilian economy, it is now often the other way around. Civilian technologies are adopted by the military, or private companies are contracted to develop them (ibid, 163-8). This brings about yet another role for civilians in the war business.

Much of the technological edge of Western powers, as discussed in the previous two topics, is based on *software*. Using the right software a ‘smarter’ bomb can be produced and by obtaining the adversary’s software his technology can be duplicated or countered. Hence stealing software, or capturing its programmers, becomes a viable and possibly necessary element of information warfare (ibid, 168-9). Though largely the domain of espionage—traditionally associated more with undetected infiltration than with massive violence—we see how civilians and their businesses can become an important target for military operations. The dilemma this puts forward is whether all those civilians may legitimately be harmed for the purposes of war.

If we have to consider the problem within Walzer’s theoretical framework, I think the information workers of the early 21st century are best compared to what he calls *munitions workers*. Munitions workers are civilians, but liable to be killed in military operations against the facilities in which they are at work, provided these facilities produce the means an army needs to fight, not just fulfil some auxiliary function. With the rising importance of information warfare, it seems not unreasonable to say that R&D facilities, software companies and information processing sites are part of what gives an army its tactical advantages, or in other words, what enables it to fight effectively. This makes those sites into legitimate targets of war.

We can even go further and state that some information workers should be considered as soldiers, because they keep actively applying their knowledge to keep the armies that employ them at an advantage. A munitions worker just assembles a rifle, polishes a bullet or packages a bomb, after which his work is finished. Just destroying the stored products effectively annuls his work and he needs not be killed in the process (although it is excusable if he is). Yet the primary value of a military-employed information analyst is his knowledge and his skill in interpreting newly acquired data. An enemy could bomb his office and destroy his archive, but this does not make him much less of a threat. Not until the information worker himself is actually captured or killed does the army lose the advantage it had by employing him. Consistently applying Walzer’s distinctions between soldiers and civilians make the people working on the vital information for an army into soldiers just as much as the people actually holding the guns, irrespective of whether he is an army employee or works for a private company or government agency.

Neither interpretation of the new *knowledge workers* is entirely satisfactory. If they are the same as *munitions workers*, this ignores the vital role they continue to play even after they have left their

‘factory’ at the end of the workday. If they are soldiers, it seems counterintuitive that they are liable to be killed even though they never pose a *direct* mortal threat to their enemy soldiers. This again calls for a more fine-grained categorisation of individuals that may be encountered on the ‘battlefield’ and to what types of military acts they may legitimately be subjected.

4.4.2. New operators for the machine

I started this section by introducing the distinction between tools and machines. For Lewis Mumford the machine is not just a perspective to reflect on the social impact of devices. It is a heuristic to describe the direction in which modern culture was developing through the industrial era. While already in pre-classical Egypt an extensive social organisation existed, which Mumford coined a *megamachine*, modern technologies revitalised and enhanced this machine. The classical megamachine was primarily focussed on bringing together a large labour force; the industrial machine tried to reduce the amount of labour needed to perform the functions of industrial society (Achterhuis, 1992, 244-51). If we look at the machines of the information age, I think the best way to characterise them is as enhancing the human faculties. Humans are not the supplicants of labour that *serve* the machine, but instead they are the centrepiece of its functioning.

As an example from the battlefield, we can take the *soldier-as-a-platform*. This is part of late 20th century military doctrine, where soldiers are deployed in the field, linked to their base with a wireless connection, gathering information and marking targets for strikes. These soldiers not so much fight their own battles, as designate where an air strike or precision missile should be launched at. Their success is not primarily dependent on the technology used, but on the skill of the human that guides the technology. This requires an entirely different kind of soldier than the mass machine of World War I or even the more recent Vietnam War. The soldier that operates at the centre of this network has to be intelligent, highly educated and trained and well informed about the specifics of the operations he is involved in.

Walzer’s main reason for not holding soldiers responsible for the wars they fight, was that they typically lacked the combination of intelligence, information and freedom to choose, that would make them moral actors. They “are not (...) members of the fellowship of warriors; they are ‘poor sods, just like me’, trapped in a war they didn’t make.” (Walzer, 2000, 36) It is questionable whether this claim still holds for soldiers of the twenty-first century. Surely, many armies are still comprised of conscripts, of the poor who have little of an alternative to make a living or of those indoctrinated by political or religious zeal. At the same time, the new kind of soldier brought to battle by high-tech Western armies is necessarily intelligent, has access to much information and needs a certain degree of autonomy to do his job in the complex environment that modern war-zones are. He has had a professional training and has willingly chosen a military career. He should be more capable of making moral judgements than was his drafted counterpart of the industrial era. Though still bound by the

chain of command and the threat of repercussions for not obeying it, the networked soldier has less of an excuse for participating in an unjust war. He is not as much a *victim* as Walzer's soldier is.

Walzer's work lacks discussion of this new kind of soldier. Perhaps the closest case in his writing is that of officers, who also stand out from the general infantry. However, in the previous chapter we already saw that Walzer assigns no more responsibility for the overall justice of a war to an officer than to an ordinary soldier. So unfortunately this does not help us any further in considering the new intelligent soldier on the present-day battlefield. Maybe Walzer's thought is too much rooted in the reality of wars fought by disciplined soldiers operating in strictly hierarchically organised armies. That this view of armed forces is certainly not true for all times is shown by Howard (1976, 20-37) in his discussion of the wars fought by mercenaries in sixteenth-century Europe. The mercenaries would fight for the side offering them the highest pay, regardless of whether that side had justice on its side. Even though the individual soldiers who took part in mercenary bands may, to a degree, still have been victims, fighting simply to sustain themselves, they had at least some freedom to choose the side they would fight for. Thus they might at least have been held in part morally accountable for the overall justice of the wars they fought. In this case the *moral-equality-of-soldiers-thesis* is not a necessary feature of just war theory. A similar argument may be made for contemporary high-tech soldiers. As they have the intelligence, information and freedom to make some informed decisions about the causes they lend themselves for, they should not be exempted completely from the burden of responsibility for the overall justice of their wars. Then one of the foundations of Walzer's just war theory is seriously weakened.

4.4.3. Technology: not a panacea

In the preceding subsections I have discussed a few of the most outstanding military technological developments and some of their moral consequences. I may have given the impression that they will change the nature of warfare forever; that from now on, war will be some clever game of gathering information while disrupting the enemy's information flow, of pushing buttons that cause some effect a thousand miles away, of using science-fiction-like gadgets to make the enemy submit, but not of actual fighting and bloodshed. This image is far from the truth. Even the U.S. Department of Defence (DOD) in its vision of warfare in the near future—*Joint Vision 2020*, a document that generally embraces the revolution in military affairs and stresses the importance of information warfare—concedes that asymmetrical methods and objectives of an adversary are often far more important than the relative technological imbalance. It states that “we should not expect war in the future to be either easy or bloodless.” (Joint Chiefs of Staff, 2000, 5-6)

Hammes (2004) is even more critical of the course DOD has laid out to meet the challenges of 21st century warfare. Firstly, he believes the present organisation of the U.S. army is too hierarchical and inflexible to meet the needs of fourth generation warfare (4GW). It may have the most technologically advanced information and communication systems in the world, but the procedures a field commander

must go through to tap into them are so bureaucratic that they are of little effect. Thus technology *alone* is of little tactical value to modern armies if they do not adapt their organisational structure to it. Secondly, Hammes contends that we overestimate the advantage Western powers have through information technology against 4GW adversaries. The technologies originally invented for the army are often quickly mimicked by corporations to exploit them commercially. The Internet, satellite imaging and mobile telephony were all originally invented for military purposes but are now used on a daily basis by hundreds of millions of people worldwide. Even small organisations in a poor country can easily use commercially available technology to counter the perceived advantages of a technological superpower. A decentrally organised terrorist network may even have more of an advantage today than it would have had fifty years ago, because of the way it can use the internet to coordinate resources and activities unnoticed. All this is possible despite the surveillance and communication tools available to Western states. Insurgents in the recent Afghanistan and Iraq conflicts have also shown themselves very apt at employing the Internet and mass media to convey their political messages to our homes (Hammes, 2004, 190-206).

