

## **Necessar(il)y evil?**

*A theoretical and empirical analysis of the applicability of just war theory to  
human security and new wars*

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## **Ch. 1. Introduction**

The central problem of this research is that due to the existence of ‘new wars’ there is a focus on human security, while just war theory has not (been) adapted to these new phenomena.

A typical case illustrating this (lack of) development is the conflict in Bosnia-Herzegovina: current just war principles do not seem fit to account for and assess the waging of and behaviour in this war. According to Kaldor (2006: 33), Bosnia-Herzegovina is the “archetypal example, the paradigm of the new type of warfare in the 1990s”. At the time of intervention, human security considerations were the main reason for intervention, but the practical reality of the conflict (the involvement of many different types of actors, with varying motivations and interests, the deeply rooted ethnic component and a weak international mandate to top it off) showed that upholding the principles of just war in a new war is not straightforward (e.g. discriminating between combatants and non-combatants). Moreover, sometimes compliance is even perceived as undesirable because releasing just war principles (such as proportionality and good intentions) is more effective to further self-centred political and economical goals (through identity politics, targeting civilians, population displacement).

Although some just war principles are ‘human security-sensitive’, like humanitarian intervention as a just cause (besides aggression and self-defence), other principles seem theoretically unfit and/or practically unrealistic in a new-war framework and context, such as legitimate authority, proportionality and discrimination. Since it is too easy to condemn all new wars as unjust, just war theory has to be adapted to the ‘new war’-phenomenon and human security framework.

Over the last 15 years, the focus of the field of international security has shifted from a traditional approach based on (external) military threats against the integrity or sovereignty of the state, to a human-oriented framework based on issues like environmental degradation, poverty, disease, civil war and ethnic conflict that pose a threat to the safety and security of people or humankind. The major differences are that the state is no longer the main object of security (people are), that the threats that endanger the lives of human beings are not necessarily related to military conflict (but can be), and that those threats do not stem from relations and interactions between states, but rather originate within states (intrastate violence for example) or on a higher, regional or global, level (like environmental and economic threats). (Kaldor, Martin & Selchow, 2007; King & Murray, 2001; Liotta, 2002; Owen, 2004; Paris, 2001) This shift from state to human security fits the empirical development of so-

called 'new wars'<sup>1</sup>, its main feature being that the parties involved no longer are exclusively states; transnational, non-state actors play a big role and conflict is intrastate rather than interstate.

However, this shift from state to human security and the emergence and existence of new wars as an empirical phenomenon has not (yet) penetrated current just war theory. The just war framework still relies on a heavily state-centric perspective. It departs from the assumption that states are the actors that declare and wage war, intervene and fight and thus act in accordance (or not) with the principles of just war. The principles of *jus ad bellum*, *jus in bello* and *jus post bellum* (concerning different stages of war) are thus drawn up, adapted and applied to the perspective and conduct of states. Furthermore, even individuals involved in (state) wars are almost defined in terms of the state: the people fighting state wars are uniformed soldiers and (have to) follow orders from their commanders, who ultimately have to account to the political leadership. Although, of course, soldiers have 'personal'/individual agency, as they actually (choose to?) fight and kill and therefore are liable and can be held accountable to a certain extent<sup>2</sup>, they are somewhat depersonalized by the hierarchical structure in which they find themselves and the 'don't ask don't tell'-policy and since they all have to obey the same rules and adhere to the same code of conduct<sup>3</sup>.

The main *ad bellum*, *in bello* and *post bellum* principles are just cause, good intentions, proportionality, discrimination and legitimate authority. With regard to new wars, all the above-mentioned principles seem either hard to apply or theoretically unfit.

Although the just cause-criterion has been adapted over the last years, by extending the legitimate reasons to wage a war with humanitarian considerations (formalized by the UN in the *Responsibility to Protect*) instead of mere defensive motivations (self-defence against

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<sup>1</sup> See Kaldor, 2006.

<sup>2</sup> In general, there is consensus within traditional just war theory about the moral individual responsibility of soldiers for their conduct in war: although they cannot be held responsible for the *ad bellum* justness of the war in which they are fighting (although not according to Jeff McMahan, 2004: 717, who states that 'unjust soldiers', soldiers fighting an *ad bellum* unjust war, are inherently wrong for merely fighting), they are responsible for the way in which they wage the war and comply to the *in bello* rules. "For soldiers ... are not responsible for the overall justice of the wars they fight; their responsibility is limited by the range of their own activity and authority" (Walzer, 2006: 304). See also Greenwood, 1983 and Zupan, 2008.

<sup>3</sup> This is why soldiers are morally equal (see for example Walzer, 2006: 36). "Soldiers enjoy a moral equality implying a set of rules, liberties and rights that each combatant holds equally, regardless of the putative justice of their war" (Underwood III: 9).

aggression), it still remains fairly state-centric. For *states* have the right to defend themselves, their territorial and political integrity, against an aggressive *state* and *states* have the responsibility to intervene on humanitarian grounds when another *state* is using violence against its own citizens. It remains ambiguous and unclear whether non-state actors can and do have just and legitimate reasons to wage a war, against their own state or against other non-state actors, for example when they are being economically and/or politically marginalized or are faced with violence and brutality. This closely interlinks with the principle of legitimate authority. New wars involve non-state actors (local, regional as well as transnational) which are formally not a legitimate authority of the state. In accordance with a literal interpretation of current just war theory, this implies that non-state actors cannot legitimately declare and wage war, even though they might have relevant (just and legitimate) reasons to do so. Furthermore, state authority is actually already eroded from the top; with the supranational institution of the United Nations (UN) and its Security Council, which has a (definite) say in justifying (humanitarian) interventions, as a perfect example. Thus, not only does this criterion pose moral problems regarding who or what can be perceived as a legitimate authority, its enforcement also poses practical problems due to the existence of non-state authorities that are perceived to be legitimate in the international law and (just) war context.

Furthermore, the criterion of good intentions, which demands that the entering into war takes place (and that the conduct in war is) in accordance with the underlying just cause, also poses problems with regard to new wars. Even though good intentions might have been present at the beginning of the war, it is imaginable that they get obscured, for example, by economical interests resulting from the (continuance of) conflict or grievances towards the opponent resulting in revenge and retaliation.

The most important impediment for the proportionality-principle is not its moral validity to new wars, for this is a principle which should be held up by any actor, regardless whether it is state or non-state, but rather its practical application in conflict. Since identity politics and strategies of sowing fear and population displacement are commonly used in the new type of war, it is highly doubtful whether proportionality-considerations of expected costs and benefits are even remotely present in the minds of political and military or rebel group leaders (or regular soldiers).

Lastly, the *in bello* criterion of discrimination between combatants and non-combatants and the connected *post bellum* principle of discrimination are difficult to uphold, since it is in practice harder to distinguish between civilians and soldiers due to the guerrilla-type warfare

which is common in new wars. Therefore, responsibility for aggression and war crimes is even more difficult to assign, which makes it difficult to discriminate between actors.<sup>4</sup>

### Content of the research report

The relationship between the ‘new’ human security framework and just war theory is ‘under-researched’ and thus unclear. Human security has become more and more respected and accepted as a conceptual security framework, in theory as well as in (policy) practice, with the UN *Responsibility to Protect* and the establishment of the International Criminal Court (ICC) and the International Convention to Ban Landmines for example. (King & Murray, 2001: 589; Liotta, 2002: 484; Owen, 2004: 377; Paris, 2001: 88; Bodelier, 2008: 13) This revision of the security framework has severe implications; for policymakers (since it defines the frame of successful policy actions) and for example aid workers as well as for political and legal theorists. Therefore, it is even more remarkable to see that the just war tradition has not (entirely) caught up with this development and that the (*ad bellum*, *in bello* and *post bellum*) principles of just war still portray a fairly state-centric view towards security. Although several aspects have been heavily debated, such as the shift from merely aggression to humanitarian intervention as a just cause for war (and were even acknowledged and revised in practice by the *Responsibility to Protect*), most of the criteria do not reflect human security issues, concerns and threats and/or cannot actually be practiced in the new type of conflicts. These include the above-mentioned criteria of legitimate authority, discrimination, just cause and good intentions. But also the criterion regarding the likelihood of success seems problematic, since war is entrenched in societies due to the parallel economy and identity politics and the warring parties paradoxically have a mutual interest in the conflict situation.

The purpose of this research is to analyse the extent to which the theoretical principles of just war theory are in accordance with the theoretical assumptions of human security and new wars, and whether the principles are actually applicable to the practical reality of new war. This research does not deal with the normative value of just war theory and its principles; this is beyond dispute. One could say the question of moral necessity comes before this research, as it is a fundamental assumption to the scientific puzzle where this research attempts to shed some light on. If just war theory and its principles would not be considered normatively

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<sup>4</sup> Furthermore, Jeff McMahan (2008: 20-22) argues that sometimes, in certain cases, non-combatants can be legitimate targets of attack, due to the principle of “liability to attack”, which begs the question if the principle of discrimination might not only be hard to apply, but also morally unfit.

necessary or dominant, the extent to which it is challenged by human security and new wars (the central question of this research) would not be relevant.

In order to research whether just war theory is capable of assessing recent empirical developments, like the shift from state to human security and the phenomenon of new wars, priority lies with determining what human security and new wars actually and exactly entail. Furthermore, it is important to explore the content of current just war theory and identify possible obstacles with regard to conflicting assumptions and applying the principles to new wars in order to assess its justifiability. With the help of a case-study of the Sierra Leonean war, which can be called a typical new war (in accordance with Kaldor, 2006), it is possible to research whether notions of just war theory can be detected on some crucial points, like the relevant actors and whether these actors act in accordance with the *ad bellum*, *in bello* and *post bellum* principles.

The central research question is: To what extent do recent empirical developments in violent conflict between states and transnational actors, such as the shift from state to human security and the existence of 'new wars', challenge current Just War Theory with regard to assessing the justifiability of (new) wars?

The sub-questions that need answering in order to answer the main research question are:

- What does the shift from state security to human security entail and what are the features of new wars?
- What is the current framework and content of just war theory?
- To what extent do the (*ad bellum*, *in bello* and *post bellum*) principles of just war fit the theoretical assumptions underlying the new context of human security and new wars?
- What can the war in Sierra Leone tell us about features of new war and the consequences for the application of just war principles?



## **Ch. 2. From State Security and Old wars to Human Security and New wars**

In this chapter, the theoretical notions of state and human security will be described and analyzed. Furthermore, the theoretical features (assumptions) of old and new wars will be set forth and linked to the corresponding notions of (respectively) state and human security, in order to answer the first sub-question: ‘What does the shift from state security to human security entail and what are the features of new wars?’ This chapter is crucial for the rest of the thesis, for it lays the fundament of the whole research by defining what human security threats actually are and what characteristics are typical of the so-called ‘new wars’. First, the traditional notion of state security and (features of) old wars are discussed, thereafter follow the notion of human security and (features of) new wars.

