

Justified: Just War and the Ethics of Violence and World Order

Chris Brown

1. Prologue: Justified

Justified was an American TV series, aired between 2010 and 2015, which followed the exploits of US Marshall Raylan Givens in contemporary Kentucky, more specifically, Harlan County. The premise of the show, which developed from a short story by Elmore Leonard,¹ was that Harlan County in the 2010s is, in many respects, not dissimilar from the Wild West of the 1870s and 80s, with crystal meth production standing in for cattle rustling; our hero Raylan is obliged to use deadly force with some regularity, in his own defence and in defence of others, gunfights being a feature of most episodes. Raylan kills lots of people and these killings are investigated by federal attorneys, who, understandably, are concerned that Raylan's approach to law enforcement may not be entirely by the book. This concern is not dispelled by these frequent legal post-mortems, but the latter conclude, in each case, that the killing was justified. These verdicts are not an endorsement of Raylan's methods, much less do the authorities consider it a point in his favour that he found himself so frequently having to shoot his way out of trouble—'justified' simply says that, given the circumstances and all things considered, he was entitled to act as he did.

There is a message here for those who, like me, believe that the just war tradition remains the best way to approach the ethics of force internationally, and the message is that the very term just war does the argument no favours. We should learn from this TV series and rename the position we support 'Justified War'. If we read 'justified' for 'just' some at least of the most common objections to the theory become much less compelling. Consider, for example, the doctrine of 'double effect', the principle that it may be permissible to cause a serious harm to a third party as a side effect of pursuing a good end, even if this side-effect were predictable in advance, so long as it was not directly intended. Some such principle is a necessary feature of any attempt to produce a workable ethics of violence, but to describe the result—let's say the killing of a number of innocent individuals—as 'just' sticks in the craw. To say that it is 'justified' may also be challenged, but at least with this usage there is less of an implication that the killing was a good even admirable thing, which the term 'just' does imply. That, at least, is my intuition, and what follows constitutes a defence of justified rather than just war. At times, and depending

¹ 'Fire in the Hole' in E. Leonard, *Fire in the Hole and Other Stories* (2012).

on context, I will use the old expression ‘just war’ but when I do the reader should read this on every occasion as ‘justified war’.

2. Violence, Ethics, and World Order

We live in a world where the dominant normative assumption—reflected in documents such as the UN Charter, the Universal Declaration of Human Rights, and the Genocide Convention—is that violence between states is illegitimate (Article 2(4) of the UN Charter) except in very restrictive circumstances, specifically immediate self-defence (Article 51) or as mandated by the Security Council (Articles 41 and 42). This is in stark contrast to, say, the normative assumption that underpinned European international relations in the nineteenth century, which was that violence was a legitimate act of state which could be resorted to without legal sanction, always assuming certain forms were followed.² This permissive attitude towards the use of force between collectivities was actually typical not just of the nineteenth century international order, but of virtually all previous ‘international’ orders that is world orders where there was no genuine imperial centre. World empires do not accept that tributary countries have a right to make war on each other, much less on the empire itself, but world orders that have involved multiple power centres have usually adopted a permissive attitude.

That changed in 1945 when the independent countries who formed the United Nations wrote a document that abolished the right to make war at the sovereign’s behest—whether some of those nations, or perhaps any of them, actually intended to follow this doctrine is another matter; the point is the law changed. However, the UN Security Council has rarely been able to act as the controller of violence the Charter seems to envisage. The veto power of the five permanent members of the Council (the P5), intended to protect their core interests, has been used much more widely to prevent the Council from acting in respect of issues where the P5 believe that they or their clients and allies have any skin in the game, which, of course, is most issues. The result has been that there have been many wars in the last seventy-five years but only two that have taken place under the authority of the UN—Korea in 1950, Iraq in 1991. In effect, the legal regime governing force is a dead letter;³ the Security Council cannot exercise the authority given it by the Charter, and states are therefore obliged to make their own arrangements to protect themselves and advance their interests. Some aspects of contemporary international relations are governed, but not the resort to force.

