

Philosophy Bachelor Thesis



The Moral (in)Equality of Combatants

Two Views Concerning the Status of Individuals in War

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Introduction

In this thesis I will try to answer the question whether or not just and unjust combatants are morally equal. I will answer this question by beginning with a description and explanation on the different rules concerning war, the Jus ad Bellum rules (rules governing the resort to go to war) and the Jus in Bello rules (the rules governing the conduct of war). Based on these rules we can differentiate between just combatants (fighting on the side of war upholding the Jus ad Bellum rules) and the unjust combatants (fighting on the side of war not upholding the Jus ad Bellum rules). In the third chapter I will describe the philosophy of Michael Walzer, who defends the traditional just war theory, and who argues that the Jus ad Bellum and Jus in Bello rules are independent. In his view, just and unjust combatants are morally equal, meaning that just and unjust combatants have an equal right to kill each other, and equal rights to self-defence, also the Jus in bello rules are equally applied to both sides. In chapter four I will describe the arguments of Jeff McMahan, who attacks the traditional just war theory. He argues that the Jus ad Bellum and Jus in Bello rules are logically dependent and just and unjust combatants are thus not morally equal.

I will compare both philosophers by examining and comparing their theoretical arguments, normative arguments and their ideas on the culpabilities and responsibilities of combatants. I will conclude that even though McMahan has influential and important new ideas in a field which is heavily dominated by the orthodox view of combatants which Walzer defends, Walzer's philosophy is more consistent and has less flaws than McMahan's theory and can be considered more convincing.

It is important to understand this thesis will not provide any arguments for or against the idea of Just War. Both the authors discussed in this thesis acknowledge the rules of war and the idea of Just War. However, the topic of Just War is not uncontroversial. Due to the dangers of losing a war, one could argue that once a war has started, one should only be concerned with winning the war instead of abiding by the rules or behaving morally, this position is called "Realism". On the other hand, one could also argue that due to the damage brought upon by war, one should never go to war, even when one is attacked by another country. This is the Pacifist position, which entails that war is unjustifiable and one should never meet aggression with aggression. Both these positions are opposed to the idea of Just War, wherein one can justly go to war and fight a war if all required conditions (rules of war) are satisfied. This thesis will solely be concerned with the Just War theory itself and will not provide any argumentation against Realism or Pacifism.

Another point I want to highlight is the relevance of the topic of this thesis. One could think that War Ethics is a topic merely discussed among philosophers and therefore not relevant to the people who should be concerned with it the most, namely politicians and generals. However, this is not true. Many

of the ideas of War Ethics have found their way into legislation. In 1949 the Geneva Convention was signed and ratified by 196 countries. Many of the legislation found in the Geneva code originates from philosophical thought and especially ideas in the field of War Ethics.

I also want to highlight the relevance of the main topic of my thesis, the status of individuals in war. With the many wars still being fought today one can see the importance of thinking about the status of the individuals fighting these wars. Are the soldiers responsible for the war they are fighting, and if so, should they be punished for it afterwards or are the Generals holding all responsibility? Should people who are being brainwashed by ISIS into fighting be giving the same status as soldiers who voluntarily join ISIS? Can we blame people for falsely believing their war is Just? And what should governments do to protect people from being tried for mutiny if they conscientiously object to fight a war? Due to the difficult nature of these questions, they cannot and will not all be answered in this thesis. However, by defining the status of individuals in war and especially by answering the main question of this thesis, whether or not all combatants are equal, this thesis will take a small step towards answering these questions.

We will see how Walzer and McMahan provide different answers concerning these questions with sometimes providing argumentation based on wars fought in the past, but as one can see, the questions asked are still relevant today.

I will start this thesis with the different rules of war. The reason for this is that this is one of the main differences between Walzer and McMahan. In short, Walzer argues that the Jus ad Bellum rules are logically independent from the Jus in Bello rules, in the sense that a just war can be fought unjustly and an unjust war can be fought justly. For instance; a soldier can uphold all the rules of Jus in Bello, while the war he participates in is unjust (it does not uphold the Jus ad Bellum requirements). McMahan on the other side, argues that the Jus ad Bellum rules and the Jus in Bello rules are not logically independent, in the sense that a soldier who participates in an unjust war by definition cannot uphold the Jus in Bello requirements. Another reason why I start this thesis with the Jus ad Bellum rules (chapter 1) and Jus in Bello rules (chapter 2) is because in order to think about the status of individuals in war, and War ethics as a whole, it is important to have some basic knowledge concerning the different rules of war. Therefore, I will present the different rules of war in the next two chapters, paying special attention to the rules which are of more importance to the answering of our main question whether all combatants are morally equal. These chapters will mainly consist of the different rules of war and their definition as laid out in the Geneva Convention.

Chapter 1

Jus ad Bellum

In this chapter we will look at the Jus ad Bellum rules, these are the rules concerning the justness to go to war as laid out in the Geneva Convention. The Jus ad Bellum rules of war have been a topic of debate of many philosophers for many centuries. They go back as far as the ancient and medieval times and are a way to understand and think about the legality and morality of war. Over this vast amount of time a certain consensus has arisen on the formal conditions that make up the Jus ad Bellum conditions and therefore the conditions to start a war justly. There are seven conditions which are widely accepted as the requirements of Jus ad Bellum and only when all the conditions are met, a country can go to war justly. So if a country upholds all requirements but lacks, for instance, the “right intention condition”, they cannot pursue their war justly. I will now elaborate more on each Jus ad Bellum requirements in turn.

1.1 Just cause

In general, a Just cause for war is being as “a military act that violates (or threatens to violate) a state’s sovereignty. A military act need not involve violence against people, but could include, for example, the illegal occupation of land” (Frowe, 2011, p. 51). State sovereignty is defined as the territorial and political integrity of a state, which can only be the case if that particular state has authority over its political system and its borders.

However, there is consensus amongst philosophers that one can have a just cause not only when a military act violates ‘your own’ state’s sovereignty, wars of other-defence can also have a just cause. A good example is when Nazi-Germany violated Poland’s sovereignty by invading their territory. This not only gave Poland a Just cause for war, but also Great-Britain and France who in means of other-defence declared war on Germany (McMahan, 2005, p. 1).

This criterion will play an important role in McMahan’s argument. Although McMahan agrees on the fact that all Jus ad Bellum requirements have to be met in order to fight a just war, he will argue that the Just Cause criterion has priority, since other Jus ad Bellum criterions cannot be upheld when one does not have a Just cause (McMahan, 2005, p. 5). We will see in the chapter on McMahan that according to McMahan, one cannot even uphold the Jus in Bello criteria without a Just cause, making the Jus in Bello and Jus ad Bellum rules logically dependent of one another.

1.2 Proportionality

In order to explain the proportionality criterion, it is useful to think of an example of a personal relation between people (instead of a relation between countries). When for instance a person tries to rob you from your money, it is not permissible for you to kill that person (even if this is the only way to prevent someone from stealing your wallet). The same applies to the waging of war, “in order for a war to be just, it must be a proportionate response to the suffered wrong” (Frowe, 2011, p. 54). However, the proportionality criterion is hard to grasp, we must compare the harms brought by war with the goods brought upon by a victory. This is one of the main problems concerning the proportionality criterion, we must compare harms which are radically different. For instance; “How much human lives can we sacrifice in order to take back territory lost to an invading nation?”. In order to do this we must compare harms across categories that do not seem to be linked directly, in this example human lives and territory (Hurka, 2005, p. 55).

The other problem concerning this condition is the epistemic uncertainty concerning war. It is very hard to ‘calculate’ how much harm a war will bring. Since war itself is such an uncertain enterprise, we simply cannot know how much harm a war will bring once it has begun. Therefore, the proportionality-condition is not a so-called one-off assessment but an ongoing evaluation of the justness of the war. “Things change in war; it might well become apparent that a war that appeared proportionate at its outset is no longer so, and is thus no longer just” (Frowe, 2011, p. 54).

1.3 Reasonable chance of success

This criterion prohibits a state from fighting a war “against all odds”. If a state is being attacked by another state which is overwhelmingly more powerful and the defending state has no chance of winning, the weaker state must surrender instead of fight, even if the more powerful state unjustly attacks the weaker state. This does not mean a state can only wage war from which it will be sure to be the victor, it only entails that there must be a reasonable chance of success (Frowe, 2011, p. 57).

1.4 Legitimate authority

This criterion specifies that a war can only be just if it is fought by a legitimate authority. In other words, a war can only be just if it’s declared by the head of that particular state, such as the president, prime-minister, king or congress. Since war is usually defined as a relation between states, a legitimate authority is defined as a person or group who is authorized to speak on behalf of the state on the international stage (Frowe, 2011, p. 59).

1.5 Right intention

The criterion of right intention is closely linked to the criterion of just cause. The right intention criterion specifies that a state cannot justly go to war by using a just cause as an excuse to wage war that in fact is not being fought in respect to a received wrong (which is a just cause), but rather for another purpose i.e. economic advantage (Frowe, 2011, p. 60).

