

## Chapter 2

## The Just War Tradition

The contemporary debate on humanitarian intervention focuses on the question of when it is right – or just – to use force. It is unsurprising therefore, that those engaged in this debate have drawn upon the rich philosophical lineage of the Just War tradition. The extent to which the contemporary debate employs the language of the tradition is clear; the tradition's key criteria – just cause, right authority, last resort and proportional means – are the central foci of the modern discourse and have been employed by both proponents and opponents of various interventions.

Humanity's propensity to engage in warfare is an obvious feature of our history. This tendency has catalyzed many moral and legal texts seeking to variously critique, restrain and justify the resort to force (Evans, 2005, p.1). In response to the prevalence of war certain religious and moral theories have espoused pacifism, the absolute prohibition of force. Conversely some 'realist' perspectives view war as an inevitable aspect of human existence which defies moral appraisal (see Chapter 4). As Chris Brown notes, 'neither position sees a moral problem associated with the use of military force; force is either unproblematically wrong (pacifism) or simply morally unproblematic (realism)' (2006, p.100). The question of whether a war can be 'just' therefore excludes realists and pacifists. Just War theorists do not endorse or promote violence, however. Rather it is with great reluctance that many have advanced the position that under certain extreme circumstances the use of force is permissible. The tradition represents an attempt, therefore, to delineate these circumstances, and constitutes 'a two-thousand-year old conversation about the legitimacy of war' (Bellamy, 2006b, p.2).

This chapter is divided into three sections. The first section outlines the key tenets of the tradition and the widely proffered, though controversial, tripartite division of the tradition's principles. The second section traces the evolution of the tradition, outlining the key thinkers, events and themes that have shaped its tenets and contemporary form. The final section addresses the contemporary status of the tradition and the manner in which it has often come to be used controversially as a checklist legitimizing intervention.

## The central tenets

The Just War tradition comprises many disparate influences and there are significant differences between its key proponents. Thus as A. J. Coates argues, 'The unity that is the Just War tradition embraces many formulations that content one with another and that defy uniform classification' (2006, p.59). The diversity inherent in the Just War tradition does not undermine its status as a 'tradition', however, as traditions, according to Nicholas Rengger, 'can have many roots . . . traditions as I understand them do not have an essence or a central core' (2002, p. 362). The now commonly used term, 'Just War theory', is perhaps less applicable, however; O'Donovan asserts that the Just War tradition is neither a theory nor is it about just wars, but that it is rather a 'proposal for doing justice in the theatre of war' (Rengger, 2005, p.152).

It is important to outline initially what the Just War tradition is not. The impetus behind the Just War tradition was to create a means by which war could be evaluated, not a means to justify war. The key theorists associated with this tradition conceived of war as always a lamentable occurrence which could sometimes be justified *in extremis*. The fact that certain wars could be judged as justifiable did not constitute an endorsement of a war, but rather an acknowledgement that 'there are some wrongs that are worse than the wrong of war itself' (Bellamy, 2006b, p.3).

There are many sub-traditions with very different philosophical orientations and ideological dispositions. These sub-traditions are united, according to Alex Bellamy, by three common factors. First is a shared concern that the recourse to war should be limited and the manner in which it is fought constrained. Second is a common origin in Western traditions of theological, legal and philosophical thought. Third, the thinkers involved endorse a common set of rules governing the decision to wage war and the manner in which it is fought, although 'they differ in both their interpretations of the rules and the relative weight they attach to them' (Bellamy, 2006b, p.4).

In relation to the third commonality mentioned, there is, Robert Myers notes, 'little argument about the criteria', and the basic template is clear (1996, p.118). The tenets of the Just War tradition are invariably divided into two categories of criteria: those governing the resort to force (*ius ad bellum*) and those governing conduct during war (*ius in bello*). A third category concerning justice after war (*ius post bellum*) has more recently been added (Orend, 2000). Rengger rejects the idea of creating a third category, however, arguing that this is already implicit in the tradition (2005, p.154). Thus the judgment of war undertaken through this framework comprises an assessment of the motives, the methods and the post-conflict policies pursued by the intervening actors. Each of the three sections contains a series of related criteria as outlined in Box 2.1.

**Box 2.1 The Just War criteria***Jus ad bellum*

- 1 Right intention: Those using force must be motivated to do so by just rather than expedient intentions.
- 2 Just cause: Force must only be used to correct or prevent a grave injustice.
- 3 Proportionality of ends: The anticipated benefits of using force must outweigh the injustice being addressed.
- 4 Last resort: Force should only be used after all peaceful means have been exhausted or are clearly not viable.
- 5 Likelihood of success: Force must only be used if there is a strong likelihood of military victory.
- 6 Right authority: Only recognized public authorities have the right to authorize the use of force.
- 7 Proper declaration: The resort to force must be publicly declared and publicly justified.

*Jus in bello*

- 1 Discrimination: Force must only be directed against aggressors and never against civilians or non-combatants.
- 2 Proportionality: The force used should be the minimum necessary to achieve victory and proportionate to the original aggression.
- 3 Just conduct: All national and international laws governing the use of force must be obeyed in the course of the military action.

*Jus post bellum*

- 1 Just peace: The final settlement should be publicly declared, reasonable and fair.
- 2 Proportionality: The aim of the settlement should be to confirm those rights initially violated.
- 3 Discrimination: The settlement should discriminate between the leaders, the military and the civilians of that group held responsible for the violence.
- 4 Responsibility: Aggressors, on both sides, must be punished in a fair and accountable manner.
- 5 Compensation: Innocent victims, on all sides, must be compensated for their losses.

