

JUST-WAR THEORY: ETHICAL DELIBERATION ON WAR

*A Thesis submitted
in partial fulfilment for the degree of
Doctor of Philosophy*

By

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DEDICATED TO
GOD THE ALMIGHTY
AND
MY DEAR PARENTS



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DECLARATION

I, Miss Sanlut Nengneithem Haokip, hereby declare that the work presented in this thesis entitled “**Just-War Theory: Ethical Deliberation on War**” contained original research work carried out by me under the supervision of Dr. Ventaraman Prabhu, Professor in the Department of Humanities and Social Sciences, Indian Institute of Technology Guwahati.

Conforming by the ethical practice of reporting information, due acknowledgements have been made wherever the findings of others have been cited. All the research articles and resources used have been cited in the reference section.

This work has not been submitted elsewhere for the reward of any degree or diploma.

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CERTIFICATE

This is to certify that the work described in the thesis entitled “**Just-War Theory: Ethical Deliberation on War**,” submitted by Sanlut Nengneithem Haokip (Regd. No.: 146141021) to Indian Institute of Technology Guwahati, India, for the award of the degree of Doctor of Philosophy is an authentic record of the research work carried out under my supervision in the Department of Humanities and Social Sciences, Indian Institute of Technology Guwahati, India.

Place: IIT Guwahati

Prof. Venkataraman Prabhu

Date: 17th July 2021

Thesis Supervisor

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“He shall bring forth your righteousness as the light, and your justice as the noonday”
(Psalm 37:6)

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THESIS ABSTRACT

Just-war theory (JWT) is a set of rules that aims at just practices in war. The theory represents a belief in justice at the commencement, during, and after war by overcoming presumed antagonism between law and arms. The chiefs concerned of the theory are regarding lives-combatants and non-combatants alike and with right resort to force.

Tracing the development of JW concept across different cultures unveil familiarity of JW rules in some form. Despite long history of JW tradition, statistics and outcome of twentieth century world wars have shown that civilian lives and property are prime targets of war. Due to the victimization of civilians in any form of conflict, the overall aim of the thesis is to search out any discrepancies in JW rules and practices in a war. These discrepancies are discussed in each of the thesis chapters. By incorporating these issues and the relevant discussions of the discrepancies found in *jus ad bellum*, *jus in bello*, and *jus post bellum* conditions of JW, the thesis aims to raise the level of humanitarian concern and the need for just resort of military force. A fresh look on these issues is pertinent in the declining morality of warfare.

Ethical deliberation on war strictly mandates compliance of the use of force to *jus ad bellum*, *jus in bello*, and *jus post bellum* conditions of JW. The thesis upholds the discussion of JW conditions within the prescribed norms of justice. It does so by postulating “justice” as the underlying conception of JW. Since the conceptual analysis of justice reveals the nature of justice as truth, fairness, harmony, and proportionality, thus exhibiting its viability to function as varied ethical, moral, religious, social, and political virtues the study therefore relocates the concept of justice in social interaction and the context of just-war in particular. The thesis’ reassertion of justice comes when the morality of war is deteriorating. This is true when considered against the compromised of moral foundation, the original intention of JW in Contemporary JW practices and in International Law. Moral decline in the ethical deliberation of war is thus discussed in the discrepancies of justice before, during, and after war. By advancing three-fold arguments against the greatest impediment to justice- Utilitarianism, the study reprovved Utilitarianism of its claim as a viable theory of Justice.

THESIS ABSTRACT

Contrary to Modern JWT's claim for "just cause" and "authority" criteria, *jus ad bellum* stressed the sufficiency of "right intention" since just cause motivation of what is just and legitimate authority's requirement of "just will" rests on right intention. Widespread moral compromises in *jus in bello*, on the other hand, is found inherent in the idea of "double-effect" and "total war." While the problem of double-effect was engraved into the theory at the time of its inception, other forms of compromises were later introduced into the theory when legality of war came to overlook the morality of war in an attempt to universalize the theory, and when political interests preceded moral end of JW. The thesis undertakes *jus post bellum* evaluation due to overwhelming neglect of post-war justice and in heightened abuse of individual rights at the pretext of national security. Evaluation of post-war justice revealed an intricate relationship between the three conditions of JW and, therefore, of the claim that the dispensation of justice post-war rests on *jus ad bellum* criterion of "right intention" and "proportionality principle" of *jus in bello*. Conversely, *jus post bellum* failure to vindicate human rights and just prosecution of crimes is associated with discrepancies in *jus ad bellum* and *jus in bello* conditions of JW. Hence, the claim that all three conditions of JW are necessary and for that reason must synergistically work together for the achievement of justice post-war.

Other contributions of the thesis include incorporating just-war tradition into International Law. In doing so the thesis aim is to overcome presumed antagonism between law and arms. It also resolves incongruities in the schematic organization existing in JW literature based on the chronological order of the theories. And the thesis' justification of certain wars against Realist's conception of war in the presumption that war be waged for "just cause" with "right intention" and under proper "authority." This presumption comes when widespread compromises in JW practices have jeopardized JWT's humanitarian concern and right resort to force in the inevitability of war. The thesis as well highlights the dangers of neglecting right-intention and proportionality principle and therefore of their importance to just-war aim in the claim that human nature is intricately linked to the causes of war.

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Introduction

1.1 Introduction

Just-war theory is a set of rules that aims at just practices in war. The theory represents a belief in justice at the commencement, during, and after war by overcoming presumed general antagonism between law and arms. The chiefs concerned of the theory are regarding lives-combatants and non-combatants alike and with right resort to force.

Just-war, as a theory, claims for right resort to force and for just engagement in war. For the purpose of JWT analysis, the thesis posits the theory within the broader scope of war. War identified as “the principle of organizing one force against another” is *very old*. (Ralby, 2013, p. 8) As construed by some, the business of war is not of recent origin but is as old as the invention of agriculture itself. Perhaps the subsequent discovery of the art of agriculture and the ensuing fixed settlement is responsible for transforming individual combat into an organized struggle for the first time. While some debates about war claim it as a recent origin, “many scholars speculate that war developed over territorial claims as a result of agriculture and fixed settlement” (p.9).

The analysis of war is essential in order to maintain the moral justifiability of resorting to force (Solomon, 1996). Those who believe in the possibility of just-war do not say “All is fair in war”; rather, they have an ethical criteria that guide their decisions about war (Gordon, 2008). Just-war theory’s claim for right resort to force is highlighted in the inevitability of war. While *jus ad bellum* and *jus in bello* criteria of JW, on the one hand, are concerned with the standard of waging war justly (May, 2015; Moseley, 2020), therefore to this end, just-war aims at coercing the wicked and helping the good (Vorster, 2015); it, on the other hand, is ignited by the concern for combatants’ behavior towards fellow combatants, non-combatants, the treatment and care for the captives (Solomon, 1996). *Jus post bellum* concerned with the expected outcome of a war has an objection to wars that may undermine long-term peace, justice, and stability.

1.1.1 Historical development of JW theory

JW tradition has been “shaped by the teachings of Cicero, Aristotelian philosophy, medieval and Reformational thought, natural law theory and modern nationalist Christianity” (Vorster, 2015, p. 56). Although the origin of JW theory dates back to the writing of Cicero (Cox, 2018) and St. Augustine; yet, many elements of the theory were established during the “classical” period of the early 16th to the mid-17th centuries. It was then that the objective moral principles of just-war governed all areas of life, including that of the individuals. Starting from archaic Greece (800-480 BC), the rules of war in Europe, even in its informal form, began to be felt as a social set of imposition until it came to be officially codified in the established *Hellenistic* customs of warfare. Although for over 3000 years, the fundamental structure of the morality of war remained, gradual changes in Just-War theory were observed starting from the 17th century through the 20th century. Much of these significant changes between classical just-war theory and its present form seem to have aroused the interaction between the theory and the law over time. It thus brought about an interaction between JWT and International Law¹. In fact, the relationship between laws and treatises to war is dated as far back to the time of Cicero, that is, during the second century B.C. In *Laelius* (about 130 B.C), Cicero warned against the disregard of laws and treatises as a step closer to war. He further states that disregarding laws and treatises is neither good for the future posterity nor for the state.

If the customs (of disregarding laws and treatises) should spread, and should draw our empire from law to force, so that those who as yet voluntarily obey us are bound by terror.... I fear for our posterity and for the immortality of the state (Harrer, 1918, p. 31).

What subjects the Western societies to the ethical analysis of violence has much to do with the historical context of the society. The outgrowing of the intellectual and legal development substantiated by the long history of internal and external struggles resulted in the formulation of “Just-War” concept. Varying degrees of organized violence were carried out during “the agonistic struggles of Greek city-states, to Rome’s imperial wars of conquest, and on to the Christianized warfare of medieval Europe” (Cox, 2018, p. 1).

However, reflection on the ethics of war and violent action is not confined to western analysis of war. The importance of the rules of war has been seen across cultures and over different periods of time. Ancient Sumerian epic of “Gilgamesh” of the early second millennium BC gives an account of prisoners of war; the great Indian poem, the “Mahabharata”

¹ <https://www.berfrois.com/2012/11/the-origin-of-just-war-theory/>

of 400 BC (Allen, 2016) or beyond is concerned with the rules for proper conduct in war; during the Warring States period (481-221) the Chinese began to develop their rules of war otherwise known to the West as the *jus ad bellum* (justice to wage war) and *jus in bello* (justice in war) in the concept of “yi bing” during the medieval period (Lewis, 2005; Friday, 2006); the Medieval Japanese understanding of the internal and external rules of war was formulated from the domestic law enforcement of the Chinese tradition; starting from the 9th century onwards, the Islamic theologians and jurists developed the doctrine of “jihad” (Kelsay, 2006) corresponding to the ethical rules of initiation and conduct of warfare.

Historical development of the Ethics of warfare in ancient Egypt developed with the emergence of the international legal community (Cox, 2017). During the Old kingdom (2686-2181 BCE), Middle Kingdom (2055-1650 BCE), and New Kingdom 1552-1069 BCE) Egyptian state had *no international organizations*. However, there *exists a recognizable international legal community within which Egypt developed its own distinctive ethics of war* (p.371). In fact, *just war tradition gave birth to modern international laws of war* (Brekke, 2005). The war ethics of the Egyptians were deeply rooted in Egyptian culture. Ethnocentrism thus formed the ideological foundation of ancient Egypt. Ethnocentrism of the ancient Egyptians comprised the belief in the cosmic role of the Pharaoh and the land of Egypt. The ideological foundation of the ancient Egyptians were later introduced into the Western conception of legitimate authority and just cause doctrine of *jus ad bellum* (Brekke, 2005).

In Ancient Egypt, Pharaoh’s authority to wage war was sanctioned by the belief in his divinely appointed office and from “the cosmological status of his kingdom. Egypt was regarded as the terrestrial embodiment of the universal politico-theological principle of order and justice called *Ma’at*.” This belief played a pivotal role in attributing superiority status to Egypt and Egyptians over other people and land. The ancient Egyptians’ absolutistic and universalizing notion of justice can also be seen in their conception of the ethics of war. In ancient Egyptian’s conception, war was necessarily defensive. War was fought for justice, for preservation and advancement through annihilation of evil recognized by them as violence and avarice, a common denominator of injustice. Thus, preservation of justice demands retributive justice. The principle of reciprocity and retribution as fundamentally important to the Egyptian’s understanding of “just cause” was translated into the concept of self-defence against the enemy’s provocation (Cox, 2017).

In Hinduism, the word *dharma* derives from the verbal root *dhr* means “to uphold” or “to maintain.” This gives the preservation of law and order or the eternal order of the world a dharmic sense (Kollar, 2005; Subedi, 2003). This socio-religio-political and legal concept understood as the law of righteousness regulates relationship between individuals, the family, the community, and the state. The *Dharmasastras* based the law of wars on *dharma*. The essence of “Dharma” referred the *Rita* (the cosmic order) in the Vedas to distinguish between good and evil. Here, good in the dharmic sense is understood in terms of “cosmic order,” whereas evil poses a threat to this order. Since an individual is viewed as a part of the greater cosmic order, preserving good at the cost of war was justified in ancient Vedic society (Subedi, 2003, p. 341).

Concerning the conception of right and wrong, a series of four *Vedas* (*Rigveda* presumably written about 2500 BC) (Griswold, 1971; Subedi, 2003), including the *Puranas*, have recorded an account of wars fought for the preservation of peace by aggressors. Traditions tell that numerous battles were fought between followers of *rita* or *dharma* and those invaders who sought to destroy *dharma* (law and order). The festival of *Dasain* in Nepal and *Dashara* in India is still celebrated in remembrance of a victory of good over evil (Subedi, 2003). However, in the *Puranic Era*, war became more common due to imperial expansionist policy (Subedi, 2003). In the *Manusmriti*, the three techniques of negotiation that a king should employ before resorting to war (*danda*) include *Sama* (Conciliation), *dana* (placating by gifts), *bheda* (dissension or veiled threat). These four techniques of *sama*, *dana*, *bheda* and *danda* became known for resolving disputes in the Hindu world. According to Manu, “the last may be employed only after the other three have been exhausted” (Grady, 1871; Subedi, 2003). It is said that “This very practice of ancient India was skilfully exploited and rehearsed by the British in the early days of their colonial rule in Indian sub-continent” (Subedi, 2003, p. 353). But while the objective of the seventeenth, eighteenth, and nineteenth century European Imperialism was economic exploitation even by ruthless means, the objective of ancient Hindu imperialism was about securing *recognition as the ultimate emperor by a powerful ruler* (p. 353). Thus, those Hindu kings desirous of the title “Chakrabarti Maharaja” were allowed to resort to force against others only to the extent of necessity. The laws of war required the aggressor king to halt any military expedition against such kings who were prepared to recognize him as the Chakrabarti Maharaj.

Under the Hindu law of war, an inviolable rule under the “Raja Dharma” includes treating another’s state herald with diplomatic honor and dignity and giving the enemy “enough time

to make itself ready for war or to give an option of resorting to other means like surrender” (Subedi, 2003, pp. 353-4). Similar to the aim of modern international laws on war, “the laws of war in Hinduism were designed to make the conduct of war as humane as possible.” These laws of war aimed to “ensure that warfare was conducted in a fair manner and by open means” (p.354). The rules of war range from the prohibition of the deployment of weapons of mass destruction to the treatment of the conquered territory. Both Manu and Kautilya emphasized on *jus post bellum* concern with the treatment of the captives of the conquered land. They particularly stressed on just, dignified and honourable treatment of the people, especially the women, and their property of the conquered land (Kautilya, 1962; Subedi, 2003, p. 354).

Tracing the development of JW concept across different cultures unveil the familiarity of JW rules in some form. This knowledge of JW rules reflect a keen sense of respect and observance of fairness and justice, along with respect for state envoy and the ethical treatment of prisoners of war. Their knowledge also mirrors the nature of JW as either defensive or retributive.

Since there is a close affinity between the ethics of war and law in the emergence of JW theory, the subject domain of JWT goes beyond the field of Applied Ethics to that of International Law.

JWT investigates the possibility of a war being just and the ethical means by which such a war might be fought. Just-war doctrine thus seeks to provide ethical underpinnings for initiation and conduct of war (Barash & Webel, 2014). Therefore, the theory of just-war aims to agree on the necessity of certain war and tend to prescribed norms on how these wars are to be fought. The justification of how and why a particular war might be fought can either take theoretical or historical approach. While the theoretical approach is “concerned with ethically justifying war and the forms that warfare may or may not take,” the traditional or historical JW approach is concerned with the development of a body of rules or agreements that have been followed across different ages (Moseley, 2019). The discussion on just-war thus comprises *jus ad bellum*, *jus in bello*, and *jus post bellum* morality of warfare. These conditions deal with justice before war, justice during war, and justice post-war respectively. Some of the pertinent issues evolving around just-war theory include the traditionalist assumption that there are justified wars; collateral damage; and the problem of non-combatants immunity; discrepancies in the dispensation of justice before, during, and after war.

Just-war as a theory aims at right resort to force and just engagement in war. However, toward that end, since JWT is replete with many moral and ethical challenges, the thesis topic is entitled “Just-War Theory: Ethical Deliberation on war.” As the thesis title suggests, many ethical issues often related will be dealt with throughout the thesis chapters. Further, ethical reflection on war is significant due to the unprecedented outcome of previous wars. A simple comparison of these figures shows a rising trend in the number of fatalities. The figure estimation of two great wars of twentieth century present 37 million deaths in WWI (1914-18) and 85 million casualties and deaths in WWII (1939-45). What make these figures more staggering is the number of civilians’ deaths and casualties worldwide. Where deaths of non-combatants were documented more than 28 million in WWI and 45 million deaths and 25 million casualties in WWII, number of combatants’ deaths in first and second great wars is estimated 9 million and 15 million respectively (Media, 2020; Royde-Smith, 2022; The National WWII Museum, 2022). Despite long history of JW tradition, huge casualties and deaths of combatants superseded by non-combatants have been recorded in the two world wars. Industrialized societies with their unbridled technological achievement in the invention of war machines have advanced this trend of mortality. Thus, the statistics and outcome of twentieth century world wars show that civilian lives and property are prime targets of war. Owing the victimization of civilians in any form of conflict, the overall aim of the thesis is to search out any discrepancies in JW rules and practices in a war. I will discuss these discrepancies in the thesis chapters.

The thesis presents a novel approach to war and JW in particular. First, it treats JW as a larger tradition than it usually treated, by incorporating the tradition into International Law. In doing so the thesis aim is to overcome presumed antagonism between law and arms. Second, based on chronological argument the thesis resolves problem of schematic organization that have existed in JW literature. Third, the thesis recapitulates the ethical framework of JW in the concept of justice and thereby clarifies the popular misconception that have misconstrued injustice as virtue and justice as vice. Since declining morality of modern warfare coupled with Utilitarian ideology have estranged “Justice” from the deliberation of war, the thesis chapter undertook conceptual analysis of justice. Conceptual analysis revealed multifaceted nature of justice and its interplay in social interaction and in the context of JW in particular. Justice as fairness in its existential, metaphysical and political imports convey the idea of truth, harmony, equality and proportionality. Since the nature of Justice has exhibited an amalgamation of varied ethical, moral, religious, social and political virtues to that extend this study also claimed

Justice as a virtue. It further advanced three-fold arguments to reprove Utilitarianism of its claim as a viable theory of justice. Fourth, it also acknowledged widespread moral compromises in the ethical deliberation of war. The thesis discussed these moral compromises inherent in traditional JWT, as well in contemporary JW, and in International Law in the discrepancies of justice in the initiation, during and after war. Fifth, the thesis has worked out a principle that applies uniquely to each of the conditions separately and to the aim of JW in general. This principle claims that JW conditions though distinct on its own are not disjointed but are interrelated and interdependent for the realization of JW aim. The claim is affirmed in *jus post bellum* condition of JW where the successes of JW deemed a general correlation between the three conditions of JW. Since all the three conditions of JW are necessary therefore, the study asserts that *jus ad bellum*, *jus in bello*, and *jus post bellum* conditions of JW must for that reason synergistically work together for the achievement of JW aim. An important highlight of the chapter is claim that human nature is intricately linked to the causes of war.

By incorporating these issues and the relevant discussions of the discrepancies found in *jus ad bellum*, *jus in bello*, and *jus post bellum* conditions of JW, the thesis aims to raise the level of humanitarian concern and the need for just resort of military force. A fresh look on these issues is pertinent in the declining morality of warfare.

These approaches to JWT are discussed and elaborated in each chapter of the thesis.

1.2 Thesis outline

The doctoral thesis is organized into seven chapters and is arranged in the following order:

Chapter 1- Introduction

This chapter presents a just-war concept and delineates the historical background of the theory. The introductory chapter will also highlight some of the pertinent issues following which have formed the motivation of the thesis topic.

Chapter 2- War: Just-War Theory context

This chapter deals with incongruities in schematic organization of the theory and in contextualizing the theory within the proper domain of war based on chronological order of the theories. The problem of systematization of JWT will assess viability of JW Pacifism against JWT.