² This position is contested by Hendrik Simon in ‘The Myth of *Liberum Ius ad Bellum*: Justifying War in 19th-Century Legal Theory and Political Practice’, 29 *European Journal of International Law* (2018) 113, but see e.g. the 1905–06 version of *Oppenheim’s International Law* Part 2. Section 53. ‘War no Illegality’; for the contestation of this position, see also the contributions by Hendrik Simon and Isabel V. Hull to Part III of this volume.

³ The clearest statement of this position is still Glennon, ‘Why the Security Council Failed’, 82 *Foreign Affairs* (2003) 16.

This means that when it comes to the normative dimension of international violence, the use of force by states, we cannot outsource judgement to international lawyers. We are obliged to decide for ourselves whether a particular use of force is justified or not. Fortunately, there is a body of ethical thought that is devoted to clarifying this issue—the just war tradition (read justified war tradition). The just war tradition in its modern form has its roots in Christianity, specifically the works of Augustine and Thomas Aquinas, and some, but by no means all, of its modern adherents are Christian, but precursors of the tradition can be found in the classical world, and broadly similar approaches can be traced in most contemporary religious and ethical codes so there is no reason to think of the tradition as necessarily Eurocentric or reliant on religious sanction.⁴ The tradition asks whether there are good reasons to resort to force, whether those who do so resort have a right to do so, and whether their intentions in so doing are proper; it also requires that the way in which force is resorted to should not go against the general rules of ethical conduct, that is, that it should be proportionate to the offence, protective of the innocent, and only undertaken if there is no reasonable alternative and there is a reasonable belief that it will make things better.⁵ I have set this out without resort to Latin and without the usual formal terms because although the latter are designed to clarify, they are actually more likely to mislead the reader, making a set of ideas that are simply based on common sense seem unnecessarily esoteric.

Given the common-sense nature of justified war thinking, it is unsurprising that it should have a degree of recognition in contemporary international relations—thus, for example, the International Commission on Intervention and State Sovereignty (ICISS) in its report on The Responsibility to Protect (R2P) of 2001 employed the above criteria to identify circumstances where external military intervention might be justified to prevent humanitarian outrages.⁶ In so doing the Commissioners did not consider that they were innovating—rather they saw this language and the conceptual apparatus it represented as the obvious way of setting out the issues. Still, for all its obviousness, the tradition is currently challenged and from two very different directions. On the one hand are those critics who argue that, contrary to its stated intentions, just/justified war thinking actually legitimizes violence. On the other hand, are those who purport to be friends of the tradition, but whose reworking thereof subverts the possibility that it might actually be applied to real-world cases. The next two sections of this chapter address the arguments of these declared critics and false friends, before the final section concludes with some thoughts on justified war and the contemporary world order.

⁴ For the classical world and the just war tradition see O'Driscoll, 'Rewriting the Just War Tradition: Just War in Classical Greek Political Thought and Practice', 59 *International Studies Quarterly* (2015) 1; Valerie Morkevicius relates the tradition to Islamic and Hindu thought on war in *Realist Ethics: Just War Traditions as Power Politics* (2018); for Islamic perspectives on international law, see also Hashmi in this volume.

⁵ I have set out my approach to just war in more detail in Brown, 'Just War and Political Judgement', in A. Lang, Jr, C. O'Driscoll, and J. Williams (eds), *Just War: Authority, Tradition and Practice* (2013) 23.

⁶ International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (2001), Section 4, available at <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>> (last visited 10 January 2020).

3. The Critics of Justified War

The critics of the tradition are many and various; in what follows I will focus on the work of three critics who between them cover a great deal of ground. First, I will look at the work of N.J. Rengger whose critique is that of a disillusioned friend; I'll then go to Carl Schmitt, an overt enemy; and finish with Maya Zehfuss who stands in here for all the radical, post-positivist critics of the just war tradition. These critiques overlap to an interesting, and rather surprising, degree but they can be considered in isolation from one another, the strategy employed here.