The very idea of dividing the tenets of the tradition in this way is rejected by some, who see this as having led to the erroneous separation of *jus ad bellum* from *jus in bello* and the encouragement of a 'checklist' approach in the contemporary era (O'Donovan, 2003, p.15; Rengger, 2005, p.153).

The major criticisms and controversies surrounding the utility and application of the Just War tradition are explored in the final section of this chapter. The next section outlines key influences on the evolution of the tradition.

**The evolution of the Just War tradition**

It is not possible to chart the evolution of the Just War tradition comprehensively here. The tradition spans over 2000 years of history, has been influenced by a great many thinkers and events, and does not constitute a continuous line of like-minded philosophers working in relay. Rather it comprises 'different streams of thought' which intermittently interweave, collide and separate (Bellamy, 2006b, p.7). This section seeks only to identify the contribution of certain influential thinkers and highlight the context in which they wrote (see Box 2.2).

The tradition has been strongly influenced by religious thinking and Christianity in particular; James Turner Johnston describes it as 'the collected consensus of the Christian culture of the West on the justified use of force, set squarely within the normative consensus on the purpose of political power' (2005, p. 14). It would be wrong however, to conceive of the tradition as inherently Christian or even religious, especially in its later phases (Donnelly, 1989, p.60; Boyle, 2006, p.31). Evidence from across the non-Western world shows that the ethics of war have been debated, in some

**Box 2.2 Key texts in the Just War tradition**

- Cicero (106 BC–43 BC): *De officiis*, 44BC.  
 St Ambrose (337–397): *De officiis*, 388–390.  
 St Augustine (354–430): *The City of God*, 413–418.  
 Gratian of Bologna (birth/death unknown – c. mid-12th century):  
*Decretum*, 1140.  
 St Aquinas (1224–1274): *Summa Theologiae*, 1265–1274.  
 Francisco de Vitoria (1492–1546): *On the American Indians*, 1539.  
 Alberico Gentili (1552–1608): *On the Law of War*, 1589.  
 Hugo Grotius (1583–1645): *On the Law of War and Peace*, 1625.  
 Samuel von Pufendorf (1632–1694): *On The Law of Nature and Nations*,  
 1672.  
 Emerich de Vattel (1714–1767): *The Law of Nations*, 1758.  
 Immanuel Kant (1724–1804): *Perpetual Peace*, 1795.  
 Francis Lieber (1798–1872): *General Orders No. 100*, 1863.  
 Michael Walzer (1935–): *Just and Unjust Wars*, 1977.

form, for millennia (Christopher, 2004, pp.9–11; Nardin, 1998). Rengger, however, accepts that the tradition does have a clear Christian and Western foundation but argues that this is unproblematic as it does not preclude its prescriptions from having universal applicability (2002, p.326).

The oft-quoted progenitor of the Just War tradition is St Augustine of Hippo (354–430), although the tradition's lineage can be traced back further; the work of the Roman statesman and philosopher Cicero (106 BC–43 BC) was of particular influence on Augustine (Bellamy, 2006b, pp.19–20). Before the fourth century AD the Christian church avowed an outright prohibition on the use of force in keeping with Jesus' instruction, 'If someone slaps you on the right cheek, turn and offer him your left'. Jesus taught that life on earth was but a transitory phase where one's behaviour would determine one's status in the infinite afterlife (Evans, 2005, p.2). Hence death was not to be feared as much as sin, leading to the idealization of sacrifice and martyrdom. The dominant posthumous interpretation of Jesus' teachings emphasized his pacifism and rejected the idea that war could ever be 'just' (Elshtain, 1992, p.44).

During Augustine's time, however, this principle became increasingly untenable. The adherence to pacifism amongst Christians, epitomized by the stoic sacrifices in the Colosseum at Rome, certainly derived from a strict reading of Jesus' commandments but was also inspired by the belief in the imminent second coming (Johnson, 1987, pp.14–17). By the end of the second century AD, however, belief in the return of Christ had waned, there were many Christians in the Roman army and the Church had begun to find an accommodation with the Empire. Thus, the timing of Augustine's work has led to speculation about the motivation behind the changes wrought by his theory. Augustine wrote at a time when the Roman Empire was under constant threat. Rome was eventually sacked by the Visigoths in 411 and Augustine's own city, Hippo in North Africa, faced the threat of invasion throughout his time there, eventually falling to the Vandals the year after he died. The relative order established by Rome was manifestly more attractive to the Church than the prospect of a Europe divided amongst pagan tribes.

In 312 Emperor Constantine converted to Christianity and by the end of the fourth century, Christianity was made the official religion by Emperor Theodosius I. Given the Roman Empire's reliance on military might, the conversion to a pacifist religion was problematic. The creation of a framework for legitimizing warfare was obviously attractive to both Rome and the Church. Mark Evans notes, 'Unsurprisingly, then, it is at this juncture that the Just War tradition is thought to receive its major initial stimulus' (2005, p. 2). According to Myers the Church was determined to cultivate a relationship with the Roman Empire so as to have some protection against the 'barbarians' massing on the Empire's periphery. To facilitate the union the Church 'turned its back on Christ and the new testament, and thus

Christianity' in favour of tales of heroic warriors in the Old Testament and certain creatively interpreted passages of the New Testament (Myers, 1996, pp.120–1). Augustine, however, was critical of the Roman Empire's lust for *dominium* and the false nature of *Pax Romana* (Elshtain, 2003a, p.105).