Chapter 3- Justice: Ethical Underpinnings of JW

This chapter is advanced as a justification of why an ethical framework for war is and must be grounded on the conception of justice. It does so by conceptual analysis of justice. In light of this concept, the chapter will tackle some of the ethical challenges facing contemporary JW responsible for the common belief that grants an irreconcilable antagonism between law and arms, and the promotion of injustice in the misconception of the nature of justice. By establishing “justice” as the underlying unifying theme of JW, the thesis chapter aims to relocate justice in social and political interaction and in the context of JW in particular.

Chapter 4- *Jus ad Bellum*: Justice in the Initiation of War

This chapter distinguishes any particular war as either just or unjust based on *jus ad bellum* conditions. The problem of moral indifference leading to the theoretical problem of the principle- in the compromise of right intention criterion in modern just war theory (MJWT) is the main highlight of this chapter. Other issues that this chapter discusses include controversy between traditionalists and revisionists on the assumptions of justified wars; the issue of moral compromise in MJW discourse; and the problem obligation or compulsion. These issues will be discussed within just-cause, right intention, and authority criteria respectively.

Chapter 5- *Jus in bello*: Justice During War

With the aim to strike a balance between humanitarian concern on the one hand, and the requirement of military necessity on the other, this chapter evolves around various factors contributing to widespread moral compromises that are inherent in Traditional JWT, or which were later introduced in MJW and International Law. The purpose of this chapter is to minimize or eliminate endorsement of wrongful killing and of ill practices of war.

Chapter 6- *Jus post bellum*: Justice at the end of war

Jus post bellum chapter focuses on what ought to happen at the end of war. In this regard, *jus post bellum* consideration with the vindication of human rights &

prosecution on the occasion of its violation will evaluate the interrelationship between the three conditions of JW and the associated discrepancies that have interfered with *post bellum* concern. *Jus post bellum* evaluation in this chapter is undertaken due to an overwhelming neglect of post-war justice and in the heightened abuse of individual rights at the pretext of national security. The aim of this chapter alludes to the importance of the three conditions of JWT in maintaining JW claim for right resort to force and the dispensation of right administration of justice for crimes committed during war. For the purpose of right administration of justice for crimes committed post-war, several levels of presumptuous sins based on “intention” are discussed in the chapter.

Chapter 7- Conclusion

This chapter will summarize the arguments and research findings of the thesis.

1.3 Research Objectives:

- To find the underlying concept of just-war (JW) in relation to the three conditions.
- To identify discrepancies that might have led to the compromise of JWT if there is.
- To evaluate if all the three conditions *jus ad bellum*, *jus in bello*, *jus post bellum* are consistent with JW aim.
- To evaluate *jus post bellum* condition and the associated discrepancies that could have interfered with *post bellum* concern with the vindication of human rights and just prosecution on the occasion of its violation.

1.4 Research Methodology

This research will be analytical based on texts and other relevant materials.



Chapter 2

War: Just-War Theory context

2.1 Introduction

The chapter deals with incongruities in schematic organization of the theory. This chapter will assess viability of JW Pacifism against JWT in order to resolve problem of contextualizing JWT.

Available literature on JW exhibits two contrasting schematic views about the theory. For ease of organizing, the study divides these contrasting views as 'narrow schema' and 'broader schema.' While the broader schema situates just-war concept between the extremes of Pacifism and Realism, the other posits the concept within a narrow confinement of Pacifism- with just-war concept having more affinity to Contingent Pacifism rather than Absolute Pacifism. However, based on the chronological argument the thesis adopts the broader schema in order to contextualized JWT within the domain of war.

The problem of the systematization of JWT is discussed in the following.

2.2 Schematic organization of JWT:

2.2.1 Narrow schema

Although a commitment to the idea of peace is old, the theory of Pacifism is but of recent origin. Pacifism was officially adopted by the 10th Universal Peace Congress of 1901 with the codification of the term by French peace activist Emile Arnaud (Fiala, 2018). Beginning with William James, Pacifism in the 20th century later became synonymous with various views that are critical of war (2006). Other peace-oriented disciplines like "Peace Studies" as well evolved with the advent of modernity (Samaddar, 2014; Barash & Webel, 2014). Thus, the existing literature shows that Pacifism, in contrast to JWT, is of recent origin.

The study also maintains that JW Pacifism, popularly known for Contingent Pacifism, is a derivative of JWT. The conjunction of Pacifism with JWT concept is, therefore, of more recent development in contrast to JWT itself.

With JWT in mind, Contingent Pacifists have formulated their idea of warfare. From the traditional conception of JWT, Larry May (2015) derived a version of Pacifism known as Contingent Pacifism or JW Pacifism. JW Pacifists object modern means of warfare on the

ground that it does not maintain the standard of JWT. It is based on the claim that modern warfare do not distinguish between combatants and non-combatant populace. This claim is particularly true in the case of aerial bombardment. As such, this has led to the absolute prohibition of certain wars like nuclear war (Moseley, 2021). In contrast to JW Pacifism, JWT can be stretched back to the time of the Roman era. Though human civilizations have been familiar with the art of war and the rules thereof, it was only during the Roman era that just-war theory was officially codified. This codification began with the writings of Cicero (106 BC) and Augustine (354 AD). While Cicero's understanding of war represents secular strand and linked war with the idea of justice, St. Augustine's just-war thinking reflects both secular and theological imprint (May, 2015). Augustine established his conception of just-war when the Roman Empire was collapsing around him. Augustine was confronted with the question of what justifies war. He was thus primarily concerned with Christian's participation in the war. While the wicked are not particularly concerned about fighting a war in a just manner, the righteous, at best, can hope for just wars rather than unjust ones (Moseley, 2020). Thus, after applying the argument from timeline to assess the viability of JW Pacifism against JWT, the former chronologically appears to be more recent in origin than in comparison to the latter. Since, in comparison to JWT, Pacifism is more recent, the thesis chapter maintains the claim that the latter cannot encompass the former. This shows that JW Pacifism is derived from the traditional conception of JW.

2.2.2 Broader Schema

The claim that JW Pacifism cannot encompass JWT for the former being of more recent origin is further strengthened by the line of thinking that maintains a popular conception about war. Three strands of thoughts about war are Pacifism, Realism, and Just-War Theory (JWT). Broader schema thus maintains JWT as a middle standpoint between the other two. "Just War standpoint mediates between the extremes of Pacifism and Realism; Pacifism, which does not allow for war under any circumstances, and realism which permits war whenever the interests of the state are at stake" (Kolff, 2003). JWT then is a standpoint that justifies means of violence selectively and only for the achievement of justice, peace, and order (Cox, 2015). That is, where just-war tasks to validate some war, it also aims to limit other (Fiala, 2018). JW, therefore, recommends going to war only when necessary and inevitable. Realists, on the other hand, are those set of thinkers who think that morality has no scope in the discussions of war. For realists, "...if adhering to a set of just-war constraints hinders a state in this regard, it ought to disregard them and stick soberly to attending to its fundamental interests in power and security" (Orend,

2004, p. 164). Thus, realists generally share a common point of not applying any moral principles in war beyond the state's self-interest. In contrast to Realist's conception of war, Pacifists do not believe in the use of force under all circumstances, even for self-defence (Fiala, 2018). But one of the occasions where Contingent Pacifists accept war is in the case of Just War (Fiala, 2014).

The existing difference between Pacifists and JW theorists further boils down to the concern on right resort to force, and the ethical deliberation on war. Ethical deliberation on war is driven by the concern for a *correct starting point for moral reflection on war* (Reichberg, 2002, p. 337). Within just-war tradition, the concern for right approach to the justness of war is reflected in a continuing debate on whether the concern either constitutes a presumption against war (PW) or presumption against injustice (PI) (Reichberg, 2002; Vorster, 2015). Presumption against war begins with a “reflection on the obligation to ‘do no harm’” (Reichberg, 2002, p. 337) and *derives a strong presumption against the use of force*² (p.337). By contrast, a presumption against injustice “argued for a more proactive conception of military force” (p.338). Regarding the use of force, those who hold the view of a presumption against war tend to limit the use of violence even for self-defence (Fiala, 2018), underestimate the weight of injustice in human affairs, and believe in the separation of war from the ordinary, and expected task of political governance. Those on the side of a presumption against injustice “argued for a more proactive conception of military force” (Reichberg, 2002, p. 338). They do not believe in the separation of civic leadership from the politics of war. Rather, they argue that moral judgment about war should begin with a consideration on the duty of civic leadership to foil serious wrongdoings (Reichberg, 2002).

Just-war theory, a commitment that justifies the means of violence (Cox, 2018), thus developed as an attempt to limit war when war became rationally justifiable (Bishops, 1984).

² Force is a broad term which is often interchangeably used with violence. Violence is the intention of a person or a group of persons to use force either physical or threatened power against an individual or a group of persons with the intention to cause injury, death, deprivation and oppression. Since the definition of violence depends on its purpose, any instrumental use of violence such as a *threat* used for intimidation and coercion also comes under the purview of *force*. In fact, World Report on Violence and Health (WRVH, 2002) defined violence as “the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group of community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, mal development or deprivation.” Force in military exercise encompasses the use of violence during armed conflicts, war or violent political conflict. *Force* specifically used in the context of war or military force more often involve all forms of violence: collective violence, cultural violence, structural violence, psychological violence, physical violence including war or the use of military force.

Just-war, as a theory, claims for right resort to force and for just engagement in war. Therefore, Just-War Theory falls within the scope of war.

From the above discussion, we observed that the reading of JW literature exhibits two contrasting schematic views about the theory. The study divided these contrasting schematic views as narrow schema and broader schema. To resolve the problem of systematization of the theory, the thesis chapter assessed viability of JW Pacifism against JWT. This chapter thus resolved the problem by contextualizing JW within the broader dimension of war. Based on the Chronological argument, the thesis chapter dissertated that JW Pacifism is chronologically more recent than the Medieval conception of JW. Therefore, the claim that JW Pacifism cannot originally encompass the idea of JW.





Justice: Ethical Underpinning of JWT

3.1 Introduction

JWT's aim for just practices in war recommends the use of force exclusively within the conditions of *jus ad bellum*, *jus in bello*, and *jus post bellum*, respectively. While the ethical analysis of war strictly mandates compliance of the use of force to the three conditions of JW, this chapter aims to find the underpinning conception of JW. In this respect, this thesis chapter derives “justice” as the unifying theme that undergirds the concept of just-war. Justice as the unifying theme emerges across the three conditions of JW. Further analysis of justice reveals multifaceted nature of the concept; revealing the nature of justice as truth, fairness, harmony, and proportionality. Conceptual analysis of justice exhibits varied ethical, moral, religious, social, and political virtues. Important highlights of the chapter also include the interplay of certain virtues to a nation's rise and fall. Earlier JW thinkers’ understanding particularly reflect the importance of virtuous practices in a war. Hence, the thesis' reassertion of the importance of justice in social interaction and in the context of JW in particular.

Where conceptual analysis of justice is significant for its own sake and for the aforementioned reasons, this analysis is vital due to the prevalence of widespread misconceptions about the nature of justice. Since any misconstrued notion about justice not only breed the wrong belief that supposed injustice as virtue and justice as vice and consequently lead to the advocacy of injustice in social and political interaction, hence this thesis chapter aims to inquire the nature of justice especially in the context of just-war. Moreover, the reassertion of justice in JWT context is especially pertinent when considered against the declining morality of war. This concern therefore forms the motivation of the objective of the thesis chapter.

3.2 Justice: Underlying conception of JW

Ethical deliberation on war is driven by the concern for a *correct starting point for moral reflection on war* (Reichberg, 2002, p. 337). Within just-war tradition, the concern for right approach to the justness of war is reflected in an ongoing debate on whether the concept is either constitutive of a presumption against war (PW) or presumption against injustice (PI)

(Reichberg, 2002; Vorster, 2015). The study claims that the presumption is indeed against injustice. It does so by positing “justice” as a foundation upon which JWT is postulated. JW's aim for right resort to force and just engagement in war is therefore highlighted in the prerogative that permits the use of violence or force only within the prescribed norms of justice.

3.2.1 Conceptual analysis of Justice

The claim that just-war as a theory is intricately linked to the concept of justice must begin with the analysis of the concept. Conceptual analysis of justice reveals "justice" as the underlying unifying theme of JW. Elaboration on the discussion of Justice as the underpinning idea of JW is stated in the following.

3.2.1.1 Justice: A Unifying theme of JW

Etymologically, the term *jus* or *ius* suggests various meanings. The Latin word for *jus* signifies a right, power, privilege, or an aggregate of laws taken as a whole (Law, 2008). In this sense, *jus* is the right to sue one's right in a law court. It also means the place where justice was sought (Wikipedia, 2021). *Jus* or *ius* is, therefore, a bunch of laws formulated for the vindication of rights or a wrong by means of war. It also stands to justify certain wars considered to be just and right under certain compelling circumstances. These circumstances include the susceptibility of human rights outside the domain of justice and may include human rights abuse of soldiers by the institution of war³.

Although Cicero (106 BC) and St. Augustine (354 AD) hardly believed in the possibility and justifiability of just-war, including that of their time (May, 2015), they justify war for the cause of justice. Consider Cicero's contribution to JWT. His unique contribution to just-war theory represents a three-fold conception of justice: justice in the commencement of war, justice in right conduct during war, and justice in the aftermath of war. Cicero's *jus in bello* concerned with justice during war asserts the permissibility of combatants class alone to fight during a war (Cicero, 1913). His *in bello* concern also strongly negates cruelty employed during a war. This *in bello* justice condition for the honorable conduct of combatants during a war is so important that Cicero based *jus post bellum* condition of war on it (May, 2015). Thus,

³ Some of the authoritative readings on the issue of human rights abuses by the institution of war include *Hegel: Elements of Philosophy of Right* (1991); Ilan Zvi Baron's *Dying for the State: The Missing Just War Question?* (2010); Cheyney Ryan's *Democratic Duty and the Moral dilemma of soldiers* (2011) and others.

the three conditions of warfare *jus ad bellum*, *jus in bello*, and *just post bellum* are all concerned with justice at different stages.

Rules of warfare, also known as *jus in bello* consideration of justice during a war in general, must be distinguished from *jus ad bellum* rules of commencing a war justly and *jus post bellum* focused on just outcome at the end of a war. These three-fold conditions are all concerned with justice at different stages of a war. While *jus ad bellum* principle of just-war theory aims at justice in the right commencement of a war, *jus in bello* justice in the conduct of war commences in violation to *jus ad bellum*. Finally, the criterion of *jus post bellum* concerned with justice in the aftermath of war maintains the claim for right resort to force so as to object wars that may destabilize long-term peace, justice, and stability. Since the influence of justice stretches across all the three conditions of just-war, “Justice” as a unifying theme emerges. Thus, justice is the underlying theme undergirding the conception of JWT.

3.2.1.2 Interplay of Justice in social interaction

The term *jus* in Latin also enjoins the idea of joining or fitting together in a bond. Justice in this derivative sense suggests the joining or fitting together of men in an organized system of human relations. Justice plays a vital role in social interaction. While it aims to achieve peace and harmony in social interaction on the one hand, justice, on the other hand, focuses on the establishment of a just state in the lack of it (Mahajan, 2008).

3.2.1.2.1 Justice as Fairness

This section will inform justice as fairness in its existential, metaphysical and political imports. Justice, when understood in terms of equality is fairness. Justice ethically is the quality of fair mindedness. While the existential import of justice imbibes the concept of truth and equality in social cooperation; justice in its metaphysical import invokes religion and divinity to the concept therefore, an affinity between positive law and higher law is maintained; the political import of justice conveys the idea of harmony, equality and proportionality in the writings of the Early Pythagoreans and Francisco Vitoria. In the works of John Rawls, St. Augustine, Roman Lawyers and others the existential, metaphysical and political significance of justice as fairness is discussed in the following.

3.2.1.2.1.1 Existential import of Justice

John Rawls' (1921-2002) theorization of justice starts as an inquiry into our basic assumption asserts the primacy of justice and truth. His theory of justice asserts that truth and justice are uncompromising virtues in human activities and that they are inevitable for social

justice and for the achievement of a well-ordered society (Haokip & Prabhu, 2020, p. 36). In his theory of justice, Rawls interprets what is known in the traditionalist social contract theory as "the state of nature." By this idea, social contract theory explains and even justifies the formation of the state. The theory explains that the state of nature is conditioned by perennial conflict for resources and dominations of one group over another. According to Thomas Hobbes, this state where "all is against all" came to be resolved in the formation of the state, which is based on certain contractual agreements. However, Rawls proposed "original position" represents a new form of contract produced by people in the initial situation (p.37). Therefore, the chapter's assertion that Rawls (1971) "original position" if it has not replaced, presents an alternative to social contract theory's "state of nature" by firmly positing truth, fairness, equality & justice in social interaction.

John Rawls (1921-2020) in his "Theory of Justice" (1971), advanced the concept of justice as "fairness." His concept of justice as fairness focuses on equality in the "original position." The original position is the hypothetical state of equality wherein free people engaged in social cooperation in order to arrive at the principles of truth and justice- the bedrock for social justice and a well-ordered society. The principles so derived by the original agreement would in turn, determine the standard of what is to be considered just and unjust, especially with regard to the proper assignment of rights and duties in the basic institutions and distribution of benefits in social cooperation. In this hypothetical state of affairs, free people, through rational reflection, can choose rights and entitlements from a "veil of ignorance." We arrive at veil of ignorance by excluding the knowledge of those contingencies which set men at odds and allows them to be guided by prejudices. Thus, Rawls's theory of justice as fairness aims to exclude personal prejudices in the choices of principles for just state and in the judgments we make about them. The choice of the principle of justice in turn is imperative for the establishment of social justice and a well-ordered society (Rawls, 1971).

John Rawls' claim for the inevitability of justice and truth for social justice and a well-ordered society is reflected by his theory of justice. Rawls considered justice so important that he called it as "the first virtue of social institutions" (Rawls, 1971, p. 3). For him, as truth is to the system of thought, so is justice to social institutions. Rawls, therefore firmly posits the validity of any theory to the truth. Correspondingly, the validity of laws and institutions are subject to the standard of justice. For Rawls, any theory, laws, and institutions are subject to the test of truth and justice. Thus, any theory that fails to stand by the test of truth is liable to

revision or rejection. Likewise, any laws and institutions that do not stand up to the test of justice must be subject to reformation or abolition (Rawls, 1971).

While Rawls in his 'Theory of Justice' (1971), is concerned with laying out foundational principles away from preconceived notions for a well-ordered society, his other work 'The Law of Peoples' (1999), proposes the possibility of adopting principles at second level contract. These principles so adopted would be applicable for governing international relations. This includes eight principles "for the purpose of judging the aims and limits of war" (Rawls, 1999, p. 4). These principles correspond to *jus ad bellum* in traditional just-war theory. These principles lay emphasis on freedom, of keeping promises, equality between all parties, territorial autonomy, the right to self-defense, protection of human rights, restrictions in the conduct of war, and humanitarian intervention. The seventh of the eight principles endorse limits in the conduct of war and therefore commands the observance of certain restrictions in the conduct of war. It restricts conduct of war by distinguishing between outlaw leaders and their civilians, while at the same time provide amenities for the protection of human rights of both civilians and combatants, and judges the appropriateness of an action or policy by means-end reasoning (p.94-96).

From John Rawls' *Theory of Justice* (1971), the study observes an intricate link between justice, truth, and equality in choices of principles that would determine the standard of what is to be considered just and unjust in the proper distributive shares. Rawls considered truth and justice so integral in social interaction that he subject any theory, laws and institutions to their test. Rawls' insistence on the application of truth and justice is particularly important when considered against its pertinence for the conceptual analysis of justice. By firmly positing truth, fairness, equality & justice in social interaction, the study has asserted that Rawls (1971) "original position" if it has not replaced, presents an alternative form of contract to social contract theory's "state of nature." Rawls was concerned with laying out foundational principles away from preconceived notions in order to establish a well-ordered society. He also proposed the possibility of adopting principles at second level contract for the governance of international relations. His thinking thus represents different aspects of knowledge but one that converges in the emphasis of justice and truth in the choice of principles from personal inclinations and prejudices by subjecting to the test of truth and justice.