Rengger's critique of the just war in his *Just War and International Order* (2013) is particularly compelling because he might be thought as the kind of thinker who would be sympathetic to the tradition⁷—he was a distinguished political theorist with a good knowledge of the classics, an interest in theology, and whose intellectual mentors were Michael Oakeshott and Eric Vogelin. Neither a hard-line realist nor a radical post-positivist he was, on the face of it, not the sort of writer one would expect to produce a strong critique of the just war tradition, yet that is indeed what he does. The essence of his critique is that the modern literature on the just war changes the original emphasis on restriction to one of permission—whereas originally just war thinking was designed to restrict the resort to force as far as possible and to restrict the kinds of violence that could be employed, he argues that many modern writers use the tradition to give permission for the exercise of violence. He has in mind particularly the support given by some just war thinkers to the 'War on Terror' and the intervention in Iraq in 2003—reference points here would be Jean Bethke Elshtain's *Just War Against Terror* (2003) and James Turner Johnson's *The War to Oust Saddam Hussein* (2005).⁸ Both Elshtain and Johnson are writers who sit within the Christian tradition of writing on war and peace, and both, according to Rengger, have crossed a line and become advocates for war, a position that a just war theorist, again according to Rengger, ought not to occupy.

One response to this critique might be to say that while these two writers, amongst others, have used the tradition in this way, it is open to others to employ the same tradition to different effect, which was indeed done by many critics of the 2003 war. But for Rengger the permissive nature of much modern writing on the just war is no accident and not a matter of the choices made by particular writers. Instead he relates the permissive use of the just war tradition to the wider project of producing an international order based on the legalizing of international relations via such institutions as the International Criminal Court (ICC) and in turn he relates this to changes in domestic society towards a more regulated and organized domestic order, away from his favoured conception of politics as an Oakeshottian civil association. A permissive attitude to the use of force internationally runs in tandem with a permissive attitude towards the use of compulsion in support of economic and social goals domestically.

⁷ N.J. Rengger, *Just War and international Order: The Uncivil Condition in World Politics* (2013).

⁸ J.B. Elshtain, *Just War Against Terror: Ethics and the Burden of American Power in a Violent World* (2003); J.T. Johnson, *The War to Oust Saddam Hussein: Just War and the New Face of Conflict* (2005).

Those less attached to the Oakeshottian conception of politics will not be impressed by the argument here, but the narrower point Rengger makes needs to be answered. One possible response to his argument is that the opposition of 'restrictive' and 'permissive' on which his argument is based is false with regard to the just/justified war tradition. Just war thinking both restricts *and* permits violence. At the heart of the tradition is the notion of righting a wrong—'just cause' to use the conventional term; action is *both restricted to and permitted in* circumstances where those with authority use it with the intention of righting a wrong and with due attention to such practical considerations as the protection of the innocent, proportionality, last resort, and the prospects of success. It may or may not be the case that writers such as Elshtain and Johnson are *excessively* permissive—that is a matter for practical judgement—but that they are permissive of violence is not in itself a reason to reject their arguments.

A further point *contra* Rengger might be that, as he admits, he has no easy answers to the questions raised by the just war, no alternative formulation that will do what in his opinion the just war is failing to do. One critic who certainly does have an answer here is Carl Schmitt, whose work as a whole constitutes a critique of the just war tradition and is perhaps best summarized in his *The Nomos of the Earth: In the International law of the Jus Publicum Europaeum* (2003).⁹ Schmitt's critique is more wide-ranging than that of Rengger, but he does have an answer of a sort to the question of the alternative—although, frustratingly for him, this answer is no longer available and can only take the form of an elegy for a lost European past.

Schmitt understands the just war as an essentially theological notion which legitimized total war. Just war theorists may have attempted to limit the role of violence in human affairs, and the Catholic Church in the Middle Ages certainly did try to use its influence to ban certain weapons and enforce truces, but these measures were always subverted by the basic logic of the just war, which, according to Schmitt, by inviting the judgement that one side in a conflict is 'just' involved identifying the other as 'unjust', with the concomitant that the unjust must be defeated whatever the cost, even if this involved using banned weapons or taking a conflict to extremes. Just war thinking justifies escalation, feeds self-righteousness, and legitimizes war—this goes beyond Rengger's critique; in this account the notion of a just war is not simply permissive of war but actively encourages it. Also, unlike Rengger, Schmitt is clear that there is an alternative framework against which just war thinking ought to be judged, and much of *The Nomos of the Earth* is devoted to defending this alternative.