1.6 Last resort

The last resort criterion stipulates that “a war can be just only when all other means of averting a threat or seeking redress have been exhausted” (Frowe, 2011, p. 62). And “all other means” is usually conceived of as economic sanctions, diplomatic pressure and trade bans.

One could argue that war is never a last resort, since countries could endlessly try to avoid the use of military force by using these “other means”. However, it is important to understand that the conditions of last resort only entails that all these “other means of averting a threat” have been tried, not that they have been tried endlessly.

1.7 Public declaration of war

The last condition of Jus ad Bellum is that only when all other conditions are met, a country has to publicly declare war. “The Hague Convention of 1907 requires that war must not commence without previous or explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with the conditional declaration of war” (Frowe, 2011, p. 63). This condition is crucial since it ensures that the civilians of the countries who are going to war can be evacuated from cities and other war-time targets. Since the declaration of war is a formal agreement that the laws of war are now applied to the relations between both ‘warring’ states.

So far I have elaborated on all the requirements a country has to meet before they can justly go to war, lets now look at the requirements a country has to meet to fight a war justly, the so-called “Jus in Bello rules”.

Chapter 2

Jus in Bello

The Jus in Bello rules concern the justice of acts within the war itself, whereas the Jus ad Bellum rules as described in chapter 1, concern only when it is just to go to war. This chapter will be a very theoretical chapter which will consist mainly of the different Jus in Bello rules and their definition as described in the Geneva Convention.

The Jus in Bello rules who stipulate the justness of the conduct in war can be categorized in four different categories. The first condition stipulates which requirements a person must meet in order to be qualified as a combatant. The second condition specifies the targets that one may legitimately attack in war. The third category describes the legitimate tactics that can be used in war, in terms of the scale of attacks, the strategies and sorts of weapons that can be used. The last category described how prisoners of war ought to be treated.

2.1 Qualification of combatant

It is important to make a distinction between combatants and non-combatants because different rights and privileges are attained by being in one category or the other. For instance, it is permissible to attack an enemy combat while it is impermissible to attack non-combatants. Being a combatant also comes with a right, namely the right to attack and kill enemy-combatants, however it is important to understand this is the Traditional view concerning the status of combatants which Walzer defends. However, there is disagreement if being a combatant alone is enough to gain the right to attack and kill enemy-combatants, and this important for the main topic of our thesis: what is the moral status of combatants? In this Thesis we will see how McMahan disagrees with the idea that all combatants have the same status by arguing that only just combatants gain the right to attack and kill enemy-combatants. However, both Walzer and McMahan agree that this is a right non-combatants don't have: when a non-combatant would kill an enemy-combatant it would count as murder (Walzer, 2015, p. 138).

Now that it is clear why it is important to have a distinction between combatants and non-combatants, let us now look at what the requirements are to be qualified as a combatant. In the Geneva Convention of 1949 it was stipulated that to be qualified as a combatant, a person must:

- "Be part of a hierarchical group, such that there is a recognizable chain of command;
- Wear a distinctive emblem that is visible from a distance;

- Bear arms openly;
- Obey the rules of Jus in Bello as laid out in the Convention.” (Frowe, 2011, p. 101)

2.2 Legitimate targets

2.2.1 The requirement of discrimination

The distinction between combatants and non-combatants is not the same as the distinction between legitimate and illegitimate targets in war. For example, state-leaders who are in theory non-combatants, can be legitimate targets of war if they are instrumental in the waging of war. Also, some members of the military can be illegitimate targets, for instance, doctors and clergy who are performing ‘civilian roles’ in the army. Therefore, the only legitimate ‘combatant targets’ are the ‘active combatants’, and killing them would only be legitimate if by doing so a military advantage is achieved (if no advantage is achieved by killing a combatant, it is not permissible) (Walzer, 2005, p.144).

However, even non-combatants can be a legitimate target of attack. The status of combatants can reach beyond the class of soldiers, and even civilians can be a legitimate target in war. A distinction can be made between two classes of civilians (Walzer, 2005, p. 145). First there are the munition workers, who are liable to be attacked since they work on ‘warlike activities’ (they work in a weapons or munition factory). They lose their right to life because their work directly contributes to the war-effort (Walzer, 2015, p. 146). The second class of civilians are the normal-civilians; they are not liable to be attacked, their work does not directly contribute to the war effort, and is also needed in peacetime.

It is important to understand that even though soldiers need to eat, a farmer (who makes the food for the soldiers) is not considered a legitimate target. The distinction has to be made between what a soldier needs to live and what he needs to fight. Of course soldiers do need food to fight, but food doesn’t make soldiers, soldiers. It’s the arms they carry (Walzer, 2015, p. 146).

We will see in Chapter 4 how McMahan argues that unjust combatants cannot discriminate between combatants and non-combatants since they lack a just cause.

2.2.2 Non-personal targets

“The basic rule regarding legitimate non-personal targets (i.e. buildings and so on) is that one can strike targets that have a military function, the destruction of which will afford one a military advantage” (Frowe, 2011, p. 105). For instance, one may legitimately attack munition factories, military

headquarters, military vehicles etc. But also railways, roads, television- and radio-stations and research-centers that are being used to develop military technology.

Illegitimate targets are non-military buildings, such as, religious buildings, schools, hospitals etc.

It is important to understand we are talking about legitimate 'targets'. If one targets a military headquarter and by trying to destroy this, one also destroys the school-building next to it (collateral damage) the attack could still be permissible. However how much and whether or not collateral damage is permissible depends on conditions such as necessity and proportionality (Walzer, 2005, p. 152). We shall now look at these conditions in the following paragraph.

2.3 Legitimate tactics

2.3.1 Military necessity

A legitimate attack in war must meet the conditions of proportionality and of military necessity. The condition of military necessity requires that "an offensive be intended to confer some sort of military advantage" (Frowe, 2011, p. 106). This requirement stipulates why only those things (buildings, vehicles etc.) connected to the military can be a legitimate target. The key-word is military advantage. Since blowing up a school will not have a military advantage, but blowing up a military airfield will, the former is not considered a legitimate target but the latter is. We will define 'military advantage' as improving the chance of a military defeat of the opponents (Walzer, 2005, p. 144). Military leaders should therefore only consider the military advantage an attack will bring them and are not allowed to consider what we may call 'political ends'. For instance, directly bombing a school could bring about a political advantage; by showing opponents how far you are prepared to go and horrifying them into surrendering. However, this is considered a political end instead of a military end and is therefore an illegitimate tactic.

It is good to understand that this requirement emphasizes on military necessity and not 'just' necessity. Since this helps to "iterate the division between Jus ad Bellum and Jus in Bello, reminding combatants that though the war as a whole is a political project, their role in it must be restricted to military concerns" (Frowe, 2011, p. 107).

2.3.2 Proportionality

Military tactics are not only constrained by the sorts of ends commanders may pursue, commanders must also consider the proportionality of their attack. Just like in the Jus ad Bellum requirement of proportionality, the harm one inflicts must be proportionate to the good that one aims to bring about. Therefore, it is of vital importance to identify the type of goods and harms that should be taken into

account. Thomas Hurka states that the relevant in Bello goods are “defined by the just cause for war” (Hurka, 2005, p. 44). This means the harms that are brought upon by war must be outweighed by the good aim that justifies going to war. For instance, defending the sovereignty of a nation can be considered a good that could exceed the harms brought upon by war.

The main harms brought upon by war are the lost lives. However, not all lives count equally under the rules of Jus in Bello.

First we have the lives of combatants, these are not counted as heavy as civilian-lives in an account of proportionality since they waived their right to life by having signed up to fight, they are not wronged by being killed if and only if it brings about a military advantage for the attacking force. However, the lives of combatants are still a factor in proportionality-considerations. If one can only claim a small military base by killing a million soldiers, this would still be unproportionate to that goal and thus impermissible.

The next type of lives are those of the enemy non-combatants. In most considerations on proportionality, civilian lives will be the main factor in determining if the attack is proportionate. The Geneva convention prohibits killing of non-combatants “which would be excessive in relation to the concrete and direct military advantage anticipated” (Frowe, 2011, p. 108). One could be confused by this since the Geneva convention also states that violence against non-combatants is forbidden. It is therefore good to understand that the targeting of non-combatants is forbidden, while the loss of non-combatants life as a foreseeable side-effect is not. This is called the Doctrine of Double effect (DDE). This doctrine draws a distinction between the intentional killing (of non-combatants) and the killings that are unintended and proportionate to a certain military goal (Walzer, 2015, p. 154).

However, in war there are many different ways to achieve certain military goals, some would mostly endanger non-combatants (i.e. artillery strikes) and some will mostly endanger combatants (i.e. sending in a patrol). In this scenario Walzer argues that the combatants have a duty to accept the risk in order to save the non-combatants. “And if saving civilian lives means risking soldiers’ lives, the risk must be accepted” (Walzer, 2015, p. 156). This shows that according to Walzer, in calculating proportionality, the lives of combatants count for less than that of non-combatants.

In the chapter on McMahan we will see how he argues that an unjust combatant (one who fights in a war without a Just cause) cannot satisfy the criterion of proportionality since a military action can only be proportionate relative to the just cause of war.