Augustine, building on the work of St Ambrose (337–397), highlighted certain sections of the Bible and pronouncements made by Jesus which suggested that force, though always regrettable, could be legitimate (Deane, 1963, p.154). He argued that pacifism was neither a divine law nor a reasonable course of action given that earthly life was necessarily fraught with danger and violence;

Whoever hopes for this so great good [perpetual peace] in this world, and in this earth, his wisdom is but folly. . . . For in the very great mutability of human affairs such great security is never given to any people, that it should not dread invasions hostile to this life. (Augustine, in Deane, 1963, p.155)

Augustine determined that the sin of violence lay not in the act itself but in the motivations behind the act. He argued that force was justified if the intention was just and if the act was ordered by a just ruler. It therefore followed that a soldier carrying out the orders of his ruler was acting justly because it was not he who had decided to kill and he personally took no pleasure in it. War could be justified if waged on four grounds; in self-defence, to collect reparations or reclaim stolen property, if divinely sanctioned, and to maintain religious orthodoxy (Bellamy, 2006b, p.28).

The role of the authority ordering the use of force is of paramount importance in Augustine's schema. The state in itself was neither moral nor good but its utility lay, according to Augustine, in its instrumental value – that of providing the forum for adherence to, and the application of, God's laws. He argued that war could only justifiably be waged by states. This clearly state-centric conception is understandable, however, when one considers that Augustine's religious convictions held that humans can never achieve true justice or righteousness, and that it was God who ultimately rewards and punishes. The temporal abuse of the framework he avows is therefore insignificant given the capacity of God to punish wicked rulers.

In 395 the Roman Empire permanently divided into its Western and Eastern parts, and by 476 the Western Roman Empire had effectively fallen after a defeat to Germanic tribes. The aftermath of Rome's collapse, the so-called 'Dark Ages', witnessed the emergence of many rival groups and widespread violence throughout Europe. This disaggregated order was not a propitious environment in which to preach restraint, and the disposition advocated by Augustine was ignored in favour of a militaristic culture (Johnson, 1987, p.58). Certain groups adopted the iconography of the church and the idea of divinely sanctioned war but ignored the more

restrictive elements of Christina thinking (Bainton, 1986, p.103). The Church's attempt to reassert its dominance eventually evolved into the launching of the Crusades, which 'jarringly fused certain Just War ideas with a sanctioning of morally unmitigated violence against unbelievers' (Evans, 2005, p. 3). The siege of Jerusalem in 1099 by Christian crusaders led to the massacre of some 70,000 Muslims, after which Raymond of Aguilers declared, 'It was a just and splendid judgment of God that this place should be filled with the blood of unbelievers' (Bellamy, 2006b, pp.46-7). Augustine's endorsement of divinely sanctioned war had become an abused aspect of his teaching embraced in isolation by warmongering zealots.

Writing during the last years of the Crusades, St Thomas Aquinas (1224-1274) built on the work of Augustine and those related aspects of canon law to produce 'a short, clear statement [which] provided what is probably the classic statement of the traditional just war theory' (Boyle, 2006, p.35). Aquinas did not separate *jus ad bellum* from *jus in bello*, and articulated a view clearly based on the earlier Augustinian perspective. Aquinas rejected the notion of a 'Crusade' and preached a reactive doctrine (Evans, 2005, p. 3).

In the *Summa Theologiae* Aquinas stated that war could be justified only if three conditions were met:

Firstly, the authority of the ruler at whose command war is to be waged. . . . Secondly, there is required a just cause: that is that those who are attacked for some offence should merit the attack. . . . Thirdly, there is required, on the part of the belligerents, a right intention, by which it is intended that good may be accomplished or evil avoided. (Boucher and Kelly, 2003, p.122)

In terms of proper authority, Aquinas stated that only the head of the state (or polity) can rightfully order war as, uniquely, 'rulers have the right to safeguard that public order against external enemies by using the sword of war' (Finnis, 1998, p.284). Aquinas, like Augustine, argued that private citizens and public officials were bound by different rules (Bellamy, 2006b, p.26). Aquinas did not outline a list of potential just causes, but argued that such a cause would involve a reaction to harm done by others to one's state, including, controversially, punitive action. As Joseph Boyle notes, this punitive element is today rejected both by positive law, and perhaps more relevantly, Catholic doctrine (2006, p.39). With respect to right intention Aquinas draws on Augustine's writing to condemn those who fight for reasons of revenge, hatred or power even if the initial two criteria are met. Self-defence on the part of a state was self-evidently just so long as it was a necessity caused by unprovoked attack (Boucher, 1998, p.198). His doctrine of double effect (see Box 2.3) additionally sanctioned action

### Box 2.3 The doctrine of double effect

'Unintended negative consequences are excusable if four conditions are satisfied:

- 1 The desired end must be good in itself.
- 2 Only the good effect is intended.
- 3 The good effect must not be produced by means of the evil effect.
- 4 The good of the good effect must outweigh the evil of the evil effect (proportionality).'