3.2.1.2.1.2 *Metaphysical import of Justice*

The importance of justice in social interaction is further suggested by the metaphysical import of justice. St Augustine's (354-430) understanding of justice advanced an affinity between justice with religion and divinity. His conception of justice not only suggests the absence of discord and conflict but strongly connotes "building up of a right relationship between man and God" (Mahajan, 2008, p. 365). The Roman Lawyers likewise conceived the conformity of positive law and higher law in the conception of justice and what is right. Justices may be defined as "a fixed and abiding disposition to give every man his right. The precepts of law are as follows: to live honorably, to injure no one, and to give every man his own. Jurisprudence is a knowledge of things human and divine, the science of the just and the unjust" (p.365). As such, in Roman conception, the Lawyer was considered a "priest to justice" (p365).

Augustine's conception of justice not only yields the belief in the justness of war but also of the possibility of a just-war in the inevitability of it. Since Augustine believed in the justifiability of few wars as just-war, he was, therefore, concerned with the rules of engaging in a warfare that aligns with the standard of justice.

Further investigation of the concept reveals a harmonious and proportional aspect of Justice. These aspects of justice, therefore, assert the relevance and importance of justice for the achievement of social justice and for the establishment of harmony and order in social interaction. Plato's *The Republic* (1943), which is one of the earliest available literatures on the nature of Justice impressed upon the establishment of Justice for social Justice and harmony. The theme of social justice that emerged during the course of inquiry between Socrates and his interlocutor, Thrasymachus stressed on the relative nature of Justice and Injustice. In *The Republic*, the notion of Justice advanced by Thrasymachus comprised in the interest of the stronger. As such, a just duty of the subjects now includes the demand for obedience to the laws that have been framed in the interest of the stronger. However, unlike Thrasymachus' Ruler, who rules for and according to his interests, Socrates' true Ruler frames laws in the interests of his subjects. Thus, often like a skilled artist, a true ruler never errs or makes mistakes in his commands. What makes this possible as Thrasymachus had suggested is his concern with the interest of his subjects which compose the weaker section and not the stronger.

The bifurcation on what constitutes or should constitute the nature of a true ruler further condenses in their conception of the intention of the Shepherd, who is also the Ruler of the states. Owing to their intention, Thrasymachus was pessimist about the possibility of a good

ruler. For most of the time, Thrasymachus observed that the shepherds tend to get the pleasure of diner or a banqueter or so that he can gain a profit by trading the sheep in the marketplace. Therefore, his supposition that “perfect injustice is more gainful than perfect justice” (Plato, 2021, p. 33) further led him to the misconception that injustice is more advantageous than justice. This misconception eventually led him to attribute the qualities of Justice to injustice. So, for some limited and temporal advantages that injustice offers, Thrasymachus was convinced that injustice is a virtue and justice vice (Plato, 2021).

Nevertheless, this does not align with Socrates' understanding of the nature of a true ruler. According to Socrates, the Shepherd always regards the lives of his flocks or subjects, be it in public or private. Whereas Thrasymachus' understanding of the shepherd reflects more of the nature of hirelings⁴, Socrates' definition of a true ruler by far reflects a right understanding about the nature of a Shepherd. Shocked by the cunning devices that had exchanged the just for the unjust, Socrates firmly emphasized that while characteristic to justice is the quality of virtue and wisdom, injustice is characterized by vice and ignorance. Hence, Socrates not only disarmed Thrasymachus of the misconception that led him to call injustice virtue, but he also asserted the fact that Justice is indeed stronger than injustice.

3.2.1.2.1.3 Political import of Justice

The concept of justice conveys the idea of proportionality. Justice as proportionality dates as far back to the time of ancient Greece. The earliest conception of justice is found in the works of the early Pythagoreans (600-400 BCE). This group of thinkers conceptualized “justice as a square number,” which is a number multiplied by itself. Justice mathematically represented by a square number was equated with the concept of harmony or proportion. From the equal parts of a square number, the Pythagoreans derived the concept of a just state. According to the Pythagoreans, "a state is just if it is composed of equal parts and justice is the continuance of that equality" (Mahajan, 2008, p. 364). Later, Francisco Vitoria's (1483) just-war thinking also represents harmonious and proportional aspects of justice. His three conditions of JW allude to the principle of proportionality. This is apparent where his just-war criteria aim at:

- proportionality between the cause and the reasons of war,
- proportionality between the method and its conduct.

⁴ These rulers are unwilling to govern without remuneration and exchanged their duty for benefits, even compete for these benefits. By this definition most of the rulers do not qualify the standard of a Shepherd, who is a true ruler.

Thus, Francisco's just-war conditions seek the observation of due proportion during a war, during its prosecution, and after victory (Suarez, 1944). Thus, Justice plays a vital role in social interaction- resolving conflict by employing war. The chapter will further discuss the existential import of justice in the following.

3.2.1.2.2 Justice is a virtue

Conceptual analysis of justice reveals the nature of justice as truth, fairness, harmony, and proportionality. Since the nature of justice exhibits an amalgamation of varied ethical, moral, religious, social, and political virtues, this study claims justice as a virtue. This claim is apparent in earlier Just-War thinking. Traditional JW thinkers well understood the interplay of certain virtues to a nation's rise and fall. For instance, Augustine associated the decline of the Roman Empire with a lack of virtue. His classical work *De Civitate Dei* (1470) recorded how the successes of the Roman Empire rest on some virtue and justice it possessed in the earlier stage of its development. By dint of these virtues, the Roman state could produce peace and enjoyed a lasting reign in their Empire. *However, its strength disintegrated because the state was not inspired by the love of God but by national pride and desire for imperial glory* (Vorster, 2015, p. 56). This understanding is also reflected by Plato in his dialogue *Laches* (399-390 BC). Here, Socrates and Plato insisted on inculcating prudent steadfastness and courage in order to manifest just practices in war (Plato, 2006). Thus, just-war as a theory is grounded on certain virtues.

Justice is a virtue since it represents the quality of justness, rightness, fairness, and being reasonable. This moral and ethical concept is averse to what is unjust, wrong, or unreasonable (Mahajan, 2008). Thus, while the positive connotation of justice upholds what is just, right, fair, and what is lawful, the negative connotation of justice denounces injustice, falsehood, and anything that illegal.

3.2.1.2 Criticism

But where traditional JW thinkers understood the interplay of certain virtues to a nation's rise and fall, modern JW discourse seems to have *relinquished some of its earlier moral roots* (Vorster, 2015, p. 56). This is apparent in medieval just-war theory to justify some war to deter a danger that causes even greater harm than war itself (Reichberg, 2002; Vorster, 2015). While medieval just-war tradition highly regarded internal dispositions such as *virtue and right intention as important criteria for war ethics, modern just-war discourse rarely addresses issues of character*. (Vorster, 2015, p. 55). As a consequence, there is a common belief that

grants an irreconcilable antagonism between law and arms. This deception is most apparent when considered against the common belief that the administration of a commonwealth cannot be carried on in the absence of injustice. This is especially true when considered against a sovereign (State or King) that considered nothing unjust, expedient. In fact, according to Hugo Grotius (1583-1645), those who assert antagonism between law and arms promote injustice. Yet, just-war as a theory is embedded in the concept of justice claims for right resort to force. JWT in this sense, is a body of law that aims at just practices in war.

3.2.1.2.1 Utilitarianism

While Utilitarianism advances its own conception of justice, the study observes greatest impediment of justice in the idea of Utilitarianism. Therefore, contrast to the Utilitarians claim the study have formulated three-fold arguments in order to discuss why Utilitarianism is not a viable form of justice.

3.2.1.2.1.1 Utilitarianism is a form of egoism

Any argument against justice is based on utilitarian principle. Utilitarians include a set of people who refute universally accepted law of nature based on relative law. Accordingly, this rejection of justice includes the reduction of law to the level of mere utility. In their denial of justice, the Utilitarian even went further and replaced justice with mere utility. They not only deny justice but they even consider utility as the mother of what may be considered as fair and just. Utilitarianism is, therefore, a belief that all actions "are impelled by nature toward ends advantageous to themselves" (Grotius, 2006, p. 388).

There are various forms of Utilitarianism, but one that centers on the aim to obtain the greatest happiness and satisfaction of the greatest number and in the search for utility. Though there is nothing wrong with the utilitarian principle and rather sounds attractive and appealing, yet, Utilitarianism in contradistinction to its claim is deeply embedded in a form of egoism⁵. A classic example of Utilitarianism is found in the disposition and teachings of Carneades.

Carneades (214/3-129/8 BC), a renowned academic skeptic of ancient Greek school, was widely admired for his power of oration. He, however, was infamous for having rendered the art of eloquence to the service of falsehood. Carneades, in fact, represent a wide-ranging section of this crowd. His philosophical prowess and art of oration are most evident in his praise for justice on the one hand and with equal zeal and persuasion in his praise of injustice. While

⁵ The philosophy of self-centeredness.

his praise for justice is founded on natural law, his persuasion to injustice is most evident in his reduction of justice to the level of mere utility. Carneades denied universally accepted law of nature for relative law. According to him, all law varies depending upon any particular customs, for the same law changes over time. His rejection of the law of nature led him to conclude that utility is the principle driving force. Subsequently, this philosophy has led to the reduction of law to mere utility. Since *there is no law of nature*, actions of all creatures *are impelled by nature toward end advantageous to themselves; that consequently, there is no justice, or, if such there be it is supreme folly, since he does violence to his own interests who consults the advantage of others* (Grotius, 2006, p. 388).

To the Utilitarian, the standard of measurement for what is fair and right is utility. As such, some have mistakenly conceived violence as a virtue. Consequently, to seek justice and advantage of others in social life amounts to an act of supreme folly. Thus, to the utilitarians, the relative law of nature is important over universally accepted law of nature. Such attitude, however, is pernicious in that it not only reduces law to the level of mere utility but consequently promotes injustice in social life. Nevertheless, this is not the case with JW since the conception of justice undergirds the theory.

However, according to Grotius, utilitarian's ridicule of justice is folly. For while they consider the regard of laws for their own sake right and for immediate advantage, they on the other hand, deny other of the same privilege. The utilitarian commits themselves to such attitude all the while being aware of the disadvantage it would pose for himself and for his future posterity. A similar consequence endangers the future of those who transgress the law of nature and the law of nations. As such, Hugo firmly holds individuals, rulers, and nations accountable to the standard of justice. On the contrary, Hugo states the view that holds individuals, not nations or rulers, accountable to the standard of justice as erroneous. This error stems from those instances where the law did not prove advantageous and fail to protect an isolated citizen. The same pattern of erroneous thinking fed by a sense of adequacy even outside the requirement of justice thus came to consider that a state is immune to such disadvantages. The misunderstandings regarding the state are because it seems to "contain in themselves all things required for the adequate protection of life" (p.390). Just-war theory, therefore, aims to demystify the common belief that grants an irreconcilable antagonism between law and arms. Thus, the theory is a body of law that aims at just practices war. The theory represents a belief in justice of war and of just outcome by overcoming presumed general antagonism between

law and arms. The chiefs concerned of the theory are regarding lives- mainly with the issue of civilians' protection during warfare and with right resort to force.

It is observed that Utilitarians in their emphasis on self-centredness and utility have no fixed standard of judgment. Since Utilitarianism has refuted universally accepted law of nature for relative law, utility becomes the sole governing authority when it comes to the consideration of fair and right. While Utilitarians have exchanged what is fair and right with utility to such an extent that some have construed violence as virtue, Hugo Grotius considered Utilitarians' ridicule of justice as folly. For by transgressing the laws of nature and nations, Utilitarians endangered the future of their own and their posterity. Since the individuals and states or nations are not immune to such disadvantages, Hugo holds individuals, rulers, and nations accountable to the standard of justice. The aims of Just-war theory is to demystify the common belief that grants an irreconcilable antagonism between law and arms.

3.2.1.2.1.2 Utilitarianism is structurally inconsistent to sound ethical doctrine

John Rawls Theory of Justice (1971) a work dedicated with the re-examination of the foundation of our thought system and of the principles of social and political institutions not only subject them to the test of truth and justice but it invariably connects the concept of "good" with "right." While Rawls rightly pointed out that right and good are the main concepts of ethics, he also taught that the structure of every ethical theory are determined on the basis of how these concepts are defined and join to one another. Nevertheless, Teleological Utilitarianism's definition of the good is disconnected from the conception of what ought to be considered as right (Rawls, 1971). Nonetheless, owing to the importance of the end to the means didn't utilitarian like John Stuart Mill (1806-73) first aimed at the inquiry of the ultimate good, the *summum bonum* of life? Mill's acute awareness about the importance of the end to the means surfaces in the wake of the consideration of good apart from the right. For this reason, when pleasure takes the role of good, all boundaries between right and wrong pleasure suddenly disappear. Mill was well aware of the implications the end has to the means. As such, he was concerned with the determination of the ultimate good, the end to be pursued first since it predefined the rules of action. Mill in the *Utilitarianism* (1863) states,

All actions is for the sake of some end; and it seems natural to suppose that rules of action must take their whole character and colour from the end at which actions aim. When we are pursuing something, a clear and precise conception of what we are pursuing would seem to be the first thing we need, rather than being the last we are to look forward to (Mill, 2017, p. 1).

Mill, therefore, tacitly recognized and for that matter made the assertion that end and means are not interchangeable. However, this assertion also imply that the means employed gets its character and colour from the end. Thus, Mill was very well aware about the implication the end has to the means. But the study observes that his preoccupation with the inquiry of the *summum bonum* as well pursue the ultimate good in the absence or misconception of the idea of right.

While Rawls have pointed out that the structure of every ethical theory are determined on the basis of how the concepts of right and good are defined and joint to one another, Utilitarians in general have considered good apart from the right. Further, when we take Mill's insistence on the principle that the end of an action impart its character and colour to the means employed and apply it to utilitarians' pursuit of pleasure, Utilitarianism, in the absence or misconception of the idea of right at most lends up in hedonism and eudaimonism.

3.2.1.2.1.3 Utilitarians compromise of end and means

Unlike Immanuel Kant's (1724-1804) "Categorical Imperative" which obligate us to the performance of certain rules of behaviour especially toward our fellow humans, Utilitarians with the exception of John Stuart Mill⁶ often make the mistake of interchanging the end to the means. In contrast to the Utilitarians, Kants categorical imperative exhorts us to treat our fellow humans as an end in itself, and never as a means. Since Kant's moral philosophy is concern with morally right and wrong actions in order to bring about right dealings with our fellow humans, his categorical imperative adhere to the idea of justice. But Utilitarianism for its reduction of end at mere utility has failed to be a proven theory of justice. Even Mill's inquiry about the *summum bonum* for lack of proof, lends up in the reduction of the ultimate end to the level of mere utility. According to Mill, *Questions about ultimate ends can't be settled by direct proof. You can prove something to be good only by showing that it is a means to something that is admitted without proof to be good* (Mill, 2017, p. 3). For Mill, everything else is subservient to the *summum bonum*⁷, the ultimate end. However, for lack of proof Mill's inquiry about the *summum bonum* as well reduces the ultimate end to the level of mere utility. To Mill since the

⁶ Mill was well aware about the implications the end has to the means; thus, he prioritized the inquiry of the ultimate good, the end to be pursued first since it predefined the rules and color of actions.

⁷ Since more than two thousand years of the inception of Philosophy there has been a wide disagreement between Philosopher's on the question of the greatest good, the *summum bonum* of life. In other word, the issue more specifically deals with the determination on what constitutes the foundation of morality. This disagreement however remains unresolve to this day.

nature of ultimate ends is indeterminate and is not subject to *direct proof*... *whatever is good is not good as an end but as a means to something* (p.3). The reduction of what is supposed to be an end to the level of utility and means is thus observed across the broad spectrum of Utilitarianism. As such, Utilitarianism is not a viable theory of justice.

The claim that the ethical deliberation on war presupposes presumption against injustice posits “justice” as a foundation upon which JWT is postulated. Corresponding analysis of justice revealed the multifaceted nature of the concept. This analysis also established justice as the underlying unifying theme of JW in that the influence of justice stretches across all three conditions of just-war. Hence, the claim that JW is upheld by the virtue of justice. Valuation of the concept of justice clarifies the common mistaken notion of JW in the pre-eminence of justice in social interaction and identifies popular misconception to the Utilitarian standard of measurement- the philosophy that has exchanged what is fair and right with utility. This chapter also resolved the commonly held belief that presumed an irreconcilable antagonism between law and arms. It does so by reasserting the concept of “justice” the context of a just-war.

Since the thesis chapter has established justice as the underlying conception of JW, the following three chapters are dedicated to the deliberation on the discrepancies in the dispensation of justice in the commencement, during, and after a war. The need to identify discrepancies that have led to the compromise of JWT is pertinent when considered against the declining morality of war.



Jus ad bellum: Justice in the Initiation of War

4.1 Introduction

In the ethical deliberation on war, the previous chapter titled "Justice: The Ethical Underpinning of JWT" had postulated "justice" as the foundation of JWT. This postulation mandated the discussion of *jus ad bellum*, *jus in bello*, and *jus post bellum* conditions within the prescribed norms of justice. However, the present chapter aims to identify discrepancies that might have led to the compromise of *jus ad bellum* condition of JWT.

Some other issues that will be discussed within this chapter include: the controversy between traditionalists and revisionists on the assumptions of justified wars; the problem of moral compromise in MJW discourse; and the issue of obligation or compulsion. These issues will be discussed within the criteria of just-cause, right intention, and authority, respectively.

4.2 *Jus ad bellum* justification of war

Jus ad bellum, the first among the three conditions of Just-War Theory, aims at justice in the initiation of war. This condition maintains moral justifiability of resorting to force within the prescribed conditions of JW. The *jus ad bellum* ethical framework for conducting war in a just manner (Moseley, 2020), therefore, stressed that the principles of justice of war aim be guided by the criteria of "just cause," war being considered as a "last resort," declared by a "legitimate authority" (Moseley, 2020; Cady, 2014) with "right intention (Solomon, 1996) with guaranteed fortuity of success and proportionality in the means used to achieve the end (Moseley, 2020). All these conditions aim at right use of force. This chapter will mainly discuss *jus ad bellum* criteria of justice in the commencement of war in light of the following questions:

- When is it justified to go to war? (Moseley, 2020).
- Who may permissibly wage war? (Grotius, 2006)

While the first question is principally concerned with just cause and right intention norms, the latter mainly concerns legitimate criterion of just war.

4.2.1 Just cause

According to the just cause criterion, not all causes of war are just. While waging of just war demands a just cause (Vorster, 2015; Solomon, 1996), some causes of war are swayed by the regard for what is useful, others motivated for what is just (Grotius, 2006). In this regard, Dr. Aaron Ralby's (2013) in-depth analysis of military history reveals dual aspects of warfare. His understanding of the world of warfare captures the changing as well as the unchanging faces of war. According to him, while the nature of war has changed with the emergence of new technology and tactical innovations, the causes of war are almost constant⁸. He states,

Although the nature of war has changed, the reasons for war remained constant. Wars are still waged in competition over territory and resources; out of hatred, intolerance, or the desire for vengeance; or because of the simple greed for the glory of individual rulers, who by the very force of their character rally vast armies to fight for their cause-however just or unjust (Ralby, 2013, p. 8).

Since the justness of war depends on the cause for which war is undertaken in the first place, *jus ad bellum* concern with justice in the commencement of war asks, "When is it justified to go to war?" Other pertinent issues of just-cause include the traditionalist's and revisionist's contention on justified wars.