### 2.1. Traditional security notions: state security

The traditional state security approach is based on the idea of (external) military threats against the integrity or sovereignty of the state. Up till the end of the Cold war everything evolved around ‘state security’; around the question how countries or states could protect themselves from each other. (Bodelier, 2008: 13)

State security symbolizes the traditional understanding of national security, which focuses heavily on the protection of the territory and borders, and the territorial integrity, of the state and the protection of its citizens against external threats, stemming from physical violence by other states. These traditional foreign policy concerns have always tended to prioritize the national interest over respect for and violations of human rights. (Meredith & Christou, 2009: 6) This “hyper-emphasis on state security, especially in the emergence of ‘homeland security’, affects other concepts of security, especially regarding the practice of individual liberties and the freedom to participate openly in civil society” (Liotta, 2006: 35).

#### *2.1.1. State security and international law*

The notion of state security is still the starting point of international law, which is anchored in the UN Charter: countries enjoy territorial integrity and cannot breach each other’s sovereignty by an attack. (Bodelier, 2008: 13; Cohen, 2006: 489; Thomson, 2000: 141; Bass, 2004: 388) In the international order and law, the “independence and primacy of the territorial integrity of the state” is the most important, “cardinal” rule (Navari, 1993: 50). The definition of sovereignty usually refers to “the claim of supreme political authority within a territory” and government autonomy within state borders (Thomson, 2000: 141). The focus on state

security thus enjoys some legitimacy, at least in a judicial sense, since all states are sovereign and have to respect the right to non-intervention and "... in the international arena intervention is generally seen to be a violation of sovereignty, and a threat to world order" (Little, 1993: 13). More importantly, "intervention is, under most circumstances, and illegal act", for "states are clearly proscribed from intervening in the domestic affairs of other states" in contemporary international law (Little, 1993: 13).

## 2.2. Features of old wars

In her book *New and Old Wars* Mary Kaldor distinguishes between old wars and new wars and elaborates on the differences between the two types of warfare. These differences mainly occur with regard to the goals that the warring parties have, the methods of warfare that are employed and the war economy that arises with the continuation of the conflict.

The core tenet of conceptions of old war is that conflicts are traditionally fought by regular military forces (as representing states), trying to defeat their opponent on the battlefield. Combat takes place between similar opponents; armies with the same weapons and goals. (Kitzen, 2008: 123) According to Kaldor (2006), old, Clausewitzian wars are fought between states for a definable political end, i.e. state interest (defined in geopolitical or ideological terms)<sup>5</sup>. In old wars, the means of warfare was the capture of territory by military means and battles were the decisive encounters of war. The units fighting these old wars are government or state armies; vertically organized hierarchical units. Furthermore, in old wars battle was contained to the battlefield and fought between soldiers (combatants), so civilian deaths were common<sup>6</sup>. The financing of the wars was mostly internal and the war economy which emerged during the conflict was heavily centralized, totalizing and autarchic (Kaldor, 2006: 7-10, 95-97).

Although this typology applies internationally, there are some more specific features of old wars in (Sub-Saharan) Africa. According to Chris Allen (1999: 368), old forms of conflict were relatively limited in scope and intensity, with the usage of old and inefficient weapons and governed by norms both of combat and of its resolution, and tended to have goals of the redistribution of cattle or access to land and water between the conflicting groups.

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<sup>5</sup> The term 'Clausewitzian wars' refer to the ideas of Carl von Clausewitz, who wrote in his *On War* about the typical features of wars and the inherent logic of extremeness and totality and without intrinsic limits on military conduct. (Walzer, 2006: 23-24)

<sup>6</sup> However, this seems to imply that the Second World War is not an example of an old war, for millions of people from one specific ethnic and identity group were brutally murdered and extinguished.

In the last century, this culminated in the paradigm of interstate, industrial warfare: technological developments and the concept of the “*nation-in-arms*” led to large-scale battles, with clear examples being the two World Wars (Kitzen, 2008: 123). Western military culture considers warfare as an undertaking of the state to realize a political goal and characteristic about the western military culture is a deeply rooted preference for large-scale battles between regular military forces. (Kitzen, 2008: 124-125, 132)

Although the rise of nuclear weapons at the end of the Second World War eventually led to a strategic deadlock, the underlying assumption of interstate total, industrial warfare was upheld. (Kitzen, 2008: 123, 127) An American general in Vietnam, which is a typical case of dogmatic adherence to traditional ideas about war and displays its possibly disastrous consequences, puts his finger on the sore spot: “I will be damned if I will permit the U.S. Army, its institutions, its doctrine, and its traditions to be destroyed just to win this lousy war” (Kitzen, 2008: 133).

However, nowadays, the empirical reality is that Western soldiers find themselves fighting irregular enemies in foreign societies, who try to avoid direct battle and prefer tactics which make it possible for them to fight on their own conditions and terms. (Kitzen, 2008: 124) By firmly adhering to notions of old wars and traditional warfare, effective military action is hampered and ending and resolving the conflict becomes extremely difficult.

This underpinning [the preference for decisive, large-scale battle] became a doctrine which then developed into a dogma, an unquestionable fact, which solidified the enduring appeal of interstate industrial war long after its demise, and indeed in many ways to this day. For at the root of the problems we have now with the use of force and forces is their persistent structuring and use as if the old paradigm still held. (Smith, 2005: 152)

### 2.3. New notions of security: human security

The human security approach is based on the idea that it is people that need and deserve protection against threats originating mostly from within the state or from regional and global pressures. The major differences between the state and human security approach are that the state is no longer the main object of security (people are), that the threats that endanger the lives of human beings are not necessarily militarist (but can be) and that those threats do not stem from relations and interactions between states, but rather originate within states (intrastate violence for example) or on a higher, regional or global, level (like environmental

and economic threats)<sup>7</sup>. However, state and human security are not mutually exclusive, for “protecting citizens from foreign attack may be a necessary condition for the security of individuals”, although it is “certainly not a sufficient one” (Human Security Centre, 2005: VIII).

Even though human security can thus include certain aspects that mirror state security threats and issues, it is far more broad than this traditional concept. For even when states are protected, this does not automatically mean that its population is safe: during the genocide in Rwanda for example, the security of the state remained neatly intact. (Bodelier, 2008: 13) The war in Yugoslavia and the terrorist attacks on the 11th of September 2001 questioned the state security doctrine, and a growing realization of the need to protect not only states but also the people within them existed. (Bodelier, 2008: 13) Thus, a shift from state to human security has taken place, within the academic world as well as the policy and development world (see for example, Katzenstein, 1996; Cohen, 2006; Kitzen, 2008; Liotta, 2006).

The first notion of human security was laid down by the United Nations Development Program (UNDP) in their 1994 Human Development Report, which stated that:

The concept of security has for too long been interpreted narrowly: as security of territory from external aggression, or as protection of national interests in foreign policy or as global security from the threat of nuclear holocaust... Forgotten were the legitimate concerns of ordinary people who sought security in their daily lives. For many of them, security symbolized protection from the threat of disease, hunger, unemployment, crime [or terrorism], social conflict, political repression and environmental hazards. (Liotta, 2000: 476-477)

UNDP linked security and development and conceptualized human security as “safety from chronic threats as hunger, disease and repression” and “protection from sudden and hurtful disruptions in the patterns of daily life” (Paris, 2001: 89). However, the core idea of human security is that people, rather than states, are (and should be) the object of security.

Although there is a relative consensus among (certain) scholars about the necessity and existence of a difference and shift between state and human security, the concept of human security (what it should and, maybe even more importantly, should not entail) is still heavily debated. Although an expression of “freedom from fear” and “freedom from want” probably

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<sup>7</sup> See for example Kaldor, Martin & Selchow, 2007; King & Murray, 2001; Liotta, 2002; Owen, 2004; Paris, 2001.

covers the idea of human security, as a concept it is ambiguous and too broad<sup>8</sup> (Kaldor, Martin & Selchow, 2007:273). In order to correctly relate human security (and new wars) to just war theory, a human security framework and a clear concept are essential. Therefore, exploring and analyzing this will be a priority of the research in this thesis.

In general, a distinction can be made within theories about human security with regard to the definition of what constitutes a threat to human security, between a narrow(er) and broad(er) definition. The narrow definition of human security focuses exclusively on preventing violence against individuals, violence which can be caused by terrorists and guerrillas as well as by states or criminals. The broad definition, as employed by the UNDP, also focuses on other threats that should fall under human security, such as poverty, underdevelopment and malnutrition and environmental degradation. German Chancellor Gerhard Schröder spoke in Munich in 2005 and stated the range of security threats: “the proliferation of weapons of mass destruction, regional instability and failing states. However, poverty and underdevelopment pose no less a threat”, for these are the conditions that feed terrorism (Adamski et al., 2006: ix). Proponents of both views of human security agree that the focus should be on the protection of the individual, wherever in the world it may find itself. (Bodelier, 2008: 13)

For pragmatic as well as theoretical and methodological reasons, human security threats in this thesis are defined as *situations or actions threatening life or livelihood*<sup>9</sup>, as directed towards all affected actors, which can be states and/or their representatives, but also (and most importantly) individuals, (identity) groups and (non-governmental) organizations, and as *stemming from political violence* (including for example genocide and terrorism). Although of course other developments threatening the life of people all over the world can be pointed out, such as environmental degradation, poverty and diseases, these are not considered to be (human) *security* threats in this research. In accordance with the UN *Responsibility to Protect* (R2P) and UN Secretary General Kofi Annan, calling for the “protection of communities and individuals from internal violence”, this research employs a more narrow concept of human security (Human Security Centre, 2005: VIII, Kaldor, 2007: 183). The main pragmatic reason

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<sup>8</sup> These ‘freedoms’ refer to a speech President Franklin D. Roosevelt proclaimed on the 6<sup>th</sup> of January in 1941 in his State of the Union, that there are for essential human freedoms (/rights): freedom of speech and expression, freedom of worship, freedom from want and freedom from fear. See for example <http://www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm>.

<sup>9</sup> Although it may suggest otherwise, this definition of a threat also applies to states. Although their ‘life’ cannot actually be threatened, their existence and survival can be.

for adopting this narrow focus is the limited time and research possibilities available under this particular research. But there are also theoretical and methodological motivations for adhering to the narrow concept. Besides the fact that measuring hunger, disease and natural disaster, and especially allocating (a certain 'amount' of) liability and accountability for causing or fostering it and responsibility for compensation and/or intervention, is not only extremely difficult, it is also politically and normatively controversial. Furthermore, it is of utmost theoretical and political importance to clearly determine and specify what exactly counts as a security threat and broadening instead of (or even next to) deepening the concept will only lead to deterioration and impoverishment of the urgency of security and actual threats to it (see also Krause & Williams, 1996).