(Bellamy, 2006b, p.124)

which caused unintended harm provided the intention and the outcome were just and the harm caused was unavoidable and unintended. Aquinas's emphasis on right intention, according to Robert Holmes, 'means that one must intend to promote the good and avoid evil; merely having a just cause and legitimate authority is insufficient' (1992, p.200).

The Western Schism in 1378 divided the Western Christian church and resulted in three separate popes claiming rightful authority. This led to the declaration of crusades against fellow Christians, thus highlighting the subjective nature of 'divinely' sanctioned war. The excesses of the crusades did much to undermine the idea of a divinely sanctioned war, and led to the emergence of 'natural law' as the preferred moral reference point (Evans, 2005, p.3). The universalism ostensibly inherent in natural law enabled the eventual emergence of international law, conceived as a universally applicable positive expression of natural law.

During the 14th and 15th centuries the conduct of war rather than its inception became the dominant focus, with the development of the chivalric code (Bellamy, 2006b, pp.40-4). The 'discovery' of America in the late 15th century and subsequent European colonization led to increased speculation about how the indigenous peoples - routinely described as savages - should be treated and whether the ethics of warfare then ascendant in Europe should be extended to these peoples.

Francisco de Vitoria's (1492-1546) writings are of paramount importance to the evolution to Just War thinking (Bellamy, 2006b, p.50). Natural law, according to Vitoria, could be determined without divine revelation. He believed that objectively a war may be just on one side but that only God could truly tell. He wrote:

where there is provable ignorance either of fact or of law, the war may be just in itself for the side which has true justice on its side, and also just for the other side, because they wage war in good faith and are



hence excused from sin. Invincible error is a valid excuse in every case. (quoted in Bellamy, 2006b, p.53)

Thus states could not wage a Just War simply because they felt it was just, and Vitoria suggested that the decision to use force should be taken only after wide consultation, including with those who opposed the use of force. According to David Boucher:

Vitoria implies that the Law of Nations and customary law are to be equated with human positive law, and not with the Natural Law. . . . If Natural Law as a dictate of reason prohibits the killing of the innocent, the Law of Nations as a deduction from this determines who are to be regarded as innocent. (1998, p.200)

Like Augustine and Aquinas, Vitoria argued that citizens should obey their leader and trust their sovereigns. Vitoria believed that all commonwealths had the right to declare war provided they were a 'perfect community' – namely self-sufficient and independent (Boucher, 1998, p.202). Bellamy notes that this, coupled with the argument that just wars were inherently subjective, 'unwittingly paved the way for later realists and legalists' who used this to claim that as just wars were impossible to objectively appraise, it should be assumed that wars waged by sovereigns were just (2006b, p.55).

Vitoria's appraisal of Spain's war on the aboriginals in America contained a provision directly related to the contemporary debate on humanitarian intervention. In outlining permissible grounds for the use of force, he argued that the practice of cannibalism was so contrary to natural law that it was permissible for external forces to intervene to stop it (Boyle, 2006, p.45). Despite his misgivings about Spanish colonialism, therefore, Vitoria believed that there were certain moral grounds for external interference.

The Dutch lawyer Hugo Grotius (1583–1645) is often referred to as the father of international law. His views were shaped by the holy wars of the 17th century – in particular the Thirty Years War (1618–48) – when opposing sides articulated Just War rationales and claimed divine blessing. Grotius rejected the notion of divinely sanctioned wars and wars to enforce religious orthodoxy, and sought to establish a secular natural law basis for the recourse to force. 'Grotius's objective', according to Paul Christopher, 'was to supplant the impotent and corrupt ecclesiastical authority with an external, objective, secular authority that the competing political interests (i.e. nation states) would accept – a corpus of international laws' (2004, p.67).

Grotius believed in the law of nature, but argued that it was not evidenced through the expression of individual will, but rather 'has an objective existence as a criterion of human action' (Boucher, 1998, p. 212). This

natural law, Grotius believed, formed the basis of the law of nations. This law he argued, however, was the product of formal agreement between states though it was designed for the good of humanity rather than just the states which created it (*ibid.*, p.213). His criteria for a Just War were self-defence, the punishment of wrongdoers, the enforcement of legal rights, the reparation of injuries and situations when there was no possibility of effective arbitration (Bellamy, 2006b, p.73). After the Treaty of Westphalia (1648) and the development of the modern nation state (see Chapter 3), the nature of 'just' wars evidenced a definite state bias, and 'national interests became increasingly prominent in Just War theory's concept of justice' (Evans, 2005, p.4).

Following Grotius the legalist approach began to dominate. Samuel von Pufendorf (1632–1694), though not dismissive of divine law, sought to orientate the regulation of state conduct and warfare more towards positive law. He believed that law was universally valid and not particular to Christian societies. Emmerich de Vattel (1714–1767), whose contribution to the development of positive international law is profound, sought to codify the notion of sovereign equality and inviolability. Unlike Grotius and Pufendorf he argued that war could not be waged justly on behalf of foreign citizens as this created an easily abused pretext for intervention (Boucher, 1998, p.259). War could only be waged by states on the basis of self-defence to preserve the common good of the state.

Immanuel Kant (1724–1804) was sceptical of the power of natural law and moral persuasion, since states 'are not subject to a common external constraint' (Bellamy, 2006b, p.82). Kant sought to integrate normative perspectives into clear legally binding treaties between states, and was critical of the prescriptions articulated by Grotius, Pufendorf and Vattel which, he argued, had not and could not restrain states as they lacked a legally constituted framework (Boucher, 1998, p.269).