Altogether, we should not maintain the illusion that technology will drastically change the face of battle in the near future. I believe this section has outlined some of the moral consequences if the promises of technology were to be fully realised. If so, this gives rise to some difficult points of criticism against Walzer's work, as I have outlined in the preceding two subsections. We should remain alert to the technological developments that present themselves. For instance, if the U.S. army were to switch to using *only* nonlethal weapons, we have to be very careful in honouring any claims to moral superiority that might accompany such a transformation. If at some point in time the technological imbalance between fighting powers is such that one of them is virtually impervious to harm, we must reconsider which options we will allow the weaker power from a moral point of view. Yet as long as the technological promise has not been fulfilled, Walzer's ideas of *jus ad bellum* and *jus in bello* remain a strong basis for our moral judgements.

4.5. Conclusion

In *Just and Unjust Wars* (2000) Michael Walzer has provided an eloquent twentieth-century statement of just war theory. A vulnerability of this statement is that it makes assumptions about the empirical reality of warfare that are not necessarily true in any other era. In some cases this has important consequences for the validity of the moral claims Walzer derives from his theory. In this chapter I have outlined a number of empirical characteristics of present-day warfare that give rise to criticism of Walzer's theory of a just war. I have done this by studying warfare indirectly, through three structural dimensions that shape modern conflict: the political, the socio-economical and the technological.

In the political domain we were able to observe that many contemporary wars are not waged exclusively by and against states, but that non-state actors also constitute military powers in their own

right. Sub-state actors such as guerrilla movements, secret services and terrorist networks engage in war-like acts, where it is often difficult to determine empirically whether aggression has taken place and if so which state can be held responsible for it. Supra-state bodies wage wars on behalf of their members, but because of the differences between member-states' commitments and involvements the question of responsibility is far from easily answered here either. The problem with Walzer's theory of *jus ad bellum* is that it bases itself on a state-centric worldview and therefore fails to address the problems posed by non-state actors. In the domain of *jus in bello* we saw that the asymmetries between certain types of political structures give rise to tactics that violate the war convention as Walzer conceived it. Walzer does not lack clarity about the immorality of such tactics, but we must ask ourselves how we should treat our rules of war against an adversary that has a radically different system of values.

The socio-economical dimension revealed that contemporary warfare shows a high level of integration between civilian and military functions. One of Walzer's most fundamental *in bello* notions is that there is a strong distinction between soldiers and civilians in terms of their rights and duties. This strong distinction is not easy to maintain if we accept that there are many roles that fall into the shady area between the civil and the military. Another challenge to Walzer's war convention is that an increasing number of wars is being fought against the backdrop of a city. Neither Walzer's discussion of the *doctrine of the double effect* nor that of *guerrilla warfare* provides a satisfactory answer to this challenge. We should have a set of rules in our *jus in bello* that help us decide on what actions are acceptable in situations where civilians are in the middle of the war zone every day.

In the section about the technological dimension I painted a picture of the moral consequences of new technological developments. Even though these developments have not all been fully realised yet, it is worthwhile to consider to what criticisms of Walzer's theory they would give rise. After all, the technological promise is an important factor in shaping the military policies of states for the future. In the area of *jus in bello* the development of non-lethal weapons posed ethical questions about the responsibilities that go with the use of such weapons. If soldiers and civilians are no longer killed but just 'incapacitated', is there any limit left to the actions that may be taking against them? If one's adversary does not use nonlethal weapons, is the death toll of a fight entirely his responsibility? Similar questions are brought up by the technological dominance that lies in the promise of the *revolution in military affairs*. Additionally it introduces the problem whether a group may resort to measures that are normally outlawed by the rules of war if it is facing an army that is technologically so far superior that it stands no chance of winning a conventional war. The phenomenon of *information warfare* introduces a new kind of *knowledge worker* to the war business. This actor is directly and actively involved in the military effort, but poses no immediate lethal threat on the battlefield. Walzer's theory of *jus in bello* has no category for dealing with this kind of actor, making it a problematic case.

The technological structure of the fighting parties also expands a problem with the foundation of Walzer's theory. The high technology of contemporary Western armies require intelligent, well-informed and to a certain degree autonomous operators. These operators differ significantly from the victim-type soldiers that in Walzer's work formed the ground for strictly separating *jus ad bellum* from *jus in bello*. While under the assumptions Walzer makes about soldiers it is defensible that they bear no overall moral responsibility for the wars they fight, this position is more difficult to maintain for the new high-tech soldier. A reconsideration of the burden that soldiers bear for the overall justice of their war would be welcome in a modern just war theory.

Chapter 5 - Conclusions

At the beginning of this text I posed the following central question:

How does Michael Walzer's just war theory stand up to some of the salient developments that have shaped warfare in the early 21st century?

Hopefully the chapters that followed have provided insight in both Walzer's theory and in the developments in warfare that challenge it. In this final and concluding chapter I will summarise my findings into a more concise answer to the main question. This I will do in the first section, by again giving a brief overview of Walzer's theory and of my main points of criticism. In the second and third sections I will speculate on an outline for amendments to the theory that may strengthen it against the various critiques. Section 5.2 covers the *jus ad bellum* part and section 5.3 the *jus in bello* part.

5.1. Just war theory and its criticisms

With his 1977 book *Just and Unjust Wars* Michael Walzer has presented us with a strong and versatile theory in the just war tradition. On the one hand he admits that in some cases war is justified or even a moral obligation. The use of this last resort enables us to stand up against gross violations of political sovereignty, territorial integrity or human rights. On the other hand he labours to minimise the occurrence of war and, in case it does occur, to limit its harmful effects. Especially the civilian population finds in him a determined guardian of its rights. This combination of pacifist ideology and realist concessions to the occasional necessity of violence makes it a balanced theory that still has a strong appeal to our moral intuitions.

Walzer assumes that even the people administering the violence in war, the *soldiers*, are in a sense *victims* of their situation. Out of respect for the rights of their 'fellow victims' on the other side, soldiers are limited in the means they are allowed to use against enemy soldiers, even if those enemy soldiers fight for a thoroughly unjust cause. Soldiers on either side of a conflict are to be regarded as perfect moral equals. This is possible only if a strict separation is made between the rules that stipulate when it is justified to wage a war, or *jus ad bellum*, and the rules that govern the conduct during war, or *jus in bello*.