### *2.3.1. Human security and international law*

Within international law there has traditionally been a heavy focus on state sovereignty and the right to non-intervention. However, due to “the proliferation of new threats to international peace and security coming from civil wars, failing states, transnational terrorism, grave human rights violations from genocide to ethnic cleansing, and the risk that private individuals or ‘rogue’ states will acquire weapons of mass destruction” it seems necessary “to transcend the sovereignty-oriented, ‘state-centric’ view of international relations and international law based on state consent” (Cohen, 2006: 485).

The problem is, that sovereignty and intervention are hardly compatible; when there is an opening and possibility for legitimately intervening into the internal affairs of a state, this automatically means that this impairs on the state’s territorial integrity. Sovereignty and intervention are “inextricably linked”, for: “to argue against intervention is to give to sovereignty a value higher than any other. To argue for intervention is a direct challenge to the value of sovereignty” (Forbes & Hoffman, 1993: 9-10). The question that lies at the heart of the distinction between sovereignty and intervention, is whether rights in the international arena are inherited by states or by individuals. “The specific dilemma posed by intervention is in the form of a conflict between the moral significance of the state and the claims of humanity; ... between the moral autonomy of states and obligations imposed by universal justice” (Johnson, 1993: 65).

With the adoption of the R2P by the UN in 2005, room has been created within international law for (humanitarian) intervention and human security concerns. R2P entails that although states are sovereign, accordingly they are responsible for the wellbeing and fate of its peoples.

When citizens become victims of war or mass murder and their governments/the authorities do nothing against this (or maybe even inflict it themselves), the international community may step in and intervene. (Bodelier, 2008: 13) It is “the responsibility of some agency or state (whether it be a superpower such as the United States or an institution such as the UN) to enforce the principle of security that sovereign states owe to their citizens” (Liotta, 2006: 37). Sovereignty is not an inherent right of the state, but also entails corresponding duties, and therefore only has to be respected when the state respects, promotes and secures the (human) rights of all its citizens. (Johnson, 1993: 68; Little, 1993: 25; Häußler, 2007: 5) “The moral significance of the integrity of the state depends upon its securing the welfare and the rights of its citizens” (McCarthy, 1993: 80). This seems to indicate that human rights have not only become an important focus, but also conditional requirements with actual sanctions attached to them. This suggests that state sovereignty is contained to a certain extent and that states have lost some of their traditional functions and control. (Habermas, 2008: 444) “The internal authority of the state (and not only its control) has become contingent on outside judgments based on cosmopolitan principles” (Cohen, 2006: 485).

Accordingly, there is a dark side to this development: when there is no morally superior principle of non-intervention and equal territorial sovereignty, states (especially powerful ones) can always try to find a reason for intervention under the title of ‘democracy’, ‘freedom’ or (respect for) ‘human rights’, which causes intervention to get caught on a slippery slope and has serious consequences. (Cohen, 2006; Liotta, 2006) The war in Iraq is a good example according to some (e.g. Cohen, 2006): the United States used cosmopolitan rhetoric to further their own strategic goals and interests in the Middle-East region. Since the “responsibility to protect” also means the “right to intervene”, and “in the topology of power, dominant states will intervene at the time and place of their choosing” (Liotta, 2006: 37). This seems to be an irresolvable problem, for even though most authors agree that there should be some sort of measures which can be taken in case of gross violations of human rights and that the principle of non-intervention thus cannot be absolute and infinite, most of them also acknowledge the possible dangers and pitfalls, especially since the intervention in Iraq, of releasing the sovereign equality of states completely or even partially. (Little, 1993: 21) Finding a solution, or even a middle, seems impossible and the dilemma seems insurmountable, for the principle of non-intervention and the idea and value of humanitarian intervention are mutually exclusive and “necessarily incommensurable” (Johnson, 1993: 61).

The emergence of the human security framework is strongly related to the emergence of the concept of 'new wars' over the last years, since the end of the Cold War. The new war thesis argues that the character of contemporary wars has fundamentally changed, specifically since conflict is more intra-national than international, involves a combinations of state and non-state actors and violence is mostly directed to individuals, and therefore it is strongly related to the concept of human security.

#### 2.4. Features of new wars

In her book *New and Old Wars*, Mary Kaldor distinguishes between old wars and new wars and elaborates on the differences between the two types of warfare. The most important feature of new wars is that the parties involved are no longer only states; transnational, non-state actors play a role and conflict is often intrastate instead of interstate. Further differences mainly revolve around the goals that the warring parties have, the methods of warfare that are employed and the war economy that arises. The main goal of new wars is identity politics. Identity politics is a claim to power based on a particular identity and is not derived from any (notion of) state interest or forward-looking project of how society should (ideologically) be organized<sup>10</sup>. (Kaldor, 2006: 7, 81) Furthermore, motivations are more and more based on 'greed', personal profit from the economic situation in times of conflict, rather than 'grievances'<sup>11</sup>, although these may be used as a rhetorical pretext for the pursuit of the own interests. Although in warfare (and even in less violent circumstances) looting and personal gain or profit are not new, the way in and extent to which economic interests prevail, as a logic of plunder, over ideologically motivated revolutionary movements is striking and new. (Reyntjens, 2005: 587; Reno, 2002: 837) Furthermore, in new wars, the mode of warfare is one of guerrilla warfare, where actual battling is avoided and the territory is controlled by political control over the population, and counter-insurgency, which encompasses "techniques of destabilization aimed at sowing 'fear and hatred'", like population displacement (for example ethnic cleansing) (Kaldor, 2006:8-9, 105, 106). Other typical features are the large number and various types of different actors; the units that fight these new wars consist of a range of different groups that are highly decentralized. (Kaldor, 2006: 9, 97) The culture of

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<sup>10</sup> William Reno (2002: 837)) also emphasizes the lack of a ideological goal or motivation of the conflicting groups in new types of war.

<sup>11</sup> Terms derived from Collier, Paul & Hoeffler, Anke. (2002) "Greed and Grievance in Civil War". *The Centre for the Study of African Economies Working Paper Series*, Working Paper 160, <http://www.bepress.com/csae/paper160>, accessed on 15-07-2011.



conventional warfare rests on battle between similar opponents, while nowadays, warring parties are different in almost every way, from battle mode to conceptions about the laws of war. (Vlasbom, 2011: 6) Because of the large range of different actors and groups involved in these new types of conflicts, there is a lot of ambiguity: not only about the nature and motive for the protest and fighting as mentioned above, but also regarding the type of actors themselves. Although different terms like warlords, militias, guerrillas, rebel groups and terrorists seem to suggest that there is a clear distinction between these types of actors, while actually they can (and in practice often do) all take part in new wars and conflicts. When Christopher Clapham (1998: 1) for example describes “Guerrillas”, a neglected phenomenon according to him, in the politics of modern Africa, he is actually describing typical characteristics of new war-type actors and combat groups:

... the development of armed movements, usually originating in the countryside and often attacking across state frontiers, which have sought to contest the power of African states, and have frequently established their own forms of rule, in territories from which the control of established states has disappeared.

Moreover, the objects of the violence stemming from war are also different; nowadays the ‘fighting-arena’ is less contained which causes more civilian deaths and civilians may even become the intended targets of the warring parties and their identity politics and predatory behaviour. Finally, the way in which wars are financed and the war economies emerging during conflict differ greatly for old and new wars. The former had centralized, totalizing and autarchic war economies, while the latter are decentralized, often criminalized and heavily dependent on external resources. (Kaldor, 2006: 10, 95) A war logic is built into the functioning of the economy, for the fighting units fare well by plunder, the black market and external assistance, and thus the continuation of violence is in the interest of (and mutually reinforced by) all the warring parties. (Kaldor, 2006: 10, 95)

All in all, new forms of conflict are very intense and destructive, not rule governed (though they are not irrational), have ends involving the seizure or destruction of food and other resources (and thus their denial to one of the groups), are often associated with brute means and orgies of violence, and the warring parties use modern weapons. (Allen, 1999: 368) One important lesson learned from the wars in Iraq and Afghanistan is that conventional military technology is not very helpful when Western troops get involved in the struggle for power on the ground. Nowadays, wars are not being fought between similar or ‘equal’ armies on a geographically defined battlefield, but between regular military forces on the one side and

non-state, disordered forces (militias, guerrillas and terror networks) on the other side. (Vlasbom, 2011: 6)

In order to research and analyze to what extent these recent empirical developments, such as the shift from state to human security and 'new wars', challenge current Just War Theory with regard to assessing the justifiability of (new) wars, which is the central question of this thesis, it is important to find out what the just war theory actually entails. This will be the main theme in the next chapter.

### Ch. 3. Just War Theory

*“There is a fine line between legitimate killing and murder, between soldiers as criminals and soldiers as heroes. Just war is about managing that fine line” (Kaldor, 2007:161).*

In this chapter, the sub-question ‘What is the current framework and content of just war theory?’ will be answered. First of all, just war theory will be embedded within the range of ideas concerning war and morality and other approaches will be explained. Thereafter, the principles of just war theory, connected to the resort to war, the conduct during war and the termination of war, will be described and discussed. At the end, questions and discussions within the just war tradition will be addressed and will prove to be linked to human security and new wars.

#### 3.1. Just war theory as ‘middle ground’: between realism and pacifism

Within the body of thought regarding what role morality plays in (thinking about) war, there are three theoretical approaches, namely pacifism, realism and just war theory. Since just war theorists position themselves with regard to these other approaches, it is important to specify the assumptions underlying these theoretical approaches in order to understand what the just war tradition exactly encompasses.