Following the French Revolution (1789), the emphasis on the conduct of states meant that the *jus ad bellum* aspect of the tradition was largely sidelined in favour of an emphasis on the conduct of war, and 'from the late eighteenth century onwards little of importance was written in the tradition until the mid twentieth century' (Rengger, 2002, pp.354–5). Writers such as Hegel, Meinecke and Clausewitz largely dismissed the question of right authority, assuming that states necessarily possessed this right, thus 'the traditional questions of the *jus ad bellum* [were] largely irrelevant' (*ibid.*, p. 359).

The American jurist Francis Lieber (1798–1872) wrote *General Orders No. 100* during the American Civil War, outlining conventions governing the conduct of armies at war. The 'Lieber Code' laid the foundation for the emergence of laws of war, which became more explicit and international by the end of the 19th century. This codification was contrasted, however, with what Peter Malanczuk describes as 'an almost complete abandonment

of the distinction between legal and illegal wars' during the 18th and 19th centuries (2006, p. 307). By the outbreak of the First World War the rules governing the resort to force had lost any real legitimacy, and aggression was routinely legitimized as self-defence; indeed this was the justification offered by Kaiser Wilhelm II for the invasion of Belgium in 1914.

Following the carnage of the First World War the League of Nations was established as an attempt to limit the resort to war. While Articles 10–16 of the League Covenant required all disputes to be submitted to the League before force was used, the League manifestly failed to act as a higher authority than its constituent member-states. The outbreak of the Second World War and the subsequent Cold War led to the intellectual dominance of the realist perspective, which largely dismissed moralizing about war, preferring instead to focus on explaining the interaction of states and the extent to which a balance of power, rather than abstract moral principles or legal doctrine, could limit the outbreak of war (see Chapter 4). Yet, while realism assumed primacy in the post-Second World War era, the evolution of international law evidenced the formal incorporation of many of the Just War tradition's key prescriptions (see Chapter 5).

The contemporary evolution of Just War thinking has been a largely driven by events (Rengger, 2005). Michael Walzer's key modern rendering of the Just War tradition – *Just and Unjust Wars* (1992a) – was written in response to the Vietnam War, and the increase in interest in the tradition in the 1990s was in large part due to the increased exposure afforded to, and incidents of, intra-state crises. Many of the so-called 'new humanitarians' – those concerned with contriving some means by which the suffering of people abroad could be halted – looked to the tradition to justify their advocacy. As the final section of this chapter will demonstrate, however, some argue that the modern usage of the Just War discourse constitutes a misappropriation of the tradition.

### Contemporary relevance

The revival of interest in the Just War tradition in the 1990s owed much to those instances of intra-state conflict that challenged both positive international law and the foreign policy preferences of Western states (Hehir, 2008a, pp. 33–52). Interest in the tradition had revived prior to the 1990s, however, when the carnage of the Second World War had led many to invoke the *jus in bello* provisions of the tradition (Rengger, 2002, pp.353–63).

The renaissance in Just War thinking occurred against a backdrop of societal change which was to have significant influence on the contemporary manifestation of the tradition. According to Rengger the new approach to the Just War tradition, in both scholarship and practice,

'disclosed a character very different from that which the Just War tradition had traditionally displayed'. In identifying the catalysts for this change Rengger points to the 'general hostility to war under any circumstances in liberal public cultures', 'a concept of *jus in bello* largely transformed by both legal instantiation and military habituation', and finally 'the effective secularization of the societies in question' (Rengger, 2002, p.358). Jean Elshtain suggests that the modern incarnation of the tradition is based on certain shared principles:

the current heirs to this way of thinking assume (1) the existence of universal moral dispositions, if not convictions – hence the possibility of a nonrelativist ethic; (2) the need for moral judgments of who/what is aggressor/victim, just/unjust, acceptable/unacceptable, and so on; (3) the potential efficacy of moral appeals and arguments to stay the hand of force (1992, p. 324)

References to the tradition abound in the contemporary discourse. Nicholas Wheeler, in his influential book on humanitarian intervention, *Saving Strangers*, acknowledges that his four criteria for legitimate intervention derive from the Just War tradition (2002, p.34), while Thomas Weiss describes the International Commission on Intervention and State Sovereignty's (ICISS) criteria as a 'modified just war doctrine' (2007, p.106). Tony Blair claimed that NATO's intervention in Kosovo was a 'just war', and his criteria for intervention bear a striking similarity to the Just War tradition's criteria (Blair, 1999).

The two clearest distinctions between modern interpretations of the tradition and its historical antecedents are the contemporary separation of *jus ad bellum* from *jus in bello* and the deemphasizing of the importance of right intention. Indicative of the separation of the two major categories, Walzer argued that if the indiscriminate bombing of German cities was the only way to stop the spread of Nazism, then this violation of *jus in bello* would yield to the greater good of the defeat of Nazism (1992, p.251). This may be a persuasive argument but it is not in accordance with the Just War tradition, which does not permit such selective adherence (Brown, 2006, p.108).

In the contemporary era the concern with motivation has diminished, with many arguing that it is the outcome rather than the intention that determines whether a war is just (Wheeler, 2002, p.38; see Chapter 8). The importance afforded to intention by both Augustine and Aquinas belies their religious conviction, in particular the idea of the soul's progression in the afterlife. The emphasis on intention in Aquinas's doctrine of double effect is clear, but from a consequentialist point of view, it does not make sense to support one action and condemn another because of the intentions of the actors if the outcomes were similar.

