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**The Ethics of War: A New Individualist Rights-Based Account
of Just Cause and Legitimate Authority**

Emily Lois Pollard

Abstract

My thesis focuses upon the *ad bellum* criteria of just cause and, to a lesser extent, legitimate authority. I begin by developing an account of the individual right to self-defence, grounded upon the individual right to lead a flourishing life, drawing upon Jeff McMahan's and Judith Jarvis Thomson's rights-based accounts of defence, and developing a dual account of liability to attack.

I then outline a broadly individualist account of just cause, based upon this account of the individual right to defence. I explain what kinds of just causes for war would exist, based upon the delegation of individual defensive rights to a collective entity. Following this, I develop an asymmetrical account of the rights of combatants, based upon the dual account of liability. I argue that most unjust combatants are weakly liable, and I propose a general presumption of weak liability for both just and unjust combatants. I suggest that unjust combatants may therefore possess at least some rights of individual defence, but that just combatants have additional war rights resulting from taking part in a wider act of defence.

Finally, I expand upon my argument concerning the delegation of individual defensive rights, by explaining which types of collective entity may receive delegated defensive rights and how such rights are delegated, and I also argue that collective entities which have been delegated individual defensive rights are therefore legitimate authorities, based upon a definition of legitimate authority as *moral* authority.

Overall, my thesis aims to develop an individualist account of just cause, grounded upon the delegation of individual defensive rights to a collective entity, and to use my account to develop an asymmetric account of combatants' rights and a rights-based account of legitimate authority.

**The Ethics of War: A New Individualist Rights-
Based Account of Just Cause and Legitimate
Authority**

Emily Lois Pollard

**PhD Thesis
Department of Philosophy
Durham University
2017**

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Statement of Copyright

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Introduction

The just war tradition has developed over a considerable amount of time as a response to the terrifying prospect of unlimited war, as an attempt to place some limits upon the nature and scope of morally permissible or ‘just’ wars, by arguing that only a war which fulfils certain criteria can be counted as a ‘just’ war¹.

Such limits are necessary to forestall the danger that a theory of war might drift into accepting realism, the theory which argues that there can be no moral boundaries upon war, indeed that there is no such thing as a just or unjust war, that ‘war lies beyond (or beneath) moral judgement’ (Walzer, 1977: 3) because it is a sphere of action wholly different, indeed separate, from ordinary actions and ordinary life.

Indeed, realism claims, in Michael Walzer’s words, that war is ‘a world apart, where life itself is at stake...where self-interest and necessity prevail...and morality and law have no place’ (1977: 3), in that moral rules do not apply within that sphere, but rather ‘every man’s being and well-being is the rule of his actions’ (Hobbes, 1994: 104). This, realists claim, is not a moral stance, simply a statement of fact, of how things are. Thomas Hobbes sums up this argument with the phrase ‘*inter arma silent leges*’ (1994: 104), meaning ‘in times of war the law is silent’.

However, realism about war is not a view that most people would, for obvious practical reasons, wish to become widespread, however accurate a view of reality it might claim to represent, because the very dangers of war, the possibilities of large-scale loss of life, which make it so difficult to limit or regulate, are precisely what make it so important to try. Without such limitation, the dangers, the potential loss of life, would only increase

¹ By ‘war’, I mean an organized military campaign, aimed at achieving certain goals. I would, however, accept quite a broad definition of a ‘military campaign’, encompassing guerrilla tactics and acts of sabotage against an enemy army (if used in conjunction with more conventional military tactics on other fronts); though I would *not* suggest, for reasons that will become clear, that it might encompass terrorist acts.

exponentially, especially if the realist assertion that ‘anything goes’, that ‘we can neither praise nor blame’ someone’s actions in wartime (Walzer, 1977: 3), is accepted².

Pacifism has been espoused instead by some philosophers, such as Cheyney Ryan, who argues in favour of pacifism as the ‘*skeptical* position’ that ‘the proponent of killing cannot produce a single compelling argument for why killing another person is permissible’ (1983: 509), or Martin Benjamin, who in the course of his espousal of ‘pragmatic’ pacifism argues that ‘nations – especially the heavily industrialized superpowers – should abandon, as unstated or public policy, conventional military means of providing security to their citizens’ (1973: 197). However, most agree that total pacifism may not always be an option in a world where the need for defence is so often a reality. Therefore, just war theory has over the past two thousand years evolved to fill the gap, to provide the moral limitations upon war which at least attempt to prevent or mitigate the potentially horrific consequences of war. Just war theory would therefore seem to be the best possible alternative.

However, over this time certain established views of just war theory have gradually emerged, and I believe that the time is ripe for an analysis and redefinition of certain aspects of these views.

The traditional view of the scope and purpose of just war theory runs as follows. As Walzer puts it, a war is ‘always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt’ (1977: 21).

The first of these ‘judgements’ is the judgement as to whether the decision to go to war is a just or a justifiable one, and this is decided according to how far the war in question would correspond with a set of criteria ‘governing the decision to go to war’ (Bellamy, 2006: 121), known as *jus ad bellum* rules.

Similarly, the second ‘judgement’ of a war is made according to a set of moral conditions ‘governing its conduct’ (Bellamy, 2006: 121), known as *jus*

² Hobbes did also argue that people would naturally act ‘honourably’ in wartime, meaning that they would, or should, ‘sate not the cruelty of their present passions’ (Hobbes, 1994: 104) – but he did not present this as a moral rule, but rather as a ‘law of nature’ (1994: 104), meaning that such ‘cruelty’ would be impossible for any belligerent who does not have an unnatural ‘disposition of the mind to war’ (1994: 104). This to the modern mind (bearing in mind the ‘cruelties’ committed by many seemingly ordinary people during the wars of the twentieth and twenty-first centuries) seems rather optimistic.

in bello. Even more recently, a third kind of ‘judgement’ has been developed, namely, a war may be judged as a consequence of ‘the ethics of the postconflict environment’ (Patterson, 2012: 5), according to a third set of criteria, *jus post bellum*. A war is thus considered just or unjust depending upon whether or not it fulfils all of the *ad bellum*, *in bello* and *post bellum* criteria.

The content of the *jus ad bellum* and *jus in bello* criteria, since they are the older sets of criteria, is more firmly established than the newer *jus post bellum*.

Jus ad bellum is most usually thought to be determined by seven criteria. These have developed in order to determine when and if it is just, or even morally permissible, for one state to declare war upon another.

- 1) The just cause criterion, which states that there must be a ‘just cause’ for war, a ‘goal, or set of goals’, in Jeff McMahan and Robert McKim’s words, ‘that provides the reason for going to war and makes it permissible, if other conditions are satisfied, to resort to war’ (1993: 502).
- 2) The right intention criterion, which argues that those who declare war must do so at least primarily because of that just cause, the just cause must be their primary motivation. As Helen Frowe put it, this criterion ‘specifies that one cannot use a just cause as an excuse to wage a war’ (2011: 60).
- 3) The legitimate authority criterion, which states that only a ‘legitimate’ authority may declare or wage a war.
- 4) The reasonable chance of success criterion, which states that if the war is to be justified, the belligerent power must foresee that it has at least a ‘reasonable’ prospect of actually winning that war.
- 5) The proportionality criterion, which argues that declaring war can only be justified if, in Fisher’s words, ‘one reasonably expects that the harm caused by the war will not outweigh the good to be achieved’ (2012: 73).

- 6) The last resort criterion, which states that war should only be declared when ‘all other means of averting a threat or seeking redress have been exhausted’ (Frowe, 2011: 62).
- 7) The ‘proper declaration’ (Bellamy, 2006: 124) criterion states that the declaration of war must be made publicly, in order to ensure that all relevant parties are aware that hostilities have commenced.

The *jus in bello* criteria determine the methods by which it would be moral or justifiable for a belligerent state (and its armed forces) to wage war. They number only two; but these two are weighty criteria, regulating most aspects of permissible conduct towards the enemy during conflict.

- 1) The discrimination rule, which requires that military action ‘must be directed solely against the armed forces of the enemy’ (Norman, 1995: 119) and that civilians, or ‘non-combatants’, are not permissible targets of attack.
- 2) The *in bello* proportionality rule, which requires the use of ‘proportionality in judging the means of war’ (O’Brien, 1981: 39) – in short, only those means of fighting which can be reasonably expected to produce more good (in terms of hastening victory and the fulfilment of the just cause) than harm are permitted.

Finally, *jus post bellum* is a set of criteria which determine how a victorious belligerent may justly act at the ending of a conflict and beyond. Since I will not be discussing these criteria in my thesis, there is little need for a full definition of them here; but at the bare minimum, most definitions of *jus post bellum* agree that there must be limits on the post-conflict actions of the victor, prohibiting them from taking malicious or vindictive actions which would negate the just cause and any positive consequences of fulfilling it.

In my thesis, I will be focusing upon the *ad bellum* criterion of just cause and, to a lesser extent, upon the criterion of legitimate authority. I will begin by developing my own account of the individual right to self-defence,

grounding it upon the individual right to lead a flourishing life, drawing upon W.N. Hohfeld, David Rodin and Judith Jarvis Thomson's rights-based accounts of defence.

I will argue that the right to a flourishing life is a cluster-right, meaning that it is composed of a bundle of basic rights to the various aspects of a flourishing life such as security, liberty, bodily integrity and continued physical existence. I will further argue that the scope of this right is bounded by a dual account of liability to attack. I will suggest that attackers can be liable in a stronger sense and a weaker sense.

Weak liability will be a causal account, drawing upon such accounts as Thomson's, and I will argue that those who are weakly liable may retain some limited form of defensive right. Strong liability, on the other hand, will be based upon moral responsibility for an act of violence, drawing upon McMahan's moral responsibility account of liability, and I will argue that those who are strongly liable to attack lose all defensive rights.

I will next proceed to outline a broadly reductive individualist account of just cause, based upon this account of the individual right to defence. I will begin by examining the arguments for both collectivist and individualist accounts of defence³, and concluding that individualism is more plausible.

I will then argue that the individual right to defence can ground a form of collective defensive right, in that individual defensive rights can be delegated to a collective entity, such as a state, resulting in a collective right to exercise these individual defensive rights; which has the state or other collective entity as its subject, but remains individualist in its object, end and scope. For the sake of simplicity in this portion of my argument, I will leave the question of

³ By 'collectivism' I am referring to the view that rights to defence, life, etc. may be directly possessed by certain distinct collective entities like states or corporations; and by 'individualism' or 'reductive individualism' I am referring to the view that such rights are primarily individual – that a collective may not possess a right to defend *itself*, or a right to its *own* continued existence. I should point out that I will be discussing collectivist and individualist approaches to rights theory, and defensive rights specifically, rather than any other understandings of the terms, such as collectivist and individualist approaches to international law (under which collectivist approaches are those which provide a state-centred focus to international law, seeing it 'as a series of agreed obligations between a plurality of fundamentally independent polities scattered around our globe' (Morss, 2013:8), and individualist approaches are those which argue international law should be concerned with regulating and providing protection to individuals, moving the focus 'away from abstract constructs such as the state and toward the solid ground of individual needs and individual liabilities' (Morss, 2013:9)).

what types of collective entity, besides the state, may be the recipients of delegated defensive rights until a later chapter. I will go on to explain what kinds of just causes for war would exist, based upon this delegated defensive right.

Following this, I will develop an account of the rights and liabilities of combatants, focusing on the issue of whether or not just and unjust combatants have equal or symmetrical war rights. I will examine the arguments in favour of absolute equality or symmetry between just and unjust combatants by such theorists as Yitzhak Benbaji, as well as arguments by such theorists as McMahan, CAJ Coady and David Rodin that, on the contrary, only unjust combatants are liable to attack, meaning that unjust combatants not only lack the right to attack their enemies, but may not justifiably defend their own lives. I will conclude that both have interesting elements, but neither is fully convincing.

I will then develop an asymmetrical account of the rights of combatants, based upon the dual account of liability I mentioned earlier. I will argue for a general presumption of symmetrical weak liability, meaning that we can assume, in the absence of proof to the contrary, that unjust combatants do possess at least some rights of individual defence, but I will suggest that this does not result in symmetrical war rights, because just combatants have additional war rights resulting from their part in a wider act of defence – in short, the right to wage the war they are contributing to, and all the war rights or permissions that derive from this right. Unjust combatants must (unless proven otherwise) be considered justified in acting to preserve their own lives in battle, but only just combatants have the further right to perform aggressive military actions, because these actions are part of their larger act of defence.

Finally, I will expand upon my earlier argument that individual defensive rights may be delegated to a collective entity, by explaining which types of collective entity may receive such delegated defensive rights – namely, what sorts of collective entities count as legitimate authorities.

I will begin by defining the legitimate authority criterion in terms of *moral* authority rather than political or legal authority. I will examine and reject the more usual definition of legitimate authority as state or political authority, by criticising Grotius' and Rousseau's arguments for this point as well as David

Estlund's normative consent theory. I will then consider and reject Cecile Fabre's alternative cosmopolitan definition of legitimate authority as moral authority, concluding that she does not provide a plausible definition of the moral authority to wage war.

Following this, I will compile a list of criteria that may determine which collective entities may be delegated individual lethal defensive rights, and thereby attain the moral authority to wage war in defence of the individuals in question. Drawing upon the arguments of Peter French and Margaret Gilbert, I will identify four essential criteria: the collective entity must a) be a genuinely collective subject of intention and action; b) be of sufficient size and stability to wage a military campaign; c) contain sufficient organisational structure and decision-making procedures to qualify as a conglomerate under French's definition; and d) it (or its leaders) must hold the intention of actually and fully exercising the defensive rights that are delegated to that collective. I will argue that states which fulfil these four criteria may be delegated defensive rights by their own citizens, but in order for non-state collective entities to be permissibly delegated defensive rights (or for states to be delegated the defensive rights of those who are not their citizens, for instance in an interventionist war) they must fulfil the two further conditions of a) representative legitimacy and b) effectiveness, in addition to the four essential criteria. I will draw upon the arguments of Christopher Finlay and Michael Gross to define these two further conditions.

Finally, I will explain how individual defensive rights are delegated to collective entities. I will argue that individuals delegate their defensive rights to their own states through tacit consent; but I will develop an account of tacit consent which is slightly different from the traditional Lockean definition. I will define tacit consent as the conscious or unconscious *acceptance* of the state's defensive role and the benefits of being defended by the state. I suggest that an individual may withdraw her consent at any time, and that, subject to certain conditions, individuals may also delegate their defensive right to another state or non-state collective entity, but only through actual consent; for instance, by requesting the help of that collective entity to defend their lives.

Overall, then, my thesis aims to develop an individualist account of just cause for war, grounded upon a collective entity's right to exercise the

individual defensive rights that have been delegated to it, and to use my account of defensive rights to develop an asymmetric account of the rights of combatants and an account of moral authority based primarily upon the active or tacit act of consent that grounds the delegation of individual defensive rights to a collective entity. In this way, I hope to provide a plausible reworking of this area of just war theory.

Chapter One: A Rights-Based Account of Individual Self-Defence

Introduction

One of the most readily accepted conditions for just war is that of just cause. In order for a war to be justified, it seems intuitively obvious that there must be a reason, or ‘cause’, for the waging of that war, and it must be a reason that is sufficient to justify taking such drastic action as war in order to achieve it. When one considers the nature of war and the ethical and humanitarian crises that war is bound to create, it is clear that such a terrible act cannot be justified for an arbitrary or insufficient cause. The cause of a war must be so important that even war, if it is necessary in order to achieve that cause, is acceptable. But while recognising the *need* for a just cause is simple enough, determining what exactly a just cause for war is, and *why* a particular cause is just, is far more complicated.

Many just war theorists, as long ago as Thomas Aquinas and Hugo Grotius, and as recently as Jeff McMahan, Thomas Hurka and David Rodin, have considered how defence, or indeed any hypothesized just cause, can be grounded as a just cause for war. McMahan, for instance, claims that ‘there can be various just causes for war other than defense against aggression’ (2005:1). He writes in 2005 that ‘the just causes for war are limited to *the prevention or correction of wrongs that are serious enough to make the perpetrators liable to be killed or maimed.*’ (2005:11), but has more recently come to think that a person can be liable to be killed to prevent him from committing a large number of smaller wrongs, and hence that the prevention of a large number of smaller wrongs could also be a just cause for war⁴.

Many other just war theorists have offered a list of possible just causes for war. For example, Alex Bellamy asserts that just cause is ‘usually limited to

⁴ I am indebted to Jeff McMahan for this point (personal communication, 03/10/15).

self-defence, defence of others, restoration of peace, defence of rights and the punishment of wrongdoers' (2006: 122). Other theorists agree with the suggestion that one or more of these causes are just, while disagreeing with others.

Brian Orend, for instance, argues that 'the only just cause, for resorting to war, is in response to aggression' (2006: 43), which entitles peoples or countries 'to defend themselves with force if they are victimized by an armed attack' and to 'defend other countries should *they* be attacked' (2006: 32). Richard Norman agrees, writing that 'The wrong which war should attempt to right is the crime of aggression, and the only justification for going to war is therefore as *defence against aggression*' (1995: 119-20). AJ Coates writes that modern just war thinking tends 'simply to equate the just war with a war of self-defence and the unjust war with a war of aggression' (1997: 156).

James Turner Johnson, on the other hand, defines 'classically' just cause as 'one or more of three conditions: defense against an attack, recovery of something wrongly taken, or punishment of evil' (1991: 21), and added that the latter two are not absent from contemporary just war theory as it might seem; but rather 'they have been subsumed within a gradually broadened concept of defense that allows retaliation for an attack launched and completed (punishment of evil) and defines wrongful occupation of territory as a state of "continuing" armed attack' (Johnson, 1991: 22).

Finally, Ronald Santoni writes that a just cause is the aim to 'protect and defend innocent life' (1992: 104) – which would seem to include what Orend refers to as 'self-defence from aggression' and 'other-defence from aggression' (2006: 32) but, unlike Orend, would also include Bellamy's category of 'restoration of peace' (2006: 122) – in other words, it would include the possibility of interventionist wars to improve the situation in another country in circumstances of humanitarian crisis.

Amongst all of these different claims, the most common area of agreement is the consensus that defence is a just cause for war. Unlike some pacifist theorists such as Cheyney Ryan, I agree that defence is a just cause for war. However, unlike McMahan, I intend to argue that defence (albeit in more than one guise) is the only just cause for war.

However, I first need to show why defence is a just cause for war. In my dissertation, I intend to argue that the existence of a just cause for war is based upon a right to defence. In order to do this, it is first necessary to discuss the possible definitions and derivations of a right to defence, and identify those rights upon which a right to defence may be grounded. Therefore, in this chapter, I will establish the existence of an individual right to defence, and then move on in the next chapter to show how just cause can be based upon this individual right, using a broadly reductive individualist strategy.

Collectivist or ‘state-based accounts’ (Frowe, 2015: 173) of just cause argue that states can directly possess defensive rights, and many justify this claim by means of an analogy with individual defensive rights. For instance, Grotius uses this sort of analogy, moving from an individual right to self-defence to a national right of defence. He writes that ‘What has been said by us up to this point, concerning the right to defend oneself and one's possessions may be made applicable also to public war, if the difference in conditions be taken into account’ (Grotius, 1925: 184) (though as Rodin⁵ notes, he is ‘at times sceptical’ about such analogies (Rodin, 2002: 107). Collectivists would therefore argue that a just cause for war, such as the defence of a state from aggression, is based upon the right of that state to defend *itself*⁶.

However, reductive individualists like McMahan (described by Rodin (2014: 79) as reductive individualism’s ‘greatest contemporary advocate’) and Helen Frowe, ‘reject’ as Frowe puts it, ‘a collectivist approach to the morality of war in favour of an individualist view, according to which individuals (rather than

⁵ Rodin himself specifically argues against this analogy, and also against a reductive individualist right of defence. He proposes instead that ‘military action against an aggressive state may be justified as a form of law enforcement rather than self-defence’ (Rodin: 2002, 163). I will consider his criticisms in a later chapter.

⁶ I should note that a collectivist view need not take the view that a collective entity’s rights cannot be grounded upon individual rights; collectivists such as Walzer, for instance, argue that collective rights to life and liberty are grounded upon individual rights, in that these collective rights are drawn, by a long ‘process of association and mutuality’, from individual rights, to become ‘their collective form’ (1977: 54). What distinguishes collectivists from reductive individualists is the collectivist argument that collective entities (most often states), like individuals, can directly hold rights such as rights of defence or rights to life; that those rights, howsoever derived, are collective in nature, with collective subjects, objects, ends etc., and that most collectivists define the rights (of defence, or of life, liberty, territorial integrity, etc.) of a *collective*, rather than an individual, as the primary, and in some cases (though not all) the sole justification for a defensive war. I will explain this argument more clearly in the second chapter.

states) are the proper focus of moral guidance and evaluation' (Frowe, 2015: 173).

They argue that 'the morality of war is reducible to the morality of ordinary life' (Frowe, 2015: 173), and thus claim that just cause for war can be based upon the individual defensive right of each member of a particular group (usually a nation or state). The state itself would not have a right to go to war to defend its *own* continued existence, but the individual rights of defence possessed by each member of the endangered state would ground their collective defence as a just cause for war (assuming of course that individual lives were in danger rather than just the existence of their state). Rodin describes this approach as the attempt to 'show that national self-defence is the coordinated exercise of individual rights of defence' (Rodin: 2014, 74).

My own rights-based definition of just cause can best be described as a variant of reductive individualism. I do not intend to ground just cause on a *national* right to defence, as Grotius and other collectivists do. I will attempt to ground it on the *individual right* itself, but instead of defining national defence as the 'coordinated exercise of individual rights of defence' (Rodin, 2014: 74), I will argue that these individual rights could be delegated to a group or collective of those individuals (probably, but not necessarily, a nation or state), producing a 'collective' right of defence which is not possessed by an abstract entity like a nation, but by all of the individuals comprising that collective together. I will explain this position more clearly in Chapter Two.

So, later in this work, I will explain how individual rights, possessed by each member of a group or nation, can ground defence as a just cause for war. First, however, I must attempt to explain what I take such an individual right to be, and why I believe it is the best grounding for just cause.

To this end, in this chapter I will first explain the various ways in which other theorists have structured an individual right to defence, in order to place my definition within the theory as a whole. Then I will explain my definition of an individual right, and show how it differs from the other definitions that I have outlined.

1: Possible Rights-Based Justifications of Individual Defence

To begin with, I shall explore how an individual right to defence such as the one I propose might be structured. If a person (call her Susan) were the victim of an unprovoked attack, then I would want to say that she has a right to defend herself from that attack.

Before we go on to determine precisely what she has a right to defend (what Rodin calls ‘the end of the right’ (2002: 99), or how this individual right maybe extended to ground a just cause for war, we must first decide such things as whether this right is a claim right or a liberty right, when it is permissible to exercise this right, whether it is a basic right or grounded upon other rights and if so, what rights they might be. In this section, I will discuss some ways in which an individual right might be structured, before moving on to explain what sort of defensive right I would support.

Judith Jarvis Thomson, for example, argues in favour of a right to ‘preserve one’s life against an attack on it’ which is ‘traditionally thought to be a natural right, that is, a right a human being has simply by virtue of being a human being’ (Thomson, 1986: 44). She derives this concept of a ‘natural right’ from H.L.A. Hart’s and Joel Feinberg’s definitions of ‘natural rights’ and ‘human rights’ respectively.

For instance, Hart defines a ‘*natural* right’ as one which ‘all men have...*qua* men’ and which ‘is not created or conferred by men’s voluntary action’ (1955: 175), and Feinberg defines ‘human rights’ as ‘generically moral rights of a fundamentally important kind held equally by all human beings’ (1973: 85) (‘moral rights’ being previously defined by Feinberg as ‘rights that are held to exist prior to, or independently of, any legal or institutional rules’ (1973: 84)). Thomson also claims we have a ‘right to not be killed’ which may or may not also be a natural right (but even if it is, she suggests that it does not follow that it is inalienable).

Since in this way she is suggesting both that Susan has a right to preserve her life ‘against an attack on it’ and that the attacker has a right ‘to not be killed’ (Thomson, 1986: 44), she must explain how and when a victim of an

attack such as Susan is permitted to exercise her defensive right, given that it conflicts with a right of her attacker's. Thus, she considers four possible reasons why it may be permissible for Susan to exercise her natural right to defend her life when doing so necessarily means violating her attacker's right to not be killed.

The first is the suggestion that the attacker's right not to be killed is temporarily non-operative whilst he is in the act of attacking Susan, though he possesses that right before the attack and after he has ceased (for instance, if some recent injury meant he was suddenly unable to continue attacking). The second is the possibility that the attacker's right not to be killed is '(at all times) less stringent than any innocent person's is' (Thomson, 1986: 45), so that Susan may kill her attacker because his right not to be killed is 'at all times' less stringent than her right to preserve her life.

The next states that the attacker's right to not be killed was, before his attack on Susan, 'as stringent as any innocent person's is' (Thomson, 1986: 46), but is at the time of the attack 'less stringent' (Thomson, 1986: 46) than Susan's right to preserve her life against the attack. The last possibility is that the attacker's right to not be killed is always equally stringent, but that Susan, as the victim of his attack, has a *more* stringent right to 'kill a person who is currently giving every reason to believe that he will kill [the] Victim unless [the] Victim kills him' (Thomson, 1986: 46).

Thomson admits that these possibilities have their flaws. She immediately dismisses the second, pointing to our intuition that the attacker's right not to be killed returns to its previous level of stringency if his attack has been somehow (non-fatally) prevented. Then she points to the fact that the first and third possibilities 'are marvellously *ad hoc*' (Thomson, 1986: 46) in that there seems to be no reason to accept either the attacker's temporary loss of his right, or the change in the stringency of that right 'other than the fact that if we do, we seem to have in hand an explanation of why [the] Victim may kill [the] Aggressor'.

Similarly, she indicates that the victim's right in the last possibility seems 'carefully tailored to its purpose' (Thomson, 1986: 47), and it seems hard to think of a reason for accepting this right other than 'the fact that it is permissible' for the victim to kill someone if she has a reasonable belief that

he will otherwise kill her. However, her suggestion that the right to self-defence is a natural right, which comes into play as and when the actions of an 'Aggressor' (Thomson, 1986: 45) place him in the position that his 'right to not be killed' (Thomson, 1986: 44) is either forfeited somehow or rendered less stringent than the victim's defensive rights, is accepted by various other ethicists.

For instance, David Rodin defends an account of individual or 'personal' (2002: 103) rights to self-defence, based on a Hohfeldian definition of a right. In his classic article, W. N. Hohfeld describes rights and duties as sets of normative relations, between the subject, object and end of the right or duty. He argues that 'a right in the strictest sense' (1913: 36) is simply a claim, with a duty as its 'correlative' (Hohfeld, 1913: 38); however, later theorists like Rodin and Thomson interpret this to mean that claims are one 'subclass of rights' in Thomson's words (1990: 40), and that liberties or privileges may also be described as rights.

Suzanne Uniacke similarly describes the possibility that individuals might have 'an agent-relative permission' to defend themselves; namely the 'permission to defend oneself in certain ways against particular threats' (1991: 73). Rodin (2002: 23) also writes that 'the right of self-defence and defensive rights more generally are simple Hohfeldian relations which do not contain claims' – rather, he argues that the individual right of self-defence is a liberty, or permission-right.

Thus, for Rodin having a right of self-defence means that an individual is 'at liberty to defend a certain good by performing an action which would otherwise be impermissible' (Rodin, 2002: 99). According to Rodin, the 'moral justification for this liberty' (2002: 99) invokes three considerations:

'(i) an appropriate normative relation exists between the subject and the end of the right, consisting either of a right *to*, or a duty of care towards the good protected, (ii) the defensive act is a proportionate, necessary response to an imminent threat of harm, (iii) the object of defensive force has an appropriate degree of normative responsibility for, and the subject is innocent of, the harm threatened.' (Rodin, 2002: 99)

Thus, Rodin argues that these three considerations are sufficient to justify ‘personal’ rights of defence (2002: 103). So, if Susan were to be attacked when innocently walking home, and she were to fight and kill her attacker in self-defence, her right to do so would be justified by her right to that which she is fighting to protect, in this case her own life. Killing the attacker must, however, be necessary to save her life, and thus also a proportionate response to the attack.

Daniel Statman argues in favour of a third condition, a ‘success’ condition stating that ‘otherwise immoral acts can be justified under the right to self-defence only if they are likely to achieve defense from the perceived threat’ (2008: 659). He claims this condition is ‘implied’ by the accepted conditions for self-defence (2008: 659), and that a reasonable chance of success must be necessary for individual self-defence since it is generally considered necessary for collective defence (being a *jus ad bellum* condition).

However, there are other *ad bellum* conditions (such as right intention) which do not have an equivalent position in the individual right to self-defence. I also consider it intuitively plausible that an individual could have a right to attempt self-defence even in the knowledge that she does so hopelessly – after all, unlike the leader of a nation or other collective entity, she is risking no one’s life but her own (and that of her attacker) in making that decision. For this reason, I will not be using Statman’s success condition as a necessary condition for the possession of an individual right to defence, but will stick to Rodin’s suggestions of necessity and proportionality.

As I will show later in this chapter, I accept Rodin’s suggestions of the appropriate considerations to justify self-defence, but I do not agree with Rodin’s assessment of (i) and (iii) (in short, Rodin and I differ concerning the appropriate normative relation and the appropriate degree of normative responsibility).

Rodin’s reasoning in this case seems to be that Susan’s attacker, because he is culpably responsible for attacking her, has forfeited his right not to be fought and killed in response to his actions, if such is the necessary and proportionate response in the circumstances. This leaves Susan with the

liberty to defend her life (or not to do so if she chooses to waive her right of defence).

Other theorists, namely Michael Walzer and John Rawls, argue that defensive killing, both individual and national, is justified in order to preserve access to the rights of life and liberty. Insofar as they consider a right to defence, they consider it as a part of these two rights (part of having the right to life and liberty being the right to preserve them). This results in another possible way of grounding a rights-based account of defence. The arguments of these two writers are not *exactly* identical, but they contain sufficient similarities to be treated as yielding a coherent account of justified defensive killing – in fact, just war theorists such as Rex Martin discuss the arguments of Walzer and Rawls together, as, in Martin’s words, ‘constituting something like a unified view of the subject’ (2007: 75).

The rights to life and liberty, Walzer claims, are ‘a palpable feature of our moral world’ and are ‘somehow entailed by our sense of what it means to be a human being’ (Walzer, 1977: 54) – thus, though he admits he ‘cannot try to explain’ (1977: 54) what it is that makes them *rights*, he argues they are necessarily in existence and necessarily belong to every human being, as they are part of what it ‘means to be . . . human’ (1977 54).

Thus, Walzer’s and Rawls’ account bases the justifiability of defence upon the rights to life and liberty. According to this account, Susan does not have a right to defence in itself; rather she has a right to her life and her liberty, and she is justified in defending herself against her attacker because he is threatening at least one of these rights.

My thinking on the right to defence is much closer to Rodin’s and Thomson’s, than to Walzer or Rawls. I would argue that there does exist an individual right to defence, and that basic rights can ground that right to defence without that defensive right collapsing back into a Walzerian right to such a thing as life or liberty. I will explain my reasons for rejecting Walzer’s and Rawls’ collectivist account of defence in the next chapter. First, however, I must outline what an individual right to defence might be, and how it fits in with the tradition of individual defensive rights within just war theory, as supported by such noted theorists as Judith Jarvis Thomson, David Rodin, Cecile Fabre and Jeff McMahan.

2: An Individual Right of Defence

Defensive rights in the just war tradition have a long and varied history. Of course, in order to build a definition of just cause for war, individual rights of defence can only go so far, and some kind of liberty right for a group of people, such as a nation, to defend themselves as a whole is required. However, my task here is to establish the existence of the individual right – in Chapter Two, I will move on to show how a group can derive such a right from the individual rights of its members, considering both the collectivist and reductive strategies, and develop a form of reductive individualism which will support my definition of just cause.

An individual right to defend oneself from unjustified aggression is, as I have said, supported by such theorists as Judith Jarvis Thomson, Suzanne Uniacke, Cecile Fabre and David Rodin⁷. Of course, while these theorists agree upon the existence of such an individual right of defence, they may differ in the details (such as the grounding or scope) of an individual right.

For instance, Fabre suggests that ‘if an agent lacks an objective justification for attacking V [the victim of his attack], the latter has the right to use lethal force in self-defence’ (Fabre, 2014: 60) (subject to certain limitations concerning the necessity and proportionality of such a response, of course), and that ‘For V to have that right means that the target of her self-defensive move is under a duty not to defend himself’ (Fabre, 2014: 59), meaning that an individual’s right to defend herself is based upon the fact that the attacker has made it permissible for her to do so, because he has rendered himself liable to that attack through his attack on the victim.

Being ‘liable’ to attack means, as Seth Lazar puts it, that ‘He loses his claim right to life, and the defender therefore has no duty not to kill him’ (2009: 700). Lazar also states that ‘Moral responsibility for an unjustified threat is, I think, required for liability to defensive killing’ (2009: 703).

⁷ Rodin, of course, argues that this individual right cannot be transformed into a collective right, but this is a topic for my next chapter.

Thomson, on the other hand, argues that ‘it is permissible for you to kill a person in defence of your life’ (1991: 289) (meaning that you have a liberty right to do so) even if that person is not ‘morally responsible’ for the attack, as Lazar (2009: 703) would have it. She gives the examples of an Innocent Aggressor or Attacker⁸, who actively threatens your life through no fault of his own, for instance if ‘some villain had just injected him with a drug that made him go temporarily crazy’ (Thomson, 1991: 284), and an Innocent Threat, who is passively threatening your life (such as a fat man who has been pushed off a cliff and is about to fall on you and crush you).

In both these cases, Thomson argues, the potential victim has a liberty right to defend herself by killing (if necessary) the Innocent Aggressor and Innocent Threat, because ‘they will otherwise violate your rights that they not kill you, and therefore lack rights that you not kill them’ (Thomson, 1991: 302). This is closer to Fabre’s definition of liability to attack, since the Innocent Aggressor and Innocent Threat both lack any ‘objective justification for attacking’ (Fabre, 2014: 60); although Fabre says that while she agrees with Thomson’s conclusion that the Victim may kill the Innocent Aggressor or Innocent Threat, she does not agree with her argument for this point.

Fabre argues, instead, that ‘agents generally have a personal prerogative to confer greater weight on their own projects and goals than on other agents’ similar projects’, and that while this prerogative does not give them the right to kill innocent bystanders, it ‘does permit them to kill their attacker if the latter, whatever might be said about their lack of moral responsibility for the situation of forced choice between lives, nevertheless subjects them to a wrongful lethal threat’ (Fabre, 2014: 57).

Yitzhak Benbaji alternatively suggests that killing an Innocent Threat in self-defence might ‘in some cases’ be both ‘morally permitted’ and ‘morally unjustified’ (2005: 615); in that ‘the right to kill innocent threats is a right to do wrong’ (2005: 615) because ‘by taking advantage of his right to self-defence, the potential victim treats the innocent threat *as if* he were a boulder rather than a person’ (2005: 619) – namely, she fails to respect him ‘as a

⁸ The terms ‘Innocent Aggressor’ and ‘Innocent Attacker’ are used interchangeably, by various writers, to refer to this same example. I will therefore follow their example, and use both terms.

person' (2005: 619), and so acts wrongly even though her action was permitted.

Finally, Rodin suggests that individual defensive rights

‘derive from a complex set of normative relationships between four entities: the subject (the holder of the right), the content (the defensive act), the object (the party against whom the right is held), and the end (the good or value which the defensive actions seek to protect or preserve).’ (Rodin, 2002: 99)

His view is that an individual has the right of defence when she is ‘at liberty to defend a certain good by performing an action which would otherwise be impermissible.’ (Rodin, 2002: 99)

What we have here amounts to the suggestion that the individual right to lethally defend oneself against a threat to one’s life is a liberty right to self-defence, grounded upon the existence of a claim right to life, and the fact that the attacker has made himself liable to defensive action by attempting to violate that claim right. Lazar, on the other hand, suggested that a right should be grounded upon the ‘status and interests’ of the rights-holder (Lazar, 2009: 292) – but I will not be using Lazar’s ‘hybrid’ theory of rights here. I now turn to an explanation of what I believe an individual right to defence consists of.

I will use this definition of the individual defensive right as a permission, or liberty right. It cannot be a claim right in the Hohfeldian sense, since (as I will argue) in itself it need not be correlated with any specific duty, and it is grounded upon the possession of certain basic claim rights.

Thus, I argue that an individual has the liberty right to use lethal force in defence of one’s life. I will now define the kind of individual right I am advocating, by first explaining what the ‘end’ of defence is (defined by Rodin as ‘the good that the defensive act is intended to protect or preserve’ (2004: 64), then the scope of this right, and finally I shall define the ‘appropriate normative relation...between the subject and the end of the right’ (Rodin, 2002: 99).

2i) The Appropriate End of Individual Self-Defence

When I say that an individual has the right to defend her life, this at first looks like a rather narrow definition of the permissible end of self-defence. The traditional definition of a life, in this sense, is usually that of the physical continuation of existence⁹, but this, I believe, is an insufficient definition, for physical existence need not be a *life* in any real, deep, meaningful way.

A real life must also include such things as safety and security, the means to carry on living for the foreseeable future, and, of course, the values and principles that make life fulfilling and meaningful, because all these are the things that make living a life *living*, not merely existing. I wish to use a broader definition of ‘life’, as more than mere continued physical existence.

I am not alone in thinking that *life*, in the context of the proper end of self-defence, must mean something more than the biological definition of ‘living’ – that is, continuing to function as a living organism. For instance, Norman argues that there is a relevant distinction here between being alive and ‘having a life’ (1995: 57), which not everything that is alive does. He suggests referring to James Rachels’ distinction between ‘the *biological* sense of ‘life’ and ‘the *biographical* sense in which some living things may ‘have a life’ (Norman, 1995: 55). As Rodin puts it, this means ‘a capacity to shape a meaningful life as a distinctive ongoing project’ (2002: 156).

Similarly, Rodin himself argues that if we have a right to kill in defence of liberty, it must be because ‘liberty is a necessary condition for the shaping of any meaningful life’, as ‘in part we value life because of the liberty that it enables us to exercise’ (2002: 47). The defence of one’s life is only worthwhile if it defends *a meaningful life*, and does not, for instance, reduce one to a hopeless drudgery of an existence lacking in any quality of life whatsoever. However, I think it is important that, before accepting this and moving on, we explore more thoroughly what it means to have a right to

⁹ This is the definition that Walzer uses when he argues that individuals have a right to life, for instance.

defend a *meaningful* life. Henceforward, for convenience's sake, I will refer to this concept of a meaningful life as a flourishing life¹⁰.

The primary question that needs to be answered is; what precisely constitutes a flourishing life? Theories vary from the purely hedonistic argument that 'what would be best for someone is what would make his life happiest' (Parfit, 1987: 493), or the preference-hedonistic concept that a person's life 'went better if it went as he preferred' (Parfit, 1987: 494), to more nuanced utilitarian definitions like Mill's view that a flourishing life is one that contains an appropriate balance of higher and lower pleasures, a higher pleasure being 'one to which all or almost all who have experience of both [that and a lower pleasure] give a decided preference, irrespective of any feeling of moral obligation to prefer it' (2003: 187), to other theories of well-being such as Desire-Fulfilment Theories, which suggest that 'what would be best for someone is what, throughout his life, would best fulfil his desires' (Parfit, 1987: 493), and Objective List Theories, which hold that 'certain things are good or bad for people, whether or not these people would want to have the good things, or to avoid the bad things' (Parfit, 1987: 499).

I do not have the space to consider these conceptions of a good or flourishing life in any detail, but briefly, I believe that my definition of a flourishing life would be closest to the Objective List Theory. I would argue that there are indeed some things which are 'good' for a person to have in their life whether or not they are preferred¹¹, like security, stability, liberty and so on.

¹⁰ I should also note that when I refer to a 'flourishing life' as the end of self-defence, the concept I describe is similar to, but distinct from, the concept of a flourishing life that Fabre uses in her arguments. Fabre suggests that individuals have certain rights, such as subsistence rights and the right to self-determination, which are human rights precisely because they are necessary for individuals to live a flourishing life, and that it is these rights which constitute an appropriate end of self-defence. My argument is, rather, that we have a right to *the flourishing life itself*, a right to live such a life, which (as I will explain shortly) is a cluster-right consisting of rights to all the aspects of a flourishing life.

¹¹ A tricky situation for Objective List Theories might be presented by the possibility of a person who prefers not to have any of the 'good things' that constitute a good or flourishing life – should he be given these things whether he wants them or not, for his own good? Again, I do not have the space to discuss this at any great length, but I would think that most people, whether they actively think about *wanting*, or *preferring*, these 'good things' (most people who have them do not, until they lose them), never actually *prefer* not to have them, unless they need to sacrifice one 'good thing' in order to preserve another they value more. But, if free to choose whether or not to have these 'good things' without sacrificing anything else in order to get them, I think it is safe to assume that most people would prefer having them to not having them.

Derek Parfit gives further examples, such as ‘rational activity’ or ‘the development of one’s abilities’ (1987: 499). He also suggests that avoiding certain ‘bad things’ like ‘being betrayed, manipulated, slandered, deceived, being deprived of liberty or dignity’ (1987: 499) would contribute to a good life. I will refer to these ‘good things’ and the avoidance of certain ‘bad things’, therefore, as aspects of a flourishing life.

I have already outlined some of the aspects which, I believe, go towards making up such a life, aspects such as security, the means to sustain life in the future, or the freedom to live according to one’s values and principles, but I also need to explain what it is that makes them aspects of a flourishing life.

Living a fulfilled, happy, contented life is, it intuitively seems, better than living a life which is not fulfilled or happy but which is, for the most part, endurance rather than life. Thus, it seems, we have reason to value those things which provide our lives with fulfilment, happiness and meaning.

However, this does not mean that we thereby invest these things with their own value – for one thing, we do not value them for their own sakes. We value them solely because of their positive contribution to our lives, and therefore, it seems to me that it is really our lives, in this extended sense, that we are placing value upon. These things are valuable not in and of themselves, but as a part of a fulfilling, happy, contented, whole life – a life, in short, which is worth living.

Thus, the definition of what constitutes a flourishing life would be that of a life which includes all the things which the person in question values because they provide her with a fulfilling, contented life, including not only the freedom to live according to her most cherished values and principles, but also such things as security and stability so that she can live without enduring or anticipating chaos or further attack (which is not a situation in which a person could manage to live a contented or fulfilling life), and the means to carry on living at anything more than basic subsistence level.

Of course, proportionality will determine what degree of response is appropriate in cases where the importance of the aspect of life to the meaningfulness of the person’s life may be less than absolutely central. This is particularly necessary in this case, as it is highly implausible to suggest that

lethal self-defence could be justified in order to protect aspects of a meaningful life which are less important, such as privacy.

Obviously, without continued physical existence, no human life can continue to enjoy the other aspects of life that I have outlined here; therefore, the actual, physical death of an individual would be the worst possible attack upon a person's flourishing life, and the strongest response would be proportionate.

However, if that attack were to destroy other aspects of a full and meaningful life while stopping short of actually killing the person to whom that life belonged, for instance by depriving her of the means to continue living in a comfortable manner (e.g. depriving her of her home, or depriving her of all but a subsistence level of food), or by destroying the sense of safety and security upon which her life was founded, or by destroying or damaging her ability to live according to the values or principles which she held most dear, this obviously would also be a bad consequence of that attack, though a less serious one. This is because the destruction of these aspects of a flourishing life, while less serious than actual killing since it does not extinguish the *entire* life of the person in question, nevertheless partially destroys it – it destroys important aspects of what it means to lead a life in the deeper sense that I have described.

The harm threatened by an attack upon a person can, in this way, be seen as more serious in direct relation to however many aspects of a flourishing life are destroyed, and worst of all when people are physically killed, as this would destroy *all* aspects of their lives. The more serious the harm threatened, the stronger the proportionate response to that harm would obviously be.

Obviously, then, a threat to a person's continued physical existence would (if necessary) justify lethal defensive action, as all the aspects of that person's flourishing life are being threatened with destruction. However, there are also other aspects, a threat to which would involve a threat to other, necessarily connected aspects of flourishing life. For instance, if an attacker was threatening to rape his victim, this would involve a threat not only to her bodily integrity (another important aspect of flourishing life) but to her safety and security, her freedom to choose what happens to her body, possibly her health, and so on.

Similarly, an attacker who aims not to kill his victim, but to seriously and permanently maim them – say, by cutting off both her legs (assuming for the sake of argument that she would not bleed to death, but would survive this attack) – would by so doing destroy vital aspects of her future quality of life. Since these forms of harm all involve a threat to so many aspects of flourishing life, lethal defence against the attacker would seem to be proportionate in each case.

Thus, Victim may defend herself against Attacker not only if his attack threatens to kill her, but if it threatens to destroy other aspects of her flourishing life, for instance if he plans to kidnap her (threatening her liberty), rape her, or, though this perhaps might be trickier, maim or blind her. All of these threatened harms count as attacks upon Victim's life, in this wider sense of a *meaningful, worthwhile* life, as opposed to life in the narrower sense of a continued physical existence.

2ii) The Scope of an Individual Defensive Right

The scope of an individual's right to defence is, according to most definitions of the right, determined by the question of liability – Victim is only permitted to defend herself against the person or persons who are liable to be attacked by her. It is also often accepted that Victim's right to kill in her own defence and Attacker's forfeiture of 'his claim right to life' (in Lazar's words (2009: 700)) are two sides of the same coin – Rodin argues that they are 'Hohfeldian correlates of one another...the same normative fact described from two different perspectives' (2002: 75).

In short, Victim only has the right to defend herself against her attackers if, in McMahan's words, they 'render themselves relevantly noninnocent, thereby losing their moral immunity to attack and instead becoming liable, or morally vulnerable, to attack' (1994: 193) – and thereby also, it would seem to follow, forfeiting their right to defence.

Gerald Lang calls this the '*Forfeiture Account*' of liability, since it explains Victim's gaining a right to kill and Attacker's loss of his right not to be attacked by saying that 'the Attacker loses his right in virtue of forfeiting his right, and he forfeits his right due to wrongdoing' (2014: 38). Lang

compellingly defends the Forfeiture Account, and I believe his defence of it is sound. However, as I will shortly explain, the fact that Attacker's behaviour causes him to forfeit his immunity to attack, does not necessarily result in the simple correlation that Rodin suggests.

In the straightforward, paradigmatic example of an Attacker who deliberately and maliciously attacks Victim with the intention of killing her, it seems fairly clear that Attacker is liable to Victim's defensive attack. In other, less straightforward cases such as Thomson's Innocent Attacker or Innocent Threat, some theorists such as Lazar might disagree with Thomson's assertion that they are liable, because they bear no moral responsibility for the threat they pose. I agree that Attacker, Innocent Attacker and Innocent Threat are all liable to attack, but it does not seem to me that this necessarily puts each of the three under 'a duty not to defend himself', as Fabre (2014: 59) would have it.

Basically, I do not see that Victim's right to defend herself and Attacker's forfeiture of his right to defend himself have to be correlated just because Victim's right of defence and Attacker's loss of his right to life are correlated according to the Hohfeldian definition.

McMahan, for instance, argues that 'Even if the IA [innocent attacker] loses his immunity to attack, he retains a right to self-defense' (1994: 283). Even though McMahan concludes his paper by rejecting 'the view that the self-defensive killing of an IA is wrong' but saying that he is also 'unable to find a fully convincing justification for the view that it is permissible' (1994: 288) (meaning that he could not prove either way whether the Innocent Attacker does become liable to attack), he seems here to recognise the possibility that some form of liability to attack may co-exist with a permission to defend oneself.

More recently, McMahan points out that while it seems impermissible for a liable person to defend herself (because if the harm to which she is liable does not go to her it will go to someone else, which would be a less just distribution of harm that is unavoidable), this claim about liability is limited to a certain context – that of the immediate conflict. He then suggests that there may in fact be a lesser-evil justification for a person who is liable to be harmed to defend himself from harm – for example if the only person who could disarm

a bomb (which would otherwise kill a thousand people) were planning to commit murder before disarming it, then it might be permissible for the murderer to defend himself from his victim's defensive attacks (because otherwise no one would be able to disarm the bomb). He also suggests that a murderer who changes his mind (mid-attack) about committing the murder, but is now about to be killed by his intended victim, might be permitted to use a lesser form of self-defence (such as striking the victim), provided that he does not inflict too much harm by this action, and that he will not cause further harm afterwards¹².

Frowe, on the other hand, argues that it is permissible for the victim to kill an Apparent Threat, someone she mistakenly believes is about to kill her, but that 'different, objective factors determine whether Victim's target is liable to such force' (2010: 247). While I also disagree with her argument¹³, this seems to be another example of divergence between Victim's right of defence and the Attacker's liability. However, Frowe's view is, as she states in another paper, that 'a person who is liable to a harm is not permitted to defend herself against that harm' (2011: 174), so I may have misunderstood her point here.

Thomas Hurka also suggests that we may distinguish between a stronger form of liability – permanent liability – and a weaker, temporary form. For instance, he argues that conscripts are not as liable to attack as volunteer soldiers. The difference is not that conscripts strictly speaking have a different form of liability than volunteer soldiers, but that they are 'only sometimes liable to attack and at other times immune' (2007: 215), which would seem to suggest that when conscripts are liable, they are fully liable, not permitted to defend themselves. I will explain my reasons for disagreeing with this view later in my dissertation.

However, even disagreeing with the main thrust of his argument, I think Hurka's suggestion (2007: 215) that conscripted soldiers may become 'legitimate military targets... just because they are a danger' to the enemy soldiers they are trying to kill, but are not *as* liable as the volunteer soldiers

¹² I am indebted to Jeff McMahan for this argument (personal communication, 03/10/15).

¹³ I would say that Victim's defensive actions against an Apparent Threat are excusable, though not justified, though I have no time to go into this here.

who might be said to bear greater responsibility for their actions (because they chose to be there, and the conscripts did not), is a compelling one.

Uwe Steinhoff gives an equally interesting definition of liability to attack, which follows Thomson in many respects, but differs from her in arguing that the Innocent Threat is liable to attack not because he is causally responsible for violating the victim's rights, but because 'people have a general right to defend themselves against unjust threats of all sorts... not only to threats posed by persons, but to all threats, including to those posed by inanimate objects (2012: 347). Since the victim's rights to life and to self-defence and the Innocent Threat's rights to life and to self-defence are incompatible, Steinhoff suggests that 'in this case both parties have lost their claim-rights to life and to self-defence but retained their liberty-rights to life and self-defence' (2012: 347).

They each still have the liberty to defend themselves, as in Steinhoff's words 'a liberty (-right) held against a certain person only implies that I am not duty-bound towards that person not to exercise this liberty and thus implies that by exercising it I would not wrong her' (2012: 347) (so both can hold these liberty-rights simultaneously), but their claim rights to self-defence cannot be held simultaneously, since, as Steinhoff puts it, a claim right 'implies that the person I hold the right against cannot interfere in my exercise of it without wronging me' (2012: 347).

Steinhoff's account of liability relies upon the suggestion that we have both a claim right to defence and a liberty right to defence, whereas I have defined the right to defence as a liberty right alone. As I shall explain shortly, I believe that there are some cases in which an A may permissibly engage in counter-defence (i.e. interfere in the exercise of B's right of defence) and some cases in which A may not, and this depends not upon whether B has an additional claim right to defence, but upon whether A retains her liberty right of defence. This additional claim right is simply not necessary. However, Steinhoff's argument also has its interesting points, in that it illustrates that symmetrical rights of defence are not as counter-intuitive as they might at first have seemed.

In short, it seems to me that Victim's right of defence and Attacker's loss of his right of defence can diverge – you can sometimes have one without the

other. The Innocent Attacker and Innocent Threat are in this situation (and, as I will argue in Chapter Three, so are most soldiers on the battlefield).

While Victim's right to defend herself against Innocent Attacker and Innocent Threat means that they have lost their claim rights to life (meaning that they may permissibly be the targets of Victim's attack), it does not *necessarily* mean that they have lost the right of self-defence. There may seem to be a simple Hohfeldian relation between these two things – that if I have a liberty right to defend something, then you cannot have a claim right that permits you to stop me from defending it. However, I do not think that in this case, Victim's liberty right and Attacker's claim right, as previously described, are rights to exactly the same thing.

It is also possible that the liberty-right of defence can exist without a claim right to life, because life (in the narrow sense) is what this right refers to, and as I argued in 3i), the ultimate end of defence is not life in a narrow sense but in a wider sense, a flourishing life, and I would argue that one can lose a claim right to life in the narrow sense while retaining a claim right to flourishing life. I will give an argument for this point later, but first I must explain what this means for liability.

It means, essentially, that losing one's claim right to life need not mean that one loses the right to defence as well. Losing the right of defence means, as I will explain at greater length in 3iii), losing a larger number of claim rights to the various aspects of a flourishing life, and in order to lose all of these claim rights together one must, to put it crudely, have done something to deserve it. Losing just the claim right to life in the narrower sense, however, can perhaps happen in a Walzerian sense, because one poses an immediate threat to another human being.

In short, the Innocent Attacker loses the claim right to life in the narrow sense, simply because her unwitting actions are about to violate another person's claim rights to flourishing life. She thereby becomes liable to defensive attack by Victim. However, she does not at the same time lose her right to defend herself. In order to do so, she must be more than merely causally responsible for the violation of Victim's rights. She must deserve to lose her right of defence, by, for instance, possessing 'an appropriate degree of normative responsibility for...the harm threatened.' (Rodin, 2002: 99).

In this way, we can distinguish a stronger form of liability, and a weaker form¹⁴. Becoming strongly liable to attack would mean both losing one's right not to be attacked, and losing one's right of defence. So, a strongly liable attacker may legitimately be attacked by his victim, and that he 'is not entitled to engage in counterdefense', as Jonathan Quong (2012: 46) puts it. Weaker liability to attack would mean only losing one's right not to be attacked, whilst retaining one's right of defence. A weakly liable person is therefore the legitimate target of defensive action, because of the threat he poses to Victim's continued meaningful life, but he may be such a legitimate target without being subject to a duty not to defend himself against attack.

Many accounts of liability only use the stronger form, such as McMahan's moral responsibility account (which states that 'the criterion of liability to defensive killing is moral responsibility, through action that lacks objective justification, for a threat of unjust harm to others' (McMahan, 2005: 394), or the culpability account (which means that 'a person only becomes liable to defensive harm when he is culpable for an unjust threat of harm against others' (Quong, 2012: 47).

Other examples include the causal account supported by Thomson (which argues, as McMahan (2005: 389) put it, that 'the violation of a right is a matter of what one person causes to happen to another' – in other words, a person is liable if they are the immediate cause of the threat of harm) and Quong's own moral status account, in which he argues that you are liable to attack if you 'behave either *as if* other people are liable to the harms you might impose, or *as if* others do not have the sort of stringent moral claims that each person normally possesses' (Quong, 2012: 47) (because when you act in this way, you treat others as if they lack the moral claims necessary to protect them from the harms you might impose, and so it is only fair that you bear special liability for your actions' (Quong, 2012: 47-8)).