##### *3.1.1. Pacifism*

The group of theorists that focuses on the morality of war and considers war as entailing all kinds of unbearable horrors and torments and therefore as immoral, and therefore should be condemned, are called pacifists.<sup>12</sup> Pacifists condemn all use of physical violence and advance the claim that states and individuals should never take part in any war-effort whatsoever. The motives for calling to evade and back out of war can be of a practical (waging war does not achieve the desired goals) as well as a moral nature (war is inherently wrong). (Bull, 1979)

There can be several reasons for supporting this position. A pacifist could have religious motives, with a command of nonviolence coming from God, or could reject the use of

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<sup>12</sup> For more information about (the theoretical assumptions of) pacifism, see for example Hare, J. E. & Joynt, Carey B. (1982). *Ethics and International Affairs*. London: The MacMillan Press Ltd., h. 3, Nagel, Thomas. (1985). “War and Massacre” In: *International Ethics* edited by Beitz, Charles R., Cohen, Marshall, Scanlon, Thomas & Simmons, John A., New Jersey, Princeton University Press, p. 53-75, Graham, Gordon. (1997). *Ethics and International Relations*. Oxford: Blackwell Publishers Ltd., h. 3, Claude, Inis L. Jr. (1980). Just Wars: Doctrines and Institutions. *Political Science Quarterly*, 95(1), 85-87.

violence intuitively. Moral insights are considered to have absolute status, and one of these insights is that it is wrong to kill innocents. War always and inherently kills innocents and therefore all wars should be stopped and prohibited. There are also so-called consequentialist or utilitarian motives, whereby the (bad) consequences of war are central to the theoretical position. Since war always does more harm than good, the best option is, all things taken into account, to never take part in any war-effort. (Fotion, 2000: 16-17)

### 3.1.2. *Realism*

So-called realists are diametrically opposed to pacifists and instead of viewing war as immoral, war is said to be amoral; morality does not play any role in thinking and talking about war or in judging it. Realists deny the validity and effectiveness of moral rules that should curtail the behaviour between states. (Bull, 1979) Regarding the resort to war, as well as the conduct during war and the termination of war, a state has no moral obligation versus another state. “There can be no binding principles in states’ relations with each other; ... the nature of states provides it with no moral guarantee against intervention by other states” (McCarthy, 1993: 80). After all, according to realists, states find themselves in a state of nature with respect to each other, without the existence of a ‘higher’ or superior authority in the international society that can enforce (compliance with) rules. This means that, in order to survive, states will only pursue their own national interest<sup>13</sup>. (Hendrickson, 2009) Even if ethical considerations would play a role at the international stage (which obviously is not the case according to realists), and states could choose to adopt these rules and principles in theory, they would still give primacy to their national interest. This is the only thing they could permit themselves given the hostile environment, the reality of war and the permanently latent threat thereof. Given that the stakes in war are so high, no state is capable of rationally

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<sup>13</sup> About what constitutes this national interest, there is a lot of discussion within realism, for example between the defensive and offensive branch. While offensive realists state that it is best for states to strive for as much power as possible and (regional) hegemony, defensive realists state that in order to be secure, states should strive to as much power as needed instead of the maximum. (Walt, 2002) Even when the total destruction of other states should not be the aim, since states want to avoid such a fate later themselves, and prudence (which is especially relevant for classical realists like Morgenthau and can be seen as a moral concern) is an important consideration and credo (for, ‘heavy is the head that wears the crown’), this concern is mainly a concern for the security and survival of the *own* state, and not so much about the wellbeing of other states. Thus, it is not to say that realism is void of moral concerns or values, but in the relations between and behaviour towards other states, and in the discussion and judgement of war, no such things are relevant.

contemplating what the costs and benefits of waging war actually are or would be. (Fotion, 2000: 18)

### 3.1.3. *Just war theory*

Just war theory has developed for several ages within the Christian theology and international law into a set of criteria that should judge when, and to what extent, limited participation in armed conflict would be morally admissible. (Peach, 1994: 152)

As mentioned above, realists state that morality does not play any role with regard to the beginning, waging and ending of war in principle. In accordance with this distinction, just war theorists state that there are moral principles that are able to guide a state in determining under which conditions it is morally justified to resort to war (*jus ad bellum*), how it should morally be waged (*jus in bello*) and when and how it should be terminated in a morally justifiable manner (*jus post bellum*). (Fotion, 2000: 22)

Just war theory encompasses three sets of principles, each concerning different stages of war, namely *jus ad bellum*, *jus in bello* and *jus post bellum*, and these will be elaborated on below.

## 3.2. Principles of *jus ad bellum*

The first *ad bellum* principle is ‘just cause’, which entails that a state can only resort to violence against another state in case of ‘defence’. One can speak of (self-)defence when the own state is under aggressive attack, when an ally falls prey to an aggressor or when there is a clear and imminent threat (a so-called pre-emptive strike). Furthermore, a state can legitimately or justly wage a war (on humanitarian grounds) against another state which exposes aggressive behaviour against its own peoples. Aggressive wars, based on for example material interests or ideological convictions, are by definition unjust. The resort to war out of convictions of ‘honour’ or ‘glory’ (alone) therefore can never be a satisfactory motive (when the war is meant to be just). Moreover, it is important to note that meeting the other criteria is a requisite for waging a just war; a just cause is a necessary, but not a sufficient condition.

The second principle that has to be met for a war to be just, is that of ‘good intentions’. This means that a state enters into war with the intention to act in accordance with the just cause that provoked the war. Although the criterion of good intentions falls within *jus ad bellum*, it must be clear that it spills over into *jus in bello* and *jus post bellum*. For it is only after the war has ‘properly’ started, and in some cases only after its end, that any judgement can be made about how good the intentions of the state actually were. (Fotion, 2000:23-24) In principle and in practice it might be difficult to determine ones ‘real’ intentions and whether they

actually are ‘good’, the Iraq war being a good example: were the ‘freedom and liberation of the Iraqi people’ and ‘bringing democracy’ the true underlying intentions, or was their nature more geopolitical, and even if they were, were they ‘good’<sup>14</sup>? Sometimes, the line between good and bad intentions might not be easy to draw; intentions that seem good may have another connotation to them or have an unforeseen effect. However, despite the practical and principled issues, this principle mainly serves to ensure that the original good intentions do not get lost out of sight, especially once the war has started, and guides behaviour in the conduct and ending of war.

Thirdly, there is the ‘proportionality-principle’. This principle contains that, before initiating a war, a state has to balance the “expected universal good” and the “expected universal evils” resulting from waging war (Orend, 2000:121). The principle serves as a warning that if it can reasonably be expected that the harmful effects of a war (“human and material destruction” according to Regan, 1996: 48) exceed the positive effects, one should not engage in war. The *in bello* proportionality principle (see paragraph 3.3.) is mostly concerned with limiting the effects of violence on non-combatants (‘collateral damage’) and, to a somewhat lesser extent, property and the environment. (Stahn, 2006: 927) The harmful and positive consequences of war that should be weighed with regard to the *ad bellum* proportionality principle, however, can be much more broad and general; they include vulnerable groups as non-combatants, the destruction of property and the environment, but also encompass for example financial effects and power, and even social effects like reputation, norms and values and culture. Off course, this general nature of what can constitute ‘universal good’ and ‘universal evils’ leaves room for interpretation, which could mean that states come to different cost-benefit analyses and corresponding outcomes, which makes this principle arbitrary and open for manipulation. For example, if a state deems the positive effects of ensuring its oil access to be greater than the harmful effects of denying another state its right to territorial integrity, one may wonder if there are any ‘hard’ legitimate reasons or rules for condemning this (since there is no neutral

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<sup>14</sup> What constitute good intentions is another question which answer is debatable; although democracy can be viewed, and often is portrayed, as a fundamental universal human right, it is questionable to what extent and on what grounds such universal human rights exist and apply. Is it really a common and universally shared right or is it a Western idea which is attempted to be transferred and exported? See also for example the discussion about intervention and sovereignty (Ch. 2, page 14-16). The main concern many of the authors who are somewhat sceptical towards intervention have, is that when intervention is tolerated and can be ‘justified’, by referring to cosmopolitan values and humanitarian concerns for example, there is no telling whether these concerns are real or mere rhetoric and no limit to (powerful) states trying to expand their own norms, values and interests (see for example Cohen, 2006, and Liotta, 2006).

or objective yardstick for what harmful or positive effects are and which value should be accorded to them).

The fourth principle is the ‘likelihood of success’. This criterion and the proportionality-principle both deal with consequences. If no good consequences result from starting a war, then a state should not proceed to war. Thus, “a state may not resort to war if it can reasonably foresee that doing so will have no measurable impact on the situation” (Orend, 2000:121).

Fifthly, there is the ‘last resort-principle’, which encourages states to only turn to the means of war when all other possible actions, like diplomacy and (financial) sanctions, have proved to be unfruitful and it is the only reasonable remaining option.

The sixth and final *ad bellum* principle is ‘legitimate authority’. This principle entails that only a legitimate political authority of the state can make the decision whether or not to proceed to war. (Regan, 1996: 20)

It is important to keep in mind that if one of the negative conditions applies to a certain situation (for example the lack of good intentions), the state to which it applies can no longer start a *just* war. However, vice versa this is not the case; if one of the positive conditions applies to the involved state (for example having a just cause), this does not mean that it is automatically justified to start a (just) war. (Fotion, 2000: 23) Only when all of the above criteria or conditions are met, one can speak of a (*ad bellum*) just war; all of the principles are necessary conditions for a (resort to) war to be deemed just.

### 3.3. Principles of *jus in bello*

With regard to the means employed in a war, three *in bello* principles have to be met in order for a war to be just. Norms of *jus in bello* are meant to guide the behaviour of the actors involved in a war. The responsibility for compliance of states mainly lies with the military commanders and soldiers that formulate and execute the war-policies of their state. (Orend, 2000: 121)

The first *in bello* principle is that of ‘proportionality’. The content of this principle is the same as the *ad bellum* proportionality requirement, but is concerned with acts and behaviour in war. This means that for any important military tactic or action, the positive and harmful effects of that specific act have to be considered. This principle refers to ‘collateral damage’, for it refers to what unintended and incidental consequences or effects may count as legitimate with regard to furthering the goal set for and reaching the outcome intended in waging the war, and

generally requires “that the collateral costs to non-combatants of a particular military action not be disproportionate to its expected military utility” (Rodin, 2008: 53).

Secondly, there is the principle of ‘discrimination’, which obliges the actors involved in a war to discriminate with regard to their opponents. There is a moral distinction between combatants and non-combatants. Combatants must always discriminate between legitimate military targets and the civilian population within an enemy state.

The final principle entails that there is a ban on the use of ‘intrinsically heinous means’. Extraordinary cruel and horrible methods, like mass rape-campaigns or the use of nuclear, biological and chemical weapons of mass destruction, can be employed under no circumstances. (Orend, 2000: 121)

One last important remark is that even a state that resorted to a just war according to *ad bellum*-criteria, should live up to the *in bello* norms. However, it is possible that both, or all of, the warring parties violate the norms of *jus in bello* and thus wage an unjust war.

Within the just war literature there is a fair level of agreement about the abovementioned principles of *jus ad bellum* and *jus in bello* (see for example Hare & Joynt, 1982; Graham, 1997; The Harvard Law Review Association, 2006; Regan, 1996).

#### 3.4. Principles of *jus post bellum*

Recently, several authors have attempted to incorporate another set of principles judging the ‘justness’ of a war, more specifically the way the war is ended and the employed exit strategies, which is categorized as *jus post bellum*. Brian Orend (2000:123) for example is an advocate of principles of justice *after* war and tries to answer the question “What should a just state aim at with regard to the ends of a just war?” The principles that Orend (2000:122,128-129) drafts, which form the criteria of *jus post bellum*, are based on the assumption that the state to which they apply is the just ‘winner’ of the war and “victorious in its pursuit of its just aims”. Thus, it needs to be noted that the mere fact of victory does not automatically acknowledge rights to the victor and duties to the defeated; “might does not equal right” (Orend, 2000:122). It is only possible to speak of *jus post bellum* in the termination of armed conflict if the state waging a just war is victorious.