As the tradition has increasingly been used as a template for the discussion on the legitimacy of humanitarian intervention, it has been criticized on a number of grounds. The major criticisms are offered below.

#### Is the tradition universally applicable?

While it is clear that the tradition's evolution evidences a clear progression away from religious dogma, the question of its Christian character remains. Additionally, while the basis for the tradition may have moved from divine law to natural and positive law, overviews of the tradition's key thinkers rarely include non-Western writers. In what sense then does the tradition's obvious Western and Christian foundation preclude its universal application?

It would seem unreasonable to argue that ideas are limited in their applicability to the origin of their initiators. It is additionally not true that Western culture alone has articulated prescriptions on the use of force and just conduct in war. Rengger describes the Just War tradition as 'global', arguing that any tradition is 'part of an ongoing and potentially never-ending conversation in which many different assumptions will take centre stage at various points' (Rengger, 2002, p.362). Hence the dominance of Western Christian voices is conceived as but temporal.

Those who defend the universal applicability of the tradition argue that its basis is natural law, rather than divine law, which, by definition, is applicable to all humanity. Terry Nardin argues that the contemporary variant of natural law – common morality – constitutes a universal code which informs politics and law, though it is often obscured or ignored by dominant politico-legal systems. 'Common morality', he argues, 'is a critical morality possessing wider authority than the moral practices of particular communities' (Nardin, 2003, p.18). Thus a belief in the existence of a common morality necessarily enables one to view the Just War tradition as the expression of universal truisms rather than 'any purely particularist and partisan creed' (Evans, 2005, p.8). This argument is persuasive if one accepts the underlying validity of a universal moral code knowable to all. Clearly relativists reject such an idea, and hence argue that the applicability of the Just War tradition is limited.

#### The tradition is inherently statist

The tradition is criticized for its statist bias and for enabling the issue of just authority to be appropriated by states. The issue stems from the earlier proponents of the thesis – Augustine and Aquinas – who have been accused as having delegated great power to the state in authorizing war. Aquinas, like Augustine, viewed the state as a unit of order for the common good rather than an aggregation of individuals (Boucher and Kelly, 2003,

p.113). The state's utility lay in its capacity to promote and facilitate the common good rather than collective individual goods. Individual good was essentially subsumed through the state into the collective good. Aquinas recommended that citizens obey the state in all but the most extreme circumstances, and favoured 'passive disobedience' over revolt (Finnis, 1998, p.290). As with Augustine, the state-centric nature of Aquinas's prescriptions is ultimately explained by his instrumental conception of the state and belief in divine judgment (Canning, 2003, pp.119–20). Individuals acting out of a duty to the state need not necessarily fear that their own state is commanding an unjust act, as the rulers would face divine retribution while the compliant citizens would not be punished for their obedience.

Aquinas suggested that the 'right authority' is the one who has no authority above them. Those who served a master must seek authorization from that person to use force. The nature of just authority central to his schema, however, is somewhat ambiguous. As John Tooke notes, specifying who this authority might be needs 'serious discussion' yet this is lacking in Aquinas' work (1965, p.26). Additionally, Tooke notes that 'the "common good" of which Aquinas wrote and which must be the aim of a just war, was rather a limited good, that of a city or province, and never the international good of all' (1965, p. 27). In his assessment of the implications of this perspective, Holmes notes:

The net effect is that it is the interests of the state that are paramount and that its laws, so long as they do not directly contravene divine law, should be obeyed unquestioningly. In this one can see the groundwork laid for Hobbes, Machiavelli, Hegel and Treitschke . . . Clausewitz . . . and of 20th century political realists. (1989, p.141)

Thus the delegation of just authority to states, evidenced throughout the tradition's lineage, would appear to have facilitated the widespread abuse of the tradition, especially in the 18th and 19th centuries.

Anthony Coates, however, argues that this modern interpretation of the tradition is 'deficient' and a misreading of the tradition, which overlooks the fact that the question of justice was linked to the idea of just authority and sovereign inviolability. Coates's reading of the tradition suggests that 'the internal constitution and practice of the defending state needs to be taken into account' and that the legitimacy of the use of force 'depends on the moral status of those who use it and those against whom it is used' (2006, pp.63–4). Similarly Rengger argues that the contemporary status of the Just War tradition constitutes a misappropriation of its tenets. He argues that writers such as Johnston and particularly Walzer have portrayed the tradition in a 'state-centric and legalistic' manner and in a form which 'encourages the tendency to think of it in terms of a juristically

based calculus' which fails to accurately apply the tradition's conception of right authority (2005, p.151). Walzer focuses on the state, and his analysis proceeds according to the 'legalist paradigm' which he describes as 'the fundamental structure for the moral comprehension of war' (1992a, p. 61). For Walzer the utility of the Just War tradition lies in its capacity to influence international law as, without legal expression, this code is impotent (*ibid.*, p.288). Rengger argues that a correct reading of the tradition demonstrates that while the state may be the right authority in a given context, this should not be assumed (2005, p.152).