2.3.3 Weapons and tactics

Next to the conditions of proportionality and military necessity are the sorts of weapons and techniques one can use stipulated by the Jus in Bello rules. Most of these rules are negative, meaning that they stipulate what one cannot do, what is not prohibited is permitted by default. There are two principles governing the laws of weaponry. The first one is again the principle of discrimination (between combatants and non-combatants): “one cannot use weaponry which cannot be directed only at military targets, because they are either ‘blunt instruments’ or cannot be sufficiently controlled” (Frowe, 2011, p. 112).

The second principle is that one cannot use “weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering” (Frowe, 2011, p. 112). A good example that it is prohibited to use ‘exploding bullets or dum-dum bullets’ (bullets which will explode on impact, causing big internal trauma). Since standard bullets are enough to make a combatant ‘hors de combatant’ the additional trauma caused by dum-dum bullets is conceived of as unnecessary and thus impermissible.

2.4 Prisoners of war

The Geneva convention also provides conditions on how to treat prisoners of war (POW’s). Every combatant which is captured should be treated as a POW in respect to the following rules. It is not permitted to injure or to torture POW’s, or to use them for scientific or medical experiments. When POW’s are captured, the forces of the POW must be informed as soon as possible. These rights come with some obligations however, the POW is obliged to tell their captor their name, rank, date of birth and affiliation. Any further information is not obligatory for the POW to tell. The prisoner can be questioned, however, it is not permitted to threaten the POW to give up information (Walzer, 2005, p. 46).

So far we have seen the Jus in Bello rules and the Jus ad Bellum rules. Now we will look at how Walzer and McMahan reach different conclusions based on these different rules of war. On the base of these Jus in Bello and Jus ad Bellum rules, Walzer concludes that Just and Unjust combatants are morally equal. In Chapter 4 we will see that McMahan uses these rules of war to conclude the exact opposite, namely that Just and Unjust combatants are not morally equal. Therefore, it is good to understand that Walzer and McMahan agree on the definitions of the rules of war as described above. They do however reach different conclusions concerning the status of just and unjust combatants. In the next chapter we will see how Walzer argues, based on these notions of Jus in Bello and Jus ad Bellum, that all combatants are morally equal.

Chapter 3

Walzer: The Moral Equality of Combatants

So far we have seen the different rules concerning war, with this information in mind we can look at how Walzer interprets these rules in order to show how all combatants are equal. The first set of arguments, 'the theoretical arguments', are the arguments put forth by Walzer to show why combatants are morally equal. The second section of this chapter covers the 'normative arguments', instead of trying to prove the principle of the moral equality of combatants, these arguments show why it is morally good to have this principle in place. The last set of arguments will be focused on the responsibilities and culpabilities combatants have.

3.1 Theoretical arguments

Walzer defends the 'orthodox' view of combatants. This view holds that the Jus in Bello rules and the Jus ad Bellum rules are logically independent, meaning that a soldier fighting in an unjust war (a war which doesn't uphold all the Jus ad Bellum rules) can still fight this war justly (by fighting according to the Jus in Bello rules). This is the view which has dominated the thinking about War Ethics for many centuries, going back as far as the work of Hugo Grotius in the 17th century. The main idea behind this view is that it is unfair to state that combatants act wrongly in virtue of the wrongful decision their leaders made to engage in an unjust war. Based on this idea (of unfairness) most war ethicists defend the principle of the moral equality of combatants. This principle holds that combatants do not do anything wrong simply by fighting on the unjust side of the war, and are therefore morally and legally equal to combatants on the just side of the war.

3.1.1 Responsibility

The idea that it is unfair to state that combatants act wrongly in virtue of the wrongful decision of their leaders entails that combatants are not responsible for the war they are fighting: it is the political leaders who are. Combatants should therefore only concern themselves with how they fight (the Jus in Bello rules) and not with the reasons why they fight (the Jus Ad Bellum rules should only be the concern of the political leaders). We conceive of combatants as people who should follow orders of their superiors, and as long as they fight according to the Jus in Bello rules, they do not do anything wrong. Walzer argues that "we draw a line between the war itself, for which soldiers are not responsible, and the conduct of war, for which they are responsible" (Walzer, 2005, p. 39). However, Walzer does admit that it's hard to draw the line concerning generals (for they are also somewhat responsible for the justness of going to war since they are not expected to be as obedient as foot

soldiers) but Walzer argues that “Generals may well straddle the line, but that only suggests we know pretty well where it should be drawn” (Walzer, 2015, p. 39). Exactly because of this we can understand how citizens who explicitly criticized the war in Iraq and Afghanistan, and called Tony Blair and George W. Bush murderers, still expressed their support for the troops actually fighting the war.

3.1.2 Two models of combatants

The basis of this idea of responsibility can be explained, by referring to the reasons why combatants fight in wars. Walzer distinguishes two different models of combatant fitting the different reasons why one would engage in fighting a war. The first one is the gladiator model of combat, meaning that combatants are forced to fight (like the Roman gladiators) by their nation. Like the gladiators it is in the interest of fighters on both sides to fight the war (since otherwise both would be punished by their own state). According to Walzer, combatants fitting this model do no wrong by fighting such a war.

The other model is called the boxing model of combat. In this model, combatants are like boxers who have consented to fight in the war, just like boxers consent to being punched by their opponent. The reason we call this the boxing model is that boxers waive their right not to be punched, but only by their opponent, just like combatants waive their right not to be killed, but also only by enemy combatants (if a civilian would take a knife from his kitchen table and kill a combatant it would count as murder).

Walzer describes his view as follows: “The moral reality of war can be summed up in this way: when soldiers fight freely, choosing one another as enemies and designing their own battles, their war is not a crime; when they fight without freedom, their war is not their crime.” (Walzer, 2015, p. 37). So either way, combatants are morally equal.

Given these two models, Walzer argues that modern war is more like the gladiator-model than the boxing-model. Walzer argues that “war itself isn’t a relation between persons but between political entities and their human instruments. These human instruments are not comrades-in-arms in the old style, members of the fellowship of warriors; they are “poor sods, just like me, trapped in a war they didn’t make. I find in them my moral equals” (Walzer, 2015, p. 36). According to Walzer this does not only mean you can recognize a fellow human being in your enemy, it means more strictly that you recognize a fellow human being in your enemy who is also not a criminal. This is one of the main pillars of Walzer’s theory, namely that we also have to recognize that combatants are not merely the ‘executioners’ of war, but also the victims of it. When one conceives of combatants as victims of war, who are “trapped in a war they didn’t make” (Walzer, 2015, p.36) it is difficult to differentiate between the moral status of just and unjust combatants. Both sides are forced to fight and should be considered as victims of war. When we follow this line of argument, we can see unjust combatants are victims of

the war as well. And it would be unjust to punish the unjust combatant for being forced to fight. According to Walzer, arguing against the moral equality of combatants is therefore unjust in respect to unjust combatants who are the victims of war as well, and should not be punished for being forced into a war they are not responsible for.

3.1.3 Domestic examples

Walzer does not think we can compare killing in war to examples from ordinary life because the killing in war is governed by rules, and the reason war is governed by rules is because it is sometimes necessary to go to war. Think for instance of a country who goes to war in order to defend another country which is wrongfully being invaded. Based on this idea of necessity it is understandable why there ought to be rules concerning the killing done in war, for if it is necessary to go to war sometimes, it is better to have rules governing this activity. However, this idea of necessity does not apply to killing in a domestic setting. According to Walzer “War as an activity (the conduct rather than the initiation of the fighting) has no equivalent in a settled civil society” (Walzer, 2015, p. 127).

The example Walzer uses is that of an armed robbery. Think of a bank robber who walks into a bank and shoots a guard who was reaching for his pistol. The bank robber would be guilty of murder, even if he shoots the guard merely in self-defence. Since he had no right to rob the bank, he also had no right to defend himself against the guard of that bank. We do not judge him like we would judge a soldier who would kill someone in self-defence because the idea of necessity does not apply to criminal behavior, there are no rules governing the killing done in a bank robbery because it is never necessary to rob a bank. Therefore, Walzer argues that this is not comparable to a soldier killing another soldier in a fire-fight because this is done in a rule-based setting. If in fact both were combatants, we would not call the soldier killing the other one a criminal. Since both were shooting at each other, we can argue that both of them tried to kill the other one in self-defence. According to Walzer “so long as they fight in accordance with the rules of war, no condemnation is possible” (Walzer, 2015, p. 128).

The crucial difference between the two examples is the fact that war is governed by rules because it sometimes is necessary. However there are no rules of robbery or murder, and the reason that there are no rules of robbery is because it lacks the idea of necessity, it is never necessary to rob a bank or to behave criminally. Walzer argues that “the moral equality of the battlefield distinguishes combat from domestic violence” (Walzer, 2015, p. 128).

Again, it is important to understand that Walzer conceives of combatants on the basis of their status as victims. That combatants do not choose to fight is most evident when there is conscription. However, even if one signs up voluntarily to fight, there are still powerful forms of incentive and encouragement which would make it inappropriate to argue that the soldiers themselves are

responsible for fighting in war because we must still conceive the unjust combatant as victims who did not choose to fight. It seems unjust to punish the unjust combatants by affecting their moral status, thus Walzer argues that just and unjust combatants are morally equal.