4.2.1.1 Traditionalists definition of war

JW theorists believe in the possibility of war, and they justify some war in the inevitability of it. Thinkers like Marcus Tullius Cicero (106 BC) and Hugo Grotius (1583) suggested that war is not in conflict with the law of nature. Cicero's justifies the use of force on two principles. "First according to nature" (Grotius, 2006, p. 394) is the principle Cicero advanced for the justification of war. According to him, when force is used for self-defense, or for preservation, and self-assistance, war does not conflict with the first principle of nature. On the other hand, according to his Second Principle of right reason and nature of society- which he considers more important than the first principle, prohibits the use of "force which is repugnant to the society." This second principle advocates the use of force for the safeguarding of rights to be infringed by another. Thus, according to Cicero's just war thinking, use of force

⁸ Although Ralby's account for the causes of war doesn't represent JWT's conception of a just cause, it nevertheless reflects the importance of ethical practices introduced in the theory of a JW.

or violence per se is not unjust if “the use of force...does not violate the right of others” (Grotius, 2006)

Therefore, the traditionalist strand of JW thinkers justifies war for self-defense, national defense, and for humanitarian intervention to avert gravest of crimes. Exceptional to traditionalists strand of JW thinking is their justification of national self-defense. Walzer's (1977) recommendation to state's rights to self-defense was advanced for the preservation of fundamental human rights to life and liberty (Walzer, 1977; Grotius, 2006; Lazar, 2017).

This criterion of waging war justly demands that any military action must not be unprovoked (Solomon, 1996). While Cicero intended that war should right a wrong (Harrer, 1918), Aquinas' just war thinking retained a punitive conception of war in that it was either in response or violation of rights that need to be rectified (Solomon, 1996; Moseley, 2020). Therefore, the moral ground of a just cause cannot be detached from the good it aims to achieve, which is “to promote good and avoid evil” (Vorster, 2015).

4.2.1.2 Revisionists criticism

Revisionists, however, challenged traditionalist's position. Although both camps are fundamentally concerned with the morality of war, they hold different views on national defense, the policy of military intervention, and non-combatants immunity. Their difference is most apparent in the Revisionists' challenge of the Traditionalists' permissibility of war for national- defense, humanitarian intervention, and “the moral standing of the states” (Lazar, 2017, p. 38) held by the Traditionalists. While the traditionalists' ethics of warfare confined military action for national- defense, to support their ally, and in order to deter *crimes that shock the moral conscience of mankind* (Lazar, 2017, p. 39), Revisionists challenged the Traditionalists' permissibility of national defense. They reject traditionalists' protection of individual rights by States. Revisionists' rejection of the state's claim for individual rights is based on the claim that “states are often the preeminent threat to those rights.” This is evident when the prosperity of common life comes at the expense of the cultural minority (Caney, 2005). Revisionists, therefore, argued for expanded military intervention (Lazar, 2017).

4.2.2 Right Intention

Right intention criterion is paramount for the justification of any war to be just. For this reason, this criterion demands that war be not undertaken for wrong reasons (fear, greed, or cruelty), but should be waged only in pursuance of what is right and to coerce the wicked and to help a righteous cause (Grotius, 2006; Vorster, 2015). Despite its importance, the thesis

chapter observes a compromise in modern just-war (MJW) discourse. This compromise in *jus ad bellum* condition happened when MJWT stressed "just-cause" and "authority" as a sufficient criterion of just-war (Vorster, 2015). The chapter will therefore discuss this compromise of MJWT in its neglect of right intention criterion and in the problem of moral indifference.

4.2.2.1 Problem of moral indifference: Neglect of “Right Intention” in MJWT

Although modern just-war (MJW) discourse came to overlook right intention criterion in favour of just cause and authority, this study stress on the sufficiency of "right intention" in determining the moral justifiability of a war. The chapter's claim for the sufficiency of right intention is made on the assertion that just-cause and authority criteria suffer from certain limitations. Different factors responsible for moral indifference and neglect of right intention in MJWT is discussed in the following.

4.2.2.1.1 Inability to assess the subjective element of JW

The criterion of waging war justly demands that any military action must not be unprovoked (Solomon, 1996), that the aim of war be intended to right a wrong (Harrer, 1918), and that war be considered either in response or violation of rights that need to be rectified (Solomon, 1996; Moseley, 2020). In contemporary just-war (CJW) thinking, while stressed is often put on the interdependence of just cause with other valid *jus ad bellum* criteria, right intention also considered as the subjective element responsible for the justification of war is often overlooked. Intentional neglect of Augustine’s demand for “right intention” for the justifiability of any war came to be justified following the belief in the possibility of “a just cause without intending to fight for it; without anybody knowing it”⁹ (Steinhoff, 2014). Besides, modern just-war consideration of the sufficiency of just cause over right intention is perhaps because of the inability to assess the intentions or motives of people as in contrast to the assessment of just outcome in relation to their actions (Boyle, 2013). However, an inch mistake in the assessment of intention would be counterproductive to just-war aim. St. Augustine in his *Contra Faustum* (1887) of Vol. xxii described the counter-nature of right intention as “The passion for inflicting harm, the cruel thirst for vengeance, an unpacific and relentless spirit, the fever of revolt, the lust of power, and such like things, all these are rightly condemned in war” (p.74). Augustine not only condemned wrong intention, but despite MJW theorists’ claim for the sufficiency of just-cause and authority, he foresaw the impossibility of

⁹ “‘Right intention’, the subjective element of the justification of a war, on the other hand, is not to be subsumed under the criterion of just cause: there can be a just cause without anybody knowing it” (Steinhoff, 2014).

just-cause in the absence of right- intention. This asserts that just-cause and right-intention are synergistically linked. Therefore, the validity of just cause invariably leads to the question of right intention.

Moreover, the fulfillment of just cause criteria alone is not a sufficient criterion for waging a just-war as it has become considered in modern just-war theory. According to Larry May, wars of the past, which include WWII and its tactics of dropping bombs on populated centers, clearly indicate that WWII was not a just-war. Though it might meet just cause condition of just initiation of war, it nevertheless remains silent on the criterion of justly conducting or ending a war (May, 2015).

4.2.2.1.2 Separation of “Right Intention” from “Just Cause”

MJWT’s consideration of the sufficiency of “just cause” over “right intention” also came about in the separation of right intention from just cause. Although the norms of just-cause and right-intention came to be separated in modern just-war discourse, this was not so in traditional JWT. For *jus ad bellum* just-cause entails just-intention & right-agenda (Steinhoff, 2014; Solomon, 1996). Indeed, just cause is logically link to right intention. This logical connexion requires the satisfaction of right intention to just cause (Coady, 2007; Fisher, 2011; Lee, 2012; Pollard, 2013; Regan, 1996). Nevertheless, while traditional just-war thinking prioritizes subjective elements¹⁰ like virtue and right-intention as an important criteria of war ethics, MJW rarely care about addressing JW’s concern with the issues of internal orientation. Contemporary warfare came to disregard the traditional just-war requirement of *subjective* awareness (Steinhoff, 2014).

However, Augustine and Aquinas were particular about right intention in considering that war must not be driven by fear or greed, or cruelty but should be waged to secure peace by handling the wicked and helping the good. Their stress on right-intention criteria, *the subjective element of the justification of a war* (Steinhoff, 2014) (abstract), emphasized that the moral ground of a “just cause” cannot be detached from the good it aims to achieve, which is “to promote good and avoid evil” (Aquinas, 1997, p. 367). But when “just cause comprises all (valid) just war criteria *apart* from right intention” (Steinhoff, 2014, p. 43), compromised with the subjective requirement for justifying conditions for commencing a war justly is the possible outcome. Besides this, laxity in subsiding the subjective justification of war has also led to the

¹⁰ Subjective elements determine the outcome of a war. Being aware about its importance, Medieval just-war thinkers gave priority to the subjective side of warfare.

compromised of the just war aim of promoting good and avoiding evil (Vorster, 2015). So, the claim of the study that in traditional just-war theory, “just cause” and “right intention” criterion were designed to function synergistically will not be achieved as long as their entwining nature is overlooked in modern just war discourse.

4.2.2.1.3 Depreciation on inculcating higher virtues in military art

The importance of right intention to just cause in just war traditionalist thinking can also be seen in the insistence on the inculcation of higher virtues in the context of military art.

Aquinas argues that “right intention not only demands the restitution of justice, but also the recovery of peace” (Vorster, 2015, p. 61). He firmly believed that just-war does not conflict with peace but is waged in order to achieve peace. Because of this, Aquinas considered that the instance of allowing evil to prosper is not a true form of peace. According to him, true peace exists in consensus with justice; therefore, a cause is just that attempts to restore peace (Gorman, 2010). This intention is reiterated in the last dialogue of Plato’s *Laws* (348 BC), where he made a certain reference to war. In the dialogue, Plato’s mouthpiece Cretan Kleinias explains to a stranger that due to the natural enmity or the state of nature (Plato, 2006; Vorster, 2015) that exists between cities, the laws of Crete were framed while keeping war in view. But the dissatisfied questioner, the visitor, insisted that the best laws are inspired not by war but by peace. Peace is then defined as a state where virtue may fully develop and prosper. According to this definition, excellence in war is not devoid of virtue but is a part and partial of virtue. For this reason, excellence in war is but the lowest and smallest requisite part of virtue (Stalley, 1983). Plato’s writings on war also centre on courage as a part of virtue. Socrates is depicted in *Laches* (399-390 BC) as stressing on the importance of inculcating higher virtues like the virtues of moderation, justice, and prudence in order to well establish the virtue of courage in the context of military art. He also warns against courage devoid of other virtues. Thus, in the word of Socrates, *the danger of possessing courage without having internalized other virtues, such as moderation, justice, and not least prudence without proper guidance from other virtues, courage can lead one astray* (Plato, 2006, p. 23; Devereux, 1977). He then points out different circumstances under which courage may be exhibited. These *include fighting wars, fighting against desires, fighting against pain or fear, and so on* (Plato, 2006, p. 23). This thus asserts that warlike courage is not limited to war. The virtue of courage is viewed in light of other virtues, as is stated in the *Laws* (348 BC).

Prudence, in turn, is first and leader among the divine goods. Second, after intelligence comes a moderate disposition of the soul, and from

these two mixed with courage comes justice, in third place. Courage is fourth. All of these last goods are by nature placed prior in rank to [the human goods: health, beauty, strength, and wealth], and this is the rank they should place in by the legislator (Plato, 2006, p. 29)

War and justice can go along so far as warlike courage is *subordinated to the other virtues* (p.29). Thus, this study claims that JW criterion of right intention is intricately interwoven with the criteria of just cause. This is apparent in the assertion for the development of military courage in subservient to higher virtues.

4.2.2.1.4 Neglect of “Right Intention” for “Authority”

The insufficiency concerning just-war criteria of “just cause” is further apparent in the case of “authority” for the reason of ambiguity.

According to April Carter (1979)¹¹ and Barbara Goodwin (1997)¹², the notion of political authority is a matter of pure abstraction. There is no clear distinction between authority and power. They invariably co-exist in a political institution. In the word of April Carter, “No state, however benevolent, can wholly abstain from the use of force” (Hoffman & Graham, 2015, p. 4). Karl Marx (1970) and JS Mill (1074) similarly agree upon the idea of inseparability of power and authority, but they refer to it under a different context. Both speak about a form of constraints that exist in economic and social relations. While Marx recognizes it as an economic constraints¹³, Mill understands it as a moral constraint¹⁴ embedded in social relations. Thus, in the political sphere, “authority rarely exists in its pure form” (Hoffman & Graham, 2015, p. 4). Similar ambiguity is found regarding power. It does not exist in pure form. Luke’s *Three Dimensions of Power* (1974) discusses three dimensions of power as the decision-making bodies, “groups beyond the decision-making forum” (p.7), and those who exert their preference by protest (Hoffman & Graham, 2015). Carter, Marx, Mill and Luke agree that authority and power invariably co-exist in political, economic institutions, and social relations respectively.

¹¹ In her book entitled *Authority and Democracy* (1979), Carter argues for the rare existence of pure authority. She asserts that a government with liberal ideology relies on the use of coercion.

¹² More recently, Barbara Goodwin in her *Using Political Ideas* (1997), argues against any attempt to separate power and authority for “in any normal political situation, and in every state institution, they co-exist and support each other” (314).

¹³ Marx in his *Capital* (vol.1, 1970), asserts how *mutual interests* (356) dominating economic relations act as market constraints and *subordinate the laborer to the capitalist* (737).

¹⁴ In his work *On liberty* (1974), Mill contrasted between the "physical force of state" to the "moral coercion of public opinion" (68). According to him, morality as a constraint encompasses both the idea of power and authority.

The above discussion not only points to the insufficiency of the “just cause” and “authority” conditions but also alludes to the importance of “right intention.” Right intention is important because it is logically linked to just cause criterion, which is responsible for just war aim.

4.2.3 Legitimate Authority

Just-war theory is a commitment to legitimate authority. This commitment deals with the question: Who should be obeyed? Who may permissibly wage war? The criterion of legitimate authority is therefore concerned with identifying proper authority that ought to be obeyed and of a sovereign authority who have the right to go to war. In this respect, the study identifies the base of legitimate authority on "just will." Just will with legal effect. In this sense, war declared by a legitimate authority must be legally sanctioned and legally enforced. Therefore, specificity of JW legitimate authority requires submission to "just will" not just any "will" since in some cases, human will animate evil than good. Therefore, the chapter claim that just will is and must be founded on right intention. More will be discussed in the following.

On answering the question of "Who should be obeyed?", the criterion identifies proper authority in "just will." In contrast to unjust will, both Augustine and Hugo Grotius have acknowledged the base of legitimate authority to just will.

Referring to Roman authors, Grotius's usage of “just” (*iustum*) is equivalent to anything that is “legal” or “regular.” An adjective term from which “just-will” is derived. In the context of warfare, just-war may be understood as an *act originating in the will* (Grotius, 2006, p. 399). Similarly, in the book *De Libero Arbitrio* (English: *On Free Choice of the Will*) written during 387-89, Augustine has acknowledged the role of human free will in the origin of evil. According to Augustine, God never sanctions evil but *what animates evil acts in human beings* is the state of their “internal orientation” (Vorster, 2015; Carnahan, 2008). The internal orientation, when driven by *libido* (lust) and *cupiditas* (greed), and fear, informs man towards "preventive killing" and "pre-emptive killing" (Augustine, 2010, p. 10; Vorster, 2015).

According to Aquinas, a competent authority who makes a formal declaration of war are those that have received *the power of the sword from God in order to protect the commonwealth* (Vorster, 2015, p. 61) from internal and external threats. His understanding of war is for defense. As such, he emphasized that leaders ought to be the protector of the innocent. Failing to perform this vital task, at any rate, equates to *negligence of virtue* (p.61). He also

clarified on who should be obeyed. According to Aquinas, such authority that has acquired power wrongly ought not to be regarded as from God (Vorster, 2015).

JW legitimate authority criterion also aims to answer the question: Who may permissibly wage war? In this regard, there are efficient causes of war. The efficient causes are those who wage war on their account. Under the law of nations, public war is either formal or non-formal. Here, “formal” (*solemne*) is spoken in the sense of “just will” with “certain peculiar effects” (Grotius, 2006, p. 396). In this sense, formal war suggests the force of civil law. One that is legally sanctioned or that is legally enforced. The word “just” in the context of warfare indicates wars that are declared formally and non-formally. Therefore, based on *acts originating in the will* (p.399) Hugo Grotius classified efficient causes of war into three different types: Principal agents, Auxiliary agents, and Instruments. Principal efficient cause of war is the person whose interest is at stake. Since public war can be divided into formal public war and less formal public war or private war, we have the authority with supreme power and private persons or individuals as the corresponding efficient causes. Auxiliary agents are those who wage war on account of others. “Various ties which bind men and summon them to mutual aid” (Grotius, 2006, p. 399) include kinship, neighbours, nationality etc. Instruments are “persons whose acts of will are dependent on the will of another” (p.399). These people are either servants or subjects. In this sense, instruments could be “a son in relation to his father” or “a slave in relation to his master” (p.400).

Just-war theory is a commitment to legitimate authority. This commitment is a reflection on the principle that asserts that only sovereign authorities have the right to go to war (Lazar, 2017). Under the law of nations formal war can only be declared and waged by an authority who holds supreme power within the state. While non-formal public war lacks certain formalities, formal waging of war cannot forgo certain formalities but must observe formalities (Grotius, 2006). These formalities include a declaration of war by a legitimate authority (Cady, 2014; Moseley, 2020). Legitimate authority includes the head of state, the President, followed by the Congress (Solomon, 1996).

4.2.3.1 Problem of obligation

Relevant to *jus ad bellum* authority criteria is the issue of obligation which is to be condemned to war. This issue poses a challenge to the normative conditions of the state (Baron, 2010, p. 221). JWT has thus come to be criticized for the victimization of soldiers by the institution of war. For sending many combatants to their deaths and obliging soldiers to fight

the cause they know to be unjust (Ryan, 2011). Philosophers outside just-war tradition have addressed the issue of obligation. The problem of being obligated to war can be traced far back to the writings of philosophers like Spinoza, Rousseau, Kant, Hobbes, and Hegel. Concerning the obligation, all these philosophers commonly *recognized the challenges that the problem poses to the normative conditions of life in the state* (Baron, 2010, p. 221). The problem of obligation or compulsion is widely acknowledged by intellectuals both within and outside of just-war tradition. Although nineteenth century Pacifists and Medieval JW theorists acknowledged it, contemporary just-war literature is silent on the issue of being obligated to jeopardise one's life in the supposed garb of patriotism. In just-war literature, the forgotten issue of the "obligation to die" is raised by Ilan Zvi Baron (2010). In his article, *Dying for the state: the missing just war question?* (2010) Baron has also stressed on the importance of incorporating the issue of obligation into our everyday understanding about the ethics of war (Baron, 2010). This problem of obligation is further discussed in the following.

The problem of being obligated into war for the state begins with the belief that "soldiers had an obligation to die" for the supposed claim that combatants had to die at the pretext of greater good. Yet this obligation to die is highly questionable in light of the

Actual reasons for the war, the costs of the war and its justifiability. If the war was unjustified, was the state justified in sending so many soldiers to their death? What if the war was justified? Does it matter that those who died were voluntary enlistees and not conscripted soldiers? (Baron, 2010, p. 215)

Similar view is developed by Cheyney Ryan (2011) in his "argument to democratic duty." By this argument, Ryan discussed "the contradictory position in which a democratic society can place its soldiers, ethically" (Ryan, 2011, p. 10). In which while he, on the one hand, acknowledged that democratic citizens do wrong in *obliging* their soldiers to *fight in wars they know to be unjust* (p. 12), he on the other hand, in response to McMahan's failure in not giving "sufficient weight to the institutional claims on soldiers in a democratic society" concluded that "soldiers are victimized by the institution of war" (p. 10). Similarly, according to a resounding traditional pacifist thinking of the nineteenth century, "Pacifists have held that war wrongs all soldiers in part by placing them in impossible moral situations" (p. 13). Starting with Hegel, nineteenth century political philosophers held "the idea that states impose apparently contradictory demands on soldiers" (p. 13). Therefore, they conclude that the state's right to war minimizes and even rejects individuals' rights (Hegel, 1991). Thus, Samuel Pufendorf *On the Duty of Man and Citizenship* (1673) uses the term "compel" to describe the

dangerous implication concerning the issue of obligation. According to him, the term “compel” also refers to the “risk of death,” the obligation *to death itself* and *of going to war* (Baron, 2010, p. 216).

Another prominent philosopher known to have addressed the issue of obligation is Immanuel Kant. Kant was vehemently opposed to war. His ideas on war are scattered throughout his work. Some of these works include Kants’ *Perpetual Peace* (1795), *Idea for a Universal History from a Cosmopolitan Standpoint* (1784), *Critique of Judgment* (1790), *On the Radical Evil in Human Nature* (1792), *Metaphysical Principles of Law* (1797). He was opposed to war, especially one that is devoid of humanitarian concern. Kant's criticism of war from "categorical imperative" standpoint is strongly opposed to the idea of recruiting people in the military for killing other people. His categorical imperative does not allow treating others merely as a means. As such, the act of hiring and serving in the military for killing people cannot be justified since it is opposed to human rights. Kant says, “hiring men to kill and be killed seems to mean using them as mere machines and instruments in the hand of someone else (the state), which cannot easily be reconciled with the rights of man in one’s own person” (Orend, 2004, p. 166).