Since the status quo is what brought about the violence and conflict in the first place, restoration of this situation should not be aimed for in ending the war. Instead, the proper termination (of a just war) is the establishment of “a more secure and just state of affairs than



existed prior to the war” and the “vindication of those rights whose violation grounded the resort to war” (Orend, 2000:122-123).

The first *post bellum* principle is ‘just cause for termination’, which is fulfilled if the vindication of the originally violated rights is provided for to a reasonable degree. The cause that justifies the war should be furthered and the parties to the conflict have an obligation to (at least try to) bring about the desired outcome. (Bass, 2004: 386) Furthermore, the aggressor should be subjected (and should submit to) reasonable principles of punishment and violations of the principles of *jus ad bellum* and *jus in bello* (even when committed by the ‘just’ side) are to be accompanied by penalties. (Orend, 2000:128 and 2007: 580; Bass, 2004: 404) One practical question that can be posed is whom should execute this; who has jurisdiction? Judicial judgment by the victor could generate the appearance of a conflict of interest and be viewed as biased, so ‘neutral’ and ‘objective’ international judges would be better suited to ensure fair and reasonable punishment. However, it is questionable whether all (particularly powerful) states would be willing to adhere to and respect such a supranational judicial system and its rulings (the United States and the unwillingness to recognize the ICC can be seen as an example).

Secondly, there is the principle of ‘right intention’. This entails that the state in question intends to implement the process of ending the war in accordance with and in the spirit of the other *post bellum* principles. This means that revenge and retaliation are not legitimate motives and war crimes should be investigated and prosecuted in a symmetrical and equal fashion. (Orend, 2000:128-129)

The third principle is that of ‘public declaration and legitimate authority’, which encompasses that “the terms of peace must be publicly proclaimed by a legitimate authority” (Orend, 2000:129).

The fourth principle of *jus post bellum* is ‘discrimination’. In the punishment of crimes and setting the terms of peace, the (just) victor has to take into account which actors are the most responsible and should therefore discriminate between political and military leader, soldiers and civilians. This point touches upon the discussion within just war theory about whether individuals can be held morally responsible for their behaviour and acts in war and whether they are liable for (individual) punishment.

Lastly, the fifth *post bellum* principle is ‘proportionality’. This means that “any terms of peace must be proportional to the end of reasonable rights vindication”; extremely hard punishments are illegitimate (Orend, 2000:129; 2007: 580). This also implies that victorious states, once

the war is stopped and the intervened state becomes sovereign again, have to restrain themselves and may not meddle in the internal affairs and design of the state by imposing extensive reforms or policies that go beyond the original goal; they have “no right to reconstruct a conquered polity simply out of self-interest: no right to impose puppet regimes, or to reconstruct a polity for the victor’s economic, military, or political gain” (Bass, 2004: 390).

### 3.5. Discussions within just war theory

Although just war theory can be seen as ‘middle ground’ between pacifism and realisms, naturally there are theoretical discussions within just war theory. For example with regard to the question whether *jus ad bellum* and *jus in bello* (and *jus post bellum*) can and should be separated. Within just war theory there has traditionally been a strict division between the justness *of* war and the justness *in* war and even within contemporary international law the independence-thesis, which means that the *ad bellum* status of a war does not influence the *in bello* rights and responsibilities of combatants, is an important proposition<sup>15</sup>. When a link is proposed between *jus ad bellum* and *jus in bello*, this means that the *ad bellum* status of a war does (or should) have moral and practical consequences for the way in which that war can be fought by the warring parties. The possibility of living up to the principles of *jus in bello* is seriously hampered when the resort to war is not justified<sup>16</sup>. However, when the division is lifted, this also has consequences for the symmetry between warring parties and the moral equality of soldiers; should ‘just warriors’ then have a morally superior status over ‘unjust warriors’ since they adhered to the *ad bellum* principles and therefore should have certain privileges or rights and exemptions<sup>17</sup>? An important question and discussion this raises, is whether this reward and punishment is fair, viewed from the point of responsibility and liability; are the ones responsible for the (potential) violation of *jus ad bellum* actually affected by applying the norms regarding *jus in bello* in a asymmetrical fashion<sup>18</sup>?

Furthermore, discussion within the just war tradition also exists about the interpretation and content of some of the principles, for example regarding just cause (*ad bellum*) and discrimination (*in bello*). The content of the just cause principle has shifted from war purely on grounds of self-defence towards the possibility (and even the duty or responsibility) to

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<sup>15</sup> See for example Walzer (2006: 21).

<sup>16</sup> See for example, Rodin & Shue (2008).

<sup>17</sup> See for example Michael Walzer (2006) versus Jeff McMahan (2004, and in Rodin & Shue, 2008).

<sup>18</sup> See for example Greenwood (1983) and Rodin (2004).

intervene on humanitarian grounds, and this extension of the just cause principle is acknowledged by the UN as the R2P. Since nowadays ‘new wars’ have replaced classical, Clausewitzian wars, the distinction between combatants and non-combatants is often not as easy to make and sometimes even not valid anymore, which causes discussion about the content of the principle of discrimination. Jeff Mc Mahan (2008: 20-22) for example, states that non-combatants can be legitimate targets of attack in certain circumstances, by the criterion of *liability to attack*.

This brings us back to the first chapter, where the concepts and features of humanitarian intervention, the R2P and new wars have been elaborated on, and indicates the possible tensions between (current) just war theory and new theoretical and empirical developments of human security and new wars. Just war theory seems to be based on traditional notions of state security and old wars, which could indicate that the abovementioned new concepts and developments are not fitted in. The way in which different aspects of human security and new wars relate to *jus ad bellum*, *jus in bello* and *jus post bellum* principles of just war theory will be discussed in the following chapter.

#### **Ch. 4. Human Security, New Wars and Principles of Just War**

In the following section, the previous chapters will be linked and the sub-question ‘To what extent does human security and the phenomenon of new wars fit the just war framework?’ will be answered. This chapter discusses systematically which principles of *jus ad bellum*, *jus in bello* and *jus post bellum* do not match with, or accommodate, theoretical notions of human security and typical features of new wars, and which principles can (in theory) fit these new theoretical and empirical developments in (or can be adapted to do so).

The shift from state to human security and the emergence and existence of new wars as an empirical phenomenon, as described in the previous sections of this thesis, have not (yet) been incorporated by current just war theory. The just war framework still relies on a heavily state-centric perspective. (Heinze & Steele, 2009: 2) It departs from the assumption that states are the actors that declare and wage war, intervene and fight and thus act in accordance (or not) with the principles of just war. The principles of *jus ad bellum*, *jus in bello* and *jus post bellum* (concerning different stages of war) are thus drawn up, adapted and applied to the perspective and conduct of states. “Our moral vocabulary about war is primarily equipped to apply to the conduct of states” and is positioned within “state-centric normative frameworks” (Heinze & Steele, 2009: 1). The empirical phenomenon of new wars and its theoretical features, raise problems and “ethical dilemmas” for the current framework and principles of just war, which are posed by “non-state actors that engage in armed conflict amidst an international normative order that undeniably reserves the right to wage war to states only, and the rules of which were intended apply primarily to states” (Heinze & Steele, 2009: 3). What these problems and dilemmas exactly look like and entail will be explored below.

In principle, the theoretical principles of just war are to be upheld in any kind of war situation, regardless of the types of actors fighting it, for they are moral guidelines, guiding not only (engagement in) war itself, but also behaviour conducted in it, established to prevent aggression and atrocities (including human rights violations and illegitimate killing). Thus although their moral importance is undeniable, most of these principles either seem unfit to deal with theoretical assumptions and features of new wars and/or human security, or hard to apply in the practical reality of a new war in their current (traditional) form.

## 4.1. Principles of *jus ad bellum*

### *4.1.1. Just cause*

Over the last years, the just cause-criterion has been adapted by extending the legitimate reasons to wage a war with humanitarian considerations (formalized by the UN in the R2P), instead of mere defensive motivations (self-defence against aggression). However, it still remains fairly state-centric. For *states* have the right to defend themselves, their territorial and political integrity, against an aggressive *state* and *states* have the responsibility to intervene on humanitarian grounds when another *state* is using violence against its own citizens. It remains ambiguous and unclear in traditional notions of just war theory whether non-state actors can and do have just and legitimate reasons to wage a war, against their own state or against other non-state actors, for example when they are being economically and/or politically marginalized or are faced with violence and brutality. But because of the extension of the just cause criterion from self-defence to humanitarian intervention, notions of human security are already fitted in and therefore it is applicable in the context of new wars.

### *4.1.2. Good intentions*

This principle closely interlinks with the before mentioned criterion of just cause. The principle of good intentions demands that the entering into war takes place (and that the conduct in war is) in accordance with the underlying just cause. Even though good intentions might have been present at the beginning of the war, it is imaginable, especially in new war situations, that they become obscured, for example by economical interests resulting from the (continuance of) conflict or grievances towards the opponent resulting in revenge and retaliation. However, since it is possible to uphold the principle of just cause when proclaiming a new war, it is also conceivable that the intentions match the justness of the cause, at least at the stage of entering into the war.

### *4.1.3. Proportionality*

The most important impediment for the proportionality-principle with regard to new wars is not its moral validity, for this is a principle which should be held up by any actor, regardless whether it is a state or non-state actor, for a war to be just, but rather its practical application in (new) conflicts. Since identity politics, strategies of sowing fear and population displacement are commonly used in the new type of war, and motives for resorting to war are mostly economical instead of ideological ('greed' rather than 'grievances', see for example Reno, 2002 and Collier & Hoeffler, 2002), it is highly doubtful whether proportionality-

considerations of expected costs and benefits are even remotely present in the minds of political and military or rebel group leaders. This does not mean rebel groups (or their leaders) are exempted from the moral duty to make proportionality considerations; it just means that due to typical features of new wars relating to motives, strategies and means make it unlikely these considerations will count (or even be made). Even though there may be pragmatic reasons not to terrorize the population, like ‘winning hearts and minds’ for support (moral or financial) or in exchange for food and shelter, popular new war-tactics like identity politics and population displacement, and the usage of rape and mutilation as weapons of war, make a friendly (or at least non-violent) approach highly unlikely.