This alternative emerged from the development of the sovereign, territorial state in Europe, which involved a spatial disposition of the Continent that undermined the jurisdiction of the Catholic Church and the Empire. This political order is no longer committed to the preservation of God's Order in the world but instead is based on Reason of State. The European princes created amongst themselves a *Jus Publicum Europaeum*, a secular legal order under which they recognized each other's rights and

⁹ C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (2003). This is the English translation—the original was published in 1950 and mostly written during the Second World War. I have written at greater length of Schmitt in 'From Humanised War to Humanitarian Intervention: Carl Schmitt's Critique of the Just War Tradition', in L. Odysseos and F. Petito (eds), *The International Thought of Carl Schmitt* (2007) 56.

interests, *within Europe* (the proviso here is crucial). Beyond the line, in the extra-European world, Europeans engage in large-scale appropriations of land, respecting neither the rights of the locals nor each other's rights, but within Europe a different *modus vivendi* was possible. In the extra-European world appalling atrocities occur which would not happen, or at least ought not to happen, in Europe. As between European rulers within Europe, war became 'bracketed'—rationalized and humanized. Rather than a divine punishment, war became an act of state. Whereas in the medieval order the enemy must necessarily be seen as unjust the new humanitarian approach to war involved the possibility of the recognition of the other as *justus hostis*, an enemy but a legitimate enemy, not someone who deserves to be annihilated, someone in whom one can recognize oneself, always a good basis for a degree of restraint. This, for Schmitt, is the great achievement of the age, and the ultimate justification for the sovereign state.

[An] international legal order, based on the liquidation of civil war and on the bracketing of war (in that it transformed war into a duel between European states), actually had legitimated a realm of relative reason. The equality of sovereigns made them equally legal partners in war and prevented military methods of annihilation.¹⁰

The new thinking about war also opened up the possibility of neutrality as a legal status; since war was no longer justified in accordance with a theological judgement based on notions of good and evil, it became possible for third parties to stand aside if their interests were not engaged. Equally, the ordinary subjects of belligerent rulers need not feel obliged to become emotionally engaged in the fray; war becomes a matter for sovereigns and their servants, civil and military—the kind of wider involvement that might be appropriate to a war between good and evil becomes strictly optional. Thus was established what Schmitt clearly regarded as a kind of golden age in European international relations, a golden age that would be sabotaged in the twentieth century by the United States, with the reluctant, ambiguous, assistance of the United Kingdom—two maritime powers whose commitment to the *Jus Publicum Europaeum* was highly qualified in the case of the United Kingdom, non-existent in the case of the United States. At this point Schmitt's argument veers away from his critique of the just war and need not concern us here, but that critique stands alone and needs to be answered.

Part of the answer concerns the facts of the case. Contra Schmitt, medieval just war thinkers did not usually endorse crusades, nor did they demonize enemies in the way he suggests is inherent in the logic of a just war—obviously just war thinking could be twisted into a kind of Manichean division between good and evil but none of the central figures of the tradition fall into this trap. Again, Schmitt's picture of the bracketing of war may have been an accurate, albeit rose-tinted, description of war in Europe in the middle of the eighteenth century, but only for a short period and, even then, war was more of a disaster for those directly affected by it than Schmitt allows. But, even if one were to accept Schmitt's account of the golden age of the *Jus Publicum Europaeum* it is clear that this happy arrangement is no longer of any relevance to the twenty-first

¹⁰ Schmitt, above note 9, at 142.

century—not only is his vision unacceptably Eurocentric, it is also based on the assumption that European power is dominant in the rest of the world. In effect, Schmitt's overall position is one of nostalgia for a world order that no longer has any relevance—even if one were to accept all his premises, which would be ill-advised. From Rengger's work we can take away the message that just/justified war thinking ought not to be excessively permissive; from Schmitt the takeaway is that just war thinkers ought not to allow their desire for justice to lead to the demonization of those deemed not to have a just cause. In both cases, this is no more than common-sense and the logic of justified force demands.

Maya Zehfuss's *War and the Politics of Ethics* (2018) is not actually oriented towards the just war tradition—instead her focus is on 'Western' war in general—but her work certainly touches on the tradition and on some of the writers who I approach in the next section of this chapter, the false friends of just war.¹¹ Zehfuss's central concern is with the way in which, she argues, the West has adopted the project of making the world a better place through the allegedly judicious use of violence. Western war is ethical war, no longer to be justified in terms of reason of state but by the good in terms of human rights and freedom from oppression that it is designed to produce. But, of course, war kills people, including, very often, the people it is intended to protect, and this subverts the ethical intent.