To start with the former, Walzer bases his theory on the notion of *aggression*. Aggression is defined as the interruption of a condition called *peace with rights*. A state can disrupt another state's peace by sending its army across the border, but a dictator can also violate the human rights of its own population. In both cases the act justifies the victim-state and the international community to wage a war against the aggressor state. In case the violation has not yet taken place but there is a real and

immediate threat of war, accompanied by active preparations, where not responding to the threat would greatly increase the risk, then it is allowable to use a pre-emptive strike against the state that is at fault.

The rules of combat laid out by Walzer find their foundation in *human rights*. Once the fighting has started, soldiers give up their right to life, but gain the licence to kill other soldiers without being held criminally responsible. Required is though that these deaths are both necessary and proportionate to the military objective. In contrast, civilians enjoy an immunity from harm. Their deaths can only be justified as *collateral damage*, using an amended version of the *doctrine of the double effect*. Walzer adds a third category to the spectrum; that of munitions workers. These workers are regular civilians, with the exception that they work in a factory producing weapons for the army. Although munitions workers are primarily immune as a target of acts of war, they can be killed without too much hesitation if this is a side effect of bombing their factory, which is, after all, a strategic target. Another slightly different class is comprised of civilians who support a movement of guerrilla fighters and let their village be used as a fire base. Those civilians are more liable to be harmed if the guerrilla fighters draw the fight to their village and they have been offered sufficient opportunity to escape.

A special and controversial topic that Walzer discusses is that of *supreme emergency*. When the existence of a political community is imminently threatened by a horrendous evil, that community may lay aside the rules of war to avoid its annihilation. Here the distinction between *jus ad bellum* and *jus in bello* breaks down, as we can only conceive a supreme emergency being posed by an unlawful aggressor. More strongly, according to Walzer when this kind of survival is at stake, we leave the moral domain altogether and enter the realm of necessity.

5.1.1. Criticism of Walzer's *jus ad bellum*

Walzer's *jus ad bellum* revolves around the central notion of *aggression*. Even though this concept was only invented after World War I, I see no objection to using it as the basis for determining the just cause of a war. What I *do* find problematic is that there are no different degrees of the concept. If somehow a state has violated another state's territorial integrity or political sovereignty or makes substantiated threats of doing so, or if it grossly violates the human rights of its own population, then aggression has been committed and war is justified. No a priori limits are set to the extent of this war, except for that its ultimate goal may go no further than regime replacement and that during the war the *jus in bello* is respected. So in theory a small border-crossing by one state can lead to a full scale invasion in response by another. In fact this is not far from what happened in the 2006 Lebanon war. Since one of the purposes of having a *jus ad bellum* is to prevent random or unreasonable initiation of hostilities, the singular, undifferentiated interpretation of aggression is a serious weakness in the theory.

This problem of differentiation was given regard by earlier writers in the just war tradition with the requirement of *proportionality*. Although not all of the traditional requirements associated with just

war theory are of lasting value, it is regrettable that Walzer does not give more attention to some of them. For example, problems of justification in case of pre-emptive or interventionist wars can be eased if a *legitimate authority* is appointed and the intervening state is required to *formally declare* its war and its intention. A more explicit reference to the criterion that war is a *last resort* after other means has been exhausted and that it is only resorted to with at least a reasonable *probability of success* would help prevent the needless or hopeless use of force.

Another weakness of Walzer's theory of aggression becomes apparent when we look at the political structure of the actors involved in armed conflict. Walzer shares the *realist* assumption that states are the primary actors on the international stage and almost exclusively writes in *statist* terms. Non-state actors are bent into the framework of states, as if they represent a clearly distinguishable political community that tries to establish or protect its sovereignty over a certain territory. Yet many contemporary wars are not waged between states or even between bodies resembling them. Sub-state actors such as guerrilla movements, secret services and terrorist networks commit acts that, if they were states, would count as aggression. It is difficult though, to link these acts to particular states and assign responsibility for them. Supra-state bodies wage wars on behalf of their members, but even if on paper all those members have a shared responsibility, it is counterintuitive that in response to an aggressive act by a supra-state organisation the international community can just wage a war against a random member. Walzer's state-centric theory fails to address the problems posed by those non-state actors.

My final criticism of Walzer's *jus ad bellum* is incited by the nature of the soldiers we encounter on today's battlefield. In the wars that involve technologically advanced Western powers, soldiers must necessarily be intelligent, well-informed and to a degree autonomous in order to fulfil their role as a *technology platform* in battle. These soldiers have often willingly opted for a military career and have undergone extensive schooling and training. They can hardly be compared with the 'poor sods' that Walzer thinks typical soldiers are. Even though in many other cases soldiers may still be 'poor sods' or victims of the state, in the cases where they are not the foundation of the strict separation between *jus ad bellum* and *jus in bello* is undermined. It is difficult to maintain that the free, intelligent and informed Western soldiers can bear no responsibility for the overall justice of the wars they fight. They should at least in part share the burden of policy makers if they lend their services to them in the war effort and in return reap its rewards.

5.1.2. Criticism of Walzer's *jus in bello*

Central to the *in bello* part of Walzer's theory is the notion of *noncombatant immunity*. In principle this notion makes sense; that those people who are not involved in the war business should not be harmed by those who are. In practice it is much harder to ascertain whether someone is indeed taking part in the war or not and if so, to what degree this makes him liable to be harmed or killed. Walzer uses the category of *munitions workers* for factory labourers who manufacture arms and bullets,

arguing that their workplace and their product is a legitimate target of war and that they therefore cannot be granted the same immunity as ordinary civilians while they are at work. If the class of munitions workers is strictly limited to those people involved in a select few types of production, I do not see the need to use this separate class. If those production types are vital for and exclusively used by the army, then they may just as well be shared under the range of military activities. In that case their workers could be given the same status as soldiers.

If, on the other hand, we want to establish a clear status for all the people who in some significant way contribute to the war effort, the concept of munitions workers is far too narrow. In contemporary society many functions, such as research and development, communications and logistics are shared between the civil and the military domain. Specialist tasks set by the army may be contracted to private companies. Knowledge workers in research institutes may have in their heads the information that gives an army its tactical superiority. All those people are involved in the war but they are not adequately covered by one of the three categories *soldier*, *civilian* or *munitions worker*. To deal with these categories a more fine-grained systematic of *jus in bello* would be required.

One respect in which Walzer's theory looks outdated is that it fails to consider the *city* as the stage on which battles take place. He primarily considers battles as occurring in the open field, in the air, at sea or in sparsely populated areas. The presence of civilians on the battlefield is incidental and an effort must be made to keep them free from harm. However, many contemporary conflicts are fought over a longer period in densely populated cities. This makes it much more difficult to maintain noncombatant immunity and Walzer doesn't consider how just war theory should deal with that difficulty.

Though Walzer's discussion of who may and who may not be harmed in time of war is elaborate and thorough, his theory lacks systematic discussion of the weapons allowed to fight. He argues that the means of fighting do not in a significant way change war as a moral condition. Yet in studying the technological structure of fighting parties we can observe that technology *does* have a strong impact on the ethics of war. The development of non-lethal weapons raises ethical questions about the responsibilities that go with the use of such weapons. If soldiers and civilians are no longer killed but just 'incapacitated', is there any limit left to the actions that may be taken against them? Or does this elevate the party using those weapons above morality? The contrary might be argued; that as a consequence of its technological advancement this party gains a responsibility not just for the casualties of its own weapons, but also for those of his adversary's, who may, because of his technological disadvantage, feel forced to exploit all advantages he can find, with less regard for the casualties this causes. Otherwise we can envision situations in which it becomes impossible for one of the fighting powers to create any reasonable chance of winning without breaking the rules of war. Such a situation of desperation can be very dangerous. These problems are related to the weapons and technologies used on the battlefield. Because these tools are not created overnight and form part of a larger machine, it would be helpful if just war theory offered some guidance regarding the means that are allowed to fight and the way in which can be dealt with technological asymmetries.