Similarly, on account of the level of human rights abuses, including that of soldiers involved in a war, Larry May strongly advocates the impossibility of just war (May, 2015). However, in contrast to Realist conception of war or war that is waged for *territory and resources; out of hatred, intolerance, or the desire for vengeance; or because of the simple greed for the glory of individual rulers* (Ralby, 2013, p. 8) just-war approach to war is much needed. In fact, just-war claim for right resort to force is far more justified than those wars waged for selfish ambition and aggrandizement, and for other wrong reasons. Contrary to this is just-war's justification of some war in order to prevent a danger that may be more harmful than war itself (Vorster, 2015; Reichberg, 2002). JW justifies war for civilian's protection. Indeed, *the lives and the rights of civilians have been the paramount concern in the just-war tradition as well as in contemporary International Law* (May, 2015, p. 3). The theory of just war opposes rash use of power and force. Since JWT aims at just resort to force and just engagement in war, wars waged for just claim, right cause, and with right intention is not contradictory to the morality of war.

4.2.4 Proportionality and Necessity

Proportionality principle of *jus in bello* context refers to the justification of the means used to achieve the end. In contrast to the proportionality of means and end, the disproportionality of means against the intended end occurs when the end that is to be achieved is not considered valuable enough to justify the means. According to Seth Lazar, overcoming the problem of proportionality requires the test of proportionality. To overcome problem related to proportionality, we need to ask whether the evil deterred is greater than the evil imposed.

On the other hand, the Necessity criterion refers to the inevitability of war when no other possible resort is left (Lazar, 2017). The necessity criterion requires that war be fought *as a last resort; after all possible avenues for resolving a conflict have been exhausted* (Solomon, 1996, p. 6; Moseley, 2020; Cady, 2014).

According to Seth, there is a superficial distinction between the criteria of Proportionality and Necessity. "A war might be necessary because there is no other means to achieve its end, and yet disproportionate, because the end is not valuable enough to justify the means" (Lazar, 2017, p. 46). Proportionality of means and end demands choosing right means from the comparison of different means available to achieve the end. However, comparing between different means to achieve the intended end requires the application of necessary constraints. This requires the comparison of all the available options that have a prospect of preventing the impending danger. This is important to rule out the possibility of any form of collateral damage with the chosen means. Applying proportionality constraint requires contrasting our best military option against the imminency of the threat. This assessment encompassed a wider measure that leans on comparison of all the available options (Lazar, 2017).

4.2.5 Realistic fortuitous for success

One of the requirements of just-war is a reasonable hope of success (Solomon, 1996). However, disproportionate¹⁵ war includes a war that "lacks adequate prospects of success" (Lazar, 2017, p. 44). Since war involves the infliction of great evil, it is wisest to rule out war that lacks the prospect of success.

¹⁵ Disproportionality in the use of means to achieve the end.

An important issue with the prospect of success criterion in war includes the war of pre-emption, also known as pre-emptive war. Preventive war is concerned with averting a threat that is less imminent by “less harmful means than the resort to force” (p.44). However, Walzer (2006) is against the permissibility of pre-emptive war as it could increase the chance of losing a war more likely. At most, what war of pre-emption does is minimize abuses of states that are prone to war. Moreover, “Preventive war is just a pragmatic concession to predictably wrongful state practice, rather than a deliverance of moral law” (Allen & Robert, 2004). According to St. Augustine, since “preventive killing,” is born out of fear, greed, and lust, it overrides the just requirement of war. Also, since preventive killing is animated by the evil inclination of man (Carnahan, 2008; Vorster, 2015) for that reason, though one may try to justify pre-emptive actions on the ground of “just human law” (Augustine, 2010; Vorster, 2015), it nevertheless contradicts God’s eternal law (Vorster, 2015).

Although modern just-war came to overlook “right intention” for “just cause” and “legitimate authority,” thus has led to the problem of moral indifference, this study however, observes the sufficiency of right intention in determining the moral justifiability of a war. The sufficiency of right intention is based on the claim that just cause motivation for what is just and legitimate authority's requirement of "just will" rest on right intention. Though different thinkers across different periods have for legitimate reasons criticized victimization of soldiers by the institution of war, this study nevertheless maintains the moral justifiability of certain wars. After due observation, this thesis dissertated justification of JW claim for right resort to force against Realists’ conception of war. While Realists justify war waged for selfish ambition, aggrandizement, and for other wrong reasons, JW justifies certain war to prevent a danger that may prove more pernicious than war itself and for the protection of non-combatants from harm. Hence, this thesis chapter maintains that wars undertaken for just cause, with right intention, and under legitimate authority are not contradictory to the morality of just-war.



***Jus in bello*: Justice during War**

5.1 Introduction

The rules of warfare are established by international law in order to regulate the conduct of belligerents during international armed conflicts (Dinstein, 1993, p. 966).

Jus in bello principle, a path to honourable conduct and justice during war in general must be distinguished from *jus ad bellum* justice in the commencement of war, and *jus post bellum* principle that aims at justice post war. *Jus in bello* rules of warfare strongly approve just practices in war. These rules of warfare demands that just-war be waged justly. Originally, the concept of *jus in bello* seems to have been ignited by the concern for combatant's behaviour towards fellow combatants, non-combatants, the treatment and care for the captives. *Jus in bello* rules of warfare therefore lies in civilian's protection and in just resort to force. Since *jus in bello* claim involves a balance between humanitarian concern on the one hand and military necessity on the other, the paper evaluates this claim in light of the questions: Does *jus in bello* condition reflect and justify just-war theory's claim of right resort to force? If no, what are the theoretical problems that *jus in bello* condition have contributed to rebut JWT's claim? In this regard, the paper examines if *jus in bello* condition of just-war is consistent with the theory's claim in order to justify engagement in war. Toward this aim, the paper tries to identify any possible discrepancies in just-war thinking at *jus in bello* end that could have otherwise hindered JWT from achieving its claim for right resort to force. The findings of the study indeed note certain discrepancies in *jus in bello* principle of just-war thinking, owing which have led to self-contradictory nature of JWT. Various factors have thus contributed to the theoretical problem of just-war.

The study observes compromises with moral foundation, the original intention of Traditional-Contemporary Just-War Theory and International Law based on various factors. Principles of discrimination and proportionality concerned with the issue of civilian's protection and with right resort to force came to be compromised in the idea of "double-effect", in the mobilization of "total war" at home-front, and with growing indifference to the original intention of just-war even while weapons of war have become more destructive and sophisticated. Later part of the paper further discusses the theoretical setback of just-war in the compromise of *jus in bello* morality and legality of warfare when political interests superseded

moral interests of just-war. This compromise stems from the separation of morality of warfare from the domain of legal inquiry. As such, moral indifference not only endorsed unjust practices during war but have come to compromised *jus in bello* concern.

While the paper deals with the specificity of each problem in latter sections, historical development of just-war is the focus of the following.

5.1.1 Development of “jus in bello” concept

Ensuring combatant’s honourable and just conduct after the spirit of *jus in bello* rest on three principles:

1. Distinguishing between combatants and non-combatants to ensure protection of civilians and to limit collateral damage i.e., minimize destruction of non-military targets.
2. Proportionality with regard to military objectives. This condition applies to combatant’s behavior during their engagement in war (Solomon, 1996, pp. 8-9).
3. Necessity principle claim the inevitability of war when no other possible resort is left. The aim of this principle is to minimize the abuses of war in the inevitability of defensive war (Allen & Robert, 2004).

Jus in bello concept seems to have been ignited by humanitarian concern and of mitigating the effects of hostilities. Although the concern for military behaviour during war was globalized with the Nuremberg Trial (1946) and Tokyo War Crimes Tribunal (1946-48) conducted by the end of WWII, the concept of *jus in bello* is dated as far back as the fifth century BC in the history of mankind (Solomon, 1996). Though *Jus in bello* principles originates in the writings of Cicero, Augustine and Aquinas, “doctrine of restraint in war” an initiative of the “Peace of God” and “Truce of God” movements gave proper form to non-combatant immunity. By the doctrine, the Church for the first-time prohibited use of violence at certain places, times and on certain persons. Until this movements, since medieval notion of just-war was mainly retributive medieval just war thinking especially that of Augustine could not determine who could permissibly be killed. These eleventh century peace movements not only became the heritage of the Christian Pacifists but also served as a major source of non-combatant immunity doctrine. The concept may also be found in the code of chivalry developed by the Christian Knights of the Middle Ages. The code of Chivalry introduced the conception that war was a contest, whose participants were to fight fairly and honourably by respecting and protecting the defenceless (Ryan, 2011). According to James Turner Johnson the idea

codified in the customs and sensibilities of the knightly class not only help distinguished between belligerents and non-belligerents but the same embodied *jus in bello* concept as well (Ryan, 2011; Solomon, 1996). The same concern became a catalyst for the enactment of *Lieber Law* of 1863 which was later drafted as an instruction for the United States' Armies in the Field. "Yet, despite this universal concern, the attempt to limit war has suffered various setbacks. It was not until the 19th century that a movement to codify the laws of war began and modern international humanitarian law was born" (Meron, 2000).

In the historical account, Orthodox narrative juxtaposed *International Humanitarian Law* (IHL) and rules of warfare. IHL refers to the present understanding of the *ius in bello* – rules concerning conduct of combatants during warfare. IHL is the branch of Public International Law that pursue the moderation and mitigation of armed conflict and the suffering caused by it (McCoubrey, 1998). *International Committee of Red Cross* (ICRC) also considered as the "guardian and promoter" (Knut & Louis, 2004) of IHL described the nature and purpose of IHL in the following:

International humanitarian law is part of the body of international law that governs relations between states. It aims to protect persons who are not or are no longer taking part in hostilities, the sick and wounded, prisoners and civilians, and to define the rights and obligations of the parties to a conflict in the conduct of hostilities (ICRC I. C., 2010).

International Humanitarian Law (IHL) enjoined the humanitarian side of war. The term not only represents a novel approach to the *ius in bello* but also introduced us to "a new field of law" (Alexander, 2015, p. 110) endowed with humanitarian principles. These principles are outlined in the 1977 *Additional Protocols to the Geneva Conventions*¹⁶. Despite this, IHL and humanitarian understanding of *jus in bello* remained controversial as States and legal commentators both called into question the Protocols' principles and authority. However, at the end of the 20th century following after human rights organizers, practitioners of IHL suddenly accepted the authority of *Additional Protocol I* and, with it, a humanitarian vision of the *ius in bello* (p. 110). This is evident in the "confident use of the term 'IHL' to describe all the laws of war" (Meron, 2000).

¹⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) 1977, 1125 UNTS 609.

IHL claim its legacy from long and varied history. The term International Humanitarian Law therefore refers to a set of International Law that is concern with armed conflict – whether customary, conventional, Hague or Geneva (O'Connell, 2013).

Accordingly, while International Lawyers claim national IHL to a code of warfare found across various periods of history and cultures; at other times, they emphasized on the contribution of Henry Dunant who initiated the International Committee of the Red Cross (ICRC) after he witnessed the Battle of Solferino (1859). The creation of ICRC would later give rise to the formation of the Geneva Conventions¹⁷. The formation of the Geneva Convention (1949) started with the adoption of the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1864) upon the instigation of Dunant. Since then, several other inventories of humanitarian mechanisms include: the 1907 Hague Convention (Solf, 1986, p. 123), the 1949 Geneva Conventions and the 1977 Additional Protocols (Jaworski, 2003). *Jus in bello* tradition further evolved after “the influenced by the early modern military conduct of Gustavas Adolphus’ Swedish discipline in the Thirty Years War, and in the military practices during the eighteenth-century wars I Europe” (Solomon, 1996, p. 8).

The Additional Protocol I of 1977 supplements the four Geneva Conventions. The general proviso of these conventions is the promotion of protection and preservation of war victims. The authority of the principles advanced in the International Law therefore mandated the protection of the wounded and sick, or shipwrecked civilians and combatants on sea or at waters [The Protocol I of 1977, Part I, Art. 1&2]. Similar to these conventions is the Hague Convention. The provision of Hague Convention (1907) on land warfare embodies the rules of International Law (ICRC I. C., 2010).

Further rules of warfare that embodies humanitarian principles are *jus in bello* discrimination principle, proportionality principle, and necessity principle. The study however notes certain discrepancies in *jus in bello* condition of just-war thinking. These discrepancies in thought have ultimately led to theoretical problem of JWT. JW theoretical problem will be discussed one after the other in the following sections.

First and foremost, the work discusses discrepancies in thought in the idea of double-effect and total war. While principles of discrimination and proportionality are integral to *jus*

¹⁷ Geneva Conventions 1949, 1125 UNTS 3.

in bello humanitarian concern, the thesis work observed discrepancies in just-war thinking is inherent in the idea of double effect. In addition to double-effect, the infiltration of these principles and consequently of *jus in bello* concern is observed in the idea of total war. Thus, eventually leading to self-contradictory nature of Just-War Theory.

In latter section, the work deals with compromise of *jus in bello* morality and legality of warfare. Compromise with *jus in bello* morality and legality of warfare occurred with the separation of morality of warfare from the domain of legal inquiry. This separation has consequently led to the diminishing status of war treaties as political interests preceded moral interests so as to universalize the theory. As such, war treatises were ignored for political interests.

I

5.2 Theoretical problem of *jus in bello*: Self-contradictory nature of JW

In every war, including the “just” ones, there is also an unjust cause, for example the unjust cause of killing or maiming large numbers of innocent people on the other side (Steinhoff, 2014, p. 36).

Jus in bello rooted in the problem of moral indifference in modern just-war (Moseley, 2020; Solomon, 1996) is responsible for the theoretical problem of just war theory. This problem is discussed in the self –contradictory nature of just war. Just War is self-contradictory in that it does not stick to the criterion of Just War. For, the principle of double-effect, used to justify collateral damage run into just-war principle of discrimination and proportionality. Thomas Aquinas, in his *Summa Theologiae* (1485), framed the principles of double-effect and proportionality to address the issue of personal self-defence against an aggression. Both these principles are still relevant to the contemporary just-war *in bello* criteria (McDermott, 1997).

Since the essence of Just-War lies in civilian’s protection and in just resort to force, the principle of discrimination and proportionality is not optional to Just-War. The study, therefore, claim that any compromise toward this concern can invalidate the whole purpose of Just-War. Indeed, there is discrepancies in *jus in bello* conception of just-war. This paper elaborates these issues one after the other in the following sections. But first the paper discusses the compromise of these principles in the idea of double-effect and in the concept of total war. Discrepancies in thought is certainly inherent in the idea of double-effect. Then in latter section, the work

analyse the infiltration of just-war principles of discrimination and proportionality in the compromise of morality and legality of warfare.

5.2.1 Principle of Discrimination

In the International Law, Discrimination principle is “underpinned by the fact that killing civilians is worst than killing soldiers and the fact that intentional killing is worst than merely foreseen killing” (Lazar, 2017, p. 50). Accordingly, 1977 Additional Protocol of Geneva Convention obliges combatants to ensure safety and *protection of civilian population from the effects of hostilities* [Article 44 (3,4 & 7)]. As such, combatants ought to distinguish themselves from civilian population during their engagement in an attack or in *a military operation preparatory to an attack* (The Protocol I, p. 26). Therefore, discrimination principle in general obliges combatants of armed forces engaged in a military conflict to:

- carry his arms openly, and
- be visible to the adversary during a military deployment preceding the launching of an attack [Art. 44 (3)],
- wear uniform [Art.44 (7)].

The purpose of this is for armed combatants to distinguish himself from civilian populations. A combatant who fails to comply with the requirement of this principle if succumb to the enemy shall forfeit his right to be a prisoner of war. According to Article 13 of the First and Second Conventions and Article 43 of the Additional Protocol, all “prisoner of war status” are entitled to protection when wounded or sick, or shipwreck at sea or at waters.

1977 Protocol amend the Geneva Conventions of 12th August 1949. As such, the Protocol upholds the general accepted practices of states. Article 44 (7) of the Protocol (1977) is but a reiteration of the already agreed upon practices of states.

Jus in bello principle of discrimination is concerned with the issue of civilians’ protection in war and poses a question: “Are all civilian population deserving of our concern?” (Solomon, 1996, p. 9). The principle also seeks to ensure the protection of civilians living in the enemy-occupied territory (Solomon, 1996). This is clearly stated in Cicero’s instruction on the conduct for those involved in destroying and plundering cities. It is an appeal for combatants to seriously consider on avoiding any rash or cruel act that forgo the ethics of warfare. According to him, the duty of a great man during warfare must exhibits a balance between humanitarian concern and military necessity. Holding upright and honourable conduct under all

circumstances of warfare therefore requires ensuring the protection of the majority while punishing the guilty. It is evident from the above statement that Cicero did not approve the practice of indiscriminate cruelty even when a city is captured. He also strongly recommends that war be waged properly and justly. According to him, just wars must be waged justly. For this, certain conduct that needs to be observed include viz., to spare the allies, hold themselves and their men accountable, treaties with the enemy reached in wartime must be observed, and truce should not be violated. By becoming a protector of those states and nations defeated in war Cicero recommends the practice of justice by those who have gained victory in war (Harrer, 1918). Thus, under *jus in bello* principle of discrimination, pillage and wanton destruction of civilians private property are prohibited.

5.2.1.1 Problem of “Double-Effect” and “Total War”

However, the principle of discrimination concerned with the issue of civilians’ protection in war (Solomon, 1996) comes under increasing threat when insurgents infiltrate everything and when the principle is compromised in the given idea of double effect. Under such circumstances, you cannot tell who is a member of the opposite and who is loyal to your side (Long, 1968). It therefore, endangers the safety of the entire area (Solomon, 1996). It became a reality after the introduction of what came to be known as “total war”.

Traditional just war theory has granted immunity to non-combatants during a war. This was true during the eighteenth century when France and England were fighting the Seven Years’ War. In a book called *A Sentimental Journey through France and Italy* (1765), Laurence Sterne, an English author recounted of “a time when states engaged in war without the lives of their citizens poisoned, corrupted, or otherwise focused by the conflict” (Sterne, 2018, p. 52). This separation between civilians and military however “changed dramatically with the ‘hardening’ of political boundaries” and with the advent of a peculiar means of warfare also known as the “total war”. The concept of total war came to be institutionalized during First World War only after the coinage of the term “home front”. The term home front since then came to legitimized “the direct and deliberate targeting of civilians maintaining that front” (Barash & Webel, 2013, p. 53). The distinction between combatants and non-combatants further narrowed since “entire populations were enlisted in the war effort” (p. 52). Military forces often raised by “taxing the population at large” (p.52) necessitated mobilization in the home front so as to provide the much-needed food, clothing, and munitions. This triggered a compromise with an issue in non-combatant immunity contended for in traditional war theory.

Among other changes that have contributed to the compromise of non-combatants immunity in modern warfare “has been the combination of: Increased destructiveness of the weapons, *and* decreased selectivity as to their targets” (p.51).

Often these combinations are very destructive. For while the weapons have become more deadly, even capable of attaining precision as to their targets, yet these weapons are “increasingly directed toward civilians” (p.52). In order to ensure non-combatants protection within the given circumstances and in the contexts of strategic bombing, military raids, or air raids over enemy’s territory aimed to terrorize and break the morale of innocent civilians (Dinstein, 1993), the principle draws a fundamental distinction between legitimate targets from illegitimate targets (Dinstein, 1993; Cady, 2014). Thus, civilian objects that do not comprise military purposes come under the purview of non-combatant immunity. Non-combatants objects include:

hospitals, medical installations, ambulances, hospital ships, and medical aircraft; places of religious worship; cultural property, such as museums and historical monuments; undefended places; unarmed merchant ships not travelling in as escort convoy; crops and drinking water indispensable to the survival of the civilian population; dams, nuclear electrical generating stations, and other installations, etc. It is also forbidden to harm the wounded and the sick; medical or religious personnel; envoys bearing flags of truce; and of late, even journalists (Dinstein, 1993, p. 967).

The argument against non-combatant immunity during a war came under increasing attack with the involvement of civilians in building the arms, ammunition and supply for military needs (Barash & Webel, 2013). There are certain conditions under which non-combatants can put themselves under legitimate target. “Military targets encompass not merely military forces and installations (including depots, vehicles, aircraft, and warships) but also factories engaged in the manufacturing of military supplies or central lines of communication” (Dinstein, 1993, p. 967). Thus, civilians inhabited areas that are not clearly demarcated from a military objective become vulnerable to “be looked upon as a single ‘target area’ for the purpose of bombing” (p.967). This is most prominent in the case of total war where its application is always accompanied by some sense of ambivalence among the perpetrators.