In Chapter 4 we will see how McMahan deviates from this argument. He will use examples from domestic life (the example of the bank robber) to prove his thesis that unjust combatants are not equal to just combatants

3.1.4 Historical example

Instead of domestic examples, Walzer uses examples from wars themselves, the Second World War to be specific, in order to show why all combatants are equal.

One of the most well-known Generals from the Second World War is the German General Erwin Rommel, from many biographers who have written about him we can learn that he was a very chivalrous and honourable General, and while many officers and generals in the German army “surrendered their honour” to Nazism, it was known of Rommel that he concentrated on the soldier’s task of fighting instead of the politics of Nazism. During the times of combat he always maintained the rules of war. Even though he fought a morally unjust war, we can still argue that the way he fought it was honourable and just. The example used by Walzer is that of the Commando Order issued by Hitler on 28 October 1942. This Commando stated that all enemies who were found behind the German line should be killed at once (Walzer, 2005, p. 38). It is obvious this goes against one of the main principles of Jus in Bello, namely that captured enemy soldiers should be granted to POW-status and be taken care of properly (Frowe, 2011, p. 115). General Rommel burned this Commando Order, and did not enforce the orders given to him by Hitler, he did in fact not shoot the prisoners who were captured. Most people will agree that we should praise Rommel’s constraint for burning the Commando Order. However, according to Walzer the fact that we praise him for this behaviour has some implications about the nature of war. Walzer argues that “It would be very odd to praise Rommel for not killing prisoners unless we simultaneously refused to blame him for Hitler’s aggressive war” (Walzer, 2015, p. 38). Consider for instance a domestic case of an invader who breaks into a building and kills everyone but the children. It would be strange to describe the invader’s restraint as admirable. But we do describe the restraint of Rommel as desirable. According to Walzer, this shows an important difference, namely that unlike the invader, a soldier is not a wilful wrongdoer but rather a servant or an obedient citizen. In other words, we can only say Rommel’s restraint was praiseworthy if we blame the war itself on Hitler. For if the war itself was blamed on Rommel, all the killing done in the war by Rommel and his troops would be accounted for as murder, whether it’s aimed at soldiers, POW’s or civilians, because the war fought by the Germans was unjust. So why do we praise Rommel’s constraint

for the burning of the Commando order, instead of blaming him for the killing done by his army? Why is he not like the invader, who committed murder while it was unnecessary? According to Walzer this is because of the logical independence of Jus in Bello and Jus ad Bellum rules. It was Hitler who was responsible for the war itself, and Rommel who was responsible for how the war was fought.

3.2 Arguments for the principle of the moral equality of combatants

So far we have Walzer's theoretical arguments why combatants are morally equal. We will now look at his and others normative arguments on why it is desirable to have the principle of moral equality of combatants in place. The first arguments are normative and show that having the principle of moral equality of combatants will make the suffering which inherent in war less severe. The second argument will focus more on the capability of combatants to judge their war, and the responsibilities they have.

3.2.1 Normative arguments

The first argument to grant moral equality to all combatants is a pragmatic one. If we would deny the fact that unjust combatants can obey the Jus in Bello rules, we would brand them as criminals immediately from the start of the war. By doing so the unjust combatants will have less motivation to act according to the Jus in Bello rules. They don't have to care about not purposely killing civilians, treating POW's rightly or using only legal weapons, since they are already branded a criminal anyway.

However, if we do grant moral equality to combatants, and state that unjust combatants can act according to the Jus in Bello rules, or in other words, don't brand the unjust combatants as criminals, we give the unjust combatants reasons not to ignore the Jus in Bello rules and therefore minimize the suffering in war. They are not criminals from the start, and are therefore more likely not to, for example, kill civilians on purpose, since by doing this they would become criminals. By divorcing the morality of the fact that one fights with how one fights, we give unjust combatants an incentive to minimize the suffering in war.

A second argument to separate Jus in Bello from Jus ad Bellum rules is that this separation can make surrender more likely to happen. Consider the fact that you are an unjust combatant (and therefore fighting in an unjust war). You know when the war ends and the other party wins, or when you are captured during the war, you will be arrested and put on trial for fighting in an unjust war. It seems clear that surrendering does not seem an option anymore, for surrendering means being put in jail, and an unjust combatant would rather have the war drag on than hasten its outcome by surrendering. So if combatants are not morally equal the war might take much longer than necessary for the fact that unjust combatants would rather be fighting on the unjust side than be put in jail. However, if there

are no moral implications for combatants fighting on the unjust side of the war, we remove their incentive to perpetuate the war. This again minimizes the suffering done in the war.

In the chapter 4 we will see how McMahan's reasoning allows him to state the exact opposite, arguing that branding the unjust combatants as criminals would minimize the amount of unjust wars that will be fought. He argues it would take away the incentive for a person to become a combatant for an unjust cause, and therefore minimize the suffering done by war.

3.2.2 Capability and responsibility of combatants

The second set of arguments for granting the morally equal status to combatants are epistemic ones. Soldiers fighting in a war must act under extreme epistemic limitations, meaning that for them it is nearly impossible to know whether or not the war they are fighting is just or not. Most common soldiers do not have enough knowledge on the historical background of the war, or the events that led to the war being fought in the first place. And even if they would have read a lot or had some prior knowledge of their country's relation with the opposing country, they are epistemologically limited to know exactly what the reasons and intentions of their leaders are for engaging in warfare. The soldiers have almost no opportunity to deal with their ignorance (since political news on the frontline is limited and objective information on the war that they are fighting is scarce). And even if they had access to the information needed for them to have a rational evaluation of the war they are fighting, they would still lack the time to examine it, but also perhaps the competence and confidence to form a judgment about their war. It is for these reasons that, in many cases, it is reasonable for combatants to accept the claims of their leaders and obey the order to fight.

However, even if a combatant would have doubts about the justness of their war it is reasonable to assume that they know of their own epistemic limitations, how restricted their perspective and therefore judgment is, and thus why they trust the judgment of their political leaders. It is understandable that combatants would rather go for the judgment of their political leaders, believing that their war is just, rather than follow their own doubts and refuse to obey their orders, for in almost all armies this would be seen as mutiny and punished heavily.

A good example can be found in the beginning of the Second World War. Before the actual invasion of Poland, Nazi-Germany planned a so-called false flag operation in order to manipulate the German people into believing Poland was the aggressor and their war was therefore just. The so-called "Gleiwitz incident" where German (mostly SS) operatives posing as Poles staged an attack on the Gleiwitz radio station and broadcasted an anti-German message in Polish. This was then used by German press to try to manipulate the German public and the international world into thinking Poland was the aggressor (The Avalon project, 2008).

Having this example in mind, can we really blame a soldier of the German army in 1939 for believing what the press and his political leaders tell him? Where it seems reasonable to expect from soldiers to consider evidence and make responsible decisions, we cannot demand too much from soldiers. Not only is evaluating all evidence time consuming and complicate, but also the information available for soldiers is most likely incomplete and can be heavily influenced by their governments. So even if a soldier has doubts about what the media and political authorities tell him, how much confidence will he have in his own judgment? Enough to not follow orders from military leaders, and thus risk being punished heavily? With this example I hope to show how hard it is for a soldier to have a clear judgment about the war he is fighting, because of the epistemic limitations he faces.

We can see how the governments of warring countries use propaganda to manipulate their civilians and soldiers into believing the war they are fighting is just. It seems unfair to blame someone for being manipulate. Unjust combatants should not be blamed for falsely believing their war is just. And if it is unfair to blame someone for having false beliefs, Walzer argues unjust combatants should not be blamed for fighting the war itself, and hence should be granted the same moral status as their counterparts fighting on the just side of war.

So far we have seen the Jus ad Bellum rules, the Jus in Bello rules and how Walzer interprets these rules in order to show why all combatants are morally equal. First, we saw how Walzer argues that it is unfair to state that combatants act wrongly in virtue of the wrongful decision their leaders. He argued it is the leaders who are responsible for the war itself, and the combatants who are merely responsible for the fighting in the war. Next, we saw how Walzer divided combatants according to two models, the gladiator-model and the boxing-model. Walzer argued modern war can best be understood by the gladiator-model, with combatants being forced to fight. This is an important aspect of Walzer's theory, namely that combatants are not only the executioners but also the victims of war. Combatants should not be punished for being forced to fight, therefore unjust combatants do not gain a different moral status than just combatants. Next, we saw how according to Walzer, having this principle of moral equality of combatants in place would reduce the harm done by war. For it would provide motivation for the unjust combatants to uphold the Jus in Bello rules and to surrender without being labelled a criminal and risk being jailed. Finally, we saw how Walzer argues that we cannot demand too much from combatants, for they must act under extreme limitations, and cannot be held responsible or punished for having false beliefs.

In the next Chapter we will see how McMahan deviates from this view, arguing that unjust combatants (fighting on the side of war lacking a just cause) should not be granted the same moral status as just combatants, and thus arguing against the principle of moral equality of combatants.