Zehfuss pulls in arguments that we have already met from Rengger and Schmitt, while giving them a twist. Rengger's concern with the permissiveness of much contemporary just war thinking is specifically endorsed by Zehfuss. Schmitt, on the other hand, does not register on her radar, which is rather strange since her critique of ethical war echoes the kind of arguments he puts forward, although her 'ethical warriors' go to considerable lengths to avoid civilian casualties and to understand their enemies, while Schmitt's crusaders take things to extreme in their war against the unjust. Part of the reluctance to engage with Schmitt may come from a fundamental disagreement with the positive side of the latter's argument—Zehfuss does not want to endorse the *Jus Publicum Europaeum* that is the ideal presented by Schmitt, but the result is that her critique of Western war does not present an alternative understanding of the role of force in human affairs.

The key here is the term 'Western' war. Like other radical critics of the wars of the last two decades such as Ken Booth whose 'Ten Flaws of Just Wars' (2000) is a brief summary of all the reasons why just war thinking is unacceptable to radicals, and indeed, like political movements such as the 'Stop the War Coalition', her focus is specifically on wars waged by the West.¹² Wars waged by non-Western states and other actors are outside the scope of her study, just as, for example, the Stop the War Coalition never critiques the war-making of Russia or Iran in Syria with anything like the intensity it devotes to opposing the occasional Western engagements in that conflict. For Zehfuss it is Western war that is the problem; it is the attempt to justify war in ethical terms that

¹¹ M. Zehfuss, *War and the Politics of Ethics* (2018).

¹² Booth, 'Ten Flaws of Just Wars', 4 *The International Journal of Human Rights* (2000) 314; see also, partly in response, Brown, 'A Qualified Defence of the Use of Force for Humanitarian Reasons', 4 *The International Journal of Human Rights* (2000) 282. For the Stop the War Coalition see <<http://www.stopwar.org.uk>> (last visited 10 January 2020).

attracts her critique—non-Western countries are, in effect, given a free pass to engage in war for traditional reasons of state presumably on the principle that killing people for political reasons is somehow less condemnable than killing them in order to make the world a better place. It is difficult to see the moral force of this position.

To summarize, critics of the just/justified war tradition argue that thinking about the use of force in line with the tradition does not actually serve the ends to which the tradition is supposed to be devoted. Far from limiting international violence, thinking in terms of the just war is in danger of having the opposite effect, being excessively permissive of the use of force, encouraging a crusading mentality, and providing ethical justifications for policies that do great harm. These are serious critiques, and they certainly identify attitudes to force that should be avoided—but they do not actually undermine the essential nature of just war thinking. In effect these critiques warn us of the dangers of misusing the idea of the just war, but the fact that it is certainly possible to misuse just war thinking is not a reason to avoid the discourse altogether.

4. New (False?) Friends of Justified War

Whereas the just war was once a rather esoteric minority interest, there are today (at least) three different conceptions of the idea that are current in contemporary discourse: first, there is what I would describe as ‘neo-classical’ just war thinking, drawing on the deep history of the discourse and applying it to modern conditions—this is the version of justified war defended here; then there is ‘legalist’ just war thinking which essentially equates the notion of a just war with that of a war fought in accordance with the Law of Armed Conflict, and the UN Charter, possibly slightly amended to allow for the possibility of humanitarian intervention; and finally there is ‘revisionist’ just war theory, which applies the techniques and assumptions of analytical political theory to the notion of a just war. The latter two approaches are closely connected—the legalist approach is best represented by the work of Michael Walzer who understands just war in terms of human rights, but rights as expressed via membership of a community, whereas the revisionists remove this latter restriction. From their perspective just war thinking has to be wholly consistent with a full understanding of human rights, most particularly (and obviously problematically) the right to life. The work of these thinkers has, without question, galvanized the study of justified war over the last two decades—the key question is whether their formulations have actually taken the notion too far away from its origins and undermined its capacity to actually relate to the realities of war. Are they, in other words, false friends of the justified war tradition?