5.2.2 Principle of Proportionality

Another reason pertaining to moral indifference in a Modern Just War the claim resides in the failure to observe the “principle of proportionality”. The study claims this failure as a result of alienation from the original intention of traditional Just-War theory. While in traditional just war thinking, containment of violence within the military limits is considered

important (Moseley, 2020), *jus in bello* in contemporary just war doesn't necessarily think so. It seems to allow spillage or accidental injury of non-combatants in war under the condition that it must be offset by the good to be accomplished (Cady, 2014). It thus came to be justified and legitimized in the idea of "double-effect".

The principle of double-effect deals with the issue of spillage. The principle applies to an act of unintentional killing in self-defence. The Principle states that, "nothing prevents a single act from having two effects, only one of which is intended while the other is beside the intention" (Cady, 2014), for the nature of a morality is always directed toward certain action. "Aquinas qualifies this argument by stating that an act may not be intended, yet be regarded as unlawful when proper care is not taken to remove obstacles that might cause unintended injuries" (McDermott, 1997, p. 390). However, Aquinas implication of spillage is rather an outcome of negligence. According to him, accidental injuries to civilians happen due to lack of overhaul in ascertaining the absence of unintended injuries. Thus, spillage in war is not only unnecessary, and for that matter avoidable, but also unlawful (Vorster, 2015, p. 62) and immoral¹⁸ (May, 2007, p. 1). Thus, while the principle of double-effect is used to justify spillage (Solomon, 1996, p. 9) in Just-War Theory, the principle of proportionality is used to assert that the methods used should serve the goal and be proportional to the end in mind.

Just War under the provision of double-effect may even exempt punishment from the crime of spillage as an outcome of the unintended injury. "If the soldier's intention is one of not to harm innocent people, and maintain reasonable provisions to restrict civilian deaths to the minimum, the soldier cannot according to the just war tradition, be held culpable for the deaths of innocent people" (p. 62). Nevertheless, proportionality principle do not justify killing even for self-defence when measures used are out of proportion with the goal to be achieved. This arises when disproportionate force or violence is applied for self-defence (McDermott, 1997).

According to the principle of proportionality in just war tradition, "killing in self-defence becomes unlawful only when the measures used are out of proportion with the end" (p. 390). Such an occasion might arise when a person used disproportionate violence than is required for self-defence (McDermott, 1997). When it comes to the issue of defence, the proportional standard requires that engagement in war must be proportional to the wrong to be

¹⁸ War is immoral because it not only asks men to serve in war but also expect them to *die in those wars*.

avenged (Moseley, 2020). The principle also asserts proportionality of the means used in achieving a goal (Vorster, 2015).

Proportionality principle is concerned with right use of force especially when considered against the choice of means or methods of war. This principle is particularly concerned with the moral responsibility of combatants. It enquires the question: “What is the moral responsibility of combatants to ward such innocent victims of war?” (Lazar, 2017) Pertinent to the question is the issue of victims who are used as human shield during warfare. Conversely, the issue deals with the abuse of moral restraint of combatants by using civilians as their cover (human shield) against their opponent’s attack.

While it’s been thought that right against harm can be forfeited only through a person’s actions, this recent issue with proportionality otherwise highlights how involuntary used of humans as shields diminishes civilians right to their basic rights. Article 57 of the First Additional Protocol (1977) address recent debate on endangering civilian rights by abusing them to deter adversary. The protocol requires combatants to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimize incidental loss of civilian life, injury to civilians and damage done to civilian objects”. The moral foundation outlined in Article 57 of the Geneva Convention has been adapted into recent just war theory (Lazar, 2017). Proponents of this theory include Michael Walzer (*Just and Unjust Wars: A Moral Argument with Historical Illustration*,1977), Jeff McMahan (*The Just Distribution of harm between Combatants and Non-combatants*, 2010), Seth Lazar (2012) and David Luban (*Risk Taking and Force Protection*, 2014). Combatants acknowledged the aforementioned moral foundation in their obligation to shield non-combatants, and in their duty to look out for one another (Lazar, 2017).

5.2.3 Necessity principle

A necessary criterion of just war claims the inevitability of war when no other possible resort is left. Applying the necessary constraints require comparison of all the options available necessary for averting the threat. This process is important in order to warrant that the chosen ones do not involve inflicting needless harm and so that it would act as a concession to predictably wrongful state practices. Therefore, securing the requirement of imminent threat is inevitable to minimize the abuses of war once defensive war is undertaken (Allen & Robert, 2004).

Important considerations in this regard are disproportionate war and preventive war. While disproportionate war is concerned with avoidance of any war that “lacks adequate prospects of success” (Lazar, 2017, p. 44); preventive war aims toward averting a threat that is in future. In terms of their prospect of success both wars are more unlikely to succeed and therefore wisest to rule out. This is because the former has little or no prospect of success and involves infliction of great evil, while the latter could sometimes increase the chance of losing a war more likely (Lazar, 2017). In this regard, close connexion between war and human nature is also observed. While just-war theory is concerned with proper reasons for war that is, war waged for just-cause, to ensure measures of safety for life and liberty, and as a last resort (Lazar, 2017; Harrer, 1918); preventive war seems to be ignited by the state of abnormal internal orientation. In his Book 1 of *On Free Choice of the Will* (387-389) Augustine discusses the role of human free will in the origin of evil. According to Augustine, God did not create evil but *what animates evil acts in human beings* is the state of their “internal orientation” (Carnahan, 2008; Vorster, 2015). The internal orientation is in turn driven by *libido* (lust) and *cupiditas* (greed) which informs man towards “preventive killing” and “pre-emptive killing”. In this book, Augustine relates the root of preventive killing to fear. Preventive killing thus is an act that is born out of the desire to be free from fear. However reasonable preventive killing seems and although one may try to justify pre-emptive actions on grounds of just human law (Vorster, 2015; Aquinas, 1993) it nevertheless contradicts God’s eternal law (Vorster, 2015). So, in order to tame human aggressive nature to war, minimize the destructive outcome of war and in order to maintain the justness of war, rules of engagement (ROE) came to be codified in the military ethos which in turn provides rules and guidance on how troops are to act on the battlefield. Though early Greeks and realists thought that law is silent in times of war, the specific function of the rules of engagement or ROE during war is to reinforce the thinking that “laws of war must govern the conduct of war” (Solomon, 1996, p. 16). Therefore, special care with the means and method of war is to be given utmost importance in order to justify aggression during war.

When it comes to the selection of means or methods of attack, observance of all feasible precautions becomes a necessary requirement. Prescribed precautions are important in order to avoid, minimize incidental loss of non-combatant life and damage to non-combatant objects. While risk of all weapons of war remains undisputed, the level of risk these weapons pose to human lives and things often carry the weight of its permissibility. Since some weapons of war have long-standing harmful effects than others do. For the same reason, not all weapons are

permissible during war. The destructiveness of some weapons of war goes beyond its immediate victims. A number of weapons that have been forbidden include: chemical, biological, and bacteriological weapons; poisons; weapons destructive to the environment; specific types of floating mines in maritime warfare. Yet other types of warfare that are prohibited for civilian's concerns include land mines, booby traps, and incendiary weapons (Dinstein, 1993). Crime committed against civilians are also committed when destruction is imposed on non-combatants objectives. This could include the destruction of infrastructure, like water treatment facilities, sewage systems, electricity lines, etc. which by definition, were not military targets.

5.3 Non-combatant Immunity and Military Intervention

Since non-combatant immunity is the paramount concern of just-war, any compromise toward this aim can undermine the right to national defence. The right to national defence is undermined when a sovereign state is unable to protect the security of their citizens (Shue, 1997) or when the state institution pose “the preeminent threat to those rights” (Lazar, 2017, p. 41). Given within certain limiting conditions Just-war therefore assent to the exercise of force as a national enterprise. That is, when grave goods are at stake (Cahill, 1994). These limiting conditions which are moral and legal in nature demands “States to go to war only for national defence, defence of other states or to intervene to avert ‘crimes that shock the moral conscience of mankind’” (Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 1977). Hugo Grotius in his work *Law of War and Peace* (1625), that contributed toward the beginning of modern human rights doctrine render resorting to armed forces permissible on occasion of violation of rights (Grotius, 2006). That is the inevitability of war demands the just war aim for the defence of life and restoration of rights and laws that has been violated. While International Law permits only sovereign with legitimate authority the right to go to war and for national defence, Revisionists extend the right to self and other defence to non-state actors as well. When the issue is of self-defence and other defence, no one is obliged to wait for institutional support (Lazar, 2017; Fabre, 2008).

All “rules of warfare” aim to maintain an equilibrium between humanitarian considerations, on the one hand, and the requirements of military necessity, on the other. Thus, the dual aspects of formulating rules of war aim at: reduction of the adverse effect of war to every possible level, and to ensure that those parties involved in warfare may not forfeit their right to the selection of means or methods of warfare (Dinstein, 1993). Indeed, the “lives and

the rights of civilians have been the paramount concern in the Just War tradition as well as in contemporary international law” (May, 2007, p. 3). The study, therefore, claims that any compromise toward this concern can invalidate the whole purpose of Just-War.

International Lawyers suggest two common ways of understanding the history of IHL. Narrative about the historical development of IHL presents the amendment of laws of warfare so as to make it more human-centric; another traced this development in a story of imperialism and oppression. In the historical account, Orthodox narrative juxtaposition of “IHL” and the “laws of war” have rendered the used of these terms interchangeable. Drawing on post-colonial and critical methodologies, yet another narrative about the IHL bring to fore its history of oppression and imperialism. The story of IHL therefore narrates the trumped of violence of war or military, and Western needs and its subsequent legitimization of suffering over human values (Gardam, 2001). The historical accounts of IHL are therefore the classified documents of treaties that is replete with *a litany of compromise and pragmatism* (Alexander, 2015, p. 113). As a result, such pragmatic and compromised approached “left military necessity unchallenged as the dominant value of the laws of war” thus *leaving civilians more vulnerable than ever to the scourge of combat* (Chris & Roger, 1994, p. 76). This is true of the 1907 Hague Conventions. Several other discrepancies of IHL include the failure of The Nuremberg Tribunal that *actually helped legitimate unrestrained conduct in war by refusing to convict, or even prosecute, based on violations of the laws of war* (p.66). In this regard, *even the contemporary values of humanitarianism have been called into question, with David Kennedy identifying its ability to conceal problems and misdirect attention* (Kennedy, 2004).

This study observes how compromises with the moral foundations, the original intentions of Traditional-Contemporary JWT and International Law in the idea of double-effect have led to leniency towards non-combatants immunity. These compromises are claimed to be associated with the theoretical problem of *jus in bello* ethical conditions of just- war. This study further claims compromise in just-war intention has resulted to the self-contradictory nature of Just –War Theory and the endorsement of wrongful killing.

II

5.4 *Jus in bello* compromise of morality and legality of warfare

Just-war theory which constitutes a willingness to compromise on peaceful method by resorting to violence and force in order to institute peace and order is concerned with the morality and legality of war. In this section we will discuss how compromise with just-war

aim of non-combatants happened when the legality of law overlooked the morality of war when in an attempt to universalize the theory, war treaties were ignored and as political interests preceded moral interests.

5.4.1 Separation of morality from Jurisprudence

According to traditional contractualists, the aim of combatants is the protection of the non-civilians. Compromise of this aim in international law seeped in when the legality of law overlooked its moral leaning. The aim of International Law is indeed moral- its founder Hugo Grotius' version of the law of nature was specifically directed towards combating Moral Scepticism and to reach rational settlement about moral disputes despite religious disagreements (Schneewind, 1995). However, separation of morality from the domain of legal inquiry took place with the introduction of hegemonic form of jurisprudence during the nineteenth-century. This polarizing school of thought generally came to be known as legal positivism. Separation of morality from jurisprudence, the philosophy of law happened when legal positivists compartmentalized Traditional philosophical concerned with the ideal aspect of the legal standards to the domain of moral and political philosophy. In modern times compartmentalization of morality from legal inquiry became a success with the erosion of the medieval worldview on the natural law. Medieval conception of natural law was grounded in the will of God. Hugo's conception of the laws of nature as obligatory in nature is asserted by the belief that God Himself enforces the laws. This fact is evident by "the limit on the laws that governments may legitimately impose" (Schneewind, 1995, p. 306). As such, allegiance to "external" rather than "internal" command of law was considered valid. As the external command of law grew more important than the internal command of law, legal judgements wholly resorted and even conformed to empirical judgement for resolving questions regarding legal matters. Thus, what legal positivism does is to act as a barrier to obstruct the relevance of morality and value in jurisprudence. d' Entreves AP in his work entitled *Natural Law: An Introduction to Legal Philosophy* (1994) writes:

At best, the legal philosopher becomes a sort of gatekeeper, halting and repulsing attempts to insinuate moral or value-laden issues into the study and practice of law. But this effectively abolishes legal philosophy itself. Traditional philosophical questions regarding the essence of law or ideal legal standards are excluded from jurisprudence (Entreves, 1994).

As a consequence of such compromises, acquittal of unjust combatants from the crime of murder-killing for unjust cause with the condition that combatants fight within International Law (Benbaji, 2008; Benbaji, 2011) became acceptable.

While Hugo Grotius affirmed the importance of law, healthy boundaries in instituting law that protects personal rights from the violence of another and a law of restitution for the maintenance of social order (Grotius, 2006), legal bindings on warring parties fail due to the following reasons:

5.4.2 Agreement signed between warring parties that are alien

Historically, JWT is conceptualized as a war convention. It represents a set of treaties for combat between warring parties. Geneva convention (1949) and Hague convention (1899) as an instance was instituted to ensure protection for victims of war (Law T. A., 2011) and to settle international disputes by judicial means (Britannica, 2020). Today though war conventions aim to prosecute transgressions and transgressors of war by means of which Lawyers could limit certain forms of warfare, this was not the case of the past. This was because in the past, war conventions were rarely applicable where warring parties shared different values, beliefs, race, language such that “they see each other as less than human” (Moseley, 2020) as was true in archaic Greece. Plato in the *Republic* recognized aggression driven by hatred and self-indulgence¹⁹ in resources as the cause of the Greek unjust engagement during warfare towards non-Greek, whom they consider enemy by nature. While fight with the barbarians were recognized as war in proper and was considered natural; fights within the Greek city states were categorized as faction and unnatural (Cox, 2015).

When Greeks fight with barbarians and barbarians with Greeks, we’ll assert they are at war and are enemies by nature, and this hatred must be called war; while when Greeks do any such thing to Greeks, we’ll say that that are by nature friends, but in this case Greece is sick and factious, and this kind of hatred must be called faction (Bloom, 2016, p. 150).

Thus, just within the confinement of intra-hellenistic warfare Plato came to introduced just-war rules of proper conduct, proportionality and non-combatant immunity. This partisan view was shared by both Plato and Aristotle. However, intra-Hellenistic engagement of war was criticized by Socrates, Plato and Aristotle alike. As a result, the universalization of Greeks engagement of warfare practiced only within Greeks was recommended (Cox, 2015). Similarly, just war theorists denounced asymmetrical morality between belligerents so as to universalize rules of combat between parties with alien culture and belief. Only between enemies that share a moral identity an agreement on rules of war and peace be formed

¹⁹ Socrates in the *Republic* reasoned the acquisition of neighbouring community’s resources for luxurious living as the root cause of war.

(Moseley, 2020). This set of universally applicable set of rules would later influence Romans interpretation of justifiable war (Lazar, 2017).

However, the reluctant agreement reached in order to universalize the rules of warfare would be encumbered by for lack of strong moral foundations. We will further discuss this in the following.

5.4.3 Political Realism

Traditionally, Just-War Theory aims to offer moral foundations to current International Law at large and the rules and regulations of armed conflict in particular. But Revisionists criticise international law for its pragmatic flaws—for lacking strong moral foundation (Lazar, 2017). The study claims compromises in the ethical deliberation of JWT when political interests preceded moral interests so as to universalize the theory. According to the traditionalists such changes is improbable in that while moral revisionists reject traditionalists' attempt to morally justify rules of engagement in warfare (Shue, 2008; Shue, 2010; Lazar, 2012; Shue, 2013) , they at the same time want to reach an agreement with the traditionalists by changing the law. Traditionalists therefore opined that such reluctant agreement would not only undermine the authority of the law but would prove disastrous (Lazar, 2017). This body of law is even more important when considered against a sovereign who consider nothing unjust which is expedient.

Political realism in contrast to jus-war theory is “the recognition that human relations are governed by power” (Moseley, 2007, p. 25). Political Realism as a theory puts the interest of national egoism over and above the doctrine of reason of state. National egoism is a form of political Realism that embraces self-interest as a code of state conduct. This form of Realism is inspired by private morality. What political realists then do is try to induce private morality on public morality. However, the act of inducing private morality to state conduct is problematic, and therein lies the philosophical problem of Realism. “When one compares the conduct of states with that of individuals. The discrepancies between the two stands out. Virtually everything deemed reprehensible in conduct among individuals is widely practiced among states” (Holmes, 1989, p. 52). Woodrow Wilson’s in his 1917 message had hinted the same. He had forewarned that wrongful conduct of individuals in civilized states would be insisted upon the standard of nations and governments. By the doctrine for reason of state, Political Realists justify the need for the existence of a state. This justification is based on the purpose of a state in promoting and maintaining values of highest order in the society. Further, when it comes to

state conduct, unlike national egoists, the doctrine recommends public morality over private morality. Besides these fundamental differences there are different forms of political Realism.

When it comes to determining the place of morality in international affairs, Positivistic Realism considers international relations apart from the activity of morality. Positivistic Realists have no absolute judgment on the rightness or wrongness of going to war. On the other hand, Normative Realism opens the possibility of making moral judgments in international affairs but does not allow such freedom of judgment on foreign policy. While a stronger form of Normative Realism denies any appeal of moral judgment to international relations, its weaker form concedes the application of morality to foreign affairs. Following Machiavelli, soft realists honor morality when they want, but when expedient, they abandon morality (Holmes, 1989). Such is the ethics of Political Realism.

Realists are therefore amoralists in that they reject all ethical considerations either in human relations or in international relations. In essence, political realism boils down to the belief that “might is right” (Moseley, 2007). A political realist who necessarily takes war as an extension of politics keep state’s interests first before any form of morality. This is perhaps well evident when political realism took precedence over a legal body of rules while declaring and waging war. For political realists anything expedient to solve pressing political and practical issues becomes important than any fledging legal conventions (Moseley, 2020).

Jus in bello rules of warfare aims to maintain an equilibrium between humanitarian condition and the requirements of military necessity. In this context, the paper evaluate violation of the morality and legality of *jus in bello* rules of warfare and addressed the compromise in the problem of moral indifference in modern just-war theory. This study observes how compromises with the moral foundations, the original intentions of Traditional-Contemporary JWT and International Law in the idea of double-effect and total war have led to leniency towards non-combatants immunity. These compromises are mainly associated with the theoretical problem of *jus in bello* ethical conditions of just- war. The result of these compromises is the self-contradictory nature of Just-War Theory and the endorsement of wrongful killing with the possibility of undermining states right to national defence.



Jus Post Bellum: Justice at the End of War

6.1 Introduction

"Pottery Barn rule": "You break it, you own it."²⁰

The above statement delivered by Secretary of State Colin Powell after the end of combat operation in the Iraq War and oft-cited by America's European allies best exhibits the nature of justice post-war (Williams & Dan, 2006). *Jus post bellum* evaluation of justice in the aftermath of war aims at what ought to happen at the end of war. In this respect, *jus post bellum* consideration with vindication of human rights and prosecution on occasion of its violation evaluates the interrelationship between the three conditions of JW. Evaluation of *jus post bellum* reveals an intricate relationship between the three principles of just-war. All are contributing toward JW's claim for right resort to force. Where justice at the end of war aims at the vindication of human rights and just prosecution of crimes, this correlation stresses post-war *justice* reliance on *jus ad bellum* criterion of "right-intention" and "proportionality principle" of *jus in bello* in order to rightly administer judgment for crimes committed during war. Conversely, failure of *jus post bellum* aim is associated with discrepancies in *jus ad bellum* and *jus in bello* conditions of just-war. This is apparent in the case of spillage or collateral damage which is the problem of proportionality. The paper claims that the dispensation of justice post-war depends on *jus ad bellum* criterion of "right-intention" and "proportionality principle" of *jus in bello*.