Chapter 4

McMahan: The Moral Inequality of Combatants

So far we have seen the orthodox view on the moral status of combatants, arguing that all combatants are morally equal. We will now see how McMahan deviates from this view by arguing that unjust combatants (combatants lacking a just cause) cannot satisfy the Jus in Bello rules and are thus not morally equal to just combatants. We will see how McMahan debunks Walzer's division based on the gladiator-model and the boxing-model (section 4.1). Next, we will see how McMahan argues that one cannot satisfy the Jus in Bello rules without having a Just cause, meaning that unjust combatants cannot justifiably fight (section 4.2). He will pay special attention to the Jus in Bello rules of 'liability to be harmed', 'principle of proportionality' and the 'requirement of discrimination'. McMahan will argue that unjust combatants, who lack a just cause, cannot satisfy these requirements and are therefore not morally equal to just combatants. Next, we will look at how McMahan views the culpabilities and responsibilities combatants have, where we will see how he argues that only just combatants can have claim-rights and thus just and unjust combatants cannot be morally equal (section 4.3). Finally, we will also look at the normative arguments as put forth by McMahan, he argues that not having the principle of moral equality of combatants in place would lead to less unjust wars being fought and thus to reduce the damage brought upon by war (section 4.4).

4.1 Two models of combatants

In order to do understand McMahan's theory we must first look at his attack on the consent-based account of combatants. Walzer distinguished two different models of combatants: the gladiator model, with combatants being forced to fight and the boxing model, with combatants voluntarily consenting to fight. The first argument against this distinction is that in many wars, the combatants on opposing sides might not fight for the same reasons, combatants on one side might be consenting to fight while combatants on the other might be forced to fight. The combatants who are forced to fight will therefore not agree to being killed by the 'consenting combatants', meaning that the 'consenting combatants' are not absolved from any wrong-doing if they would kill the 'nonconsenting combatants'. It may be permissible for 'consenting combatants' to kill other 'consenting combatants' but it does not follow that that they may kill 'nonconsenting' combatants.

However, most defences of the moral equality of combatants focus mainly on the consent-based accounts (the boxing model). McMahan also argues against these accounts. McMahan shows that not all combatants are consenting to be killed. We have seen that according to the orthodox view of

combatants, combatants waive their rights to be killed (Walzer, 2015, p. 36). But according to McMahan accepting a risk to be killed is not the same as consenting to be killed (McMahan, 2009, p. 52). Think of a person crossing the road, by doing this he accepts the risk of being hit by a car, however, he does not consent to being killed by a drunk driver; a drunk driver would still wrong him by doing so. McMahan argues that there is a difference between accepting the risk of being killed by enemy combatants and consenting to being killed by enemy combatants (McMahan, 2009, p. 52).

Another argument against the consent-based account is that consenting to being killed does not mean it is permissible to kill that person. Think of a person who has severe and permanent pain and wants to be euthanized, it seems permissible to kill her if and only if she has consented to this. However, we would find it impermissible if she has not consented to it, which seems to make consent the criterion to distinguish between the permissibility or impermissibility of killing that person. McMahan thinks this is a mistake (McMahan, 2009, p. 56). According to him it is not consent alone that can make it permissible to carry out the euthanasia, it is the consent in combination with the fact that the person has permanent and severe pain. The permissibility of killing relies on consent and a lesser-evil justification. The lesser evil in this case would be the fact that the person is relieved of the permanent and severe pain he is suffering from. And in the absence of this lesser-evil justification, killing a person who consented to being killed is still wrong (McMahan, 2009, p. 56).

Following McMahan's argument, we can see that only unjust combatants can be killed permissibly. Even if just combatants would consent to being killed, the unjust combatants would lack a lesser-evil justification to kill them. The deaths of just combatants are not a lesser evil, since killing them will help the unjust combats to win the war and frustrate the just side of the war. Therefore, unjust combatants cannot permissibly kill just combats, while just combatant (who have a lesser-evil justification for killing) can (McMahan, 2009, p. 57). This means that just and unjust combatants are not morally equal.

McMahan's last argument against the consent-based accounts of combatants concerns the fact that it is not only combatants who die in a war. If one should argue for the consent-based account, one must also show how it is permissible for them to inflict collateral damage on non-combatants. We have seen that non-combatants can be harmed only as a foreseeable side-effect of a justified action, the doctrine of double-effect (Walzer, 2015, p. 154). However, if one lacks a justification for their actions (their military goal lacks a just cause) they cannot permissibly attack while causing collateral damage. Every harm brought on non-combatants must be a foreseeable side-effect of a justified action. However, since the unjust combatants lack this justification (they don't have a just cause) they can only engage in fighting in which they would be sure to cause no collateral damage. Due to the damaging nature of war this seems nearly impossible (McMahan, 2009, p. 57).

4.2 Just cause

According to McMahan, the 'just cause' criterion is the most important of the Jus ad Bellum criteria. He argues that without this "several of the other requirements cannot be satisfied even in principle" (McMahan, 2006, p. 708). Think for instance of the 'right intention criterion' that one may only permissibly engage in war if one pursues a just cause (one cannot use one's just cause to fight a war which is in fact fought for different reasons). However, McMahan goes beyond this claim, and argues that without a just cause, combatants cannot possibly uphold the Jus in Bello criteria. We will now look at some of the Jus in Bello criteria and see how McMahan argues that it is only possible to uphold these if one has a just cause. If he succeeds in doing this he thus shows that Jus in Bello and Jus ad Bellum are logically dependent.

4.2.1 *Just cause and liability to be harmed*

According to the traditional just war theory, everyone is initially morally immune to be harmed. This means that if one does nothing to lose one's right to be harmed it is impermissible to be harmed. We call such a person 'innocent' (innocent in war ethics means 'currently harmless' and is not opposed to 'guilty' but to 'currently harming'). One is therefore innocent in war if one does not pose a threat, meaning one does not contribute to the persecution of war (McMahan, 2009, p. 8). According to the orthodox view of war ethics, combatants are posing a threat (they are bearing arms) and non-combatants are innocent. In this sense, being liable to be attacked means one poses a threat to others. As such one therefore loses one's right not to be attacked. So according to the traditional just war theory, one does not have to commit a crime to become liable to be attacked: posing a threat (by for instance bearing arms) is enough to lose one's right not to be harmed. And since combatants on both sides pose a threat to one another, they are therefore both liable to be harmed. So like the unjust combatant, the just combatant loses his right not to be harmed simply by being a combatant and posing a threat to the opposing combatants. So again we can see how according to the traditional just war theory, combatants are morally equal. (Walzer, 2015, p. 145).

McMahan does not agree with this. He argues that if a person is defending against an unjust attack (an attack lacking a just cause), the attacker and the victim are not morally equal. Instead, the attacker loses his right not to be harmed, while the victim remains his right not to be harmed (McMahan, 2009, p. 14). According to McMahan, unjust attackers are liable to be killed and killing them would no longer wrong them (if and only if killing them is necessary and proportionate). Think again of the bank robber who shoots the guard who is reaching for his gun. In this scenario, the bank robber first threatens the guard, who then reaches for his gun in self-defence, which then constitutes a threat to the bank robber. The bank robber's initial threat was unjust, while the guards threat is just. Instead of arguing that the

bank robber can shoot the guard in self-defence, McMahan claims that the bank robber lost his right not to be killed. In contrast, the guard did not lose his right not to be killed, since he is defending himself against an unjust attack. McMahan concludes both are not morally equal. Contra Walzer, McMahan thus thinks that if a victim of moral aggression is not morally equal to their aggressor, unjust combatants are not morally equal to just combatants (McMahan, 2009, p. 15). While unjust combatants lost their right not to be killed, just combatants did nothing to lose their right to be killed and are therefore wronged by being killed. This is based on what one may call 'commonsense morality'. Most of us think it is normal that one cannot justly pursue unjust causes. If what one is trying to achieve is morally wrong, all the methods one uses to try to achieve this goal are wrong as well.

This is in contrast with the view of Walzer. According to his view even combatants who are fighting for unjust goals, and have unjust ends, are still morally permitted to achieve this unjust end (if they uphold the Jus in Bello rules).

4.2.2 Just cause and proportionality

McMahan argues that if one lacks a just cause one cannot have a proportionate attack. Remember how the proportionality criterion was a calculation of the harm that one inflicts which must be proportionate to the good that one aims to bring about. However, McMahan states that the good effects that may weigh against the bad effects are limited to those specified by the just cause, for only those types of good that may permissibly be pursued by means of war can contribute to the justification for war (McMahan, 2005, p. 3). So if one wants to know if an attack on a village is just, one must calculate if the harms done by the attack on this village are in proportion to the goods which are achieved if one takes over the village. However, if one does not have a just cause for the war itself, there can be no goods which can be achieved and the attack will always be impermissible.