Because these accounts only consider the stronger form of liability (meaning that, in their view, either the victim of an attack is liable and may not defend himself, or he is not liable and he may do so), I believe they all suffer from

¹⁴ I do not have the space here to thrash out a complete account of liability, nor to outline and examine Quong's objections to the culpability account and McMahan's account, so I must simply note that they exist and leave responding to them for another time. Here, I will include only a shorter definition of my account of liability.

one of two problems. Either, as with the causal account, too few rights are granted to certain attackers, or, as with the others, the scope of the defensive right itself seems to be too narrow.

According to the causal account, the Innocent Attacker or Innocent Threat are liable to attack, *and therefore may not defend themselves*. Thomson allows that ‘some people’ would find this a counter-intuitive conclusion, or at least would ‘feel uncomfortable’ with the suggestion that the Innocent Attacker is liable to be killed (1991: 286), but she attempts to account for it by suggesting that such Innocent Attackers or Threats are about to ‘violate your rights that they not kill you, and therefore lack rights that you not kill them’ (Thomson, 1991: 302).

Uniacke argues, similarly, that there are two kinds of justifications for killing, and the second form ‘is based on the information that is available to the agent at the time’ (2000: 631) – so that ‘putative self-defense based on reasonable beliefs’ (2000: 633) may not only be excused, but actually *justified*.

However, to base an entire account of liability upon ideas like this seems rather too stringent. Granted, the fact that the Innocent Attacker is about to kill you counts for something, and even the fact that you believe he is about to kill you may, as Uniacke claims, also count for something; but does it really mean not only that it is morally permissible for you to kill them, but that they may not try to prevent you from doing so, despite their lack of responsibility for the situation that they are in? Instead, I would agree with McMahan that in order for an attacker to surrender his own right of defence, that attacker must be responsible for the attack in some sense more meaningful than merely having, wittingly or unwittingly, physically instigated it.

In addition, Rodin provides a cogent objection to this argument, pointing out that

‘Something can only violate rights if it is the subject of a duty... But something can be the subject of a duty only if it has certain minimal capacities, including the capacities of acting, deliberating, choosing and intending.’ (Rodin, 2002: 86)

In short, since Innocent Attacker and Innocent Threat neither intend, choose, nor willingly act to threaten Victim, they cannot be said to have violated Victim's rights – they are only puppets or tools, and hence do not have the duty not to attack their victims.

Similarly, Michael Otsuka argues that Innocent Threats, for instance, no more violate your rights than does 'a (faultless, agency-lacking) stone [which] will kill you if it falls on you' (1994: 80). He points out that suggestions, such as Frances Kamm's, that an Innocent Threat at the very least causes the rights-violation of the Victim because an Innocent Threat is 'a person who should not be in an inappropriate position relative to others' (Kamm, 1992: 47) are problematic, since they imply that the person is 'capable of taking precautions to avoid being in that inappropriate location' (Otsuka, 1994: 81), which obviously an Innocent Threat or an Innocent Attacker is not. They are in no relevant sense different from the stone, as they had no more choice about the matter than the stone had, and so if a stone cannot violate the rights of the person it lands on, neither can an Innocent Threat.

Otsuka goes on to argue that both Innocent Aggressors and Innocent Threats are like Bystanders in this sense. They do not 'violate, or cause the violation of, your right not to be killed' (1994: 84) even when their presence plays a causal role in your death (as even a Bystander's presence may do, when for instance she stands unwittingly blocking your only escape route). He furthermore suggests that 'Threats and Bystanders *share* an important morally relevant property...that of being a "bystander", qua responsible agent, to the object that poses a danger to life' (1994: 84).

We may not kill a Bystander, he argues, because of 'her lack of responsible lethal agency, and not the absence of her body from the sequence of events that results in death' (1994: 84). Innocent Threats (and, he adds later, Innocent Aggressors) also lack responsible lethal agency, and so, in his view, 'The killing of a Threat and the Killing of a Bystander are, other thing equal, on a par as far as permissibility of concerned' (1994: 76) – they are both morally prohibited, in short. Otsuka calls this the '*Moral Equivalence thesis*' (1994: 76).

However, Otsuka's Moral Equivalence Thesis goes too far the other way, as do accounts of liability such as McMahan's moral responsibility account or

Quong's moral status account. The Innocent Attacker or the Innocent Threat are neither morally responsible for their actions nor deliberately 'treat others as if they lack the moral claims necessary to protect them from the harms you might impose' (2012: 47), and thus, according to such accounts, they are not liable to attack at all.

Proponents of such accounts could respond by biting the bullet, and accepting that morally, the victims of such attackers do not have the right to defend themselves (an unacceptably counter-intuitive response, in my view). Alternatively, they could argue that if their victims kill an Innocent Attacker or Threat in self-defence, then the victims' actions are not justified (in the sense that they have done something that they did not have a right to do), but these actions were nevertheless excusable, since their actions were necessary to defend their lives against an immediate threat.

I agree with Thomson that this is not an acceptable response, since it would mean that the victims, although their actions were excusable, were still acting wrongly or impermissibly. As McMahan points out, 'common intuitions about the justifiability of self-defense' (1994: 264) include the intuition that 'self-defense seems justified...against an *Innocent Attacker*' (1994: 263) – justified, not merely excusable.

Any account of liability which leaves innocent victims of an attack (innocent in the sense that they bear no responsibility for said attack) in a situation where any action they take to prevent their own death is in some way *wrong*, however excusable it might be, is problematic. It is far too harsh on such innocent victims of attack (who are, let us not forget, *innocent victims*) that they should bear any share of the moral blame. The paradigm subjects of an individual right of self-defence are innocent victims of attack – if an account of such a right includes some such victims but not all, then it has failed somewhere.

This problem also cannot be answered by arguing that once the victim of this attack defends themselves, they also become liable to attack, so that the Innocent Attacker or Innocent Threat are permitted to defend themselves against their victims because the victims have just become liable, and so forfeited their own rights of defence.

Liability, in the stronger sense in which the liable person forfeits their own right of defence as well as becoming the legitimate target of defensive action, can only result from an unjustified threat of harm, and so to say that the Victim renders herself liable to attack would mean that her original defensive action was unjustified – which of course brings the whole edifice of a defensive right crumbling down.

In addition, Frowe criticises Otsuka's argument that Innocent Threats and Innocent Attackers are not liable to attack, arguing that even though they 'lack...responsible lethal agency' (Otsuka, 1994: 84), the 'innocent person...is part of what is going to kill Victim, and is thus, unlike [a Bystander], a proper object of self-defence' (2008: 284). In addition, she argues that Otsuka fails to prove that killing a Bystander and killing an Innocent Threat are morally equivalent, since a Bystander is either killed as a side-effect or treated as a means to the end of defending one's life, but 'it is the killing of an innocent threat that is a means, not the innocent threat herself' (2008: 288).

She claims, therefore, that 'neither of the two kinds of bystander killing that Otsuka discusses', namely killing as a side-effect or treating as a means, 'apply to the killing of innocent threats' (2008: 288). This, Frowe admits, does not necessarily mean that killing innocent threats in self-defence is in fact permissible, but, in her words, 'it does show that Otsuka's argument for the impermissibility of killing threats — namely that such killings are akin to bystander killings — is incorrect' (2008: 282).

The problem with the cases of the Innocent Attacker and Innocent Threat is that, as the name applies, there are innocent victims of attack on both sides. The attacker or threat, not being responsible for the threat of harm itself (although they are its immediate cause), has done nothing to warrant the loss of their right of defence, and yet nor has their victim. This can best be accounted for by the conclusion that both are liable to attack in the weaker sense, meaning that both are legitimate targets of the victim's defensive action, whilst retaining their own rights to self-defence.

So, where does this leave us? Liability in the weaker sense would appear to be closest to the causal account. All those who are the direct¹⁵ causes of unjust threats of harm to innocent victims become weakly liable to the defensive actions of said victims.¹⁶ I do not have the space here to thoroughly explore an account of strong liability, but I accept McMahan's account of 'moral responsibility for an unjust threat' (2008: 22) as a plausible criterion for strong liability.

When someone chooses to attack a defenceless stranger, foreseeing the threat to this person's life, he becomes a legitimate target for that person's defensive actions, *and* forfeits his own right of defence – or, in Fabre's words, has 'a duty not to defend himself' (Fabre, 2014: 59) (which is the same thing as having his liberty right revoked). In short, the scope of a right of defence is this: all those who directly cause an unjust threat of harm, and all those who are morally responsible for such an unjust threat, are liable, but only the latter forfeit their own right of defence.

2iii) The Grounding of an Individual Right to Self-Defence

Finally, I will explain what it is that grounds the existence of an individual right to defence. As I mentioned earlier, Rodin mentions three things that are necessary for a right of defence. The second, that the act of defence must be 'a proportionate, necessary response to an imminent threat of harm' (Rodin, 2002: 99), and the third, which concerns liability, have already been discussed. It is the first of the three which concerns us here; namely, the requirement that 'an appropriate normative relation exists between the subject and the end of the right' (Rodin, 2002: 99).

¹⁵ To include cases of indirect causation, where no criterion of moral responsibility is included, would spread the net too wide. We are all the indirect causes of a multitude of occurrences, no doubt including harms, which we are not responsible for and may never even know about; if we were weakly liable for all of them, this would lead to chaos. Strong liability, on the other hand, may include some cases of indirect causation (the man who drugged the Innocent Attacker, for example).

¹⁶ This may seem counter-intuitive in some cases where the attacker is not morally responsible because of a lack of ability to understand their actions, for instance in my earlier example of a child soldier. Yet I think, hard as it might be, we must bite the bullet here and say that even a child who is thus threatening another with harm is weakly liable to attack, and that his victim may defend herself. The only alternative would be to say that if she cannot defend herself by non-lethal means then she must, morally, submit to being killed; and this is even more counter-intuitive.

Rodin suggests that there are ‘three different relationships which may serve as a grounding for a defensive right’ (2002: 37), the first of which is ‘that in which the subject has a right *to* the good whose protection is the end of the defensive action’ (2002: 37), the second is ‘an established duty of care towards a certain person or object’ (2002: 37-8)¹⁷ and the third is ‘a duty to protect or preserve a person or thing even though one has no established obligation of trust or care’; namely, a duty ‘of rescue’ (2002: 38). I will follow this line of reasoning.

From this, I take it that there must be some other, basic rights or duties towards the end of defence, namely the victim’s ability to lead a flourishing life; and the existence of a right to defence is grounded upon such rights or duties. Duties of care and of rescue are, I believe, more relevant to the grounding of a right to defend others, which I will not be considering in this chapter, as we are here attempting to ground a right of individual *self*-defence.

An individual right of other-defence, as Rodin suggests may also involve duties of care or rescue towards the other people who need defending – for instance a duty of care towards your family might justify defending them against an attacker. A duty of care or rescue may not be the only justification for other-defence – for instance a stranger, in the act of simply asking for your protection, gives you the right to join in his defence, but you do not necessarily have a *duty* to defend him. However, the issue of other-defence is more interestingly discussed in terms of collective defence, which is the subject of the next chapter. So, I will focus here upon the question of which basic rights might ground a right to self-defence.

It might seem that since the end of defence in this case is the victim’s life, then the obvious answer is, a right to life. However, things are not quite that simple. If we accept a claim right to life (in the narrow sense, meaning continued physical existence) as the only such ‘appropriate normative relation’ between the subject and end of a right of self-defence, then we run into difficulty for both my definition of the proper understanding of life (in the

¹⁷ Rodin suggested that this duty could also be a duty towards objects you might be obliged to protect, such as the duty of ‘museum curators to protect the artefacts entrusted to their custody’ (2002: 38). However, I do not think duties to objects could be important enough to pass the proportionality requirement for a right of defence, so I will only consider duties to people, when I consider this point.

context of the end of the right to self-defence), and for my concept of weaker liability to attack, since if a claim right to life (in the narrow sense) grounds the right to self-defence, then it would be difficult to see how an Innocent Attacker could retain their right to self-defence when their claim right to life (in the narrow sense) had been lost.

Therefore, I suggest that, since the end of a right of defence is life in the wider sense that I have outlined, flourishing life, then this defensive right must be grounded upon more than just a basic claim right to life in the narrow sense, as mere physical existence. The appropriate right upon which to ground the liberty right to defence of a flourishing life would be a claim right to a flourishing life.

However, as I have explained, a flourishing life is composed of a large number of aspects of a meaningful life. The claim right which we have to a flourishing life is, therefore, also made up out of the rights to all of these aspects that constitute a flourishing life, such as a right to security, to liberty, to physical integrity, and, of course, to continued physical existence. It is not, strictly speaking, a single right in itself, but what Thomson calls a ‘cluster-right’ (Thomson, 1990: 56); a right containing a bundle of other rights which comprise a right to one single thing, which in this case is a full and meaningful life. Thomson argued that these cluster-rights are not ‘correlative with a duty’ (Thomson, 1990: 56) in the Hohfeldian way, and thus cannot be rights ‘in the strictest sense’ (Hohfeld, 1913: 36)).

However, she also points out that ‘Liberties are clusters of rights, and are themselves rights’ (Thomson, 1990: 56) – in other words, lacking a correlative duty does not mean that a cluster-right cannot be a right in some sense. I will for the most part follow Thomson’s definition of a cluster-right here, although I must distinguish between her definition of a cluster-right in itself and her definition of the rights which go together to make up the cluster-right to life, which is in many ways different from my own – and understandably so, since mine is based upon the definition of a flourishing life, while Thomson’s is based upon the traditional, narrower understanding of life, so she considers mainly such claim-rights as ‘claims...against other people that they not deprive us of life’ and ‘privileges...of preserving our lives against (human and nonhuman threats to them)’ (Thomson, 1990: 285).

These all concern the right to life in the narrow sense: so, if we accept that this and the rights to some of the other things I have identified as aspects of a meaningful life (such as liberty and privacy) are also cluster-rights, then it would seem that the right to a flourishing life is a cluster-right which contains other cluster-rights as well as simple rights.

It also seems that the component-rights that make up a cluster-right are neither necessary nor sufficient; indeed, a right to an aspect of a flourishing life may be lost or forfeited without the person in question losing the right to a flourishing life.

Thomson argues similarly that ‘the contents of the various different cluster-rights can vary across time and person’ (1990: 287)¹⁸. For instance, a criminal who is arrested and sentenced to prison has thus forfeited his right to liberty, but it intuitively seems that he retains his right to a full and meaningful life, despite not having the right to this one aspect of it – because he retains his right to other aspects, such as security.

However, a prisoner on death row (arguably) also loses his right to a continued physical existence (or, at least, continued past a certain point), but, up until the moment of his death, he still possesses the rights to other aspects of a flourishing life, such as bodily integrity and security – and the possession of these rights is sufficient to ensure that he still possesses the right to a flourishing life. Thus, it may perhaps, under certain circumstances, be possible to have a right to a meaningful life even when you lack the right to continued physical existence.

Of course, just as some of the aspects of a flourishing life are more important, so also the rights to these particular aspects of life are more important than the rights to other aspects. This is because violating a person’s right to continued physical existence necessarily involves violating all the other rights that constitute the cluster-right to a flourishing life (that person’s

¹⁸ Thomson also argued that some of the rights contained within a right to life, the ‘most central rights protective of life’ (1990: 287) must be maintained in order for the person in question to retain his right to life. However, as I have said, this refers specifically to the right to life in a narrow sense. Since the rights contained within a right to flourishing life are specifically rights to aspects of that life, none of them can be described as ‘rights protective of life’, except perhaps those contained within the right to continued physical existence. This would, then, seem to be the only component-right which cannot be forfeited while still retaining the right to a flourishing life. However, as I will soon explain, there may be reasons for doubting this.

rights to continued liberty, security and so on will all be violated if he is killed), and violating a person's right to bodily integrity also involves violating others (though not all) of her rights, such as her right to safety and security.

However (and crucially), although this means that the potential violation of the rights to these aspects of a flourishing life count for more in a proportionality calculation, it does not mean that the loss or forfeiture of any one of these rights will result in the loss or forfeiture of the cluster-right to a flourishing life – even these aspects are neither necessary nor sufficient.

The *violation* of these rights may involve the violation of other rights, but it seems possible for a person to continue to possess rights to some aspects of flourishing life even when they have forfeited the rights to others. And, as I have said, the cluster-right to a flourishing life is essentially a bundle of rights, not dependent upon the possession of any particular one of those rights, but upon the existence of a non-specific number of them.

What does this mean for my account of liability? Well, when a theorist (such as Lazar (2009)) asserts that a person becomes liable to attack through losing his claim right to life, they use life in the narrower sense; not flourishing life but the claim right to continued physical existence. I have no quarrel with this as a definition of liability in the weaker sense.

But stronger liability requires something more, something like McMahan's 'moral responsibility...for a threat of unjust harm to others' (2005: 394), and this alone imposes on the attacker a duty not to engage in counterdefence, meaning that this alone causes him to forfeit all of the bundle of rights which constitute the cluster-right to flourishing life.

As long as a person has the claim rights to some aspects of a flourishing life, then he retains the cluster-right itself. A person can, however, surrender his whole right to a flourishing life, at once, by willingly choosing to act in a way that will foreseeably violate another person's rights to various aspects of a flourishing life, as I argued in 3i) and 3ii).

He forfeits his whole right in this case because of the responsibility he bears for acting in this way – because of his deliberate unjustifiable attack on an innocent victim, he forfeits the right to defend himself against their attack, and

in order to do this, he must at least temporarily, forfeit his right to a flourishing life.

In short, the reason why the Innocent Attacker and Innocent Threat are only weakly liable is because, through their causal responsibility for the threat of harm, they forfeit the claim right to a continued physical existence, (but only that, and no more). Thus, they are legitimate targets for Victim's defensive action, but, since they still possess the cluster-right to a flourishing life, they still have a right of defence¹⁹. The strongly liable attacker, however, has forfeited his entire cluster-right to a flourishing life, because he is morally responsible for the threat of harm – he therefore has neither the right not to be attacked nor the right to defend himself against his victim's actions.

The distinction between strong and weak liability is therefore grounded upon the difference in forfeited rights – a strongly liable attacker is strongly liable precisely because he has forfeited his entire cluster-right to a flourishing life, and a weakly liable attacker is only weakly liable because she has only forfeited her right to life in the narrow sense, but retains the cluster-right to a flourishing life – and *this* is what allows her to retain the right of defence, which is dependent upon the possession of the wider right to a flourishing life.

It might be objected that even when an attacker is liable in the stronger sense, this does not mean that they have forfeited all these claim rights involved in the right to a flourishing life. For example, when a police officer is forced to kill an armed suspect in self-defence (a suspect who is, let us presume, fully competent and responsible for his actions), she is not permitted to kill him with the most painful means at her disposal.

For instance, she may not deliberately shoot him so that he dies an extremely slow and painful death, if she is an expert sharpshooter and knows that she can hit him in the head and kill him instantly. She is similarly not permitted, for instance, to mutilate his corpse. This might suggest that the

¹⁹ This may appear to suggest that a death row inmate, who has lost only his right to continued physical existence, has the right to defend himself from being executed. I would say that he does, but only through legitimate channels, such as submitting appeals. The necessity limitation on the right of individual self-defence rules out physical violence as a means here (but not in cases of an Innocent Attacker or Innocent Threat, as only through attacking the other person can the victim defend herself). Also, the right to a flourishing life only gives us the right to defend ourselves against unjustified harm, and legal execution is (arguably, or at least legally) justified harm.

suspect still has certain of the claim rights that comprise a right to flourishing life – such as the right not to have unnecessary pain inflicted upon them, and the right to bodily integrity (assuming for the sake of argument that certain rights could still be possessed after death).

However, I would argue that this is not the case. Rather, the right of defence does not permit its subject to do whatever she wants provided it is in defence of her own life²⁰. This is pointed out, for instance, by Rodin's statement that a defensive action must be 'a proportionate, necessary response to an imminent threat of harm' (2002: 99) – the additional harm inflicted upon the suspect by the police officer was not necessary to stop him from killing her, as she had other options (the quicker and presumably less painful head shot). Thus, her permission right does not extend to this (or to mutilating the corpse, as this also is not necessary to defend herself).

The reason why the right of defence, even when the attacker is strongly liable, does not extend to unnecessary or disproportionate actions is not because that attacker still has a claim right to such things as bodily integrity whilst the attack is in progress, but because even a right of defence only gives us permission to do certain things to our attackers, even when they are totally lacking in rights.

A person's loss of the right to continued physical existence does not necessarily give just anyone the permission to kill them, as in the case of the condemned prisoner – a stranger is not permitted to wander in off the street and perform the execution. The permission granted by his loss of rights is limited; as also is the permission granted by a right of defence – in the prisoner's case, it is limited to certain, qualified professionals; in the attacker's case, it is limited to the use of the minimal necessary force in defending yourself.

Therefore, I would argue that there exists an individual right of self-defence which is grounded upon the right to a flourishing life.

²⁰ Also, the police officer may have additional duties contingent upon her position as a police officer, which have nothing to do with the rights of the suspect, such as the duty not to behave in a manner unbecoming her position as a representative of the police force. However, this is a less interesting response to this objection, as it would not apply to other victims of attack who do not happen to be police officers, so I will focus upon the more generally applicable response.

3: Conclusion

In conclusion, I have argued in favour of a liberty right of individual self-defence, including a wider understanding of a life, a meaningful life, as the appropriate end of a self-defensive right, and a dual conception of liability, with both a stronger and a weaker form.

I have argued that this individual right to self-defence is grounded upon a right to flourishing life, which is a cluster-right composed of a bundle of basic rights to the various aspects of a flourishing life such as security, liberty, bodily integrity and continued physical existence. But what does this mean for just war theory?

The individual right of self-defence which I have developed in this chapter will, I hope, form the basis for a definition of just cause for war. In the next chapter, I therefore hope to demonstrate that the best definition of a just cause for war is a definition grounded upon this individual right of defence, as delegated to a state or non-state collective entity.

Chapter Two: A Rights-Based Account of Just Cause for War

Introduction

Having developed an account of an individual right to defence, I now intend to explain how this right to defence can help to ground a just cause for war. As I mentioned earlier, the existence of an individual right of self-defence has been used to ground a definition of a just cause for war in two ways: the collectivist or analogical strategy, as advocated by Walzer, and Noam Zohar, and the reductive individualist strategy, used by Frowe, McMahan and Fabre.

The collectivist strategy suggests that just as individuals can have defensive rights, so too can certain kinds of collective entities, most usually defined as nations or states. They often use an analogy with individual defence to justify the existence of this right of national defence, saying that a nation or state, being a collective entity and thus analogous to an individual entity, has a right to defend itself when its existence is threatened by the unjustified aggression of another state in the same way that an individual person has the right to defend herself from the unjustified aggression of another individual.

As Rodin puts it, collectivists ‘take the notion of state rights seriously and try to give moral content to them as independent from, yet analogous to, the rights of personal self-defense’ (2002: 123). Hence, according to collectivists the defence of a country from invasion, a form of attack analogous to the physical attacks of Attacker upon Victim, is a just cause for war, because just like an individual, that country has a right to necessary and proportionate defence against attack.

Of course, different theorists give different answers to the question of exactly what these ‘state rights’ (Rodin, 2002: 123) are. Some, for instance, such as Yoram Dinstein, see the ‘right of self-defence’ to be purely ‘an

international legal right’, rather than a moral right or one inherent in ‘the principle of State sovereignty’ (Dinstein, 1988: 170).

He inclines to the view that when it was written in Article 51 of the Charter of the United Nations that ‘Nothing in the present Charter shall impair the *inherent* right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security’²¹ (my italics), the expression ‘inherent right’ was merely ‘a reference to customary international law’ (Dinstein, 1988: 171). The existence of this right to self-defence as a *legal* right is hardly in doubt, but other just war thinkers argue that it exists as a human right, a ‘natural right’ (1988: 169) as Dinstein would call it.

For example, Nigel Dower describes collectivism as the argument that ‘the right of self-defence in warding off an aggressor’ (2009: 82) is a just cause for war, and that ‘a country has a right to defend itself against an attack by another country, just as a person has a right of self-defence against attack’ (2009: 86). Similarly, Guthrie and Quinlan write that the ‘most obvious’ just cause for war is ‘A country’s right to defend itself against aggression’ (2007: 17). This would seem to suggest a Hohfeldian permission right, like those we have already discussed, but possessed by countries rather than individuals.

The reductive individualist strategy, on the other hand, does not base the justifiability of defensive war upon the rights of states, but upon the rights of the individuals within those states. Reductive individualists such as Frowe or McMahan argue, in McMahan’s words, that ‘national defense is reducible to the defense of individuals’ (2004: 75). Rodin recognized two ways in which reductive individualists can do this.

Firstly, they can argue that a national right of defence is ‘simply an application, *en masse*, of the familiar right of individuals to protect themselves and others from unjust lethal attack’ (Rodin, 2002: 127) – in short, the *country* does not have a right to defend itself, but when it comes under attack, if the lives of its citizens are threatened then they may exercise their individual rights of defence, all together, and carry out a joint act of defence – namely, a

²¹ Charter of the United Nations, 1945, Article 51, on <http://www.un.org/en/documents/charter/chapter7.shtml>.

defensive war. In Rodin's words, this means that justified national self-defence is defined as 'a lot of people exercising the right of self-defense at the same time and in an organized fashion' (2002: 140).

Alternatively, reductive individualists might argue that 'the state has an obligation (and therefore a right) to defend its citizens in much the same way that a parent has the right to defend his or her child' (Rodin, 2002: 129). It would suggest that, rather than the joint implementation of a lot of individuals' rights of defence, national defence is 'the state exercising the right of defense on behalf of its citizens' (Rodin, 2002: 140). This does not mean that the state itself is the holder of this right; but rather that the state is obligated to act upon its citizens' rights of defence in the case of war, because the collective nature of the violence offered to these citizens by war is such that they cannot defend themselves from it on an individual basis. This is perhaps closest to the line I intend to take, though not identical, as I do not ground any defensive rights the collective possesses upon parental obligations, but upon the individuals' delegation of their defensive rights to the collective.

In this chapter, therefore, I will first briefly explore the collectivist and reductive individualist strategies for deriving just cause from rights of defence, and the basic problems with each, such as those which are convincingly identified by Rodin. Then, I will go on to suggest that rights may be delegated from individuals to collectives (such as nations or states) – a primarily individualist method of grounding collective rights upon individual rights. I will show why this strategy for grounding collective defensive rights does not suffer from the same problems as the two main strategies, and I will explain what kinds of causes for war count as just causes under this definition and why.

1: Strategies for Grounding Collective Rights of Defence

1i) The collectivist strategy

I will begin by analysing the collectivist or analogical strategy, most famously identified with such theorists as Walzer and Rousseau. Their argument is that states can themselves possess defensive rights, grounded on state rights which are, in Norman's words, 'analogous to the rights of individuals, which should not be violated' (2006: 196).

The first task for collectivists, then, is to show how it is that states, which are after all artificial entities, neither physically alive nor in any way capable of *feeling* the losses they may undergo, can have a right which is often accepted to be grounded upon other rights, such as the rights to life and personal integrity. How can a state have a right to life upon which to ground the right to defend itself, when it is not a living being?

Rodin identifies the strongest argument which collectivists can give in answer to this question, as follows. He writes that collectivists might claim that 'the proper end of national-defence is the defense of what we might call the 'common life' of a community' (2002: 127). In other words, where the appropriate end of individual defence is an individual's flourishing life, the analogous end of a state right of defence is the 'common life' enjoyed by the members of that state.

Rodin describes this analogy between individual defence and state defence as the claim that since 'persons are constituted by their existence as organic entities and they have the claim-right against other persons not to destroy their life or interfere in their bodily integrity', and 'States are constituted by their existence as sovereign entities and they have the claim-right against other states not to destroy their political independence or interfere in their territorial integrity', then in the same way that 'individuals have the right to defend, with lethal force, their existence as organic entities, so states have the right to defend with military force their existence as sovereign entities' (2002: 110).

Similarly, Steven Lee described this as a ‘*domestic analogy...between individual autonomy and state sovereignty*’ (2012: 113).

The collectivist thinker Noam Zohar also argues that in wartime ‘it is a collective that defends itself against attack from another collective rather than simply many individuals protecting their lives in a set of individual confrontations’ (1993: 615). His view is that ‘the individual and the collective are *both...facets of human existence*’, and that ‘this dual reality properly yields a dual morality’ – that is, ‘individual morality’, and ‘collective morality’ (1993: 618). Thus, while wars are roughly analogous to individual conflicts, Zohar would argue that they are not the *same* thing, that collectives have a separate, and different, set of rights and obligations according to which they ‘relate to each other’ (1993: 618).

Rodin suggests that there are ‘three viable interpretations of the common life as a potential end of national-defense’ (2002: 142): the first being ‘an account of state legitimacy’ as the source of the value of the common life²², the second being ‘the common life as the embodiment of a particular cultural and historical heritage’, and the third being ‘the common life as the arena of collective self-determination and autonomy’ (Rodin, 2002: 142).

²² Rodin mentions Thomas Hobbes as advocating a collectivist strategy grounded upon this definition of the common life, since Hobbes writes that a ‘Commonwealth’ exists ‘*to the end he [the Sovereign or state] may use the strength and means of them all, as he shall think expedient, for their peace and common defence*’ (2005: 121). In Rodin’s words, the ‘essence of Hobbes’ argument is that the moral authority of the sovereign state derives from its ability to provide order in human affairs’ (2002: 145). The fact that Rodin describes Hobbes’ argument as collectivist may seem contradictory when you consider that Hobbes is concerned primarily with individual rights – indeed, Samuel Freeman described him as positing that ‘persons are...fundamentally self-centered and individualistic’ (1990: 126). However, this is not the case. Many collectivists, including Walzer, ground their arguments for collective rights in individual rights. The main point of collectivism is not that individual defensive rights do not exist, but rather that collectives *also* have rights to defend themselves, that cannot be reduced to individual defensive rights exercised collectively or on behalf of individuals. The reason that Hobbes’ argument is described as collectivist is that he advocates a state, or sovereign, with basic rights of its own, a sovereign which, in the words of one political theorist, ‘has no obligations to [its] subjects, whose power is unlimited and undivided, and whose rule is permanent’ (Sreedhar, 2008: 785), and although the standard interpretation of Hobbes often takes individual subjects to retain the *liberty*-right of self-defence themselves, they do not retain the *claim*-right that they had in the state of nature, so that while they are under no obligations to *permit* the state to, for instance, execute them if they have the power to resist, the state is still within its rights to kill them – to use Susanne Sreedhar’s example, ‘the Athenian state had a right to order Socrates to drink the hemlock even though Socrates had a right to disobey’ (2008: 785). This claim that the state has its own rights which exist independently of the rights of individuals, and which can indeed clash with them, is a fundamental tenet of collectivism.

So, the collectivist concept of a national right of defence would seem to define that right as follows. The subject of that right, which Rodin describes as ‘the right’s bearer’, would be the state itself, rather than the individual citizens within that state. As Walzer puts it, ‘states...possess rights more or less as individuals do’ (1977: 58).

The object of the defensive right would also be a state, the state which committed the act of aggression that makes defence necessary. As this right is a right held by states, it is also a right held against states. And the end of that right would be the ‘common life’ of the citizens of that state.

So, what does this mean for just war theory, and specifically for the definition of a just cause for war? Well, it would mean that a state is permitted to engage in whatever defensive actions are necessary and proportionate when its common life, the appropriate end of its defensive right, is threatened, in the same way that individuals are permitted to do when their analogous right to life is threatened.

For instance, McMahan (although himself not a collectivist) describes the most common collectivist ‘way of thinking about war’ as ‘to think of states themselves as sovereign individuals whose relations with one another are governed morally by principles that are *analogues* of the principles governing relations among persons’ (2009: 79).

This would mean that what might be termed ‘national self-defence’ – a nation’s defence of its ‘common life’ from unjust aggression – would be a just cause for war, when war is a proportionate response to the act of aggression in question, and is necessary to successfully achieve defence against that aggression.

As Tadros puts it, when ‘one country attacks another country it is permissible for the second country to defend itself against the attack by the first’ (2014: 18). Walzer defines aggression in this context as ‘Every violation of the territorial integrity or political sovereignty of an independent state’ (1977: 52) – the integrity and sovereignty of a state being considered to be either elements of, or necessary to the survival of, the collective life and liberty of that state.

Walzer, Zohar and other collectivist just war theorists also define other-defence as a just cause for war. For instance, Walzer writes that ‘Other states

can rightfully join the victim's resistance; their war has the same character as his own' (1977: 59). This means that in addition to a permission right to the defence of its own common life, a state may have the permission right to defend the common life of other states, when their integrity or sovereignty is similarly threatened by aggression.

If, for instance, Country A is unjustifiably attacked by Country B, but lacks the military resources to successfully defend themselves, Country C may permissibly choose to aid Country A in its national defence, and may if necessary (and proportionate) permissibly declare war on Country B to defend Country A from its aggressive actions.

It is perhaps a trickier matter to decide whether Country C may do this if Country A has sufficient resources to win the war alone. But since, as Uniacke put it, it is 'widely accepted that the use of force in self-defence against an unjust threat is justified only if the force is necessary and proportionate' (2014: 62), we can perhaps assume that the same can be said for other-defence. In this case, there might be reason to question the necessity for Country C to declare war on Country B in Country A's defence when Country A effectively does not need their help.

Finally, some collectivists have accepted a third just cause for war, that of humanitarian intervention. Such interventionist wars are, in Norman's words, 'held to be justifiable if waged against countries which fail to uphold the human rights of their own citizens' (2006: 191). For instance, Walzer claims that humanitarian intervention 'is justified when it is a response (with reasonable expectations of success) to acts "that shock the moral conscience of mankind"' (1977: 107).

Therefore, collectivists such as Zohar and Rousseau use an analogy with the individual right of defence to propose a national right of defence, with states as the subject and object of the right, and the appropriate end of defence as, in Rodin's words, 'the 'common life' of a community' (2002: 127).

As I mentioned in Chapter One, Walzer and Rawls ground the national right of defence not just upon this analogy but upon the individual rights to life (in the narrow sense) and liberty of the citizens of the nation in question. Walzer and Rawls do use the aforementioned analogy, however, this does not commit them to the argument that national rights come into existence independently of

individual rights – even if they currently exist separately. The main collectivist claims are that collectives are the subjects of rights in the same way that individuals are, and that the rights they possess are collective rights, differing from individual rights in that their subjects, objects and ends are collective in nature. But collectivists may nevertheless posit that collective rights can be derived from other rights, including individual rights.

Walzer writes that ‘Individual rights (to life and liberty) underlie the most important judgements we make about war’ (1977: 54). He suggests that these individual rights undergo a ‘process of collectivization’ – through a long, ongoing ‘process of association and mutuality’, a nation’s ‘common life’ is shaped, and from this common life derives the nation’s rights of ‘territorial integrity and political sovereignty’, which Walzer argues ‘can be defended in exactly the same way as individual life and liberty’ (1977: 54). For instance, he suggests that a nation or people’s right of territorial integrity ‘derives from the common life its members have made on this piece of land’ (1977: 55).

But make no mistake; these are *collective* rights. The fact that a nation’s common life is derived from the individual rights to life and liberty of all its members, somehow invested in or surrendered to the community through ‘a long period of...shared experiences and cooperative activity’ (1977: 54), does not change the fact that the rights derived from this common life are now rights held by nations alone; and that just cause for war, as Walzer would define it, is the defence of this collective good, this common life – at best, simultaneously with individual lives, and at worst, instead of them. For instance, he also describes this common life as a people’s ‘shared life and liberty, the independent community they have made, *for which individuals are sometimes sacrificed*’ (1977: 54, my italics).

For Walzer, the defence of individual lives alone cannot justify war, the defence of a nation’s common life is necessary – as he puts it, ‘If no common life exists, or if the state doesn’t defend the common life that does exist, its own defense may have no moral justification’ (1977: 54). Hence, a state is not morally permitted to defend its own citizens’ lives from the external aggression of another state if it is in such inner turmoil as to have no sense of a

shared ‘independent community’ (1977: 54)²³ – for instance, if it consists of several smaller, mutually antagonistic tribes. This is a controversial consequence of many collectivist arguments concerning just cause for war.

Similarly, Rawls argues that ‘Well-ordered peoples’ (1999: 90) (by which, briefly, he means both liberal, democratic societies and ‘decent peoples’, which, while nonliberal, have ‘basic institutions’ that ‘meet certain specified conditions of political right and justice’ (1999: 58), ‘respect and honor human rights’ and ‘accept and abide by a (reasonable) Law of Peoples’ (1999: 92)) have just cause for going to war ‘only when they sincerely and reasonably believe that their safety and security are seriously endangered’ (1999: 90) by the actions of other societies. He adds that societies have a ‘right to fight a war’ to ‘protect and preserve the basic freedoms of its citizens and its constitutionally democratic political institutions’ (1999: 91).

In the same way, then, Rawls seems to be arguing that there exists a collective right to defence, possessed by well-ordered peoples (and some benevolent absolutist states), and that the target of this right is collective, being the aggressive society against which a well-ordered people must defend itself, and the ends are collective as well as individual, being the safety and security of the well-ordered society in question, and the freedoms of its political institutions in addition to the freedoms of the individual citizens – but that ‘outlaw states’ which do not have a history of respecting human rights, lack this right even if the individual lives of their citizens are endangered.

So, Rawls and Walzer both appear to argue that a just cause for war is, in Walzer’s words, ‘to protect against external encroachment’ on states’ ‘rights (to [shared] life and liberty)’ (1977: 54), and in Rawls’ words, ‘self-defense’ (1999: 91), which he defines as the defence of the ‘safety and security’ (1999: 90) and ‘basic freedoms’ (1999: 91) of well-ordered societies. Walzer’s ‘right to life’ roughly corresponds to Rawls’ right to defend ‘safety and security’, and Walzer’s ‘right to liberty’ similarly corresponds to Rawls’ right to ‘preserve the basic freedoms’ (1999: 91).

Walzer and Rawls’ account of justified defence as the defence of the human rights to collective ‘life and liberty’ marks out three kinds of war as potentially

²³ Assuming, for the sake of argument, that despite its turmoil it is capable of defence.

possessing just cause: self-defensive war, collective or other-defensive war, and wars of humanitarian intervention. Each of these types of war aims at protecting or restoring the right (to life and liberty) of a certain group or nation, whether against the aggression of an external enemy, or against the abuses of those within the nation of the threatened group.

Only in the case of humanitarian intervention, which Walzer suggested is only justified ‘when it is a response (with reasonable expectations of success) to acts “that shock the moral conscience of mankind”’ (1977: 107), acts shocking enough to override a ‘presumption against intervention’ that arises from the collectivist ‘commitment to [national] self-determination’ (2004: 68), does he appear to define individual lives rather than the preservation of a sovereign nation as the primary aim of a just war. However, Walzer considered that acts heinous enough to justify overriding this presumption would be very rare, and that ‘the norm is not to intervene in other people’s countries’ (Walzer, 2004: 81). In addition, Walzer writes that humanitarian intervention ‘uphold[s] the values of individual life *and communal liberty*’ (1977: 108, my italics). So, the defence of the collectivized rights of the ‘peoples’ who are referred to as the subjects of humanitarian intervention would also seem to be part of the aim of a Walzerian humanitarian intervention. Hence, this argument would seem to be compatible with Walzer’s overall collectivist strategy.

However, there are both flaws in the general collectivist strategy of grounding collective defence in an analogy with individual defence, as pointed out by theorists such as Rodin, and problems with Walzer’s and Rawls’ account of defence as a just cause based primarily upon a collective right to shared life and liberty. I will now explain what these problems are.

1ii) A problem with Walzer’s and Rawls’ account

The main problem arises when we consider how Walzer and Rawls could argue that the defence of human rights can be justified by fighting a war. Such a war will inevitably violate the rights to life and liberty of some individuals, whether or not these individuals would have been harmed in this way had the war gone unfought. If these rights are sovereign and indisputable, then their

violation is always wrong, for whatever reason it might be undertaken – and it may be assumed that Walzer and Rawls are not of this opinion, since the acceptance of absolute and inviolate human rights would lead inevitably to pacifism. Even if these rights may be overridden, however, this cannot happen without good reason – unless, for instance, the individuals in question were liable to attack.

The problem, of course, is that war inevitably involves the violation or infringement of some people's rights to life and liberty – and sometimes, certainly in the case of non-combatants killed in enemy bombing strikes, they would seem to be killed unjustifiably. Any country fighting according to the principle of *jus in bello* will, naturally, aim to avoid violations of the rights of enemy non-combatants (and, if the war is one of humanitarian intervention, even aim to put a stop to such violations), but any war which is fought by the means of armed forces will involve the violation of *some* soldiers' rights to life or liberty.

Not only will the belligerent country send its own soldiers into mortal danger, into situations where it is likely that some will either be killed or captured, which may not necessarily be infringement of their rights if these soldiers have willingly consented to expose themselves to risks by joining the army; but the belligerent country will also pursue military strategies aimed at killing or capturing as many enemy combatants as possible – which, unless the enemy combatants in question are liable to attack (an argument I will consider later) will at least infringe the individual rights of this particular group of human beings.

Also, many countries use or have used conscription to recruit large numbers of combatants when they are at war and need to increase the size of its armed forces – for instance, during the First World War, Britain conscripted men into the armed forces between 1916 and 1918.

Many 'absolutists', who refused either to fight or perform non-combat service such as working as stretcher-bearers, were nevertheless drafted into military service and court-martialled if they refused to obey orders. Forty-one of them were even sent to France on active duty, where they could be shot for

refusing an order²⁴. The practice of conscription legally forces the conscripts to join the army and by so doing risk their lives and freedoms, thus ensuring that many of the combatants who risk their lives and freedom on the battlefield may not be doing so voluntarily.

Martin argues that the ‘soldiers themselves have, by [Walzer and Rawls’] hypothesis, a right to life...It seems paradoxical to say that one can protect human rights from violation by *violating* rights’ (2007: 78) – yet, given the definition of human rights under Rawls and Walzer’s arguments, this is precisely what any normal combat situation entails.

Using the defence of human rights as a just cause for war has this paradoxical appearance because defending these rights in battle involves violating them, by killing, wounding and imprisoning enemy soldiers. It also (even more troublingly) may involve violating the rights of civilians, those non-combatants who are inevitably caught in the crossfire as a regrettable though generally accepted consequence of modern warfare.

In Rodin’s words, ‘The most profound objection to the traditional [collectivist] conception of national self-defence is that it permits, and often mandates, the mass wastage of individual rights in order to support the formal rights and status of political entities’ (2014: 88) – which, to my mind, is especially troubling when these ‘formal’ rights have been derived from the individual rights themselves.

There are various options open to Walzer and Rawls here. They could deny that those who are killed or imprisoned as a result of the war have their rights violated or infringed in any meaningful way, if they are killed as a proportionate side effect of military action aimed at bringing the war to an end. However, this seems like an obvious example of misuse of the Doctrine of Double Effect – if the act in question is shooting an enemy soldier, to say that our aim was to hasten the end of the war by depriving the enemy of a fighter, and the soldier’s death is a side effect of this aim which we would have avoided if we could (by permanently crippling him instead, say) smacks of mental quibbling (and is, in any case, not a claim that many modern just

²⁴ <http://spartacus-educational.com/FWWconscription.htm>

war theorists would make). The soldier's death cannot be so easily detached from the aim of our action here.

Alternatively, they can deny that their argument requires these individual rights to be absolute and inalienable, but merely universal: meaning that although we all possess them as part of our sense of what it means to be a human being' (Walzer, 1977: 54), we can surrender them or forfeit them.

In other words, some people, such as soldiers, may willingly forfeit their rights; and others, such as conscripts or criminals, may legally and justifiably lose them against their will. Rodin writes that the suggestion that 'the possession of the right [to life] would be conditional on non-engagement in certain kinds of conduct', rather than 'inalienable' and possessed 'unconditionally', may be counter-intuitive, but 'should not be seen as a fatal objection, for many other important rights, such as the right to privacy and the right to liberty, are seen as conditional in this way' (Rodin, 2002: 71), and the right to life, in principle, need not be different.

However, it seems to me that Walzer's definition of these rights still makes that response troubling. If these rights are part of 'our sense of what it means to be a human being' (Walzer, 1977: 54), then how can they be forfeited against our will? Perhaps a person could willingly give up or sacrifice part of his or her humanity (though even this I find worrying), but how can we be said to lose part of what makes us human against our will and, in the case of conscripts, without having done anything to deserve that loss? Is a conscript any less human than a soldier who willingly enlisted, or a civilian?

Nevertheless, Walzer opts for the second of these possibilities. His argument, as Martin neatly summarizes it, is the 'idea that combatants temporarily forfeit their human rights to life and liberty and take on, in their place, certain "war rights"' (2007: 76). For instance, Walzer writes that,

'the soldiers who do the fighting, though they can rarely be said to have chosen to fight, lose the rights they are supposedly defending . . . Simply by fighting, whatever their private hopes and intentions, they have lost their title to life and liberty . . . even though, unlike aggressor states, they have committed no crime' (1977: 136).

So, the rights to life and liberty that an individual possesses as a civilian are somehow lost when he becomes a soldier. Hurka expands this point somewhat, suggesting that ‘by voluntarily entering military service, soldiers on both sides... freely accepted that they may permissibly be killed in the course of war’, and thus ‘freely gave up their right not to be killed in certain circumstances’ (Hurka, 2007: 210). This means that killing them would no longer be unjust.

Thomson also suggests that ‘consent’ may be a viable way for an alienable right to be lost, which means that if by enlisting in the army a soldier may be understood to have given his consent that enemy soldiers may attempt to kill him, then he ‘has ceased to have a claim’ (1990: 348) (the claim in question being a claim right to life).

Instead of these rights, which they lay aside for as long as they serve as combatants, soldiers ‘gain war rights as combatants and potential prisoners, but they can now be attacked and killed at will by their enemies’ (Walzer, 1977: 136). In short, these war rights chiefly consist of the right to ‘attack and kill’ those combatants in the service of your (or rather your country’s) enemy, to the same degree that those enemy combatants have the right to kill you. Non-combatants, in Walzer’s view, do not have this right – civilians cannot choose to kill enemy soldiers with impunity, because they have not surrendered their right to life – the right to kill cannot exist without the liability to be killed.

This approach is echoed in modern military law: legally, when a person joins the armed forces and is sent into a combat zone, as long as they are on active duty they surrender the human rights they have as an ordinary civilian. A campaign by the family of Pte Jason Smith, who died of heatstroke while on active duty in Iraq in 2003, to make human rights law apply to soldiers in combat situations was defeated at the Supreme Court in June 2010 – the BBC reported leaders of the armed forces as saying that it was ‘impractical to allow troops in combat zones to be protected by human rights law’²⁵.

²⁵ <http://www.bbc.co.uk/news/10450556>

All very well for soldiers: but what of civilians? The possible collateral deaths of civilians in wartime is often accepted as an unfortunate but unavoidable consequence of fighting a war, and factored into proportionality calculations on this basis. Can Walzer justify war to defend individual rights to life and liberty in the knowledge that the same rights, belonging to those who cannot be said to have either surrendered or forfeited them, will almost certainly be violated by that war?

Well, combatants are not only soldiers: Walzer defines the category of ‘combatants’ as containing both soldiers and ‘those who make what soldiers need to fight...when they are actually engaged in activities threatening and harmful to their enemies’ (1977: 146) – for instance, workers in a munitions factory become combatants only while they are actually making munitions; during that time period, they forfeit their rights to life and liberty in exchange for the ‘war rights’ of attacking the enemy (indirectly, by making munitions). Thus, Walzer argues, such temporary combatants ‘can be attacked only in their factory (not in their homes)’ (1977: 146) when attack is the only way for their enemy to force them to cease their activities.

However, this still leaves those civilians who are not engaged in such activities, but may still easily become victims of military action – for instance, workers in a munitions factory whose homes are very near that factory may be killed by a military strike on that factory even when they are not engaged in making munitions. Indeed, how are the fighter pilots to tell whether all the workers in a factory are ‘combatants’ at any one time? Say a group of them have just signed off work, and stand smoking cigarettes in the car park. Are they still legitimate targets?

It seems to me that they are not; and, indeed, Walzer argues, as I have said, that workers who thus contribute to the war effort are only ‘combatants’ ‘when they are actually engaged in activities threatening and harmful to their enemies’ (1977: 146)²⁶. The off-duty workers in the car park are thus non-combatants again. However, this still seems troubling. Non-combatants are

²⁶ However, our intuitions might be somewhat different in the (admittedly unlikely) scenario in which the factory workers in question are the only people in their country who are, or could become, capable of working the machines in the factory. In this case, they might *perhaps* continue to be liable to attack even when they are not actually working the machines, as they would continue to be necessary for the success of the war. I am indebted to Jeff McMahan for this point (personal communication, 03/10/15).

likely to be killed in an attack in a munitions factory, whether they are off-duty workers or people living in the houses around the factory, and the fact that Walzer's argument allows their rights to be outweighed by the necessity for that all-important national right of self-defence is, as Rodin pointed out, a serious problem with this 'conception of national self-defence' (2014: 88).

Seth Lazar similarly made this point, arguing that from an individualist viewpoint the analogy between individual and national rights of defence is 'very troubling' since 'when states fight each other, individuals die, and...individuals, not states, are the fundamental unit of moral concern' (Lazar, 2010: 182). I will return to this point later.

First, however, I must outline another problem with Walzer's argument, most significantly with his account of the 'war rights' (Martin, 2007: 76) of combatants. There is an important aspect of Walzer's argument for combatants' forfeiture of the rights to life and liberty that makes me uncomfortable. It begins with Walzer's calm statement that 'the soldiers who do the fighting, *though they can rarely be said to have chosen to fight*, lose the rights they are supposedly defending' (1977: 136, my italics).

Walzer acknowledges here that the soldiers, and indeed all the combatants in a combat situation, *may not have freely and willingly chosen to become combatants*. They may, of course, be citizens of a brutal dictatorship that compels all the people it possibly can to join the armed forces for the glory of Hitler, Mussolini or whoever it happens to be; but even if they are not, societies that respect the human rights of their citizens, which Rawls refers to as 'well-ordered societies' (1999: 92), when they are in desperate straits, may conscript people, willing and unwilling, into the armed forces (and have done so – as in my previous example of British conscription during the First World War).

Conscription, then, according to Walzer's argument, is a legal requirement for young men and women to give up their supposedly unassailable rights to life and liberty; it is to have these rights done away with, perhaps against one's wishes. Yet Walzer appears say that this is permissible, that we can lose these rights without having 'chosen' (1977: 136) to give them up, that our governments can simply take them away from us by the one simple act of introducing conscription.

Indeed, Walzer argues that it is not only conscripts whose freedom of choice becomes constricted in wartime – he writes that a state during wartime ‘decrees that an army of a certain size be raised’ and uses ‘all the techniques of coercion and persuasion at its disposal’ (1977: 28) to raise that army. McMahan pointed out that this effectively means that all potential combatants ‘are subject to a variety of forces that compel their will—manipulation, deception, coercion, their own sense of the moral authority of the government that commands them to fight, uncertainty about the conditions of justice in the resort to war, and so on’ (2004: 699-700).

Indeed this, Walzer claims, is the very reason why combatants fighting without a just cause are not to be held responsible for the unjustness of the war, because they are constrained to fight by necessity, exactly as just combatants are, and thus have exactly the same war rights as just combatants – a thesis he refers to as the ‘Moral Equality of Soldiers’ (Walzer, 1977: 34).

This concept of human rights that can be forfeited against one’s will seems to me to be problematic. In Cheyney Ryan’s words, it gives rise to a ‘conscription paradox’ (2004: 71). He points out that while voluntary enlistment might seem more in line with suggestions (like Hurka’s) that soldiers surrender their rights to life and in exchange are *permitted* to kill and *permit* themselves to be killed (in the sense that they agree that it does not violate their rights to be killed by enemy combatants), conscription is not a voluntary act of surrendering one’s rights.

The existence of conscription means that citizens are ‘*obligated* to engage in killing, should the state so decide’ (2004: 70), and are similarly subject to the obligation to *die*—that is, the obligation to sacrifice one’s life in war’ (2004: 71). The paradox is that this obligation seemingly arises from the very rights that we are obligated to violate, if the state’s justification for defending itself arises from the gradual ‘collectivization’ of individual people’s rights to life (Walzer, 1977: 54), or from an analogy with the individual right of defence.

Also, while it might be possible for people who wish to be soldiers to agree, on a voluntary basis, to temporarily surrender certain of their human rights in order to fight as combatants and defend the rights of others, the idea that rights which are ‘entailed by our sense of what it means to be human’ (Walzer, 1977: 54) can be forcibly confiscated by one’s own government

through conscription is rather troubling – surely, even if our rights can be forfeited by our own actions, forcible removal of these rights should be beyond the capability of any social contract.

Thomson makes the point that governments do appear to be capable, through legislation for instance, of ‘tak[ing] natural rights away from the rights holder’ (1990: 354), as when a government takes action to outlaw a previously legal activity that had caused offence to some citizens (her example is having sex in public).

However, she also adds that there are two clauses to this governmental power – a government (or ‘lawmaker’) only has the power to ‘deprive of rights’ (1990: 354) if ‘the lawmaker is legitimately the lawmaker of the society’, and if ‘the lawmaker acts permissibly in depriving’ people of the rights in question (1990: 356). The second clause, I believe, has an immediate bearing on this issue.

Does a government act permissibly in depriving its citizens of their rights to life? It is certainly a more serious issue than depriving them of their rights to have sex in public places. Intuitively, it seems that the power of life and death over its citizens is not a power which we want even a legitimate government to have. But it is still a difficult question as to whether this makes it impermissible for them to deprive us of the right to life.

It may seem controversial to argue that conscription, a practice common to so many different countries especially in times of crisis, is based upon an impermissible action, but it would be equally uncomfortable to say that it is permissible for governments to deprive us of this right – after all, there are so many ways that *that* permission could go wrong! Perhaps one solution might be to grant that it is permissible, but only under certain circumstances – say, in cases where the right-holder would have consented to surrender his right anyway, had they been given the informed choice.

However, this leaves us with the same problem: if a conscript would never have chosen to surrender his right to life in order to fight (say he was a total pacifist, or even secretly sympathised with the enemy), then the government may not force him to surrender that right. They may, in short, only conscript soldiers who would have voluntarily enlisted anyway – which, one might say, rather defeats the point of conscription.

An alternative possibility might be to say that forcing an individual to surrender their right to life is permissible if fighting a particular war is morally obligatory for a group of people, (assuming that such a thing is possible), and if conscription is the fairest way of ensuring that there are enough fighters to win the war. But who decides when a particular war is morally obligatory? The government, or whichever authority is in charge of deciding when to go to war? This would seem to be equally open to misuse. Each individual? The pacifist would never agree that a war was morally obligatory, and conscription, as a means of raising sufficient soldiers to win a war, would thereby be hamstrung. A majority of the people? Possibly, but the minority who disagree would be in an extremely uncomfortable position – forced not only to surrender their rights against their will if they are candidates for conscription, but also forced to submit to a moral obligation which they do not agree with. There would seem to be no obvious solution to this problem – at least for Walzer’s argument.