A final criticism of *jus in bello* concerns the notion of *supreme emergency*. This concept is valuable for articulating the moral intuition that at some point the threat of defeat is so horrifying, that the threatened party can no longer be expected to strictly adhere to the requirements of the war convention in its defence. For example, if we were to envision a regime like that of Hitler, Pol Pot or the Taliban on a successful military-imperialist course and the only choice left is to either submit or break the rules, we may feel sympathetic with the latter option. The problem with Walzer's account of supreme emergency is, however, that it claims that once a case of emergency has been established, we leave the moral realm and enter that of necessity. In the realm of necessity there no longer are any rules about what measures a community may or may not take for its survival. I think it would be much better if we were to establish a clear threshold for deciding when a supreme emergency exists, but also to stipulate what rules come into effect once the normal convention has been put aside.

5.2. *Jus ad bellum revisited*

This is where my review and critical analysis of Walzer's work ends. I want to use the remaining two sections to answer the fourth subquestion I asked in the introduction:

4. *Which revisions in just war theory are required to respond to the criticisms encountered?*

This means that I will outline some ideas that could be incorporated into the just war project to adjust to the critiques I have given. The present section will deal with my ideas about the *ad bellum* part of the theory and the next will cover *jus in bello*.

5.2.1. A more sophisticated classification of aggression

My first and foremost criticism of Walzer's *jus ad bellum* was that it makes no distinction between different kinds or levels of *aggression*; any unjustified violation of a community's territorial integrity or political sovereignty constitutes aggression. This proved problematic as it opened the door to disproportional punitive or defensive violence in response to minor acts of 'aggression'. Without a strict notion of proportionality—and there is no such notion to be found in Walzer's *jus ad bellum*—this can be a dangerous thing.

We must acknowledge that limited threats call for limited responses. That limited war is possible, is necessarily assumed in the project of just war theory. Then why can the limits not be related to the *just cause* the war is fought for? As I showed in chapter 3 already, there is no need to ask that *jus ad bellum* and *jus in bello* are completely independent of each other to maintain the *moral-equality-of-soldiers-thesis*. Without attacking that thesis I think I can provide a sophisticated classification of forms of aggression, each justifying their own response, to do justice to the diversity we encounter in

contemporary warfare. The most useful criterion for such a classification, I believe, is the threat posed from within one state to another state (or group). This could result in four classes of aggression.

1. *Internal aggression.* In this case, there is aggression within the boundaries of a state, but virtually no danger to other states. The most notable examples are civil war and minority oppression. Even if injustice is done here, outside parties should be most conservative in their response as they will quickly risk violating a state's sovereignty. It is often very difficult to ascertain which of the fighting parties has just cause or whether a group of people is really being repressed. A strongly motivated formal request for assistance by either the state government or a sub-state group adds to the evidence needed to intervene, as does the gross and obvious violation of human rights. Even when entering the war, the assisting party should only aim to replace the oppressing ruler or achieve a cease fire. The type of war to respond to this form of aggression is often of an interventionist kind; support from a larger part of the international community is highly desirable here. Collateral damage to civilian targets is not easily acceptable, as this would contradict the *causa belli*.
2. *Border raids.* This type of aggression exists where targets within a state are attacked from the outside on a very limited scale. The classical example is one city-state attacking a town just outside its border, to capture slaves or other spoils. However, in modern times other limited attacks on specific targets, such as those on the New York World Trade Centre on 11 September 2001, may be counted in this category as well. The important characteristic is that, although a state may feel 'hurt' by this type of aggression, no real threat to the entire state exists. A response to punish the aggressor is justified here, but not as an all out attack on another state. If the aggressor is not another state, but a faction operating from within its boundaries, a police action by the other state may be demanded, but no attack on the state's military may be issued.
3. *Invasions.* The next class of aggression contains attacks from one state on another, with the clear intention of occupying a substantial part of its territory. It is the typical case we think of when we talk about *war*. The attacks by Nazi Germany on Czechoslovakia and Poland or the 1990 Iraqi invasion of Kuwait all fall into this category. Here a significant risk *does* exist and a counter-attack is not just a matter of punishment or prevention of future aggression, but one of immediate defence. This justifies more widespread attacks, including those on cities vital for the sustenance of military operations. Collateral damage becomes acceptable if proportionate to the goals aimed at and everything is done to prevent it.

4. *Global threats*. This fourth and final category includes threats to large areas of the world or to substantial parts of a population. It is not just that one state or political group attacks another, but that international society itself is put at risk. The Islamic Jihad against 'the Western world' would provide a case in point so far as its intentions are concerned, were it not that it (yet) lacks the level of organisation and the means to seriously threaten the part of the world it wants to overthrow. If a state or faction has the ability of a nuclear attack on large populated areas and has shown the willingness to use it—this means much more than just a verbal threat—a global threat may be said to exist. The threat is so great that a full scale war against one or multiple states in response may be called for. Only with threats of this magnitude may we even begin to think about cases of what Walzer calls *supreme emergency* (more about that in the next section).

Each of the above classes constitutes a *just cause* for war, but the kinds of war they justify are different. In any case I would add the requirements that war is a *proportionate* means to its ends, that it is sanctioned by the people on whose behalf or over whose territory it is fought (*legitimate authority*), that it has a reasonable *probability of success* and that alternatives have been considered with regard to the burden they would put on those who would suffer from the war (a weakened form of *last resort*). If all these factors are in place, a group or state or coalition is justified in going to a limited war of a suitable kind against the aggressor.

5.2.2. Dealing with non-state actors

My proposed classification of aggression still shares with Walzer's theory the assumption of *statism*, i.e. that states are the basic units of international society. I do not think that this is wrong in principle, as the *sovereign state* does have its value for organising and protecting a political community. Without completely ignoring the division of the world into sovereign states, however, my delineations allow for non-state actors to play a part in warfare as well. They leave open the possibility that aggression is committed not *by a state* but *from within one or multiple states*.

A good example can be found in the 2001-present war in Afghanistan. While this war may be justified on humanitarian grounds and considerable debate is possible about the legitimacy of the now displaced Taliban regime, its original *casus belli* was the response to the 11 September 2001 terrorist attacks on the World Trade Centre and the Pentagon in the United States. So here a single strike by an international terrorist group, allegedly operating from Afghanistan, incites a war aimed at regime displacement—the most extreme allowable end of war according to Walzer (2000, 114-7).

Suppose that the Taliban had been a perfectly legitimate and humane regime, democratically chosen by the citizens of Afghanistan. Furthermore, suppose the reason it would not deliver the Al-Qaeda leaders to the United States had been that it was unconvinced of their guilt and wanted to protect their civil rights. Would this justify an all out war against the sovereign state of Afghanistan? I would find

that a problematic conclusion as it would go directly against the right of self-determination of a political community. On the other hand, I would find it equally implausible that the United States could do nothing but rely on the internal police work of Afghanistan, especially as the country's government showed little inclination to pursue the Al-Qaeda leaders and offer them due process. Yet these are the two options Walzer's theory of aggression has to offer.