Let's say a German commander in the Second World War (fighting on the unjust side of the war) had to decide whether or not to attack a town. The harms brought upon by this attack would be the loss of civilian lives and the damage done to the buildings. But what can be the good brought upon by this attack? If the German attack would succeed, they would take the objective, but this means that the unjust side of the war would be one step further in achieving their unjust goal. Clearly this cannot be weighed as a good in the proportionality calculation since if "the only goods that can contribute to the justification for war are those specified by the just cause, then it seems that only those goods can count in the proportionality calculation for an individual act of war" (McMahan, 2006, p. 709). This means that if one does not have a just cause, one cannot have 'goods' which are produced by acts of war that could be weighed against the bad effects. An unjust combatant can therefore never satisfy

the Jus in Bello requirement of proportionality. And because a combatant can only fight justly if he upholds all the Jus in Bello rules, no act of war done by an unjust combatant can be permissible.

McMahan does admit there are some cases, however small in number, in which unjust combatants may attack just combatants permissibly (McMahan, 2006, p. 710). When a just combatant poses an unjust threat to others, an unjust combatant may permissibly try to avert this threat by military means, since the just combatant makes himself liable to be killed. Think for instance of an unjust combatant who sees a just combatant violating the rules of Jus in Bello. It would be permissible for him to kill the just combatant since saving the lives of innocent people will outweigh the harm done to the just combatant and thus making his action permissible. However, McMahan also argues that most of the actions in war are not like this example; most of the time unjust combatants cannot act according to the Jus in Bello rules (McMahan, 2006, p. 714).

4.2.3 Just cause and the requirement of discrimination

The traditional view on the requirement of discrimination is that one must distinguish between combatants and non-combatants. One may only permissibly intentionally target the former, and not the latter, meaning only military targets may be intentionally attacked. For this reason, the requirement of discrimination is also widely known as the 'requirement of non-combatant immunity'. However, McMahan claims this is only "one interpretation of the requirement of discrimination. which in generic terms is simply the requirement to discriminate between legitimate and illegitimate targets and to make deliberate attacks only on the former" (McMahan, 2005, p. 6). According to McMahan the distinction between legitimate targets and illegitimate targets is not the same as the distinction between combatants and non-combatants. The requirement of discrimination requires that a soldier should only target those who are "morally responsible for an unjust threat or for some other grievance that provides a just cause for war" (McMahan, 2005, p. 6). If we take McMahan's interpretation of the requirement of discrimination, we can see how unjust combatants can almost never satisfy this principle. It is impermissible for them to attack those who are not responsible for an unjust threat, meaning they can never target just combatants. Only those who are responsible for an unjust threat are liable to be killed.

We have also seen that Just combatants do not lose their "right not to be attacked merely by engaging in self- or other-defence against an unjust attack" (McMahan, 2012, p. 676). Therefore, unjust combatants cannot have legitimate targets and can therefore not satisfy the requirement of discrimination. This means that only just combatants can have legitimate targets and satisfy this requirement, thus just and unjust combatants are not morally equal.

4.3 Culpability and responsibility of combatants

We have seen Walzer's argument in support of the moral equality of combatants which showed that, given combatants' epistemic limitations, we cannot reasonably hold them accountable for fighting in unjust wars. However, McMahan does not agree with this, he distinguishes between permissibility and justification, and between a subjective and objective version of both. "If an unjust combatant is epistemically justified in believing that the war in which he fights is just, or if it is epistemically reasonable for him to defer to the judgment of the political authorities in his society, then he is not merely subjectively permitted to fight but is subjectively justified in fighting, even though his war is objectively unjust" (McMahan, 2006 p. 61). The idea that a combatant can be subjectively justified in fighting an objectively unjust war only works in favour of the moral equality of combatants if those who are subjectively justified in fighting have the same moral status as those who are objectively justified in fighting. However, if those who are subjectively justified and those who are objectively justified in fighting do not have the same moral status, the argument of epistemic limitation of unjust combatants will fail. According to McMahan it would be inconsistent to accept that the distinction between the two does not lead to a different moral status. "According to an objective account of justification, a person who acts with subjective justification is objectively unjustified but fully excused" (McMahan, 2006, p. 62). However, McMahan argues that the difference between being objectively justified and objectively excused affects the moral status, the liabilities and the rights of combatants.

Let us look at liabilities first. As we have seen, according to McMahan, one is not liable to be harmed "merely by engaging in necessary and proportionate self or other defence against an objectively unjustified threat for which the threatening person is morally responsible" (McMahan, 2006, p. 62). Objectively Just combatants are therefore not liable to be harmed when engaging against objectively unjust combatants. So even if objectively unjust combatants are subjectively justified in fighting, the threats they pose are objectively unjustified and they voluntarily pose this threat and thus accept the risk that comes with objectively unjustified fighting. This means there is a difference in liability to be harmed (whether one may be permissibly harmed or not) between the just and unjust combatant (the just combatant is not liable to be harmed, the unjust combatant is liable), hence, combatants are not morally equal.

The moral status also consists of the rights one has. A distinction can be made between liberty rights and claim rights. A liberty right is a permission, meaning that if one has a liberty right to do "x" it means it is not wrong for him to do "x". A claim right on the other hand, is not a permission but a right against intervention. This means that if a person has a claim right to do "x", no other person has a liberty right to prevent that person from doing "x". "The claim that unjust combatants are subjectively justified in

fighting against and killing just combatants is at most an assertion of a liberty right” (McMahan, 2006, p. 63). So having an epistemic error (having a wrong belief) can possibly ground a permission to act, however, it cannot ground a right against interference. But on the other hand, just combatants do have a claim right of interference based on their just cause. Think for instance of a combatant who defends innocent citizens against a wrongful attack. Like the guard from our earlier example he has the claim right to defend innocent civilians by means of killing the attacker (or armed robber).

It seems strange that others could permissibly attack the objectively just combatant (or guard) as a means of preventing them from defending the innocent people against an objectively unjust threat. Nevertheless, this is implied by the moral equality of combatants. On this account this is permissible, since just combatants have made themselves liable to be attacked by posing a threat to others. Therefore, if combatants are equal, unjust combatants are permitted to attack just combatants, and thus preventing the just combatant from achieving their just cause (defending civilians) because in these circumstances the unjust combatant is epistemologically justified in believing their action is permissible, and thus making their action permissible (according to the subjective conception of permissibility). However, if unjust combatants can permissibly attack just combatants to prevent them from achieving their just cause, it follows that just combatants cannot have claim rights at all. McMahan thinks this is mistaken because this would imply that there can be no claim rights at all. If person “A” is subjectively permitted to prevent person “B” from doing “X”, this means person “B” cannot have a claim right to do “X” and there could be no claim rights at all. Since it would mean that a person is subjectively permitted to do anything as long as it is possible for him to epistemically justify his believing in the fact that he is permitted to do so. So a subjective permission to prevent a person from doing “X” can be compatible with another person having a claim right to do “X”. However, having a claim right on “X” does exclude others from having an objective permissibility from preventing the ‘claim-right holder’ from doing “X” (McMahan, 2006, p. 62). And the epistemic argument does not offer any ground to suppose that unjust combatants are objectively permitted to attack and kill just combatants. This means that just combatants do have a claim right, and unjust combatants don’t. Therefore, the different types of combatants have different moral rights and are therefore not morally equal to one another.

4.4 Normative arguments

We have seen how Walzer has argued that the moral equality of combatants decreases the actual harms and suffering done by war. Walzer argued that by having this principle in place, unjust combatants are more likely to satisfy the Jus in Bello requirements, surrender would be more likely to

happen. Let's now look at how McMahan thinks not having this principle in place would decrease the harms and suffering done by war.

According to McMahan our societies are in danger of fighting unjust wars. The idea that one does not do anything wrong merely by fighting in an unjust war can be found in almost every civilization in human history. In fact, in many civilizations in the past as well as in the present, fighting for your country is deemed heroic, praiseworthy and honourable, even if the war is unjust. The idea that one does not do anything wrong merely by fighting is intended to have a restraining effect on the conduct of war (as we have seen in Walzer's chapter). In contrast, McMahan argues that "the widespread acceptance of this idea also makes it easier to fight in a war without qualms about whether the war might be unjust" (McMahan, 2006, p. 3). So according to McMahan it is precisely because we accept the moral equality of combatants that we have seen so many unjust wars take place. Because people think of fighting in a war is honourable and heroic and since there is no need to examine whether the war is just, people are more likely to sign up and fight for their country instead of evaluating the justness of their war. Since it does not matter whether the war you will participate in is just (you are not doing anything wrong merely by fighting in the war), it is likely more people would sign up to fight for unjust wars. And as McMahan puts it, "unjust wars can occur only if enough people are willing to fight in them." (McMahan, 2006, p. 6).

McMahan does agree with the idea that it seems too optimistic to say that once people believe participation in unjust wars is wrong, people would refuse to fight in them. However, McMahan thinks it is also naïve to doubt that the widespread acceptance of the moral equality of combatants has not led to governments being able to fight unjust wars. Wars have always been initiated in context of the moral equality of combatants. If this idea were to change this could make a significant difference in the practice of war (McMahan, 2006, p. 6-7). Since most people care about morality, and the behaviour of many people is in many ways restrained by what they believe is right and wrong, getting rid of the moral equality of combatants could leave to a significant change in the amount of wars that is being fought. McMahan thinks this could lead to institutions which would accommodate this change of belief (McMahan, 2006, p. 7). Legal institutions could for instance offer protection for those who conscientiously refuse to fight. This would mean that it would be much easier for people, even active-duty soldiers, to refuse to fight, and therefore restrain governments of the attempt to initiate an unjust war (McMahan, 2006, p. 7).