McMahan also criticises Walzer’s argument, though from a different angle. He argues that the various forms of coercion a state may bring to bear upon potential soldiers, such as legal coercion (threatening them with arrest and prison if they do not submit to joining the army, for instance), the physical coercion that a violent or dictatorial government might use, or more subtle manipulation through means of propaganda, are not justifications for an individual soldier to fight in an unjust war, but ‘are at best *excuses*’ (McMahan, 2004: 700). This means that, in McMahan’s words, ‘It is false that unjust combatants do no wrong to fight provided they respect the rules of engagement’ (2004: 700).

Hence, he argues that just as individuals who defend themselves against an unjust threat of harm from an attacker do not lose their rights through posing a threat to their attacker, because the attacker’s actions constitute an unjust threat of harm to which the victim is entitled to respond, so the just combatants in a conflict do not lose their rights, because the attack by the unjust combatants is unjustified. Even Walzer (1977: 128) admits that in an individual case when someone poses an unjust threat of harm, his victims do not lose the rights to life and liberty if they attempt to defend themselves, and thus pose a threat of harm to the original attacker. Their threat was justified,

and his was not – so he does not have the right to kill them in his own defence.

If unjust combatants' attacks on just combatants are thus unjustified, it seems that Walzer has no grounds to argue that just combatants lose their rights to life and liberty, or that unjust ones gain any corresponding rights to attack them. Although, as I will explain in Chapter Three, I do not agree with McMahan's argument that all things being equal, no unjust combatants may permissibly defend themselves against just ones, I nevertheless think that this is a convincing demonstration of a flaw in Walzer's argument concerning the rights of combatants.

Henry Shue, however, responds to McMahan's argument by calling it a 'bad argument by analogy' (2008: 100). He contends that McMahan assumes 'war is not sufficiently different from ordinary life that it must employ a different kind of criteria to specify who and what may properly be attacked' (2008: 100) – in other words, that McMahan asserts that if in ordinary life Person A is morally prohibited from defending himself against Person B if Person B's attack is justified, then the same must be true in wartime, when A and B are combatants.

However, Shue suggests that this is not necessarily the case, that there are relevant differences between war and ordinary life which may, at least, mean that the moral rules that govern our conduct in war are different from those which govern our conduct outside of war. For instance, he points out that 'the moral rules for ordinary life' do not and cannot regulate the specific conduct of *combatants*, because 'ordinary life contains no combatants' (2008: 100).

This might suggest, as Shue claims it does, that there must be 'specific standards that apply to ordinary life and specific standards that apply to war' (2008: 90), and that, for this reason, Walzer's position that combatants have rights in war which non-combatants do not possess (since they are presumably not involved in fighting the war) is more plausible than McMahan would have us believe. An unjust combatant's attack on a just combatant is simply not analogous to a mugger's attack on his victim, or a criminal's attack on the police officer sent to apprehend him, so it cannot be governed by the same rules – the unjust combatant may indeed have a different set of rights to the

mugger or criminal, which permit him to defend himself where they may not do so.

Hurka also responds to McMahan, objecting specifically to McMahan's claims that liability should be applied 'not just to the resort to war as a whole but to each individual goal of war', and also 'not just to an enemy group X as a whole but to each individual member of X' (2007: 200), so that 'one is permitted to use force against a given person only if he himself shares in the responsibility for the relevant wrong.' (2007: 200). The first claim that Hurka discusses is not immediately relevant to the counter-argument to Walzer that I wish to consider here, so I will move on to the second.

Hurka argues that McMahan ignores the 'surrender-of-rights justification' (2007: 211) which he has outlined and which is, he argues, implicit in Walzer's argument – for instance, he claims that Walzer's statement that an enemy combatant may be attacked because 'he has allowed himself to be made into a dangerous man' (Walzer, 1977: 145), this statement 'suggests a voluntary assumption of status like that central to the surrender view (Hurka, 2007: 211).

Of course, this response hits a snag when it comes to the issue of conscription, as conscripts may not be said to have *voluntarily* assumed the status of a soldier or 'dangerous man' (Walzer, 1977: 145). Hurka suggests a 'hard-line reply' (2007: 213) which he claims is implicit in Walzer's argument, namely the reply that even where a soldier is conscripted into the army, this 'was to some degree voluntary, because it involved a choice' – the soldier decided to join the army rather than go to prison. Hurka continues that 'its being voluntary even to that limited degree was sufficient for it to involve a full surrender of rights' (2007: 213).

This seems a distinctly unpalatable reply to me – it still involves the enforced surrender of rights which, even though they are not inalienable, are nevertheless meant to be central human rights. Hurka mentions that 'A contract between A and B is no less binding on B if he was "forced" into it by unfavorable circumstances or even by hard dealing by A' (2007: 213), and that the legal ramifications of conscription do not count as undue duress if 'conscription is not in itself forbidden' (2007: 214).

As Suzanne Uniacke points out, even duress ‘by threats’ or ‘duress of circumstances’ are not accepted as ‘defences to murder or attempted murder’ (1994: 54). Although this is a matter of law and may not necessarily be correct as a claim about morality, it highlights a presumption that even where circumstances or the threats of a person or organization are forcing a person into doing X, there is still a point at which that person chooses to give in to the threats or the circumstances, chooses to do X, and is to some degree responsible for his actions.

However, although the contract in Hurka’s example may be legally binding, the act of using ‘hard dealing’ (2007: 213) (presumably analogous to the threat to send the unwilling conscript to prison if he does not agree to surrender his rights) does not seem morally permissible. Are we then to say that such a contract is *morally* binding? If B could find a legal loophole to wriggle out of the contract, surely we would not condemn him in the way that we might if he had entered the contract willingly.

Similarly, Uniacke argues that duress *should* in fact be at least an excuse for committing wrongful actions like murder, showing that (despite the law) someone who was forced into wrongdoing in this way is not morally judged as harshly as someone who did the same thing, but willingly and without being forced into it.

In the same way, then, since a conscript has been forced into agreeing to join the army, that agreement, the supposed surrender of his rights, might not seem as morally binding as that undergone by a soldier who has voluntarily enlisted.

However, Hurka also offers another possible reply to the problem of conscription for his and Walzer’s ‘surrender-of-rights justification’ (2007: 211), a ‘soft-line reply’ (2007: 213). He suggests that the answer is to give greater weight under the proportionality criterion to the lives of conscripted soldiers (or those forced into military service by ‘economic hardship’ (2007: 214)) over the lives of volunteer soldiers.

Thus, conscripts would not seem to lose their rights of life and liberty to the same degree that volunteer soldiers would, because they have not *voluntarily* surrendered them; though they would be liable to attack they would not be *as* liable. In Hurka’s words, this would mean that ‘volunteer soldiers may be attacked at any place and time during a war’, but ‘conscripts have higher

moral standing because they are only sometimes liable to attack and at other times immune' (2007: 215).

While I find a dual concept of liability a compelling one (as I have explained), I do not think that it necessarily proves what Hurka wants it to prove – namely, that McMahan's criticism of Walzer does not work. His argument is that conscripts 'have not surrendered or forfeited any rights', but 'may be attacked just because they are a danger' (2007: 215). But a soldier cannot be a legitimate target of attack without having lost any of the rights that once made him immune – if this is Hurka's point, it would be nonsensical.

If his point is, rather, that conscripts lose at least some of their rights without surrendering or forfeiting them, then we are back to where we started. A conscript becomes 'a danger' (2007: 215) to the enemy because he has been coerced or forced into the position where he must stand on the front lines and shoot at them, so his rights are still in some sense being forcibly removed. It seems to me that this is still problematic.

McMahan responds most interestingly to Hurka, by pointing out that conscripts and volunteer soldiers are not the only types of soldier; there is a third relevant type, which might be called a temporary volunteer. These might be people who 'voluntarily enlist only when their country has already been unjustly attacked, intending not to become professional soldiers but to fight in this one just war only' (2008: 26).

Such temporary volunteers are, McMahan argues, 'very much like' the individual victim of an unjust attack who must defend himself against that attacker (2008: 26). There is enough similarity for us to be able to say that, like the individual defending himself, the temporary combatant 'has no reason to waive his right not to be killed and there is no reason to suppose that he does so' (2008: 26). This also provides something of a response to Shue's argument, in that the comparison between domestic and wartime killing may still hold true in the cases of temporary volunteers.

If this is the case, then whether or not Hurka has solved the conscription problem, he has not successfully shown that all combatants necessarily surrender their rights in exchange for war rights' or 'a global permission to engage in attack' (McMahan, 2008: 26) – some just combatants, albeit not all, may still be illegitimate targets of attack.

However, Cheyney Ryan also criticises McMahan's argument, suggesting that by giving 'insufficient weight' to what he terms 'the institutional claims on soldiers in a democratic society' (2011: 12), his view creates a 'moral dilemma' (2011: 13) for soldiers, which cannot be resolved by simply allowing them to conscientiously object from any war they feel to be unjust.

In short, by arguing that soldiers are only morally permitted to fight in just wars, meaning that only unjust combatants lose their rights and thus become legitimate targets of military action, McMahan makes it every soldier's moral responsibility to determine whether the war his country is about to engage in is just or unjust, and to refrain from fighting in it if it is unjust.

Ryan's point is that soldiers may feel that they have a 'democratic duty' to serve in the armed forces, even in a particular war, whether or not they believe that that war is unjust. They may feel this way because in such democracies as the US and UK, serving as a soldier is seen as fulfilling a 'general duty to support democracy's protective institutions' (2011: 22) – because their actions as soldiers are 'protecting the protection of our democratic society' (2011: 22).

Ryan ultimately argues that soldiers of a democratic country do not have such a duty, and that belief in this duty is based upon false empirical assumptions, such as the assumption 'that a democratic government will generally go to war for legitimate reasons; more specifically, it will generally go to war for reasons of self-defense' (2011: 23).

However, even though belief in this duty is erroneous, the impact of this kind of belief upon soldiers' attitudes to their jobs and their duties to perform them should not be underestimated, and Ryan argues that McMahan does just that. McMahan's argument is, as Ryan summarizes it, that 'our institutional obligations can *never* override our personal obligation not to participate in an unjust war' (2011: 30). However, Ryan suggests that anyone who believes that participating in whatever wars he is commanded to participate in is part of the larger task of protecting the democracy he lives in and, by extension, all his loved ones who live inside it and enjoy its protection, would find this a 'real dilemma', since 'The duty not to kill unjustly comes into conflict with the duty to protect one's loved ones' (2011: 31).

Lazar, for instance, points out that 'associative duties' (2009: 91), which are 'non-contractual duties owed in virtue of a valuable relationship' (2009: 90)

such as that between ‘lovers, family members, friends, and perhaps compatriots’ (2009: 91), can ‘clash with, and sometimes override, our general duties’ (2009: 91) – general duties being duties ‘owed to people simply in virtue of their humanity’ (2009: 90), such as McMahan’s proposed duty ‘not to participate in an unjust war’ (Ryan, 2011: 30).

In short, Lazar argues, it is not the case that such general duties always override associative duties, and so when a soldier has what he feels is a duty towards his family and loved ones to serve unquestioningly in the armed forces, there is at least the possibility of a genuine dilemma caused by the clash of duties here.

Not only does McMahan’s account of war rights impose this dilemma upon soldiers, but it imposes an additional ‘unfair burden’ by imposing an ‘obligation to resist’ fighting in an unjust war, even when doing so would mean that they faced ‘harsh sanctions...like a long prison sentence’ (Ryan, 2011: 32).

However, this does not necessarily disprove McMahan’s arguments. Ryan’s argument seems to suggest not that the ‘democratic duty’ that he thinks motivates soldiers is a valid duty (as a pacifist, this would indeed be a contradictory position for him), but that its motivational force means that soldiers are in a ‘real dilemma’ (Ryan, 2011: 31) and that the obligation McMahan’s argument places upon them is therefore an unfair one. But surely it would be equally valid to conclude that the cause of this dilemma, the problem which we need to address and correct, is not the obligation, but the motivational force of the ‘democratic duty’?

McMahan points out that as things stand it is ‘highly doubtful that many [soldiers] do take seriously their moral duty to examine the reasons for and against their participation in the war’ (2009: 150). His argument is that this needs to change, and an obligation not to take part in unjust wars means that combatants must begin to look at the morality of the wars they are about to fight in, rather than accepting, for instance, that being a soldier of a democratic nation means that one may fight without first examining whether or not the war is just, or that fighting is somehow justified even when the war is not.

In short, the unfair dilemma that Ryan claims McMahan creates for soldiers does not necessarily stem from the unfairness of McMahan’s suggestion that it

is 'wrong to fight in a war that lacks a just cause' (2009: 6) and that therefore (in Ryan's words) we have an 'obligation not to participate in an unjust war' (2011: 30). It is, rather, a result of the general acceptance of arguments such as the argument from democratic duty, and perhaps this is what we need to challenge in order to solve McMahan's dilemma.

Victor Tadros also argues that combatants may not be wronged by conscription. His view is that 'It may be permissible to coerce me to enter a co-operative scheme that interferes with my interests in some way if the scheme also benefits me' (2012: 269). So, conscription is permissible (and 'the conscript has a duty to serve' (2012: 269)) if, had conscription not been enforced, she would have been in a worse position than she is as a conscript.

In Tadros' words, we should 'compare the costs that she now bears with the costs that she would bear were there no system of conscription' (2012: 269), and if, for instance, she would most probably have been killed in the bloodbath that would have resulted if there had been no conscripted army to defend the country (and if 'there is no fairer method of selecting whom to defend us than conscription' (2012: 269)), then she is not wronged by being forced to give up her rights and serve as a soldier.

Of course, this is most usually not the case, and Tadros himself admits that where it is not, where for instance 'sufficient numbers consent to serve' (2012: 270), then conscription is not justified. But he maintains that conscription is still 'permissible under the strict conditions specified' (2012: 270). However, I do not think that this practical criticism can successfully defeat moral concerns about the problem of conscription. People can surely be wronged by such things as the enforced removal of their human rights even if it benefits them in a practical sense.

For instance, if someone objected to having a blood transfusion for religious reasons, and a hospital overrode his wishes, gave him a blood transfusion and saved his life, then that person has undeniably benefited from the doctor's actions, and yet it does not seem a mistake to say that he has also in some sense been wronged. In a similar way, if a total pacifist was conscripted, surely even if he would have died had he not fought in that war, the fact that it was done against his wishes, that he was completely opposed to fighting,

surely means that he too is wronged by that action, even though it had more benefits than costs for him.

For these reasons, I believe Walzer's argument that people can 'temporarily forfeit their human rights to life and liberty', in Martin's words (2007: 76), even if they have not chosen voluntarily to do so, is not only problematic for Walzer's definition of 'human rights', but is also a morally worrying suggestion, which one can only hope few people – and fewer governments – have come to accept.

Rawls also opts for the second possibility, arguing that combatants can forfeit or surrender their rights for a limited time. However, he has a different answer to the question of how to justify sacrificing or denying the individual rights of combatants in wartime.

He argues, as Martin puts it, that combatants have an entitlement to 'mutual self-defense against attack'; meaning that, since 'soldiers on each side are protecting themselves, in combat, from attacks by soldiers on the other side; and since the attacks from either side can be deadly, each side may use lethal force in self-defense' (2007: 76). Rawls writes, for instance, that 'the reason why they [soldiers of the state being justly attacked] may be attacked directly is not that they are responsible for the war, but that well-ordered peoples have no other choice. They cannot defend themselves in any other way, and defend themselves they must' (1999: 95-6).

In short, although Rawls believes that one must 'respect, so far as possible, the human rights of the members of the other side, both civilians and soldiers' (1999: 96), the soldiers' right to life cannot in most circumstances be respected if one's own combatants are to defend themselves; and the necessity of defence (in an individual case which is a smaller part of a campaign of national or collective defence) outweighs the necessity of consistently respecting the human rights of the enemy combatants, who are after all a group whose profession (whether freely chosen or not) compels them to fight enemy combatants, and therefore carries with it the accepted risk of being attacked in defence. This is why Rawls states that one 'must respect . . . the human rights of the members of the other side' only '*so far as possible*' (1999: 96, my italics).

Rawls' argument means that combatants only become vulnerable to attack – only surrender their rights to life and liberty – when it is necessary for the 'other side' (1999: 96) to defend themselves by using lethal military force. This differs from Walzer's argument that all combatants 'forfeit' (Martin, 2007: 76) their rights to life and liberty for the duration of the war in one important way. Rawls' argument would, in Martin's words, 'restrict the *extent* of vulnerability considerably', so that 'the range of acceptable vulnerability might be restricted, under the standards of self-defense, to active deployment or readiness for combat on the field of battle or actual fighting' (2007: 77).

However, as Martin pointed out, it is not entirely clear that Rawls' argument succeeds in proving that *all* combatants have an equal right to attack. Just combatants may have a right to attack unjust combatants because 'They [the justly fighting state] cannot defend themselves in any other way, and defend themselves they must' (1999: 96). But Rawls does not explain why unjust combatants should have the right to defend themselves against just combatants.

It is less clear that an unjustly fighting state *must* defend itself – indeed, if its war is aggressive and its opponents are fighting to defend their rights and freedoms against its oppression, then McMahan, for instance, might argue that the aggressive state's soldiers have no justification for defending themselves against the just combatants at all. The just combatants, in Martin's words, are 'defending human rights, not violating them, and...acting properly in doing so' (2007: 78), and Rawls gives no reason why there should be a moral necessity for unjust combatants to defend themselves against the justified actions of their opponents.

Therefore, I believe that Walzer and Rawls do not successfully prove that all combatants must surrender or forfeit their rights to life and liberty by the simple act of becoming combatants during wartime. This is a serious problem for Walzer's and Rawls' arguments that the rights to 'life and liberty' (Walzer, 1977: 54) ground just cause for war.

This problem, it seems to me, can best be answered by abandoning a definition of just cause grounded upon these rights of life and liberty, and turning to a definition grounded upon the individual right to defence, as I intend to.

1iii) Further issues with the collectivist strategy

Now, I turn to the problems with the collectivist strategy as a whole. Firstly, Rodin attacks the collectivist argument that the appropriate end of a right of national defence is ‘the ‘common life of a community’ (2002: 127). He criticises all three of the concepts of ‘common life’ that he identified – firstly, he argues that a definition of common life based upon state legitimacy cannot successfully ground a right of national defence, for two reasons.

The first is that there is ‘a prima facie universalist argument implicit in the...account which is in deep tension with the notion of a right of national-defense for individual nation states’ (2002: 146) – in that according to this account the very justification of the state’s existence derives from ‘its ability to provide order in human affairs’ (Rodin, 2002: 145), but by according states a right of national defence, we create a state of nature at the national level. This means that the state’s ‘ability to provide order’ (2002: 145) is, in Rodin’s words, ‘incomplete, because individuals remain insecure, their life and projects liable to disruption at any time from the outbreak of hostilities between states’ (2002: 146).

Rodin’s second reason is that, even if we accept the basic premise of the account of ‘common life’ based upon state legitimacy, ‘it is difficult to see how there could be a right to defend against aggressors who seek to conquer and rule’ (2002: 147). This is because such aggressors do not threaten ‘political association as such, but...the particular form of a given political association, and we as yet have no account of why one form of stable political life should be preferred over any other’ (2002: 147), as long as it ultimately provides us with the same (or a better) degree of order.

Next, Rodin criticises a second possible collectivist interpretation of the common life, that common life can be defined as ‘the embodiment of a particular cultural and historical heritage’ (Rodin, 2002: 142), on the grounds that it ‘brings us perilously close to a relativism of value’ (Rodin, 2002: 150), when objective values are necessary both in order for the proportionality requirement embedded in a right of defence to have any real use or meaning, and also for the right of national defence itself, which, in Rodin’s words, ‘is,

by its very nature, asserted across national boundaries by one state against another' (2002: 151).

Finally, he criticises Walzer's particular interpretation of the common life, arguing that when Walzer holds 'the particular character of a community...to underlie the right of national-defense', he ignores the fact that 'human communities do not coincide with the boundaries of states'. In fact, as he goes on to say, 'No community is ever fully integrated within a particular state and no territory ever nurtures but a single community' (Rodin, 2002: 158).

For instance, multiple nations exist within the United Kingdom, and even within one nation each of us may simultaneously belong to a number of distinct communities – Rodin suggests that 'communal affiliations' may be 'defined by my family, my neighbourhood, my city, my national region, my country, my international region, and perhaps also the global community' (2002: 159). I think that Rodin makes coherent points against all three collectivist interpretations of the common life, and in particular against Walzer's argument.

Another objection to the collectivist strategy (targeted particularly at Walzer's collectivist argument, but applicable to the collectivist approach as a whole) may be seen in the arguments of Richard Wasserstrom, Gerald Doppelt, Charles Beitz and David Luban. Their point is that Walzer, and the collectivist strategy in general, focuses too much upon the rights of states, and in so doing, ignores the rights of individuals, which leads to some unpleasant and counter-intuitive conclusions. Wasserstrom, for instance, writes that under a collectivist account, 'The rights of states, and not the rights of individuals, come in the end to enjoy an exalted, primary status within the moral critique of aggression' (1978: 544).

Doppelt similarly writes that it 'places the rights of de facto states above those of individuals' (1978: 26), Beitz added that Walzer's argument 'belongs to the morality of states' (1979: 412) (presumably rather than that of individuals), and Luban also distinguished between nations and states, arguing that a 'nation' or 'political community' (1980: 168) is 'the more-or-less permanent social basis of any state that governs it' (1980: 169), and that Walzer confuses a nation with a state, according even an illegitimate state (defined as 'one governing without the consent of the governed') the 'right

against aggression' (Luban, 1980: 169) which rightfully belongs to the nation, not the state, being grounded in the consent of individuals which binds together communities rather than states.

They therefore argue that a collectivist's focus upon state rights, which gives the right of a state an importance that can trump the individual rights of citizens of that state, is implausible. This is because, in their view, the "statist"...character' (Walzer, 1980: 209) of collectivists like Walzer's theories leads to 'granting illegitimate states a right to which they are not entitled' (Luban, 1980: 169), namely, the right to defend themselves against aggression.

In Walzer's words, their argument is that Walzer's view 'conserves...the authority or sovereignty of illegitimate, that is tyrannical, regimes' (1980: 210), whereas such thinkers as Luban emphasize that individual rights are more important than the rights of states, and would thus be 'more open, given certain qualifications about proportionality, to an activist and interventionist politics aimed at overthrowing such regimes and maximizing the enjoyment of individual rights' (1980: 210).

Walzer responds that the subject of his argument is in fact 'not the state at all but the political community that (usually) underlies it' (1980: 210), suggesting that Beitz and Luban (at the least) have misunderstood his point here. He argues, briefly, that 'The state is constituted by the union of people and government, and...Foreigners are in no position to deny the reality of that union', because they cannot, from an outsider's perspective, know enough about 'the conflicts and harmonies, the historical choices and cultural affinities, the loyalties and resentments, that underlie it' (1980: 212). For this reason, they should abide by 'a morally necessary presumption: that there exists a certain "fit" between the community and its government and that the state is "legitimate."' (1980: 212).

Walzer suggests that citizens of tyrannical states are not obligated to defend their states, that they are 'as free not to fight as they are free to rebel', but that 'that freedom does not easily delegate to foreign states or armies and become a right of invasion or intervention' (1980: 214). This may be a convincing argument that a concern with individual rights does not necessarily mandate us to intervene and attempt to protect the rights of others (at least not without

other conditions being fulfilled), but I do not feel that it reaches the heart of the ‘statist’ objection here.

Even if we accept Walzer’s argument against ‘interventionist politics’ (1980: 210), we are still left with the issue that the collectivist view prioritizes the rights of states over the rights of individuals, and even if this prioritization does not have the specific consequences that Beitz, Luban and the others attribute to it, it still has counter-intuitive implications.

Basically, it suggests that the individual rights upon which the state’s rights are grounded are less important than those state rights, since an individual’s rights may be forfeited much more easily than a state’s. It seems to me that a theory which ‘places the rights of...states above those of individuals’ (Doppelt, 1978: 26) essentially gets its priorities backwards.

If state rights are of fundamental or primary importance here, meaning that a just cause for war is the defence of a *state*, then (presuming the fulfilment of the right intention criterion) that is the aim of that war; the lives of the citizens themselves are of secondary importance, and if it becomes necessary for some to be sacrificed in order to preserve the ‘political community’ –for instance, by allowing the enemy to eliminate some section of the population in order to mount a successful defence of the whole territory, rather than surrendering some of that territory in order to save lives – then if such a sacrifice were a ‘foreseen but unintended’ consequence of that country’s military tactics, a case could be made for its permissibility. This seems to me to be not only very troubling, but a hollow victory; the continued existence of a political entity is fruitless without the continued existence of the individual people who make up its population.

The continued existence of a specific political entity, by contrast, is not absolutely essential for the existence of its citizens – they could in most cases exist just as well (and in some cases better) as citizens of another polity. If the just cause is the defence of the individual lives of a country’s citizens, and a successful defence meant that the ‘political community’ would be altered so substantially that it could be said to have ceased to exist – say, if a formerly unified country was split up into three or four smaller countries – then this might seem to be an acceptable consequence of the successful defence of the lives of the people who lived in the former country.

Rawls' argument that only some nation-states, and not others, are morally permitted to wage war in self-defence seems vulnerable to the same criticism. He argues that 'well-ordered peoples' (1999: 4), meaning 'liberal democratic societies' (1999: 5) and 'decent peoples' (1999: 4) (i.e. 'nonliberal societies whose basic institutions meet certain specified conditions of political right and justice (including the right of citizens to play a substantial role...in making political decisions) and lead their citizens to honor a reasonably just law' (1999: 3)) are morally permitted to go to war in self-defence, as are benevolent absolutist states which 'honor human rights' but deny their members 'a meaningful role in making political decisions' (1999: 4). However, Rawls suggests that states which 'think a sufficient reason to engage in war is because war advances, or might advance, the regime's rational...interests', or 'have a state policy that violates the human rights of certain minorities among them', are 'outlaw states' (1999: 90) and do not have the right to go to war in self-defence²⁷.

The result is that dictatorships like North Korea which curtail some or many of their citizens' liberties, like their rights to freedom of movement, for instance, have no right to defend their people from attack, even if the war they are fighting is wholly defensive; no well-ordered state is able or prepared to step in and defend the citizens; and North Korea's hypothetical enemy, which has an even worse record of human rights, plans to slaughter every inhabitant of that country. While the dictatorship may not itself respect many human rights, it may be (and probably is) possible for its citizens to live a minimally satisfying life under its rule, and they are likely to prefer that life to being indiscriminately slaughtered.

²⁷ Rawls also identifies a fifth category, that of 'burdened societies' which exist under 'unfavorable conditions...historical, social and economic circumstances [that] make their achieving a well-ordered regime...difficult if not impossible' (1999: 90). Burdened societies also lack the 'right to war in self-defence' (1999: 92). However, Rawls goes on to say that well-ordered peoples have a 'duty of assistance' (1999: 108) towards burdened societies, although he defines this as a duty to 'bring burdened societies...into the Society of well-ordered Peoples' (1999: 106), by for instance 'help[ing] a burdened society to change its political and social culture' (1999: 108). Leaving aside the slightly paternalistic air of this 'duty', it might be extended into a moral duty for well-ordered societies to assist burdened societies should their citizens require defence against an aggressive outlaw state. After all, it would be hard to bring a society into the great family of well-ordered peoples if its citizens are all dead. Therefore, I have focused on outlaw states.

This argument seems unfair to the people living in outlaw states – their state lacks the right to defend them not because the war they are fighting is aggressive, but because of the nature of their state. It has the result that their lives are less protected by Rawls’ theory, because they are not part of a ‘well-ordered’ people. Thus Rawls’ argument can also ride roughshod over individual rights in favour of state rights, in that it may result in denying some individuals the right to have their individual lives defended.

For these reasons, I do not think that a collectivist strategy can explain how defence as a just cause can be grounded upon a right of defence. Besides the problems with defining what the common life is, and how state rights can be formulated to defend such a concept, it seems to me that collectivism unfairly prioritises state rights over individual rights – if state rights are derived from an analogy with individual rights of life and liberty, the collectivist can give no adequate explanation of why state rights should be more important than those individual rights – rather, since individuals are ontologically prior to states, should individual rights not be prioritized over those of states?

Reductive individualists would agree that they should. However, the argument that defence of a nation or state can be grounded in the defence of the individual lives of its members is also subject to some criticism.

liv) The reductive individualist strategy

Reductive individualists such as Frowe, McMahan, Fabre, Henry Shue, and C. A. J. Coady ‘seek’, as Nicholas Rengger puts it, ‘to untie the close links that have bound the [just war] tradition to the state’ (Rengger, 2013: 96). They have developed various different ways to ground the justifiability of fighting a defensive war in the individual defensive rights of the citizens of the belligerent nation.

The most central argument is, in Frowe’s words, that ‘What a state may do to protect itself is just an extension of what individuals can do to protect themselves’ (2011: 34). In short, instead of using an analogy from individual or ‘domestic’ life to collective or political life, a reductive individualist ‘takes war to be a continuation of domestic life’ (Frowe, 2011: 34) (in what might

appear to be an echo of Clausewitz's suggestion that 'war is a mere continuation of policy [politics] by other means' (1997: 22)).

For instance, McMahan argues that 'justified warfare just *is* the collective exercise of individual rights of self and other-defense in a coordinated manner against a common threat' (2004: 717). His view is that 'conditions of war change nothing at all', but rather, the morality of war should 'reflect as closely as possible the same principles of justice and liability that govern conduct outside of war' (2006: 47). This would seem to suggest the first of the two kinds of reductive individualism that Rodin identifies – the suggestion that war is reducible to a large number of individual people 'exercising the right of self-defense at the same time and in an organized fashion' (2004: 140).

This is at the heart of McMahan's argument for the moral inequality of soldiers; an individual aggressor who is liable to be attacked by his victim (in the stronger sense, at least) is not permitted to engage in counterdefence against his victim, and since war is 'the collective exercise of individual rights of self and other-defense' (McMahan, 2004: 717), the unjust combatants, each of whom is an unjust aggressor, are similarly not permitted to engage in counterdefense against the victims of their collective act of unjustified aggression (namely, the combatants fighting against them).

Frowe agrees with McMahan that war is 'part of ordinary life, to be judged by ordinary moral rules' (Frowe, 2014: 124), and that 'moral responsibility in war attaches to individuals, not collectives' (2014: 124). Thus, she argues in favour of 'a reductive individualist view of war' which 'denies that collectives enjoy a privileged moral status when it comes to inflicting harm', meaning that states and nations do not themselves have rights, nor can they confer rights upon combatants (such as Walzer's 'war rights') which they would not have had 'in a relevantly similar domestic context' (2014: 125).

On this view, the subject of the right of defence grounding just cause for war would be the 'individual citizens within the state' (Rodin, 2002: 123), collectively; the object would be the individual citizens of the enemy state who are acting aggressively towards the citizens of the first state, and the end is, similarly, the lives of the individual citizens of that first state.

However, as Rodin points out, reductive individualists might also argue that the state can be the appropriate subject and 'perhaps also the object' (2002:

129) of a defensive right, so long as the *end* of the right is still seen in terms of the individual lives of citizens. The traditional version of this argument suggests that the state would have a right ‘to defend its citizens in much the same way that a parent has the right to defend his or her child’ (Rodin, 2002: 129), whether it could properly be said to be the enemy state or the citizens of the enemy state that it was defending them from. For instance, Fernando Teson defines a defensive war as ‘*governmental action to defend the rights of its subjects, that is, the rights of individuals*’ (1997: 113). This is the line I intend to take, although I hope to define the method by which the state derives this right in a slightly different way, in order to avoid Rodin’s criticisms of this argument.

This would mean, ultimately, that a definition of just cause for war would be the defence of the lives of individual citizens of a state. Thus, that state could justify defence against the violent and aggressive invasion of another state, as that invasion would threaten the lives of citizens of the invaded state – or, as Hurka suggests, ‘there can also be a just cause when one state sponsors or allows deadly attacks on another's citizens without threatening the other's territory’ (2005: 35).

An alternative method of reducing collective defence to the defensive rights of individuals was developed by cosmopolitan thinkers such as Fabre, who writes that an account of war ‘in which the individual, as a moral and rational agent, is the fundamental focus for concern and respect’ is best served by the ‘political morality’ known as cosmopolitanism, under which ‘the individual, rather than the nation-state, is central’ (Fabre, 2014: 2).

Cosmopolitanism, as another leading cosmopolitan, Nigel Dower, defines it; is ‘the claim that all human beings are in some sense ‘citizens of the world’’ (2009: 60). In defining the ‘general *goal*’ of cosmopolitanism, he suggested that a cosmopolitan ‘has a set of values and norms which he or she thinks should be universally adopted and seeks ways to promote these’ (2009: 67).

The central claim of cosmopolitanism, for our purposes, is the rejection of what Dower calls ‘internationalism’ (2009: 67) or ‘the morality of states’ (2009: 71) – the collectivist approach which assigns duties and rights to states and which assumes that, in Dower’s words, individuals are ‘objects, not

subjects, of international law and do not have rights against any states except perhaps their own' (2009: 59).

Hence, both a cosmopolitan and reductive individualist approach to just cause for war argue that, in Frowe's words, 'there is one morality, and...everything falls under its remit' (2014: 123). For this reason, they argue that 'War is not a special moral sphere with special moral rules. Rather, it is a particular aspect of ordinary life to which we apply our ordinary moral rules' (Frowe, 2014: 123).

1v) Issues with the reductive individualist approach

Reductive individualism is criticized most notably by Rodin. Firstly, he argues that the first kind of reductive individualism that he had identified, the view that collective defence is simply the collective application of the individual defensive rights of a large number of people, is 'incapable of providing an adequate moral justification for the right of national-defense' (2002: 127), for three reasons:

- 1) Firstly, there is the fact that 'the liberties enjoyed by soldiers of a defending state in the national-defense paradigm extend well beyond what could be justified in terms of the personal right of self-defense alone' (2002: 127). Combatants (presumably) have the right, for instance, to attack enemy combatants who are not an immediate lethal threat to anyone, being asleep or otherwise unprepared.
- 2) Secondly, as Rodin writes, 'the requirement of necessity which is implicit in the right of self-defense generates a requirement for threatened persons to retreat if it is possible to avoid harm without resort to force by so doing...But the right of national-defense is not normally thought to entail a duty to appease aggression' (2002: 128).
- 3) Finally, he argues that a reason to reject the reductive individualist view is that it overlooks the fact that 'within the Just War Theory the rights of war, including the right to kill enemy

soldiers, are held equally by soldiers on both sides of a defensive war' (2002: 128).

I think, as I have already shown, that McMahan's arguments in favour of the moral inequality of combatants give us a plausible reason to reject Rodin's first and third objections to reductive individualism – the equality of combatants thesis that Rodin outlines here does not by any means constitute the only or the whole of just war theory in this area, and an inequality thesis would account for just combatants' right to attack unprepared enemy combatants, as this is part of a larger justified act of defence. However, this still leaves the second criticism unanswered, and Rodin has not yet done.

He adds that the second form of reductive individualism, the view that 'the state has an obligation (and therefore a right) to defend its citizens in much the same way that a parent has the right to defend his or her child' (Rodin, 2002: 129), has two problems. The first, which he terms 'the argument from humanitarian intervention', states that this argument justifies wars of humanitarian intervention on the same grounds as wars of national defence.

For instance, if war can be justified to defend the citizens of state A from state B's aggression, and it can be justified either on the part of state A or a third state C on A's behalf, then 'if a particular military action of state C is justified by the fact that it defends the endangered lives of the citizens of A, then it should make no difference to the morality of C's action whether the citizens of A are threatened by their own state or a third party' (2002: 131).

This, Rodin argues, is the wrong conclusion, because, in his words,

'Common sense tells us that humanitarian intervention is a very different creature to national-defense. They are different and indeed antagonistic because one is directed towards the maintenance of state sovereignty while the other involves an explicit permission to violate it' (2002: 130).

Secondly, Rodin criticises this form of reductive individualism using his 'argument from bloodless invasion' (2002: 130), which Frowe referred to as 'the Conditional Force Argument' (2014: 124). This is the argument that it

should (according to ‘international law and in the just war tradition’) be the case that ‘the right of national-defense...can be effective in the face of acts of aggression which threaten the lives of no citizens of the victim state’ (Rodin, 2002: 131-2).

Rodin gives the examples of a state which violates another’s ‘territorial integrity and political independence’ (2002: 132) by invading or annexing a totally uninhabited and economically useless piece of land belonging to the second state; or an invasion which demonstrates ‘such an overwhelming show of force that the victim state declines to resist and the intervention is accomplished with no loss of life’ (2002: 132).

In the case of such invasions as these, where no lives will be threatened unless the victim state resists the invasion, Rodin suggests that reductive individualists cannot justify war in defence of the invaded state. The reason for this is that, as Frowe summarizes it, ‘lethal force is a proportionate response only to threats to what Rodin calls *vital interests*’ (2014: 125) – such as one’s life.

Fighting to protect a non-vital lesser interest like property rights to an uninhabited piece of land, or resisting a threat which is not currently lethal but will foreseeably become so if one resists it²⁸, would be disproportionate, since it would constitute, as Lazar suggests, ‘seek[ing] out a fight, to protect something other than human life, which could often be conceded without any blood being spilt’²⁹.

Thus, if the flourishing lives of the citizens are not under threat by the invasion, then there can be no justification for war. And, Rodin says, this too is a counter-intuitive conclusion, as any defensive right needs to permit a state to defend itself in these cases. If it did not, any state could successfully invade another simply by stating truthfully that they will harm none of the invaded state’s citizens so long as no resistance is offered them.

However, this does not seem a particularly compelling objection to the reductive individualist view. If a burglar enters your house and tells you that

²⁸ Rodin argues that if it is known (to a reasonable degree of certainty) that resisting a non-lethal threat will result in that threat becoming lethal, then, as Frowe puts it, ‘any calculation about the proportionality of this...resistance must take into account the harms that the victim state foresees will be inflicted by the aggressor in response’ (2014: 127).

²⁹ This quote is from Seth Lazar, ‘The Moral Importance of Winning’, which is an unpublished manuscript cited in Frowe, *Defensive Killing*, p125.

he intends to take some of your belongings, if not the most valuable then perhaps the most treasured, but that he will not harm you in any way unless you attempt to stop him, in which case he will try to kill you and your family, then are you thereby obligated to let him take whatever he wants, and forbidden from trying to prevent him? It does not seem to me that you are.

In the same way, while the lethal indirect consequences of your resistance must undoubtedly be taken into consideration in the proportionality calculation, it does not seem to me that they should prohibit the possibility of resistance, even if they are proportionally greater than the good achieved. Rodin admits that such indirect consequences or ‘mediated harms’ do not, in Frowe’s words, ‘weigh as heavily in the proportionality calculation as harms that Victim will inflict himself’ (2014: 127) – perhaps they are more heavily discounted against than even Rodin wishes to allow.

In addition, Frowe responds to Rodin’s objection by arguing that Rodin’s argument (which she refers to as the ‘Defence Account’ (2014: 129)) does not plausibly accommodate cases where vital interests are at stake. She gives the example of a woman (Alice) who is about to be raped by a man who will go on to rape two other women if and only if Alice attempts to resist his attempt to rape her (and whose friend will do so if Alice manages to kill the rapist himself).

In this case, one of Alice’s vital interests, that of bodily integrity, is being threatened, but if her proportionality calculations must take account of the harm which her rapist or his friend will inflict upon others ‘as if she would be inflicting the...harm herself’ (Frowe, 2014: 130), then (since two women will be raped if she resists, and she is only one), she would seem to be morally prohibited from defending herself, because to do so would be disproportionate.

Frowe rightly points out that this is a highly counter-intuitive result, precisely because a vital interest is threatened. But if the proportionality calculation would make defence of a lesser interest disproportionate if such defence would result in the infliction of greater harm than would be prevented, why should it not do so where the defence of a vital interest would do the same? As Frowe observes, it is simply ‘not clear’ why Rodin’s argument ‘should be sensitive to this distinction between lesser and vital interests’ (2014: 131).

Thus, Rodin's account of defence, which he claims shows a serious problem for reductive individualism, has itself an equally serious problem, which would seem to make it untenable as it stands.

Even if we accept that defence of lesser interests is made disproportionate and, thus, prohibited by the inclusion of 'mediated harms' (Frowe, 2014: 129), the inclusion of 'mediated harms' in our proportionality calculations will often make it impermissible for us to defend our vital interests as well, which is patently ridiculous.

Frowe suggests that we may either completely reject Rodin's argument as a result of this problem, or we may modify his argument to take account of it. Her suggestion is that we modify it. She proposes a 'Revised Defence Account' (2014: 135), according to which 'bringing about the objectively less harmful state of affairs' is required only if doing so does not impose 'more cost than Alice can be required to bear to bring that state of affairs about' (2014: 137).

Victims like Alice are, under Frowe's view, only 'required to bear roughly the same amount of cost to prevent mediated harm to others as [s]he would be to rescue others from harm' (2014: 136) – which would be some cost, presumably, but not the cost of such things as her life or bodily integrity.

This is because requiring Alice to bear such a cost would be to require her 'to treat herself as a means', and 'there are limits to how much cost we can be required to bear to such ends' (2014: 135). Thus, Frowe claims, the only way to retain Rodin's mediated harms in the proportionality calculation is to modify it in this way, which would also be to preserve reductive individualism from Rodin's criticism.

In Rodin's 'bloodless invasion' example (2002: 130), Frowe suggests that under her Revised Defence Account, it would be possible for a reductive individualist to justify the rights of the members of the victim-state to defend themselves against this threat, because if the victims resist the invasion and the aggressors do retaliate with violence, then for the reasons just stated, 'the members of the victim state need not proceed as if they are themselves inflicting these harms' (2014: 137).

If, as Frowe thinks, they would not be required to sacrifice such things as the land being annexed, or the freedoms being taken away, in order to rescue

others from harm, then they are not required to do so to prevent the harms that the aggressor state will inflict should they resist. They may, therefore, permissibly defend themselves against such invasions – unless, of course, ‘they predicted that doing so would result in sufficiently graver harm to a sufficient number of innocent people’ (Frowe, 2014: 137), which, Frowe argues, is ‘not generally’ the case (2014: 138).

However, I have one problem with this response. It suggests that people are not required to make such sacrifices in order to rescue others from harm. It may be the case, as Frowe suggests, that we need to be ‘generally sceptical of the role that Rodin attributes to a duty of care’ (2014: 138) but we must have *some* duties to rescue others from harm (especially if, as Frowe’s acceptance of the ‘mediated harms’ doctrine would suggest, we are responsible for the harm that those others will suffer). How much cost would be too great to require us to bear for such a duty?

In the example of an aggressive state which intends to conquer another nation, but will only harm its citizens if they resist, this does seem to be a clear-cut case of a too-high cost – no one is required to sacrifice their own or another person’s liberty in order to rescue others from harm.

But the first case, the annexation of an uninhabited piece of land, is a bit more complicated. Is the loss of what is presumably useless real estate, really a cost too high to require someone to bear in order to rescue other people? On an individual level, if the only thing that would save the lives of a number of people would be for me to give up a small portion of my back garden which I was not using and did not need for anything essential (say I was using it as a place to store my compost bin) would I be morally permitted to say ‘No, I’m sorry these people are going to die, but I like my bin where it is, and I can’t be bothered to move it’?

Intuitively, I don’t think I am. If we have any duties to rescue others from harm, then those duties should hold in cases where the only sacrifices to us are this lesser kind. If they only hold in cases where the sacrifice to the rescuer is trivial or non-existent, then they are themselves trivial duties.

I have not the space here to develop a full account of such duties of rescue, but if they do exist, then they need to be robust enough to remain duties unless the act of rescue would force the rescuer to undergo serious sacrifices – and

the loss of land that is neither necessary for survival nor highly valued does not seem to me to be a serious enough sacrifice.

For this reason, I would question how far Frowe's Revised Defence Account answers Rodin. She could perhaps justify a right to defence against a 'conditionally violent' invasion which will ultimately deprive the victims of their autonomy, their freedom to govern themselves, as this would undoubtedly be a cost too great for a rescuer to be required to bear, but I believe that the loss of an uninhabited piece of land would not be too great a cost, and so her account would not always justify a people in defending their territorial borders.

Therefore, reductive individualism, while a stronger move from individual to collective defence than collectivism, also has its weaknesses. I hope to at least somewhat resolve some of these problems, by proposing a slightly different individualist account of just cause for war.

2: An Alternative Individualist Justification for the Right of Collective Defence.

Thus, one of the main difficulties with the collectivist view lies in the fact that, in positing a separate right of defence for individuals and for collective entities like states, it can sometimes unfairly prioritise these state rights over the rights of individuals; and one of the main difficulties with the reductive individualist view is that it cannot always seem to explain why a group should have a right of defence against aggressive threats that do not necessarily threaten members' individual lives.

Some versions, like Fabre's cosmopolitanism, go so far as to argue that collective entities have no rights at all (which I do not agree with), but even those versions which argue that some collectives have rights to defend individual members, nevertheless depict these rights as implausibly narrow. I here attempt to construct a reductive individualist account which does not

suffer from this problem, nor from the collectivist tendency to prioritise collective rights over individual rights.

I will begin, as reductive individualists do, with the individual rights of defence belonging to each person within a collective entity. As I argued in the previous chapter, there is good reason to believe that these individuals all possess a right of self-defence.

The question, then, is how do we get from a right, held by each individual, to defend her own flourishing life, to a right which can justify the actions taken by collectives to defend their shared interests and goals, which may appear to go beyond simply defending the flourishing lives of each member of that collective, as in the bloodless invasion example. I believe that a state can be justified in at least some defensive action against a bloodless invasion, and any account I give will have to take note of this.

It seems to me that the issue of grounding a definition of just cause for war upon defensive rights need not involve such a problematic move from individual to collective defence as many reductive individualists use. Rodin's summary of the reductive individualist position is that states or other collectives can have rights to protect their citizens or members as parents have the rights to protect their children, because they have duties of care or rescue towards them. I would suggest that these duties (along with all the problems Rodin identifies with using duties of care and rescue in this way) are not necessary; that states can derive rights from the individual rights of their citizens in another way.

My account of the derivation of state or collective rights begins with the idea that since individuals possess individual rights of self-defence, they can delegate those rights to others – both to individuals and, more importantly, to collectives. This is not quite the same as the extension of defensive rights to others that occurs in a case of other-defence. Let us consider the straightforward other-defensive case that I will call Assisted Defence: Victim is being attacked by Aggressor, Bystander observes this and jumps in to repulse Aggressor, either in conjunction with Victim or alone if Victim is (for instance) too badly injured to continue defending herself.

If liberty-rights of other-defence exist (and I will assume that they do) then Bystander has the liberty-right to defend Victim (whether that right is

grounded upon a duty of care or of rescue, or upon something else, which is unimportant for our purposes). But Victim retains her own liberty-right to defend herself as well (although if a duty of rescue has been invoked, she may lack the power to do so). In short, Victim's right to defend herself from Aggressor and Bystander's right to defend Victim from Aggressor co-exist simultaneously. This is not the case with the delegation of a right of defence.

This can be demonstrated with the following example. Let us say that Victim is being unjustifiably attacked by Aggressor. In most examples of this kind, it is assumed that Victim is alone with Aggressor, or observed by other non-official Bystanders, and thus Victim must defend herself against Aggressor or die.

But if there are members of the official police force present, as representatives of the state to which Victim has delegated her defensive right, then it seems clear that Victim may not defend herself against Aggressor; that she must allow the police to defend her instead. If the police arrive whilst she is in the process of defending herself, she may not continue to attack Aggressor, even if he continues to attack her – she must allow the police to stop his attack once they have begun to do so. Let us call this Police Defence.

The reason for this at first seems simple. Once the police have arrived and are in the process of defending Victim from Aggressor, then there is no longer any *need* for Victim to defend herself. As Rodin has said, and I accept, any justified defensive action must be 'a proportionate, necessary response to an imminent threat of harm' (2002: 99). The intervention of the police means Victim's defensive actions are unnecessary.

If Aggressor is running towards Victim intending to kill her, with Policeman present, and both Victim and Policeman have guns, then Victim may not shoot Aggressor to save her life unless she has good reason to believe that Policeman cannot or does not intend to do the same, as only then is her defensive action *necessary*. If Policeman is going to save her, then she does not need to save herself.

But there must be something else at work here. In Assisted Defence, I said that if Bystander leaps to Victim's defence, Victim still retains her liberty-right to self-defence, and may fight alongside Bystander to help subdue Aggressor. Intuitively, it does seem that Victim's right has to be robust in this

way, that Bystander's defence of Victim should not render her powerless to defend herself.

But in this case, just as in Police Defence, Bystander's actions, means that Victim's defensive actions may not be necessary to save her life. Let us assume that both Victim and Aggressor are unarmed and under-sized, while Bystander is big, strong and armed with a large gun (which he knows how to use). It is reasonable to assume, under these circumstances, that Bystander will be able to defend Victim even without Victim's help. Does this mean that, once Bystander arrives, Victim no longer has a right to defend herself but must allow Bystander to defend her (presuming she has good reason to believe he will)?

It does not, for a simple reason. The *action itself* is necessary, although it may not be necessary that Victim herself perform it. Some defensive action has to be taken, and if it is within Victim's power to perform at least a portion of that action in conjunction with Bystander, then it is at least permissible for Victim to do so. If the defensive action itself is a necessary and proportionate one, both Victim and Bystander have a right to perform it, and these rights do not cancel each other out – either may perform it or both together.

Why, then, is this not the case in Police Defence? What makes the right of the police, as state representatives, to defend Victim appear to supersede Victim's liberty-right of defence, when it does not do so in Assisted Defence? The most plausible answer to this question, to my mind, is that Victim *delegates* her right of defence to the state, appointing it to act on her behalf in this case and agreeing that she will let it act defensively for her.

I have given the example of the police force as a collective that exercises delegated individual defensive rights. However, these defensive rights are obviously not delegated to the police force as an autonomous institution; for indeed the police force is not such an institution. It is, rather, the internal law enforcement arm of the state, and it is as agents of the state that the police are obliged to exercise delegated individual rights. When defensive rights are delegated to the state, although the state is a collective entity composed of all its members, each member does not have the duty to perform the defensive rights delegated to that entity – the duty devolves upon those people who have

accepted the positions as agents of the state, such as members of the police force or armed forces.

What this means is that Victim allows the state, through these agents, to exercise her right of defence on her behalf, *just so long as they are in a position to do so*. This necessary clause means that she does not permanently surrender that right, but stipulates that while she always possesses it, the state must exercise it for her when its agents are in a position to (and intend to) do so. In addition, this defensive right is stronger for the entity it is delegated to; a duty rather than a right. The state may not avoid exercising the defensive rights entrusted to them.

The issue of how and why such rights are delegated to collective entities or organisations is very complex, and I do not have the space to fully explore it in this chapter. I will therefore explain it in greater detail in Chapter Four. In this chapter, it is my task to show how the move from individual to collective defence which is essential to a rights-based account of just cause can be grounded upon this delegation of rights.

The question first arises: are the defensive rights which are delegated to a collective entity *collective* rights, possessed by the collective itself, or do they remain individual rights? I believe that they remain individual rights, but their delegation to a collective entity results in a collective right to exercise these defensive rights on behalf of the rights-holders, which may, for brevity's sake, be referred to as a collective right of defence. Therefore, I intend to use an individualist grounding for collective rights of defence, in which such rights can and do exist, but they are rights to defend a collective's individual members rather than rights to defend the collective itself, and they are based directly upon the rights of these individual members through delegation. When I argue that some collectives possess a collective right of defence, therefore, it is a shorthand term for the collective right to exercise individual defensive rights delegated to that collective.

This grounding of collective rights is similar in some ways to the Lockean social contract view; according to which, in Michael Lessnoff's words, in order to become a member of any 'particular Political Society' (Locke, 1988: 352) each individual 'must give up' certain individual rights to the state (such as the right to punish 'breaches in the law of nature for himself' (1986: 61))

through express or tacit consent, which amounts to ‘a transfer of individual rights’ to that society (Lessnoff, 1986: 62). My view draws upon elements of Locke’s social contract theory, and is similar in that I also ground the delegation of defensive rights upon the express or tacit consent of individuals to that delegation, and in that I follow Locke in rejecting the Hobbesian notion that individuals ‘are under any obligation to transfer any rights to the political community’, instead attempting to prove that individuals ‘have good reason’ to delegate their defensive rights, and ‘have done so in the overwhelming majority of cases’ (Lessnoff, 1986: 62).

However, there are differences between the social contract view and my own. For one thing, my focus is solely upon individual *defensive* rights, and I make no claim that other individual rights are delegated in the same way. Also, I do not limit the delegation of individual defensive rights to states alone, but will accept that we may also delegate our individual defensive rights to some non-state collective entities. But most importantly, I argue that this process is a *delegation*, rather than a transfer or surrender of rights to a particular authority; unlike traditional social contract theory, which would follow Locke in suggesting that an individual ‘*gives up* to be regulated by Laws made by the Society’ the rights to ‘do whatsoever he thinks fit for the preservation of himself and others within the permission of the Law of Nature’ and to ‘*punish the Crimes* committed against that Law’ (1988: 352)³⁰.

One important difference this makes between my account and the collectivist account (or the traditional social contract view) is a difference in the *end* of such a collective right. It is not the right of a state (or other collective) to defend its collective life and liberty, but the right of a collective to defend the *individual flourishing lives* of its members. Many collectivists argue that a collective right must have at least one collective end, such as Walzer’s suggestion of a people’s ‘common life’; but under my account, the rights possessed by collective entities, if they can be said to be collective rights in this sense, are rights to exercise all the individual defensive rights delegated to the collective.

³⁰ I will give an account of why this delegation of individual defensive rights to a collective entity is grounded upon active or tacit consent in Chapter Four.

Being still individual rights, these have individual ends – the ends, in fact, do not change with the delegation. What, indeed, would be the point of delegating your right to defend yourself to (for instance) a state if, when you did so, it ceased to be a right to defend *you* and became a right to defend something else entirely, such as the continued integrity or liberty of the state, in which you might (and justifiably) feel that you had a less important interest than in your own life?

In short, while the collectivist account of a right to ‘national defence’, as stated by Dower, for instance, claims that a country has the right to defend ‘itself’, that is, its existence as a country or ‘political community’ (2009: 86), I wish to argue instead that collectives have the right to defend the flourishing lives of their citizens. The two are inevitably intertwined; for the defence of a country’s existence as a political community undoubtedly involves the defence or protection of the lives of its citizens (as it could not exist without them) and the defence of citizens’ flourishing lives from aggression in most cases requires the defence of their particular political community. However, the fact that the end of this right is an individual one does make some difference to the account of just cause based upon this right. This will become clear later.