Instead what I think is called for here is something like *extended police work*. While normally one state has no right to conduct policing activities on another state's territory without its permission, a war-like act such as a terrorist attack would lift the bar against this. This does not, however, mean that the policing state can wage a *war* against the other state. If its extended police work meets violent resistance by the uncooperative state's defence forces—and most likely it will—it is allowed to have its soldier-police-officers defend themselves, but by no means may it conduct strategic operations against the other state's army. The goal is to 'round up' the alleged perpetrators hiding under the protection of another state's sovereignty and put them to trial; it is *not* to bring another state to its knees. The work involved is much like rounding up a criminal network in a hostile neighbourhood. The neighbourhood may make the work more dangerous and difficult but that is no ground to turn it into an enemy.

What is the difference, one may ask, between an act of aggression by a state and one by a sub-state actor such as a terrorist network, that it places so much stricter limits on the response justified? A state is the collective organisation of an entire people, which cannot simply be 'round up'. If that entire people collectively embarks on the course of war this means it recruits a part of itself to form an army, another part to supply and support it and yet another part to lead it politically (thus forming the Clausewitzian trinity). Only by subduing its political will to continue the hostilities can it be brought to a halt. A sub-state organisation, whether it is a terrorist network, a corporation or a political movement, is not the embodiment of an entire people. It is a limited group of people, brought together by a common purpose. While the organisation may play an important social, cultural or economical role in the society in which it is embedded, dissolving it does not bring down or violate that wider society. Therefore, it can be addressed as a specific threat, instead of a general threat coming from an entire nation.

Of course there are exceptions. In some cases an organisation may be so crucial for a society's identity that it cannot be entangled from that society. If that organisation is so heavily supported by a population and also is capable of engaging in war-like activities, then we should seriously doubt whether the official government of that population is still its legitimate representation on the international stage. An example would be a militant movement that is tied to a specific territorial region of a state where it is strongly supported by the population, such as Hezbollah in the Southern part of Lebanon. In such cases extended police work is of little meaning, as one is effectively waging a war against a political sovereignty, just not a recognised one.

For supra-state actors like the NATO or the UN we need to use different lines of reasoning. Contrary to sub-state organisations they are not just a vehicle for local particular groups of people seeking some common goal. They are instead the collective product of states, which even sacrifice part of their sovereignty to them. If the supra-state organisation wages a war, just or unjust, in doing so it represents all of the states supporting it. While the decision-making structure of the organisation may be such that an individual member-state cannot always veto the course chosen by other members, whenever a member-state actively contributes to the war effort this can be seen as had the war been one waged by the state itself. This means that a state unjustly attacked by a supra-state organisation can defend itself against and punish any of the states actively supporting the attack, but not just any member state in general.

5.2.3. Putting the pieces together

Not all types of actors (i.e. states, sub-state and supra-state organisations) are equally likely to be encountered in different kinds of aggression. Sub state-actors are most likely to be found engaged in *internal aggression* against the government of their state or against other sub-state actors. Resolving the conflict is primarily a domestic matter unless gross violations of human rights are being committed by the fighting factions. If sub-state organisations commit acts we can classify as *border raids*, we enter the domain where *extended police work* is called for. It is difficult to conceive a sub-state actor mounting a full-scale invasion of another state, though not impossible. The existence of weapons of mass destruction make it possible for a small group to pose a global threat, although this would require a level of wealth and organisation not yet encountered.

States are much more likely to be found waging war in defence of an *invasion* or *border raid*, possibly against an external sub-state group or international network. The original just war theory as put forward by Walzer is best applicable to states, although I would still argue for using the more sophisticated delineations among types of aggression.

Supra-state networks—often regional organisations—are most likely to be appealed to in wars of humanitarian intervention, which fall into the category of *internal aggression*. Because of the limited scale of such operations, a war against one of their member-states in response is often not in question (but possible nevertheless, if the intervention is unjustified). If the supra state actor is capable of war on a more grand scale, as NATO and Warsaw Pact were once believed to be, depending on which side one stood, a defensive or punitive war against its participating member-states may actually be justified and even required. I find it questionable, however, if we will witness future wars between supra-state networks. Much more likely those wars will be either between states or between a sub-state organisation and a state or network of states.

My point in this brief subsection has been to show that the more sophisticated classification of *aggression* and the roles played by different types of political actors can be incorporated into a single framework. This framework is what *jus ad bellum* should look like to deal with 21st century conflicts.

Expanding Walzer's ideas into this framework gives us a solid base to make war a possible course of action if necessary, but at the same time limit its harmful effects.

5.3. Jus in bello revisited

Paramount to Walzer's theory of *jus in bello* is the distinction between combatants and non-combatants, or soldiers and civilians. Soldiers are both allowed to kill enemy soldiers and liable to be killed themselves. They are not, however, morally guilty when they do kill other soldiers in time of war. Civilians on the other hand are morally immune from harm, but when they do kill this is a domestic crime which is punishable even after the war is over.

5.3.1. Distinguishing between actors in the war business

Two of the developments I have shown in chapter 4 have made this basic distinction highly problematic. Firstly, the emergence of unconventional warfare, such as terrorist or guerrilla warfare, confronts us ever more frequently with people who fight but whose status in terms of *jus in bello* is unclear. Secondly, the continuing integration of civil and military systems involves people in the war business who are formally regarded as civilians. Yet they perform vital roles for the army, raising questions about what their status and rights should be

The first development is discussed by Michael L. Gross (2006) in his article on the named killing of terrorists. This is the practice of selecting specific people, in this case terrorists, and seeking them out for assassination. If the terrorists are viewed as soldiers, it is morally problematic, because soldiers bear no individual moral guilt unless they have committed war crimes. No single soldier prevails over any other as a legitimate target of war. If, on the other hand, the terrorists are viewed as civilians, they may be individually tracked down and arrested, but not be killed without due process. They have the same rights as other criminal suspects under domestic law. The same problem applies to guerrilla fighters who, if they are recognisable as soldiers at all during a battle, dissolve into the civilian population when it is over. For both groups, named killing may be the only effective way to fight against them, but at great moral cost in the existing framework.

To face this problem, we may have to concede that in time of war all soldiers are liable to be killed *individually* and not just as a result of unspecified violence. After all, it seems at least peculiar that there would be no moral difficulty at all in bombing an entire military encampment, killing all its residents, while it would be unallowable to select and kill a single one of them. There is no need to attach a qualification of *guilt* to a subject to be killed. His liability to be killed arises from his participation in the war effort, not from his specific actions. This concession in no way undermines the moral-equality-of-soldiers-thesis; each soldier is equally liable to be assassinated and any event—or even no event at all—may trigger him being targeted for killing. Only the end of the war, his surrender or his resignation from the military relieves him from this liability.