Chapter 5

Walzer and McMahan

So far we have seen the theories of both philosophers. We will now look at how each philosopher relates to one another in order to examine the question which of the two might have the best case concerning the moral (in)equality of combatants. We will first look at the theoretical arguments of each philosopher, beginning with Walzer's notion of dividing combatants according to two models and McMahan's critique on this notion (section 5.1). I will argue that McMahan's critique has some strong points however lacks consistency, for the arguments he uses are based heavily on consequentialism while his main claim can be deemed as anti-consequentialism. Another issue discussed in section 5.1 is how each philosopher relates to domestic life examples. Concerning this topic, I will argue that Walzer has a stronger position who argues we cannot compare killing done by a bank robber in self-defence to the killing of combatants in war, because war is a rule-governed activity since it is sometimes necessary to go to war. Next, we will look the ideas of both philosophers concerning the responsibilities and culpabilities of combatants (section 5.2). I will argue that there is a flaw in McMahan's logic for the example he uses to show why there can be no claim rights for unjust combatants relies heavily upon the fact that the unjust combatants did nothing wrong by attacking civilians. Finally, we will look at the normative arguments put forth by both philosophers (section 5.3). Walzer and McMahan both claim that their theory would lead to wars being less damaging. And since the limiting and restricting of the damage brought upon by war is one of the main aims of War Ethics, this can be an important issue in judging which theory is best. I will argue that the claims made by both philosophers need evidence in order to show whether they are correct or not, however due to the nature of war this seems to be almost impossible. However, even though both theories seem plausible, McMahan's theory seems less plausible for it relies heavily on the rather unrealistic assumption that people can inform themselves well enough to make a confident judgement about the justness of the war their country fights.

5.1 Theoretical arguments

We have seen how Walzer divides combatants in two models, the boxing-model and the gladiator-model. McMahan debunks this by showing that combatants on both sides of the war might be engaged in war for different reasons. One might be forced to fight while another has signed up voluntarily. Concerning this discussion, I think McMahan has a strong argument against Walzer. When we look at the wars in the past it is evident that not all combatants on the battlefield fought for the same reasons. The conscription of people in national service has been and still is a tradition in many (western)

civilizations. These conscripted soldiers have fought many times against soldiers who fought voluntarily. A recent example is the Vietnam-war. Walzer's assumption that combatants on both sides of the war fight for the same reasons has therefore been proven wrong by looking at historical examples of war.

The other part of McMahan's argument was that even though some combatants consent to be killed (the boxing-model), this does not mean that it is permitted to kill them or that if combatants consent to the risk of being killed, this does not mean they consent to being killed. Again, McMahan seems to have some solid ground against the arguments of Walzer. McMahan argues that by consenting to be killed one must still have a lesser-evil justification in order to permissibly kill that person, and in order to have this lesser-evil-justification one must have a just cause. McMahan's conclusion following this argument is that an unjust combatant cannot permissibly attack a just combatant (as long as the just combatant satisfies the Jus in Bello rules) because without a just cause one cannot have a lesser-evil-justification. However, McMahan's argument only works if one accepts that to permissibly kill someone, one must have a lesser-evil-justification. This idea draws heavily upon one particular ethical theory, namely, consequentialism. The idea here is that in order to see if an action is justified, we must look at the outcome of this particular action. So if by killing someone, the lesser-evil-justification is that 10 innocent people were saved, that particular action is permitted.

However, if one does not believe in consequentialism, McMahan's argument seems not to work at all. If one for instance believes that it is the action itself that holds moral value, and not the outcome of the action, McMahan's argument that an unjust combatant cannot act permissibly because he will lack a lesser-evil-justification has no moral implication for the combatants, since the outcome of their action will not affect the moral status of the combatants.

McMahan's theory also seems to be less consistent than Walzer's. On the one hand, McMahan argues in favour of consequentialism, namely, that in order to justly kill an enemy combatant one must have a lesser-evil-justification. This implies that it is the outcome of the action which justifies the action itself. However, McMahan also argues that the pursuit of an unjust war is wrong in itself (it does not matter if the unjust side would actually bring better conditions to the people, or if the just soldiers are horrible people and killing would increase their happiness). In this sense, McMahan argues that it is the action itself which holds the moral value and not the outcome of the action. This inconsistency must be overcome by McMahan.

So even though McMahan's critique of Walzer's two models of combatants seems correct, his argument that unjust combatants cannot permissibly kill just combatants because they lack a lesser-evil-justification draws heavily upon the idea that it is the outcome of the action that matters.

However, while this relies heavily on the ethical theory of consequentialism. His idea that an Unjust war is unjust no matter the outcome of this war could be deemed as an anti-consequentialist position

Another difference between Walzer and McMahan is that Walzer argues that we cannot use 'everyday-life examples' to think about the killing done in war. On the other hand, McMahan's notion of liability draws heavily upon examples of domestic life. McMahan's notion of liability is based on his example of an armed robbery. He argues that if a person is defending himself against an unjust attack (an attack lacking a just cause), the attacker and the victim are not morally equal. McMahan argues that this example can be used to think about the morality of war as well. Just like the bank robber who lacks a just cause for attacking the guard (robbing a bank is not a just cause), the unjust combatants lack a just cause for attacking just combatants and therefore just and unjust combatants are not morally equal.

Walzer does not agree with this argument, he argues that "War as an activity (the conduct rather than the initiation of the fighting) has no equivalent in a settled civil society" (Walzer, 2015, p. 127). The main argument behind his logic is that there "are rules of war, though there are no rules of robbery (or of rape or murder)" (Walzer, 2015, p.128), and the reason we have these rules of war is because war is sometimes necessary. According to Walzer, the fact that war is a rule-based enterprise sets it apart from criminal activity. It is because of these rules that Walzer argues that "the moral equality of the battlefield distinguishes combat from domestic violence" (Walzer, 2015, p. 128). And it is important that war is in fact a rule-based enterprise since war is sometimes necessary and these rules will restrict the damage and harms brought upon by war itself. It is only when we see war as something which is governed by rules that we can legitimately ask combatants to uphold the rules governing war. So long as combatants on both sides uphold the Jus in Bello rules, they can legitimately kill each other without being branded criminals. However, this cannot be said of a bank robber, since there are no rules concerning bank robberies, because it is never necessary to rob a bank. A bank robber who kills a guard shall always be labelled a criminal, even if he shoots the guard in self-defence. Walzer's main point is that war is sometimes considered to be necessary. States should be allowed to go to war when necessary. And since war is sometimes permissible it should be fought according to some rules. However, we do not think in the same way about bank robberies, they are never necessary and are thus not ruled-governed.

In this particular argument, I think Walzer has the strongest position. If we would abandon the idea that one can only legitimately fight a war if one upholds the rules, there would be no difference in killing civilians or killing combatants. For if there were no rules concerning war, the killing of a combatant or that of a civilian would both count as murder. This would mean that combatants lose their incentive to not intentionally harm any civilians for there would be no difference in killing enemy

combatants or civilians. Therefore, it seems only right that war is rule-governed, and the reason we should have these rules is that war is sometimes necessary. Hence it seems implausible to use the moral status of individuals who are engaging in an activity which is not rule-governed (like an armed robbery) in order to think about the moral status of individuals who are engaging in a rule-governed activity (like war). Therefore, the moral status of individuals in war remains unaffected by the moral status of individuals in a domestic example, and McMahan's argument that just and unjust combatants are not morally equal is not supported by his use of domestic examples.

5.2 Responsibility and culpability of combatants

We have seen how both philosophers have different thoughts on how much responsibility and culpability combatants have. According to Walzer, combatants must act under conditions of extreme epistemic limitation and he therefore argues that fighting on the unjust side of the war does not affect their moral status since this would mean that the combatants would have responsibilities and culpabilities beyond their reach.

McMahan on the other hand, argues that, even if unjust combatants are excused in fighting because of their epistemic limitations, they still lack a right against interference. So while having a wrong belief may ground a permission to act, this epistemic error cannot ground a right against interference. And since just combatants do have a claim right of interference based on their just cause, the just and unjust combatants are not morally equal.

However there seems to be a flaw in McMahan's logic. The example he uses to show why there can be no claim rights for unjust combatants relies heavily upon the fact that the unjust combatants did nothing wrong by attacking civilians. For the claim-right of the just combatants is based on the fact that they can defend civilians without any interference. However, this assumes that the unjust combatants did nothing wrong by attacking the civilians in the first place. If we assume that attacking civilians is wrong (on which both McMahan and Walzer agree), the unjust combatants would be criminals from the start of the example (for they attack civilians which is against the Jus in Bello rules). It follows that this example does show that the just combatants do in fact retain their claim right, and the unjust combatants don't. However, the unjust combatants were acting morally wrong from the outset of this example (since they were targeting civilians). The example used by McMahan does seem to work in his favour, but the example itself is wrong. The unjust combatants were already morally wrong in attacking civilians and the threat they pose to the civilians can therefore not be branded as military activity but as criminal behaviour. The just combatants only seem to have a claim right because the unjust combatants are not upholding the Jus in Bello rules. But if both sides would uphold the Jus in Bello rules there seems to be no claim rights in war whatsoever. For if unjust combatants would only

target military buildings and personnel, there can be no claim right for the just combatants to defend these military buildings or personnel. Therefore, McMahan's example only seems to work if we assume that the unjust combatants were not wrong to begin with.