Whereas the tradition presents the conventional criteria as a series of questions concerning the use of force and violence which invite the exercise of judgement—just war *theory* as espoused by the revisionists attempts to arrange these questions into a series of law-like propositions which will provide definitive answers to these questions. Early statements of this approach include David Rodin’s *War and Self-Defence* (2002) which contests the notion that states have a right to defend themselves from attack, and Jeff McMahan’s *The Ethics of Killing* (2002) which took war as simply one element of a larger problem about killing, but perhaps the most substantial and influential work is McMahan’s *Killing in War* (2009) which contests the just war tradition

on a number of points, arguing against the view that combatants should be treated as moral equals and challenging the central principle of non-combatant immunity.¹³

The central feature of this approach is a refusal to conceptualize war as a *collective* enterprise; instead, the revisionists argue, war has to be understood in terms of individual responsibility at all levels, from the high command down to the frontline soldier. As a general proposition, this stance involves replacing the idea that there is a specific body of laws associated with war—the Law of Armed Conflict—by an assertion of the universal scope and authority of International Human Rights Law. Such as substitution has dramatic consequences—in order to show how dramatic, it may be useful to set out some conventional positions which are supported by the Law of Armed Conflict and, for the most part, by arguments drawn from the just war tradition (certainly in its legalist form) but which are challenged by the revisionists.

Conventionally, both the just war tradition and the Law of Armed Conflict are concerned with and distinguish between what is usually called *ius ad bellum* (the justice of the resort to war) and *ius in bello* (the justice of the conduct of war). The division of just war thinking into these two categories is relatively recent but quite well established nowadays. A clear exposition of the distinction here can be found in Michael Walzer's highly influential *Just and Unjust Wars* (1977/2015), where he distinguishes between the 'theory of aggression' and the 'war convention'.¹⁴ Walzer's theory of aggression argues that members of international society are entitled to defend their political and physical integrity and attacks on the same, except in very limited legal and moral circumstances, constitute the crime of aggression and justify a war of self-defence. However, the 'war convention' states that the combatants in such a war, whether on the side of the aggressor or the defender, should be treated as morally equal with the same rights.

Walzer's position is somewhat at odds with the medieval just war tradition, but it is broadly supported by modern international law. As noted above, the UN Charter outlaws the use of force (Article 2[4]) except in self-defence (Article 51) or as directed by the Security Council, and self-defence is recognized by most conventional just war thinkers as the most obvious example of a just cause for war—indeed, so obvious that it is rarely discussed. As to the 'war convention', the Law of Armed Conflict extends protection to all combatants and non-combatants irrespective of the alleged justice of their cause—the same rules apply to all. The neo-classical just war tradition is a little less committed to this principle, but there are good pragmatic and moral reasons for adhering to it. Pragmatically, it is clear that if either side in a conflict could waive the rules on the basis that their opponent was the wrongdoer, then there would be no rules, to the detriment of troops on both sides. The moral case is equally strong: most combatants in a large-scale war are likely to be conscripts, not given a choice whether or not to fight. Such soldiers are responsible for their conduct in the war, but the conventional approach acquits them of responsibility for the actual war.

¹³ D. Rodin, *War and Self Defence* (2003); J. McMahan *The Ethics of Killing* (2002); and J. McMahan, *Killing in War* (2009); a good overview of the 'revisionist' position is: Lazar, 'War', in E.N. Zalta (ed.), *The Stanford Encyclopaedia of Philosophy* (2017), available at <<https://plato.stanford.edu/archives/spr2017/entries/war/>> (last visited 10 January 2020). See also the synthesis presented in C. Fabre, *Cosmopolitan War* (2012).

¹⁴ M. Walzer, *Just and Unjust Wars* (1977/2015). On Walzer, see also the chapter by Anthony Lang, Jr in this volume.