6.2 Theoretical framework

Jus post bellum condition of just-war warrant equal justice at the end of war. Post-war justice considers vindication of human-rights and prosecution on the occasion of its violation essential so as to establish just peace at the end of war. Despite its importance, *jus post bellum* is a neglected condition in a just-war domain (Bass, 2004; Williams & Dan, 2006; Frowe & Lang, 2014). While traditionalists consideration of the morality and justness of war has been evolving around *jus ad bellum* and *jus in bello* conditions of JW, much has not been said about what happens after a war end (Bass, 2004; Williams & Dan, 2006; Frowe & Lang, 2014). In

²⁰ Woodward, B. (2004). *Plan of Attack* at 150.

fact, the much-needed principle of *jus post bellum* condition is not adequately dealt by just war thinkers of different periods. As such, throughout just war literature, there is an overwhelming neglect to *jus post bellum* condition by prominent just-war thinkers. Though Augustine, Aquinas, Suarez, and Grotius have contributed much on improving the laws of war to be more humane, yet these prominent just-war thinkers have more or less left *jus post bellum* condition untouched. Similarly, Paul Ramsey, Michael Walzer, James Turner Johnson, and other modern proponents of JWT seem to have moderately dealt with the principle. Corresponding observation is made about Theologians, Philosophers, and Lawyers who have developed and polished the theory (Williams & Dan, 2006).

6.2.1 *Jus post bellum* vindication of human rights

Available literature on JW also reveals a link between JWT and human rights as a sound basis of *jus post bellum*. The human rights approach to JWT justifies the undertaking of war on occasion of its violation and the laws of warfare. This approach recommends the undertaking of war as a last resort and to secure basic rights for life and liberty.

Human rights as a sound basis of *jus post bellum* consider vindication of human rights and prosecution on occasion of its violation essential to establish just-peace at the end of war. Centre to just-war concept is the protection of life, rights, liberty, property, and vindication of human rights (Williams & Dan, 2006). Prominent thinkers of the human rights approach to JW include Michael Joseph Smith (1997), Michael Walzer (2000), Robert E Williams & Dan Caldwell (2006).

JW's concern with the vindication of human rights aims at just peace at the end of war. "A just peace is one that vindicates the human rights of all parties to the conflict" (William & Dan, 2006, p.317). Especially of those whose rights have been violated. The subject of human rights includes non-combatants, combatants, and those combatants that have surrendered or are captured. Accordingly, JW is waged for the vindication of human rights that have been violated (Williams & Dan, 2006). Vindication of human rights for just-peace, in turn, requires the pursuit of "equal-justice" and "restoration of the status *quo ante bellum*." The following deals with this issue.

6.2.1.1 Equal justice at the end of war

Jus post bellum vindication requirement of equal justice may be pursued in the process of fair prosecution of war crimes. This means prosecution of war crimes committed on both

sides or by all the parties involved and on violation of the rules of war. While, just-war recommends a rightly weighed punishment for the crimes that have been committed, it, on the other hand, prohibits the abuse of criminals or of the punishment of those who are not guilty of committing the crime. JW, therefore, aims to bring about just peace, which is possible when rights are vindicated (Williams & Dan, 2006).

6.2.1.2 “Restoration of the status quo ante bellum”

Other essential aspects of *jus post bellum* vindication of human rights include returning to a pre-existing condition before war. According to Orend (Orend, 2002), “the proper aim of a just war is the vindication of those rights whose violation grounded the resort to war in the first place” (p. 46). Therefore, the fundamental aims of *jus post bellum* is “the restoration of the status *quo ante bellum*²¹ with respect to the rights of the victims of aggression”. Following the Christian conception of JW in particular, Jimmy Carter goes beyond to a state of simply returning to a pre-existing condition before war to establishing a kind of peace that clearly improves over what already exists (Bass, 2004). In humanitarian intervention, it means securing the rights of those victims whose rights have been violated by the aggressor state. Thus, the success of war depends on “the vindication of the rights for which the war was fought” (Williams & Dan, 2006, p. 361).

However, despite the importance of the human rights approach to JW, this approach suffers from certain loopholes. This approach tends to dissolve human rights and human security for national security (Smith, 1997; Walzer, 2000). In fact, the psychology of conflict and conflict resolution as "security" has failed to secure peace since it obfuscates the aim of peace with justice. This is apparent because, like never before, "security" today has become a means of fostering, implementing, and justifying draconian laws, aggressions, global control of monopolies, resource war, immigration control, and a new form of racism (Samaddar, 2014).

6.2.2 Research gap

The existing literature, therefore, reveals the following gaps:

1. That there is overwhelming neglect of *jus post bellum* condition of JW (Bass, 2004; Williams & Dan, 2006; Helen & Gerald, 2014).
2. That human rights approach to *just post bellum* tends to dissolve human rights and human security for national security (Smith, 1997; Walzer, 2000).

²¹ The situation as it existed before the war.

6.2.3 Objective

To evaluate *jus post bellum* condition and the associated discrepancies that could have interfered with *post bellum* concern with the vindication of human rights and just prosecution on occasion of its violation.

6.3 Discussion

Since the study reveals an overwhelming neglect of *jus post bellum* condition, associated discrepancies that could have interfered with *post bellum* concern with the vindication of human rights and just prosecution on occasion of its violation will be a subject of the following evaluation.

6.3.1 Intricate relationship between the three conditions of JW

An inquiry into *jus post bellum* condition reveals an intricate relationship between justice in the initiation of war, during, and at the end of war.

Since central to JWT is human rights, the theory, therefore, not only justifies war on the event of human rights violation and the laws of warfare, but the concern for human rights alone could set a limit on unjust military practices. The study, therefore, observes an intricate relationship between the three principles of just-war in that justice in the initiation of war and during war are important for justice post war. A general correlation between the three conditions of just-war states that any discrepancies in the principle dealing with justice post war are observed to be directly correlated with the first two conditions. This logical connection between the three conditions shows that justice after war follows from justice before and during war. Justice post war thus rests on the consideration of the conditions of justice in the commencement of war and justice during war. Hence, the claim that principles used to judge *jus ad bellum* commencement of war and *jus in bello* conduct of war determine justice at the end of war is most prominent in *jus post bellum*.

6.3.1.1 Justice post war in “Right-Intention” and “Proportionality Principle”

Where justice at the end of war aims at the vindication of human rights and just prosecution of crimes, this correlation stress *post bellum* reliance of justice on "right intention" criterion and "proportionality principle" for right administration of judgement for crimes committed during war. *Jus ad bellum* right intention and *jus in bello* proportionality principle

are indeed valid for post bellum justice at the end of war. The study further observes that in judgment, the law of proportionality relies on right-intention criterion of *jus ad bellum*. In judgment, while proportionality principle aims to ensure that punishment fits the crime (Williams & Dan, 2006), right intention criterion purpose that punishment sanctioned²² accords with the nature of crime committed.

Jus post bellum efforts to promote justice for crimes committed against peace and for war crimes aim that punishment fits the crime (Williams & Dan, 2006). Therefore, *post bellum* justice in the aftermath of war requires the synthesis of right intention criterion and proportionality principle. Since there is an intricate relationship between the three conditions of JW, both are paramount for justice in the aftermath of war. *Jus post bellum* justice at the end of war requires right intention. Right intention aims at waging of war for right reason. Augustine, Aquinas, and Hugo Grotius (1583-1645) recommend undertaking war specifically for right reason. The undertaking of war for right reason prescribes that war must not be driven by fear or greed, or cruelty but should be waged to secure peace by pressing the wicked and upholding the good. Instead, they recommend war in pursuance of what is right. According to Grotius, war is permissible when “good faith”- honest and sincere intention is maintained (Grotius, 2006; Vorster, 2015). Proportional standard, on the other hand, requires that war be fought in a manner that represents a proportional response to the wrong to be avenged (Alexander, 2020). The principle is also concerned with right resort to force and therefore asserts proportionality of the means used in achieving a goal (Vorster, 2015; Seth, 2017).

From the above consideration, we see a complete overlap between right intention and proportionality principle. Therefore, the study notes that right intention is prerequisite in judgment since proportionality principle rests on *jus ad bellum* right intention for its validity.

The study further observes compromise of proportionality principle and right intention responsible for "spillage," which is a military euphemism for collateral damage and for indifference to administer just prosecution for crimes committed. In this regard, the following section will discuss how the compromise of proportionality principle and right intention criterion came about in modern just-war theory (MJWT).

²² Here, ‘sanction’ refers to the penalty issued for certain crimes that was committed.

6.3.1.2 Compromise of “Proportionality Principle” and “Right- Intention” criterion

MJWT fails to observe proportionality principle on account of moral indifference (Solomon, 1996; Vorster, 2015). Further, it is noted that *jus in bello* compromise of proportionality is rooted in the neglect of *jus ad bellum* right intention.

Just-War intention is paramount because true peace can only be based on “right intention” (Sinha, 1984, p. 33). The intention is the act of foreseen consequences yet to be realized. In this sense, intention encompasses the idea of the end and the idea of the means chosen by the self (Sinha, 1984). Despite its importance, right intention criterion is often overlooked. The instance of overlooking is most apparent in modern just-war discourse. For though *just war tradition has been shaped by the teachings of Cicero, Aristotelian philosophy, medieval and Reformational Christian thought, and natural law theory, modern just war discourse seems to have relinquished some of its earlier moral roots* (Vorster, 2015, p. 56). Although traditionalists' strand of thinking highly regarded subjective elements such as virtue and right intention as important criteria for war ethics, modern JW discourse rarely address issues of character and, therefore, virtuous practices of warfare. For right intention criterion, the subjective element of JW came to be compromised in contemporary just-war (CJW) discourse when MJW discourse considers the Augustinian condition of "just cause" and "authority" as an adequate criterion over “right intention” (Vorster, 2015). Thus, while traditional JW considers containment of violence within military limits necessary²³ (Alexander, 2020), MJWT justified and legitimized spillage or collateral damage of non-combatants in the idea of double-effect.

6.3.1.2.1 Issue of "Spillage" and "Double-Effect"

Spillage in war is immoral, unnecessary, unlawful, and avoidable (Vorster, 2015; May 2007). According to Aquinas, “an act may not be intended, yet be regarded as unlawful when proper care is not taken to remove obstacles that might cause unintended injuries” (McDermott, 1997, p. 390). While Aquinas considers spillage as an outcome of negligence, according to Larry May (2007), lack of care in not removing unintentional injuries is but an act of allowing “intentional killing of innocents” (p. 1). This is associated with moral indifference in judgment (Vorster, 2015), which is responsible for the inability of competent institutions to rightly administer justice for the crimes committed during war (Solomon, 1996). According to

²³ Perhaps best exemplified in the U.S. lead-up to the Iraq War, when U.S. Secretary of Defense Donald Rumsfeld said that he hoped that the “shock and awe” bombing campaign would not kill innocent civilians but would bring a quick end to the war. He was wrong on both counts.

Aquinas, accidental injuries to civilians happen due to a lack of overhaul²⁴ in ascertaining the absence of unintended injuries. This instance is not simply a case of negligence but is rather an instance of well-intended violence directed toward non-combatants and non-combatants' objectives. For these reasons, the study is highly critical about the principle of double-effect since it not only justifies and legitimizes collateral damage, but the idea itself embodies violation of *jus ad bellum* right-intention criterion and *jus in bello* principle of proportionality. Therefore, although the issue of spillage or collateral damage seems to be an external problem it really is an issue of judgement which is intrinsic in character. Hence, the inability of competent institutions to administer justice rightly is a case of moral failure. Therefore, it is observed that moral indifference not only allows injustice and unjust practices during war, but the same reason is responsible for injustice in the aftermath of war. Therefore, when it comes to judgment, proportionality principle rests on right intention.

6.3.1.3 Categories of crimes based on "Intention"

Since proportionality principle aims to ensure that punishment fits the crime (Williams & Dan, 2006), right intention is a prerequisite in judgment. Right intention criteria, in turn, aims to ensure that punishment sanctioned accords with the nature of crime committed. Right intention criterion is vital in judgement as moral indifference in judgment render competent institution unable to administer justice post war rightly. For this reason, the thesis recognized three categories of crimes based on intention. The three categories of crimes based on intention include presumptuous sin, not-presumptuous sin, and un-presumptuous sin. These categories of crimes will be discussed in the following.

The presupposition that "All sins are great sins, but yet some sins are greater than others" (Spurgeon, 1857, p. 77) implied different shades of crime. Both sin and crime, in their etymological sense, denote an act of transgression.²⁵ While in the context of religion, "sin" connotes an act of *transgression against divine law*²⁶ "crime" in a legal context is considered an act of *transgression towards civil law*²⁷. Sin and crime are thus used interchangeably here. Civil law, which is concerned with the ethical deliberation of its citizens' right and wrong

²⁴ In the statement, 'overhaul' refers to a lack of careful and thorough examination to make necessary changes or repairs. In this respect, the study remarks that any lack of ascertaining the absence of unintended injuries is not simply an instance of negligence but an instance of well-intended violence.

²⁵ Transgression or "Pasha," a Hebrew term, is a derivative of "Pesha," meaning *the willful deviation from a law or a commandment*. It refers to the act of breaking away from the authority in a successive stage of rebellion. Since transgression is to breach the set rules of the law purposely, it is a presumptuous sin [J. Hodges, *What is the difference between iniquity, transgression, trespassing, and sin?* (2010)].

²⁶ <https://www.lexico.com/en/definition/sin>.

²⁷ <https://www.lexico.com/en/definition/crime>.

actions, is embedded in religious belief. Natural law *conceived as the ultimate measure of right and wrong, as the pattern of good life ...the touchstone of existing institutions, the justification of conservatism, as well as revolution* (Passerin, 1994, p. 13), is said to have its origin in the idea of justice (Barker, 1948). Justice, in turn, proceeds from the nature of the cosmos, the reason of man and is animated by God (Barker, 1948). Religion is also considered necessary for the inculcation of morality. Consequently, God's existence, belief in the immortality of human souls, and belief in future rewards and punishments are the doctrine for *the foundation of all morality* (Adams, 1848, pp. 22-23). Moreover, religion and morality are considered indispensable support for “good government, political prosperity and national well-being” (Barton, 2013, p. 7025). David Barton, in his *Original Intent the Courts, the Constitution and Religion* (2013), a well-documented work on the original intention of the American founding fathers, asserted the importance of religion and morality for political prosperity, national stability, and human happiness²⁸. This work asserts religion and morality as the lone *principle upon which freedom can securely stand* (Adams, 1776).

In Just-War tradition, Aquinas deliberation on killing did not permit deliberate killing in self-defense. For him, the task of taking life is subject to public authorities acting on behalf of the common good (Aquinas, 1997, p. 390) supports the fact that there are indeed “Degrees of guilt for bloodshed” (Deuteronomy 17:8 NKJV). Thus, based on the criterion of intention, the nature of crime²⁹ may be distinguished as Presumptuous, Not-Presumptuous, and Un-presumptuous.

Presumptuous sin may be defined as that which is “Committed wilfully against manifest light and knowledge” (Spurgeon, 1857, p. 1). An act is presumptuous that is acted out in total disregard to the light of *conscience and the light of affectionate counsel and kind advice* (p.2). This sin is intentional because it has been “committed with the intention of sin” (p. 4). It is “A sin committed with deliberation...with a design of sinning...for sinning’s sake” (p.4). For this

²⁸ In his preparatory declaration, George Washington, President of the United States, called religion and morality the “great pillars of human happiness” (Barton, 2013, p. 7042).

²⁹ Constitutive criminology defines “crime” as “the power to deny others their ability to make a difference” (Stuart, 2000, p. 268). In this sense, *crime* is understood as *harm* and is based on “unequal power relations built on the construction of difference” (272). Accordingly, it understood crime as committed against the dignity of a person. For this reason, another facet of crime involves disrespect of people in numerous ways- all having “to do with denying or preventing us from becoming fully social beings.” In the process of social interaction, when “we (*are treated or*) become less than human; we are harmed”. This field of knowledge also acknowledged the role of human agency in the construction of order and vice-versa.

reason, “Presumptuous sin” is considered to be “the chief of all sins: they rank head and foremost in the list of iniquities” (p.1).

Contrary to Presumptuous sin is Not-presumptuous sin. This category of sin is not intentional but is born out of ignorance. Its root can be traced back to aggressive human nature (Solomon, 1996). Not-presumptuous sin is not motivated by hatred but is driven by blind forces of human instinct (Deuteronomy 4:41-43). In the words of Spurgeon, “A man does not sin presumptuously, when suddenly overcome by anger, though, without doubt, there is a presumption in his sin unless he strives to correct that passion and keeps it down” (Spurgeon, 1857, p. 3).

The argument for a presumption against injustice led us back to the belief that war is immoral (Solomon, 1996) and can be rationally avoided (Gordon, 2008; Zwolinski, 2014). This belief necessarily entails the relationship between human nature and war (Solomon, 1996). In Book 1 of *De libero arbitrio* (388-395), Augustine also discussed the role of *human free will* in the origin of evil. According to Augustine, God did not invent evil but what animates evil acts in human beings is the state of their “internal orientation” (Carnahan, 2008; Vorster, 2015). Thus, “unless that ignorance also be wilful in which case the ignorance itself is presumptuous sin” (Spurgeon, 1857, p. 3). This brings us to Un-Presumptuous sin.

Un-Presumptuous sin is presumptuous, for it is the outcome of self-imputed or self-inflicted ignorance. The degree to which ignorance is intended determines the difference between Not-presumptuous sin and Un-presumptuous sin. Not-Presumptuous sin is a case of unintended ignorance; Un-presumptuous sin, a case of intentional ignorance. Thus, while the former is a state of pure ignorance, the latter is a state of quasi ignorance.

In order to complement the already existing laws of warfare and to ensure that punishment sanctioned accords with the nature of crimes, this paper has distinguished crimes based on right-intention criteria into presumptuous, not-presumptuous, and un-presumptuous, respectively.

We see that external problems of spillage are subjective or intrinsic by nature. Thus, the study maintains that dispensation of justice post war depends on *jus ad bellum* criterion of right intention and proportionality principle of *jus in bello*.

Other rules of warfare that were enacted with humanitarian concern and to ensure punishment of war crimes include The Nuremberg Military Tribunal (NMT)[1946]; Geneva Conventions (1949) and the Additional Protocol I (1977); Rome Statute (1998), and like

institutions. Correspondingly, International Criminal Court (ICC)- a supra-international tribunal court, has established "crime of genocide", "crime against humanity," "war crimes," and "crime against aggression" as four core international crimes (Court, 2011). The following section discusses the development of some the core concepts and events.

6.3.2 War crimes, International Humanitarian Law and International Criminal Court

International Humanitarian Law (IHL) also known as the law of warfare was codified to limit the effects of war and to mitigate the suffering caused by it (McCoubrey, 1998). Although universal codification of IHL had begun by 19th century, it was the bitter experienced of modern warfare that further strengthened the international rules of warfare. As horrors of war crimes intensified during WWI (1914-18) & WWII (1939-45), war crimes committed in violation of the laws of warfare reinforced the need to indict individuals for "crimes against humanity". In response to meet the need for justice after war *The Nuremberg Military Tribunal*³⁰ (NMT) was set up during September 30th, 1945 to October 1st, 1946 by the Allied forces³¹ under International Law and the laws of warfare. This succession of military tribunals held after WWII tried the conduct of combatants for unjust practices during war- for committing the abuse of humanity and violation of the laws of warfare. Sir Norman Birkett, alternate British Judge during the *Nuremberg Trial* that tried the most prominent political and military leaders of the *Third Reich* described the trial as "the greatest trial in history" (Marrus, 1997, p. 563). Many treaties that followed the *Nuremberg Trial* would consequently led to the formation of *Rome Statute* (1998).