Thus, I would argue that the end of a delegated defensive right remains the flourishing lives of the individual people whose rights were delegated. It remains for me to outline the rest of the details of the resulting collective right, before moving on to explore what kinds of just cause for war would result from this kind of collective right.

As I have said, the primary subjects of the right would be the individual rights-holders, but the collective entity itself would be the subject of a collective right (and obligation) to exercise the defensive rights delegated to it. Because all the members of a collective entity have an individual right to self-defence, such countries or groups have a right to defend their lives collectively; from attack, from starvation, from disease, from anything that might threaten them (though obviously many of these would not require military action as a means of defence).

One issue with this account is that when an individual delegates her defensive right to a collective, she is not necessarily delegating that right to some external entity, as she would if she delegated it to another individual; but

she is delegating it to a collective of which she may be part. This may seem counter-intuitive – how can a person delegate a right to herself? However, this is not what is meant. One individual person is not identical with the collective of which she is part, and it can usefully be said that she delegates the right to defend her to that collective as a whole, resulting in an active duty for those agents whose job it is to fulfil their collective’s defensive obligations.

The object of the collective right, or ‘the party against whom the right is held’ (Rodin, 2002: 99), is a little trickier to identify. Individual defensive rights are generally held against the individual or group threatening the individual subject of the right, but the objects of rights held by collectives (under the collectivist account), are usually thought to be other collective entities, most often states.

For instance, Rousseau argues that war is not only impermissible but generally impossible except between two states, as between private individuals there is ‘never or very rarely extended enmities or war’ (2004b: 166), and that ‘War is...not a relationship between one man and another, but a relationship between one State and another, in which individuals are enemies only by accident...as soldiers’ (2004a: 46-7). I will consider his argument in greater detail later, but here I need only say that I disagree – McMahan, Fabre and Frowe give sufficient arguments as to why war need not be perceived as a relationship between two states *qua* collective entities.

My view is that, in the same way that the *end* of individual defensive rights does not change when they are delegated to the state or other collective entity, the *object* of those rights does not change. The object of the individual right is the individual or group of individuals who are threatening the end of that right, and so the object of a delegated right (and the target of the collective right to exercise it) remains the group of individuals threatening that end.

This group may be large or small; but in cases where the proportionality requirement permits a collective entity to wage war, one may safely assume the group to be very large; for instance the group of individuals comprising the threat posed by an aggressive state. This may include the combatants who are physically responsible for the threat, the government, leaders or authorities who are causally responsible in that they deliberately choose to bring about

that threat, and perhaps some auxiliary combatants who choose to directly contribute to it, such as munitions workers.

The account of individual liability that I developed in Chapter One is, I believe, equally applicable to this kind of collective right to exercise delegated rights, because the objects of the rights are also individuals. I will explain in greater detail what it means for my account of just cause, in Chapter Three, when I consider how my account deals with the issue of whether just and unjust combatants are equally liable to attack.

Thus, while I take the view that states and some non-state collective entities may hold defensive rights, because I believe that these rights are derived in an individualist way, that they are in fact rights to exercise the individual defensive rights which individuals delegate to their state or to a non-state entity, they are not the same as collectivist state rights. Rather, they are individual rights which are exercised by states or non-state collective entities³¹ instead of by the individuals themselves.

It is worth noting that while my account of collective defence views a just defensive war as a war waged by some collective entity in order to defend the flourishing lives of individuals, some individual people might take the opposite view – if the existence of the country or church they belonged to were threatened by the aggressive actions of another collective, they might view their actions, in waging a defensive war, as (at least partially) defending a collective entity to which they felt loyalty or love, rather than the other way around.

However, in my opinion this is due to a misapprehension. The end of defence in such situations is not the collective entity itself, but the aspects of its members' flourishing lives that depend upon the continued existence of that entity. The feelings of loyalty and love felt by these members show that membership of that collective enhances their lives and plays an important role in their identities. If no aspects of the members' flourishing lives depended upon citizenship of this country or membership of that church, then they would feel no loyalty, no urge to defend (as they see it) that collective entity. Thus, it is my contention that what they defend is the aspects of their

³¹ I will explain more clearly what sorts of non-state collective entities may possess delegated collective rights in Chapter Four.

flourishing lives that depend upon that collective entity, even though they may perceive it differently.

Hence, whilst the recipient of such delegated individual rights is a collective, and in practice will be either a nation-state or an appropriate kind of non-state collective entity, such as a revolutionary movement, the object, end and scope of these rights remains individualist, because they are still individual rights (and an individual is still the holder of each right) – the collective only possesses the right to act upon them.

I would, therefore, argue that it is possible for someone to delegate the right to defend themselves to a collective, whilst remaining the right-holder. One can delegate the ‘expression’ of a right and desist from exercising it oneself (in certain cases) but remain the holder of that right. For instance, in some companies a shareholder may delegate her right to vote in shareholders’ meetings to another individual or to the Chairman of the Board of Directors. The shareholder does not give or transfer her right to this other party, and may revoke a previously agreed delegation if she wishes³². Although it is possible for a shareholder to specify how her vote must be cast, it is also common, particularly in the US, to give the one to whom she delegates her right the discretion to decide how to cast her vote, just as individuals give the recipients of their delegated defensive rights the discretion to decide how that defence shall be undertaken. Delegating the right to vote may not be quite the same as delegating a defensive right to a collective entity; but I believe it helps to illustrate the process by which a right can be delegated, and still be held by its original subject.

Therefore, I argue that collective defence, as a just cause for war, is not justified by defensive rights held directly by collectives, with the primary goal of defending the existence or distinct identity of the threatened collective entity, as collectivists like Walzer or Rawls might suggest; but rather by individual defensive rights, which individuals delegate to collective entities, authorizing those entities to exercise them on their behalf, resulting in a collective right to exercise these individual rights.

³²https://www.mapfre.com/corporate/images/delegation-of-vote-instructions_tcm885-140005.pdf

This is an individualist account of collective defence, in that it ‘attempt[s] to show that national-defence can be derived from, or analysed in terms of, the personal defensive rights of citizens’ (Rodin, 2002: 123). Some of the reductive individualist arguments I have considered in this chapter, such as Fabre’s, have taken the route of analysing collective defence in terms of individual defensive rights, of taking it to be individual defence on a collective scale, for instance.

My account instead derives a collective right of defence from individual rights, and does so differently to Rodin’s example of individualist collective rights. Because of this difference, my view escapes the two criticisms that Rodin levels at collective rights with the defence of individuals as their ends. I will show how in the course of the next section, in which I give an account of just cause for war based upon my account of a collective right of defence.

3: A New Individualist Account of Just Cause

3i) Collective self and other defence

To begin with, a collective entity’s possession of the right to exercise delegated individual defensive rights gives rise to just cause for war when war is necessary to prevent the aggressive actions of the people of another state or group from destroying the flourishing lives of the first collective’s citizens. This would mean that what can be roughly described as collective or national ‘self-defence’, namely a nation or collective entity’s defence of its own people against external aggression, would under this account be a just cause for war.

For instance, defence against outright military aggression by another collective through invasion, such as Nazi Germany’s invasion of Poland, would be considered a just cause (as indeed it would under most accounts, this being the paradigmatic example of defence). The flourishing lives of the individual citizens of an invaded country are threatened by the aggression of the invading country, so the state to which they have delegated their individual

defensive rights has the right to exercise them, and may permissibly do so by war, assuming fulfilment of the other *ad bellum* requirements.

Straightforward joint defence (defined as the common defence, by a group of collective entities, of one or more of their number) can be similarly justified. There is, I believe, no need to introduce additional elements like duties of care to one's allies or liberty rights of rescue, as Rodin might – rather, by a previous alliance or recent agreement to assist in the defence, the other collective entities have been given permission to share in the threatened collective's right to exercise its members' defensive rights. Similarly, when an individual victim of attack says 'Help me!' to another individual, the victim extends her liberty-right of defence to that bystander, giving that bystander at least the permission to act in her defence.

Hence, for instance, a group of nations engaged in joint defence may all be justified in doing so in order to defend the same group of endangered citizens, those belonging to the originally threatened country or countries – unless, naturally, the war results in a threat to the lives of citizens of these other countries, in which case these countries will have an additional just cause, that of the defence of their own citizens.

Thus, these paradigmatic cases of collective 'self' or 'joint' defence are just causes for war under my account of the collective right of defence. But what of those cases of defence which are not so straightforward?

One difference between my account and both collectivist accounts, and many reductive individualist accounts, is that since, under my account, the object of a collective right of defence is the individual people who threaten the flourishing lives of individual members of the threatened collective entity, *qua* individuals and only incidentally as members of a particular collective, an account of just cause based upon this right would accept that war may also be justified against groups of threatening individuals who belong to no state, or have no legitimate authority.

I believe that cases in which a non-state group of individuals is a sufficient threat to justify war as a defensive action, given the proportionality constraint on the right of defence (and in just war theory as a whole), are likely to be comparatively rare. However, there could be a defensive war against a non-state group if that group was a serious enough threat – Iraq, for instance, might

have a just cause for waging war against IS forces within their country that are killing and terrorising their citizens, without acknowledging IS to be either an *actual* state or a legitimate authority. Most aggressive non-state groups are unlikely to have the resources necessary to make war a proportionate response to their aggression. However, when a non-state group *does* have such resources, it seems far more implausible to *deny* that fighting a defensive war against such a group is possible, than to admit it.

As I will explain in Chapter Four, I consider that some non-state collective entities may have just cause and legitimate authority, based upon the fact that individual defensive rights may be delegated to some non-state organisations as well as to states. It seems plausible, therefore, that if war may possibly be justified *by* non-state organisations, then it may in some circumstances also be justified *against* non-state organisations.

I must also consider how my individualist account copes with the difficult case of humanitarian intervention as a cause for war. I have not the space in this dissertation to treat this issue as fully as I would like, but I will attempt to sketch, roughly, what stance my account takes upon the issue of when interventionist wars are justified.

3ii) Humanitarian intervention

A war of humanitarian intervention is defined, according to Roberts, as ‘Military intervention in a state, without the approval of its authorities, and with the purpose of preventing widespread suffering or death among the inhabitants’ (1993: 429). Fisher argues that intervention is justified ‘when a people is being massively oppressed by its own government,...or, if the government, while not itself the oppressor, fails to protect its people from slaughter...being undertaken by others within the boundaries of the state’ (2011: 221)³³.

³³ Walzer suggests that there are two other forms of justifiable intervention: intervention ‘when what is at issue is secession or “national liberation”’ (1977: 90) (in other words, intervention to aid one of the sides in an internal ‘military struggle for independence’ (1977: 90)) and counter-intervention (intervention by Country A to halt or oppose the military intervention of Country B in Country C). I will not be considering those here, since I would consider the former to be a case of collective defence where the object is a non-state group of individuals (and thus will reserve discussion of cases like these for Chapter Four), and the

Gillian Brock suggests (with certain qualifications) that debate about the justifiability of humanitarian intervention should ‘be resolved in favour of protecting the individuals who suffer in...humanitarian crises’ (2007: 35), meaning that intervention would be in general a permissible form of defence, except where ‘safeguards against abuse’ (2007: 35) apply. However, as I mentioned earlier, collectivists and reductive individualists are far from agreed about this.

Many collectivists take their cue from Walzer, who (as I have said) argues for a ‘presumption against intervention’, based upon the ‘opposition to imperial politics and...commitment to self-determination’ (2004: 68). His position is that humanitarian intervention is not justified in *all* cases where it would be necessary to save the endangered citizens of the country that is a subject of intervention, but *only* in very extreme cases.

In his words, while ‘nonintervention is not an absolute moral rule’, intervention can only be justified in order to ‘put a stop to actions that, to use an old-fashioned but accurate phrase, “shock the conscience” of humankind’ (2004: 69)³⁴.

The presumption is that such cases will be relatively uncommon, and thus that ‘the norm is not to intervene in other people’s countries; the norm is self-determination’ (Walzer, 2004: 81). Except where such egregious circumstances overwhelm it, the collectivist is therefore bound by his argument that states have their own directly-held rights, including ‘self-determination’ (2004: 81).

Reductive individualists often justify humanitarian intervention on a much wider scale, since a reductive individualist account of collective defence holds that it has the end of individual defence, and thus it could be expected to prioritise the defence of the people under threat by the humanitarian crisis in question over any commitment to state ‘self-determination’ (Walzer, 2004:

latter to be a fairly straightforward case of collective defence – Country A may only fight Country B if Country C asks for A’s help in defending its citizens against B. Besides which, as McMahan points out, the first two examples are not cases where Walzer’s ‘ideal of self-determination’ (McMahan, 1996: 13) is overridden by concerns about human rights, but cases where that ideal has already broken down. However, this is not an issue I have time to debate here.

³⁴ Walzer gives examples such as ‘enslavement or massacre’ (1977: 90).

81), even in cases where the threat is not so great as to ‘shock the conscience’ of mankind. What matters is whether that threat is proportionate.

For instance, McMahan rejects what he calls ‘the common assumption that respect for self-determination requires an almost exceptionless doctrine of nonintervention’ (1996:2-3), and argues that, at the very least, ‘the cases that fall under Walzer’s three exceptions are not the only ones in which intervention is not ruled out by respect for self-determination’ (1996: 24)³⁵.

Fabre goes further, and writes that (according to the cosmopolitan view) not only is humanitarian intervention justified in order to halt ‘shocking’ acts such as enslavement or mass murder, but that ‘violations of civil and political rights can be part of a justification for intervention...[and] so can violations of socioeconomic rights’ (2014: 173). This expands the cases of justified humanitarian intervention still further; especially since Fabre goes on to argue that not only a right, but a ‘duty to intervene’ exists, and ‘ought to be borne by all other countries in proportion to their means when it comes to funding the war, and by the most effective army, which may well mean a multilateral international force’ (2014: 191).

Gerhard Overland argues, similarly, that ‘assistance force’, meaning force used to compel unwilling people to fulfil a duty of assistance, can be permissible ‘against culpable bystanders’ and ‘against innocent contributors’ (2009: 231). This, presumably, would not go quite as far as Fabre’s account of the duty to assist, since he argues that ‘negligent bystanders’, for instance, may not be forced to assist. However, this may equally depend upon how we determine whether a nation or group is considered a culpable bystander to a particular threat (or, for that matter, an innocent contributor).

Rodin, however, argues that reductive individualism cannot justify a right, much less a duty, to intervene. He writes that ‘having the end of defending the

³⁵ McMahan also criticizes Walzer on the grounds that his ‘conception of the right of collective self-determination—which protects domestic action up to the point of atrocity—is in tension with our understanding of the right of self-determination at the individual level’ (1996: 17). In other words, he thinks that Walzer’s view of collective self-determination is far more unrestricted than his notions of individual self-determination – for instance, if a parent ‘inflicts an excessive or disproportionate punishment on her child’, then even if she is within her legal rights to do so, ‘if the harshness of the punishment exceeds certain limits, others may intervene’ (1996: 17). In short, the individual right to self-determination is not ‘unconstrained’ in McMahan’s words – so, if the collective right is analogous to the individual right, why should it be different?

lives of persons is not sufficient to bring a proportionate and necessary military action within the purview of the right of national-defense' (2002: 131). His argument is that reductive individualists attempt to define intervention as just like a case of national defence, having the same end as any other case – that of the flourishing lives of the individual people being helped.

However, he argues that humanitarian intervention is 'no instance of the right of national-defense; it is rather a moral consideration which is in deep tension with it' (2002: 131), since a military intervention in another state can be 'a breach of that state's sovereign rights' (2002: 131) even if it halts or prevents that state's campaign of murder.

The assumption in Rodin's argument is that a state has rights of sovereignty which are independent of individual defensive rights, and I would disagree with this assumption. A state may not directly possess a right of sovereignty or self-determination – if other collectives have a moral duty not to attack a state, it is derived from its individual inhabitants' rights not to be attacked. To speak of a state's 'sovereign rights' in the context of an individualist conception of collective defence is, I believe, missing the point of reductive individualism. Hence, I do not think Rodin's objection has the force to defeat my argument.

Under my account, as I will explain in Chapter Four, a state's actions (in oppressing its own citizens) render the oppressed individuals free to delegate these rights elsewhere. The right and authority to intervene in their defence goes to the new collective to which these people choose to delegate their defensive rights, and any other collective entities to which that right and authority is later extended. Thus, if the individuals in question have not actively delegated their rights of defence to the intervening collective entity, then military intervention would seem to be unjustified.

Since the right of defence is a permission-right, the individual possessing it may waive it if she so chooses (for reasons of pacifism, for instance), and if a nation or organisation to which she is not affiliated came and defended her against her wishes, it seems to me that she would have reason to think they had done something impermissible. A collective entity may not presume upon the permission of non-members or non-citizens.

However, it would be equally counter-intuitive to argue that humanitarian intervention is *never* justified, since this might be construed as a mandate for

oppressive countries and groups to mistreat individuals' rights without fear of reprisal.

Of course, this is not what I am saying. It would be impermissible for a third party to attempt, by means of war, to rescue threatened citizens from their own government without those citizens' permission, or to presume upon that permission, but there is nothing to stop those citizens from granting them permission.

If the beleaguered citizens of an oppressive government issue a general appeal for help, then they are extending permission to defend them to any country or non-state collective entity which takes it up. Likewise, if they appeal to help to a specific country or community (one to which they have close ethnic ties, for instance), they are granting permission to defend them specifically to that collective.

Similarly, if a state, community, or an international organisation like the UN offers to help and the citizens accept, then they have delegated their right of defence to that entity. Requests or appeals for help in defending one's life are one obvious way in which individual rights of defence can be delegated to other collective entities. I will explain this more thoroughly in Chapter Four.

There are, of course, complex issues here, including considerations of how many individual people within an oppressed minority need to request help in order to delegate their defensive rights to a new collective. An appeal by some kind of authority, like the informal leaders of a disenfranchised minority, might perhaps be taken as a request by that minority in general, but what of cases where no such authority exists, or all that the prospective intervener has received is requests for help by ordinary people who are not leaders? What to do when the oppressed people have no way of indicating whether they wish an intervention in their defence or not? I do not have the space to consider these issues as completely as I would like, and I therefore merely note that they are difficult questions to answer, which I must leave for a later time.

3iii) The 'bloodless aggression' scenario

There remains the issue of a 'purely political' threat to a state or collective entity (Fabre and Lazar, 2014: 6). As I mentioned, in criticising reductive

individualism Rodin criticises rights of collective defence³⁶ which have as their end the defence of the members of that collective, by arguing that ‘bloodless invasion’ (Rodin, 2002: 131), aggressive behaviour against a state which does not threaten a single person’s life but only threatens ‘purely political’ (Fabre and Lazar, 2014: 6) aspects of statehood, such as a state’s territorial integrity, cannot be justified according to such individualist accounts, since ‘bloodless invasion’ (Rodin, 2002: 131) does not threaten any individual’s life (or flourishing life).

As I have shown, responses such as Frowe’s do not seem entirely successful in defeating Rodin’s objection. Some forms of individualism, such as Fabre’s cosmopolitanism, respond by biting the bullet; for instance, Fabre writes that ‘a pure bloodless aggression – one which is carried out without shedding blood and will not lead in the future to dehumanizing rights-violations – may not be resisted by killing its perpetrators’ (2014: 114). Her contention, however, is that such ‘pure bloodless aggression’ (2014: 114) is extremely unlikely to happen in reality, and given this unlikelihood, the individualist (or cosmopolitan) position that a collective entity may not resist a bloodless invasion does not give us reason to reject it.

However, under this argument we are still left with the result that, for an individualist (or a cosmopolitan), the right of collective defence does not extend to situations in which only non-life-threatening interests are violated, and however unlikely this is, it is still possible. Therefore, my account does not follow this route. Instead, it utilises my slightly different definition of the end of individual defensive rights.

I would suggest that some non-life-threatening interests, those which are aspects of a flourishing life, may be a legitimate end of defence. Thus, the fact

³⁶ Rodin’s criticism is specifically aimed at the argument that this kind of right could be possessed by *states*, and he does not here discuss political threats in connection with non-state collective entities. It is, at first glance, difficult to see how this criticism would apply to non-state collective entities, as they are not states and in most cases have no need of territorial integrity.

However, ‘bloodless’ attacks upon the distinctive identity of a non-state collective entity might perhaps be roughly equivalent. In another article, Rodin discusses that the hostile takeover of Cadbury’s by Kraft as an example of the destruction of a unique collective identity – a ‘bloodless’ attack in that it threatened no individual’s life, but was effectively the conquest of one collective entity by another. Therefore, although Rodin refers specifically to the defensive rights of states, his objection may also apply to the defensive rights of non-state collective entities. I will discuss this example at greater length in Chapter Four.

that Rodin's example of a 'bloodless invasion' (2002: 130) does not involve the loss of any individual lives unless the invasion is resisted does not necessarily mean an individualist account of national defence cannot justify resistance.

So, what interests would a 'bloodless invasion (Rodin, 2002: 130) threaten? Well, the right to 'self-determination', as Walzer used it, is often mentioned, but since the rights we are concerned with as the end of defence are individual rights, then Walzer's *national* right of self-determination would not work for our purposes. But the individual right of self-determination is unlikely to be threatened by a bloodless invasion in some plausible scenarios – Rodin's example of an invasion which aims to annexe a useless piece of land belonging to another state, for instance. It is hard to see how this might affect one's ability to choose the course of one's life, if the bloodless aggressor plans to stop at this annexation and not to continue taking territory or resources from the invaded country.

What other aspects of flourishing life might be threatened by the bloodless annexation of a piece of land, then? It seems hard to think of any important aspects of flourishing life that depend upon the exact shape of a territorial border, or state possession of a worthless piece of land.

However, I would argue that whether or not a bloodless invasion immediately threatens aspects of our flourishing lives, some of them are threatened *indirectly* (a mediated threat, if you will). If, as Rodin suggests, we should include in our proportionality calculations all those harms that will causally result from our actions, including 'mediated harms' inflicted by others, then we should similarly consider all those threats which causally result from the original threat.

For instance, while the individual right to self-determination is not directly threatened by this bloodless invasion, it may be threatened by the lack of stability and security brought about by this bloodless invasion. However many assurances the invaders give that they will only take that piece of land, that it will harm no citizens of the invaded country unless they resist its invasion, it is hard to imagine any one being fully convinced by such assurances.

This country has, after all, resorted to an unjust and (presumably, given the circumstances) illegal invasion to get the piece of land it wants. Are we to assume its promises can be trusted?

And even if they can, what of the international situation? When it is seen that the invaded country is unwilling to defend its assets if a promise not to harm any of its citizens is made, other invaders are likely to follow suit, and attempt to take what resources they want from this country in the same way. Ultimately, to submit to this bloodless invasion is to create an atmosphere of fear, uncertainty and instability within the invaded country that is more than likely to interfere with their ability to lead flourishing lives.

The same can be said with regards to the bloodless ‘conquest’ of a non-state collective entity. In addition, we must factor in the long-term effects upon a person’s ability (or inclination) to lead a flourishing life which might result from forcibly losing or changing a basic part of their identity such as their nationality, religion or membership of some other equally important community. Although, as I will explain later on, I do not believe that in Rodin’s example, the ‘conquest’ of Cadbury’s *actually* threatened sufficient aspects of the fundamental rights of its workers, even considering indirect or mediated harms to these individuals, to make its defence a just cause for war – membership of Cadbury’s rather than Kraft does not seem to be a sufficiently basic part of an individual’s identity. However, it is plausible that the ‘conquest’ of a non-state entity far more integral to the identities and flourishing lives of its members, might perhaps do so³⁷.

For instance, if rather than embarking upon genocide the Nazis had contented themselves with passing laws banning the Jewish religion from being practised within Germany, this might perhaps have constituted an attack upon the distinctive collective identity of the Jewish community; and one with far more serious consequences for the individuals involved than the loss of Cadbury’s would have had for Cadbury’s workers – consequences potentially

³⁷ Although some non-state collectives, like churches or religious communities, might not be immediately capable of accepting and exercising delegated individual defensive rights – if this is the case, their members may adapt them so that they become capable, or find a more suitable collective entity to defend their community from ‘conquest’. I will expand on this in Chapter Four.

approaching the amount of uncertainty, fear, confusion and loss of identity experienced by the inhabitants of a conquered country.

Of course, just as mediated harms are to be discounted against in the proportionality calculation according to Rodin, the fact that this threat is mediated has an impact on how far war can be justified in response to it. Direct threats to flourishing lives would be weighted far more heavily than indirect ones³⁸.

The indirect threat would have to be much greater than it would if it were a direct threat, and the proportionality calculation would obviously have to take into account how likely it is, given the international situation at the time, that submitting to the bloodless invasion would lead to escalation, subsequent demands, further invasions or loss of rights, as this is bound to impact upon the amount of fear and tension to which the inhabitants of a country, or members of a non-state community, are subjected.

Basically, the proportionality calculation needs to take into account whether this indirect impact upon the flourishing lives of the inhabitants of the invaded country would be great enough to outweigh the direct threats to flourishing lives that would occur if the bloodless invasion were resisted, and since the former is only indirect or ‘mediated’, it seems only fair that it be discounted against in the proportionality calculation. Nevertheless, my account would in some circumstances justify a state’s right to defend its citizens against the threat posed by bloodless invasion – or the similar right of a non-state collective entity, like a religious community, depending upon whether this collective entity’s loss or compromise would have a large enough indirect impact upon the flourishing lives of its members.

³⁸ In arguing that indirect as well as direct threats to the flourishing lives of individuals may be counted as legitimate ends of defence, albeit discounted against, it might be objected that I am opening myself up to the suggestion that indirect or mediated threats which are due to aggressive acts short of attempted conquest may also be resisted with force. I would say that this is a possibility, though only when the threat is deliberate on the part of the aggressor (if not, then the last resort criterion demands we try alerting the aggressor to the existence of that threat before resorting to war, and this will either end the threat or cause it to become deliberate). For instance, if a nation or terrorist group deliberately and maliciously cuts off all the supplies of medicine going into a plague-ridden country, although this aggressive act (arguably) does not directly cause the deaths of the sick people, if the indirect threat to their lives is great enough, I believe the plague-ridden country is justified in construing this as an attack and using military force to compel the aggressor to allow the medicines through.

4: Conclusion

In this chapter, I attempted to develop my account of the individual right to defence into an account of collective defence, using the argument that individual defensive rights can be delegated to a collective entity – resulting in a collective right to exercise these delegated individual defensive rights. I then attempted to explain what kinds of just causes for war would exist, based upon this kind of right.

Before I move on to fully explain the concept of the delegation of rights, I must first explain the implications of my account for the war rights of combatants, and develop an asymmetric account of the rights of just and unjust combatants which nevertheless allows unjust combatants some rights during wartime, most importantly the right of individual self-defence.

Chapter Three: The Rights and Liabilities of Combatants: A Version of the Moral Inequality Thesis

Introduction

In order to create a workable account of just cause based upon my individualist account of collective defence, I must first demonstrate where this account would stand upon the question of the moral equality or inequality of combatants.

As I mentioned earlier, collectivists like Walzer often argue that just and unjust combatants may both be permissibly attacked by enemy combatants, as there is no difference between just and unjust combatants in terms of liability, despite the different positions they are in (morally speaking) – namely, the just combatants are engaged in an activity which is justified and permissible, while the unjust combatants are engaged in an activity which is unjustified and impermissible (which can surely be accepted whether or not the unjust combatants themselves are morally responsible for so acting).

Adam Roberts gives a practical argument for the moral equality of combatants (often referred to as ‘MEC’) which he describes as the ‘principle of equal application’ or ‘the principle that the laws of war apply equally to all belligerent parties in an international armed conflict, irrespective of the question of how the war began or the relative justice of the causes involved’ (2008: 226). He defends this thesis for reasons that range from the historical, meaning the ‘long and distinguished tradition of thought which views the laws of war as applicable to both sides in a war’ (2008: 232) (he points to such thinkers as Rousseau, who argued that unjust combatants are no more or less liable than just combatants), to the practical, such as ‘the need for a uniform and universally accepted set of rules’ (2008: 234) (since ‘having different rules applying to, or applied by, different belligerent parties has long been

seen as a recipe for chaos' (2008: 234)) and the 'difficulty of agreeing which side is more justified in resort to force' (2008: 230).

Larry May points out, similarly, that 'One of the main practical reasons for the 'moral equality of soldiers' is that it is very hard for theorists, writing after the fact, to determine whether a war was waged for a just cause or not' (2007: 29) – primarily because even if a just cause exists, the goal of the belligerent parties involved may have been something else entirely. And if the task is so difficult for theorists working in relatively calm conditions, with the benefit of hindsight, then 'we cannot reasonably expect soldiers during wartime to make such a determination' (2007: 30). Christopher Kutz also argues (though less wholeheartedly) in favour of the equality thesis, which he refers to as the 'Symmetry principle' (2008: 69) – he concedes that there is a 'pragmatic case for symmetry', even though it 'leaves a bad taste in the philosophical mouth' (2008: 70).

However, practical considerations in favour of MEC are not sufficient in themselves to supply a philosophical case for it. In addition, it is always possible to offer practical objections to practical considerations – Coates, for instance, suggests Kutz would be wrong in thinking that asymmetry 'must undermine the moral restraint of war' (2008: 177), because in fact, as Rodin and Shue put it, '*in bello* restraint will stem from appropriately satisfying the *ad bellum* condition of right intention which he views as a disposition of humanity and solidarity with the enemy' (2008: 17). The problem is that, without actually testing both theories in the field, there is no way of knowing which is correct about whether or not restraint in war would survive the loss of the symmetry thesis. I will therefore be focussing on theoretical, rather than practical, arguments in favour of MEC.

The inequality or 'asymmetry' (Kutz, 2008: 86) thesis, championed by individualist theorists like McMahan and Fabre, takes the view that, 'it is morally wrong to fight in a war that is unjust because it lacks a just cause' (McMahan, 2009: 6), because while unjust combatants are liable to attack (since their participation in an unjust war means they have 'forfeited their right against attack' (2009: 16)), just combatants are not liable (through participating in a *just* war, they do not forfeit this right). So, in McMahan's words, just combatants are 'illegitimate targets' and 'To attack them is

indiscriminate' (2009: 16). Thus, unjust combatants are, according to this argument, unable to fulfil *jus in bello*, since just combatants are not liable to attack (unless they render themselves liable by violating *jus in bello*).

I will be defending a thesis which admits the moral inequality of combatants, but which differs from accounts like McMahan's in that it allows unjust combatants to retain the right of individual self-defence. To do so, I will draw upon the distinction between strong and weak liability which I developed in Chapter One, and show how this applies to combatants in a wartime situation. I will develop two separate but equally important arguments; a) the argument that most unjust combatants are under duress or non-culpably ignorant that their war is unjust (or both), and that since this duress and non-culpable ignorance are sufficiently strong moral excuses to excuse unjust combatants from moral responsibility for their actions as unjust combatants, they are only weakly liable to attack; and b) the argument that distinguishing the smaller number of unjust combatants who may be morally responsible (and hence strongly liable) from the weakly liable majority is usually impossible. I will conclude from these arguments that we should assume, in the absence of clear proof, that all unjust combatants are weakly liable, and hence retain their individual defensive rights and are justified in defending their own lives in battle.

Therefore, in this chapter I will strengthen the account of just cause based upon my individualist account of the collective right of defence, by exploring the way in which this account responds to the issue of combatants' war rights.

However, in order to demonstrate the place my moral inequality argument holds within the wider just war theory, it is first necessary to briefly outline the moral equality and inequality theses, and explain some of the other arguments for each position. Therefore, I now turn to the most plausible of the remaining arguments in favour of MEC.

1: The Arguments for the Moral Equality of Combatants

Walzer suggests that combatants on both sides of a conflict, be they just or unjust combatants, gain exactly the same set of rights and duties (which he termed ‘war rights’ (1977: 136)), and are subject to exactly the same liability to attack, because of ‘the mere fact that they are there’ (1977: 35). In his view, all soldiers ‘gain war rights as combatants...but can now be attacked and killed at will by their enemies’, and they do so ‘Simply by fighting’ (1977: 136), even when they have not freely chosen to fight.

Indeed, the source of MEC, in Walzer’s view, is that *no* soldier has truly made a free choice to fight. Ryan gives the example of two ‘slave gladiators’ forced by their masters to fight to the death – each gladiator ‘is compelled to attack the other, and both are at liberty to kill in self-defence’ (2008: 139). Walzer’s view would suggest opposing soldiers are relevantly similar to these gladiators. In C. A. J. Coady’s words, this is the view that ‘Opposing soldiers are moral equals...because they are in the grip of a shared servitude: they are not responsible for the war they wage’ (2008: 159). Paul Christopher similarly argued that individual soldiers ‘can never be responsible for the crime of war, *qua* soldiers’ (1994: 96).

I have already explained various cogent objections to this argument, such as McMahan’s objection that the various forms of coercion that a state may bring to bear upon potential soldiers, such as legal coercion, or more subtle manipulation through means of propaganda, are not justifications for an individual soldier to fight in an unjust war³⁹, so I will not go over them again. I will instead move on to explore other arguments in favour of MEC.

1i) The case for the moral equality thesis

³⁹ In light of the arguments I intend to make later in this chapter, I must add that while I accept that such coercion does not *justify* an unjust combatant’s actions, I disagree with McMahan’s assertion that unjust combatants are therefore fully liable to attack – they may, for instance, perform morally impermissible actions but lack moral responsibility for those actions, much like the Innocent Attacker. However, I believe that McMahan’s argument nevertheless provides a successful counter-argument to Walzer’s moral equality thesis.

One argument in favour of a Walzerian understanding of the rights of combatants is advanced by Yitzhak Benbaji, which he describes as a ‘nuanced contractarianism’ (2011: 47). According to contractarianism, Benbaji suggests, soldiers on both sides of a conflict freely enter into a relationship governed by its own rules – combatants are ‘morally equal (at the level of rights) because of the contractual relations between them’ (2011: 45).

The ‘acceptance...by just combatants’ of this special relationship between soldiers, or the ‘traditional war convention, in general, and the equality of all soldiers in particular’, Benbaji suggests, ‘frees their enemies from the duty not to attack them within a war of aggression’ (2008: 489). This is much the same as the position taken by such advocates of the moral equality thesis as Walzer and Hurka.

Benbaji, however, makes the further point that ‘soldiers’ tacit acceptance of their status is necessary but insufficient for establishing moral symmetry between them’ (2011: 45). It becomes sufficient, Benbaji argues, ‘if and only if the symmetrical rules that define soldiery codify a fair and mutually beneficial contract among states of the kind that Rawls refers to as ‘decent’’ (2011: 45).

In an earlier paper, Benbaji describes this contract between states as ‘an agreed system of rules to govern their future wars, prior to any armed conflict between them’ (2009: 599), a system which includes duties of obedience on the part of soldiers, since ‘the obedience of soldiers is crucial for the efficiency of the national defence which armies provide’ (2009: 599), and enforceability – the rules must be ‘enforceable by the warring parties during the war’ (2009: 600), as well as the assumption of a ‘right to wage defensive wars’ (2009: 599) on the part of states.

Benbaji suggests that the state for which the soldiers in question agree to fight (he assumes it will be a state) must subscribe to a system of *jus in bello* rules which is ‘mutually beneficial’, meaning that ‘The outcome of following a symmetrical code will be better to each relevant party (i.e., individuals and decent states)...than the outcome of following an asymmetrical code’, and ‘fair’ in the sense that ‘The symmetrical *jus in bello* code is not dictated by, nor does it create or maintain, unfair power or welfare inequalities among states or individuals’ (2011: 46). If these two propositions are true, and the

soldiers consent to these altered rights through their ‘tacit acceptance of their status’ as soldiers (2011: 45), they ‘lose their moral claim against being unjustly attacked by other soldiers in the course of war’ (2011: 46).

In criticising contractarianism, McMahan attacks the proposition that the symmetrical rights of combatants are mutually beneficial, suggesting, in Benbaji’s words, that ‘a regime under which soldiers have no legal right to participate in a war of aggression is better for decent states, in terms of expected welfare and rights fulfilment, than a regime which allows obedience’ (2011: 47). In addition, McMahan suggests that the former regime has the advantage of ‘making it more difficult for states to initiate unjust wars’ (McMahan, 2011: 146).

McMahan also argues against the claim that combatants, or at least just combatants, lose their rights not to be attacked. He suggests, for instance, that even if Benbaji ‘is right that soldiers effectively waive rights they would retain if they fought as individuals’, then unjust combatants who ‘invade a person’s state’ have, ‘through their wrongful action...compelled him to waive his right that they not kill him’ (McMahan, 2011: 147), or ‘wrongfully exploited his earlier waiver’ (McMahan, 2011: 147) if he joined the army prior to their invasion. In short, these unjust combatants ‘have *wronged* him by having wrongfully created the conditions in which it became permissible for them to kill him’ (McMahan, 2011: 147).

Benbaji attempts to defend his nuanced contractarian account against some of McMahan’s criticisms, but I do not believe he is entirely successful, particularly with regards to McMahan’s argument that just combatants do not automatically lose or waive their rights not to be attacked simply by enlisting as soldiers. I do not have the space to analyse Benbaji’s response to McMahan here, but I have already discussed some of McMahan’s arguments, and will shortly consider the strengths and weaknesses of his position more thoroughly.

In addition, I believe there is another problem with Benbaji’s argument. In describing this contract which ‘codifies’ the symmetrical rules and rights of combatants as existing between ‘states of the kind that Rawls refers to as ‘decent’’ (2011: 45), he implies that no such ‘fair and mutually beneficial contract’ (2011: 45) exists between the other states; those which Rawls would not have so described.

Benbaji writes that ‘Absent contractual relations among them, combatants are under a duty to make sure that any violent action that they exercise is just’ (2011: 46). They also ‘lack the moral power to undertake a duty of obedience to their state, whereby they offer themselves as instruments for whatever wars the state chooses’ (2011: 46-7). This suggests that unless a combatant can ‘reasonably believe’ (2011: 47) that he fights for a state which belongs to this ‘fair and mutually beneficial’ international contract, he is in precisely the situation that McMahan suggests all combatants are in; he must, morally, determine whether he is fighting a just war, as if not, his enemies may not be liable to attack.

As with Rawls’ argument, Benbaji’s account may not result in symmetrical combatant rights, but another kind of asymmetry. Combatants who fight both for and against states which are part of this contract would have symmetrical liability. On the other hand, combatants fighting for states which are clearly not part of such a contract (which are not members of the UN, for example) may, if their war is unjust, attack non-liable combatants, because the relationship of mutual consent to waive their rights not to be attacked does not exist between them.

And it gets trickier: when these combatants wage a just war, their enemies may make themselves liable to attack as McMahan suggests all unjust combatants do. But what of the just combatants? If they are not part of the aforementioned contract, how can Benbaji claim they are liable to attack? They have neither agreed to waive their rights as part of a fair and mutually beneficial contract, nor done anything else to render themselves liable.

Hence, not only does Benbaji’s argument seem to collapse back into partial asymmetry, but it results in the slightly counter-intuitive result that combatants fighting a defensive war on behalf of a ‘non-decent’ state are illegitimate targets of attack, while combatants fighting a defensive war on behalf of a decent state *are* liable to attack.

However, Benbaji’s defence of the symmetry argument does make some plausible points; in particular, the suggestion that ‘both sides lose their right not to be attacked by each other, but retain their right of self-defence’ (2007: 559).

Dan Zupan suggests that another possible argument in favour of the moral equality thesis might be the ordinary soldier's 'invincible ignorance' (Zupan, 2008: 217). He makes the point that soldiers on the front line are often, if not always, less informed about the true causes of the war than their leaders or governments.

This may be as a result of deliberate manipulation or misinformation by those leaders or governments, the use of propaganda painting an aggressive war as a defensive war and so on; or it may be because no individual who is not a top-level member of an organisation like a government has all the information available (assuming the top-level members do). The result is that individual combatants may not have the crucial pieces of information which would allow them to see that the war they fight is unjust.

Zupan admits that many advocates of the inequality thesis would argue that in practice, 'soldiers rarely are in such a position of ignorance' (Zupan, 2008: 218). Zupan responds by suggesting that an individual soldier's 'actual ability to know in the relevant sense is so constrained...that, in theory, MEC is the only reasonable position to adopt' (2008: 218). This is because, once he enlists, a soldier becomes subject to what Zupan calls 'contractual ignorance'; ignorance 'that follows from an appropriate acceptance of one's station and the obligations that stem from it' (2008: 223).

In short, it would be impossible to be a soldier if one were constantly questioning one's actions and their morality. Naturally, Zupan logically suggests, this does not mean 'a complete surrender of moral autonomy', but rather 'an initial benefit of the doubt to the government' (2008: 223). For instance, Zupan writes that 'An essential feature of the logic of community is that we relinquish our right to exercise our individual will at every interval' – unless, of course, 'there is good reason [to believe] that trust has been violated' (2008: 223).

A soldier who only thinks the war is unjust may well continue to serve, due to 'a recognition of his or her own fallibility' and a recognition that the government, possessing more information than the average private individual, has probably reached a more informed, more accurate assessment of the situation. In Zupan's words, 'He *thinks* the war is unjust, but he *knows* he could be mistaken' (2008: 224). Only when 'a point of certainty' (2008: 224)

has been reached does this ‘benefit of the doubt’ (2008: 223) mean that the soldier *must not* continue to serve.

What this seems to amount to is an attempt, on Zupan’s part, to define unjust combatants as Innocent Attackers. Like the drugged man in Thompson’s example, they are non-culpably unaware that they pose an unjust threat (through their belief that they pose a *just* one).

Whilst I agree both that Innocent Attackers are liable to defensive action by their victims, and that they are not morally responsible for their actions, and I conclude that they are only weakly liable, and may permissibly engage in counter-defence, that does not mean (as I will explain shortly) that they and just combatants have symmetrical war *rights*.

It is my belief that an Innocent Attacker’s lack of moral responsibility is an excuse for his fighting as an unjust combatant, not a justification. While my definition of weak liability is compatible with the Innocent Attacker’s non-culpable commission of an impermissible action, it seems to me that Zupan would need to go further, and say that the Innocent Attacker and his victim (or an unjust combatant and the just combatant he attacks) both act permissibly, in order to show that their ignorance makes them morally equal.

Zupan’s actual argument appears closest to the thesis that the actions of unjust combatants are excused rather than permissible. This presents problems for any attempt to build a justification for equal war rights upon his argument, because it is hard to justify giving equal war rights to unjust combatants when they are acting impermissibly (albeit excusably). I will expand on the reasons why in the next section.

However, even if Zupan were to say that the actions of unjust combatants on the front line are not merely excusable but *permissible*, it would be problematic. The soldiers would, it seems, be in the position of permissibly performing an impermissible act, namely participating in the unjustified aggressive attack upon the members of another collective. Therefore, although it makes some interesting points, I do not believe that Zupan’s argument for MEC is wholly convincing.

1ii) Further arguments for the moral equality thesis

Cheyney Ryan suggests that a ‘more tenable’ way to understand the moral equality thesis, and in particular Walzer’s arguments for that thesis, might be to understand MEC ‘as part of the normative system of state sovereignty that coalesced in the nineteenth century’ or the ‘*sovereignty system*’ (2008: 133). Under this system, the equal rights of soldiers are ‘grounded in the practice of conscription’ (2008: 133). Ryan’s argument is, briefly, that this sovereignty system advocates and maintains the ‘*moral equality of states*’, which includes an equal ‘right to generate soldiers’ (Ryan, 2008: 141).

If this equal right exists, it follows that combatants have an ‘obligation...to fight whether or not the war is just’ (Ryan, 2008: 144), because their state has the right to compel them to do so – in Ryan’s words, ‘they are *called* to fight’ (2008: 144). And if all combatants have such an obligation, then they ‘all are victims of the sovereignty system’ (Ryan, 2008: 145) – they have equal moral status (and thus equal war rights) as non-voluntary combatants.

However, as Ryan points out, this argument stands or falls on whether or not one accepts the legitimacy of this sovereignty system. Ryan examines and attacks one possible response to this system. He argues that the traditional sovereignty system is ‘premised on a morally *immature* military’, in which ‘responsibility was shifted onto an abstraction’ – namely, the state – which means that ‘no real persons were responsible’ (2008: 148). Zupan’s argument that the ‘invincible ignorance’ (2008: 218) of soldiers absolves them of responsibility for their actions as unjust combatants runs along similar lines. As Ryan points out, there have been many attempts to argue that there should be ‘a more morally mature military’ (Ryan, 2008: 148) – a military which holds soldiers ‘accountable for the wars they fight’ (2008: 148).

Coady, similarly, describes the traditional Walzerian account of the moral status of combatants as suggesting that ‘membership in the political community entails in certain circumstances an obligation to die for the state’ (2008b: 228), and objects that ‘adherence to just war theory makes it difficult to maintain an unqualified commitment to the obligation’ (2008b: 228) – pointing out that conscientious objectors ‘often rely upon a just war perspective to legitimate their refusal of service’ (2008b: 228). In short, an obligation requiring soldiers to deny their own understanding of whether a particular war is justified, ignores their status as moral beings.

This suggests that soldiers have, or should have, the authority to refuse to fight in wars they consider unjust. However, this is the point at which Ryan attacks this view. He suggests that if individual combatants are ‘answerable for doing what they should not do’, they must be ‘equally answerable for *not* doing what they *should* do’ (Ryan, 2008: 148).

In short, a soldier’s right or obligation to refuse to fight unjust wars even if they are ordered to do so, should also translate into a right or obligation to ‘*initiate* a war they regard as *just* – [even] when this too means ignoring their government’s orders’ (2008: 148). He refers to this as the ‘*Sovereignty Symmetry Problem*’ (2008: 148).

Clearly, the suggestion that individual combatants have a right or even an obligation to initiate just wars as well as refuse to fight unjust ones is counter-intuitive. But, does this necessarily commit us to rejecting McMahan’s concept of an obligation not to fight unjust wars, or to the equality thesis? Ryan suggests that there are possible responses, including the interesting response that we might be able to ‘bite the bullet...and grant *both* obligations, the obligation to refuse and the obligation to initiate’ (2008: 150).

This would mean, in Ryan’s words, that ‘the age of state sovereignty is past’ (2008: 150) – that as soldiers become ‘increasingly private contractors for hire’, the ultimate choice as to which wars to fight in, who to fight for, and the moral responsibility for those choices, is left to them.

However, as Coady points out, this may not be quite as counter-intuitive a possibility as it first appears to be, since the wars soldiers are permitted to initiate will not be those with only a just cause, but *just wars*, which satisfy all the conditions of *jus ad bellum*, and he suggests that it would be ‘very difficult, though perhaps not impossible, for private military ventures to satisfy these conditions’ (2008: 161).

I do not agree with the view that soldiers have both a right to refuse to fight and a right to initiate a war, since I believe that just combatants’ war rights⁴⁰ derive from the individual defensive rights delegated to their collective, which authorises them to act as its agents in this matter.

⁴⁰ By this, I mean the rights to do what they must to win the war, up to and including killing enemy combatants who do not yet pose an individual threat to them (excluding *jus in bello* violations, of course). Their right to defend themselves is, I believe, an individual right, and so is not derived in the same way.

However, I concede that the charge of ‘moral immaturity’ Ryan levels against the military mindset accepted by the moral equality thesis is a valid, and a troubling, one. The idea that combatants are morally permitted, if not actually encouraged, to suspend their judgement of the justice of the war they are fighting until or unless the injustice of that war becomes so obvious that they reach, in Zupan’s words ‘a point of certainty’ (2008: 224) (a hard thing to reach in this uncertain world, so the war’s injustice would presumably have to be *very* obvious), is not a particularly attractive view of the military.

Uwe Steinhoff offers another interesting argument in favour of a broadly symmetrical approach to combatant rights. He suggests that McMahan is ‘right in principle’ (2008: 220) that in targeting just combatants, unjust combatants are ‘deliberately targeting and killing innocent people’ (2012: 340), but that it does not follow that only unjust combatants are liable to be killed in battle or that only just combatants have the liberty-right to attack enemy combatants.

The reason for this, Steinhoff argues, is that ‘in many, if not most modern wars “just” soldiers do kill innocent and non-threatening people or non-innocently contribute to their being killed’ (2012: 341), through contributing to collateral damage (or, as Steinhoff calls it, ‘concomitant slaughter’ (2012: 341)). Steinhoff also suggests that even if they do not themselves kill innocent people or contribute to their deaths, in most wars they at least pose a threat to them’ (2008: 221).

Most soldiers are probably not directly responsible for ‘concomitant slaughter’, but Steinhoff suggests that if they participate or contribute in a guilty manner, they can still be ‘held liable’ (2012: 348). For instance, they may ‘participate in collective actions’ that cost non-combatant lives, for instance ‘maintaining the weaponry, supplying ammunition and marking targets during the war’ (2012: 348); or they may contribute by delivering or supplying weaponry to the army ‘full well knowing that it would be used for the unjust collective actions of the war’ (2012: 349).

For this reason, Steinhoff convincingly argues, these combatants are not ‘innocent in the relevant sense (namely in the sense of not wronging others)’ (2012: 341), and thus they are liable to attack under Steinhoff’s definition of liability, which I explained in Chapter One. It is closest to my account of weak

liability, and this argument would perhaps therefore fit with that account – if just combatants are causally responsible for the deaths or threats to ‘innocent people’ (Steinhoff, 2008: 221), then we can grant that this would make them weakly liable. I concede that both the participation and ‘non-participatory guilty contribution’ (2012: 348) that Steinhoff describes, would constitute sufficient causal responsibility for weak liability.

Steinhoff also argues, *contra* McMahan, that the fact that just combatants’ actions are justified, even when they cause collateral damage, does not ‘defeat liability’ (2012: 358). He argues that ‘the claim that justification defeats liability to defensive killing is ad hoc’ (2012: 359), and points out that in McMahan’s example (originally Feinberg’s) of a hiker who breaks into an empty cabin during a snowstorm and burns the furniture inside to save his life, the hiker is still liable to pay compensation to the cabin’s owners, even though his actions were justified (and the owners would not have a right of defence against his incursion). Some form of liability, it seems, can even be incurred by justified actions.

This, as Steinhoff admits, does not result in a complete moral equality thesis. He writes that Mahan’s argument shows ‘it is not true that in *all* wars the combatants on both sides have the same liberty-right to kill enemy combatants, provided they abide by the traditional *jus in bello* restrictions’ (2012b: 36). In short, it is possible for just combatants to fight a war in which they neither harm nor pose a threat to the non-labile (a war free from collateral damage), and in such a war, the just combatants would under Steinhoff’s view not be liable to attack by the unjust combatants, leading to asymmetrical war rights. However, it is Steinhoff’s contention that this ‘has little relevance’ for ‘many, if not most, modern wars’ (2012b: 36), because most wars do, in fact, involve inflicting some harm to the non-labile, on both sides.

I think that Steinhoff’s arguments make some very interesting points. In particular, I agree with Steinhoff that it is possible to become liable to attack (or at least, weakly liable) even when one’s actions are justified. For example, I would argue that the victim in the Innocent Threat scenario is justified in trying to kill the Innocent Threat, and nevertheless, she also becomes weakly liable to defensive attack by the Innocent Threat (as weak liability is

symmetrical). However, I do not believe that Steinhoff has defeated McMahan as thoroughly as he seems to think.

His argument raises the question of what defensive actions these just combatants make themselves liable to – and I believe they are only liable to action taken to prevent the non-combatant deaths that would result from their actions. Let me explain.

If the combatants in question are just combatants, and their collective actions aimed at winning the war are thus justified, then surely the only defensive actions which the unjust combatants would be morally allowed to take would be actions to defend any non-combatants threatened by a particular military tactic. The liability that results from these specific actions which cost non-combatant lives is a specific liability. I do not think, as Steinhoff appears to, that it is a blanket liability that renders them liable to any attacks whatsoever. That would only be so if they were unjust combatants, who lacked justification for fighting at all and were thus liable to any defensive attack that aimed to stop them from doing so.

So, unjust combatants would be justified in shooting down a bomber planning to drop his bombs on a site which would result in non-combatant casualties, but not in shooting a bomber whose plan to drop his bombs on a military compound was reasonably certain to kill only liable unjust combatants.

Not only does this result in unnecessary complications – the unjust combatants cannot always be reasonably expected to know or guess whether their enemies' current action will at some point cost non-combatant lives (though sometimes it will be obvious) – but it also results in far less liability for just combatants than Steinhoff would have us think. Steinhoff may be right in saying that most wars involve collateral damage at some stage, but this collateral damage is not inflicted by every military encounter – far from it.

For this reason, it seems to me that Steinhoff's argument does not succeed in proving that 'in most wars...there is the kind of moral equality of combatants that is at issue here' (2008: 220). His argument, in fact, lapses back into a moral inequality thesis. This does not necessarily mean that all the points he makes are implausible. However, I do think that he is not entirely successful in defending an effective moral equality for combatants.

Although some interesting practical arguments for the equality thesis are put forward by Kutz and Roberts, there are, as we have seen, problems with such theoretical arguments for the equality thesis as Zupan's and Ryan's. Other just war theorists, such as Coady and McMahan, have criticised such attempts to argue that all individual combatants should have the same basic combatant rights, whether they are just or unjust combatants.

For instance, Coady argues that the question of 'What moral responsibility ordinary soldiers and officers should bear for fighting in war...cannot simply be dodged in the way suggested by the moral equality thesis' (2008: 161). He thinks we cannot avoid the issue that there seems to be some kind of moral distinction between a soldier who defends his people against unjustified attack (the paradigmatic just combatant), and a soldier who fights in an unjust war, believes or suspects that it is an unjust war and continues anyway.

This is the heart of the argument that just and unjust combatants have differing rights and different liability to attack. Therefore, I will now move on to examine the arguments in favour of the moral inequality of soldiers.

2: The Case for the Moral Inequality of Combatants

One of the most significant advocates of the moral inequality thesis is McMahan. He argues that just and unjust combatants are not, in fact, morally equal (in the sense of being subject to the same rights and liability) because the just combatants are not liable to attack, not being morally responsible for the relevant threat (you will recall that McMahan's account of liability argues that 'the criterion of liability to defensive killing is moral responsibility, through action that lacks objective justification, for a threat of unjust harm to others' (McMahan, 2005: 394)).

Let us for a moment leave aside the differences between McMahan's account of liability and my own, and consider his argument for the moral inequality of combatants.

2i) McMahan's argument for the moral inequality thesis

If we accept that just combatants are not liable to attack, since their actions as combatants are morally permissible, then it seems impossible for unjust combatants to satisfy the *jus in bello* requirement of discrimination. McMahan argues that 'to attack just combatants is to attack people who are innocent in the generic sense: people who...are not liable to attack' and that just combatants 'are therefore illegitimate targets. To attack them is indiscriminate' (2009: 16). Unjust combatants, by contrast, are morally responsible for their part of the unjust threat their army poses to the combatants and civilians of the justly fighting country.

Of course, as McMahan goes on to say, this does not mean just combatants are *always* 'illegitimate targets' (2009: 16). There are, in his view, two ways in which they can become liable to attack – firstly, by 'attacking innocent civilians intentionally in the absence of a lesser-evil justification'⁴¹, and secondly, by 'inflicting unnecessary or disproportionate harm on innocent civilians as a foreseeable side effect of action intended to destroy military targets' (2009: 41); in short, by breaking the *jus in bello* rules of discrimination and proportionality.