#### Easily abused/who decides?

The most common critique of the tradition is the charge that its tenets are easily abused. According to Myers, 'These principles . . . actually have no meaning, and there are no boundaries to the ways in which they can be manipulated' (1996, p.126). Reinhold Niebuhr argued that the criteria were inherently indeterminate and values such as 'just' could be easily appropriated and misused (Bellamy, 2006b, p.107). The tradition is held to articulate principles in an authoritative vacuum, enabling states to act as their own judge, leading inevitably to highly subjective interpretations of the criteria (Kaplan, 2003, p.130; Buchanan and Keohane, 2004, p.4). The institutionalization of the criteria would, it is argued, provide a means by which the fulfilment of the criteria could be judged objectively and authoritatively. While the many holy wars and crusades undermined the 'divinely sanctioned' aspect of the early writings on the tradition, the move to a secular legal framework based on states did not eliminate the problem of abuse.

In defence of the tradition Evans argues that while there have been many examples of the misuse of Just War rhetoric, such instances cannot be deemed to undermine the utility of the tradition, as all principles can be misused and this in itself is not a viable grounds for rejecting the tradition (2005, p.7). Aggressors may invoke the tradition, but equally opponents of the aggression can hold the aggressors to account according to the criteria (*ibid.*, p.207).

Defenders of the tradition argue that the problem of misuse stems from 'a misunderstanding of the nature of just war thinking itself as essentially a matter of casuistry' (Weigel, 2007, p.23). Rengger criticizes the contemporary usage of the tradition 'where certain boxes . . . are ticked or not ticked and in the end one comes out with the view: yes this was/was not a just war' (2005, p.151). The use of Just War criteria as an apology or excuse for waging war is a misapplication of the theory. The resort to force is never considered 'good' but rather a regrettable action which can potentially be justified if a set of circumstances – outlined by the Just War tradition – arise. The criteria are not, therefore, a checklist designed to facilitate

the use of force, but rather a set of restrictive criteria conceived as a means by which the resort to force can be judged, not enabled (Reed and Ryall, 2007, p.1; Evans, 2005, p.7).

Richard Falk is critical of the contemporary moves towards 'the process of validating war by reference to the Just War doctrine'. This process, he asserts, is problematic because substituting the Just War doctrine for legal doctrine raises the issue of authority; it is plausible that exceptional cases may call for laws to be broken but, he wonders, '[is] the danger of relying on legitimacy to overcome the inadequacies of legality a means to assert the primacy of politics and the subordination of law?' (Falk, 2005a, p.43). Evans argues, however that the question of the justness of a war is not dependant on the views of the initiator of the violence but on the objective judgment of others (2005, p.8). The problem with this defence, however, is that while this expands the judgment of a war's justness beyond that of the protagonists, those not directly involved are not necessarily sufficiently dependable judges. Observers may be secretly biased of course but aside from this it cannot be assured that all will be privy to the same information or that this information is correct or complete. This will lead to differing judgments even though the same framework is being applied. Additionally even if it were possible to find two completely neutral observers, present them with exactly the same information and ask them for their view, there is no guarantee that they would reach similar conclusions. The problem is not that judges will reach different conclusion – this happens regularly in legal trials – but rather the implications of a 'split decision' following the application of the Just War framework: what happens next? This has obvious implications for humanitarian intervention and specifically the appraisal of 'illegal but legitimate' acts (see Chapter 5).

#### Does the just war tradition have any real utility?

The very idea of trying to impose rules on warfare is emphatically rejected by some. General Sherman's famous statement – 'war is hell' – points to a certain militaristic perspective on war derived from a 'win at all costs' mentality which accepts no responsibility for the horrors which war is deemed to inevitably cause. As Myers asks, 'why would anyone want to follow rules that interfere with victory and retribution . . . once they have crossed the dangerous Rubicon of war?' (1996, p.119). This critique assumes that because of the lack of an authoritative international body, states are not by constrained by moral principles, or even international law, and act solely to maximize their national interest. According to Robert Kaplan:

in a world without a universal arbiter of justice, discussions of wars as 'just' or 'unjust' carry little meaning beyond the intellectual and legal circles in which such discussions take place. States and other entities . . .

will go to war when they decide it is in their interests (strategic, moral, or both), and will, consequently, be unconcerned if others view their aggression as unjust. (2003, p. 130)

Whether the Just War tradition has directly influenced the behaviour of states is thus a contested point. There is clearly evidence that the creation of certain laws of war – such as the Geneva and Hague conventions – owes much to the tradition, and the UN Charter itself contains provisions which can be traced to Just War principles (Evans, 2005, p.5). Of course the creation of legal doctrine and the articulation of moral principles do not necessarily lead to lawful or moral behaviour.

Bellamy argues that the tradition fulfils two roles; 'It provides a common language that actors can use to legitimize recourse to force and the conduct of war and that others use to evaluate those claims. It can also inhibit actions that cannot be justified' (2006b, p.5). Rengger, however, argues that the tradition is not capable of stopping wars, and he accepts the basic realist premise that war is inevitable. He rejects, however, the attendant realist disavowal of moral judgements about war in favour of the Just War tradition. '[I]t is' he claims, 'in the task of continually holding up the mirror of our considered moral judgments in the context of war that the tradition performs its most important role' (Rengger, 2005, p.160). International law, he argues, often fails to provide guidance and in these situations – such as humanitarian intervention – 'we must surely look to a larger framework in which to embed such judgments' (ibid., p.147). The tradition is thus vaunted as a framework for examining war, not a means to either prevent or facilitate it (Armstrong and Farrell, 2005, p.11). Undoubtedly the tradition serves as a comprehensive framework which enables us to examine the legitimacy of a war or intervention. This normative goal, however, has certainly not been the limit of the tradition's actual usage, and it has undoubtedly been employed to excuse the use of force. One may question the normative idea of a framework of legitimacy on the basis that such a goal is quite a modest return on 2000 years of philosophical enquiry.