Although the stakes are often very high in new wars and humanitarian interventions, and since (civilian) lives are at stake on a large scale, it seems as if the benefits will surely outweigh the costs, but one nevertheless has to bear in mind the characteristics of new wars that simultaneously raise the costs of intervening. The typical features mentioned before about new wars and their wagers’ motives seem to point to a focus on self-interest and a lack of capability to see the bigger picture (external effects). The moral dilemma of sovereignty versus humanitarian intervention can come into play and can have far-stretching consequences, for other volatile relations and conflict situations for example<sup>19</sup>.

So even though the proportionality principle leaves room for human security considerations in the cost-benefit analysis and its moral importance is arguably even higher in new wars than in old wars, due to the almost inherent immense costs and negative ‘external effects’ (especially for civilians), it also seems to be one of the hardest principles to apply in practice.<sup>20</sup> This does not mean the proportionality-principle is morally disposable (on the contrary), but simply that it is not completely aligned with (some) theoretical characteristics of new wars, and therefore it is likely these type of considerations will not be present in the practice of new wars (an assumption which will be researched in the following chapter).

#### 4.1.4. *Likelihood of success*

This principle entails that if a state can reasonably expect that no good consequences result from starting a war, then it should not proceed to war. Although the rhetoric used in

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<sup>19</sup> For example: had the US made a comprehensive consideration of *ad bellum* proportionality, including notions of human security thinking and considering the characteristics of new wars in which they would likely end up, and foreseen for example the devastating effect of the war in Iraq, in terms of casualties as well as reputation, it is doubtful they would have rendered the benefits outweighing the costs.

<sup>20</sup> Whether this is actually true will be researched in the following empirical chapter.

describing the content of this principle is heavily state-centric, for (only) *states* make the consideration whether the consequences of the war effort will be successful or at least have a positive effect and thus can decide whether or not to go to war, in theory it could also apply to other actors who can make this sort of judgement, such as international or regional organizations and rebellious groups, NGO's or even businesses<sup>21</sup>. However, it is at least questionable to what extent success will be likely in new type of conflicts, since civilians mostly bear the (negative) consequences of starting a new war and, because of the (economical) stakes all of the warring parties often have in the endurance of the conflict, they often lack a breakthrough but rather result in a stalemate. So even when the goal that is set out to be achieved is just, it is unlikely that it actually can be achieved and the chances for success are thus slim. Considering the above, this principle of just war does not match the theory of new wars and thus it seems probable that it will not be able to fit the practical new war and security context<sup>22</sup>.

#### *4.1.5. Last resort*

Although many of the 'alternative measures' that have to be employed before resorting to war and violence, such as diplomacy and (financial) sanctions, are mostly state instruments, this principle does not automatically exclude other actors from adhering to it and thereby fulfilling (part of) the criteria for waging a just war. Nowadays, international and regional organizations like the UN and the EU impose financial sanctions and trade restrictions on states, groups and individuals (terrorists or dictators for example) and also apply diplomatic pressure. Furthermore, on the local level, one can think of measures like inter- or intra-community dialogue, initiated and/or facilitated by NGO's or CBO's, or 'diplomacy' by traditional or religious leaders to end tensions or conflict and prevent escalation (into war). Therefore, the criterion of last resort does not seem to cause any problems with regard to notions of human security or new wars.

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<sup>21</sup> However, the extent to which these types of actors would actually be in the position to make this consideration, is connected to the principle of legitimate authority, for only legitimate authorities (whatever that may mean in the new war and human security context) are in the position to justly proclaim a war.

<sup>22</sup> One might wonder what the difference is between the principle of proportionality and the likelihood of success, and why the first one can possibly be applicable in new wars, while the second cannot. In the cost-benefit analysis of proportionality, the reason (just cause) for considering to wage a war are present, which gives it a moral connotation, while the consideration of the probability of reaching this goal is more realistic and morally detached.

#### 4.1.6. Legitimate Authority

The principle of legitimate authority poses theoretical as well as practical problems with regard to new wars, especially with regard to the non-state actors that are often involved in these types of war. New wars involve non-state actors (local, regional as well as transnational) which are formally not a legitimate authority of the state. In accordance with a literal interpretation of current just war theory, this implies that non-state actors cannot legitimately declare and wage war, even though they might have relevant (just and legitimate) reasons to do so. Nowadays, authority is actually already eroded from the top; with the supranational institution of the UN and its Security Council, which has a (definite) say in justifying humanitarian interventions, as a perfect example<sup>23</sup>. This possibly clears the way for other actors to challenge state authority and declare war, especially in the context of weak or failing states and violations of human rights. Thus, not only does this criterion pose moral problems regarding who or what can be perceived as a legitimate authority, its enforcement also poses practical problems due to the existence of non-state actors that are perceived to be legitimate in the international law and (just) war context. Legitimate authority is a moral concept, consisting of internal as well as external legitimacy; an authority can claim legitimacy only when it enjoys popular support from within its power base (for states this is territorial, for a rebel group this can be ethnic or religious for example)<sup>24</sup>, and when its authority is acknowledged by other (legitimate) authorities. Therefore, it is not unimaginable that non-state actors can possess (some form of) legitimacy; it is a moral concept, broader than a mere legal concept, and thus can apply to more actors than states. The practical operation of the

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<sup>23</sup> Although the UN is a clear example of authority which has been transferred from the state, and thus of a supranational organization binding states to certain norms, decisions and international laws, it may not be the best example of an actual non-state actor. Since it is an intergovernmental organization, some may claim that states still play a big role and exert power in the decision-making process (which is obviously true regarding for example the Security Council and its veto-power states).

<sup>24</sup> However, since internal legitimacy, especially on a non-state level, is difficult to measure (there is no set threshold of a certain amount of supporters for example), a good way of determining whether a rebel group enjoys legitimacy is the presence of institutions. In this line of thinking, Hamas for example is a non-state group that can claim legitimate authority (to an extent) since it is institutionalized in the medical, educational and political realm, while the Lord's Resistance Army, originally from Uganda but now mainly active in the Democratic Republic of Congo, Central African Republic and South Sudan, is not a legitimate actor (even if it had a considerable support base). (Robinson, Glenn E. (2004). "Hamas as Social Movement", In *Islamic Activism: a social movement theory approach*, Quintan Wiktorowicz (Ed.), Indiana: Indiana University Press, pp. 112-143) Walzer (2006: 186,187, 195-196) for example acknowledges the possibility of non-state actors (guerrillas in his case) enjoying legitimacy through popular support, and highlights the problems this can pose for the principle of discrimination (this is no longer possible).



broader applicability of this principle is noticeable in the role of the UN Security Council in modern conflicts. The Council (strictly spoken a non-state actor) legitimates intervention, taking into account other *ad bellum* principles like just cause. With this responsibility, the Council automatically assigns some sort of mandate to the intervener(s), and it is conceivable that this can be non-state actors (whether rebel groups or international or nongovernmental organizations/representatives) as well as states.

Although the rhetoric used in current just war theory describing the criterion of legitimate authority is heavily state-centric, the principle itself could be upheld in the new context. As a matter of fact, it already does to a certain extent, by the role the UN (mainly the Security Council) plays in approving a humanitarian intervention. With this principle the main problem is the traditional, state-centric rhetoric, but even though at the moment the idea of legitimate authorities at the local or regional (non-state) level is controversial, the application of this principle in new wars is not unthinkable.

## 4.2. Principles of *jus in bello*

### *4.2.1. Proportionality*

Besides the *ad bellum* practical impediments to the application of the proportionality principle in new wars (see page 29-30), there are other additional obstacles regarding *in bello* proportionality in new wars, especially with regard to minimizing the harmful effects to civilians. First of all, since identity politics is a common goal in new wars and violence is often directed directly towards civilians instead of towards the fighting units of the other warring party(/parties) and the opponent, the negative consequences for non-combatants are, almost inherently, likely to be extremely vast. Even though there is room for human security considerations while determining whether a certain military act or strategy is proportionate with regard to its utility for reaching the set (political) goal, which can attribute great importance to an action (when it is necessary to protect civilians or minority groups for example) if actually employed, it is questionable whether most actors in new wars will take these into account. Self-interest (economical or political) will most likely be the main driver for action, with collateral damage as an inevitable outcome. Although the principle is not state-centric in the normative sense, for it should apply to (and be present in the minds of) all warring parties, its practical applicability in the new war context is hard.

However, though the *in bello* principle of proportionality likely suffers from implementation problems, it is capable of capturing considerations matching the idea of human security,

which, combined with the moral importance of the application of such a cost-benefit analysis, makes its practical usage not only possible but also necessary (besides problematic).

#### 4.2.2. *Discrimination*

There is a clear distinction within current international law, where one is either a combatant or a civilian. This distinction entails that “combatants are the only ones who may legally participate in hostilities and therefore be lawfully attacked” and that “civilians, on the other hand, are immune from attack, but are prohibited from participating in hostilities and can be prosecuted if they do so (e.g., for murder)” (Heinze, 2009: 136). If civilians do decide to take part in the violent conflict, their protected status and inherent innocence expires and they become so-called “unprivileged combatants”; they can become legitimate targets of attack, but enjoy none of the ‘privileges’ real combatants enjoy, such as being treated as a prisoner of war in case they are captured (Heinze, 2009: 136). The *in bello* criterion of discrimination between combatants and non-combatants (and the connected *post bellum* principle of discrimination) is difficult to uphold, since it is in practice harder to distinguish between civilians and soldiers due to commonly practiced tactics in new wars such as counter-insurgency and guerrilla-type warfare. Therefore, responsibility for aggression and war crimes is even more difficult to assign, which makes it difficult to discriminate between actors. Furthermore, and in accordance with the distinction between combatants and non-combatants offered by Heinze (2009: 136), it is possible, and in new wars not uncommon, that ordinary civilians become part of the conflict, for example by actually joining rebel groups or fighting units but also by adopting radical views and turning against their neighbours (as happened for example in the Rwandan genocide), which could provide a basis for releasing the idea and principle of ‘innocent civilians’ and non-combatant immunity in certain cases. Jeff McMahan (2008: 20-22) for example argues that sometimes, in certain cases, non-combatants can be legitimate targets of attack, due to the principle of “liability to attack”.<sup>25</sup>

However, if it is conceivable that other considerations relating to just war principles can be made in a new war context, for example regarding proportionality, it is also conceivable that one can discriminate between combatants and non-combatants. A large component of proportionality considerations are the effects on the civilian population (e.g. collateral

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<sup>25</sup> Although this is not an entirely new way of thinking (see for example Walzer’s *Just and Unjust Wars*), it begs the question if the principle of discrimination might not only be hard to apply, but also morally invalid in certain circumstances (at least according to McMahan).

damage); a distinction which can impossibly be made without discriminating between combatants and non-combatants.