Does this not lead to unjustified violence against civilians, under the pretence of them being ‘suspected terrorists’? Perhaps, but from a moral point of view no more than the current rules of war do. As Walzer elegantly argued, army operatives should go *out of their way* to prevent civilian casualties resulting from their violence, even if that violence in itself is legitimate. If civilians are killed where their deaths could have been prevented, the rules of war are violated. Thus an army should carefully consider and reconsider whether a particular individual qualifies as a soldier and is a legitimate target for named killing, in order to avoid accidentally killing a civilian. I understand that this may spawn new problems, for example in the case of a guerrilla soldier who has just resigned his military role and returned to work on his farm. As the guerrilla movement typically has no identifiable soldiers in the first place, it is impossible to visually distinguish an active but camouflaged fighter from a resigned one and the distinction will usually be made on a de facto basis. This is the inherent risk of fighting a war without uniforms. One escapes the problem of being an easily identifiable target, but one also sacrifices the legal protection and security a uniform (or its abandonment) offers. The adversary should go out of its way to ascertain that no civilian becomes the target of assassination, but if an individual’s transformation from soldier into civilian cannot be observed, this cost seems acceptable to me.

The second development observed is that military and civil functions become ever more integrated. Modern armies outsource their research and development functions to private companies and public research institutes and use private contractors for various logistical and technical support activities in time of war. Military information and communication functions are in part using the same networks, software and services that are used in civil society. Armies of the less developed world are doing the same, however. Especially those involved in fourth generation warfare employ various civilian networks to support the war effort.

We must have some way of dealing with all kinds of semi-military functions and the status their performers enjoy in our *jus in bello*. If we were to maintain Walzer’s rather strict distinction between soldiers and civilians, with the hybrid class of *munitions workers* falling somewhere in between, just war theory would lose its credibility. No army would be allowed to harm its adversary’s targets that really matter, only the ones the enemy chooses to expose directly on the battlefield. This is reasonably conceivable in a traditional war where soldiers look in the barrels of one another’s gun, but pointless in a war where one side fights by pushing buttons a hundred miles from the battlefield. Some allowance must be made so that armies can battle each other effectively while still maintaining a level of protection for those individuals not or marginally involved in the war effort. I propose to solve this problem along the following lines.

The wide range of considerations why something does or does not constitute a strategic target, can be related to two characteristics; the target gives an army its strategic or tactical advantage or the target is something the army cannot do without. I will call these *targets of superiority* and *targets of vulnerability* respectively. For example, no army can effectively function without an adequate food

supply, but few derive their strategic or tactical superiority from that supply. This makes food supply a target of vulnerability. On the other hand, high-tech remotely operated weapons may be part of what the U.S. army thinks makes it superior to any other, but even without the most sophisticated of weapons it's highly trained and disciplined soldiers would still make a decent fighting machine. A weapons factory would be a target of superiority.

This distinction between two kinds of targets is a generalisation of Walzer's distinction between 'normal' civilians working to support the military and *munitions workers*. I think it fruitful to use this generalised distinction for determining who can and who cannot legitimately be killed in time of war. If people who work in areas that are targets of vulnerability could legitimately be killed, this would make half of civil society a military target. Anyone who produces food, is involved in any kind of logistical operations, provides care for the sick or works in any other area where the army is tied to civil society would be liable to be killed. The distinction between combatants and non-combatants would be completely eroded and this cannot be our purpose. Therefore, the fact that an army cannot operate without certain functions does not make those functions a legitimate target of war.

Targets of superiority on the other hand are much more limited in scope and the ties to the army are stronger. After all, any army with a strategic superiority over others wants to control and maintain that edge. Moreover, these functions are typically ostensibly related to the military effort. People working there cannot claim complete innocence or ignorance of what their work is used for. If the government fails to inform employees of superiority functions about the nature of their labour and the risk this may put them in, it is negligent or even acting maliciously, just as a government that build a mosque or church or synagogue on top of a missile site is. By including these targets and the people employed in them in the legitimate targets of war, armies can effectively fight against each other.

Lastly, I propose to drop Walzer's requirement that a munitions worker can only be killed *while active at work* and even then after some diligence has been taken to see if his death could have been prevented. This requirement is useful in a time where production sites, machines and storage facilities are the target, the destruction of which constitutes a successful attack. With contemporary knowledge-intensive functions, the real prize is often a piece of software, or even just the knowledge in a scientist's mind. The worker cannot be said to leave the war behind when he returns home from office at the end of the day, just as the soldier in a war zone cannot when he rests in his encampment. The key lies in the identification of which functions are vital to an army's strategic superiority and in the army taking responsibility for the people involved in those functions as it does for its soldiers.

Using these adaptations, the theory of non-combatant immunity can be restated. The rules listed on page 19 still form the core of *jus in bello*. They are however slightly modified to incorporate the modifications I proposed in this section. the basic rules of war can be formulated as follows.

1. Soldiers, civilians and government officials on different sides are morally equal to each other. However, the higher an officer ranks or the better informed he is because of his function, the more of an individual responsibility he carries for the overall justice of the war.
2. Soldiers gain the right to kill enemy soldiers and the right of 'benevolent quarantine' upon surrender.
3. Killing and harm should be necessary and proportional to the war's end, both in number and degree.
4. Different classes of people are liable to be harmed or killed to different degrees, as shown in table 5.2.

Group	Violability
Soldiers	Can be attacked and killed if necessary and not disproportionate
Guerrilla fighters and terrorists	Are liable to be assassinated, both when active on the battlefield and when disguised at home in civilian attire.
Semi-soldiers, working in the army's supporting branches of tactical importance	If they form targets of superiority, they are as liable as soldiers to be harmed. If they are merely targets of vulnerability, they enjoy civilian immunity. Munitions workers, knowledge workers and military staff employees all fall in this category.
Civilians protecting or sheltering actively fighting combatants or artillery	Cannot be targeted as <i>civilians</i> , but are liable to be killed if necessary on a one-to-one ratio to the harm they cause.
Other civilians	Are inviolable, unless harm is justified by the <i>principle of the double effect</i> and every measure is taken to reduce it, or if there exists a case of <i>supreme emergency</i> and their deaths are proportionate.

Table 5.1: Modified violability table

5.3.2. Means and ends

In Walzer's account of just war theory the discussion of whom may legitimately be killed plays such a paramount role that it overshadows the question of *how* people may be killed in war. I believe this is a serious flaw. If we understand just war theory as an effort to limit the horrors of war while maintaining it as a viable instrument for defending against and punishing aggression, we should certainly include the horrors certain weapons and practices entail in our account. *Jus in bello* should prohibit the use of weapons or tactics that cause far greater harm to other humans or their property than the generally available weapons or tactics do. So if an enemy soldier can be killed by a simple bullet, it is immoral to take him captive and saw his head off instead; if an army base can be targeted for bombing, it is immoral to burn all towns and villages surrounding it instead, even if no civilians are killed this way. In both cases, the immoral practice may have some tactical advantage; that of spreading fear in the former case and that of destroying an army's supply base in the latter. Yet the primary military goals could have been achieved without these advantages, making the additional harm and destruction unnecessary.

The case is different when there would be no other way to achieve a legitimate military objective. For example, the army base just considered is unassailable and can only be fought indirectly by burning its

means of supply. The burning itself does not constitute an immoral act *per se*. It does so only in light of the fact that the same goal can be achieved in a less malicious manner. Thus this additional requirement of *jus in bello* does not impose any absolute prohibitions on the means of war, but only prohibitions derived from what is necessary. An important aspect of the formulation of this prohibition is that it only compares tactics or weapons to those *generally available*. As shown in section 3.4 on technology, it leads to unreasonable demands to take the means used by the richest or technologically most developed armies as the norm for allowable conduct on the battlefield. If the United States were to use only non-lethal acoustic ammunition, we cannot suddenly declare any army using conventional bullets as acting immoral. But it *is* immoral—I would say even a crime of war—to use means that are known to result in suffering or destruction easily avoided.