However, if the just combatants threaten noncombatants with 'harm to which they [the non-combatants] are not liable but [which is inflicted] via action that is objectively *justified*' (2009: 41), then defence against this harm, even by the non-combatants themselves, is still indiscriminate, 'in that the just combatants are not in fact liable to attack, even in self-defense by innocent people' (2009: 42). This, McMahan claims, is 'because the action that makes them responsible for the threat to innocent people is morally justified' (2009: 42).

⁴¹ McMahan accepts that there exists 'another form of moral justification' for killing, which 'appeals to the moral necessity of averting some terrible catastrophe' (2008: 23) – in short, an overriding consequentialist principle that justifies killing because it is the lesser of two evils, even if the victims are not liable. He argues, however, that this justification 'is restricted to cases in which the killing of the innocent is necessary to avert an outcome that would be *very significantly* worse, from an impartial point of view' (2008: 23), and that it would, practically speaking, hardly ever justify unjust combatants in killing non-liable just combatants, since only very 'rare wars' (McMahan, 2008: 24) would result in a situation in which killing just combatants would be the lesser of two evils.

This is one aspect of McMahan's moral inequality account which makes me rather uncomfortable, and I think it is a definite advantage of my version of the moral inequality thesis that it does not render it impermissible for either combatants or non-combatants to defend themselves against harm to which they are not liable.

So, under McMahan's account, just combatants are, with these exceptions, always illegitimate targets, meaning that unjust combatants, in fighting at all, fail to satisfy the discrimination rule even if they only target enemy combatants.

What this means is that while just combatants (provided they obey *jus in bello*) may fight in individual self-defence, and to fulfil their just cause, unjust combatants are morally prohibited from fighting either to promote their unjust cause or to defend themselves or their comrades against attack, since being liable to that attack they have, under McMahan's definition of liability, lost the right to defend themselves from this justified attack.

For this reason, only just combatants have the right to kill enemy combatants, only unjust combatants are liable to be killed in war, and all potential unjust combatants have, according to McMahan, a moral duty to refuse to fight in wars which they consider, or even suspect, lack a just cause; though, for 'pragmatic' reasons, they do not have a legal duty to do likewise (2008: 29). In McMahan's view, the morality of war and the 'law of war' are, and should be 'substantially divergent' (2008: 19).

I have already outlined various cogent and interesting objections to McMahan's argument that just and unjust combatants are subject to different rights and liabilities, such as Hurka's objection to McMahan's suggestion that liability to attack applies 'not just to an enemy group X as a whole but to each individual member of X', so that 'one is permitted to use force against a given person only if he himself shares in the responsibility for the relevant wrong.' (Hurka, 2007: 200), and Ryan's objection that McMahan gives 'insufficient weight' to 'the institutional claims on soldiers in a democratic society' (2011: 12), and that his view thus creates a 'moral dilemma' (2011: 13) for soldiers.

Although McMahan attempts to respond to these criticisms, they still have teeth. However, so does the concept that the unjust nature of a war should affect the permissibility of unjust combatants' actions. As I have mentioned, I

think that McMahan's definition of moral responsibility is a plausible basis for my account of strong liability. So, some elements of the moral inequality thesis remain convincing, despite the difficulties with McMahan's arguments.

2ii) Some alternative arguments for the moral inequality thesis

One way to account for this might be to look at some of the alternatives or refinements to McMahan's arguments which other advocates of the moral inequality thesis have devised.

For example, Judith Lichtenberg defends the moral inequality thesis, arguing that unjust combatants are not justified in the overall act of waging an unjust war, but some of their actions as combatants may be 'justified as legitimate instances of self-defence against threats to their lives', although only in limited circumstances, as this argument is based upon her claim that 'one may be justified in attacking innocent threats in self-defence when one has not non-innocently threatened them in the first place' (Lichtenberg, 2008: 129).

The just combatants are thus equated with innocent threats; which, in Lichtenberg's view, are not liable to attack, but may be attacked in self-defence by potential victims.

So, if an unjust combatant has never 'non-innocently threatened' a just combatant (Lichtenberg, 2008: 129), then he may be morally justified in defending himself against just combatants' attacks. The possibility of an unjust combatant's being permitted to defend himself in war thus depends upon whether, and how far, he is responsible for the unjust threat of harm to the just combatants.

Lichtenberg suggests that the 'typical unjust combatant...is not non-innocent in the way that would forbid him from defending himself against innocent threats' (2008: 117), because even if he fought willingly because he 'unjustifiably believed the war was just', then his fighting 'At most...played a small part in making the threat real' (2008: 117). I have considerable sympathy with Lichtenberg's view. However, I am doubtful about her method of deciding which soldiers are non-innocent in the relevant way.

Most unjust combatants, whether unjustifiably ignorant, justifiably ignorant or maliciously aware that their war is unjust, play but a small part in the

overall threat. If this is the criterion by which an unjust combatant's innocence may be judged, then it seems at first that few soldiers will count as relevantly non-innocent.

However, suppose theoretically that one individual unjust combatant found herself in a position to make a big difference to the war – she (somehow) accidentally stumbles upon the location of the enemy troops at a strategically important moment, information which will allow her side to decimate the enemy when she delivers it to her superiors.

Her liability to attack and inability to permissibly defend herself at the moment she discovers this secret location, according to Lichtenberg, depends not upon whether she *knows* that she poses an unjust threat, but upon her non-innocence, and she is non-innocent only because she poses a threat to the just combatants.

As I explained earlier, I think that posing a threat is an inadequate basis for liability in the stronger sense. The size of the threat one poses, assuming it is sufficient size to *be* a threat, may determine what size a proportionate response will be, but it does not determine whether a response is justified at all. Hence, it seems rather problematic that Lichtenberg's reasoning leaves an individual unjust combatant at one moment permitted to defend herself in battle, and at the next non-innocent and not permitted to do so, because the size of the threat she poses has increased through no fault of her own.

Lichtenberg does say that the number of combatants whose actions will count as justified under this argument depends upon factors such as 'how remote or partial is a particular unjust combatant's responsibility for the war (or for more specific threats to the enemy)' (2008: 118), but since she does not explain how large a part one individual soldier must play in order to become non-innocent, one can only assume that no answer is readily available.

In addition, Lichtenberg considers that other actions of unjust combatants (for instance, those not aimed at immediate self-defence) may be 'excused to one degree or another because of duress, mistake or ignorance, and (occasionally) insanity' (Lichtenberg, 2008: 129). She also suggests that 'some, but not all, unjust combatants will be able to claim the excuse of ignorance' (Rodin and Shue, 2008: 13).

Lichtenberg further argues that although ‘the actions of some unjust combatants will be neither justifiable nor fully excusable’ (2008: 129), it would not be ‘feasible’ (2008: 129) to punish them with, for instance, legal prosecution. The most important reason for this is because, in her words, ‘the existence of armies requires a degree of obedience inconsistent with the demands of ordinary morality’, in particular the demand ‘that individuals continually evaluate the situations in which they find themselves and consult their consciences before deciding how to act’ (Lichtenberg, 2008: 127). We must, she argues, ‘accept this degree of obedience, which is incompatible with the kinds of challenges to authority that the critique of the symmetry thesis demands’, if we wish to maintain that armies are ‘necessary and justified institutions’ (Lichtenberg, 2008: 130).

However, does this avoid the problems McMahan’s argument suffered from? I would say not – Lichtenberg’s argument follows McMahan’s too closely. The most significant difference between Lichtenberg’s argument and McMahan’s is that she argues, as I have said, that some violent actions taken by unjust combatants in their own defence may be justified, and I have already shown why I believe her argument for this conclusion (though not the conclusion itself) is problematic. Her account of unjust combatants’ liability to attack is similar enough to McMahan’s that it may also be vulnerable to the same problems.

She does attempt to give a role to the ‘invincible ignorance’ of combatants described by Ryan and Zupan, by arguing that unjust combatants’ ‘violent actions’ may be excused for several reasons, including ignorance and duress. Thus, if as Ryan suggests unjust combatants genuinely cannot, or feel they cannot, refuse their commitments to fight, or if they are ignorant of the unjust nature of the war, perhaps through what Zupan (2008: 223) describes as ‘contractual ignorance’, which ‘follows from an appropriate acceptance of one’s station and the obligations that stem from it’, then, Lichtenberg suggests, they have acted wrongly but excusably.

However, Lichtenberg argues that only *some* ‘unjust combatants will be completely excused’ – some, indeed ‘probably many more’ in Lichtenberg’s words, ‘will be excused only in part’ (2008: 129). She is not very specific about how we can decide which unjust combatants are wholly excused and

which are partially excused – she merely says that this ‘will depend on facts about the society a person lives in, the war in question, and the circumstances in which a person finds himself – his sophistication, intelligence, and access to information’ (Lichtenberg, 2008: 124).

It is perhaps easy to see why neither Lichtenberg nor McMahan attempts to base a law of war upon this account. As Lichtenberg herself says, it is not feasible to legally punish those soldiers whose actions were neither justified nor excused when ‘Often we will not know who they are; and they themselves may not know either’ (2008: 129).

But, leaving aside the issue of the separation of morality of war and the law of war advocated by McMahan and Lichtenberg, the question arises; if the justified, excused and morally guilty combatants are so indistinguishable that legal judgement is not feasible because the guilty cannot often be identified, then how can moral judgement be possible under these circumstances? This is a distinct problem for Lichtenberg’s argument.

Coady gives a similar argument in favour of the moral inequality thesis, arguing that unjust combatants may not justifiably kill either just combatants or non-combatants, but that they may be *excused* for killing just combatants because of the ‘presumption that warriors are entitled to direct lethal force against opposing warriors where they have some plausible warrant for seeing them as wrongdoers or attackers’ (2008: 164). The qualification that they must have ‘plausible warrant’ (2008:164) for this belief weakens this excuse; for instance, it does not apply if ‘the enemy troops are palpably in the right, or offer no serious threat’ (2008: 164).

This means that any realisation on the part of an unjust combatant that he *is* an unjust combatant obliges him to do whatever he can to avoid killing or harming the enemy. Coady has some sympathy with the kind of ‘duress that combat conditions and coercive command conditions impose’ (2008: 164), but not much; he suggests that while this kind of duress may provide ‘some excuse’ for unjust combatants’ actions, there are various actions an unjust combatant can and should take to avoid killing the enemy, even on the battlefield. Coady thus implies that if unjust combatants suspect that they are unjust combatants, then they may, indeed must, somehow disobey their orders to attack just combatants.

I do not necessarily disagree with Coady's conclusion that unjust combatants may only defend themselves in certain circumstances. The main part of Coady's argument that I disagree with, is the assertion that unjust combatants on the battlefield may easily avoid fighting enemy troops whenever they wish to do so.

In my opinion, individual soldiers, especially front-line troops, may not have as many options to avoid fighting as Coady thinks. He suggests that they may avoid fighting by, for instance, 'eluding combat, firing in the air, or refusing to enlist' (2008: 164).

The latter might be of some use if a soldier realised that a particular war was unjust prior to becoming a soldier, but is less helpful in answering the question of whether unjust combatants are able to fulfil their moral requirements if, as is more than likely, they do not realise the unjust nature of their war until they are fighting it. The suggestions that they may do so by avoiding combat or firing into the air seem to me inadequate.

These actions could not only lead to highly unpleasant consequences for these soldiers, including arrest or execution as a deserter or collaborator, but might morally prohibit them from defending their own lives. In a confusing, volatile situation (battles are almost invariably such), it is highly likely that just combatants may not realise one particular unjust combatant is not attempting to harm them – more probably they will treat him as they would any other enemy. If an unjust combatant who has just realised the enemy are 'palpably in the right' (2008: 164), is faced with a just combatant in the act of firing at him, under Coady's view his returning fire would apparently not be permitted or even excused, even if it was the only way to defend his own life.

This may not seem like a problem to Coady, but it seems rather counter-intuitive to me. I agree, as I will explain later, that once unjust combatants realise the unjust nature of their conflict they are not permitted to act with the intention of furthering their cause, or attack the enemy when they 'offer no serious threat' (2008: 164).

However, I do not agree that soldiers who did not set out to fight an unjust war, but realised too late that it was unjust, are prohibited from defending their own lives if they cannot avoid fighting. For Coady, it would seem, the unjust combatant's lack of options (he must fire or die) is not a factor that excuses

the defensive actions of such combatants in the same way that ignorance does – and this seems unfair to me.

In addition, the ‘moral dilemma’ (Ryan, 2011: 13), which according to Ryan would affect soldiers under McMahan’s view, also seems to me to provide a criticism of Coady’s argument.

If, as Ryan claims, the ‘institutional claims’ (2011: 12) democracies have over combatants are strong enough to create a genuine, potentially irresolvable dilemma for soldiers before conflict begins, when they are only contemplating whether or not to fight in future, from a secure environment where they have the time and resources⁴² to rationally consider their options, then how much more difficult will the decision process be when the soldier in question is on an active tour of duty, under even more pressure to fight, and her defection may result in worse consequences either from the enemy or from her own side, such as court-martial (or even summary execution, if it is that sort of army), in addition to the pressure created by these claims upon her conscience? This would at least add to the practical problems that might prevent a soldier from ceasing to fight during conflict.

2iii) Rodin’s case for moral asymmetry

Finally, David Rodin argues for the moral inequality or ‘asymmetry’ (2008: 45) of soldiers; in particular, he suggests unjust combatants ‘have no right to use force against just combatants and should be held responsible for unjust killing *post bellum*’; and ‘just combatants do not possess additional *in bello* privileges’ such as ‘the right to target non-combatants’ (2008: 45).

Rodin refers to the view that ‘unjust combatants have reduced or no *in bello* privileges’ as ‘restrictive asymmetry’ (as opposed to permissive asymmetry, which suggests ‘just combatants have increased *in bello* privileges compared to the current interpretation of *jus in bello*’) (Rodin, 2008: 55). For brevity’s sake, I will focus on his three main arguments supporting restrictive asymmetry.

⁴² For instance, in deciding at home whether an impending war is just or unjust, a potential combatant may at least attempt to research it and find out details of the potential belligerents’ reasons for waging it via the internet, media and so on, whereas in the midst of the actual conflict she may not have these necessary resources.

Firstly, he suggests that in order to accept that justified acts of war are ‘instances of, or analogous to, self- or other-defence’ (2008: 46), we must reject MEC, because ‘Legitimate defensive force may only be directed against persons who are morally or legally liable to it’ (2008: 46). This is much the same as McMahan’s argument that just combatants are not liable to attack, making their opponents’ attacks on them morally impermissible.

However, Rodin convincingly modifies this argument by rejecting McMahan’s assertion that, since liability to attack is based on moral responsibility for the threat and not on the actual threat posed by the liable individual, then, in Rodin’s words, ‘some *non-combatants* are also liable to intentional attack...if they have moral responsibility for the war, for example, by inciting, financing, or perhaps even simply by voting for it’ (Rodin 2008: 47).

Rodin opposes this view on the grounds that a non-combatant playing a part in the declaration of an unjust war is not analogous to somebody setting a mechanical trap in motion to kill someone – since the unjust combatants are not machines but people, the will of the war’s non-combatant initiator is not the only determining force. Rather, in Rodin’s words, the initiator is in the situation of someone who ‘culpably provokes’ another into attacking a third party (2008: 48).

This, Rodin asserts, changes our intuitions concerning the initiator. We might think that if the initiator brainwashes a person or, to use McMahan’s example, ‘implants a device in her brain that irresistibly directs her will to the task of killing you’ (2004: 719), it may be permissible to attack and kill the initiator if doing so will harmlessly release the controlled person (in short, the initiator’s responsibility for the attack makes him liable to defensive action), but Rodin suggests we do not think likewise when the initiator has not removed the attacker’s will entirely, but rather persuaded or allowed her to attack her victim.

Rodin gives the example of a psychopath who has been released from hospital and thus permitted to attack you, as ‘a direct result of the Minister of Health’s criminally fraudulent mismanagement of finances in full knowledge that his actions would endanger the public’ (Rodin, 2008: 48). He argues, convincingly, that it would not be permissible to kill the Minister in order to

save yourself from the psychopath⁴³, ‘even though the Minister has greater moral responsibility for the unjust threat’ (2008: 48). In this way, the non-combatants who share in the moral responsibility for the unjustified killing of just combatants are not liable to be killed by other just combatants, even if doing so would save some just combatants’ lives.

Rodin goes on to argue that the usual reasons offered to excuse the actions of unjust combatants (namely, ‘duress or...non-culpable ignorance’ (2008: 51)) do not work. Duress, he argues, ‘has not traditionally been recognized as an excuse for wrongful homicide’ in ordinary life (2008: 51), so it likewise should not be considered an excuse for killing in war.

David Mapel notes similarly that duress, like fear of being killed (or ‘personal cowardice’ as he puts it (1998: 178)), is not traditionally considered a valid excuse for a just combatant’s abandoning or neglecting his duty to fight, and argues that if this is so, such duress should not be an excuse for neglecting what Rodin calls the ‘presumably more stringent requirement not to engage in wrongful killing’ (2008: 52).

However, this does not necessarily mean duress *should* not be considered a valid excuse for an unjust combatant’s actions. One would have to bite Mapel’s bullet and acknowledge that true duress is also an excuse for failing to fight as a just combatant, even if it is not traditionally considered so – but I do not think this is too counter-intuitive.

⁴³ One possible response to Rodin’s argument might be to suggest that while our intuitions say killing the Minister is not permitted when, as in Rodin’s example, he is responsible because he culpably omits to prevent the psychopath’s release, we might feel differently if the Minister had shut down the hospital with the sole aim of releasing the psychopath and letting him harm people, either with some malicious intent or for a cause he believed justified his actions (like highlighting the need for such hospitals). The inference would be that at least some non-combatants (leaders of a collective entity, for instance) are in an analogous situation; they actively set the unjust combatants on the just ones rather than omitting to prevent their attack. However, I do not believe this works, even if we grant that the Minister would intuitively be liable for defensive action if he deliberately sets the psychopath free to harm people. The Minister in this scenario must know that the people his actions will harm are not liable to that harm, whereas most non-combatants who either permit or actively cause an unjust war do so in the belief that any combatants who are killed by their combatants will be liable to that harm, either because they believe that the other side are in fact unjust combatants, or because they subscribe to the still-widespread belief that all combatants, just or unjust, have symmetrical rights and liabilities. An intuition that the Minister might be liable to defensive attack, but non-combatant initiators might not be, could perhaps be explained by this difference in moral responsibility – the Minister is clearly doing something wrong, while the initiators could perhaps reasonably be excused for believing their actions never harm the non-liable.

If, for instance, a just combatant is reliably informed that his position is about to be overrun, and unless he ceases fighting for his just cause he will be quickly slaughtered, I do not believe he has a duty to continue fighting regardless. Otherwise, just combatants who surrender in the face of overwhelming odds are acting immorally.

Mapel himself admits that 'we should excuse a civilian who decides to take his chances on the Eastern Front rather than face...draconian punishments' like execution or imprisonment (1998: 178). It seems, then, that he does admit the power of stronger forms of duress to excuse an unjust combatant's actions.

As regards Rodin's point that in ordinary life, duress is 'not traditionally...recognized as an excuse for wrongful homicide' (2008: 51), again this does not prove it *should* not be. Someone genuinely forced to commit a crime may still be liable to be prosecuted for it, but there is bound to be some recognition of the mitigating circumstances (in terms of a shorter sentence, for instance). And such recognition amounts to an acknowledgement that duress makes a difference to the degree of moral responsibility a person may have for a coerced action.

In addition, Rodin argues, any excuse offered by duress might only be a partial excuse, not excusing the actions of soldiers who 'volunteered or allowed themselves to be drafted in circumstances in which there was a reasonable likelihood that they would be required to engage in wrongful killing' (2008: 52).

This implies, however, that the soldiers originally had a choice, they 'allowed themselves' (Rodin, 2008: 52) to be put in a situation where they lost that choice, in the knowledge that they would probably be ordered to kill wrongfully.

Freely deciding to give up the choice not to engage in wrongful killing, knowing that it is reasonably likely to be required, amounts to declaring one's willingness to engage in wrongful killing – if one was not willing, one would not freely abdicate this choice. In short, Rodin's argument excludes only cases I would not consider true cases of duress, but cases of (to coin a phrase) a culpable lack of freedom.

Rodin then argues that ignorance is an insufficient excuse since modern freedom of information and technology like the Internet provides potential

combatants with access to at least some relevant information, which he claims ‘may be sufficient to enable a morally reflective person to make a reasonable assessment of the justice of war’ (2008: 52). I do not think this is necessarily true either, and I will explain why later.

In his third argument for the moral inequality thesis, Rodin suggests ‘a simple contractarian argument’ (2008: 56) can provide reasons for accepting an asymmetrical treatment of combatants. This is the Rawlsian argument that if ‘all potential parties to war’ were ‘in an original position within which they have full factual knowledge about the world but no knowledge of how they will be situated in it’ (Rodin, 2008: 57), and if from this position they were asked to decide between the moral equality thesis, permissive asymmetry and restrictive asymmetry (assuming they had already agreed upon the need for and the content of *jus ad bellum* and *jus in bello*), then from this original position they would, in Rodin’s view, conclude that restrictive asymmetry is the best option.

He claims they would reject permissive asymmetry because they would be aware that 1) ‘most combatants at most times will be engaged in a war that is unjust’, and 2) ‘when engaged in an unjust war, the majority of combatants will mistakenly believe their war to be just’ (Rodin, 2008: 58).

He supports 1) with the point that, it being improbable in any given conflict that both belligerents have just cause (as this would mean both are defending themselves against the other’s unjustified attack), at least 50 percent of belligerent parties (and probably more) are fighting unjustly.

2), Rodin claims, is supported by the historical observation that ‘the majority of wars have been claimed to be just on both sides’ (Rodin, 2008: 58), the psychological observation that war is ‘so difficult, so dangerous and so costly, that it is exceptionally difficult for ordinary humans to undertake it without believing that they are in pursuit of a cause that is...just’ (Rodin, 2008: 58), and the fact that, since war is the final resort when two or more parties cannot agree, ‘most conflicts arise from competing interpretations of circumstances relating to justice’, meaning that ‘it is to be expected that most combatants in most wars will believe themselves to be fighting a just war’ (Rodin, 2008: 59).

For these reasons, the parties in the original position would be aware that, as potential combatants, they are more likely to be unjust combatants that just

ones. Accepting permissive asymmetry would therefore, according to Rodin, 'expose them and their compatriots to two significant forms of risk on the battlefield' (2008: 59): firstly, the 'moral risk' that, believing themselves to be just combatants, they might 'inflict incidental harm on non-combatants...which was not in fact morally justified' (Rodin, 2008: 59), and secondly the 'physical risk' that if they were just combatants and their opponents unwittingly unjust combatants, then they as just combatants would be in increased danger, because 'their enemies would inflict upon them unjust and excessive collateral harm in accordance with a mistakenly liberal interpretation of the proportionality requirement' (Rodin, 2008: 59).

Thus, Rodin argues, contractors in the original position would have ample reason to reject permissive asymmetry. He then argues that restrictive asymmetry does not suffer from any problems that might cause its rejection; that it does not, for instance, 'reduce the likelihood that unjust combatants would comply with important current *in bello* prohibitions such as the norms of non-combatant immunity' (Rodin, 2008: 60), because it is possible to retain non-combatant immunity without advocating 'combatant non-immunity' (Rodin, 2008: 60). In short, the two are not in fact logical correlates of one another, as some advocates of symmetrical war rights such as Lene Bomann-Larsen have suggested. Rather, in Rodin's view, 'combatant rights, and combatant obligations are logically separable' (2008: 61).

However, I do not accept that Rodin's arguments necessarily prove that his restrictive asymmetry is the only, or even the best, version of the moral inequality thesis. The success of my arguments will, therefore, depend upon how far they can avoid Rodin's criticisms.

I hope to defend a form of the moral inequality thesis which can successfully avoid them, whilst also avoiding the counter-intuitive conclusion that unjust combatants are not permitted to defend their own lives in battle, even if they are subject to the worst kind of duress or are non-culpably unaware they are fighting unjustly. As I have said, I disagree with Rodin's arguments against duress and ignorance as acceptable excuses for at least some of an unjust combatant's actions.

So, to sum up, the moral equality thesis defended by such theorists as Benbaji and Zupan, which argues that both just and unjust combatants possess

the same war rights and privileges, and are subject to the same liabilities, has been strongly criticised by such theorists as McMahan and Rodin, who claim that the nature of the cause for which a group of combatants are fighting does in fact make a difference.

Advocates of the moral inequality thesis differ on whether they advocate permissive or restrictive asymmetry, and also on whether some unjust combatants' actions, although impermissible according to their argument, may nevertheless be excusable. However, for the purposes of this dissertation, they may be treated as forming a fairly coherent position. The basis for their asymmetrical treatment of just and unjust combatants seems to be the argument that unjust combatants are liable to attack, and just combatants are not.

Although both the moral equality thesis and the moral inequality thesis have, as I have said, various convincing points, it is my intention to defend a slightly different asymmetrical account of the war rights of combatants. I intend to defend an account based on the definition of liability to attack I developed earlier. Basically, my account will accept the three propositions that A: Just combatants have a right to attack unjust combatants; B: Unjust combatants do not have a right to attack just combatants; and C: Both just and unjust combatants may be presumed, in the absence of proof to the contrary, to have a right to defend themselves against attack. I will attempt to show that A, B and C are a consistent set, and defend an account of the rights and liabilities of combatants based on them.

3: The Rights and Liabilities of Combatants Resulting from a Dual Account of Liability

To recap, my account of liability argues there are two kinds of liability to attack: weak liability and strong liability. I define liability in the weaker sense as closest to the causal account of liability – meaning that anyone who is the

direct cause of an unjust threat of harm to someone who is not liable to attack become weakly liable to defensive action.

Weak liability means the liable person may legitimately be attacked in defence, but the liable person retains their right of counter-defence, so that she may also defend her life against her victim's defensive attack. I argue that this is the most plausible way to assign liability to Innocent Attackers and Innocent Threats.

Also, I am prepared to accept something like McMahan's account of 'moral responsibility for an unjust threat' (2008: 22) as a criterion for strong liability. When someone chooses to attack another individual, foreseeing the threat to the victim's life, she becomes a legitimate target for that person's defensive actions, *and* forfeits her own right of defence.

What, then, does this mean for the issue at hand – the question of whether just and unjust combatants have symmetrical or asymmetrical war rights? The causal account of liability perhaps applies best to the moral equality thesis – both just and unjust combatants pose a direct threat to enemy combatants, so both, according to the causal account, are liable to the enemy's attack – while McMahan's moral responsibility account of liability, as we have seen, forms a main justification for the moral inequality thesis. But what sort of account of the war rights of combatants arises from my account of liability, which incorporates both the causal and the moral responsibility accounts?

3i) A symmetrical account of weak liability to attack

Well, the first thing to work out is whether just and unjust combatants are weakly or strongly liable to attack. In the weak, causal sense of liability, it seems fairly clear they can be weakly liable. When combatants (just or unjust) launch a direct attack upon enemy combatants, they are causally responsible for the resulting threat of harm to those enemy combatants.

As I mentioned in Chapter One, it is not my belief (as it is Walzer's) that soldiers *qua* soldiers automatically lose the rights and immunities they had as civilians. I am much more sympathetic to McMahan's view that *if* soldiers lose things like their immunity from attack or their individual right to defence, it is because of something else, something not intrinsic to their status as

combatants. McMahan's view is that this was their moral responsibility for constituting part of an unjust threat of harm to others. My view is that while moral responsibility is one factor, it is not the only one.

Causal responsibility for an unjust threat to another person's life is, I believe, the other factor that changes a soldier's rights. It makes her weakly liable, meaning that she loses her immunity to attack. However, unless that soldier is also *morally* responsible for the unjust threat (making her strongly liable), I suggest she does not lose her individual right of self-defence. Like the Innocent Attacker or the Innocent Threat, she may be defensively attacked by her victims, but she may also engage in counter-defence⁴⁴.

I would accept that all combatants, just or unjust, are at least weakly liable to defensive attack. All combatants, in the course of their duties, take actions which threaten harm to other combatants. When GI Joe shoots at GI Henry, even if Joe is brainwashed, implanted with mind-controlling military technology or sleepwalking, he is still causally responsible for the threat to Henry, and thus weakly liable.

Theorists like McMahan might object to this by suggesting that if GI Joe is a just combatant and GI Henry is an unjust combatant, then Joe's attack on Henry is not an *unjust* attack, and does not pose an *unjust* threat of harm. It is, rather, a victim's act of defence against his attacker – and, given that the victim's actions are justified according to his right of defence, the victim does not himself become liable because of it. However, I have already shown that this is not necessarily the case.

It is a potentially uncomfortable consequence of the concept of weak liability (although one which must be faced) that the victim loses his immunity from attack – he also becomes weakly liable. If the Innocent Threat, because the threat she poses is not her fault, does not lose her right to defend herself, and her Victim, who is also not at fault, also has a right to defence, then the result is that both, through no fault of their own, lose their immunity to attack.

⁴⁴ Gerhard Overland makes a somewhat similar point that lethal defensive force may be justified even 'against aggressing soldiers who are morally innocent' (2006: 455), by which he means soldiers who are not 'morally responsible for the unjust threats they pose' (2006: 460) (he gives examples such as conscripted soldiers fighting under duress, or soldiers who 'fight out of loyalty to their country and out of lawful subservience to it' (2006: 460)).

However, I consider this more plausible than the result that either the Innocent Threat or the Victim, through no fault of their own, loses the right to defend themselves. Both are in the same situation, faced with an imminent threat of harm without being responsible for it, therefore it seems to me the best solution that they should both have the same liability to attack.

If (as Thomson would have it) the Innocent Threat is strongly liable but the Victim is not, or if (as McMahan would say) the Innocent Threat is not liable at all, then either Innocent Threat or innocent Victim is thus morally obliged to permit himself or herself to be killed (even though they may act excusably if they disobey this obligation, they still act *wrongly*, and that is what I believe to be implausible). Hence, I would argue that even if GI Joe is a just combatant, and therefore acts permissibly in shooting at GI Henry, Joe may nevertheless become weakly liable to attack, *provided that Henry is himself only weakly liable*.

The question we must therefore settle is: assuming neither Joe nor Henry is brainwashed, sleepwalking and so on, is either one *strongly* liable? In short, we must determine if either just or unjust combatants are morally responsible for the threat they pose to enemy soldiers.

To begin with, as I mentioned, I agree with McMahan that just combatants, all things being equal⁴⁵, are not morally responsible for the threat of harm, because as agents of their collective they are defending all the innocent people threatened by their enemy's unjustified attack. However, I would further assert that the vast majority of unjust combatants are also free of this particular moral responsibility.

3ii) The argument for combatants' *weak* liability – duress and epistemic limitation

There are, as I have shown in this chapter, varying reasons why advocates of the moral equality thesis such as Walzer argue that unjust combatants are not morally responsible for the unjust threat of harm that they pose, and there are

⁴⁵ In other words, provided they have not made themselves strongly liable to attack by deliberately creating an unjust threat of harm in other ways – for instance, by violating the *jus in bello* rules of discrimination or proportionality.

also reasons why many advocates of the moral inequality thesis concede that, whilst unjust combatants may be morally responsible, their actions are nevertheless excused.

McMahan refers to three kinds or categories of possible ‘excusing conditions’⁴⁶ for fighting as an unjust combatant – namely, ‘duress, epistemic limitation and diminished responsibility’ (2009: 116). He agrees with Rodin that these conditions do not successfully excuse the actions of unjust combatants. However, I hope to prove that the first two⁴⁷, at least, are in fact successful in proving a lack of moral responsibility on the part of soldiers who are subject to these conditions.

Duress, as an excuse for fighting as an unjust combatant, refers to a lack of choice in the matter – a soldier who fights under duress has been forced or coerced to fight⁴⁸. ‘Duress’ may be a misleading term, since it seems to refer to the most violent, forceful means by which a soldier can be induced to fight, such as conscription enforced by death sentences for draft-dodgers.

Yet, as McMahan defines it, the ways in which potential soldiers can lack choice are fairly broad; not just conscription or what McMahan calls ‘a kind of compulsion deriving from the grinding exigencies of their economic or social

⁴⁶ McMahan suggests that these conditions would (if they were successful, and he agrees with Rodin in arguing that they are not) act as excuses only, not as justifications for unjust combatants to fight for their unjust cause – but their function as excuses serves, in McMahan’s words, to, ‘mitigate the culpability of [the] unjust combatants to whom they apply’ (2009: 123), and this may be sufficient to demonstrate that these unjust combatants are not culpable enough to be morally responsible. Hence, although I agree with McMahan that unjust combatants cannot be justified in fighting to advance their unjust cause (as I will explain later), if these conditions can apply, then these unjust combatants are not morally responsible for their unjustifiable actions, and thus are only weakly liable.

⁴⁷ The third excusing condition, that of diminished responsibility, I will not be positing as a valid excuse for unjust combatants, chiefly because I agree with McMahan that there exist ‘very few cases in which a soldier is wholly lacking in the capacity for morally responsible deliberation and agency’ (2009: 122), and also because many ways in which a soldier’s capacity for deliberation might be partially impaired, such as post-traumatic stress disorder (to use McMahan’s example), might also be placed under the umbrella of duress, or the inability to freely make a choice.

⁴⁸ In moral and legal terms, duress is considered an excuse for a person’s actions, not a justification. However, I believe this is adequate for my argument. As a moral excuse, duress proves not that the actions were justified, but that the agent is not morally blameworthy for his actions. And, as Eimear Spain put it, ‘If the act itself is unjustified, but the actor must nonetheless be exculpated, this points to a judgment that the actor chose the morally appropriate course of action in light of the circumstances, or at least a course of action for which moral, and therefore criminal, censure is not warranted’ (2011: 41). A moral excuse, then, is sufficient to prove either a complete lack or a diminution of moral responsibility for fighting as an unjust combatant.

circumstances' (2009: 117), but also what he refers to as 'pressures from natural, social, or psychological sources' (2009: 131).

It is my contention, also based upon the arguments of other theorists like Ryan and Zupan, that there are many subtle ways in which a potential combatant may not be completely free to choose not to fight. Therefore, the first option I will consider is that unjust soldiers may lack moral responsibility due to the fact that they lack the complete freedom of choice⁴⁹ necessary to opt out of fighting – an option that is, I believe, sufficiently similar to the traditional excuse of duress for that term to be used.

Epistemic limitation, as McMahan calls it, takes account of the fact that 'Combatants usually act in ignorance of a great many factual matters that are relevant to the determination of whether the war in which they have been commanded to fight is just' (2009: 119). I believe that epistemic limitation provides a second possible reason why most unjust combatants are not morally responsible for the threat they pose, and thus cannot be strongly liable.

Therefore, I intend to prove that the most plausible possible reasons that unjust combatants might lack moral responsibility are their lack of full knowledge about the injustice of their cause (called 'invincible ignorance' by Zupan (2008: 217) and 'epistemic limitation' by McMahan (2009: 116)), and their lack of freedom to choose not to fight in an unjust war.

When discussing the consent theory of authority, David Estlund made the point that 'It can only be wrong for a person to refrain from consenting if that person has had the opportunity to consent. Indeed, unless there is an opportunity, they have not refrained' (2005: 360). In order to have this opportunity, it seems to me that one must both be aware (or culpably unaware) that one poses an unjust threat, and have the ability to choose to avoid posing that threat – and, as I will demonstrate, most unjust combatants are neither.

Firstly, if combatants lack the freedom to simply choose not to fight in a just war, then McMahan's claim that they have a moral obligation to do so (and

⁴⁹ By this, I mean not just a total lack of freedom (as the Innocent Attacker lacks the power to prevent himself from killing) but the lack of a reasonable degree of choice in the matter. For reasons that will become clear, I believe a person cannot be held morally responsible for her actions if there is some force that reasonably prevents her from choosing a more morally acceptable path. This might include not just physical force or the fear of intolerable consequences such as execution or torture, but other, subtler factors, which I will discuss shortly.

are thus morally responsible for the harm they do as combatants if they fail to fulfil it), is intuitively unreasonable. To have a moral obligation that one can be blamed for not fulfilling, it must (presumably) be reasonably possible for one to fulfil it.

Eimear Spain writes that ‘the duress defence is permitted in Anglo–American law where the will of the defendant is overborne by the threats to which he is subjected which constrain his choices’ (2011: 23). I will be using an interpretation of this duress defence as the first possible reason why unjust combatants are not morally responsible for fighting as unjust combatants.

However, there could be differing definitions of what it means for an agent’s will to be ‘overborne’ (Spain, 2011: 23). The most plausible definition, which I will be using, is similar to that set out by Larry May. He suggests that an individual is absolved of moral responsibility if she is unable to make a *moral* choice – i.e. she has (she believes) no other available options that are more morally permissible. For instance, in describing the defence used in the Nuremberg courts to argue that some ordinary Nazi soldiers should not be held legally or morally responsible for following the illegal (and immoral) orders of their superior officers, May writes that ‘there are two aspects of moral choice that are of importance in the Nuremberg defense. The first is that the soldier reasonably believes that the superior’s order was legally and morally valid. The second is that the soldier believes that following the superior’s order was the only morally reasonable course of action open to him or her’ (May, 2005: 181). The first aspect appears to relate to non-culpable ignorance, the second to duress.

I would similarly argue that duress would exist where a combatant’s choices were constrained to such a degree that, even if she is aware that her collective is waging an unjust war, she will consider that serving as a soldier is still her only ‘morally reasonable’ option, the only one she can take without violating an even more vital duty or incurring an intolerable cost.

There are, as I have hinted, various reasons why it may not seem, on the part of individual combatants, like a morally reasonable option to opt out of fighting in an unjust war. One possibility is Ryan’s suggestion that combatants in democratic countries may feel they are subject to a ‘democratic duty’ to continue to serve, because (in democratic countries at least) serving as a

soldier is seen as fulfilling a ‘general duty to support democracy’s protective institutions’ (Ryan, 2011: 22).

This might diminish the degree of choice such soldiers perceive themselves to have, since if they believe that fighting whenever commanded to do so is part of the larger task of protecting their democratic nation and their loved ones within it, they could experience a serious ‘moral dilemma’ (2011: 13).

As Ryan puts it, their ‘duty not to kill unjustly’ would come ‘into conflict with the duty to protect...loved ones’ (2011: 31). They might not feel free to opt out of fighting, even if they suspected their war might be unjust – doing so would conflict with their democratic duty.

However, as I argued in Chapter One, Ryan’s argument may be flawed. Even though he argues that the democratic duty soldiers believe they are under is not a real duty, he appears to accept that belief in this duty inevitably exists. Thus, whether or not the state has a right to make these claims upon individual combatants, the claims are being made and accepted. As such, they make a difference as to the degree to which those subject to them may be morally responsible for fighting as unjust combatants.

But, as I said, McMahan could (and does) argue that the obligation not to take part in unjust wars requires combatants to look at the morality of the wars they fight in, rather than just accepting that being a soldier of a democratic nation means one has a duty to fight without first examining the justice of the war.

Unless one can prove that such a democratic duty exists, soldiers may not in fact be constrained from choosing not to fight – as I am not, when I believe I am not free to cross the road if I erroneously (due to poor eyesight, say) believe there is an unbridgeable gap in the middle.

In fact, I am free to cross the road, and in fact, the soldiers are free to choose not to fight, because I am mistaken in my belief that a gap exists, and they are mistaken in their belief that a duty exists. As I said in Chapter One, the way to solve the Ryan’s ‘dilemma’ (2011: 13) may be to demonstrate to the combatants that they do not have any democratic duty to fight regardless of whether the war is defensive.

However, as a possible reason for combatants’ lack of freedom, this still has teeth. Soldiers may be mistaken in their belief that they are subject to a

‘democratic duty’ to fight (Ryan, 2011: 22), but this belief can still be relevant in determining whether they are free to choose not to fight an unjust war, for the following reason.

These combatants may be mistaken, but *non-culpably* so. They are not responsible for their mistake, because they cannot be reasonably expected to know that their democratic duty does not exist. If a soldier from a democratic country genuinely believes he has a democratic duty to fight whenever ordered to do so (and as Ryan points out there is every reason to think many soldiers believe this, since, in democratic countries, serving as a soldier is often seen as fulfilling a ‘general duty to support democracy’s protective institutions’ (Ryan, 2011: 22)), then how is that soldier to know he is mistaken in believing in this duty?

I believe that they cannot all be reasonably expected to recognise their mistake in a world awash with propaganda, national triumphalism, and so on; and thus, we cannot convincingly argue that combatants are morally responsible for fighting in an unjust war, if they genuinely believed that they had a vital duty overriding the moral imperative not to fight.

This argument might then potentially apply to some non-democratic countries as well. If the actual existence of the duty in question is not necessary, but only a genuine, non-culpable belief in its existence amongst combatants, then might it be possible for the combatants of a non-democratic nation or collective to similarly believe in some duty binding them to fight at their government or leader’s command?

It would not be belief in a *democratic* duty (unless, for instance, the combatants non-culpably believed in the validity of a pseudo-democratic government set up by their dictator), but they could, perhaps, believe they had a duty to protect their particular community, their loved ones or their way of life, and that whatever wars they fought, even if they had some other goal, would also have the effect of protecting these treasured things.

Ryan might respond that one reason why a democratic duty seems plausible to combatants is the assumption ‘that a democratic government will generally go to war for legitimate reasons; more specifically, it will generally go to war for reasons of self-defense’ (2011: 23) (even though said assumption is, he

argues, false) – and in the case of non-democratic collectives, there can be no such assumption.

However, this response assumes combatants in non-democratic collectives are always aware that their leaders may take them to war for non-defensive reasons – it assumes a level of transparency and freedom of information which is, if anything, *less* likely in a non-democratic collective than a democratic one. Citizens of a dictatorship like North Korea, for instance, might be convinced by propaganda about their leader’s infallibility and the just nature of their government’s actions, or given a mistaken impression of other countries’ intentions.

Therefore, there is a distinct possibility that combatants in democratic and non-democratic countries may not be completely free to choose not to fight even if they suspect that the war their country is about to fight may be unjust, because they may believe, rightly or wrongly⁵⁰, that they have a duty as soldiers, to fight when called upon to do so. Other factors, such as social pressure or propaganda, may similarly constrain their choice. What McMahan presents as a simple, free choice, therefore, may not be quite so simple or free.

However, as it stands there may appear to be a problem with the argument that an unjust combatant may be under duress, and therefore not morally responsible, due to these factors. The most common legal definition of duress as a defence excusing an individual from criminal (or, therefore, moral) responsibility, as set out in Article 31 of the International Criminal Code, states that criminal responsibility is avoided when the individual’s action

has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid the threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided⁵¹.

⁵⁰ I will not be taking a stance on whether this belief is right or wrong (although as I have said, Ryan argues that it is wrong); since, as I have shown, combatants who non-culpably hold such a belief have their freedom to choose constrained whether or not the duty exists.

⁵¹ Rome Statute for the International Criminal Court (reprinted Bassiouni, 1999: 735).

Spain wrote similarly that the law ‘requires that an individual face threats of death or serious injury to claim the defence [of duress]’ (2011: 150). This would set the threshold for duress higher than I set it in my argument. I argue that an unjust combatant’s freedom to choose not to fight may be constrained by subtle threats or influences like propaganda or the belief in a democratic duty; but the legal definition of duress suggests that only direct constraints on an individual’s ability to make moral choices, like imminent threat of death or serious harm, constitute duress.

However, I would contend that duress resulting from factors like social pressure or propaganda can legitimately excuse unjust combatants from moral responsibility. The apparent problem may be due to the fact that Article 31 refers solely to ‘duress by threats’ (Spain, 2011: 1), whereas these factors are more likely to fall into ‘a subset of the duress defence’ (2011: 3) called ‘duress of circumstances’ (2011: 1), distinguished from duress by threats in that it ‘arises not due to threats directed against the accused but due to the circumstances in which the defendant finds him or herself’ (2011: 3-4). Factors like social pressure or propaganda, which do not arise from explicit threats made by an individual or distinct group of individuals, but still create a situation in which individuals are not fully free to choose a more moral option, may therefore be a form of duress.

Such factors, while they cannot suspend free will with the same immediate, shocking effect as threats to one’s life, they can diminish the ability to make a moral choice more subtly, by subverting or unduly influencing the will rather than directly overriding it by threats⁵². In May’s argument, like mine, an agent’s belief plays a large part in her ability to choose not to fight – she lacks moral responsibility if she a) ‘reasonably believes that the superior’s order was legally and morally valid’ and b) ‘believes that following the superior’s order was the only morally reasonable course of action open to...her’ (2005: 181). It is easy to see how social pressure or propaganda might cause an agent to *believe* she had no other morally acceptable action but to fight, without physically threatening her.

⁵² Although some social pressure perhaps also counts as a form of threatened harm, as it works at least partially by threatening people with harms like social exclusion, that may not seem as severe as threatening their physical safety, but may possibly count as threats to that person’s capacity to lead a flourishing life.

Even Spain suggests the definition of duress should not focus on whether or not ‘action is compelled under duress’ (2011: 26), as ‘It may be argued that this view of duress confuses compulsion with choice’ (2011: 28). Instead, she claims ‘it is preferable to view the defences as involving a reasoned choice for which the actor is entitled to be exculpated at law’ (2011: 26). This suggests a person under duress is not unable to make a choice at all, but that she is not wholly responsible for choosing the morally wrong option, since the duress she is under constrains her from adopting any more morally permissible alternatives. This need not only be through direct, physical threats, but can also be through more subtle constraints, like propaganda convincing her that she has an overriding patriotic duty to fight for her government whenever it commands.

However, one question remains to be answered; at what point do influencing factors like social pressure and propaganda sufficiently subvert or diminish unjust combatants’ faculties of free choice so as to excuse their actions?

One possibility might be drawn from what Spain refers to as attempts ‘to curtail the [legal] defence of duress by placing an objective limitation on the defence’, by ‘requiring that the defendant show the fortitude of a reasonable man’ (2011: 175). In short, this suggests duress only excuses a person’s actions if a ‘reasonable man’ (Spain, 2011: 175) would be likewise unable to resist the threats (or other factors) that constrain the duress victim from choosing a more moral alternative. To apply this kind of restriction to my definition of duress would mean the point at which factors like social pressure or propaganda become exculpatory is the point at which a ‘reasonable man’ would succumb to them – if they are weak enough that anyone of reasonable ‘fortitude’ (Spain 2011: 175) or strength of will would be able to resist them, then they would not be severe enough to excuse anyone’s actions.

However, this possibility immediately presents a problem, one which Spain herself mentions; namely ‘Just who is the reasonable man and what is reasonable behaviour?’ As Spain points out, ‘The answer varies across societies and through the ages’ (2011: 176). It might be possible to create a workable definition of a ‘reasonable’ man and ‘reasonable’ behaviour, but it seems to me both unlikely and extremely difficult, and to do so would greatly increase the length and complexity of my argument.

Instead, I would suggest returning to my original definition of duress. Duress, as I understand it, occurs when an individual's ability to make a moral choice is constrained or diminished by circumstances or the actions of others, outside that individual's control. A closer look at this definition will, I believe, yield a potential answer to the question of the threshold at which factors like social pressure and propaganda become counted as duress.

As May pointed out, whether an individual can choose a morally permissible option is determined by 'whether the alternatives open included ones that were morally permissible', and 'whether there were alternatives open that could be considered reasonable' (2005: 193). He adds that 'In most situations, it is not part of one's moral choices, and hence too much to expect, that one should have done something highly dangerous, or otherwise unreasonable' (2005: 193).

When determining whether an individual subject to more insidious kinds of constraint, like social pressure or propaganda, was in fact under duress when he fought as an unjust combatant, we must therefore determine if there were any reasonable morally permissible alternatives open for him. It may at first appear as though an individual subject *only* to these insidious constraints, rather than more direct forms of duress, does have other reasonable options besides becoming an unjust combatant, since he could refuse to fight in the army without facing any actual threats of harm. However, it is possible for these factors to limit the reasonable alternatives open to us, simply by making us incapable of choosing the morally permissible alternatives.

For instance, suppose an individual has been, from a young age, subject to high levels of government propaganda convincing him he has an overriding patriotic duty to fight for his country whenever its government commands, for whatever reason. It seems to me that when that government calls him to enlist during an unjust war, the option of refusing is *not* in fact open to him, because the propaganda has rendered him mentally incapable of following it – has convinced him this is not an option he can take due to his overriding duty.

The threshold at which factors like social pressure or propaganda become duress, then, is the threshold at which that social pressure or propaganda becomes powerful and convincing enough to close off any reasonable moral alternatives, whether by threatening an individual with some sufficiently

severe harm if she chooses them, or by making the alternatives seem so unreasonable that she is unable to choose them (e.g. by subjecting her to sufficiently convincing propaganda, such that an individual could not be reasonably expected to remain unconvinced).

Of course, this definition at first appears to have a similar problem to the first definition I considered; namely, what distinguishes a 'reasonable' alternative from an unreasonable one? However, I would argue that defining a reasonable alternative is simpler than defining a reasonable man, or reasonable behaviour. The latter two are much more subjective, varying according to different times and cultures, perhaps even altered by extreme circumstances, as Spain pointed out (2011: 176). But I would suggest a reasonable alternative can be defined more objectively, as one that it is possible for the individual to pursue, without incurring a cost too high for him to be reasonably expected to pay. May, for instance, defines a situation in which reasonable alternatives are open as one in which 'the agent had alternatives that did not involve a high probability that there would be a high price to pay for choosing that alternative course of action' (2005: 193). And it is my contention that such factors as social pressure or propaganda may close off these alternatives by affecting the agent's understanding concerning their price.

For instance, in my example of the individual brainwashed by patriotic propaganda, he has been convinced of an overriding patriotic duty to obey his government's call to arms, and so he naturally believes that refusing to fight will incur far too high a price, namely ignoring his most important duty. Similarly, if there is enormous social pressure to enlist being brought to bear on an individual, when he knows that refusal may mean losing his friends, his place within society, being disowned by his family, and so on, is it not equally likely that refusal to fight appears too costly an alternative? In these cases, the propaganda or social pressure is severe enough that individuals could not reasonably be expected not to be convinced by it.

I argue, therefore, that an individual agent subject to severe social pressure or propaganda influencing her to fight as an unjust combatant, would have no other reasonable alternative open to her. The point at which this social pressure or propaganda is severe enough to count as duress is, in my view, the point at which individuals could not be reasonably expected to overcome these

factors – hence, no reasonable, morally permissible alternatives would appear open to the majority of individuals subject to them⁵³.

In addition, there is the distinct possibility that unjust combatants will not only have their ability to make a moral choice constrained in subtle ways like these, but will experience more direct forms of duress – most significantly, conscription. A conscript, by definition, is a soldier who does not volunteer for service in the army, but is forcibly drafted, with varying degrees of force depending upon the system of conscription – ranging, as McMahan pointed out, from ‘a fine to imprisonment to execution’ (2009: 117). On the immediate face of it, conscripts would appear to be soldiers who have not chosen to fight.

Aristotle makes a similar argument about responsibility for actions under duress: if ‘things...are done from fear of greater evils’, such as the fear that ‘a tyrant...having one’s parents and children in his power’ would kill them if one did not ‘do something base’ (2001: 964), then while one technically acts voluntarily, in that the person in question is not telepathically controlled or subject to irresistible external physical forces, one’s actions are ‘in the abstract perhaps involuntary’, as ‘no one would choose any such act in itself’ (Aristotle, 2001: 965) – and no one is morally responsible for involuntary actions.

McMahan also defines conscription as a form of duress (2009: 116). However, since he advocates the strong liability of *all* unjust combatants, McMahan argues that duress due to conscription (and indeed other forms of duress) does not provide a valid excuse for fighting in an unjust war, and that conscripts are therefore just as morally responsible, and just as liable to attack, as volunteer soldiers.

He argues, for instance, that there is an inconsistency between our attitude towards unjust combatants who fight because they are subject to conscription, and our attitude towards terrorists who might be under similar duress – that we

⁵³ There may of course be some individual variation, in that some individuals may be more or less easily persuaded than the majority – but I do not think the existence of exceptional individuals who see through propaganda that convinces huge numbers of their compatriots substantially alters my argument. The majority could not reasonably be expected to do likewise. However, those individuals whose ability to resist propaganda or pressure is *lower* than the average, (people with learning difficulties, for instance) might potentially have a lower threshold at which these forms of duress become exculpatory, although I lack the space to explore this in any more detail.

consider such duress a mitigating factor for unjust combatants, but not for terrorists. However, I am not so sure that this is as clear as McMahan wants it to be. McMahan himself admits that the *kind* of duress represented by conscription is ‘seldom’ visited upon terrorists, most of whom, in McMahan’s words, ‘appear to be fervent volunteers’ (2009: 125).

Also, war and terrorism are not sufficiently analogous for one reason; the direct targets of a terrorist attack are typically non-combatants. As I have argued, if even just combatants deliberately target non-combatants, they become strongly liable, since the act of targeting non-combatants is wrong over and above the justness or unjustness of the war itself. It is simply not a means of defence to which the right of defence entitles you. The same can be said for terrorism – even if the terrorists have a just cause, they have chosen an impermissible means of furthering it.

However, McMahan also claims there are other options most conscripts could take, meaning that they do have the freedom to choose not to fight. For instance, if the punishment for refusing to fight when conscripted is imprisonment, they could choose to go to prison.

Since, as McMahan points out, ‘the wrong that is involved in fighting in an unjust war is very serious: it is the wrong of intentionally killing people who are doing more than defending themselves and other innocent people’ (2009: 132), it is a wrong of sufficient gravity that suffering imprisonment does not seem too high a price to pay to avoid committing it.

For instance, if one had two alternatives: either to be unfairly sentenced to a prison sentence or to get acquitted by killing a member of each juror’s family, so that they are too frightened to find you guilty, then McMahan would argue (and with some justification), that you may not kill innocent people in order to spare yourself this relatively minor harm. Hence, since going to prison would seem to be a reasonable alternative to fighting an unjust war, conscripts who have this option would, therefore, count as morally responsible.

McMahan also argues that even stronger forms of punishment, such as the death sentence as a punishment for conscientious objection, may not always excuse unjust combatants’ actions. He suggests that although the threat of death as a penalty for outright refusal to fight may prevent this from being a

reasonable option for combatants, there are still other reasonable options open to them.

McMahan refers to an individual situation where a criminal threatens to kill you unless you kill a third party. Just as you ‘might be able to satisfy the threatener if you compellingly *appear* to be trying to kill the third party’ (2009: 133), so, he claims, a soldier could endeavour to *appear* to try to kill the enemy, whilst avoiding actions which would actually harm them.

For instance, he suggests it might be possible to ‘refrain from harming anyone even in conditions of combat: one can fire one’s weapon into the ground, or one can refrain from firing it at all’ (2009: 133). In this way, McMahan argues, ‘it is usually possible to “go to war”, even when the war is unjust, without actual wrongdoing, provided one’s active participation is feigned rather than genuine’ (2009: 134).