Although the moral importance of this principle is immediately clear in the context of current just war theory and old wars, its ability to fit into the context of new wars (theory as well as practice) is less obvious. The distinction between combatants and non-combatants is not only harder to make due to guerrilla and counter-insurgency strategies, but possibly also invalid in many types of new war situations. However, due to the large amount of presumptions with regard to new wars, human security and involved actors, the principle of discrimination should be practically possible in this context<sup>26</sup>.

#### 4.2.3. *Intrinsically heinous means*

This last *in bello* principle forbids the use of extremely cruel and brutal methods during the war effort. This principle fits with the human security framework, since it strives to limit and diminish unbearable suffering in war for all individuals, whether combatant or non-combatant. Even if certain (military) measures would further the national interest of a belligerent state, it cannot resort to and exert such measures if they (or their consequences) are intrinsically brutal and barbaric, such as chemical and biological (and even nuclear) weapons and mass rape-campaigns<sup>27</sup>. However, although this seems to suit notions of human security, its practical effect is questionable, especially in new wars. Unfortunately, rape has not infrequently become a weapon in war to destabilize societies (such as in Rwanda and Uganda, e.g. Turshen, 2001) or has become an effluence of conflict and continues, even when the conflict in large is terminated (such as in the DRC). Also, brutal acts like the hacking of limbs, to serve as an example in case of disobedience and to sow fear among the people, and the mutilating or killing of family and neighbours to erase ties to the community, are not uncommon in many new types of conflict (like in Sierra Leone, e.g. Peters & Richards, 1998). Thus, although it is a normatively valuable principle, which in practice off course could be upheld, it is a fact that it is often violated (most of the times for reasons not entirely clear). So even though this principle suits the human security framework and is probably one of the most needed ones in new war situations since brutality seems to be a common feature of many

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<sup>26</sup> Besides the fact that it should practically be possible to discriminate, this principle's actual application could also have far-reaching positive consequences, for if discrimination is possible and applied, this means rebel groups can also be acknowledged as combatants, assigning them certain rights, which possibly makes the conflict less intense and less zero-sum.

<sup>27</sup> It is not unthinkable that certain interrogation techniques used to elicit information which can be qualified as torturous, such as waterboarding, also (should) fall under this principle.

new wars, its relevance is severely limited in theory and practice. Again, it is important to note that this conclusion does not in the least affect the moral validity of the principle, but merely reflects a problem with its suitability to the theoretical (and therefore most likely also the practical) reality of new wars.

### 4.3. Principles of *jus post bellum*

#### *4.3.1. Just cause for termination / rights vindication*

The human security approach is strongly visible in the content of this principle, for it deals with the vindication of rights that were originally being violated (which provoked the war). These can be rights of the state, such as sovereignty in case of an aggressive attack, to which self-defence is a just reaction, or human rights, in the case of repression or ethnic cleansing, when humanitarian concerns form the just cause. However, in the reality of new wars, adherence to this principle is probably difficult. Even when there is a clear-cut end to the conflict and an apparent victor, which is often not the case (new wars tend to bleed to death, and possibly later fire up again, depending on the availability of material matters like troops and money, but also on popular support, in the war-torn country and society as well as at home in the case of an international presence), things tend to stay messy. Structures that emerged or intensified during the conflict, such as a parallel (criminal) economy and deep-rooted distrust between different (ethnic) groups, cannot be dissolved easily. Putting a halt to the violence is one thing (and even this can be a challenge), but restoring peace in a context that has been drenched with conflict dynamics and violence for a long time is another. Furthermore, it is common in conflict that certain groups or people thrive on uncertainty and insecurity, but for new wars it is a particularly typical feature; it is not uncommon that both (or more) warring parties develop an interest in keeping the conflict fire burning, for economical or political gain. Examples include Uganda, where the government 'struggle' against the Lord's Resistance Army (LRA) provides legitimization for strong military policies and spending and the president holding on to power, and Afghanistan, where war lords and tribalism emerged and currently define the local security context.

But let us assume the new war is ended abruptly, with a clear and just victor, and the other warring party/parties willingly submit to this outcome. What is next? The war has surely been steeped with violations of the abovementioned principles of just war and the population was plagued with violence and brutality, so imaginably there would be enough opportunity for punishment and penalties. But how is this to be judged and enforced? Although 'objective'

and 'neutral' (international) judges seem to be most fit, in practice this seems unfeasible. Even though institutions are in place, for there are several criminal tribunals and even a criminal court (the ICC in The Hague), but especially this last one is troubled by ineffectiveness, inefficiency and allegations of being biased (none of the indictments is against Western actors). The legitimacy of the court is threatened, also by the lack of support from important powers (and not surprisingly also some of the worst human rights violators) like the US, China and Russia, and there is no hard incentive to comply.

As should be clear from the above, the prospects for upholding the principle of just cause for termination in new wars are bleak, even though in theory it takes human security into account.

#### 4.3.2. *Right intention*

From a moral perspective, this principle should be on the mind of all sort of actors in the position to end a (new) war. Since most other *post bellum* principles incorporate notions of human security, it possible to follow the spirit of these. However, since the principle of right intention deals with the implementation of the process of termination, its fulfilment is most likely unsuccessful; the investigation and prosecution of war crimes will probably not be impartial, simply because of the horrific nature and scale of the crimes and the fact that all the warring parties are presumably part of it. A practical example of this phenomenon is the case of the ICC against the LRA, which is viewed by local as well as international human rights observers as unequal, since crimes committed by the Ugandan government and its forces are not addressed at all. Therefore, the applicability of this criterion in the context of new wars is minimal.

#### 4.3.3. *Public declaration / legitimate authority*

This *post bellum* principle poses the same theoretical and practical problems to adopting it in relation to human security and new wars as its *ad bellum* counterpart (see paragraph 4.1.6.). Again, the main question is which actors can be seen as legitimate authorities, that can draft and declare the terms of peace. The same arguments as mentioned earlier apply here; state authority is already eroded from above by an international institution like the UN Security Council (although its base of legitimacy is state consent), and it is conceivable that other local, regional or international actors can also claim legitimacy, based on popular support and an institutional base.

A minor addition to this principle is the public proclamation part; it is questionable whether non-state actors, especially local rebel groups for example, have access to means to publicly

proclaim a war, but not unthinkable (a declaration on television or radio can count as public). The new context therefore does not necessarily pose any hindrances for compliance with this principle.

#### 4.3.4. *Discrimination*

In the process of ascribing liability for crimes and responsibility for respecting and upholding the terms of peace, it is necessary to discriminate between different types of actors (such as political and military leaders, 'regular' soldiers and civilians). Precisely this is perceived to be extremely difficult in new types of conflict; not only the distinction between combatants and non-combatants (as already discussed with regard to the *in bello* principle of discrimination, see paragraph 4.2.2.) is blurred, but the difference between political and individual accountability is also difficult to capture. Who is responsible for atrocities committed in a new war; the individual fighters, hacking of limbs and pillaging, the leaders of the different fighting units, inciting their men to this kind of violence, the main leader of the rebel group, leading and motivating the troops, or the disgruntled politician, instigating and (financially) supporting the conflict campaign. This example does not serve to imply that behind every new war there is a (group of) calculative, cold-hearted politician(s), even though in many cases similar (conspiracy) theories find ground. It merely intends to indicate that the 'chain of accountability' can sometimes be traced far back, but simultaneously that the 'roles' all the different actors play are not clear-cut, and attributing blame is not entirely objective. A peculiar development regarding the *post bellum* principle of discrimination is, however, that despite the fact that in theory it seems to be difficult to adhere to, in the reality of international law it seems to be acknowledged: the practical existence of the International Criminal Court (ICC) proves that it is (assumed to be) possible to distinguish between those who have a role in the conflict and those that do not.

Within just war theory there is a discussion about whether individuals can be held morally responsible for their behaviour and acts in war and whether they are liable for (individual) punishment. Although this question is essential with regard to the consequences of the principle of discrimination (the actual punishment of those responsible), for new wars this principle strands earlier along the way, namely with determining accountability: distinguishing between actors in the conflict is too difficult. So, again, it seems that one of the morally most important principles for justice in (new) war, seems particularly unfit to cope with the features of new wars.

#### 4.3.5. *Proportionality*

The explanation of this principle is heavily state-centric; states are victorious and states become sovereign again after intervention (which is carried out by another state of course). But when looking past this rhetoric, one can see that it is definitely apt to incorporate human security considerations, for in determining the terms of peace, rights vindication is the reference point. In practice however, the applicability of this principle is undoubtedly difficult. First of all, determining reasonable punishment for brutal acts often committed in new wars is a moral challenge; which sentence can be called fair for dismembering, maiming, raping and killing, and can any punishment be too hard for such cruel acts? Of course there is a line, and the principle of proportionality deals with this (fine) line. International law dictates the framework wherein this deliberation can take place, since it determines certain reference points; positive, in the sense of which acts count as criminal offences, and negative, in the sense of impermissible penalties. Although international law thus assigns rights and responsibilities to the victor, the question is (again) how it can be enforced.

Furthermore, it is quite common for a military (humanitarian) intervention to stretch out into a political intervention, by installing friendly regimes, imposing favourable policies or reconstructing a polity for personal gain. All in all, the *post bellum* proportionality principle has a normative role in new wars, there are some sort of practical guidelines formed by international law, and follows an outspokenly human security-criterion of rights vindication, which make it capable of dealing with and in new wars, even though successful application may be unlikely.

All in all, as is showed in the discussion in this chapter, the main *ad bellum*, *in bello* and *post bellum* principles that cause insuperable problems for the new context are likelihood of success, intrinsically heinous means, and right intention. In general, considerations of human security are (implicitly) present or lie at the basis of these principles (as in the *in bello* principle banning the use of intrinsically heinous means), but with regard to specific characteristics of new wars, all these principles seem impossible to practically apply or uphold. The principles of just cause, good intentions, last resort, and legitimate authority do not seem to cause any problems when theoretically applying them to the context of human security and new wars; they seem to be able to deal with such considerations, practicalities, and effects. Principles that cause dilemmas for the new context are proportionality, discrimination and just cause for termination. These principles (sometimes explicitly) require considering notions of human security or can at least incorporate them, but the theoretical

reality of new wars and their specific features and nature hampers these principles' application.