## Conclusion

The Just War tradition, according to Rengger, 'has retained a remarkable vitality and power well into our own times'. However, he also warns, 'at the opening of the twenty-first century [the tradition] shows some signs of having reached the limit of its elasticity' (Rengger, 2002, pp.353, 361). A cynic may argue that it is precisely the tradition's elasticity and inherently malleable tenets that have facilitated its longevity. Nonetheless, as long as there are wars there will be moral judgements made about war, and in this sense the tradition is unlikely to lose relevance (Evans, 2005, p.203).

The contemporary debate on humanitarian intervention has clearly stimulated a renewed interest in the tradition, and those engaged in this contemporary debate must engage with the Just War literature even if only to substantiate their critique of the role of morality in international relations. Those engaging with the tradition as a tool for understanding the contemporary question of humanitarian intervention must be conscious, however, that the tradition should not be conceived of as a homogeneous theory which can be applied unproblematically to contemporary events. Additionally, the context in which many of its key thinkers wrote was very different from our contemporary context. In isolation the tradition cannot reasonably be said to determine the justness of a particular war. 'What is considered "just"', according to Bellamy, 'depends on the interplay between the tradition's legal sub-tradition (positive law), moral sub-tradition (natural law) and political sub-tradition (realism)' (2006b, p.7). In this sense the tradition is perhaps best seen as a component in a broader framework of legitimacy.

The key sources of contention posed by humanitarian intervention are inherent in the Just War tradition, and much of the contemporary debate on this issue explicitly refers to the tenets of the tradition. While the tradition cannot provide answers to the questions raised by humanitarian intervention, it is an indispensable framework of analysis for this issue, and the historical debates surrounding the tradition's key tenets are highly relevant and informative for scholars engaged in the contemporary debate.

## Questions

- Do you consider the criteria outlined in Box 2.1 to be sufficiently comprehensive?
- Does the tradition constitute a Western Christian view of war or does it have universal applicability?
- To what extent has the tradition informed the evolution of international law?
- Has the tradition had any impact on the behaviour of states?
- What would you consider to be the tradition's primary function?

## Further reading

- Bellamy, A. (2006) *Just Wars: From Cicero to Iraq* (London: Polity); Chapters 1–5.  
 Christopher, P. (2004) *The Ethics of War and Peace* (Upper Saddle River, N.J.: Prentice Hall); Chapters 1–4.  
 Evans, M. (ed.) (2005) *Just War Theory: A Reappraisal* (Edinburgh: Edinburgh University Press).



- Holmes, R. L. (1989) *On War and Morality* (Princeton, N.J.: Princeton University Press).
- Johnson, J. T. (1987) *The Quest for Peace: Three Moral Traditions in Western Cultural History* (Princeton, N.J.: Princeton University Press).
- Nardin, T. (ed.) (1998) *The Ethics of War and Peace: Religious and Secular Perspectives* (Princeton, N.J.: Princeton University Press).
- O'Donovan, O. (2003) *The Just War Revisited* (Cambridge: Cambridge University Press).
- Rengger, N. (2002) 'On the Just War Tradition in the Twenty First Century', *International Affairs*, 78:2, 353–63.
- Walzer, M. (2006) *Just and Unjust Wars*, rev. edn (New York: Basic Books).

## Chapter 3

# The Sovereign State

The controversy surrounding humanitarian intervention centres on the relationship between the state and its citizens. Minimalist conceptions of the state hold that the state must provide its citizens with security from external aggression and ensure that economic activity can thrive. More expansive conceptions hold that the state must provide positive goods such as human rights, education and healthcare. There is therefore broad, albeit shallow, agreement that the state has certain responsibilities towards its citizens. Controversy arises, however, regarding the nature of these responsibilities, and crucially, what should be done by other states if a state violates these responsibilities. This latter point is highly contentious precisely because sovereign inviolability – that is, the right of states to non-intervention – has become a key feature of statehood. To understand the dilemma posed by humanitarian intervention it is therefore necessary to examine the evolution of the sovereign state and engage with the arguments for and against sovereignty.

In 1999 Kofi Annan, then secretary-general of the United Nations, wrote, 'State sovereignty, in its most basic sense is being redefined' (1999b). Annan cited three main challenges to the sovereign state; the process of economic globalization, international cooperation as manifest through international organizations, and the rise of human rights. While there is no doubt that globalization and international institutions have both impacted on the sovereignty of states to a very significant extent, this chapter focuses on Annan's third challenge, as it is the tension between human rights and state sovereignty that has most relevance to the issue of humanitarian intervention.

This chapter's first section outlines the nature of the sovereign state, its history and the legal rights sovereign states currently enjoy. The second section examines the argument that the status of sovereignty has always constituted 'organized hypocrisy'. The final section outlines the critical perspective on sovereignty advanced by the 'new humanitarians' and the counter-position as articulated by those who see sovereignty as both a normative good and a means of preserving international order.

## The evolution of the sovereign state

The codification of sovereignty established both the territorial state and contemporary international system (Kratochwil 1995, p.25). Yet,