This *relative* limitation of the means allowed on the battlefield leaves open the question whether there are weapons that are *absolutely* immoral. If we consider the existing conventions banning biological or chemical weapons or the convention banning land mines, these are in part covered by the relative prohibition proposed above. Biological weapons, for example, are of little military use compared to conventional weapons, but cause unnecessary harm and risk to large parts of the population when applied. However, some of the malicious weapons banned by convention *do* have a tactical value otherwise unavailable. Land mines are a prime example with their ability to effectively deny access to a large geographical area without requiring active surveillance. Yet here another case can be made, in that they indiscriminately affect soldiers and civilians alike, thus going against another rule of Walzer's war convention. So if a certain weapon necessarily acts indiscriminately against soldiers and civilians alike (e.g. land mines), keeps being harmful after the war is over (e.g. nuclear weapons) or is so inhumane that it is inconceivable that its tactical value outweighs its harmful effect (e.g. nerve gas), that weapon should be prohibited by the rules of war altogether.

Whether the relative prohibition is sufficient or not to exclude unnecessarily harmful or destructive weapons from the allowed means of warfare, it is still worthwhile to specifically name those weapons that are never justified. As discussed in section 4.4, the weapons we encounter on the battlefield are not there and then decided. Instead they are part of a larger system which I called *the machine* after Lewis Mumford's distinction between *tools* and *machines*. Whether certain weapons are used or developed depends on the social norms embedded in the machine. The more clear and articulate those norms are, the more likely that they will effectively be put into practice. Especially for the development of new weapons it is useful to name the kinds of weapons that certainly will not be allowed by the rules of war, as in this stage it is likely unclear whether a relative norm of necessity provides sufficient guidance to the manufacturer. With good reason the conventions to ban chemical and biological weapons do not or not only ban the use of those weapons, but (also) their development and storage.

5.3.3. Desperation and justice

Another question to be answered, related to the means allowed under the war convention, is to what means a fighting party may resort if *no* conventional means have any reasonable chance of success. Or, similarly, if the war convention may be broken if not doing so would create too large an asymmetry in the ends both fighting parties are allowed to pursue. These questions are especially relevant in view of technological developments that make one side in a conflict virtually impervious to harm, or alternatively provide it with precision strike capability thus enabling it to hit targets that would otherwise be impossible to hit without killing many civilians. Even though these technology-caused scenarios are not yet a reality, they are at least the goal of the research agenda pursued by the U.S. military. The example that comes to mind most easily is the case of Taliban fighters, facing the militarily and technologically vastly superior U.S. army, resorting to kidnap and terrorism as their only means to offer any significant resistance. Is this justified?

The question is certainly not new. We can imagine the Teutons in the 2nd century BC. facing the Roman army on its continuous march for conquest. They were no match for the well-armed and disciplined Roman legions. If they had had the means of kidnapping and terrorising Roman civilians, would they have been justified in doing so? The present-day case may be stronger, because of both the greater military asymmetry and the real existence of terrorism as a viable tactic, but the two are not different in kind. Walzer makes a clear case against violating the rules of war in both situations. I think this case must be defended, even if any army should succeed in using technology to make itself completely impervious to harm. If we would allow such violations, there would always be some point, in any war, where one of the combating sides finds itself in a desperate position with no means of winning. After all, that is the objective of war as it has often been conceived; forcing the enemy into a position where he can do nothing but submit.

By allowing a breach of the rules of war in situations of despair, we would in fact be dismissing the rules altogether. Then other cases may be made for reasons why we could lay aside the rules, for example because we observe that our adversaries do not live by the rules anyway, so why should we restrict ourselves with such a demanding morality? The key point is that we accept the rules of war because they safeguard human rights, something we consider of the utmost value. That value is not derived from utility and we are willing to sacrifice a great deal of merit to uphold it. That value is precisely the thing we would be willing to fight for. If this puts one side at a disadvantage, then so be it. If this means one side can *never* win—and ‘never’ is a very strong word for a situation where so much is uncertain—then this is always better than allowing it to fight on without limits.

5.3.4. Supreme emergency substantiated

The one case where this breaks down is that of what Walzer calls *supreme emergency*. The reason why we have rules of war is to limit the horrors it brings forth, sometimes in the form of protecting the rights of non-combatants. There is little point in doing so, if adhering to the rules results in a violation

of those same rights in a way or on a scale unspeakably more terrible. For Walzer this is the case if the continued existence of a political community is imminently and unavoidably threatened. I have already explained why the *political community criterion* is neither sufficient nor necessary to establish a case of supreme emergency. Yet the concept of supreme emergency is a valuable way to articulate our moral intuition that there exists a point where we are willing to override the rights-based rules of war for some greater good. A viable theory of a just war that incorporates supreme emergency should specify the criteria that determine whether such an emergency has arisen.

After having been critical of Walzer's failure to provide such criteria, the burden is on me to do so. In my view not the threatened existence of a political community gives reason to break the rules, but the threat of the lives and liberties of a much greater number than that of those whose rights would have to be violated to defend against the threat. If it can be clearly demonstrated that not resisting an aggressor by any means possible results in millions being killed or enslaved, then I believe this is sufficient ground for breaking the laws of *jus in bello*. This is not to say that we leave the moral realm from here, but instead we enter a different moral realm: that of utilitarianism.

The examples of enslavement and massacre are useful here, as they both embody a kind of life or death that is inhuman. If large numbers of people are subjected to the imminent and real threat of inhuman treatment, that would be a supreme emergency indeed. If an area or country with a large population is threatened to be invaded by another country that has demonstrated to be capable of massacre or enslavement; if the threat is real and imminent; if all other means have been exhausted and only by breaking with the war convention can it be averted; then it is a case of supreme emergency indeed. In all other cases, grave though the peril may be, the rules of *jus in bello* should hold.

This way of reasoning is clearly utilitarian in character. Walzer rejects such calculations because on their ground a small nation would have less of an entitlement than a large nation (Walzer, 2000, 254). But this is no absurdity; destroying a nation of a billion people is far worse than destroying one of a million people. The rights of all these individuals outweigh that of the preservation of the—sometimes arbitrarily drawn—borders of states. The problem is of course to determine a number. How many lives must be at risk to speak of a supreme emergency? Walzer thinks it meaningless to talk about such numbers; weighing the lives of hundreds of thousands of people against each other is a “fantastic, godlike, frightening, and horrendous act.” (Walzer, 2000, 262)

Such an endeavour is fantastic indeed, for I have no sense of magnitude when it comes to sacrificing thousands of lives. Yet this does not mean that it is theoretically impossible to make judgments about such numbers. The elegance of Walzer's whole approach to just war theory lies precisely in his ability to shape abstract notions in the reader's mind by taking him through case-by-case discussions. Most of his theory could be phrased in more general rules, as I have attempted in chapter 2. For supreme emergency the problem is perhaps that there are not sufficient historical cases to abstract from in order to come up with a clear material criterion that can be used to establish an emergency. After all, how

many occasions have there been where so many lives were subjected to such a terrible and imminent danger that we would have willingly sacrificed innocents to avert the threat?