These set of rules for armed conflict was enacted to ensure punishment on violation of the *Geneva Conventions* (1949) and *Additional Protocols* (1977)- these conventions under International Law were convened to promote the protection of war victims combatants and non-combatants alike [The Protocol I of 1977, Part I, Art. 1&2]. Other include the institution of the 1998 Rome Statute, which is an International Criminal Court created with the responsibility of repressing war crimes and to exercise punishment on occasion of its violation. (ICRC, 2004) After unsuccessful multiple attempts to create supranational and international tribunal, the Rome statute was adopted by *the United Nations Diplomatic Conference of Plenipotentiaries* on 17th July 1998 and was ratified on 1st July 2002. "The Rome Statute was

³⁰ Nuremberg Trials <https://en.m.wikipedia.org>

³¹ During WWII, the allies of World War comprised of France, Poland, United Kingdom, and the independent states like India. These countries joined forces against the Axis power & their co-belligerents that included the countries of Germany, Japan and Italy etc. (<https://en.m.wikepedia.org>)

adopted by 120 to 7³², with 21 countries abstaining” (Scarf, 1998). Since November 2019, the Rome statute is ratified by 123 states (Court, 2011).

According to Article 1 of *Rome Statute of the International Criminal Court (ICC)*, the main function of “The Court” or the ICC, is to established a permanent institution so as to exercise its power over serious crimes that is of international concern. In that sense, the Court is complementary to national criminal jurisdictions. While Article 3 states the Seat of the Court or “the host State”- The Hague, Netherlands; article 5-9 of part II identify various kinds of crime that are the concern of the Statute. This supra- international tribunal court established 4 core international crimes: crime of genocide, crime against humanity, war crimes and crime against aggression³³. Rome Statute defines these core crimes in the following.

Article 6: Crime of Genocide

These are “acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group” (p.4). It thus includes the acts of deliberately inflicting harm so as to debilitate and destroy the corporeal or psychological capacity of the members of the group and/or by imposing harmful measures policy level.

Article 7: Crimes against humanity

It is a widespread “systematic attack directed against any civilian population” (p.3) with full intention. It includes the crime of murder; extermination³⁴; enslavement; deportation; imprisonment; torture; political, racial, national, ethnic, cultural, religious, gender persecutions³⁵; kidnap; apartheid³⁶; other inhuman acts causing intentional great suffering or serious injury to the body and mind; sexual violence like rape, sexual slavery, enforced prostitution and sterilization, forced pregnancy.

³² The 7 countries that voted against the formation of supranational & international tribunal court are: The People’s Republic of China, Israel, the United States (have publicly confirmed their negative votes), other possible 4 might include countries like: India, Indonesia, Qatar, Russia, Saudi Arabia, Sudan, Yemen Iraq, Libya [Stephen Eliot Smith, “Definitely maybe: The Outlook for US Relations with the International Criminal Court during the Obama Administration”, *Florida Journal of International Law*, 22:155 at 160, n.38].

³³ *Rome Statute of the International Criminal Court* <https://en.m.wikipedia.org>

³⁴ “The intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population” (*Rome Statute of the International Criminal Court*, p.4).

³⁵ “Intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity” (Ibid, at 4).

³⁶ Institutionalized systemic oppression for the dominance of one race over another by removing legal protection for a prolonged period of time.

Article 8: War Crimes

Such “crimes are committed as part of a plan or policy or as part of a large-scale commission” (p.4). The Rome Statute categorize war crimes into three parts. These are discussed one after the other.

Part (a) of *war crimes* include crime committed in violation of the Geneva Conventions of 12 August 1949. It includes crime of

Wilful killing; torture or inhuman treatment-biological experiments; wilfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement; taking of hostages (p.5).

Part (b) of *war crimes*

“Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict” (p.6). Conscription of child soldiers (under 15 years of age); intentionally depriving civilians of relief funds or of starving civilians.

Part (c) of *war crime*

It includes violence “committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention” (p. 6). Other causes include may include humiliating and degrading treatment to personal dignity.

From the above observation we can conclude that war crimes comprise of various forms of violence. When we talk about war crimes it thus ranges from physical violence to more subtle form of like psychological violence and violence that is embedded in the system³⁷.

³⁷ For more information on different types of violence follow: Johan Galtung’s “Cultural Violence” (1990), Peter J. Riga’s “Violence: a Christian Perspective” (1969), Slavoj Zizek’s “Violence” (2010).

Article 8: Crime of aggression *bis*³⁸

“Act of aggression” imply “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations” (p.7).

According to United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974 other acts that accords with crime of aggression, regardless of a declaration of war, include: Invasion or occupation of other State region by use of artilleries like bombs, blockade, use of forces belonging to another state in contravention to the agreement or beyond the termination of the agreement, and rendering safe heaven at the disposal of another state’ perpetration or aggression against other state (Court, 2011).

6.3.3 Dangers of neglecting “Right-Intention” and “Proportionality Principle”

Contrary to just-war criteria of right-intention and proportionality is the unjust practice of war. Most of which are prompted by wrong intention. There have been many instances where “hatred” has come to conceptualized war. It has not only predominated the motivation of war but has also come to determine the ethics of war. Book V of Plato’s *Republic* (388-367 BC) captures a discussion between Socrates and Glaucon on the ethics of war. Here, they discussed how the idea of Greek hatred has come to distinguished the Greeks from the non-Greeks and how this idea applies to the code of conduct of war. According to this idea, while the hatred that propels a fight against another Greek may be termed as “faction” for they are by nature friends; the hatred that propels a fight between the Greeks and the barbarians or the non-Greeks, whom the Greeks consider an enemy by nature is term as war proper. The code of military conduct intended between a Greek did not apply while engaging in a fight against a non-Greek (Plato, 2006). War is, therefore, intricately linked to human nature.

Other thinkers who have attributed war to human nature include Sigmund Freud (1930), Augustine (387-88), Thomas Hobbes (1651) and Edmund Husserl (1935).

Sigmund Freud in his famous *Civilization and Its Discontents* (1930) presents “Instinct Theory” which states war as the resultant reaction of two equally powerful instincts called *Eros* and *Thanatos*. According to this theory, when Thanatos or death instinct which is aggressive and destructive ally itself with Eros which is creative and unifying drive through a great purpose there is war (Gordon, 2008). Similar view on the relationship between war and human

³⁸ Modified by the resolution RC/Res.6 of 11 June 2010.

nature was made by Augustine. St Augustine in his book *On Free Choice of the Will* (387-88) attributed the origin of evil to human free will. Augustine describes that God is not the author of evil but what animates evil is the state of our internal orientation (Vorster, 2015). The internal orientation in turn driven by *libedo* (lust) and *cupiditas* (greed) informed man towards preventive killing and pre-emptive killing (Carnahan, 2008; Augustine, 2010; Vorster, 2015).

Social contract theorists as well provide similar view about war and human nature. Thomas Hobbes in his seminal book *Leviathan* (1651) describes man in the state of nature as perpetually driven by the lust for power. This drive he describes is rooted in man's selfish, anxious and fearful nature about the future. Since he cannot assure himself the power and means to live then which he has at present, he keeps on acquiring more. Similar mindset drives greatest of kings to strengthening themselves "at home by laws or abroad by wars" (Hobbes, 2009, p. 7). Therefore, what prompted men in the state of nature to form a compact is neither the pursuit of happiness, nor the presence or absence of moderate power, but the perpetual desire for power. Further, since the state of nature is marked by never ending conflict for resources and domination, life in the state of nature is harsh, brutish and difficult. This state of conflict where "all is against all" came to be resolved in the formation of the state. The state of nature thus represents social contract theorists' justification for the formation of organized state institution.

While social contract theory of Hobbes has provided us an insight into the nature and condition of man before they ever came together in a compact, Edmund Husserl's *Philosophy and the Crisis of European Man* (1935) gives us a glimpse into the crisis in the internal orientation which have inadvertently contributed to the causes of war. Husserl in this work acknowledged crisis in European man to naturalistic view of life. What contributed to this crisis is the extension of materialism to spiritual life of consciousness. The departure began when western philosophy distanced from Greek disinterested rationality and when the extraordinary successes of natural knowledge was epitomized to the knowledge of the spirit. But the extension of naturalistic view of life to the knowledge of spirit objectifies and relativizes the "unique life of the spirit" (Kauffmann, 1994). As such Naturalism confuses and reduces the spiritual life of consciousness to space-time continuum and thus misses the point. Consequently, in favor of Naturalism, Philosophy has lost the spiritual nature of man.

According to Aquinas, the just-war intention is essential because wrong intention could annul the justifiability of a war (Yoder, 2009). Cicero justified war on similar ground. Cicero

approved of war when his uncompromising faith in peace is challenged by treachery, slavery, and faulty peace. His conception of peace does not involve treachery (Harrer G. A., 1918, p. 27) and obviously not slavery. He says, “The name of peace is sweet, and that condition is salutary, but between peace and slavery, there is a great difference” (p. 38). He is opposed to peace when war is garbed under peace; that is when war is its hidden agenda. Despite his love for peace, and is evident from his statement, “In my opinion, we should always plan for peace, peace which will involve no treachery” (p.27). Cicero justified war when the just-war criterion of “right intention” is not fairly observed. Therefore, war under such circumstances becomes inevitable (Harrer G. A., 1918). For this reason, Aquinas strongly argued that war be waged with the right intention. “War should not be waged out of greed or cruelty but should be aimed towards securing peace, coercing the wicked and helping the good” (Vorster, 2015, p. 62).

Nevertheless, if Just War theory has to survive its standard, it has to maintain its principles, the moral conviction reflected in the just resort to force with the same fervent with which the Pacifists have pursued peace. Writing on Traditional Pacifists, Larry May (2015) says that,

They stand out from the mass of society because they do not feel that they have to act as everyone else does. Indeed, it is the single-minded pursuit of what their conscience tells them is the right thing to do that has enhanced Pacifists' moral reputation over the centuries (p.10).

Unless just war adheres to the three conditions of fighting a war justly, Larry May’s contention for the impossibility of future war as just would be true.

The study observed an intricate relationship between the three conditions of just-war. This logical connection between the three conditions showed that justice after war follows from justice in the initiation and during war. Justice at the end of war, therefore, rests on *jus ad bellum* criterion of “right intention” and “proportionality principle” of *jus in bello*. This is most prominent where *jus post bellum* aims to ensure that punishment sanctioned accords with the nature of crimes. To this end, based on the intention criterion, this paper has distinguished crimes into presumptuous, not-presumptuous, and un-presumptuous. If just-war is to maintain its claim for right resort to force, all three conditions of just-war must synergistically work together.



Chapter 7

Conclusion

This concluding chapter highlights the overall aim of the thesis that have motivated the research and presents some of the major findings and contributions made on the existing literature of just-war.

Despite long history of JW tradition, statistics and outcome of twentieth century world wars have shown that civilian lives and property are prime targets of war. As such due to the victimization of civilians in any form of conflict, the overall aim of the thesis is to search out any discrepancies in JW rules and practices in a war. These discrepancies are discussed in each of the thesis chapters.

The first chapter served as the introductory chapter of the thesis. The introductory chapter of the thesis presents JW concept, its historical background, and many other ethical issues following which have formed the motivation of the thesis topic. The first section of the introduction set forth JWT as a set of rules that aim at just practices in war. The chapter then delineates the definition of war, and the debates about its origin. Speculation about the business of war construed its origin to the invention of agriculture itself. While war have “developed over territorial claims as a result of agriculture and fixed settlement,” (Ralby, 2013, p. 9) ethical analysis of war strictly mandates compliance of the use of force to the three conditions of JW. In fact, familiarity with JW rules of some form has been traced across different cultures over certain period of time. This development of JW concept is dealt by the second section of the chapter. Since the emergence of JW concept exhibited a close affinity between the ethics of war and law, the subject domain of JW goes beyond the field of Applied Ethics to that of International Law. By incorporating the JW tradition into International Law the thesis treats JW as a larger tradition than it usually treated.

The thesis chapter on “**War: Just-War Theory Context**” have dealt with incongruities in schematic organization of the theory. By situating JWT within the broader dimension of war, the chapter resolved problem of contextualizing JWT. The reading of just-war literature exhibits two contrasting schematic view about the theory. While the broader schema situates just-war concept between the extremes of Pacifism and Realism, the other posits the concept within a narrow confinement of Pacifism- with just-war concept having more affinity to contingent pacifism rather than absolute pacifism. However, for the purpose of JWT analysis

the thesis adopts the broader schema- the view that situates JWT between the extremes of Pacifism and Realism. This view is taken in order of timeline. Chronologically, JW Pacifism is more recent than Medieval conception of JW. Therefore, the thesis chapter claim that the latter cannot originally encompasses the former. Thus, the thesis locates JWT within what the broader dimension of war.

“Justice: Ethical Underpinning of JWT” chapter is rivetted by the justification of why an ethical framework for war is and must be grounded on the conception of justice. As such, the search for the underlying theme of JW presents “justice” as the undergirding concept of JWT. Justice as the ideal of JWT is thus seen throughout the three conditions of JW- all focusing on justice at different stages. The emphasis on the concept of justice also emerges in light of the ethical challenges for which contemporary JW have grown distant from the original intention of JW. As such, MJWT consider the importance of character or the internal disposition to the rules of warfare no longer viable (Vorster, 2015). Declining morality of modern warfare coupled with Utilitarian ideology have estranged “Justice” from the deliberation of war. Such thinking in turn fueled the common belief that grants an irreconcilable antagonism between law and arms. In fact, according to Hugo Grotius (1583-1645), those who assert antagonism between law and arms promote injustice. In an attempt to demystify this common belief and the popular misconception that have construed injustice as virtue and justice as vice, the thesis chapter had embarked on conceptual analysis of justice. Conceptual analysis revealed the multifaceted nature of justice and its interplay in social interaction. In an organized system of human relations, Justice is understood as fairness. The concept of Justice in its existential, metaphysical and political imports thus convey the idea of truth, harmony, equality and proportionality. Since the nature of Justice has exhibited an amalgamation of varied ethical, moral, religious, social and political virtues to that extend this study also claimed Justice as a virtue. By advancing three-fold arguments against the greatest impediment to justice- Utilitarianism, the study reproved Utilitarianism of its claim as a viable theory of Justice. Thus, the importance of the thesis chapter is its reassertion of justice in social interaction and in the context of just-war in particular.

“Jus ad bellum: Justice in the initiation war” delineates the occasion whereby MJWT came to compromised traditional JW aim of right resort to force. JWT aim came to be compromised when MJW discourse overlooked “right intention” criterion for “just cause” and “authority” (Vorster, 2015). However, this thesis chapter maintains the sufficiency of right intention in determining the moral justifiability of a war. Sufficiency of right intention is

claimed since just-cause motivation of what is just and legitimate authority's requirement of "just will" rest on right intention. As overwhelming neglect of JW intention has led to widespread moral indifference, this study maintains the possibility of just initiation of war in the claim that JW "right intention" be kept center and in the inculcation of higher virtues in the context of military art.

Corresponding issues of *jus ad bellum* condition that are discussed include: controversy between traditionalists and revisionists on the assumptions of justified wars; the problem of moral compromise in MJW discourse; and the issue of obligation or compulsion. These issues are discussed within the criteria of just-cause, right intention, and authority respectively. In light of these pertinent issues, the study maintains moral justifiability of certain war as considered against Realist's conception of war.

Moral compromises in MJWT continue to interfere with just practices during war. In the fifth chapter "***Jus in bello: Justice during war***" observes widespread moral compromises in MJWT. The study perceives moral compromises inherent in the idea of "double-effect" and in the problem of "proportionality". While the problem of double-effect was engraved into the theory at the time of its inception, other form of compromises were later introduced into the theory when legality of war came to overlook the morality of war in an attempt to universalize the theory, and when political interests preceded moral end of JW. Thus, the trend of moral decline in traditional just-war theory continued through to International Law. Resulting to the diminishing state of war treatises and compromise of JW aim of right resort to force. Hence, leading to unjust practices during war and tolerance of war crimes.

"*Jus post bellum: Justice at the end of War*" evaluates *jus post bellum* condition and the associated discrepancies that could have interfered with post bellum concern with vindication of human rights and just prosecution on occasion of its violation. *Jus post bellum* evaluation in this chapter is undertaken due to an overwhelming neglect of post war justice and in heightened abuse of individual rights at the pretext of national security. Evaluation of post war justice reveals an intricate relationship between the three conditions of JW and therefore of the claim that the dispensation of justice post war rests on *jus ad bellum* criterion of "right intention" and on "proportionality principle" of *jus in bello*. Conversely, failure of *jus post bellum* aim to vindicate human rights and just prosecution of crimes is associated to discrepancies in *jus in bello* and *jus in bello* conditions of JW.

Further evaluation on the three conditions of JW reveals a complete overlap between the conditions of right intention and proportionality principle. The study also observes the compromise of these dual principles responsible for “spillage” which is a military euphemism for collateral damage and an indifference to administer just prosecution for war crimes and for crimes committed against peace. To complement the already existing laws of warfare and to ensure that punishment sanctioned accords with the nature of crimes, the thesis chapter has distinguished crimes based on right intention into “presumptuous”, “not-presumptuous”, and “un-presumptuous” respectively. Hence, the affirmation of the claim that all three conditions of JW are necessary and for that reason must synergistically work together for achievement of justice post war.

The thesis chapter as well highlighted the dangers of neglecting right-intention and proportionality principle and therefore of their importance to just-war aim in the claim that human nature is intricately linked to the causes of war. Other thinkers that have attributed human nature to war include Sigmund Freud (1930), St. Augustine (387-88), Thomas Hobbes (1651), and Edmund Husserl (1935). According to Husserl, crisis in the internal orientation have not only extended naturalistic view of life to the spiritual life of consciousness but have inadvertently contributed to the causes of war.

Besides other contribution that has been made in each thesis chapter, the importance of the thesis to the field of JW study is its reassertion of “justice” when the morality of JW is in steep decline. This reassertion of justice to JWT must be considered if JW is to maintain its claim for right resort to force and of the nobility of its aim, which is to uphold the cause of justice and to protect the innocents from harm. Further, the practice of justice in warfare would end the popular misconception that there is an irreconcilable antagonism between law and arms.

With the research objectives in mind, the thesis have drawn the underlying unifying theme of JW in the conception of justice; in regard to *jus ad bellum*, *jus in bello* and *jus post bellum* conditions of JW the thesis have identified manifold discrepancies that have led to the compromise of JWT and of the possibility of achieving JW aim by overcoming these discrepancies. The evaluation of the three conditions of JW therefore reveal a correlation that is uniquely applicable to the three conditions and to the aim of JW in general.



Research Output

Publication

1. Haokip, S.N. & Prabhu, V. (2021). Jus Post bellum: Justice at the End of War. In the Proceedings of the 3rd International Academic Conference on Research in Social Sciences (pp.72-85) Berlin, Germany: Diamond Scientific Publishing
<https://www.dpublication.com/proceeding/3rd-iacrss>
2. Haokip, S. N., Prabhu, V. (2020). John Rawls “Reflective Equilibrium” A Methodology for Testing Hypotheses. (Methods and Techniques) (1st, pp. 36-41). Pune, India: Kripa-Drishti Publications
<https://books.kdpublications.in/index.php/kdp/catalog/book/32>
3. Prabhu, V., Haokip, S. N. Forthcoming: Reflection on Kant and Just War. In K. C. Pandey (Ed.), Recent notes on Kant’s ‘Perpetual Peace’.

Presentation

1. Haokip S. N., & Prabhu, V. (2021, May). *Jus Post Bellum: Justice at the end of War*. Paper presented at the 3rd International Academic Conference on Research in Social Sciences, Berlin, Germany.
2. Prabhu, V., & Haokip S.N. (2020, November). Just War: Reflection on the Value of Violence. Paper presented at International E-Conference on Philosophy, Culture and Value, Guwahati, India [Forthcoming].
3. Haokip, S.N. (2019, September). Redefining the Conception of Violence and Peace. Paper presented at World Congress on Women, IISc., Bengaluru, India.



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