However, I am highly doubtful as to whether this is a realistic option for soldiers in the heat of battle. Even McMahan admits that where a conscripted unjust combatant (at least one threatened with death if he does not submit to conscription) is put in a situation in which a just combatant will kill him if he does not kill that just combatant in self-defence, he ‘does wrong but is nevertheless blameless’ (2009: 135), since ‘In this case, duress provides a full excuse’ (2009: 135). This is consistent with my view.

However, I disagree with McMahan concerning the frequency of these life or death situations in combat. McMahan gives the impression that in the vast majority of wartime situations, a conscript will be able to pretend to his superiors that he is a committed soldier while avoiding all actions that could harm the enemy.

As I explained in my response to Coady’s similar argument, such pretence, if possible, is unlikely to be this easy. Battles are not fought in isolation; each soldier would be surrounded by fellow combatants who are bound to notice his odd behaviour – and his pretence may not always be sufficient to fulfil his superiors’ explicit orders.

What is the conscientious conscript to do when his co-combatants, perhaps fellow conscripts, are about to be killed by just combatants? What is he to do if he is assigned to operate the weapons on a plane or an unmanned drone – deliberately miss the target? Given modern targeting software, one would

think it would be extremely difficult, if not impossible to do so *and* make it appear accidental. And what if he is assigned to *pilot* a military aircraft? While he would not *directly* harm the enemy, his piloting the plane would make that harm possible. How could he *pretend* to fulfil his duties as a pilot?

All these and other examples serve, I think, to prove that McMahan's third option, that of pretending to fulfil one's duties as a combatant, is at best far less plausible than he believes, and at worst, not even an option for soldiers in combat situations. It is likely impossible to determine the exact number of situations in which a soldier might be able to pretend to fulfil his orders while never harming enemy combatants, but unlike McMahan, I believe they would be infrequent.

The only other option for the conscientious conscript, according to McMahan, would be 'to desert via surrender' (2009: 135). But what if this is impossible, or impossible before one is given unavoidable orders to harm the enemy? Take the pilot of an unmanned drone – he could receive the order to pilot his drone to a certain spot and fire upon the enemy without leaving the base of operations, or without leaving his own country (if the target was just across a shared border, for instance). Surrender would not seem to be a credible option in those circumstances.

It also may be impossible to surrender in the heat of battle, or if one's fellow combatants have orders to summarily execute anyone who surrenders. Besides, any country willing to punish conscientious objection with death may well be willing to punish the families of deserters. Would the knowledge that one's family will be murdered if one deserts be duress enough to render desertion an unreasonable option? I think it certainly would, and even McMahan implies that he thinks it might be (2009: 137).

Therefore, it seems to me that the vast majority of conscripts faced with the choice of agreeing to fight or being killed are unlikely to have reasonable opportunities to refrain from harming just combatants, and will almost certainly not have such options when they are ordered to attack the enemy. If they do have them, then by all means they should take them, but I believe that most, if not all such conscripts lack such options.

But what of the conscripts whose refusal to fight would result in a relatively lighter punishment, such as imprisonment? I agree with McMahan that if a

combatant does have a genuine, reasonable option not to knowingly fight in an unjust war, he is not under duress. But does imprisonment constitute such an option?

In most cases, I would have to concede that it does. However, having a reasonable option not to fight is necessary, but not sufficient to make an individual morally responsible for fighting as unjust combatants. He must also be aware, or culpably unaware, that his war is unjust.

Aristotle makes the similar point that ‘Everything that is done by reason of ignorance is *not* voluntary’ (2001: 966) (and it is only ‘on voluntary passions and actions [that] praise and blame are bestowed’ (Aristotle, 2001: 964)). He refers specifically to ‘ignorance of particulars, i.e. of the circumstances of the action and the objects with which it is concerned’ (2001: 966).

McMahan claims it is possible for all potential unjust combatants, both conscripts and volunteers, to discover what sort of cause they are about to fight for – and therefore, if they are unaware, they are culpably so, as they could have learned their war was unjust and chose not to. However, I believe, contrary to McMahan, that the majority of unjust combatants are neither aware nor culpably unaware that their war is unjust. Zupan, for instance, also argues soldiers cannot reasonably be expected to know with any degree of certainty whether their war is just or unjust, and that their ignorance is non-culpable.

He suggests that soldiers may be non-culpably ignorant either because the nature of being a soldier makes it unreasonably difficult, if not impossible, to question orders, or because there is insufficient information available for them to reach an informed decision – they are, as individual soldiers, not privy to some, or all, of the information their superior officers, governments or leaders have, and so they must defer to their leaders’ informed decisions.

McMahan claims, in a similar vein to Rodin, that there is in fact sufficient information available for individual combatants to make an informed decision about the justice of a war, thanks to the fast distribution of information made possible by the internet. However, this is perhaps simplifying things a bit too much.

There is undoubtedly, and perhaps always will be, information which the authorities keep to themselves for reasons like ‘national security’; and even with the information available, determining the justice of a particular war is

not a matter of looking at a small, easily managed body of information, but of sifting through a vast amount, any part of which could be mistaken, misleading, or incomplete.

To take one example, the Chilcot Inquiry into Britain's role in the 2003 Iraq War was announced in 2009. It was 6th July 2016 when the Inquiry was able to publish its findings, four or five years later than anticipated. Of course, many factors contributed to the delay, but one highly significant factor was the reluctance of governments and relevant officials to allow much of the information essential to the Inquiry's deliberations to be released to the Inquiry, let alone published in the report. For instance, one report by the *Telegraph* on 9th May 2016 blamed the delay on 'a lot of time-consuming wrangling with the Cabinet Office about how much correspondence between Blair and Bush could be released'⁵⁴.

The Chilcot Inquiry was not, of course, tasked with determining the morality of the Iraq War. Its remit, according to the *Telegraph*, was 'To examine the UK's decision to intervene in Iraq, how the British army offensive was conducted and any lessons to be learned'⁵⁵. However, I think it illustrates my point well enough. If an accurate analysis of the reasons for the Iraq War could have been made using solely the information in the public domain, then surely the Inquiry would have done so, and avoided the inevitable delays that resulted from prising classified facts from military and government organisations not known for their open, generous attitude to sharing information. And if this information was necessary to the Chilcot Inquiry, it would also be essential to an individual attempting to determine the justice of the Iraq War before enlisting. The delays and difficulty experienced by the Inquiry in obtaining this information, despite all its resources and expertise, does suggest that an individual soldier might also find it difficult, perhaps almost impossible to obtain all the necessary information necessary to determine whether an ongoing war has a just cause.

A possible response might be that an individual soldier need not undertake the same level of time-consuming research needed to determine the exact

⁵⁴ <http://www.telegraph.co.uk/news/2016/05/09/sir-john-chilcots-iraq-war-inquiry-report-to-be-published-on-jul/>

⁵⁵ <http://www.telegraph.co.uk/news/2016/05/09/sir-john-chilcots-iraq-war-inquiry-report-to-be-published-on-jul/>

causes of war, but that she could rely upon media outlets or organisations such as the Wikileaks website, that are commonly deemed reputable enough to trust and accurate enough to be useful, and consult them as to the cause of war (so as to judge its justice for herself). However, my response would be, firstly, that determining which media outlets may be helpful may be as difficult a task as determining for yourself the true causes of the war. For instance, would any ordinary individual be in a position to know if the information released by Wikileaks was inaccurate, or incomplete? The necessary information for making this determination would be the very information that less scrupulous media outlets are likely to wish conceal, and with their greater resources they are also likely to be better at concealing it than most individuals are at uncovering it.

Secondly, the difficulty for an individual to determine the truth, in the so-called ‘post-truth era’, about a military conflict with which she is not yet personally involved⁵⁶ has, in my view, been underestimated by many just war theorists. True, as McMahan points out, she has the resources of the internet at her disposal. But how much of what she finds out through internet sources, social media, supposed eye witness accounts and so on, can be trusted? Recently, it has emerged that large numbers of apparent news stories reported online, both by websites and unaffiliated individuals, are misleading, inaccurate or deliberately falsified. For instance, in April 2017, the singer Ozzy Osbourne was falsely reported dead via a Facebook page entitled ‘RIP Ozzy Osbourne’, which attracted nearly a million ‘likes’ and messages of condolence before the singer’s official representatives confirmed he was still alive! Similarly, before the American presidential election in November 2016, various hoax news stories circulated online, including one in October 2016 posted on ABCNews.com.co (a website falsely claiming to be affiliated with ABC News), which claimed (entirely untruthfully) that former President

⁵⁶ Even when a soldier is actually involved in conflict, it seems likely that in most cases she would only fully perceive her own part in it, not the whole picture. Thus, she cannot be expected to discover the justice of the entire conflict by analysing her own role in it – all that she can determine for certain is whether her own actions as a soldier are moral, meaning whether or not she acts according to the discrimination and proportionality rules. As far as proportionality, I believe it is only necessary for her to know the immediate objective of her action (such as eliminating a particular enemy position), in order to determine whether the actions she is ordered to take are proportionate to that end.

Obama had banned the recitation of the Pledge of Allegiance in American schools. This hoax story was then shared on Facebook more than 2.1 million times. This obviously makes it harder to determine which of the ‘facts’ reported on the internet are true, and these are only examples of completely falsified stories – there may be even more news stories presented online that are distorted or misrepresented versions of real events, and these may be even more difficult to distinguish from accurate reports, as they may be harder to authoritatively refute.

If such misinformation abounds in relation to trivialities like celebrity news, *and* more serious issues such as political stories that may affect an election, then it seems likely it will also flourish with regards to emerging conflicts and the causes behind them – with no way of knowing whether denials by official representatives are any more truthful. ‘Fake’ or deliberately misleading news stories could, for instance, exaggerate or under-emphasize the danger to individual flourishing lives posed by an enemy state or rogue group. If the possibility for misunderstanding or deception is so great, it seems overly morally strict to claim ordinary soldiers are culpably ignorant if they do not accurately determine for themselves whether a war is just.

For these reasons, it seems to me that while politicians and military leaders are scarcely infallible, they are perhaps better informed about whether a war is just than individual combatants, since the leaders of a collective have a greater amount of information available (as well as greater resources and facilities, and a team of staff to help them sort that information).

Thus, to my mind, McMahan’s argument does not completely answer this point – it is more than likely that individual combatants will lack the necessary information and tools to effectively determine whether a war is just. They may well have opinions about whether or not it is just, but are probably aware that these are only opinions, as likely to be mistaken as correct.

For these reasons, I believe that the ignorance of an individual soldier would almost always be non-culpable, and no one can be held responsible for fighting in an unjust war if they do not know, and cannot be reasonably expected to find out, that it is unjust.

For these two reasons (lack of knowledge and lack of choice), it seems to me that most combatants in an unjust war will not have moral responsibility for their participation and actions in that war.

3iii) An argument for the presumption of combatants' lack of moral responsibility

We now move on to the second part of my argument, in favour of the necessary presumption of combatants' weak liability. It must be admitted that this lack of moral responsibility will probably not apply to every unjust combatant. For instance, many combatants are volunteers rather than conscripts, and so would not suffer from any of the more forms of duress I have discussed.

Similarly, while Ryan makes a good point that many career soldiers may perceive themselves as having a 'democratic duty' to fight, it is surely something of a sweeping generalisation to say that *all* soldiers fight out of a sense of duty. Some may perhaps join the army for purely financial reasons, or a desire for glory or recognition. Most, no doubt, will be motivated by a mixture of reasons.

It might, therefore, be possible that some unjust combatants, those who have a strong sense of their duty to fight, are constrained from choosing not to do so, and others, who do not possess such a sense, or do not perceive that duty as sufficiently strong or overriding as to make refusal seem an unreasonable option, could have chosen otherwise.

Likewise, it may be possible for some unjust combatants, while unable to access the same level of information as those in charge, to access enough information to make an educated guess, to get a reasonable suspicion the war is unjust – this might be more plausible than accessing enough privileged information to be absolutely certain.

While this suspicion may not be strong enough to ground McMahan's proposed *obligation* not to fight, it may perhaps be argued that having such a suspicion means that combatants should, at least, be more morally critical of their orders, and that failure to question, once they suspect something is

wrong, might make them culpably unaware of (and thus morally responsible for) any unjust threat of harm they subsequently pose.

Thus, it might be possible for some unjust combatants to have *some* freedom to choose not to fight, and some suspicions that are sufficient at least to alert them to the *possibility* that the war might be unjust. This, however, leaves us in the unfortunate position that some unjust combatants may be morally responsible for the harm they inflict as unjust combatants, and thus strongly liable, while others will not be morally responsible, and will only be weakly liable. This is clearly an impossible situation, for the following reason.

It would be difficult enough for an advocate of asymmetrical war rights to determine, post-conflict, which unjust combatants might be exculpated and which are entirely culpable. Add the suggestion that some unjust combatants may have been (in some circumstances at least), fighting permissibly (being weakly liable), and others, being strongly liable and not permitted to defend themselves against attack, may have been fighting impermissibly in the same circumstances, and you have a mess that is impossible to sort out. Even if we do not consider ordinary combatants liable to prosecution for war crimes merely for fighting on the unjust side, it becomes practically impossible to distinguish those who have acted permissibly from those who have acted impermissibly⁵⁷.

I would further add that unjust combatants who have both sufficient access to information to be aware or culpably unaware that they are fighting an unjust war *and* the unconstrained ability to choose not to fight are likely to be in the extreme minority. I have already outlined some reasons why unjust

⁵⁷ McMahan deals with this difficulty in distinguishing combatants who have acted permissibly from those who have not by simply denying that it is appropriate to punish either just or unjust combatants for their participation in the war alone – he wrote that ‘Individual combatants...should not be held legally liable for the violation of *ad bellum* laws’ (2008: 36). Having argued in favour of a separation between the morality of war and the law of war, he argues that unjust combatants have disobeyed the morality of war, but legal punishment is only appropriate if they have broken the law of war. I agree with McMahan’s conclusion, though not with his reasoning (for the most part because of Shue’s convincing criticisms of his argument). It seems more plausible to me that unjust combatants who cannot be held morally responsible for their actions also cannot be punished for them – and given the virtual impossibility of distinguishing the strongly from the weakly liable unjust combatants, it is necessary to adopt a general presumption of weak combatant liability; meaning that if (as will almost certainly be the case) no clear and unmistakable proof exists to prove that a particular unjust combatant or group of unjust combatants are morally responsible for their actions, then rather than risk punishing the innocent we must accept that no unjust combatants may be punished simply for fighting as unjust combatants.

combatants may lack this knowledge and this choice, and although, as I have said, it is theoretically possible for a combatant to fight an unjust war both voluntarily and consciously, those who do are likely to be few.

Many combatants may be conscripts without a credible option for avoiding conscription, especially in more aggressive or non-democratic collectives; and of the rest, the obedience expected of soldiers, the strength and prevalence of beliefs in such things as the ‘democratic duty’ to fight that Ryan describes (2011: 10), and the wartime prevalence of propaganda and inaccurate information are sufficient to make it extremely hard and probably unusual for unjust combatants to both realise that their war was unjust and be under no duress, physical or mental, to fight.

For these reasons, I believe that the best course of action is to adopt a general presumption that unjust combatants are weakly liable, unless there is clear reason to think that one or more individual combatants are strongly liable – for instance, if they were heard to brag about participating in an unjust war for money (or, of course, if they break the *jus in bello* rules).

Since it would be impossible to determine which individual unjust combatants were morally responsible and which were not, and since the morally responsible will be in the minority, we can assume, unless clearly proven otherwise, that unjust combatants, as a group, are not morally responsible, and thus only weakly liable.

A potential problem with this argument might be that it only shows we should not adopt policies that *treat* unjust combatants as strongly liable; it does not prove that at least some of them are *not* morally responsible, and therefore strongly liable. This may be true, but I contend that it does not invalidate my conclusion.

It is likely that some unjust combatants, albeit in the minority, may not fight under sufficient duress, or non-culpable ignorance, to qualify as weakly liable. I cannot prove the *actual* weak liability of *all* unjust combatants, but I do argue in favour of moving from the arguments that *most* unjust combatants are weakly liable and that it is extremely difficult, in most cases impossible, to distinguish between weakly liable and strongly liable unjust combatants, to a general presumption, in the absence of proof, that all unjust combatants are and should be treated as weakly liable. It is an assumption of the ‘innocent

until proven guilty' kind; one realises that the defendant could be guilty, but without certain proof that he is, we must *assume* his innocence.

Admittedly, if proof of some unjust combatant's moral responsibility (such as documentation proving they had always been aware of the unjust nature of the war) emerges after the fact, it must be admitted that he was strongly liable all along⁵⁸. However, a general presumption of weak or strong liability is needed; a presumption that must cover an entire armed force, in order to serve its purpose. We must assume, in the absence of proof, that all unjust combatants are morally permitted to exercise self-defence in battle, as armed forces must act in war as a coherent, organised group, and when some of the members of that group have different war rights from the others (and those with different war rights are virtually indistinguishable from the others), the necessary level of organisation would seem impossible to maintain.

To be clear, then, I am not arguing that all unjust combatants *are in fact* weakly liable; merely that the majority are, and that because of the extreme difficulty, if not impossibility, of distinguishing strongly from weakly liable in practice, we should adopt a blanket presumption of symmetrical weak liability until and unless we are proved wrong in any individual case. I also believe that this is sufficient to ground a presumption that all unjust combatants retain their individual right of defence, unless and until we have reason to believe that one in particular is morally responsible.

3iv) An asymmetrical account of war rights compatible with a presumption of symmetrical liability

However, the fact that most unjust combatants are weakly liable (as, indeed, are just combatants, by reason of fighting an enemy composed largely of the weakly liable) does not mean both have identical war rights. The presumption of shared weak liability means only that both have, unless it is proved otherwise, the right to defend themselves against the enemy's direct attacks. The fact that just combatants are fighting as part of a larger action of defence,

⁵⁸ Clear proof of this kind if it emerges at all, seems more likely to do so after the fact, when the causes of the war are clearer with the benefit of hindsight, than while the war is ongoing.

and unjust combatants are agents of the aggressor, does make a difference to their rights and privileges as combatants.

Broadly speaking, just combatants are justified in taking those actions which are a necessary (and *jus in bello*-compliant) means of achieving their overall defensive goal; while unjust combatants are not entitled to take actions aimed at achieving their final unjust goal rather than the immediate defence of some soldier's life from attack.

In the same way, an Innocent Attacker may be justified in defending herself, but not in acting so as to carry out her initial unjust threat of harm to Victim, if the two actions diverge – for instance, if the threat Innocent Attacker poses is a threat of rape rather than a threat to Victim's life (Innocent Attacker being somehow mentally controlled by a sadist who enjoys watching rape). In this case, Innocent Attacker, being weakly liable to Victim's attack, would be justified in defending his life from Victim's defensive attack, but not in continuing to try to rape her.

The actions permitted to unjust combatants by their individual defensive rights similarly differ from their overall goal. Thus, it seems to me that weakly liable unjust combatants are justified only in actions aimed at defending their own (or their [presumably] weakly liable comrades') lives from direct attack by the enemy. The rights of defence which justify these actions would not justify actions aimed at winning the war.

For instance, unjust combatants might not be justified in opening fire on the enemy, only in returning fire if necessary to save their own lives. They would not be justified in making air strikes on enemy positions, and so on. In short, they would be morally permitted only to use defensive military tactics, not offensive ones.

In terms of *post bellum* punishment or prosecution, however, it seems plausible that even though unjust combatants are not entitled to take actions aimed at winning or advancing the fight for their unjust cause, the fact that the majority are not morally responsible for these unjust actions means also that they should not be punished for them. Unjust combatants lack moral responsibility for these actions precisely because they have acted excusably, albeit not justifiably. The general presumption of weak liability for unjust combatants that I have argued for, may also mean that we should assume, in

the absence of proof, that all unjust combatants act excusably in this way, and so may not be punished for their actions.

There could, and perhaps should, be some system of prosecution for those who are more morally responsible for the unjust war, such as the leaders, politicians, government or military officials who have made freer and more informed decisions about the war, or even some ordinary soldiers in the unlikely event that they are at some point proved to be morally responsible. However, since my focus here is specifically on liability to attack, rather than liability for punishment, I am unable to explore this argument in great detail.

I must make it clear that whilst I accept McMahan's definition of moral responsibility as a definition of strong liability, I do not agree with his permissive asymmetry. While I would accept that those few unjust combatants who are clearly morally responsible for their actions might be strongly liable, I do not believe *any* non-combatants, even those who share the moral responsibility for an unjust conflict, are liable to attack by combatants.

As I said earlier, I believe that Rodin gives a persuasive criticism of McMahan's arguments for permissive asymmetry, without undermining the concept of moral responsibility as a basis for strong liability to attack. In addition to this, I would suggest that weak liability might be a necessary condition for strong liability, or any liability at all.

Thus, unless an individual is directly causally responsible for the relevant threat (as opposed to a link much further back in the causal chain), that person's moral responsibility alone will not make him liable to attack at all, let alone strongly liable.

The overall picture of the war rights and liabilities of combatants that has emerged is one of (presumed) symmetrical liability and asymmetrical war rights. I have argued that both just and unjust combatants are presumably liable in the weaker sense, acknowledging that some unjust combatants may be liable to attack in the stronger sense, but necessarily adopting a general presumption of weak liability, unless clear evidence is found to the contrary. However, I go on to give an asymmetrical account of combatants' war rights.

In short, I suggest that combatants' liability does not solely determine their war rights – presumed symmetrical weak liability only means that both just and unjust combatants may be assumed to have the right to defend themselves.

But just combatants, because they are working towards a justified overall aim, also have additional war rights which depend upon their status as defenders against a larger act of aggression; chiefly, the right to use force to attack the enemy in order to achieve the larger-scale defensive aim, as well as defending themselves individually.

There are two rights of defence at play here – collective and individual. Combatants do not lose their individual rights⁵⁹, whether or not they are also acting upon a collective right of defence, and thus even unjust combatants retain the right to defend themselves, assuming they are only weakly liable. But just combatants have an additional right of defence; their right as agents of the collective fighting a defensive war.

This accommodates Rodin's objection that just combatants can fight proportionately since the harm they inflict may be outweighed by 'the goodness of their cause and the contribution a given military action makes to the cause' (Rodin, 2008: 53), but harm inflicted by unjust combatants may not be thus outweighed, 'for (their cause being unjust) there is no good which could render the harmful effects proportionate' (Rodin, 2008: 53).

Under my view, those actions of unjust combatants that aim at winning their unjust war are not justified. Only the actions they take to defend their own lives may be permitted, and these can be proportionate, because their immediate aim is not an unjust cause, but the preserving of a person's life, to which (assuming they are only weakly liable) they still have a right. This is, therefore, a good consequence that can outweigh harm inflicted to achieve it.

Therefore, the fact that just combatants' actions are aimed at achieving a just cause means the force they use against unjust combatants is permitted; whilst unjust combatants, are not morally permitted to use offensive action in order to win their war (though any such actions they take may be excusable). Hence, just and unjust combatants have (presumed) symmetrical or equal liability, but asymmetrical war rights.

It might seem that this argument is still vulnerable to Ryan's argument that the moral equality thesis renders combatants 'morally immature' (Ryan, 2008:

⁵⁹ Delegating defensive rights to a collective means that individuals must allow that collective to exercise them on their behalf when it or its agents can, but when they cannot (or when, being its agents, they are themselves the front line of defence) individuals may defend themselves.

148) by creating a ‘passivity among soldiers’ – since ‘an abstraction’ (2008: 148), like a collective entity, would be responsible for waging an unjust war and the harm inflicted in the course of waging it, then ‘no real persons were responsible for anything’ (2008: 148), and no soldier needs to evaluate the war he is about to fight.

Although my argument does not result in MEC, is not based upon the traditional sovereignty system Ryan is critiquing, and I would not place moral responsibility for war upon abstractions but most probably upon leaders, presidents, prime ministers and other government officials, this problem might still apply. My argument retains the assertion, common to many versions of the moral equality thesis, that unjust combatants are, or may be assumed to be, not morally responsible for the harm they inflict. This is precisely what makes soldiers morally immature in Ryan’s opinion (he writes, for instance, that the way to create ‘a more morally mature military’ was ‘by reasserting personal responsibility’ (2008: 148)). In addition, it might appear to create an incentive for soldiers not to enquire too deeply into the justice of their cause.

Since it must be assumed that soldiers are not morally responsible unless it is clearly proved they had both the choice not to fight and the knowledge that their war was unjust, it might seem in a soldier’s own self-interest to avoid coming into possession of such knowledge, as by so doing she would ensure that she could not be considered morally responsible for her actions.

However, I would dispute this reading of my argument. As I mentioned earlier, if an unjust combatant lacks moral responsibility because of her ignorance of the injustice of the war, then that ignorance must be *non-culpable*, meaning that she must not be to blame for it. When a soldier deliberately avoids an opportunity to find out if the war she is about to fight is just or unjust, then she is responsible for her ignorance of the injustice of her cause – it is *culpable* ignorance, and she therefore would still be morally responsible for the harm she inflicted as an unjust combatant.

I would further suggest that my argument may avoid Ryan’s criticism regarding a ‘morally immature military’ (Ryan, 2008: 148), in that my account does not ignore the possibility that soldiers *could*, if conditions were right (if combatants were not under duress or non-culpably ignorant that the war was unjust), be morally responsible for their actions as unjust combatants.

For this reason, I do not believe my account would necessarily result in the kind of passive, morally immature obedience Ryan warns about. Soldiers would need, to morally evaluate whether they have a possibility of learning whether the war was unjust (and pursue it if they do), and if they believe the war is unjust, they might also need to determine whether refusal to fight is a reasonable option open to them. However, if (as I believe will be the usual case) this reasonable option and this possibility do not exist in any useful degree, failure to pursue them would not render those soldiers morally responsible.

I must clarify one more point, however: the existence of the reasonable option not to fight and the possibility of discovering the war is unjust must be clear enough to be reasonably apparent to both the potential combatants and to any impartial observers. Without such clarity, combatants who fail to take advantage of their available choices and information could not be morally blamed for failing to do so. Soldiers cannot be held morally responsible for failing to take advantage of choices and opportunities of which they are non-culpably unaware.

Therefore, I would argue in favour of a general presumption of weak liability for unjust combatants, resulting in symmetrical weak liability for just and unjust combatants in the absence of any evidence of individual unjust combatants' strong liability.

However, I would also argue that the overall war rights of just and unjust combatants are not symmetrical. Only just combatants are waging a campaign with an overall aim of defence, and hence just combatants have additional war rights. They have the right to fight offensively – to attack their enemy as well as defend themselves.

Hence, I defend a slightly different form of the moral inequality thesis to many just war theorists, such as McMahan, but my account, I believe, better reflects our intuitions that while just combatants have additional rights as *just* combatants, this does not mean that if (as is the case with some conscripts) an unjust combatant *cannot* avoid fighting without being executed, his only morally justifiable option is to die.

4: Conclusion

In conclusion, in this chapter I have discussed arguments for the moral equality of combatants, and arguments, like McMahan's, for the moral inequality of combatants, which suggested that all unjust combatants are strongly liable and thus lack all the rights just combatants possess, including the individual right to self-defence. Having rejected many elements of these ideas, I have argued in favour of a slightly different form of the moral inequality thesis.

I believe that all just combatants and the vast majority of unjust combatants are weakly liable, and since attempting to pick out the few strongly liable unjust combatants, especially during a war, would be extremely difficult if not impossible, both just and unjust combatants may be presumed, in the absence of clear proof, to retain the individual right of self-defence, but that just combatants have the additional war rights to perform aggressive military actions because these actions are justified in order to achieve their larger goal of defence.

This version of the moral inequality thesis, I believe, follows on well from my account of just cause for war, and best accords with our moral intuitions concerning the rights of individual soldiers.

Chapter Four: The Conditions for Possession of a Collective Right to Defence

Introduction

In previous chapters I considered individual defensive rights and how they ground a definition of just cause for war; in this chapter I intend to discuss the delegation of these defensive rights from individuals to collective entities, and determine what kinds of collective entities can possess the authority to wage war. As I mentioned in the introduction, I accept the definition of ‘war’ as an organized, stable military campaign, aimed at achieving some goal or goals.

Although I elsewhere argue against some of McMahan’s points, we agree that it is highly counter-intuitive that individual people might have the power of ‘conscientious initiation’, as Ryan (2011: 38)⁶⁰ calls it – the moral authority, in short, to declare and subsequently wage war. I have shown, in Chapter Two, that the appropriate subject of the kind of right of defence that can justify war (the right to exercise delegated individual defensive rights) must be a *collective* entity.

I argue that individual defensive rights belonging to each member of a group may be delegated to that group as a whole, giving that collective entity as a whole the right to take necessary (and proportionate) action to defend these members. I must now explain what kinds of groups may have this collective right of defence, and demonstrate how individual rights are delegated to such groups. Since, as I will argue, the right to wage war and the authority to do so are inextricably linked, this also amounts to a rough working definition of who has the authority to go to war.

⁶⁰ Ryan is referring to combatants in particular, but I believe the point stands. His suggestion is that it is implausible for individual combatants to have the authority to initiate a war alone – if this is implausible, then it must be even more implausible to suggest that the same authority should also belong to non-combatants.

Traditionally, there is often an assumption that the only collective entities with rights of collective defence (and thus the authority to wage war in defence of their members) were sovereign states. This may be based on arguments that can be traced to the beginnings of just war theory. The argument that to declare war justly one must have legitimate authority goes back to St Augustine, who writes that in order to lawfully make war, one must have the command or permission of a ‘higher and legitimate authority’ (2007: 348). The exact composition of this ‘authority’ is then further defined by Thomas Aquinas, who writes that, in addition to just cause and ‘rightful intention’, a just cause requires ‘the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private individual to declare war’ (1947: 1359).

Thus, Aquinas’ definition of legitimate authority is that of the ruler or government of a ‘city, kingdom or province’ (1947: 1359), which modern just war theory would describe as the government of a nation-state. Many laws and conventions of war appear to accept this definition almost wholeheartedly.

For instance, the 1907 Hague Convention IV ‘Respecting the Laws and Custom of War on Land’ refers to ‘the belligerent States’⁶¹ and ‘belligerent parties’ interchangeably, as though ‘States’ were the only entities that could conceivably wage war; and in the chapter headed ‘*The Qualifications of Belligerents*’ it specifically states that the ‘laws, rights and duties of war’ apply only to armies ‘commanded by a person responsible for his subordinates’⁶² – in other words, the army must be an ‘army of the State’⁶³, following the orders of some ruler or government officials who are thus responsible for that army’s actions.

To begin with, then, I must explain why I do not believe sovereign states are the only collective entities to which individual defensive rights may be delegated. I must decide which kinds of collectives are the appropriate kinds to receive delegated individual defensive rights, and therefore what collective entities may possess a collective right to exercise the delegated individual

⁶¹ Annex to the 1907 Hague Convention IV and Regulations, Regulations Respecting the Laws and Customs of War on Land, Section 1, Article 37.

⁶² Annex to the 1907 Hague Convention IV and Regulations, Regulations Respecting the Laws and Customs of War on Land, Section 1, Article 1.

⁶³ Annex to the 1907 Hague Convention IV and Regulations, Regulations Respecting the Laws and Customs of War on Land, Section 1, Article 8.

defensive rights by means of war. In doing this, I will also determine which collective entities have the authority to wage war, as the two are, if not perfectly synonymous, at least inextricably connected. To have the right to exercise delegated defensive rights by means of war (or, more succinctly, the right to wage war) *is* to have the moral authority to do so. It would seem contradictory to grant that a collective entity has the right, and *duty*, to exercise its members' defensive rights by any necessary and proportionate means, including war, and yet assert that it lacks the moral permission or authority, and thus the liberty, to do so.

Rodin mentions that a 'radical' (2004b: 94) implication of reductive individualism for the legitimate authority condition is that 'if national defense is reducible to personal self-defense, as the reductive view holds, then it would be presumptively legitimate to form private armies to fight private defensive wars' (2004b: 95), because 'personal self-defence may be undertaken by private individuals' (2004b: 94-5).

While I do not believe this is necessarily a problem for individualists (since many, such as Fabre, conclude as I do that some 'private' defensive wars, in the sense of being fought by non-state entities or organizations, may in fact be justified), it does suggest that possession of the right to self-defence that grounds just cause may be linked to possession of legitimate authority to wage war.

One objection might be that an entire collective may have the *right* to go to war, but only a small part of that collective (its government or elected leadership, for instance) may have the *authority* to take that group to war. However, this kind of authority to wage war is, I believe, distinct from the definition of legitimate authority I wish to use. It appears to be a definition of legitimate authority as political authority, involving the suggestion that possession of the authority to go to war derives from a person or group's acknowledged role within a collective entity (as the recognised leader or elected government), and it is therefore not possessed by entire groups but by the leaders of those groups.

There are practical advantages of limiting authority in this way; for instance, to do so may make it clearer which parties within that collective may be held accountable for the decision to wage war or to continue with a military

campaign. Also, it means that the process of negotiation is perhaps simplified for the antagonists.

It is also possible, as Steven Lee argues, to understand the legitimate authority criterion solely in terms of ‘Legal legitimacy’ or ‘authority that is exercised in accord with the rules (or laws) of an organization’ (2012: 82), and to therefore deny that the criterion has any moral content.

However, it seems to me that definitions of legitimate authority as purely political or legal aren’t sufficiently normative for a *just war* theory. Determining whether a state or government is *legally* or *politically* legitimate does not help to determine whether that state or government’s being able to wage war is *morally justifiable* – and this seems to me to be the point of this criterion. A more useful definition of legitimate authority for this purpose is that of a *moral* authority, required in order for a collective to have the right to wage war; an authority which can be possessed by an entire group, and which some cosmopolitans, such as Fabre, suggest may even be possessed by one individual alone.

Few would deny that in collectives where there is an elected or otherwise acknowledged leadership, which has the authority and duty to exercise certain powers, that leadership has the *practical* or *political* authority to *declare* war. To say that a government has the authority to take its country to war is simply affirming that the government’s role within that society is to take such actions when they are appropriate. To interpret the legitimate authority criterion in this way makes it much too wide in scope; any collective would have legitimate authority to wage a war if that war was declared by the appropriate political authority.

The same could be said for Lee’s definition of legitimate authority in terms of legal legitimacy. Lee himself admitted that ‘the criterion is likely to be satisfied by any war, understood as a conflict between large organizations...given that the de facto rulers of organizations capable of using force act under the rules (official or unofficial) of that organization in initiating war’ (2012: 82-3).

This reduces the legitimate authority criterion to the merely ‘procedural’ (Lee, 2012: 82), suggesting that all political leaders, or all leaders who follow the rules of their societies in declaring war, are automatically legitimate

authorities. The reason seems to be that these definitions ignore the link between legitimate authority to wage war and the *right* to wage war. As I said, I believe that these, while not quite the same thing, are inextricably bound up together – one cannot have the authority to wage war without the right to do so, and having the right to do so implies one has the authority, as a right that one has no authority to exercise seems inert, useless, even faintly absurd. But political authority or legal legitimacy are not linked to the right to wage war. Many just war theorists besides myself have separated political or legal legitimacy and the right to wage war – Rawls, for instance, argued that ‘outlaw states’ (1999: 90) may possess the former, but cannot possess the latter; and cosmopolitans like Fabre might claim individuals or groups who do not have the former can nevertheless have the latter.

My own argument differs from both Rawls and Fabre. I would suggest that a better definition of legitimate authority is that of a *moral* authority to wage defensive war (much more closely connected with the right to wage war than political or legal authority) which is dependent upon the delegation of individual defensive rights to a collective entity. A collective entity has the *moral* authority to wage war, but only to exercise the individual defensive rights of its citizens. There is no such thing as the moral, or legitimate, authority to wage an unjust war⁶⁴.

I would therefore argue that the legitimate authority to wage war is distinct from legal or political authority to take one’s collective to war. The legitimate authority criterion should be concerned not (or not primarily) with which group within a collective has the legal right or the political authority to take that collective to war, but rather with which groups are *morally permitted* to wage war – just war theory is, after all, intended to determine the morality of war, rather than the legality of war. I do not deny that collectives capable of waging war must have leaders or governments in place with the political and legal authority to declare war, but *legitimate* authority to wage war is not this kind of authority, but rather a moral authority. I therefore argue that the

⁶⁴ The one exception might be if the enemy were to use non-discriminatory or disproportionate tactics that threatened innocent civilians, in which case even a collective already waging an unjust war might gain the moral authority to fight in their defence (albeit only in their defence – the larger campaign of war would still be unjustified, and the collective would still have no moral authority to wage that war).

collective right to exercise delegated individual defensive rights which grounds a collective entity's just cause for war also grounds that collective's legitimate authority to wage that war. This is the clearest distinction between my definition of legitimate authority and other definitions that rely on political or legal authority.

Another objection to my argument might be that claiming a collective entity may have just cause but lack authority to wage war need not necessarily mean it *cannot* exercise its right of defence, but only that it cannot do so in certain ways (ie by waging war) – in short, its right is circumscribed. However, since a collective right of defence is simply the right to exercise delegated individual defensive rights, to suggest a collective has a partial or circumscribed right to do this suggests that all the individual defensive rights delegated to it are similarly circumscribed. And unless the attack in question is not serious enough to threaten sufficient aspects of their flourishing lives to make war a proportionate response, this does not seem plausible.

I will therefore assume that collective entities have one of two options; they may either possess the full right to exercise delegated individual defensive rights by any necessary and proportionate means (including war), which means that they have the right, and moral authority, to wage war, or that they may lack this right and authority altogether.

In this chapter I will determine which kinds of collectives individuals may delegate their defensive rights to, as this is the basis for the right and moral authority to wage war. I begin by examining and criticising the reasons why stalwarts of the just war tradition like Grotius and Rousseau, as well as other more modern just war theorists, argue that states are the only collective entities that possess legitimate authority. Ultimately, I will reject the identification of states or official governments as the only entities with authority to wage war. I will go on to develop a definition of what distinguishes the kinds of collective entity that could be custodians of delegated individual rights, and are thus potential legitimate authorities, from the kinds that cannot, drawing upon the arguments of theorists like David Estlund, Michael Gross, Margaret Gilbert and Peter French. I will then go on to further explore the implications of the delegation of individual defensive

rights, for instance what rights and duties states or non-state collective entities might bear as a result of accepting delegated individual defensive rights.

1: A Consideration of Various Definitions of Legitimate Authority

First, I must explain why I reject other traditional and modern definitions of the authority to wage war, many of which limit it to political or state authority. For instance, Aquinas was among the first just war theorists to claim that legitimate authority was possessed only by a sovereign power, or nation-state. He claims this because firstly, the private individual ‘can seek for redress of his rights from the tribunal of his superior’ (1947: 1359) – in other words, he has no need to wage war because there is an authority above him that he can, and should, appeal to for justice.

Secondly, private individuals are not permitted to ‘summon together the people’ (1947: 1359) – in other words, raise an army and command it to fight. Finally, he suggests that

‘as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them...[and] so too, it is their business to have recourse to the sword of war in defending the common weal against external enemies’. (Aquinas, 1947: 1359-60)

In other words, since political leaders are responsible for the ‘common weal’ or general good of those in their charge, they have the authority to defend them by war if necessary. The government has the job of defending and protecting the interests of their citizens in the international arena, and therefore it must also have the job of defending them from attack. That,

Aquinas seems to suggest, is simply what a government is there for; it is part of its mandate or remit.

More recently, some just war theorists have refined this argument, and suggested other reasons why either all nation-states, or some nation-states in particular, depending upon whether or not they fulfil certain criteria, have legitimate authority (and thus would be the appropriate subjects of a collective right of defence).

For instance, Weeks suggests that rather than being grounded upon the possession of sovereign authority *per se*, the authority to declare war should depend upon the wishes of the citizens of the belligerent state, since state authorities are ‘tasked to represent the will of the people’ (2010: 63).

This would seem to suggest that only states which have the consent of their citizens to go to war have the authority to actually wage that war. A consequence of this argument might be the limitation of authority to wage war to democratic states, as dictatorships seldom consider themselves to be ‘tasked’ with representing the wishes of their citizens (Weeks, 2010: 63). However, as I will show later in this chapter, such an argument does not necessarily limit legitimate authority to states, since non-state collectives may also have the consent of their members to wage war.

In another example, Jonathan Parry suggests that, in the nineteenth century, the Liberals sought to ‘underpin state legitimacy’ through ‘maintaining and promoting the health and vigour of the national community’ and also through ‘The constant articulation of pride in the values that Britain projected to the world’ (2006: 389).

This is in some ways similar to Walzer’s argument that states possess collective ‘rights of territorial legitimacy and political sovereignty’ (1977: 61) (upon which their status as legitimate authorities would seem to depend), but a state’s possession of these rights ‘depends upon the reality of the common life it protects and the extent to which the sacrifices required by that protection are willingly accepted and thought worthwhile’ (1977: 54).

If the ‘reality of the common life’ (Walzer, 1977: 54) (or the ‘health and vigour of the national community’ (Parry, 2006: 389) are in doubt, or if ‘the state doesn’t defend the common life that does exist’ (Walzer, 1977: 54), then Walzer would argue ‘its own defense may have no moral justification’ (1977:

54)⁶⁵. Not only could such a state not have just cause for war under Walzer's argument, but it cannot make the same 'claims to territory and sovereignty' (1977: 54) that other states can. This argument would, therefore, seem to suggest that only states which fulfil these conditions are legitimate authorities.

Massimo Renzo also advances an interesting argument, suggesting that legitimate authority (which he defines politically, as the state's 'right to rule' (2011: 575), as well as the authority to wage wars) derives from individuals' 'natural duty not to pose unjust threats to others' (2011: 578).

This, he suggests, is a duty which anybody refusing to enter a state and live by its rules ('anarchists' as he calls them (2011: 578)) inevitably flout, because they 'prevent the state from performing its legislative, executive and judicial functions, which are necessary in order to have a minimal level of order and security' and thus 'expose those living next to them to the dangers of the state of nature, thereby posing an unjust threat' (2011: 578)⁶⁶.

A significant common thread running through these varied concepts of legitimate authority is their acceptance that the only kinds of collective entities with the authority to wage war are nation-states, although they may differ on the subject of how many nation-states possess this authority, and why the others are excluded.

For instance, Renzo admits that he is leaving aside the possibility of other forms of legitimacy besides the state's, because 'states are the most common form of political organization' (2011: 579). Weeks also only discusses consent to *state* authority, and Walzer does not believe non-state communities are possessors of collective rights that would ground their right or authority to go to war precisely because they are *non-state* communities, and he only

⁶⁵ However, it is Walzer's contention that very few states will, in practice, lack legitimacy in this way. He writes that 'most states do stand guard over the community of their citizens, at least to some degree: that is why we assume the justice of their defensive wars' (1977: 54).

⁶⁶ He further argues that 'would-be independents can be justifiably coerced in self-defence to enter the state', because 'those who pose an unjust threat to others can be justifiably coerced in self-defence, at least when they are morally responsible for posing the threat' (2011: 580). I am doubtful about this whole argument, primarily because I disagree with Renzo concerning the degree of threat 'would-be independents' pose to the functioning of a state unless there are an improbably large number of them (in which case, they could form their own state and be just as legitimate in this sense). I find it hard to picture a few individuals living in the state of nature threatening the smooth-running of an entire state, even if they do 'end up in disagreement about practical matters' (2011: 588). Also, I am uncertain that any threat posed to a state would be an *unjust* one if the 'would-be independents' are themselves oppressed or otherwise endangered by that state.

considers state rights (political sovereignty and territorial integrity) to be grounds for just cause and proper authority.

The question I must first answer is, therefore, whether there might be a valid argument that only nation-states possess legitimate authority. I have already examined and rejected Walzer's collectivist rights as a basis for just cause, and so they will not do as a basis for legitimate authority either – my account requires a very different definition of a collective right of defence. I will therefore begin by examining the reasons why two stalwarts of just war theory think legitimate authority belongs only to states.

1i) Arguments for the state as sole legitimate authority

To begin with, I will examine Hugo Grotius' argument. Grotius claims it is 'unlawful by the Law of Nature' (2012: 338) for the inhabitants of a country to rise up and declare war against their 'Superiors', because the state was 'instituted for the Preservation of Peace' (2012: 338). He subscribes to the Hobbesian view that society developed to put an end to the chaotic '*war of all against all*' (Hobbes, 1998: 30) that was the state of nature.

Following on from this argument, individuals' right to defend themselves against injustice can, in the interests of 'maintaining publick Peace and good Order' (Grotius, 2012: 338), be overruled by the state, which by its mere existence acquires 'a superior Right in the State over us and ours, so far as is necessary for that End [peace and order]' (2012: 338).

A similar argument is made by St Augustine, who writes that the requirement that 'the authority and the decision to undertake war rest with the ruler' was according to 'the natural order' (2007: 351). This argument is absolute: *no* attempt by anything besides a state to declare war is morally permitted because, if such attempts persist, all things will descend into chaos – 'there would be *no longer a State*, but a Multitude without Union' (Grotius, 2012: 339).

If states choose to treat their citizens unjustly, and no other state decides to intervene, then, however heinous the treatment in question might be, the situation is unchanged – in Grotius' words, 'we ought rather to bear it patiently, than to resist by Force' (2012: 338).

Leaving aside the question of whether Grotius is correct about the practical claims he makes (that a war by any entity other than a state would result in the breakdown of society) I feel there is still a serious problem with this argument.

To discover that problem, we must look more closely at why Grotius believes that anarchistic chaos, the ‘Multitude without Union’ (2012: 339), is such a terrible thing, to be avoided at such cost. It can only be because of the consequences to people of living in chaos, without the protective shield of society.

The evils of chaos exist solely in the suffering of those who endure it. The disorganised chaos of a world devoid of intelligent inhabitants does not seem an inherently bad state of affairs, because that chaos harms no one. Besides, Grotius’ use of the words ‘*Multitude* without Union’ (2012: 339, my italics) clearly shows he is thinking of the effects of a lack of ordered society upon humanity.

If humanity’s suffering in a state of anarchy is something to be morally concerned about, why should the suffering of humanity through the ‘Injury...done us by the Will of our Sovereign’ be so cavalierly dismissed as something we ‘ought to...bear patiently’ (Grotius, 2012: 338)? Is constant fear and suffering caused by living in anarchy really worse than constant fear and suffering caused by living in a despotic political state?

I believe that the two cases are in fact likely to be equally unpleasant. If the one is severe enough to justify setting up the state in order to end it, surely the other might justify setting up another state, even by fighting a revolutionary war against state authorities.

There are, of course, a few cases in which this was done peacefully, for example, as Jan Narveson remarked, pacifist means used to win an independent state in India were ‘apparently rather successful’ (1970: 263), but inevitably in many cases the despotic nature of a state may make a peaceful resolution impossible.

In these cases, it seems that if suffering caused by anarchy justifies the institution of ‘civil society’ by whatever means necessary (in a state of anarchy, one can hardly assume *all* parties peacefully agree to give up certain freedoms to become citizens of a stable society), then the means private

individuals take to rid themselves of suffering caused by despots are also justified – up to and including war. This undermines Grotius’ argument.

Rousseau gives a different argument; he suggests not that it is immoral or unjustifiable for anything but a state to wage war, but that it is *impossible*.

Rousseau writes that ‘War is...not a relationship between one man and another, but a relationship between one State and another, in which individuals are enemies only by accident...as soldiers’ (2004: 46-7). His argument states that ‘war can only arise within a certain framework, one that presupposes the so-called civilized order’ (Reichberg, Syse and Begby, 2006: 482).

In other words, there are conditions of war that only the nation-state can fulfil; namely, the fact that, as Rousseau put it, ‘War is a permanent state which presupposes lasting relations’ (2004: 166). Conflict between individuals, on the other hand, can arise and be settled swiftly, in no more time than it takes to have a fistfight outside the pub, to use a modern example. In Rousseau’s words, friendships and enmities between individuals are ‘in continual flux’ (2004: 166).

As a collective body, a state can have collective aims and interests, considerably wider in scope than those of individuals, and can endeavour to achieve them for longer periods of time by focussing the combined efforts of large numbers of its citizens towards achieving them. Rousseau claims this is necessary for war, and this is why, he argues, the constant relationships presupposed by the state of war ‘rarely obtain between man and man’ (2004: 166).

He claims it is equally impossible for an individual or non-state group to declare war against a nation-state, as ‘any State can only have other States, and not men, as enemies, inasmuch as it is impossible to fix a true relation between things of different nature’ (Rousseau, 2004: 47).

This is not necessarily to say that conflict between a state and a group of civilian rebels could not be described as a war because the conflict would be unequal, but rather that the ‘constant relationships’ necessary for war can only obtain between two entities that are similar in the relevant ways (fixed laws, stability of purpose, length of potential existence and so on); namely, states. Thus, according to Rousseau, only states can wage war, so state authority is the only legitimate authority.

This is a practical argument – an argument about the nature of the world (and war); it is, therefore, a practical objection I offer to it. Rousseau claims ‘continual relationships’ are impossible except between states; I would argue they are not. Rousseau’s mistake is to assume that ‘individuals’ and ‘nations’ are the only two kinds of entity capable of entering into relationships like alliance or enmity.

He states that besides individual people, the only entities capable of this are ‘artificial’ (2004: 169) or collective entities, composed of numerous individuals who surrender certain freedoms in order to better achieve their common interests and goals. His assumption is that the only ‘artificial’ entity in existence is the state. This, I suggest, is not the case.

There are many non-state ‘artificial bodies’, which can be said to pursue aims, make alliances, even command (or compel) their members to certain action, just as a state commands its soldiers to take military action.

One obvious example is a trade union, which often forms collective goals on behalf of its members, and orders its members to a form of campaign action by calling a general strike – long-term disputes over, for instance, pay or working hours between the trade unions and the government require a continual relationship of opposition, like the continual relationships Rousseau describes as necessary for war⁶⁷.

For example, the miners’ strike against Margaret Thatcher’s government lasted from 5th March 1984 to 3rd March 1985. In order to mount such a long-standing campaign to achieve clearly specified goals – to prevent the government’s ‘programme of closures that would see 20 pits shut and 20,000 miners lose their jobs’⁶⁸ – Rousseau’s ‘lasting relations’ (2004: 166) must certainly have existed between the trade union and the government. In support of this point, Gerry Wallace writes that ‘Strikes, like wars, are examples of collective conflicts, the nature of which may make it impossible to play by the rules that apply in conflicts between individuals’ (1991: 133).

Many other examples exist of non-state collective entities capable of maintaining ‘constant relationships’: there are multinational corporations,

⁶⁷ This is not necessarily to say that trade unions can, or should, wage war! My point here is simply that some organisations, such as trade unions, can maintain these kinds of ‘continual’ relationships.

⁶⁸ BBC News, from <http://news.bbc.co.uk/1/hi/uk/3494024.stm>

some of which could be said to hold power equal to that of a small country; there are terrorist groups like al-Qaeda; there are international religious groups or cults; and there are rebel movements and informal ‘people’s governments’, seeking to overthrow an older regime.

In fact, it might even be possible to argue that a popular protest movement with no official leadership hierarchy can constitute a collective entity, can (through social media like Facebook and Twitter) formulate its own goals, plan its actions, and perhaps achieve them.

For instance, during the 2011 protests in Egypt, the BBC News website commented that the protests ‘were co-ordinated through a Facebook page where organisers say they are taking a stand against torture, poverty, corruption and unemployment’⁶⁹. When discussing the Egyptians’ overthrow of Mubarak’s regime or the Tunisians’ ousting of their president Zine al-Abidine Ben Ali in 2011, it often seems sensible to refer to the ‘protest movement’ as a collective entity and discuss ‘its’ aims.

Thus, I believe Rousseau is wrong when he claims that only nation-states can maintain the ‘constant relationships’ which I agree are necessary for war, as many of these collective entities can clearly do so.

Whether all these entities have the moral authority to wage wars is, of course, another issue, but Rousseau does not address it. His argument is that war is, by definition, only possible for a nation-state, and I have shown this to be false. It is even possible for a non-legitimate authority to wage *a* war, provided they have the ability to effectively do so (as IS does, for instance), even if they cannot wage a *justified* war.

Lionel McPherson gives a different argument, defining legitimate authority as state or political authority, and arguing that most non-state groups which ‘resort to political violence’ (McPherson, 2007: 546) are not waging war but engaging in terrorist activity.

One distinctive thing, however, is that McPherson suggests non-state political violence, while it does not count as ‘conventional war’ (2007: 546), may not necessarily be impermissible if a non-state group has what he calls ‘representative authority’, which is ‘morally analogous to the legitimate

⁶⁹ BBC News, from <http://www.bbc.co.uk/news/world-africa-12289475>

authority of states' (2007: 543)⁷⁰ (which, he asserts, most states possess, except tyrannical ones perhaps, drawn from 'the majority support of their people' (2007: 545)).

Nevertheless, it is his contention that 'Typically, nonstate actors engaged in terrorism do not meet this requirement' (2007: 545), so that terrorism (as he defines it) can be distinctively wrong 'with regards to a defeasible perspective from which nonstate actors lack representative authority and states have it' (2007: 545).

Terrorism is defined by Louis Pojman as 'a type of political violence that intentionally targets civilians (noncombatants) in a ruthlessly destructive, often unpredictable manner...in order to inspire fear and create panic' (2003: 140). However, as I have said, McPherson argues that terrorism can be identified by the fact that 'terrorists do not have adequate authority to undertake political violence' (2007: 524). Janna Thompson similarly suggests that all 'attacks...military or non-military' (Thompson, 2005: 153) committed by non-legitimate authorities are, by definition, terrorist.

However, I subscribe instead to what McPherson calls the 'dominant view' (2007: 525), that terrorism is distinctively wrong because it is specifically violence performed in deliberate contravention of the *in bello* discrimination rule – violence which is aimed *intentionally* at non-liable non-combatants, with the aim of creating fear – what McPherson refers to as a 'fear-effects clause' (2007: 529).

McPherson criticises this 'dominant view' on the grounds that the fear-effects clause 'does not morally distinguish terrorism and conventional war' (2007: 529). Ordinary civilians, he argues, have more to fear from acts of conventional war than acts of terrorism.

Furthermore, the suggestion that acts of terrorism can be distinguished from acts of war because terrorist acts are *aimed* at targeting civilians and creating fear while acts of war, if the belligerent in question follows *jus in bello*, cannot intentionally target civilians is, McPherson suggests, implausible because

⁷⁰ I agree that representative authority is one of the necessary conditions for a non-state group to be a potential moral authority (as will become clear later in this chapter, when I will outline and discuss this condition at greater length), but, as I will show, I disagree that non-state collective entities lack representative authority as 'typically' (2007: 545) as McPherson would have it.

‘when the unwarranted harm can reasonably be expected, commonsense morality is not committed to recognizing that the agents’ intentions make a moral difference, at least in the manner that the conventional interpretation of the DDE allows’ (2007: 537).

In other words, he simply denies any moral distinction between an agent who intends to kill civilians in order to create fear, and an agent who foresees a reasonable chance that civilians will be killed and fear created as a side-effect of her actions, and chooses to go ahead anyway.