The same problem withholds us, I think, from being able to clearly describe the morality that comes into effect once a supreme emergency has occurred. Earlier in this text I argued that in such situations we do not leave the moral realm completely, but just enter a part of it where different rules apply. I believe the morality in time of a supreme emergency has some sort of a utilitarian form. We may override the rights of a limited number of civilians to save a much larger number from enslavement or massacre. Yet again we lack the experience to come up with a ratio between these numbers.

If we, as humanity, had faced more cases of supreme emergency we might have been able to define the magnitude a threat must have in order for it to be called a supreme emergency; and we might have been able to come up with guidelines for weighing our violations of innocents' rights against the lives we save from impending disaster. Maybe we must count our blessings and be glad that we lack this experience. Hopefully we will never have to add to our casuistry of supreme emergency. With his theory of just war, despite its shortcomings, Walzer has arguably provided us with the most powerful intellectual tool to avert that fate.

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Summary

Recent armed conflicts have brought forward difficult moral dilemma's. A strong attempt to resolve such dilemmas is made by the project known as *just war theory*, of which Michael Walzer is the best known contemporary advocate. In 1977 Walzer developed a modern statement of just war theory in his book *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. While his book carries much force, it is also liable to criticism. Especially the changes in the empirical reality of warfare give reason to critically reassess Walzer's theory. The text here summarised attempts such a reassessment by answering the following question:

How does Michael Walzer's just war theory stand up to some of the salient developments that have shaped warfare in the early 21st century?

Walzer's theory of a just war

Walzer's just war theory on the one hand accepts that there are some evils that justify a forceful resistance, while on the other hand it tries to limit both the occurrence and the consequences of war. The ethics of starting a war are covered by a part of the theory known as *jus ad bellum*; the ethics of fighting one belong to the domain of *jus in bello*. The two parts of the theory are logically independent; the rules that stipulate what the fighting parties are and are not allowed to do are completely independent of the reasons they are fighting. Walzer argues for the strict separation between *jus ad bellum* and *jus in bello* based on what he calls *the moral equality of soldiers*: since soldiers do not choose the wars they fight and cannot decide their own fate, they are moral equals, irrespective of the side they fight for.

Central to *jus ad bellum* is the notion of *aggression*. Aggression is defined as the interruption of a condition called *peace with rights*. A state can disrupt another state's peace by sending its army across the border, but a dictator can also violate the human rights of its own population. In both cases the act justifies the victim-state and the international community to wage a war against the aggressor state. In case the violation has not yet taken place but there is a real and immediate threat of war, accompanied by active preparations, where not responding to the threat would greatly increase the risk, then it is allowable to use a pre-emptive strike against the state that is at fault.

The *jus in bello* laid out by Walzer finds its foundation in *human rights*. Once the fighting has started, soldiers give up their right to life, but gain the licence to kill other soldiers without being held criminally responsible. Required is though that these deaths are both necessary and proportionate to the military objective. In contrast, civilians enjoy immunity from harm. Their deaths can only be justified as *collateral damage*, using an amended version of the *doctrine of the double effect*. Walzer adds a third category to the spectrum; that of *munitions workers*. These workers are regular civilians, with the exception that they work in a factory producing weapons for the army. Although munitions

workers are primarily immune as a target of acts of war, they can be killed without too much hesitation if this is a side effect of bombing their factory, which is, after all, a strategic target. Another slightly different class is comprised of civilians who support a movement of guerrilla fighters and let their village be used as a fire base. Those civilians are more liable to be harmed if the guerrilla fighters draw the fight to their village and they have been offered sufficient opportunity to escape.

Criticism of *jus ad bellum*

In Walzer's conception of *aggression*, the foundation of his *jus ad bellum*, it is a singular, undifferentiated crime, i.e. there are no different degrees of the concept. If somehow a state has violated another state's territorial integrity or political sovereignty or makes substantiated threats of doing so, or if it grossly violates the human rights of its own population, then aggression has been committed and war is justified. No a priori limits are set to the extent of this war, except for that its ultimate goal may go no further than regime replacement and that during the war the *jus in bello* is respected. By not differentiating between different kinds of aggression and the responses they justify, one is either too restrictive in not allowing any forceful reaction at all to the lesser cases of aggression or too permissive by opening the door to the same measures that would be allowed against a full scale invasion. Walzer errs on the latter side, which is a very dangerous flaw in his theory.

Another weakness of Walzer's theory of aggression becomes apparent when we look at the political structure of the actors involved in armed conflict. Walzer assumes that states are the primary actors on the international stage and almost exclusively writes in *statist* terms. Non-state actors are bent into the framework of states, as if they represent a clearly distinguishable political community that tries to establish or protect its sovereignty over a certain territory. Yet many contemporary wars are not waged between states or even between bodies resembling them. Sub-state actors such as guerrilla movements, secret services and terrorist networks commit acts that, if they were states, would count as aggression; supra-state actors may wage wars on behalf of their member-states. It is difficult though, to link these acts to particular states and assign responsibility for them. Walzer's state-centric theory fails to address the problems posed by those non-state actors.

My final criticism of Walzer's *jus ad bellum* is incited by the nature of the soldiers we encounter on today's battlefield. It seems unnatural to consider either the soldiers who have risen to the rank of officer or the intelligent, well-trained soldiers employed by high-tech Western armies as *victims*. These soldiers have often willingly opted for a military career and have undergone extensive schooling and training. This undermines the strict separation between *jus ad bellum* and *jus in bello*, as well as the moral equality of soldiers. It is difficult to maintain that the free, intelligent and informed Western soldiers can bear no responsibility for the justice of the wars they fight.

Criticism of *jus in bello*

Central to the *in bello* part of Walzer's theory is the notion of *noncombatant immunity*. In principle this notion makes sense; that those people who are not involved in the war business should not be harmed by those who are. In practice it is much harder to ascertain whether someone is indeed taking part in the war or not and if so, to what degree this makes him liable to be harmed or killed. In contemporary society many functions, such as research and development, communications and logistics are shared between the civil and the military domain; specialist tasks set by the army may be contracted to private companies; knowledge workers in research institutes may have in their heads the information that gives an army its tactical superiority. All those people are involved in the war but they are not soldiers. The category of *munitions workers* Walzer uses is a suitable way out of this problem if we are considering the traditional industrial workers of a weapons factory. Yet for the manifold jobs in contemporary society that are in some way part of the military apparatus the category is too narrow.

Though Walzer's discussion of who may and who may not be harmed in time of war is elaborate and thorough, his theory lacks systematic discussion of the weapons allowed to fight. He argues that the means of fighting do not in a significant way change war as a moral condition. Yet in studying the technological structure of fighting parties we can observe that technology *does* have a strong impact on the ethics of war. What if through technological advancement one side in a conflict is so far superior to its adversary that the latter stands no chance of winning; is the hopeless side then allowed to resort to drastic measures that would normally violate the rules of *jus in bello*? The development of non-lethal weapons raises ethical questions about the responsibilities that go with the use of such weapons. If soldiers and civilians are no longer killed but just 'incapacitated', is there any limit left to the actions that may be taken against them? Does this elevate the party using those weapons above morality? All these problems are related to the weapons and technologies used on the battlefield, which just war theory would do well to pay more attention to.

Despite these criticisms Walzer's just war theory still provides a solid base for ethical decision making in twenty-first century conflicts. It would be valuable to explore what modifications could strengthen the theory to stand up to the empirical reality of contemporary warfare. The text of which this is a summary provides a few lines along which such modifications could be developed.