Revisionist just war theory is critical of both the theory of aggression, the current version of *ius ad bellum*, and the moral equality of combatants, the current core principle of *ius in bello*, criticizing the international legal status quo and the just war tradition from an anti-collectivist position which focuses on the rights and responsibilities of the individual. David Rodin's *War and Self-Defence* presents the core argument with respect to *ius ad bellum*. States do not have an unqualified right of self-defence—such a right is conditional; only just societies have the right to defend their political and territorial integrity. Only just communities are entitled to defend themselves and even then, attacks on the sovereignty or territorial integrity of a state are not, in themselves, justifications for war—they are such if, and only if, individual rights are violated. So, for example, a bloodless invasion would not count as an act of aggression.

Jeff McMahan's *Killing in War* is the most important revisionist work on *ius in bello*. He regards all combatants (and non-combatants) as rights-bearers but posits that they hold different rights, depending on the justice of their cause—there is no moral equivalence between combatants fighting a just war and those fighting an unjust war.¹⁵ Combatants in an unjust cause are not entitled to act aggressively or to defend themselves and the fact that they were conscripted into the army and may not share the beliefs of their leaders is irrelevant in the context of their moral responsibility. However, they are still rights bearers who possess the right to life, therefore they can only be killed in self-defence by just combatants who *do* have the right to defend themselves. The model here is very much that of domestic policing where the police have powers of arrest and may use necessary force if they are resisted; the criminal may not resist arrest but may not be subjected to violence in the event of non-resistance. Perhaps even more controversial, is the revisionist critique of the principle of non-combatant immunity set out by both McMahan and Fabre. Again, individuals are to be judged in accordance with their behaviour and those who support an unjust war, even if they do not actively participate in the fighting, may in restricted circumstances be subject to attack.

These positions are counter-intuitive, but, of course, that does not make them wrong—still there are compelling reasons to be concerned at the development of revisionist just war theory. There are two points here which are basic, and which address the underpinnings of revisionist just war theory: first, war is a collective enterprise, a *social* phenomenon; the idea that all social behaviour can be understood in terms of the behaviour of individuals is something that revisionist just war theorists share with other analytical political theorists and mainstream economics and is subject to the same critiques that those disciplines attract. Second, revisionist just war theory relies on implausible assumptions about the capacity of the theorist to make authoritative judgements as to the justice of particular causes or particular tactics. The revisionist just war theorist believes that with enough concentrated brainpower the justice of a cause can be accurately assessed. This assumes too much; human beings do not possess the means to achieve that kind of certainty. The neo-classical just war tradition, rooted in a Christian adaptation of Aristotelian *phronesis*, stresses the centrality of judgement but does not hold out the possibility of certainty. Classical just

¹⁵ See also D. Rodin and H. Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (2008).

war thinking provides questions, while revisionist just war theory purports to provide answers, often expressed with very little humility—consider, for example, McMahan's summary condemnation of Wittgenstein's 'moral stupidity' in supporting Austria-Hungary's case in the First World War.¹⁶

These two, as it were, generic criticisms feed into the specific content of revisionist just war theory, but an equally important point is that this approach loses contact with the realities of war and the importance of the moral framework of the soldier. Michael Walzer makes the point nicely in a 2012 online interview with Nancy Rosenblum where, contrasting their approach with his own, he remarks that for the revisionists 'the subject of just war theory is just war theory [whereas] I think the subject matter of just war theory is war'.¹⁷ The point is that it would be next to impossible to fight and win a war that satisfied all the requirements of the revisionists. It is difficult to imagine what kind of cause would be regarded by the revisionists as fitting this bill for a just cause and assuming that, by some quirk of fate, a just cause that would satisfy the revisionists could be found and therefore a war could be justly undertaken, the kind of *in bello* restrictions that they would impose would make actually fighting the war a practical impossibility. Given an army that is unable to take the initiative, that may not close with the enemy, that is obliged to recognize the right to life of its opponents, the only possible outcome of a conflict would be a pointless stalemate—that is, if both armies were fighting with the same revisionist restraints which is an unlikely state of affairs.

The fact that it would be virtually impossible to fight and win a just war under revisionist terms is a conclusion that the revisionists themselves would probably welcome; the argument would be that if a war could not be fought justly, as they define fighting justly, it ought not to be fought. Revisionist just war theory is, when the chips are down, essentially pacifist, which loses contact with the central aim of the justified war tradition, which is to discriminate between cases—the just war is an alternative to pacifism on the one hand and a *Realpolitik* approach on the other. There is a perfectly good set of arguments in favour of pacifism, and therefore no need to approach this position from the direction of the just war tradition; better to preserve the latter for arguments in favour of discrimination. Of course, if everybody adopted revisionist ideas the problem of war would disappear, but it is clear that this is not likely to happen anytime soon.