While McPherson makes some interesting arguments, I disagree with him on two points. Firstly, I do not believe the same *kind* of fear is created by a terrorist act as would be created by an act of war that abides, even technically, by the discrimination rule.

A large part of what makes terrorism a frightening prospect is the thought that one could, oneself, be *deliberately* targeted, that someone might hate *you*, an ordinary civilian, enough to want to kill you. I think that McPherson is too quick to dismiss the role of intention here – it does make a difference, whether to the amount, or the quality of fear produced by a violent act.

Kamm, for instance, makes the similar point that ‘the intention to harm and terrorize NCs [non-combatants] as an end or means’ (2006: 65) is a ‘distinctive element’ of terrorist activity. However, she differs from me in arguing that this intention to terrorise ‘does not play as large a role in accounting for the prima facie wrongness’ of terrorist activity ‘as does the harm it causes’ (2006: 65).

I believe that the harm caused by terrorist violence does also play a role, but this distinctive intention on the part of the terrorist plays a larger role, as it is that which makes his actions *worse* than the actions of a non-terrorist (a just combatant following the *in bello* rules, for instance) who inflicts the same amount of harm.

Secondly, I think that acts of terrorism and ‘acts of conventional war’ (McPherson, 2007: 537) cannot be as clearly separated as McPherson or Thompson would like. I would instead argue that legitimate authorities such as states are quite capable of using terrorist tactics.

While most of a legitimate state’s military actions could not be described as terrorist, having defensive aims rather than the principal intent to terrorize,

there are many examples of presumably legitimate authorities (in McPherson's sense) performing acts of terrorism – the Blitz, for instance, or the firebombing of Dresden.

Steinhoff seems to agree – indeed, he writes that terrorism's 'most frequent form is state terrorism' (2007: 13). I also do not believe there is anything contradictory about suggesting that a state could perform acts of terrorism as part of its war effort. The Blitz, for instance, was an act of terrorism *and* an act of conventional war. I would therefore argue that military violence cannot be sharply divided into acts of war and acts of terrorism – I think that many acts of war can also be acts of terrorism if they deliberately flout the *in bello* condition of discrimination with the aim of shortening a war by terrorizing enemy civilians.

Therefore, I believe that the attacks of non-legitimate authorities could fall into the same category as attacks by legitimate authorities which fail to satisfy right intention or last resort, or any other *ad bellum* condition. The attacks of unjust belligerents are acts of (unjustified) war, and whether they are also terrorist acts will depend upon whether they aim to create terror by targeting non-combatants.

In short, I also disagree with McPherson's arguments that only state authorities are legitimate authorities, as his argument that non-state political violence does not count as war, but rather terrorism, is too problematic.

Another argument for the state as the sole legitimate authority, made primarily by Coates, suggests that a state has a right to war which 'derives...from its membership of an international community to the common good of which the state is ordered and to the law of which it is subject' (Coates, 1997: 126). He adds that 'the right of war is vested in the state as a political community and that powers are entrusted to rulers of governments as agents of those communities' (1997: 129).

This might potentially exclude some states, such as those which do not consider themselves subject to the laws of the international community (Nazi Germany, for instance) but the identification of the authority to wage war with some form of state authority remains.

However, this definition of legitimate authority is, I believe, successfully criticised by Steinhoff. He writes that Coates' overall argument is

contradictory, in that Coates claims that legitimate authority is a ‘logically prior principle’ (Coates 1997: 123), but derives it, at least partially, from a state’s being subject to international law. And, as Steinhoff points out, ‘the requirements of *causa justa* and non-combatant immunity’ are ‘constituents of international law’ (2007: 12) – meaning that under Coates’ definition, legitimate authority is actually ‘dependent upon these requirements’ (Steinhoff, 2007: 12). If a state wages war without just cause or violates the discrimination rule, it ceases to abide by international law, and thenceforward lacks legitimate authority.

Therefore, it is my belief that none of these arguments successfully prove that states *alone* can possess the authority, and thus the right to wage war. I will consider and reject one last argument for this point, which discusses a more general account of authority; but applied to my account of the collective right of defence, it could produce an argument for the delegation of individual defensive rights to democratic states alone.

1ii) Normative consent as a possible grounding for state legitimate authority

David Estlund argues that the consent of the citizens of a state is necessary for its government to have authority over them. He is speaking in terms of more general authority than the authority to declare war – he defines the kind of ‘authority’ he was referring to as ‘the moral power to require action’ (a definition he credits to Joseph Raz), meaning that ‘To say you have authority over me on certain matters is to say that on those matters if you tell me to do something, then I am, for that reason, required to do it’ (Estlund, 2005: 352).

However, Estlund’s argument might also be useful in showing how the delegation of individual rights grounds the right and authority to wage war, as these entail, for instance, the ‘moral power to require’ (Estlund, 2005: 352) combatants to engage in hostilities against another group of combatants. If individuals consent to delegate their individual defensive rights to a particular collective entity, then this could establish that collective’s moral power to require such things of them.

Estlund argues in favour of what he calls ‘normative consent theory’ (2005: 352). This is an expansion of actual consent theory, which, as Estlund

describes it, is the argument that ‘without consent there is no authority..., but unless there are certain nullifying conditions...consent to authority establishes authority’ (2005: 352).

The ‘controversial element’ (2005: 353) of actual consent theory, Estlund suggests, is the clause that without consent there can be no authority (which he refers to as the ‘libertarian clause’ (2005: 353)), because this would mean that not all governments of nation-states necessarily have authority over their citizens. A government operating without majority consent, under this definition, might lack the moral power to require its citizens to pay taxes, for instance.

Estlund’s normative consent theory differs from actual consent theory in that he asserts that not only can consent be disqualified by ‘certain nullifying conditions’ (2005: 352), as actual consent theory suggests (for instance if it is extracted under extreme duress), but that there are also conditions under which non-consent would be invalid. Under these conditions, Estlund argues, ‘this wrongness...cancels what would otherwise be the authority-blocking power of non-consent, with the result being authority’ (2005: 356).

He gives the example of a flight attendant who, after a crash, orders an uninjured passenger to help her with the injured. Under actual consent theory, if the passenger refuses to consent to help, then she has no authority over him, even though, as Estlund put it, ‘owing to her knowledge and situation, you would be wrong to refuse to consent to her having the power to require actions of you’ (2005: 358).

Estlund suggests that this is an implausible conclusion, and that if we believe instead that the bystander ‘has not escaped the authority by refusing to consent’, then we must conclude that ‘In this case, non-consent to authority is null’ (2005: 357).

In this way, Estlund argues, a democratic state has authority grounded upon the normative consent of its citizens. Estlund suggests, in David Enoch’s words, that ‘given its epistemic and legitimacy credentials, and the humanitarian obligations to avoid all sorts of catastrophes—we all *ought* to consent to its authority, and so it has authority just as if all of us did in fact consent’ (2009: 39).

Estlund gives a lengthy, complex argument that ‘people would be required to consent to the...authority of democratic legal arrangements’ (2008: 135). I do not have the space to explore this argument in detail, but briefly, it rests upon the view he calls ‘epistemic proceduralism’ (2008: 135). Enoch defines this as the view that ‘Specific political decisions in a democracy...are legitimate because they are the outcomes of a democratic procedure, and that procedure itself is legitimate because it is likely...to lead to correct, that is, qualifiedly acceptable, decisions’ (Enoch, 2009: 38).

This might be applicable to my account of the right and authority to wage war, which I have suggested is established by the delegation of individual defensive rights. If we assume Estlund is correct, and there is a normative reason why individual citizens *should* consent to the authority of their democratic state in matters such as this, which under my account means that they *should* consent to delegate their defensive rights to that democratic state, then should Estlund’s argument be successful, democratic states must be legitimate authorities, with the collective right of defence I have defined, whether or not the individuals in question *actually* wish to delegate their defensive rights to that state.

However, in order for normative consent theory to be entirely successful, it needs to answer one question – if the existence of normative consent rests upon an obligation to consent to that authority, then what is that obligation grounded upon? Estlund suggests two potential ‘approaches to authority that also do not rely on actual consent’ (2005: 364), upon which this obligation might be grounded.

One possibility is ‘urgent task theory’, which ‘holds that some tasks are morally so important that there is a natural moral duty to obey the commands of a putative authority who is well-positioned to achieve the task if only people will obey’ (2005: 365). The problem with this approach is, as Estlund convincingly argues, that some tasks that might be important achievements ‘nevertheless make no plausible moral claim on everyone who we might try to enlist by commanding them to help’ (2005: 365). He gives the example of building a temple – a morally important achievement for believers in the relevant faith, but not a task the builder necessarily has authority to command others, especially those who are not his co-religionists, to assist with.

Estlund suggests urgent task theory could nevertheless be used to support normative consent theory, by arguing that ‘in the case of some urgent tasks, but not others, those who are commanded would, if asked, be wrong not to consent to the commander’s authority for these purposes’ (2005: 365). He suggests that ‘The wrongness of refusing consent, rather than urgency itself, would be the explanation for why some urgent tasks ground authority and others do not’ (2005: 365).

However, this argument seems somewhat question-begging to me. The reason why in some urgent tasks, like saving the lives of the passengers in the wrecked aircraft, the passenger would be wrong to disobey the orders of the putative authority, seems to be that refusing consent is wrong in these cases.

However, it seems to me that the passenger might not be wrong to disobey the stewardess’ orders if the situation were different – say, if she ordered him to help her with another passenger’s baggage. His refusal in this non-urgent situation might be discourteous, but not *wrong*. On what is the ‘wrongness of refusing consent’ in the first situation grounded if not in the ‘urgency itself’ (Estlund, 2005: 365)?

Estlund’s second possibility is the ‘fair play’ or ‘fair contribution’ argument (2005: 365). This is the argument that ‘it is wrong to take advantage of the cooperation of others in an arrangement from which one benefits without contributing one’s fair share’ (2005: 365).

He suggests this argument generates an obligation to obey a putative authority, in that there would be a ‘requirement to consent to this...person’s authority so long as there is a proper and competent effort at fairness’. In Estlund’s opinion, such a requirement ‘might best explain authority when it is understood as falling under the larger umbrella of normative consent theory (2005: 366).

I would agree that this is a more plausible attempt to ground normative consent theory than urgent task theory, and it fits well with Estlund’s suggestion, that democratic states are the only legitimate authorities. But I nevertheless find this ‘requirement’ (Estlund, 2005: 366) too problematic.

Estlund admits that making a ‘proper and competent attempt at fairness’ (2005: 366) does not necessarily mean one will succeed in being fair. Estlund admits that ‘the state is fallible’; it may ‘not always distribute burdens quite

fairly' (2005: 366). Nevertheless, if it is attempting to be fair, the 'fair contribution' argument (Estlund, 2005: 365) and the normative consent theory together suggest we have 'a duty to comply with the commands even when they are mistaken' (Estlund, 2005: 366). This is precisely what I find problematic.

If a state attempts fairness, but is so ignorant or mistaken in its information that it is in fact giving extremely unfair orders, why should the attempt itself ground an obligation to obey those mistaken orders? Civil disobedience may even serve to alert the state to the unfairness of its orders when other methods fail.

I do not rule out the possibility that something else might possibly ground a duty to obey a state even in these circumstances, but I simply do not think that its good intentions could be that thing. If 'burdens' are 'distributed' so unfairly that some members of society are starving, even dying, would the government's mistaken or ignorant belief that the distribution is fair really ground an obligation to obey the state's authority if there is no other way besides civil disobedience to alert the government to the situation? I do not believe it would.

Therefore, I do not think that Estlund's normative consent theory is successful enough to provide a plausible basis for the delegation of individual defensive rights solely to democratic states. Nevertheless, elements of actual consent theory, in particular the basic idea that *some* form of consent (whether active or tacit) by the delegators is necessary for delegation to take place, is an attractive one, and one to which I will return. However, without the problematic normative element of Estlund's expanded consent theory, this argument can provide no reason why democratic states should be the only collective entities to which such delegation is plausible.

1iii) A possible Cosmopolitan definition of the authority to wage war

I now turn to Fabre's account of the right and authority to wage war, which I consider more plausible than the accounts which attempt to identify legitimate authority solely with political authority. To recap, Fabre suggests that

‘whatever rights and privileges states have, they have them *only* in so far as they thereby serve individuals’ fundamental interests’ (2008: 964).

Fabre argues that a state is legitimate (which she defines as the possession of a ‘moral *right* to govern’ by state officials (2014: 45)) only if ‘its institutions and officials, through the laws which they vote and enforce and the executive decisions which they make on the basis of those laws, respect and promote the fundamental rights of both the state’s members and outsiders’ (2014: 46)⁷¹.

However, like myself Fabre separates the political authority to declare war, possessed by leaders of legitimate states, from the moral authority derived from the ‘right to go to war’ (2008: 965), which is not confined to political authorities. Rather, she suggests both that groups acting without state backing ‘may resort to war to overthrow an illegitimate state’, and that ‘individuals acting alone have the right to go to war against unlawful foreign belligerents’ (2008: 965).

The reason for Fabre’s extension of ‘the right to go to war’ (2008: 965) to non-state collectives like ethnic groups or civil movements, as well as ‘individuals acting alone’ (2008: 965), derives from her cosmopolitan political theory; in particular, her argument that ‘individuals are the fundamental units of moral concern and ought to be regarded as one another’s moral equals’ (2008: 964). Fabre’s cosmopolitanism advocates an individualist conception of defensive rights as a just cause for war, and she naturally accompanies this with an individualistic conception of the authority to wage war.

She rejects ‘legitimate authority’ in its traditional political sense – meaning specifically ‘an organization that has the authority to make and enforce laws over a given territory, and has a claim to be recognized as such by other comparable organizations’ (Fabre, 2008: 967) – and also broader political definitions which include some non-state agencies like ‘national liberation movements’, because ‘they defend ‘state values’ such as national sovereignty

⁷¹ However, she allows some room for consent – she adds the caveat that if state A would be better at protecting the interests and rights of the citizens of state B than state B’s government, this does not automatically give state A the right to govern state B against the wishes of state B’s citizens, because ‘it is a necessary condition for an individual permissibly to be given that to which she has a right that she should (in some sense) consent to it’ (2014: 48). The same holds true for a community of individuals – if ‘A has good reasons to believe that B would not consent’ (2014: 48), then A does not necessarily have the right to govern B. I have some sympathy with this part of Fabre’s argument, as I will show.

and territorial integrity from, typically, foreign, colonial powers' (2008: 968). Her argument is that 'a cosmopolitan account of the just war must renounce the requirement that a war be declared by a legitimate authority [in this sense] in order to be just' (2008: 968).

This cosmopolitanist account argues that 'violations of individual basic rights, as well as violations of collective, political rights' (2008: 969) may constitute a just cause for war, if those basic rights 'protect central aspects of individuals' prospects for a minimally flourishing life' (2008: 969).

This may at first seem fairly compatible with my own definition of just cause, since I would agree with Fabre that the right to a flourishing life⁷² is both an individual right⁷³ and the appropriate end of defensive rights. However, as I will show, the cosmopolitan account soon diverges considerably from my arguments.

Fabre goes on to argue that because the violations of individual rights can provide a just cause for war, it is not plausible to conclude that only states or political communities, can wage war, because any group of individuals, she claims, can have a just cause if their individual rights are sufficiently violated.

She continues that if a non-state collective entity, for instance a religious community, has a just cause then advocates of the political definition of legitimate authority are committed to the view 'that [the religious group] cannot wage a *just* war..., but that it would have been able to do so had it been a state' (2008: 969). This, she argues, is 'misguided, *on cosmopolitan grounds*' (2014: 145), because it would deny the fundamental cosmopolitan principle that 'all human beings have human rights to the goods and freedoms they need in order to lead a minimally flourishing life', including 'the right to protect oneself from violations of one's human rights'.

⁷² Although I define it as a cluster-right, which is slightly different from her definition, this need make no appreciable difference to this portion of the argument.

⁷³ Although Fabre's point that some collective rights, like the right to collective self-determination may furnish aspects of a flourishing life is an interesting one, I would argue that the cluster-right to a flourishing life itself remains an individual right. Other aspects of this cluster-right, such as a minimal social life, can only be achieved in conjunction with the presence of others (and indeed, the aspect of a flourishing life that Fabre describes, if it exists, might perhaps also be described in terms of the individual right to live within a stable and self-determining community), but the cluster-right to a flourishing life which we are concerned with remains an individual one.

By denying this religious community the right to wage war to protect their ability to lead flourishing lives, we are denying its members this human right because they belong to a non-state group rather than a state or political community. Thus, Fabre argues that cosmopolitans are committed to arguing that such non-state collective entities may have the right, and thus the moral authority, to wage war to protect their rights.

In practical terms, Fabre suggests that most, if not all, non-state collective entities may, if they have a just cause, also have the right to wage war in defence of their rights. For instance, she suggests that ‘the very poor are legitimate holders of the right to defend their subsistence rights against the affluent’s dereliction of duty’ (2014: 116)⁷⁴, and that a war ‘may be fought by those individuals acting singly, or by their acting together without the attributes of state sovereignty’ (2014: 116).

Similarly, she argues that if ‘some individuals within state A have a just cause for taking up arms against their regime’, the fact that their group is not itself a state does not mean they have no authority to wage war for this cause. This would suggest revolutions or uprisings by non-state organisations or loose alliances of different groups might, potentially, be just wars (assuming just cause, reasonable chance of success, etc.).

She even proposes it need not necessarily be only *groups* that have the right to wage war. Although she admits a single individual is unlikely to have a reasonable chance of success, and so will almost certainly be unable to wage a *just war*, she writes that while this would ‘lead us to deny him the right to wage *that particular war*’, it would not ‘rebut the radical claim that he can hold the right to wage war in general’ (2014: 148).

Although, as I have said, I agree that states are not the only entities that possess the authority to go to war, there are other aspects of Fabre’s argument I find problematic – particularly her suggestion that it is theoretically possible for individual people to have the right to wage war.

⁷⁴ Subsistence being one of the most important aspects of a flourishing life, it is Fabre’s contention that affluent groups, in particular nations have ‘negative and positive duties’ (2014: 112) towards poor or deprived groups, such as the negative ‘duty not to *subject* distant strangers to severe deprivation’ and positive ‘duties to provide help for the very deprived should they be unable to access the resources necessary for a minimally decent life’ (2014: 110). I do not agree, but since my focus here is on Fabre’s definition of legitimate authority, I can only mention it in passing.

Since I argue that to possess the right, and authority to wage war is to be the appropriate recipient of delegated individual rights of defence, and thus to possess the collective right of defence that grounds just cause, to grant this kind of authority to individuals would mean a single individual could possess this kind of defensive right, which seems contradictory.

For an individual person to possess this right, the act of defence in question must be the defence of a group of people who have (for whatever reason) delegated their defensive rights to that individual, which seems to me a different concept to that which Fabre is discussing, and is in any case highly problematic, since there seems little or no reason for people to consent to such a delegation. One lone individual⁷⁵ would be no better equipped to protect their right to a flourishing life than they themselves would be.

However, this is not my only criticism of Fabre's argument. I also object to her argument that *any group* of individuals can have the right to wage war (which would mean in terms of my account, that any group might be the appropriate recipient of delegated individual defensive rights).

I must admit that if this were the case, then it would follow that all collective entities would in fact have the moral authority to go to war. Inherent in the possession of a defensive right is the suggestion that one is morally permitted (and thus has the moral authority) to exercise that right in necessary and proportionate ways. However, I do not necessarily agree with Fabre that just *any group* can possess the defensive right in question.

For instance, in addition to states and non-state collective entities such as religious and ethnic groups or civil and political movements, should collective organisations like a local amateur dramatic club, or a bird-watching society, have a collective right to defence, resulting in a theoretical authority to declare war? Fabre would probably retort that such small groups will almost certainly fail to fulfil the other *ad bellum* conditions, in particular reasonable chance of success, and this is true, but it seems to me to miss the point.

⁷⁵ An absolute ruler might perhaps be a different issue, since he is presumably at the head of some form of state or army, with the resources to protect his subjects if he wishes to do so. One might therefore argue that the defensive rights of his subjects are not delegated to the ruler as an individual, but as the head of state (or non-state collective – an absolute religious leader, for example), which in a group organised in this way would be much the same as delegating them to the collective entity. I believe it may be theoretically possible that this kind of collective could be morally entitled to wage war, if the *ad bellum* criteria are satisfied.

There seems, intuitively, to be something fundamentally wrong (as well as futile) with according an unsuitable collective like a bird-watching society even the *theoretical* right to wage war, even if one knows they can never justifiably use it. Fabre's separation of legitimate authority (as she defines it) from the right to wage war may be what causes her to miss this point. The fact remains that suggesting that an entity has the right to wage war necessarily means that that entity has some sort of authority, some moral entitlement to do so.

I believe that granting the right to wage war (and hence the moral authority) to any group that perceives a threat to its members' flourishing lives, misses a fundamental element of the authority criterion. Furthermore, it misses one of just war theory's fundamental aims – that of limitation. Far from limiting the number of conflicts that might count as justified wars, this aspect of Fabre's cosmopolitanism seems to potentially increase them.

However, given that authority to wage war needs to be limited to certain kinds of collective entities, we still need to determine which collective entities. In the next section, therefore, I outline my account of the kinds of collective entities which may possess the right to wage war, and hence the moral authority to do so, by determining which collective entities may receive delegated individual defensive rights. To do this, I also need to flesh out how individual defensive rights can be delegated to collective entities.

2: An Account of Legitimate Authority based upon the Delegation of Rights

To recap, I argued in Chapter Two, that the appropriate subjects of the collective defensive rights which ground defence as a just cause are the collectives to whom individual defensive rights have been delegated.

I have shown that the appropriate recipients of our delegated individual defensive rights are collectives; and I must now show why these rights are delegated to some kinds of collective entities rather than others. Why my

nation or my ethnic community, and (presumably) not my book club? There must be some way of distinguishing between the two: we do not delegate our defensive rights to every collective entity we are affiliated with, however small or unsuitable.

Perhaps the consent theory of authority, which we have already examined in this chapter, could provide some help. It seems plausible to me that we might be able to delegate our defensive rights through the active or tacit act of consenting to delegate them.

But before I move on to determine how consent might provide grounds for the delegation of individual rights to a collective, I must first give a working definition of a collective, and explain what kinds of collectives might be the appropriate recipients of delegated defensive rights.

2i) The Collective as a Recipient of Delegated Individual Defensive Rights

There are various kinds of collective; some are often accepted as potential subjects of defensive rights (like states), but others (like football clubs, or corporations), many would consider inappropriate entities to which to entrust their defensive rights. Groups which cannot receive delegated individual defensive rights cannot, I believe, hold legitimate authority to wage war. It is therefore necessary for me to give an account of the kinds of collectives to which individuals may permissibly delegate their individual rights.

First, the distinction must be made between casual agglomerations, like the passengers on a bus, or a group of people who join forces to move a fallen tree out of the road; people who come together for some short-term common purpose but whose group lacks more formal cohesion and structure; and those groups which are stable, organised collective entities. Peter French makes a relevant distinction here, between ‘aggregates’ and ‘conglomerates’ (1984: 5, 13). In Geoffrey Scarre’s words, aggregates are ‘mere unstructured collections or gatherings of people’ (2012, 77). They may have some common purpose, but ‘they have not assembled to pursue some project *as* a group, and no purpose(s) can be assigned to the group as a whole which cannot be assigned to its members separately.’ (Scarre, 2012: 77). The bus passengers and tree-removers would seem to fit into the category of aggregates.

Conglomerates, on the other hand, are more highly structured and organised, and their members have more to unite them than shared purpose(s). French defines a ‘conglomerate collectivity’ as ‘an organization of individuals such that its identity is not exhausted by the conjunction of the identities of the persons in the organization’ (1984: 13) – in short, a conglomerate is more than just ‘a determinate set of individual human beings’ (French, 1984: 13), it is a collective with a distinct identity over and above its members’ individual identities (whereas an aggregate is ‘merely a collection of people’ (French, 1984: 5)). Scarre adds that a conglomerate ‘possesses some form of organization or structure appropriate to achieving certain goals or purposes that belong to the group as a whole rather than to its members *qua* individuals’ (2012: 77). French’s examples of conglomerates include ‘the Rolling Green Country Club’, ‘the Democratic Party’, and ‘the Red Cross’ (1984: 13).

Thus, the members of a conglomerate do not merely share the same individual purpose, but have *joint* purposes, which cannot be achieved individually, and, indeed, might not even make sense individually. For instance, a debating society might have the purpose of enjoying stimulating discussions of interesting topics – which can only be a purpose aimed at jointly by two or more individuals.

French also suggests there are degrees of conglomeration, which, as Scarre observed, depend ‘upon the level of internal organization devised...in order to realize the shared purposes of the group’ (Scarre, 2012: 77) – so ethnic groups, for instance, could be more or less conglomerated according to the degree to which they have what French calls ‘CID’ or ‘Corporate Internal Decision’ structures (French, 1979: 212). These are, in Scarre’s words, the kind of ‘hierarchical structure...well-defined policy- and decision-making procedures, codes of conduct or rules of operation’ (2012: 77) typically found among conglomerates like corporations or universities; and as French put it, a CID structure’s ‘primary function is to draw experience from various levels of the corporation into a decision-making and ratification process’ (1979: 212). Possession of CID structures ‘in at least a minimal degree’ (Scarre, 2012: 77) is necessary for a group to be conglomerate.

This distinction between aggregate groups and conglomerate groups seems to me a valid one, and conglomeration seems a plausible minimal condition

for a group to be what I would term a collective entity (or, in brief, a collective)⁷⁶. But to return to the question of which groups are the appropriate recipients of delegated rights; would either aggregates or conglomerates (or both) be such recipients?

The fact that aggregates, while their members may share the same individual purposes, do not have joint purposes or a fully realised decision-making structure seems to rule them out⁷⁷. The defence of *all* members of a group would require the kind of well-structured, well-defined internal decision structures that French describes as a distinctive feature of conglomerates. A mere ‘collection of people’ (French, 1984: 5) could not plan and carry out a defensive military campaign at all. In addition, while the defence of large numbers of people might appear to be a shared individual purpose, I believe it is a joint purpose once the defensive rights of these individuals are delegated

⁷⁶ David Copp objects to French’s suggestion that aggregates and conglomerates can be distinguished because an aggregate is ‘merely a collection of people’ (meaning that an aggregate’s ‘existence as that particular aggregate is not compatible with a varying or frequently changing membership’ (French, 1984: 5)) whereas conglomerates have an identity over and above that of the individual members’ identities, and so are not fundamentally changed when one member arrives or departs. Copp points out that ‘an audience may gain or lose members. Notice that we do not say that there is a new audience when a few latecomers arrive’ (1984: 256). His point is that an aggregate may continue to exist as a particular aggregate if it has ‘historical continuity in membership’ (1984: 258); meaning, as May put it, that ‘most members stay the same over time’, *and* if ‘there is a “unity relation”...something which is common to all members and which thereby links individual persons to one another’ (May, 1987: 28). This is a valid point, but I believe French’s distinction holds up nevertheless. An aggregate may be roughly the same if a few members arrive or leave (and a ‘unity relation’ exists) but it still does not have the kind of joint purposes, structure or identity that ‘is not exhausted by the conjunction of the identities’ of the people involved (French, 1984: 5) – in short, Copp’s argument does not eliminate the other, more important differences between aggregates and conglomerates, and thus does not fundamentally alter the distinction. I would also reject May’s criticism that some aggregates without formal organizational structures like ‘teams and mobs’ can ‘have sufficient structure to require a nonindividualistic analysis of their behaviors, even though they have no formal organizational structure’ (May, 1987: 23). I do not have the space to analyse May’s argument in full, but he suggests a group without any structure at all can ‘engage in joint action’ if they ‘attain unity’ (1987: 23); as for instance if an angry mob storms into a building or an audience applauds at the end of the play. This may well be the case, but I do not believe such ‘unity’ is sufficient to make the mob or the audience into a conglomerate as French defines it. Engaging in a joint action does not mean the audience’s behaviour cannot be ‘reduced to its members, and their behaviour’ (May, 1987: 23) – the audience members applaud simultaneously, but while their purpose of showing appreciation is a common one, it is not a *joint* one. I think French’s point that the members of an aggregate have a common purpose behind their joint action and the members of a conglomerate have a *joint* purpose sufficiently demonstrates that even when members of an aggregate act together, their behaviour is still reducible to individual behaviour. Thus, I believe French’s aggregate/conglomerate distinction also survives this criticism.

⁷⁷ Cosmopolitans like Fabre (2014: 148) suggest that any individual or group (aggregates and conglomerates alike) could in theory be permitted to wage war, but I have already given my reasons for disagreeing with this argument.

to a collective entity. While the end of a defensive war remains the individual lives of the right-holders, the purpose of that war is the defence of all their lives, not separately but together.

A collective waging war is not simply a group of people each aiming to defend her own life, like a group of random women each struggling to defend herself against a mob of rapists, but it is a well-structured group aiming to defend *all* the individual lives of a group of people, whether members of that collective or another collective. The cooperation and participation of a large number of people is necessary to produce, as Rousseau would have it, ‘a mutual, steady and manifest disposition to destroy the enemy State, or at least to weaken it’ (2004b: 175), and therefore this would seem to be a joint purpose.

For these reasons, I accept the definition of a ‘collective entity’ as a conglomerate group, and I further believe rights can only be delegated to a group that is a collective entity in this sense, rather than a casual, disorganized group of people. Therefore, in order for a group to be the appropriate recipient of delegated rights, it must be a conglomerate, which would mean its members could have a joint purpose, and that it would have organisation and decision-making structures necessary to achieve joint purposes. But is being a conglomerate sufficient to be an appropriate recipient of delegated individual defensive rights?

Well, consider the implications if it were. Any number of non-state groups or organisations may be conglomerates, without being technically (or morally) suitable to wage war. For example, one might categorise a bird-watching society as a conglomerate, its members united in a joint purpose and possessing the necessary organisational structures to take joint action to achieve that purpose.

Let us imagine that some aspects, such as freedom of movement, of the flourishing lives of members of a small bird-watching society (say twenty to forty members) are being threatened or stripped away, because they are the only members of a very small ethnic minority within their country, towards which the government has adopted a policy of oppression. Could the members of this bird-watching society, even in principle, delegate their defensive rights

to this society and authorise it to wage war to defend these aspects of their flourishing lives?

Granted that the bird-watchers have a right to defend these aspects, I still do not think that the bird-watching society, at least in its current form, structure and size, could be the appropriate collective to defend them by lethal means, or, therefore, a legitimate authority to wage war.

Of course, just war theorists could rightly observe that a bird-watching society cannot in these circumstances fight a just war even if we grant them just cause and legitimate authority – such a small non-state organisation attempting to wage war against a state is likely to fail the condition of reasonable chance of success.

However, I do not think that this solves the problem. The issue is not whether the bird-watching society can fight a just war (clearly, they cannot), but whether they could have the right and authority to wage war in general. As Fabre points out, the lack of a reasonable chance of success would not ‘rebut the radical claim that [an entity] can hold the right to wage war in general’ (2014: 148).

This demonstrates part of what makes this argument so counter-intuitive. If this bird-watching society, at least in part due to its size and lack of resources, lacks the ability to fight a potentially just war under any circumstances, how can it have the authority to wage war? It seems implausible to suggest that a collective entity that lacks this ability should nevertheless have the authority to wage war in a general sense.

Yet such groups may be conglomerates, with distinct identities and sufficiently developed organisational and decision-making structures to formulate and achieve joint purposes. If all conglomerates are appropriate recipients of delegated defensive rights, then collectives like these may potentially be appropriate recipients.

I do not wish to extend the field of legitimate authorities to declare war, to include all conglomerates. Therefore, I propose additional criteria which a collective must fulfil in order to have a potential right to fight a defensive war. To begin with, I will draw upon another view of the definition of a collective entity.

Margaret Gilbert writes that she considers a group to be a collective (as opposed to a mere aggregate) only if she considers it to be a ‘genuinely collective [subject] of intention, action, and so on’, and that ‘a population is a genuinely collective subject of intention if and only if, roughly, it can plausibly be regarded as having an intention of its own, an intention, if you like, of the population as a whole’ (2002: 123). In her view, the ‘intention’ of a collective is not ‘a plurality of intentions of individual members’ (2002: 127), not every individual member each intending to wage a war (which could be impossible), but rather derives from a ‘joint commitment’ to perform a certain action, which can occur

‘without everyone...knowing or even conceiving of the content of their commitment...if there is a joint commitment to authorize as a body some person or body to make decisions, form plans, and so on, on behalf of the jointly committed persons. For the sake of a label, one might call this an authority-producing joint commitment’ (2002: 127).

The delegation of individual defensive rights to a collective entity might plausibly constitute a kind of joint commitment to permit that collective, or its leaders and agents, to act in our defence. I do not accept every aspect of Gilbert’s argument, for instance, as I will argue, I do not believe joint commitments must be openly expressed in any ‘large group where people do not know one another personally, or even know of one another as individuals’ (2002: 126), and (perhaps because defensive commitments are not the only commitments common to citizens of a state) it seems to me that failure to enter into this commitment (i.e. pacifism) would not disqualify an individual from membership of a state (although it might disqualify her from membership of a collective whose *sole* joint commitment was defensive, like a resistance movement). Nevertheless, it seems minimally plausible that a collective entity must be a collective subject of intention in order to hold and exercise delegated individual defensive rights, as some kind of collective commitment to defend individual lives would seem to be necessary for any kind of collective action like the waging of a defensive war.

However, this alone does not sufficiently narrow the field of appropriate recipients of delegated lethal defensive rights. For instance, many of the collectives I mentioned earlier, like bird-watching clubs and debating societies, might also fulfil this criterion – for instance, a bird-watching club might form a collective intention to go on a fund-raising drive for their trip to a bird sanctuary. To rule out these collectives, we must devise further criteria.

These criteria must limit the collectives that may hold delegated individual defensive rights to those capable of fulfilling them. As I said, to suggest a collective like a bird-watching society is an appropriate entity to hold delegated individual defensive rights, when it is fundamentally incapable of usefully acting upon such rights, seems highly counter-intuitive.

I have argued that the moral authority to wage defensive war and the moral right to wage defensive war are inextricably linked, and that the moral right and authority to wage defensive war arises from the delegation of individual defensive rights to a collective entity; it follows, therefore, that to delegate defensive rights to these collective entities would be to accord them a power they would be utterly incapable of exercising. It is pointless to extend a moral authority to entities that could never act upon that authority.

Therefore, I have devised the following list of criteria to determine the appropriate recipients of delegated individual defensive rights, which limit the field to collective entities that are at least potentially capable of exercising these rights.

- 1) The collective entity must be, as Gilbert proposed, a ‘genuinely collective [subject] of intention, action, and so on’, in that it must ‘plausibly be regarded as having an intention of its own, an intention, if you like, of the population as a whole’ (2002: 123)⁷⁸. When I describe a

⁷⁸ Gilbert’s argument that our political obligations arise from ‘a sense of joint commitment’ (1993: 127), and that ‘The widespread observed use of such phrases as ‘our government’ and ‘our country’, alongside any relevant behavior, would itself appear to provide a basis for common knowledge in a population that a substantial portion of its members have openly expressed their willingness jointly to commit in the relevant way’ (1993: 128) may appear similar to my definition of tacit consent to delegate defensive rights, as I will go on to explain it. However, I do believe they are quite distinct. Besides the fact that mine is at bottom a voluntarist argument, and Gilbert’s arguments have most often been linked with nonvoluntarist contract theory, I do not believe that individuals who merely consent tacitly have ‘openly expressed their willingness’ to enter into any defensive commitments, as it

collective entity as intending to perform a certain action, like waging a war, I therefore mean it in this sense.

- 2) The collective entity must be large enough and stable enough to wage a military campaign⁷⁹. It is not necessary that this quite amounts to a reasonable chance of success in that campaign (although such a chance is of course necessary for it to fight a *just* war, since it is one of the *jus ad bellum* criteria), but it is necessary that it should be capable of devising and sustaining the kinds of activities necessary for a stable, organised military campaign, (raising troops, formulating and implementing long-term military strategies, and so on). A collective entity which is utterly unstable and on the verge of collapse would probably be unable to fulfil this criterion, as would a small, non-combatant organisation like a bird-watching society (ruling out a radical expansion of its size and resources).
- 3) There must be a central, organised structure and decision-making procedure. A central locus of responsibility within the collective entity would seem necessary; some individual or group of individuals (government, general, ruling council, etc.) which has the authority to officially declare and co-ordinate a war on behalf of that whole collective, and is primarily responsible for waging that war should it emerge that it is an unjust one. However, this kind of authority is strictly political authority, not *moral* authority, as I have mentioned. A collective's moral authority to wage war arises from individuals' delegation of their defensive rights to that collective, and belongs, in principle, to the collective as a whole; while practically speaking,

seems contradictory to suggest that the open expression of willingness could occur without the expresser's conscious knowledge, but tacit consent to delegate defensive rights can, as I will explain later, take place before the consenter becomes aware of it.

⁷⁹ It *may* be possible for a smaller or less stable collective, which lacks the resources or the organisation to wage a traditional military campaign, to fight using less traditional means like terrorist tactics or sabotage. However, as I have already explained, I do not believe terrorist tactics are ever permissible as a method of waging war, and so the capability for terrorist acts does not render a collective entity capable of waging war. Acts of sabotage, like the actions of the French Resistance during World War II, might be permissible (subject to the *in bello* criteria), but I believe they could only be considered acts of war if they took place as part of a larger campaign, or as one front of a campaign waged by other allies on other fronts using more conventional means. Hence, it is possible for such smaller or less stable collectives to wage war alone – although they might play a part in assisting a larger collective or group of collectives in a jointly-waged war.

political authority to declare war usually belongs to a small group within a collective entity, namely the leaders of that collective. It is also not necessarily the case that such a central locus of authority can only be found within states; it may be less common, but it is not impossible for a non-state collective entity to develop a distinct centre of authority. For instance, during the Chinese Revolution, the Chinese Communist Party and its militant wing the Red Army, had both a distinct chain of command and distinct figures of authority, most notably its chairman Mao Zedong⁸⁰.

- 4) The collective entity must be well-intentioned, i.e. it (or rather its leaders and officials) must intend to defend those who delegate their defensive rights to it in order for that delegation to be effective. They must intend to actually and fully exercise these defensive rights if and when it becomes necessary, rather than merely feign such intentions in order to further some self-serving end, such as remaining in power, or gaining recognition for philanthropy amongst the international community. For instance, say Collective A initiates an interventionist war, ostensibly to defend the lives of an endangered minority within Country B, but never intends to defend them – accepting their plea for defence is in fact a ploy to increase the popularity of Collective A’s leaders for an impending election, and once the election is over these leaders intend to find an excuse to quietly withdraw from the war with the minority’s defence unfinished. This intention nullifies the minority’s delegation of their defensive rights to Collective A. It may not always be obvious in peacetime whether or not a collective fulfils this condition⁸¹, but once a collective purposefully fails to defend the flourishing lives of those

⁸⁰ <https://www.britannica.com/biography/Mao-Zedong>

⁸¹ It may be difficult for individuals to determine, when there is no current threat to their flourishing lives, whether their collective intends to exercise their defensive rights should the need arise. However, assumptions can perhaps be made based upon the accountability of the collective’s leaders to individual members, and the collective’s record on upholding their members’ rights in other, less urgent situations. If it does become clear that a collective would not defend its members’ lives should an aggressor threaten them, then individuals may immediately delegate their defensive rights elsewhere, or they may attempt to (non-violently) alter their collective through peaceful protests or governmental reform to increase its level of accountability, for instance, so that they can be reasonably certain that it will defend their lives should the need arise – an option they will not have in situations where defence is immediately necessary.

people who rely upon it to do so, it becomes apparent that those individuals must delegate their defensive rights elsewhere.

These four criteria are essential conditions. States which fulfil these conditions would, I believe, be suitable candidates to receive delegated individual defensive rights. Non-state collective entities also need to fulfil these conditions but, as I will show, they also need to fulfil further conditions in order to be suitable to receive delegated individual defensive rights.

First, however, there is a fifth general condition for both states and non-state collectives, that is not *essential* but is nevertheless *desirable*, as individuals are more likely to consent to delegate their defensive rights to collectives which also fulfil this fifth condition, and less likely to withdraw their tacit consent to delegate these rights⁸².

- 5) It is preferable that the collective entity be non-isolationist; i.e. that it permits free and friendly relations with other collective entities – not the kind that misuses other collectives, for instance by financially exploiting them, or prevents its own citizens from engaging with other collectives (like North Korea, for instance). Individuals are more likely to actively consent to delegate their individual defensive rights to collectives that fulfil this condition because, among other things, these collectives are presumably less likely to wage aggressive (and therefore unjust) wars against other collectives, and individuals may lead richer and more prosperous lives as members of such collectives, as they would have more opportunities for improving their own lives through commercial and cultural engagement with other collective entities. Also, the leadership of a collective that misuses members of other collective entities may someday turn to misusing minorities within its own (or majorities, if an elite minority is in power) – it therefore seems preferable to delegate one's rights to a member of a collective that does not misuse members of other collectives, as there is less likelihood that it will someday turn to misusing you.

⁸² This will become clearer when I explain my account of the delegation and withdrawal of individual defensive rights to and from collective entities later in this chapter.

The collective entity to which individuals delegate their defensive rights therefore must be a conglomerate entity (as French defines it), a collective subject of intention and action (as Gilbert suggests), and one which is stable, well-intentioned, and of sufficient size and capabilities to wage a campaign of war. I also suggest that it may be either a state or a non-state collective entity.

Although I disagree with Fabre's cosmopolitan conception of the authority or right to wage war on the grounds that it grants this right to all groups and even individuals, I do agree with her that at least some non-state collective entities could have the 'right to wage war' (2014: 152) for a just cause. Kamm similarly suggests it is 'hard to believe that no nonstate group can legitimately represent and permissibly act for people who suffer sufficient injustice' (2004: 652). Many other just war theorists, like Rodin, argue against this assertion, but I do not believe they successfully defeat the proposition that *some* non-state collective entities, at least, could have the right and authority to wage war.

For instance, Rodin argues that non-state collective entities are not the appropriate subjects of the kind of collective defensive right that would render that entity a morally legitimate authority. In one of his articles, he uses the example of the hostile takeover of Cadbury's by Kraft Foods in February 2010. He attempts to base an argument against this kind of non-state collective defensive right upon what he suggests is an intuitive understanding that Cadbury's did not have the same 'permission to use lethal force' (2014: 73) in its defence that we accord to states, not even in a 'lesser form', even though Cadbury's was a distinct collective entity, an 'independent and self-determining community' (2014: 73) with a 'unique collective identity' (2014: 70), which Kraft's actions were threatening, and which was actually wiped out by the 'conquering' company in the end.

Rodin describes it as 'madness' to suggest that groups like Cadbury's may be the appropriate subject of lethal collective defensive rights. However, our intuitions concerning this example may, I believe, be complicated by the fact that it is decidedly uncertain whether Kraft's actions constitute either a direct or an indirect threat to sufficient aspects of a flourishing life to make armed defence in this case justified, even if a company like Cadbury's is an

appropriate subject of delegated defensive rights. I do not, in fact, think that Kraft's actions constitute such a threat.

Rodin suggests that 'the right to the independence of our state' is one of the 'fundamentally important rights' that we have the right to defend, because it is 'grounded in the moral value of participating in a self-determining community' (2014: 73) – however, we are all part of many different self-determining communities throughout our lives. The impact of the loss of a particular community upon our ability to lead flourishing lives depends upon that community's importance to our lives and identity.

In my opinion, Cadbury's may well have had a unique collective identity, but being a part of *that particular* collective identity would not be an important enough aspect of its workers' lives for its defence to constitute just cause for war. As I pointed out earlier, it would also not have sufficient indirect impact upon their lives to justify the direct threats to their lives that would be incurred by war. It might be more plausible, given that only lesser aspects of its members' flourishing lives are threatened in this scenario, that Cadbury's might have a lesser right of defence, permitting them to take legal, non-violent actions in defence of the existence of Cadbury's as a community, and thus the aspects of its staff members' flourishing lives that depend upon membership of that community, such as launching media campaigns.

However, if we consider whether it would be intuitively plausible for the management of Cadbury's to have the right or authority to declare war on Kraft should Kraft actually threaten sufficient aspects necessary to the flourishing lives of Cadbury's workers, (by assassinating workers at Cadbury's in an attempt to force the management to agree to their demands, for instance), the answer might be different. If, for some reason, no state or other official entity were able to step in and stop this from happening, and the only other collective entity with an interest in stopping the assassinations was Cadbury's itself, would it be so impermissible for the management of Cadbury's to engage their own 'combatants' (i.e. private security teams) to wage a defensive war against Kraft, if this were the only way to defend their workers?

If we think that this might be permissible under these circumstances, as I do, then this would suggest it is at least possible for some non-state collective

entities like Cadbury's to become legitimate authorities, if the members of those communities should delegate their defensive rights to them. It is simply the case that most individuals, at least in fairly peaceful nation-states, never, or hardly ever, delegate their defensive rights to non-state collective entities, for an obvious reason.

In actual fact, if Kraft's had used violence or intimidation against Cadbury's workers, Cadbury's would have been able to report it to the civil authorities, thus ending it. The defensive rights of Cadbury's workers never needed to be delegated to their company, because they were already being adequately exercised by their state.

But if the state ceased to exercise these rights, and Cadbury's were perfectly able and willing to do so, then I do not think it inherently impossible or counter-intuitive for Cadbury's workers to rely upon their company to protect their ability to lead flourishing lives, if no other collective entity would or could do so. Hence, I do not agree with Rodin's suggestion that non-state communities obviously lack rights of defence.

Both some states and some non-state collectives seem potentially capable of satisfying my four general essential criteria – many non-state collective entities will of course, fail the second criterion in that they lack sufficient size and resources, but it is possible for some non-state collectives, perhaps even Cadbury's, to fulfil it. In addition, attempts such as Rodin's to suggest that non-state collectives can never be the appropriate entities to defend their members' rights, fail. Therefore, I posit that some non-state collective entities can be appropriate recipients of delegated individual rights.

However, there remain two further conditions which I believe non-state collectives must fulfil in order to be appropriate recipients of delegated individual rights. States may to some extent be excused these further conditions, but as I will argue later in this chapter, a non-state collective entity has more to prove.

2ii) Further conditions for the delegation of rights to non-state groups

The first condition is that those non-state groups which are appropriate recipients of delegated defensive rights must have, as Christopher Finlay suggested, ‘representative legitimacy and consultative input’ (2010: 288).

The possession of these, Finlay argues, would be ‘typically vital to the authorization of non-state entities and hence to their ability to invoke the targeting rights characteristic of war’ (2010: 288-9). Finlay provides a convincing argument that non-state entities need to have this quality in order to be legitimate authorities, even though, as I will show, it does not provide the sole necessary condition for non-state legitimate authority that he suggests it does.

On the other hand, I believe states which lack representative legitimacy (for instance, non-democratic states which do not always consult their citizens, whether or not their actions are nevertheless consistent with those citizens’ wishes) may nevertheless remain appropriate recipients of individual rights. This is because (as I will argue in the next section) while active consent is necessary to delegate defensive rights to a non-state collective, individuals may delegate rights to a state by tacit consent, and retain them so long as it does not fail to exercise them when necessary. If a non-representative state passes the four general essential conditions, I see no reason why it should not be a legitimate authority if its citizens continue to give their consent to be defended by that state. Otherwise, we reach the unpalatable conclusion that a non-democratic, non-consultative state with a good human rights record, which stands ready and willing to wage war to defend its citizens from an invasion force intent on mass slaughter, is not morally permitted to defend them.

But to return to Finlay: his basic argument is that non-state collectives’ ‘moral authority claims’ may be grounded in ‘a criterion of representative legitimacy’ (2010: 305). This would suggest that in order to be appropriate recipients of delegated individual defensive rights, non-state entities ‘considering recourse to violence’ should both ‘consult with those they claim to represent’, and ‘seek wide endorsement in order to legitimate their programmes for action’ (2010: 309). In short, they should ensure that by waging war they would truly represent the wishes of the individuals whom they are defending, because this, in Finlay’s view, gives them legitimacy.

Michael Gross similarly argues that guerrilla organisations, in order to gain the legitimate authority that is so often granted unquestioningly to states, ‘must evolve in the direction of rational authority’, which he defines as having four conditions – ‘effectiveness, domestic recognition, representation, and international approval’ (2015: 41).

Of these conditions, the most significant for our purposes would seem to be representation and effectiveness, as domestic recognition and international approval would seem to be conditions more concerned with making nation-states recognise that the non-state organisation has moral authority than with actually gaining that moral authority. Effectiveness as a condition for non-state legitimate authority will be returned to later⁸³.

Representation, however, is also essential to Gross’ definition of non-state legitimate authority. He writes that the necessary representation ‘might be democratic – that is one person, one vote – but may also include group or corporate representation whereby local leaders speak for their community’ (2015: 41) – which is a plausible suggestion.

Finlay argues that the criterion of representative legitimacy is necessary for two reasons. Firstly, he suggests that those non-state entities in particular that wage wars ‘at least partly on behalf of claims about the self-determination of ethno-national communities’, base this justification upon a presupposed ‘identity between the will for self-determination and the desire for national independence’ (2010: 305). If this ‘identity’ were mistaken, and ‘the community in question preferred to remain part of a larger political entity’, or even if it were significantly divided upon the question, then these claims would be either ‘falsified’ or ‘diminished’ (2010: 305).

Secondly, Finlay claims that support for this representative legitimacy criterion may arise ‘from important empirical concerns about contingency and unpredictability’ (2010: 306). He writes that if the goals for which a non-state

⁸³ Effectiveness, as in a group’s ability to effectively achieve its goals (or cause) by means of war, is also, as I mentioned earlier, a necessary condition for any collective entity’s ability to wage war in the descriptive sense, and thus it comprises part of the second of the four general criteria I mentioned earlier; the criterion which requires that any collective must be capable of organising and carrying out a long-term military campaign. Any collective, state or non-state, must fulfil this condition in order to be capable of holding delegated defensive rights. However, effectiveness as a condition for non-state legitimate authority is, as I will show, distinct from this second general criterion.

collective entity wages war are not ‘present in sufficient force’ within the people for whom they are ostensibly fighting (that is, in my terms, if the non-state entity aims to protect or preserve aspects of individuals’ flourishing lives which the individuals either do not feel are sufficiently threatened, or do not actually value as significant aspects of a flourishing life), then ‘either an attempted liberation will fail in its immediate military objectives through a lack of popular support during the war; or if its war succeeds, the political goods it sought to achieve will fail due to the lack of popular support or participation after the war’ (2010: 306).

Firstly, he suggests that representation is a necessary condition for consequentialist reasons; because if legitimate authority were considered to be possible without it, then such non-state collective entities would be extremely unlikely to be able to fulfil or sustain their goals.

He then argues that representation is necessary for two further reasons, the first of which draws upon Hannah Arendt’s arguments that ‘violence...is inherently unpredictable’ (Finlay, 2010: 307). This means that ‘only the most proximate, short-term goals can sensibly be pursued by violent means because any more distant aims would probably be thwarted by the means employed’ (Finlay, 2010: 307). Next, Finlay refers to Arendt’s argument that ‘violence is *generative*’, meaning that ‘it tends to alter in more or less radical ways the political situations in which it was initiated and may thus overwhelm the purposes for which it was initially intended as a means’ (2010: 307).

For these reasons, Finlay argues that a non-state collective entity considering waging war needs to ensure ‘that all or as many as possible of those whose rights and interests are involved in the decision should participate in making it’ (2010: 309), since ‘it can never provide demonstrable assurance...*either* that all hope is to be abandoned of future non-violent amelioration *or* that recourse to violence will achieve a satisfactory result’ (2010: 309).

The unpredictable nature of war, therefore, makes it absolutely necessary that the individuals being defended are consulted, participate in the decision and give their ‘wide endorsement’ (2010: 309), in Finlay’s words, not only to delegate their defensive rights to this non-state entity but that it should fight this war on their behalf.

However, although I believe that Finlay adequately proves that this criterion of ‘representative legitimacy and consultative input’ (2010: 288), which involves not only the consent but the active participation of the individuals being defended, is necessary to ground a non-state collective entity’s authority to wage war, it nevertheless seems to me that there may be a need for a further condition to determine which non-state collective entities are appropriate recipients of delegated individual defensive rights.

After all, a non-state collective of questionable principle or practice like the Colombian FARC or al-Qaeda could hypothetically claim to be thoroughly representative of the wishes of its members and to consult them adequately about the progress and direction of its military campaigns, but I would like to avoid the conclusion that these are potential legitimate authorities, whether or not they can fulfil the other *ad bellum* conditions. Therefore, I propose a second condition to determine which non-state collective entities are appropriate recipients of delegated individual defensive rights – the condition of effectiveness.

Recall that effectiveness was one of Gross’ other conditions for a guerrilla organisation’s possession of legitimate authority. Gross suggests, as I mentioned, that non-state collective entities like guerrilla organisations must not only be effective in creating and securing an accurate framework of representation and consultation with those they claim to represent, but must also ‘be effective agents of just cause’ (Gross, 2015: 40). This would mean that only those non-state organisations which either were at that moment reasonably capable of successfully waging a war for their just cause, or could quickly gain such capabilities should they choose to do so – for instance, non-state political entities like the National Transitional Council during the first Libyan civil war in 2011; or more generally speaking, such non-state organisations, corporations or ethnic or religious communities, which might have sufficient resources to acquire those things that might be necessary for a reasonable chance of success, such as professional combatants. This incorporates the first and second conditions necessary for any state or non-state collective to be the appropriate recipients of delegated individual rights, and goes a little further – collectives must not only be able to effectively

achieve their aims by means of war, but they must be able to effectively achieve *just*, or legitimate, aims.

This condition is distinct from the aforementioned conditions that a collective must be of sufficient size and stability to wage war and that it must be a conglomerate, and thus sufficiently organised to take joint actions aimed at achieving a joint purpose. If a state satisfies these two conditions, then it will also be *capable* of effectively achieving just war aims – whether it in fact does so or not. The same cannot be said for non-state collective entities – for instance, an extremist movement might be both a conglomerate and of sufficient size to be able to effectively wage *a* war, but because of its nature, its goals, beliefs and prejudices, it is incapable of effectively achieving *just* aims by means of war.

Janna Thompson gives a definition of legitimate authority that is somewhat similar to Gross's. She suggests that three conditions are necessary for the possession of legitimate authority. One of them is broadly similar to Finlay's requirement of representative legitimacy – she writes that the 'leaders of the state or organization should be acting as the agents of its people', meaning 'the people in whose name or for whose sake it claims to act' (2005: 155).