McMahan's conclusion that if we would follow the arguments of traditional just war theory, it would mean that there can be no claim rights at all seems greatly overstretched. For if we assume that both sides of the war satisfy the Jus in Bello rules, it merely shows that there can be no claim rights in war itself. The rights of just and unjust combatants are therefore the same, and by using this argument, we cannot conclude that just and unjust combatants are morally unequal. McMahan's claims that unjust combatants cannot have claim rights is therefore debunked and McMahan's conclusion that just and unjust combatants are not equal is not supported by his example. So even though there is difference between unjust soldiers who are merely subjectively justified, but objectively unjust, and the just soldiers who are objectively just, McMahan fails to show (with this example) that this would lead to a different moral status between just and unjust combatants.

5.3 Normative arguments

We have seen how both philosophers claim that their theory would result in restricting the harms and damage brought upon by war. Walzer argues that if we won't accept the equality of combatants, unjust combatants would lose their incentive to uphold the Jus in Bello rules or to surrender. McMahan on the other hand claims that if unjust combatants are not morally equal to just combatants this would lead to less wars being fought since people would be less likely to sign up to fight for their country if they suspect their war is unjust.

The impact of these theories on the extent to which wars are harmful can be a very important factor in judging which of the two theories is better since it is one of the chief aims of war ethics to try to limit the damage and harm done by war. Both theories seem to have a positive feature here but both also rely on a hypothetical notion that what they propose would actually be true without having the proper evidence that this is actually the case. It seems plausible for instance that if a combatant knows he will only be labelled a criminal when he does not satisfy the Jus in Bello rules, he would be more likely to uphold these rules, as Walzer argues. However, one can only be sure this is the case if we could find evidence based on the wars that have been fought or are still being fought today. The same can be said of McMahan's theory. Again, it seems plausible that if people knew they would be labelled a criminal if they would sign up to fight for an unjust war, this would mean less people actually signing up, resulting in less unjust wars being fought altogether. However, this assumption is also very hypothetical and needs evidence to prove it. To know which of these two theories would in fact limit the damage brought upon by war we need scientific evidence. We must for instance study whether

having the notion of moral equality of combatants in place would result in more combatants upholding the Jus in Bello rules. However due to the disturbing nature of war it is very hard to research this. War is altogether a dangerous situation in which objective research seems nearly impossible. For it is often too dangerous for researchers to find evidence in war which would lead to an objective conclusion. Not only would it be too dangerous for researchers to find evidence in war, but in order to see which of the two theories would limit the damage brought upon by war the most, we must compare a war which is fought according to McMahan's theory with one that is fought according to Walzer's theory. This seems an impossible task, for most wars would not be fought according to one of the two theories, and even if this would be the case, it would be very hard to determine whether or not the damage brought upon by these wars is limited due to the combatants fighting according to one of the theories or because of other factors.

The claims made by both philosophers need evidence and since both philosophers lack the evidence we can say of neither that they are true. The problem is that the only way to prove one of the two might be true we need hard evidence, and as argued above, this seems an impossible task.

Even though both claims seem plausible, and we need hard evidence to make final judgments concerning their claims, the theory of McMahan seems to be a bit less plausible than Walzer's theory. McMahan seems to ignore the fact that people might not be able to form a correct judgment and would sign up anyway. If one for instance knows that unjust combatants would be labelled criminals, however they wrongly believe the war their country is fighting is just, they would sign up anyway (even though his war would be unjust). We have seen this argument in Walzer's chapter. Many people are misled by their government and do not possess the capabilities and resources to make a proper judgment concerning the justness of their war. So even though people know that fighting on the unjust side of the war will affect their moral status, they might not know they are in fact fighting on the unjust side of the war, and would therefore sign up as soldiers anyway. As we have seen in many wars in the past, people are misled by their government into thinking their war is just even if it is objectively unjust. McMahan's claim that the idea of moral inequality of combatants would lead to less people signing up to fight is therefore too optimistic and debunked by examples of wars that have been fought in the past. Think for instance of Second World War where the German government misled the German people into thinking Poland was the aggressor. Even if the German people would have believed that fighting on the unjust side would affect your moral status, they would have still signed up wrongly believing they are on the just side. McMahan's claims seem therefore less likely to limit the unjust wars being fought than he claims they would.

One of the positive features of McMahan is his proposal to have institutions within societies which would protect people who would conscientiously refuse to fight. Again, we cannot know if this would result in less unjust wars being fought. However, it is easy to see that this would result in less people being dragged into wars in which they are not willing to fight. Having institutions which would protect people from their governments is a praiseworthy aspect of McMahan's theory, but it does not affect the moral status of individuals who are fighting on any side of the war. As such it could easily fit in Walzer's theory as well and does not in any way confirm or deny whether McMahan's or Walzer's theory is true.

Chapter 6

Conclusion

In this Thesis I have analysed the different rules concerning war. First, I've described the Jus ad Bellum rules, the rules governing the resort to go to war. I have discussed each of the individual rules (spending more time on those which were important for this thesis). Next, I've described the Jus in Bello rules (the rules governing the war itself). It was important for me to start this thesis with the definitions of these rules because my main question, are unjust and just combatants morally equal, depends on whether or not the Jus ad Bellum and in Bello rules are logically dependent. As we have seen, Walzer who defends Traditional Just War Theory, argues that just and unjust combatants are morally equal and thus that the Jus ad Bellum and Jus in Bello rules are independent. We have also seen how McMahan argues the exact opposite by showing that the Jus in Bello rules are dependent of the Jus ad Bellum rules (especially the "Just Cause" criterion).

In the comparison between McMahan and Walzer we saw how McMahan debunked Walzer's division of combatants in the gladiator-model and the boxing-model. McMahan showed that even if this division can be made, it is impossible to claim that soldiers on both sides of the war are fighting for the same reason. McMahan however goes beyond this claim and tries to show that by consenting to be killed one must still have a lesser-evil justification in order to permissibly kill that person, and in order to have this lesser-evil-justification one must have a just cause, and just and unjust combatants are therefore not morally equal. I have shown that McMahan's argument relies heavily upon the ethical theory of consequentialism, and without further argumentation why we should apply consequential thinking in war ethics his argument is not uncontroversial in order to show that just and unjust combatants are morally unequal. McMahan's theory also seems to be less consistent than Walzer's. On the one hand, McMahan argues in favour of consequentialism, namely, that in order to justly kill an enemy combatant one must have a lesser-evil-justification. On the other hand, his idea that an Unjust war is unjust no matter the outcome of this war could be deemed as an anti-consequentialist position.

Next, we saw how McMahan and Walzer disagree on the fact that one can use 'domestic examples' in order to think about moral status of individuals who are engaging in war. I have tried to show that Walzer's theory seems to be stronger in this debate. It is because we have rules of war that we cannot compare this to domestic examples where no rules are applied. And the reason we have these rules of war is because war is sometimes necessary. And we do not have rules of 'bankrobbery', since robbing a bank is never necessary. In this aspect as well Walzer seems to have a more convincing theory.

I have also highlighted the different viewpoints of both philosophers concerning the culpabilities and responsibilities of combatants. McMahan does not argue against Walzer's notion that combatants lack the resources and often culpabilities to make a confident judgment about their war, McMahan does however argue that this leads to just and unjust combatants having different rights and therefore a different moral status. According to McMahan, it is only just combatants who can have claim rights. However, I have shown that there is a flaw in McMahan's reasoning since the example is based on unjust combatants not upholding Jus in Bello rules. If the unjust combatants in his example would in fact uphold the Jus in Bello rules there can be no claim rights whatsoever in war (not for the unjust combatants, but also not for the just combatants). The example he uses therefore works in his favour, but the example itself is not flawless and does not show that just and unjust combatants have different rights.

Finally, I have shown that both philosophers claim that their theory would lead to fewer wars being fought or the wars being fought being less damaging. I have argued that the claims made by both need evidence before we can make our judgments about them. But due to the nature of war, it seems a nearly impossible task to have proper research. I have also argued that even though we need evidence to see if either of both claims is true, McMahan's seems less plausible for it relies heavily on the rather unrealistic assumption that people can inform themselves well enough to make a confident judgement about the justness of the war their country fights. So even though we need hard evidence in order to have a final judgment on which of the two philosopher's claims are true, Walzer's claims seem to be more plausible.

In conclusion, it seems like Walzer's theory is more convincing and has less flaws than McMahan's. Both the theoretical and normative arguments of Walzer are stronger and even though McMahan is able to debunk some of his arguments, McMahan's argumentation is often inconsistent and not without any flaws in logic. So even though McMahan does introduce some influential and important new ideas in a field which is heavily dominated by the orthodox view of combatants that Walzer defends, he has not fully succeeded in doing away with the principle that just and unjust combatants are morally equal.

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