5. Conclusion: Justified War and Contemporary World Order

There are good reasons for the widespread view that the rules-based international order, largely designed during the Cold War but re-fitted in the 1990s and 2000s, is now in real trouble, with the institutions designed to support this order failing in the

¹⁶ McMahan, *Killing in War*, above note 13, at 1.

¹⁷ Nancy Rosenblum, 'A Conversation with Michael Walzer' (2012), available at <<https://www.youtube.com/watch?v=TyvnmLoO38>> (last visited 10 January 2020). Walzer expresses similar sentiments in the Afterword to the 2015 edition of *Just and Unjust Wars*.

task with which they have been charged. This is true in particular with respect to the central system of great power relations; the management of the latter has become increasingly difficult, to the point that it is no longer being attempted, the main post-war 'manager' of the system, the United States having, under the Trump administration, more or less given up on the task. Given this context, the collapse of the legal regime governing the use of force takes on a new significance. For most of the last twenty years, both friends and enemies of the justified war tradition have more or less assumed that the role of force in contemporary international relations is likely to involve so-called humanitarian interventions or other 'savage wars of peace'.¹⁸ These are the Western wars that Zehfuss critiques and the wars that Rengger argues modern just war thinkers are too ready to support—and, in so far as the 'revisionist' theorists imagine their ideas could be put in practice it is in the context of the rules of engagement for conflicts such as that in Afghanistan or Syria.

These conflicts will doubtless continue, indeed are continuing not just in Afghanistan and Syria but in many areas in West Africa where French soldiers are battling the local Al-Qaeda franchises, but larger problems now loom. Great power wars are no longer unthinkable. Chinese actions in the South and East China seas and the Taiwan Strait could easily lead to conflict with the United States and its allies; *pace* current negotiations, nuclear politics in Korea could also lead to a confrontation between China and the United States; and, of course, in Europe we have already seen the use of force to change internationally agreed boundaries when Russia annexed Crimea and invaded eastern Ukraine. Threats to the independence of the Baltic Republics, (especially dangerous since, unlike the threat to Ukraine, NATO members are involved) Cold-War style probing of Western defences by Russian aircraft, and provocative boasting about Russia's new suite of offensive weapons—taken individually these steps may not amount to much but taken together they suggest that it would be unwise to dismiss the possibility of a return to large-scale warfare. And if, as is repeatedly rumoured, the United States in response to the unwillingness of European members of NATO to take the steps necessary to defend themselves, were to withdraw from the alliance, either formally or informally, it would be foolish indeed to believe that President Putin's Russia would not take advantage of the power vacuum this would create.

The prospect of great power war is, of course, truly terrible, but the very awfulness of what would be involved makes it particularly important that we—informed public opinion as well as government officials and the military—develop clear thinking about the circumstances under which a resort to force would be justified. To pick up a revisionist theme, is self-defence always a just *causus belli*? What would be a proportionate response to a Russian invasion of the Baltic Republics? Shifting to more immediately plausible scenarios, what should be the response to large-scale cyber-attacks on civilian infrastructure? What kind of rules of engagement should be imposed on militaries that might have to fight against well-organized and equipped conventional opponents whose respect for the Law of Armed Conflict could not be guaranteed?

¹⁸ 'Savage wars of peace' comes from R. Kipling 'The White Man's Burden' and has most recently been used in M. Boot, *The Savage Wars of Peace: Small Wars and the Rise of American Power* (2002).

These are questions it would be good if we had thought through before we actually need to—indeed, if we think through these questions it maybe we can avoid ever having to answer them in the real world. And the burden of this chapter is to suggest that, *pace* critics of the tradition, and the *pace* the implausible formulations that some friends of the tradition prefer, the conventional notion of justified war is still the best place to begin with the task of grappling with these, literally, life and death questions.

The Justification of War and International Order

From Past to Present

Edited by

LOTHAR BROCK AND HENDRIK SIMON

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