The other two conditions state that 'it must be an organization in control of the violence of its members...able and willing to enforce obedience to the restrictions of just war theory', and secondly, that 'it must recognise (even if it does not always live up to) the restrictions of just war theory' (Thompson, 2005: 155). These two conditions might form elements of the effectiveness condition – in order to be an effective agent of just cause, it certainly seems probable that an entity would need to recognise the limitations imposed by just war theory, and to be able to enforce obedience to them. Both states and non-state collective entities might fail to satisfy this criterion, but as I have argued, there is reason to believe that states might retain delegated individual defensive rights even without satisfying this and the representative legitimacy criterion.

It might be observed that my argument suggests non-state organisations need to satisfy more conditions than states do in order to be appropriate recipients of delegated rights. States need only fulfil the four general conditions, while

non-state collective entities must also satisfy the further conditions of 1) representation and consultation, and 2) effectiveness.

Some just war theorists such as Finlay and Gross, bite this bullet and accept that non-state entities must satisfy more conditions. Gross, for instance, writes that ‘Unlike states...guerrilla organisations must constantly struggle to gain legitimate authority’ (2015: 43).

However, the main reason for this difference is that, as I will argue in the next section, it is usual for individuals to tacitly delegate their individual defensive rights to the state they live in. Non-state collective entities can only receive those rights when individuals withdraw them from the state they had previously delegated them to and need another collective entity to act in their defence. If the state to which these individuals had previously delegated their defensive rights lacked representational legitimacy or effectiveness, this may give individuals good reason to withdraw their defensive rights from that state and delegate them elsewhere.

However, people often have sentimental or patriotic attachments to the state that they live in, and place a high value on being able to entrust their own defence to it that state. As I argue in the next section, individual consent established the delegation of individual defensive rights, and I believe individuals are free to give their consent, as long as the state in question can, and intends to, exercise their defensive rights⁸⁴. And as I have said, it seems counter-intuitive to conclude that a state which can and will defend its citizens when they wish to delegate their rights to it, is not permitted to do so, simply because it is not democratic and thus lacks representational legitimacy.

I think, therefore, that for states, these two extra conditions are, like the fifth main condition, desiderata rather than essential conditions. States which fail the fifth condition by exploiting other states or by stifling their citizens’ interactions with other states and collectives, or which lack representational legitimacy or effectiveness as agents of just cause, may still retain delegated individual defensive rights, although I do also think it is plausible that they

⁸⁴ It is, of course, possible that a group of individuals might, for whatever reason, wish to delegate their defensive rights to a collective entity that either can’t or does not intend to exercise those defensive rights. However, this is one exception in which I would say that consent alone does not establish the delegation of defensive rights. A state that won’t exercise individuals’ defensive rights effectively rejects the delegation of these rights to it, and thus invalidates the delegation.

might have a diminished authority to wage war. Perhaps such states might retain the authority to wage war to defend the flourishing lives of their own members, who (as I will argue) have already delegated their defensive rights, but not the authority to accept the delegated defensive rights of other individuals – so they would potentially have the authority to wage self-defensive wars, but not other-defensive or interventionist wars.

Since both of these situations require the individuals in need of defence to actively choose another state or non-state collective entity to delegate some or all of their defensive rights to, it seems plausible that the appropriate choice to make would be one which is capable of effectively defending them by just means, and is willing to act upon their wishes and consult them about the decision to go to war. Such will also be the case whenever individuals choose to delegate their defensive rights to a non-state collective entity, as the delegation will always be an active choice on the part of the individuals.

So, to sum up, I would argue that in order for non-state collective entities to be appropriate recipients of delegated individual defensive rights, they must also satisfy two further conditions; the first, drawn from Finlay's argument, being the twofold condition of 'representative legitimacy and consultative input' (2010: 288), meaning that they must accurately represent the wishes the individuals they defend, and see that 'as many as possible of those whose rights and interests are involved in the decision should participate in making it' (2010: 309), and the second, drawn from Gross, is effectiveness, meaning that collective entities must be able to achieve their just cause by means of just war, as without a reasonable chance of success they are not, in Gross' words, 'effective agents of just cause' (2015: 40).

If, therefore, a state fulfils at least the four main criteria, or if a non-state collective entity fulfils these and the two additional criteria as well, then individual defensive rights *may* be delegated to that collective entity. In the following sections, I will explain how they may be delegated, and what rights and duties collective entities derive from agreeing to exercise individual defensive rights.

3: A Reworking of Consent Theory as a Basis for the Delegation of Defensive Rights to Collective Entities

3i) Consent Theory and Social Contract Reasoning

As I said earlier in this section, the basic argument of actual consent theory is that, in Estlund's words, 'without consent there is no authority (the libertarian clause), but unless there are certain nullifying conditions (the nullity proviso) consent to authority establishes authority (the authority clause)' (2005: 352). The act of delegating one's individual rights, in particular the right of defence, to a collective entity, certainly gives that collective entity some authority – the authority of acting on my behalf in circumstances which involve my defence and the defence of the other members of that collective, so an account of the basis of authority would definitely be useful here.

Earlier in this chapter I rejected Estlund's normative consent theory, but perhaps certain elements of actual consent theory would be useful in defining a legitimate basis for the delegation of defensive rights. Firstly, the 'libertarian clause', which states that consent is a necessary condition for authority to be established, could perhaps be adopted as a basis for the delegation of the right of defence to a collective entity.

The authority clause could perhaps also be included in a weaker form – meaning that the authority to exercise individuals' defensive rights would be at least partially established by the consent of the individuals who would be defended.

It certainly seems plausible to suggest that some form of consent is necessary for the delegation of individual rights to a collective entity – I would reject, as I have explained, Estlund's normative argument that authority may exist without consent in circumstances where refusal of authority would be 'morally wrong' (2005: 356) for some reason. I would also reject nonvoluntarist approaches like John Horton's, who argued that 'Political association is for most people in an important sense non-voluntary' (2010:

146) and that ‘Individuals most often become members of a polity by being born in a particular place or of particular parents, just as they are born into a family’ (2010: 149), without consenting to the duties and obligations of that membership. At least, I would reject this argument as regards the defensive obligations of collectives and individuals – the account of tacit consent that I will develop explains why I believe that some consent is necessary to justify these particular obligations. The question of other, more general political obligations, however, is beyond the scope of this dissertation. But given that consent is necessary for the delegation of defensive rights, what sort of form could this take?

Zupan, for instance, suggests, as Rodin and Shue put it, ‘a form of social contract reasoning’, under which ‘We all surrender to collective national institutions the individual right to use force that we possessed in the state of nature in order to gain the benefits of improved security’ (2008: 13). He draws upon the Lockean argument that, in Samuel Freeman’s words, ‘no person can be obligated to become a member of any political society and subject to another’s political authority except by his or her own consent’ (2012: 142), and that by residing within a society and enjoying its benefits, we give our ‘tacit consent to obey its laws and not undermine it’ (2012: 142) – a tacit consent that may be assumed to exist, unless explicitly denied or withdrawn.

By similarly drawing upon this, I could perhaps argue that through consenting to be defended by a particular state, individuals ‘give up certain rights that they had in the notional state of nature’ (Zupan, 2008: 215-6), namely the rights to defend themselves in circumstances where the state is in a position to defend them, and ‘cede that authority and responsibility to the state’ (Zupan, 2008: 216); that is, consent to allow the government of their nation to exercise these defensive rights on their behalf.

I do not, however, believe that this consent establishes the total surrender of the individual right of defence, but merely delegates it to the relevant collective entity, giving that collective and its leaders the authority to exercise this right, and in exchange, agreeing that one will not continue to exercise it in circumstances where the collective entity is willing and able to do so on one’s behalf. While this conclusion has crucial differences to the conclusions of social contract theorists like Locke or Rousseau in that it is not a transfer or a

surrender of rights, but the right is retained by the individual, I believe that it is similar enough to be established by a theory of consent.

In addition, as it stands this theory of consent does not seem able to accommodate my argument that individuals might also delegate their defensive rights to other collective entities besides nations or states. As I have said, I agree with Fabre that it is at least possible that some non-state groups may also have what Zupan calls 'Proper Authority' (2008: 215) to declare war. However, the same kind of tacit consent which (as I will show) usually establishes the delegation of individual defensive rights to the state, will not suffice to explain how such delegation might occur.

Briefly, this tacit consent can only occur where there is some prior understanding (whether conscious or not) of a collective entity's recognised defensive role in wartime. But as it stands, the relationships we have with the non-state communities we belong to, do not typically involve those communities taking a defensive military role. Any scenario in which individuals also delegate these defensive rights to non-state organisations or communities cannot, therefore, be the same kind of tacit consent that some social contract theorists such as Locke argue we automatically give in exchange for the 'security obtained from accepting common laws which are enforced by the sovereign' (Zupan, 2008: 216), since these groups are not usually in charge of matters involving the military defence of their members.

Ultimately, the point of a social contract is that tacit consent to that contract is given by the members of a state because their contract with that state is generally accepted and consistent over a long period of time; nation-states are the widely-accepted defenders of their citizens, and therefore the social contracts which involve the delegation of *rights of defence* to a collective entity, specifically, are with nation-states. That seems unlikely to change.

There are also further problems with using a social contract approach to justify more general political authority and political obligations. For instance, David Hume argues it is dubious that an original social contract at the beginning of civilization could explain or justify the political authority of modern-day states, as 'being so ancient, and being obliterated by a thousand changes of government and princes, [the original contract] cannot now be supposed to retain any authority' (1987: 471). He suggests that in order for

their argument to be plausible, social contract theorists must contend ‘that every particular government, which is lawful, and which imposes any duty of allegiance on the subject, was at first, founded on consent’, but that this claim ‘is not justified by history or experience, in any age or country of the world’, as most modern states were founded by ‘usurpation or conquest’ (1987: 471).

In addition, Hume argues that if the express consent of present-day citizens, rather than the original social contract, is used to justify the political authority of existing states, then a further problem emerges. He points out that there is little or no evidence that the majority of people have ever thought about why their state might have authority over them, or why they might have obligations to obey that state, let alone that these people have freely consented to the state’s political authority. ‘Tis strange’, he writes, ‘that an act of the mind, which every individual is supposed to have formed, and after he came to the use of reason too...should be so unknown to all of them, that...there scarce remain any traces or memory of it’ (1987: 470). Even though some of Hume’s argument here, for instance his assertion that almost all states and sovereigns do not regard themselves as subject to a consensual contract with their citizens, but ‘claim their subjects as their property, and assert their independent right of sovereignty, from conquest or succession’ (1987: 470), is arguably outdated, he nevertheless makes a good point that a large number of ordinary individuals ‘never make any enquiry about its [state authority’s] origin or cause’ (1987: 470), but merely accept that the state has authority over them, and so they cannot be said to have expressly consented to that authority. Thus, grounding the existence of political authority on individuals’ express, active consent is problematic.

Therefore, for these reasons, I do not intend to use a full social contract theory, or express consent, to explain the delegation of individual defensive rights to collective entities. I suggest instead that elements of the reasoning behind social contract theory⁸⁵ may explain why and how we delegate our

⁸⁵ To make it clear, I am not proposing a social contract of the kind proposed by social contract theorists like Hobbes, Locke and Rawls, which suggests that [by ‘consent[ing] to the rule of law’ within a particular society (Zupan, 2008: 216), one is tacitly agreeing to *surrender* certain rights to that society, on the condition that it agrees to protect and exercise those rights. I am merely suggesting that elements of the reasoning behind social contract theory may perhaps be used to suggest that a similar form of consent may instead constitute a tacit agreement to *delegate* one’s defensive rights to that society or state, and that active consent

individual rights to nation-states, most significantly the Lockean argument behind actual consent theory, that *either* express or tacit consent to allow another entity to exercise your right on your behalf is necessary to give that entity the authority to do so. In order to avoid Hume's aforementioned objections, it is necessary that *tacit* consent, in addition to the express consent that, as Hume rightly points out, is not usually in evidence, may also permit a collective entity to exercise defensive rights on the behalf of its individual members. Hume's objections to the notion of tacit consent will be considered and responded to shortly.

However, I would first like to emphasize that my argument differs from Locke, Rousseau and many other social contract theorists in that I argue, as I have said, that this consent does not establish a *surrender* or *transfer* of rights. Rather, I argue that such consent establishes the *delegation* of your individual defensive right to a collective entity, a *permission* for that entity to exercise it on your behalf. As I have explained, it is quite possible for someone to delegate the right to defend themselves to another party whilst remaining the holder of that right.

Hence, this is not an irreversible process. For instance, if states cease to exercise this right, and thus to protect our flourishing lives, then its actions invalidate our previous delegation, in which case the rights revert to us and we can actively delegate them elsewhere – to a non-state collective entity, if necessary.

Allen Buchanan makes a similar point when he argues that any 'right to secede' which groups may possess must be a 'remedial right' (1997: 34). By this he means that 'a group has a general right to secede if and only if it has suffered certain injustices, for which secession is the appropriate remedy of last resort' (1997: 34-5). They do not have a 'primary right' to secede from their original nation or collective entity, which would be 'a (general) right to secede in the absence of any injustice' (Buchanan, 1997: 35). I think this is a

can similarly establish the delegation of individual rights to a non-state collective entity. Unfortunately, I do not have the time or the space here to develop a clearer or more detailed social contract theory.

plausible point – this right to withdraw our tacit consent to delegate our defensive rights to our state would also seem to be remedial in this way⁸⁶.

For example, if a collective entity within a nation-state, such as a religious community, is threatened with the loss or destruction of significant aspects of its inhabitants' flourishing lives, either by forces external to the state or by the state itself, and the state knowingly chooses not to defend that group, then I believe that whatever tacit consent to delegate their defensive rights to this state that the individual members of this religious community might have given becomes invalid because of this lack of defence⁸⁷.

The tacit delegation of individual rights to the state takes place on the condition that the state must exercise the rights that individuals delegate to them. Without this condition, it seems to me that there would be very little point in having a social contract at all. By failing to exercise them, the state then fails to honour this contract, and its individual members become free to delegate them elsewhere. As I mentioned earlier, the intention to do this is also one of the conditions that makes a collective entity suitable to receive delegated defensive rights.

As I argued in Chapter Two, the collective defensive right that grounds defence as a just cause originates in the defensive rights of individual people, which they delegate to a particular collective entity. However, these individual defensive rights still remain individual in object, and scope; they are simply being exercised by a collective entity. So, when a state fails to exercise the defensive rights of a number of its citizens at a time when the flourishing lives of these citizens are threatened and need defending, it makes sense to suggest

⁸⁶ This is not to say that we necessarily only have a remedial right to immigrate to other countries – I would not consider ordinary emigration (as opposed to fleeing to another country as a refugee) to be withdrawing our consent, so much as extending it to a second nation. An individual's right to do this is more likely to be a primary one that is dependent upon the legal permission given by the countries involved.

⁸⁷ The degree of invalidity may be determined by the number and importance of the aspects of the individuals' flourishing lives which the state refuses to defend. If it refuses to defend such aspects as their physical lives and bodily integrity, then their tacit consent becomes wholly invalid, but if the state proves itself willing to defend these aspects of a flourishing life, but not lesser aspects such as freedom of speech, then the situation becomes more complicated. I think it plausible, as I will show, that such a lesser failure might furnish a reason for individuals to permissibly withdraw their defensive rights and delegate them elsewhere if they wish.

that they can withdraw their consent, even if that consent was, up until the moment of their state's failure, only tacit⁸⁸.

As I mentioned in Chapter Two, one option for such groups of people might be to delegate their defensive rights to another state, thus justifying the form of war that is commonly known as humanitarian intervention. A conscious choice to make this delegation would plausibly be required – in other words, either some leaders of the threatened group in question, or a majority of the people themselves, would have to request the other nation of which they were not a part to exercise their defensive rights on their behalf and that other nation-state would have to both receive and accept this request.

This second nation-state cannot, therefore, presume upon the consent to be defended of the threatened individuals; they must explicitly consent to delegate their defensive rights to this second nation, most probably in the form of some sort of request for help.

The reason for this, I believe, lies in the fact that the individuals in question are not members of the nation to which they are now appealing for help; no social contract exists between them, no tacit consent to delegate certain rights has been given. The delegation must therefore start from scratch and be explicit.

However, living in the imperfect world we do, there are likely to be situations in which a group of endangered individuals are unable to delegate their rights to any other nation. This might perhaps be because no other nations can or will agree to accept it for reasons of their own, or because the individuals themselves are for some reason unable to make this request, for example if they are being persecuted or imprisoned by their own hostile state which has ensured that they are unable to contact the international community

⁸⁸ In criticism of the consent theory of authority, Fabre makes the point that basing authority on consent would mean that a collective entity with a just cause might not be able to fight for that just cause if it does not have the consent of the people who are being defended. However, here I would bite Fabre's bullet and agree that without some form of consent a collective entity cannot wage a war, because consent is necessary for the delegation of individual rights to that entity, and thus without that consent it would not be possible for that entity to have a just cause for war, as it would not have the collective right of defence upon which just cause is, I have argued, grounded. Also, intuitively, it seems plausible that if a group of individuals, for whatever reason, do not wish their rights to a flourishing life to be defended by a particular state or non-state entity to which they have not already delegated their rights, that that state does not have the right to fight for these individuals even if their defence would be a just cause. The individuals must have the ultimate choice as to if and where to actively delegate their rights.

in order to appeal for help. In any cases where groups of threatened individuals cannot delegate their defensive rights to another nation⁸⁹, it seems plausible that they may consent to delegate these rights to a non-state collective entity⁹⁰.

It also seems plausible that the collective entity need not be pre-existing; in short, a collective entity could be brought into being, in order to provide an entity to which to delegate their defensive rights. For instance, it is all too possible that the lives of a community or ethnic minority may be endangered by the actions of their own state, but that state, being the cause of the danger, either will or can do nothing to alleviate it. It is also possible that this group is unable to ask other pre-existing states or non-state collective entities to defend them, or that their pleas go unheard.

In these circumstances, I believe they can form a new organisation, for instance a resistance movement, to which they could delegate their defensive rights (provided it could fulfil both extra criteria, in addition to the four main ones). There are some cases in which this has been done; in which the entity fighting a defensive war on behalf of a minority has been not a pre-existing state or collective entity, but a movement or organisation that arose out of the oppression of that minority, and attempted to defend them when their state authorities could or would not – for instance, the Polish/Jewish resistance movements (the Żydowska Organizacja Bojowa (Jewish Combat Organization) and the Żydowski Związek Wojskowy (Jewish Military Union))

⁸⁹ I am suggesting the delegation of defensive rights to a non-state collective entity as a secondary choice to delegating them to a nation-state for purely practical reasons; because a nation-state, with its vast resources and standing army, is practically speaking much better equipped to fight a war, and therefore much more likely to fulfil the reasonable chance of success condition than a non-state organisation. It therefore seems plausible that individuals should petition states for help first, and consider the delegation of defensive rights to non-state organisations to be something of a last resort.

⁹⁰ As Christopher Finlay rightly pointed out, when non-state collective entities wage war, they ‘often...aim at goals of a political nature that cannot easily be reduced to the immediate defence of individual victims from clearly identifiable ‘aggressors’’, such as ‘national liberation’, ‘secession based on communal self-determination’, or ‘achieving civil rights in situations where the oppressor state stops short of direct personal violence’ (2010: 296). I do not have the time and space in this dissertation to determine exactly how many such ‘political goals’ would count as justifiable reasons for war under my account of just cause, but suffice it to say that a great many probably would. It all depends on how many aspects of a flourishing life are being threatened by the political or civil oppression which such entities aim at stopping or preventing, and that is something that would vary on a case-to-case basis. However, I believe it is safe to say that this will not greatly affect my argument.

which unsuccessfully attempted to resist Nazi forces in the 1943 Warsaw Ghetto Uprising.

If a collective entity arises in this way, then it would seem to be necessary that it accept the delegated defensive rights of the people in question, as this is the very reason for its existence. Indeed, in such a case, where the organisation is formed by the vulnerable group themselves, this acceptance is not merely an obligation that it must comply with – defence is what it was created to do, it is not a duty so much as an essential part of its nature. On the other hand, I can see no obligation requiring pre-existing states or non-state collective entities to accept the rights of individuals who have not already tacitly delegated their defensive rights to them.

Such collectives must consider the individuals they already have a duty to defend, and may even consider whether it is in the interests of that collective as a whole to accept these delegated defensive rights, even if it is only on a temporary basis. The same can perhaps be said for pre-existing non-state collective entities of which the individuals may already be members, but which have not previously had defensive rights delegated to them (for instance corporations, churches and religious organisations) – they have no obligation to accept, and may well consider whether it is in the whole collective's interests to accept the responsibility to defend some of its members' flourishing lives. If an oppressed Catholic minority within a non-Catholic country petitioned the Catholic Church to step in and wage a defensive war on their behalf, for instance, the Catholic Church (if we assume that it fulfils the criteria) would seem to be able to refuse, as it has no existing obligation to defend its members' lives, and does not necessarily have to accept one.

Given that there is no moral requirement for states to accept the delegated defensive rights of non-members, and similarly no requirement that pre-existing non-state collective entities accept rights that are not already delegated to them, by their own members or others, it would seem that some oppressed minorities may be left with no one to defend them unless they themselves can form an organisation dedicated to doing so. I may have to admit that this potentially might be the case – after all, it is often the case in practice, as without an obligation to help suffering civilians in Syria (for example), most of the world in fact does nothing to help them.

However, there is one thing I can say in response – assuming a collective entity has no good reasons not to accept the delegated defensive rights of a group of individuals (no conflicts of interest or exceptional danger to their collective or the lives of non-combatant members), then they may actually have an incentive to do so. Accepting these delegated defensive rights may save a large number of lives; and it seems likely that the collective that does so can be assured of future alliance with the community it defends.

One could perhaps also argue that even if one is under no absolute moral obligation to take a particular action, it may still be morally praiseworthy, and avoiding it for no good reason may still be seen as morally blameworthy, not because one has failed in a necessary obligation but because one has consciously ignored the moral reasons for taking that action.

For instance, even if we accept that I have no absolute moral obligation to donate to charity on any specific occasion, if I *never* do so, and indeed actively avoid giving to charity in cases where doing so would cost me next to nothing, I can still be criticised; not for being morally wrong in the sense of failing a moral obligation, but for deliberately avoiding taking a morally good action when there were no sufficient reasons for not doing so. The Kantian notion of perfect and imperfect duties is relevant to this argument, in that Kant argued a person may be subject to both ‘strict or narrow (rigorous) duty’ (2000: 87) and ‘contingent (meritorious) duty’ (2000: 92), and that while the former, perfect duty ‘allows no exception in the interest of inclination’ (2000: 85, footnote), the latter, imperfect duty permits latitude according to inclination. But even though I am under no perfect duty to give to charity, if I consistently and deliberately avoid doing so, perhaps I can plausibly be held up to moral criticism.

In the same way, while pre-existing collective entities may have no absolute obligation that requires them to always accept delegated defensive rights, if they refuse to accept them when careful consideration of the case reveals no relevant reasons not to do so (no conflict with their duty to defend the lives of their non-combatant members, for instance), then these collective entities have, by ignoring the requests for defence of those in need without good reason to do so, acted in a callous manner, a manner worthy of moral condemnation. Whether accepting these requests is considered as an imperfect

duty or a supererogatory act, I think that refusing them without a good reason may be morally blameworthy even though it is morally permissible.

Admittedly, avoiding such moral blame may or may not act as an incentive for accepting the delegated defensive rights of a group of individuals. However, what we are discussing here is an extraordinary circumstance – cases in which the state to which individuals already belong does not accept or exercise their defensive rights, and they must find some other collective entity to delegate them to. Since explicit consent to delegate rights to the state is almost never in evidence, (with possible exceptions being immigrants who might sit a citizenship exam in the UK, or swear the Naturalization Oath of Allegiance to become citizens in the US); the method of consent commonly used to delegate defensive rights to the state would have to be a form of tacit consent. However, there is a potential problem with using tacit consent to establish the delegation of individual defensive rights to a collective entity.

3ii) Difficulties with Traditional Tacit Consent, and an Alternative Definition

If tacit consent is understood entirely in the Lockean sense, according to which ‘every Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his *tacit* Consent’ (Locke, 1988: 348), then it is, in Michael Keeley’s words, ‘an implicit act’ (1995: 243), and ‘anyone who participates in a system of law and enjoys its protection’ gives her tacit consent (1995: 243-4) to the rule of that law. In the specific case of tacit consent to state defence, this definition of tacit consent would suggest that citizens tacitly consent to delegate defensive rights to the state by means of enjoying the state’s defence of our flourishing lives, the protection of its armed forces etc., or by participating in the state’s defence of its citizens, for instance by working in a war-related industry. This leaves us with a problem. In order for consent to be meaningful, it must be possible for someone to *dissent*, and dissent does not seem possible when tacit consent is defined in this way.

For instance, Hume writes that if tacit consent to political authority is construed as ‘living under the dominion of a prince, which one might leave’

(1987: 475), (and presumably receiving the benefits of living in that dominion), then we do not in fact have the choice to consent to or dissent from the authority of that ‘prince’, as in many cases simply leaving the country may not be an option one actually has, for financial reasons, or family ties, for instance. In this case, Hume suggests, it is as ridiculous to say citizens of a polity have the option of dissenting by leaving the country as it is to say that someone on board a boat has the option of leaving it when ‘he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her’ (1987: 475).

A. John Simmons argues likewise that ‘We are for the most part born into political societies and rise into our places as citizens of them without ever freely choosing to participate or to become members’ (1996: 248); the result being that if membership of a society and the benefits it confers constitute tacit consent, then ‘the nonvoluntary character of membership entails that our political obligations also fall on us independently of our voluntary choice’ (1996: 249). Similarly, we cannot avoid receiving benefits such as the protection of the state’s armed forces, and in many cases we cannot simply leave the country in order to avoid receiving them; so if receipt of such benefits establishes tacit consent to delegate defensive rights, dissent would appear to be impossible. Keeley makes the additional point that a ‘reliance on mere participation to indicate consent...dilutes the concept and confers legitimacy on questionable practices’ (1995: 244).

However, I would respond that tacit consent to delegation of one’s defensive rights does not arise from merely ‘enjoying’ the benefits of being defended by one’s state – or even from participation in that defence, when such participation, like the paying of taxes that (among other things) support the armed forces, cannot reasonably be avoided. Rather, I suggest that it arises from the act of *accepting* those benefits. We do not, I believe, accept these benefits merely by receiving them. A person can receive something, even a benefit, without consenting to receive it; and this receipt does not imply that one has consented to receive that benefit, that one owes the benefactor anything in return, or that one has entered into any kind of contract with the benefactor by means of receiving that benefit (especially if one is powerless to avoid receiving it). Participation in state defence that cannot be reasonably

avoided is not indicative of consent, and nor is the receipt of benefits that cannot be reasonably rejected.

In support of this point, Nozick argues that ‘You may not decide to give me something, for example a book, and then grab money from me to pay for it’ (1974: 95) – even if by receiving that book, I have arguably benefited from your action. He suggests, and I think persuasively, that ‘One cannot, whatever one’s purposes, just act so as to give people benefits and then demand (or seize) payment’ (1974: 95), because the fact that those people have benefited from your actions does not mean that they wish, or consent, to receive those benefits, and asking them to pay seems therefore impermissible.

For example, if a patient at a hospital refuses a life-saving blood transfusion on religious grounds, and the doctor chooses to give him that transfusion anyway (perhaps even while the patient is asleep or unconscious), then the doctor’s actions have undeniably benefited the patient. Nevertheless, it does not seem that this patient’s unwilling, unwitting receipt of the blood transfusion amounts to his acceptance of (or, therefore, his tacit consent to) the transfusion or its benefits.

Obviously, this example differs in at least one way from the case of a citizen who receives the benefits of state defence. The patient has expressed his unwillingness to undergo blood transfusion prior to the doctor’s administering it, whereas the state may not be aware of the individual preferences of all of its citizens. Indeed, many citizens of the state, such as very young children or the severely mentally disabled, cannot even express an opinion either way prior to their defence by the state. However, I do not believe that this fact substantially alters my point.

The state, like the doctor, may act so as to save an individual if unaware of that individual’s preferences. A doctor in an emergency situation, if unaware of whether his unconscious patient would accept a blood transfusion or not, might well presume upon that acceptance and perform the transfusion. If he does so, and it transpires that the patient did not want the transfusion, then the doctor has still acted in good faith, but the fact still remains that the patient did not and has not *consented* to the action that benefited him.

In a similar way, a state may, and indeed must, presume upon the wishes of its citizens to be defended. Those who, like the very young, are unable to

either accept or reject the delegation of defensive rights of the state may be defended because, as with the unconscious patient, there is no way of telling what their future wishes upon the matter will be, and so their acceptance may likewise be presumed.

In addition, there is no reliable way, in wartime, of defending only those non-combatant citizens who wish to be defended, given that the dissenters are likely to live and work in close proximity to other non-dissenting citizens, and also, as I will explain shortly, their refusal to delegate their defensive rights does not necessarily mean that they are no longer citizens of that state with the associated right to reside within its borders, so exiling them is out of the question. Therefore, the best, and possibly the only, way for a state to succeed in the defence of its citizens is to defend them all as a group, rather than attempting to defend some but not all of them.

However, what this means is that a state must presume upon the acceptance of its defensive actions by all its citizens, even in the knowledge that some of them have not given that acceptance. Since a state cannot defend just those citizens who accept its defence, as dissenters still remain citizens of that state and (presumably) still reside within its borders, it must act as though all these citizens had accepted its defence, in the same way that, I believe, the doctor could permissibly use blood transfusions to save a group of patients that included both those who agreed and those who did not agree to that procedure, if he did not know which patients did or did not agree to the transfusions, and this was therefore the only way for him to save the lives of those who wished to be saved in this way. The state acts permissibly in doing so, as it is the only way for it to fulfil its obligations towards the majority of its citizens, even though those who benefit from the state's defence of their flourishing lives but did not agree to this benefit, have not consented to be defended.

I must take a moment to reinforce an important distinction here. When I discuss delegating rights to the state, I am referring to defensive rights, and when I argue that tacit consent to delegate these rights results from the acceptance of benefits from the state, I mean the benefits of being defended against external threats. This is distinct from the acceptance of other benefits provided by the state, such as internal stability, welfare or healthcare, upon which some social contract theorists such as Locke or Rousseau might ground

tacit consent to a more general state authority, not just authority to defend its citizens but a government's political authority over its citizens, authority to require their obedience in other matters than defensive ones.

To clarify, I am not necessarily advocating a full social contract approach to ground the political authority of states. My concern is merely to develop a plausible grounding for the delegation of individual *defensive* rights to a collective entity. Were a social contract approach used to ground political authority and political obligation in general, then tacit consent to delegate defensive rights might form a small part of the larger tacit consent that could perhaps establish political authority, but I believe that my arguments concerning the delegation of individual defensive rights can exist separately from a social contract approach to political authority.

The more general tacit consent to this more general state authority is not my concern in this dissertation, as thrashing a social contract theory out in detail would probably double its length, and I do not rule out the possibility that the political authority of the state may also be established in some other way besides tacit consent. But I must mention it in order to establish that it is possible for an individual to refuse to accept the benefits of defence (even if he cannot avoid receiving them), but continue to remain a citizen of that state, and continue to be obligated to obey the state's authority in all other matters except those *directly* pertaining to defence (such as conscription into the armed forces), as these particular obligations derive their force from the delegation of defensive rights to the state⁹¹.

It is for this reason that I contend that a pacifist can refuse to delegate his defensive rights to the state in which he resides, but still accept that state's authority in other matters, and still continue to be a citizen of that state, perhaps because of his consent to its general authority. Thus, an individual can dissent from his state's authority to defend his life by means of war, and still

⁹¹ The obligation to pay taxes that go towards paying for the armed forces is not, I believe, an obligation that directly results from the delegation of defensive rights – paying taxes to the government, and accepting the government's right to determine how those taxes are spent, subject (at least in democracies) to scrutiny by the voting public, is a part of our more general, non-defensive obligations to a particular political authority. For this reason, as I mentioned earlier, I do not believe that paying such taxes constitutes voluntary participation in the state's defensive actions; the payment cannot be avoided without violating other, non-defensive obligations individuals might have as citizens of that state (which is a matter outside the scope of this dissertation).

be subject to the rights and obligations of a citizen of that state, with the exception of those directly resulting from the defensive right he does not wish to delegate.

Having argued that receipt of the benefits of defence by one's state is distinct from tacit acceptance of those benefits, and that tacit consent to delegate one's defensive rights to the state is established by the latter, it now remains to explain what I mean by this kind of acceptance of the benefits of defence. It is distinct from the receipt of the benefits of defence in that one can receive a benefit whether or not wishes to, and indeed whether or not one acknowledges it is a benefit; but in order to tacitly accept this benefit one must at least *not object* to receiving it. This may be either because one actively wishes to receive it, or because one has simply failed to either welcome or reject it, not through lack of ability to do so but through lack of substantial consideration of the matter. A large number of people may take their government's right to defend their lives for granted, without fully considering it; and it is my contention that this unacknowledged acquiescence is a form of tacit acceptance.

For instance, if I take it for granted that I have an obligation to take care of an elderly member of my family⁹², without ever questioning that duty, then I have tacitly accepted such a duty, unless and until I begin to question it – in which case my acceptance would either become express, conscious consent, or I should reject the duty and my tacit consent would be withdrawn (whether or not this invalidates the duty in the case of familial obligations is another matter).

In constructing an argument against the social contract approach to political authority as a whole, Simmons suggests that 'ordinary people do not experience political life as voluntary and...they do experience many of their

⁹² Admittedly, Locke denies that familial obligations can be usefully compared to political obligations (describing 'Political' and 'Paternal' authority as being '*perfectly distinct* and separate' (1988: 314)), but others, such as Ronald Dworkin, have questioned this and suggested that obligations to family, friends or colleagues might be similar to political obligations (1986: 196). However, Dworkin's suggestion is that this is due to the nonvoluntary nature of political obligations, which is not the way I intend to direct my argument. Rather, I would suggest that a useful comparison can be made because some (though perhaps not all) familial obligations may be voluntary to some extent, and grounded upon an individual's tacit consent to these obligations, an acceptance which may well result from the individual never questioning that she has such an obligation. Thus, the two kinds of obligation may be similar enough for a useful comparison to be made (though they are not, of course, the same).

duties (including their political duties) as nonvoluntary' (1996: 249). His argument, therefore, is that voluntarism, the view that we actively, voluntarily consent to our duties to the state, is flawed because it is not 'realistic' and 'does not reflect our shared moral experience' (1996: 249). This is similar to Hume's argument that consent theorists' use of tacit consent to political authority is problematic, because such tacit consent can only take place 'where a man imagines, that the matter depends on his choice' (1987: 475), and, in fact, people do not 'imagine' that the state's authority depends upon their consent. The same objection could perhaps be made against my argument – if people experience the state's defensive role in their lives and their duties to support or take part in the state's defence of their flourishing lives as nonvoluntary, then the argument that individuals' tacit consent to delegate their defensive rights grounds both the state's right to defend individuals, and these individuals' duties to support that defence, is equally unrealistic.

However, I would argue that Simmons and Hume's objections do not successfully undermine the plausibility of tacit consent as grounds for the delegation of specifically defensive rights, for two reasons. Firstly, it is clearly not the case that *everyone*, without exception, experiences the delegation of defensive rights to the state as a nonvoluntary process. The very existence of pacifists and conscientious objectors, either those who object to the state's involvement in a particular war or those who object to war in general, shows that it is at least *possible* for individuals to question, even deny, that they have obligations to participate in their state's defence of their flourishing lives. This also suggests to me that the entire process of delegating these defensive rights can be experienced as voluntary, since in order to deny that war is ever justifiable, absolute pacifists must deny that the state has a right to defend them in any circumstances.

Secondly, it seems to me that it may be possible for *some* people within a country to experience their obligations to their state in the matter of defence, or the delegation of their defensive rights, as nonvoluntary, without this posing quite the threat to voluntarism that Simmons and Hume would suggest. The fact that the majority of people may not stop to consider that they have a choice whether or not to accept the defensive role of the state or any obligations they might have to participate in that defence does not mean that

that choice is not there; especially if some people within that state are publicly questioning, even denying the state's defensive role and their obligations to participate. To continue to experience these obligations, and the defensive role of the state, as nonvoluntary when others deny that the state should have such a role or that these obligations are morally binding is, it seems to me, a form of tacit acceptance.

Even if an individual state punishes dissent, in the form of conscientious objection to state conscription, for instance, by stiff prison sentences, then so long as some people do publicly engage in conscientious objection (either in that state or another where that laws are more lenient), and so long as the non-dissenting majority of its citizens are aware of the existence of dissent⁹³, then there is clearly a possibility of denying the state's defensive role and the individual obligations that result from it for those who wish to do so, and failure to see it amounts to tacit acceptance of the state's defensive role.

Therefore, citizens of a state may accept the delegation of their defensive rights to their state as nonvoluntary, without questioning it, simply because they know it is the commonly accepted role of states to defend the lives of their citizens⁹⁴. But once they do begin to question it, perhaps because their own opinions on the effectiveness or morality of war in general have altered, or because they question the morality of a particular war their state intends to

⁹³ It may, of course, be possible (in a state like North Korea, for instance) for the existence of dissent like this to be concealed from the average citizen. However, one could perhaps make an argument that under these circumstances North Korean citizens are not being permitted to fully consent, as full consent requires the possibility of dissent, and that this might establish a reason why (as I will argue later) they could withdraw their consent and delegate it elsewhere. In any case, the 'realistic' picture (Simmons, 1996: 249) in most democratic countries is that dissent *does* exist, and people are aware of it (and the same may be true in many non-democratic states, except the citizens may not be as free to act upon their dissent).

⁹⁴ In criticising Gilbert's 'joint commitment' (1993: 125) concept of political obligation, Simmons makes a point which might be relevant here. He suggests that there is a 'confusion of political acquiescence with positive, obligation-generating acts or relationships', and that 'a preparedness to go along, even under conditions of full knowledge, is certainly not the same thing as consent or commitment, nor does it have the same normative consequences' (1996: 257). However, being prepared to go along with the state's defensive role, for whatever reason, is not quite the same as accepting that the state should have such a role, since accepting that role requires believing that the state has, and should have, such a role, and mere acquiescence or submission does not. For instance, Simmons' example of acquiescence which does not generate a commitment is that of 'acquiescing to some pushy participant's efforts to organize our game', which, he suggests, 'in no way commits me to accepting his further plans or pronouncements about the game' (1996: 257). This would seem to be a case in which I am acquiescing to the pushy person's organizational role to save myself the trouble of arguing with him and potentially ruining the game, but (since I see him as pushy) I clearly do not agree with, or have faith in, his role as organizer. If I *accept* his role as organizer, it seems to me much more likely that I have thereby consented to it.

engage in, then the tacit consent arising from this tacit acceptance may be withdrawn.

However, this kind of withdrawal is distinct from the kind that is necessitated when a state fails to fulfil one of the five general conditions to hold delegated defensive rights; it is voluntary, and there is no need to delegate defensive rights elsewhere even if the dissenter wished to do so, as the state in question could adequately defend the dissenter's life. Pacifists who do not wish for the state to defend them by means of war at all, will obviously not wish to delegate their defensive rights elsewhere.

But in the case of citizens of a state who disagree with a particular war, things may be different. Perhaps they may realise that the war their state is fighting is not a just war, and withdraw their tacit consent for the state to defend their lives by waging this particular war, but continue to accept the state's role in defending their lives as a general principle – in which case, they temporarily withdraw their consent in the present instance, regarding the present enemy, while still accepting the state's protection in other circumstances. Also, as I will argue shortly, if they do not give their consent for the state to wage a particular unjust war of aggression, but still wish to be defended once that war has put their lives at risk, it might be possible for them to temporarily delegate their defensive rights elsewhere, to a non-state collective entity with the power to protect them, for instance⁹⁵.

Hence, my account deals with the problem posed by refusal to delegate individual defensive rights; namely how individuals can dissent from doing so when consent is given tacitly. As tacit consent relies on accepting the benefits of protection by the armed forces as well as receiving it, then dissent consists of a public or private refusal to give that acceptance. In addition, this refusal does exempt the dissenter from obligations that would have been imposed on him by his tacit consent, such as the obligation to submit to conscription. The obligation to pay taxes that help to support the armed forces is the one exception, since I have argued that the obligation to pay taxes is not entirely

⁹⁵ It might, of course, happen that these individuals mistakenly believe that their country is fighting an unjust war, whereas it is in fact fighting a just one. But if such a mistake was made, I would have to admit that they were simply mistaken in believing that they had good cause to withdraw their consent, and therefore while they were entitled to withdraw that consent, they were not in fact permitted to delegate their defensive rights to another entity.

based upon the delegation of *defensive* rights, since taxes paid to the government are used for many other purposes besides the armed forces.

Therefore, I argue that consent is the means by which we, as individuals, delegate our individual defensive rights to a collective entity, authorising it to act in our defence. We tacitly consent to delegate our defensive rights to the state we live in, but if it fails to exercise those rights, or to exercise them fully, they revert to us and we can delegate them elsewhere, to another state or to a non-state collective entity such as a resistance movement. There remains the question of what results from the delegation of defensive rights to a collective entity; what rights and duties result from this process for the collective entity and for the individuals themselves.

3iii) The Rights and Duties Arising from the Delegation of Individual Rights to a Collective Entity

If a collective entity accepts the delegated rights of individuals, either its own members or non-members, then it would seem that certain rights and duties arise from this delegation, on both sides. To begin with, the state or collective entity has, as I have already mentioned, the duty to actually exercise the defensive rights that have been delegated to it. If it does not, if either it becomes so unstable that it is clearly incapable of doing so, or it refrains from action, voluntarily choosing not to defend its members, then it fails one of the conditions for being an appropriate recipient of delegated defensive rights, and the individuals whose delegated rights have not been properly exercised (by which I mean exercised as the individuals themselves would wish to do themselves if they could) are free to delegate these rights elsewhere.

As this suggests, while the collective entity does fulfil the conditions I have mentioned and properly exercise the defensive rights delegated to it, the individuals who have consented to delegate those rights also have a corresponding duty to allow the collective entity to exercise them, to defend their lives, so long as it is able. They also have the duty to assist the collective in defending their lives, at least if requested to do so. But if the state proves unable or unwilling to defend them (thus ceasing to be an appropriate entity to which to delegate defensive rights), they may create a new collective entity to

enact their defence (i.e. organize themselves into a resistance movement or other non-state defensive entity) if possible, or delegate the right to another pre-existing collective if not.

Indeed, individuals may, and do, choose to withdraw their defensive rights from one collective entity and delegate them to another at any time, simply by switching the collective entity to which they claim membership – for instance, emigrating from one country and applying for citizenship of another would seem to be an act of re-delegating, or at the very least extending one’s delegation of rights, from the first nation to the second. In addition, as I have already argued, pacifists and other dissenters who decide that they do not wish their state to defend them either generally or in one particular war with which they do not personally agree, thereby withdraw the defensive rights which had been previously delegated to their state through their tacit acceptance, whilst still remaining citizens of that state, with all the other rights and obligations of citizenship, save those relating to defence.

However, it may seem counter-intuitive to suggest that individuals may both withdraw their defensive rights from their state *and delegate them elsewhere*, whilst still remaining a citizen of their state and resident within its borders, thus retaining (without accepting) all the benefits of defence by that state. For one thing, such split loyalties could lead to moral and practical dilemmas; for instance, to which state these citizens are obligated to pay the taxes that support an armed force, or whether their state has any right to demand their participation in the waging of a war.

For this reason, I would argue that individuals can in normal circumstances re-delegate their defensive rights to another state by means of becoming members of the state to which they now wish to delegate them⁹⁶. They may re-delegate their defensive rights, either to another state while remaining citizens of their original state, or to a non-state collective entity, *only* in three cases. The first is if the state proves to fail one of the conditions of being an

⁹⁶ In addition, I would contend that an individual cannot take back her right of defence and exercise it *herself*, privately. As I said when arguing against Fabre, awarding private individuals the moral authority to wage private wars on their own behalf, is not only contradictory to just war theory’s aim of limiting the number of potentially justified wars, but it also seems like a recipe for social chaos, possibly empowering any private individuals wealthy enough to do so to raise their own personal armies and wage war in their own defence.

appropriate recipient of delegated defensive rights (for instance, either being unable or unwilling to exercise these rights). In these cases, the collective may no longer hold the defensive rights in question, and the individuals may delegate them to whomever they wish, whilst still remaining members of that collective entity if they wish to.

The second is if the state in question exercises delegated individual defensive rights but does so in a less than satisfactory way; for instance if it is isolationist, non-representative or an ineffective agent of just cause; or if it attempts to hide the existence of dissent to the state's authority to wage war, in order to prevent its citizens from becoming aware that dissent is a possibility; or if it proves willing and able to defend the greater, but not the lesser, of the aspects of its citizens' flourishing lives (if it protects them physically but refuses to defend their freedom of speech or freedom to practise their religions, for instance). I believe in such cases that the state may continue to hold delegated defensive rights if individuals wish to continue delegating them, but the individuals may permissibly choose whether to continue delegating their rights to this state, or delegate them elsewhere.

The final exception would be if a collective entity fulfils the conditions for being a potential legitimate authority, but fails one of the other *jus ad bellum* criteria. For instance, if a collective fully intends to exercise its members' defensive rights, but its leaders also have a morally disreputable agenda for doing so. Say, Country A wages a genuinely defensive war against Country B, and genuinely intends to defend its citizens from B's aggression, but also hopes that by winning the war, it can put itself in a position to take long-term control of Country B, at first using the excuse that it is necessary for the post-conflict reconstruction of B's infrastructure. In this case, A does not fail the conditions for being an appropriate recipient of delegated defensive rights, but it does fail the *ad bellum* criterion of right intention.

I think it is plausible that in this case, as with the other two exceptions, A's citizens have a choice between continuing to delegate their rights to A, withdrawing their rights totally (refusing, as pacifists do, to accept that any collective entity may defend them), or delegating their rights elsewhere – the same choice faced by citizens of a state that fails to be a representative authority or an effective agent of just cause. They *may* withdraw their

defensive rights and delegate them elsewhere, as A is incapable of waging a just war in their defence. But if they choose to continue to delegate their defensive rights to A, perhaps because A may be the most capable or effective agent of their defence, or perhaps because of ignorance of A's true intentions, then they have acted permissibly, and A was morally authorised to defend them, even though it chose an impermissible means of doing so (i.e. waging an unjust war).

But when none of these three exceptions apply, then as long as the individual in question wishes to remain a citizen of their state and also to be defended by means of war, then he or she must allow that collective to defend them, even if they no longer accept that defence. They may not ask another state or non-state collective entity to defend them instead whilst remaining citizens of the first state.

In the case of all other citizens, whose tacit consent establishes the delegation of their defensive rights to their state, this delegation creates a more straightforward obligation to allow the state to defend them. To return to the Police Defence example from Chapter 2, if Victim is attacked in the street, happens to possess a gun and there is no policeman or other instrument of the state's defensive function present, she is permitted to shoot her attacker if this is a proportionate and necessary action to save her life (or other elements of her flourishing existence, such as bodily integrity). But if a policeman happens to be present, and not for some reason unwilling or unable to help, then Victim *must*, assuming her consent to delegate her defensive rights to the state, allow the policeman to defend her – she may not ignore the policeman and shoot the attacker dead if she knows the policeman can stop him.

There are, as I said, other duties that individuals incur when delegating their defensive rights to a particular collective entity. They may have a duty to participate in that defence if the collective asks it of them, by submitting to be conscripted if conscription becomes a necessary part of that defence (and if they are physically capable, of course), by working in a war-related industry like a munitions factory, or by accepting certain hardships in order to further the chances of their own defence being successful – such as food rationing or refraining from strike action.

The collective therefore has the corresponding right to demand their participation in defensive wars. For instance, the collective has the aforementioned right to conscript its individual members who have consented to delegate their defensive rights, as well as non-members who have delegated their defensive rights to it, and these individuals have the corresponding duty to submit to conscription and fight as soldiers in a defensive war if they are capable of doing so.

It would seem implausible to deny that one has an obligation to participate in one's own defence⁹⁷ if one does (as most people do) actually want to be defended, and if one has consented to be defended by this particular entity. Only a pacifist who does not agree with defending even his own life by the use of military force (and therefore does not give his consent) would be a complete exception to this⁹⁸, although the specific requirements of the obligation would take account of certain limitations such as physical or mental disabilities, and individual expertise (i.e. if an individual person might be more necessary to that collective in her current occupation).

As I explained in 2iii), any individuals refusing to aid in the defensive project for reasons such as pacifist convictions, have not consented to delegate their defensive rights, even if they happen to receive the benefits of such defence. The collective entity only has the right to conscript those who have truly consented to delegate their defensive rights, as it is this act of delegation that gives rise to this permission right – in agreeing to let the state defend us, we agree to support and participate in this defence, and in refusing either agreement we refuse both.

This might appear to have potentially problematic consequences, however. If an individual citizen's refusal to consent to be defended by her state means that that individual receives all the benefits of state defence but is subject to no corresponding duties or obligations, then what incentive has she to consent to

⁹⁷ It might also be suggested that if the lives of the belligerent collective's members are not the ones at stake (e.g. interventionist war), then these members do not necessarily have a duty to submit to conscription, unless the progress of the war means that their lives and those of their fellow citizens also become threatened.

⁹⁸ I do not rule out the possibility that pacifists or dissenters might reasonably be asked to take on some non-military services to assist in the war effort, as for instance in World War One when many conscientious objectors were recruited to serve as ambulance drivers and stretcher-bearers in organisations like the Friends Ambulance Unit – but I do not believe that a state can morally *require* such service of them.

that defence? She loses nothing by her dissension, and in fact continues to receive the benefits of defence without the need to participate in that defence in any way.

However, I would respond that such parasitic ‘free riders’ (Nozick, 1974: 90) would be subject to a contradiction in their thinking. By definition, if an individual chooses not to consent to defence *because* she wishes to continue being defended without being obligated to participate in that defence, then she has accepted that she *wants* to be defended by the state in these circumstances, even though she does not want the corresponding obligations. It is therefore impossible for her to withhold her consent to be defended, as by admitting that she wishes to receive the benefits of defence she has in fact accepted them, and by doing so given her tacit consent to delegate her defensive rights. The only citizens who genuinely do not accept the benefits of defence by their state are those who, because of their convictions about the lack of justification for war itself or for this particular war, genuinely do not want to receive the benefits of defence, and would willingly do without them if they could.

To recap, then, in this section I have explained how the delegation of defensive rights to the appropriate collective entities results in a certain set of rights and duties pertaining to both the collective entities in question and the individuals themselves.

4: Conclusion

In conclusion, I have argued in this chapter that the best way to determine which collective entities are the appropriate recipients of a delegated right of defence would be to determine which collective entities have the legitimate authority to go to war, as the two are inextricably linked – to have legitimate authority is to be the appropriate recipient of a delegated defensive right, as this is what gives a collective entity the authority to wage war.

I have therefore considered and ultimately rejected Estlund’s normative consent theory of authority and Fabre’s cosmopolitan definition of legitimate authority, and then argued in favour of a necessary condition of legitimate

authority, defined as moral authority based upon elements of consent theory; since tacit consent, as I have argued, is the method by which individuals may delegate their rights to their own states, and some form of active consent is the method by which individuals may delegate their rights to another state or to a non-state collective entity.

I have also outlined four essential conditions that all collectives must fulfil in order to be the appropriate kind of collective to receive delegated defensive rights (as well as a further, non-essential condition that is desirable for collectives to fulfil). Fulfilling these four essential conditions would be sufficient to prove that a particular state may be delegated the defensive rights of its own individual citizens. However, while I believe that non-state entities can also be legitimate authorities, I also believe that it takes something more than these four conditions to determine which non-state collective entities may be legitimate authorities. I have therefore identified two further conditions that non-state entities must fulfil in addition to the main four. These are representative and consultative legitimacy, and effectiveness. Thus, I have concluded that both states and certain non-state entities (those which also fulfil the further conditions of representative and consultative legitimacy and effectiveness) can be legitimate authorities, and appropriate recipients of a delegated right of defence, and I have outlined the rights and obligations which a collective authority gains as a result of receiving delegated individual defensive rights.

Conclusion

Throughout my thesis, I have argued in favour of an individualist account of just cause, grounded upon the individual right to defence which may be delegated to states and certain non-state collective entities, thus creating a collective right of defence. These individual defensive rights, as I have argued, are specifically rights to defend a person's flourishing life, to which they have a human right. This is a cluster-right, composed of a number of basic rights to all the aspects of life which go towards making an individual person's life flourishing, including the right to continued physical existence – the traditional right to life.

I also argued in favour of a dual account of liability to attack, under which a person who becomes weakly liable by reason of being causally responsible for an unjust threat of harm, is a legitimate target of defensive action but retains their own right of self-defence, and a person who becomes strongly liable by reason of being morally responsible for an unjust threat of harm, both becomes a legitimate target of defensive action and loses their own right of self-defence.

I then developed an account of just cause for war, based upon these individual defensive rights. As I said, collective entities such as states, or certain non-state groups, may be delegated these rights and thus possess a collective right of defence, and I explained how this collective right may ground the just causes of 'self' defence by a state or group against the threat to the flourishing lives of their members, and the defence of another state or group against a similar threat to their members – and I showed how both the other-defence of a state against external attackers and the other-defence of a non-state group of individuals against a threat posed by their own state (humanitarian intervention) might possibly be justified in this way.

Following this, I went on to develop an account of the war rights and liabilities of combatants based upon my account of just cause. I argued in favour of a presumption of symmetric weak liability to attack, but concluded

that combatants fighting for a just cause had additional war rights deriving from the fact that their military actions played a part in a larger justified action⁹⁹, namely the fulfilling of a just cause.

I further argued that collective entities which possess delegated individual defensive rights are therefore legitimate authorities, in the sense that they possess the moral authority to wage war. I argued that this was the most plausible understanding of the legitimate authority criterion.

Lastly, I developed a more detailed account of the delegation of individual defensive rights to collective entities, arguing that individuals may only delegate defensive rights to their state if it fulfils four essential conditions, and may only delegate their defensive rights to a non-state collective entity, or to another state, if the collective entity in question fulfils two further conditions, those of representative legitimacy and effectiveness, in addition to the four main criteria. I also argued that this delegation of individual defensive rights is established by consent, either (in the case of one's own state) by tacit consent as I have defined it, or (in the case of another state or a non-state collective entity) by active consent.

In conclusion, I hope I have shown that an individualist account of just cause which results in a collective right to exercise delegated individual defensive rights is fairly plausible, and has the advantage of avoiding some of the counter-intuitive suggestions that other individualist arguments make, such as McMahan's suggestion that all unjust combatants necessarily lose their rights to individual self-defence, or Fabre's conclusion that people can individually possess the right, and hence the moral authority to go to war.

I conclude, instead, that the moral authority to go to war is limited to collective entities, and that both just and unjust combatants may retain the right to individual self-defence, without slipping into the equally implausible collectivist argument that the justice of a combatant's cause makes *no* difference to his rights as a combatant. I hope, therefore, that I have demonstrated a fairly coherent and plausible account of just cause and legitimate authority based upon the individual right to defend one's ability to lead a flourishing life.

⁹⁹ Assuming reasonable chance of success, last resort and so on, of course.

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