*Table 1. Overview of just war principles in relation to their moral desirability in new wars and the feasibility of applying them to the theoretical context of new wars.*

		<i>Unfeasible in theoretical new war context</i>	<i>Feasible in theoretical new war context</i>	<i>Problematic for theoretical new war context</i>
<i>Morally desirable</i>	<b><i>Jus ad bellum principles</i></b>	- Likelihood of success (4.1.4.)	- Just cause (4.1.1.) - Good intentions (4.1.2.) - Last resort (4.1.5.) - Legitimate authority* (4.1.6.)	- Proportionality (4.1.3.)
	<b><i>Jus in bello principles</i></b>	- Intrinsically heinous means (4.2.3.)		- Proportionality (4.2.1.) - Discrimination (4.2.2.)
	<b><i>Jus post bellum principles</i></b>	- Right intention (4.3.2.)	- Public declaration / Legitimate authority* (4.3.3.)	- Just cause for termination (4.3.1.) - Discrimination (4.3.4.) - Proportionality (4.3.5.)
<i>Morally undesirable</i>	<b><i>Jus ad bellum principles</i></b>			
	<b><i>Jus in bello principles</i></b>			
	<b><i>Jus post bellum principles</i></b>			

\* Although the rhetoric used in describing this principle in current just war theory is heavily state-centric, its conceptual content can be transferred to the context of new wars and considerations of human security. In its traditional form the practical applicability of this principle is limited in new wars, but this hindrance is merely rhetorical.



In the following part of this thesis, these problematic principles and their applicability and usage in the new context will be further researched on the basis of a case of a war that can generally be seen and qualified as a 'new war'. In this specific case, attention will be paid to the extent to which features are present in the practical reality of the war that can be linked to principles of just war, or to the extent to which these are not present. For example regarding the principle of discrimination; are there grounds for discriminating between combatants and non-combatants between warring parties, for example on the basis of uniforms or other specific features, in the particular case? This type of empirical research allows the possibility to determine whether the theoretical and potential problems identified in this chapter (4) can also actually be identified in the practical reality of new types of war and conflict.

## **Ch. 5. Case-study of a New War and the Principles of Just War:**

### **Sierra Leone**

This chapter constitutes the empirical section of this research, with the earlier discussed theoretical issues and problems with principles of just war and new wars and notions of human security further researched in the practical reality of a conflict, which (in accordance with Kaldor, 2006) can be classified as a new war. The case that will be analyzed is chosen sort of randomly from the cases Kaldor discusses in her book *New and Old Wars*, to be sure it fits with her leading theory about characteristics of and differences between old and new wars. However: sort of randomly, because for pragmatic reasons they were narrowed down to one and the chosen case is the one that portrays the least amount of interstate involvement and which has the most adequate and relevant literature available. Therefore, the conflict that will be further analyzed is Sierra Leone<sup>28</sup>. In order to gather empirical evidence for the (non)application of just war principles in this case, mainly secondary literature will be analyzed.

The principles that will be ‘tested’ are the principles of proportionality, discrimination and just cause for termination, because these are the principles that are likely to pose problems in the new context, but yet their application is not completely unconceivable. It is interesting to look at these cases, where the theoretical analysis (see chapter 4) is indecisive, which makes their practical applicability uncertain and worth investigating. Rather than choosing a sort of least likely case (researching the principles that seem unfeasible in the new theoretical context) or a most likely case (analyzing the principles deemed feasible in the new theoretical context), this chapter focuses on the principles ‘in the middle’, the ones that cover the theoretical grey area and whose applicability and compliance in new wars is therefore intriguing.

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<sup>28</sup> Although there was a (changing) international presence during the Sierra Leonean war, with Nigerian, Guinean, Kenyan and Zambian soldiers for example, this was mainly in the context of regional/international organisations, and not so much states, with ECOWAS and the UN sending troops. Furthermore, the Liberian aspect played a significant role in this conflict, with President Charles Taylor supporting the rebels with weapons and training for diamonds, there has not been any official Liberian intervention in the conflict.

In the end, around mid-2000, there was an interstate intervention, by the United Kingdom, to support the UN peacekeeping force. Although this intervention played a huge part in the final stage, by fostering disarmament and thereby ending the war, and was thus extremely important, it came at a very late stage in the war, which makes it possible to minimize its impact on the war in general (so Sierra Leone still can function as a good case study for the purposes of this research).

### 5.1. Background to the conflict

The war in Sierra Leone began in 1991, with a rebellion by the Revolutionary United Front (RUF), lead by Foday Sankoh, against the government of Sierra Leone and its president Joseph Momoh. The rebellion is a spill-over from the war in Liberia, which Charles Taylor begins in 1990, causing 80.000 Liberians to flee the Sierra Leonean border and the Economic Community of West-African States (ECOWAS) to install a monitoring group (ECOMOG), based in Freetown. (Gberie, 2005: 5; Smillie, Gberie & Hazleton, 2000: 11) The RUF started attacking Sierra Leonean villages at the Liberian border and motivated their violence by employing a rhetoric of anti-corruption and pro-democracy, aiming to “‘liberate’ the country’s derelict peasantry and the dispossessed” (Smillie et al.: 11; Gberie: 6). However, exactly these dispossessed and marginalized people suffered most from the RUF violence and looting. Popular support among civilians for the RUF was very limited, mostly because of their terror tactics and the brutal and random violence they portrayed, indicating that the rebel group was “‘mainly aimed at criminal expropriation, not social protest” (Gberie: 8, 15, 75).

In April 1992, there was a mutiny by a group of frontline soldiers, not having received any payment for three months, which escalated into a coup ousting Momoh and the soldiers installing a junta, the National Provisional Ruling Council (NPRC), lead by Captain Valentine Strasser. (Gberie, 2005: 68; Smillie et al., 2000: 11) At first the ‘revolution’ was very popular, because the population was finished with the corrupt and predatory behavior of Momoh and the lack of success with which he countered the RUF rebel movement, whose brutal war campaign, characterized by amputations, continues. However, popular support was declining rapidly after a while, after reports of the army being involved in criminal behavior and banditry and collaborating (directly or indirectly) with the rebels. (Gberie: 79, 88) At the beginning of 1993, two groups of volunteer forces emerged: the Tamaboros and the Kamajors. These battalions consisted of traditional hunters, determined to fight the RUF to protect their own territory and people; not able to rely on the army because it was “‘perceived to be either incompetent or in collusion with the enemy” (Gberie: 79, 84).

Especially the Kamajors were quite successful in fighting of the RUF (and sometimes dealing with corrupt parts of the NPRC, who saw them as a threat to their lucrative ‘collaboration’ with the RUF) and were viewed as a strong opponent, a force to be reckoned with. However, due to the dubious role many of the army soldiers played and the guerilla tactics of the RUF (fleeing to the bushes, able to escape the heavy artillery of the NPRC and ECOMOG, and changing their strategies to more swift and quick but no less devastating attacks) chaos was

complete and to grave to handle internally, even with the support of Nigerian and Guinean ECOMOG forces. Therefore, in 1995, a South African private military company named Executive Outcomes (EO) was brought in to counter the rebels, and it was considered successful: towards the end of 1995 rebel activity was brought under control to a great extent (pushed out of Freetown and the diamond areas), which lead the junta to organize elections in order to restore civil rule. (Gberie: 94, Smillie et al.: 11; Kaldor, 2006: 100)

In the beginning of 1996 Strasser is replaced by Julius Maada Bio, peace talks with the RUF were initiated and elections were held, marked by some degree of RUF violence but pronounced 'free and fair', after which Ahmed Tejan Kabbah became the new President. (Gberie, 2005: 95, Smillie et al., 2000: 12) At the end of 1996, a peace accord was signed in Abidjan (Ivory Coast) between Foday Sankoh and President Kabbah.

However, after EO withdrew from Sierra Leone, on demand of the RUF, and the army was again responsible for national security, a coup by rebellious soldiers ('sobels') called the Armed Forces Ruling Council (AFRC), lead by Major Johnny Paul Koroma, ousted President Kabbah in May 1997. Koroma invited the RUF into his movement and the combined forces were named 'the People's Army'. (Gberie: 95-96)

The AFRC coup was widely unpopular in Sierra Leone, especially due to the incorporation of the RUF, and its reign was "characterized by systematic murder, torture, looting, rape and shutdown of all formal banking and commerce throughout the country" (Smillie et al.: 12). The People's Army raided towns believed to be aiding resistance groups (like the Kamajors), attacked media outlets and journalists perceived to rally against the AFRC and disturbed peaceful demonstrations, assaulting participants with machetes and guns. (Gberie: 110-111)

Nigerian soldiers (first on a bilateral mandate, later in ECOMOG context) were in 1998 finally able, working together with groups like the Kamajors among others, to push back the AFRC/RUF from Freetown and the diamond mining areas and President Kabbah returned from Guinea in March 1998. While the Sierra Leonean army was being disbanded, many villages in the interior of the country continued to suffer from AFRC/RUF violence and brutality (most of the junta managed to escape during the ECOMOG invasion), causing the UN Security Council to deploy military and human rights observers on a peace-keeping mission (UNOMSIL) while ECOMOG troops continue to battle the People's Army. (Gberie, 2005: 116; Smillie et al., 2000: 12) The Kabbah government soon charged and tried a total of

sixty people, junta soldiers and affiliated civilians, including Foday Sankoh, which resulted in death sentences for many of them. (Gberie: 116-117; Smillie et al.: 12)

In an attempt to free Sankoh, RUF commander Sam Bockarie (who took over after Sankoh was captured in 1997) declared ‘Operation No Living Thing’ and entered Freetown with his forces on January 6<sup>th</sup> 1999, unleashing nearly two weeks of “random, ecstatic and finally comprehensive” terror on the population (Gberie: 127). The looting, raping, killing and mutilating continued, but (if possible) in even more gruesome ways than before, the rebels heavily influenced by drugs, and on a much larger scale (mass amputations)<sup>29</sup>. By the time ECOMOG was able to push the rebels back, 6000 civilians were killed.

The Sierra Leonean government and the RUF started negotiating a peace agreement, leading to the signing of the Lomé Accord in July 1999. In this accord, the provision of several high-ranking government positions to Sankoh and other RUF and AFRC leaders was included, as well as a controversial amnesty agreement. (Smillie et al., 2000: 9, 12; Williams, 2011: 175) Although the UN protested the amnesty agreement, they were generally supportive of the accord, and approved a 6000-member Peacekeeping Force (UNAMSIL), to bolster the ECOMOG presence and charged with disarming the RUF (for which task the United Kingdom sent military observers). (Smillie et al.: 9, 11; Gberie, 2005: 158, 162)

Perhaps unsurprisingly, many of the RUF rebels were not willing to cooperate with the UN mission and simply disarm, a sentiment fueled somewhat discretely by Sankoh, and thus the violence heightened again, resulting even in the kidnapping of UNAMSIL soldiers. Initially this bold resurrection went un-counteracted by UNAMSIL due to an ambiguous mandate and internal strife, but finally it managed to get its act together (aided by a separate British intervention) and took on a more aggressive approach, speeding up the disarmament process. The RUF announced it had a new leader, Major Issa Sessay, who was willing to cooperate with UNAMSIL and the Brits, urging his troops to disarm. The war in Sierra Leone officially ended in January 2002, when the last disarmament centre was ceremonially closed. (Gberie: 168-175)

It is probably clear from the above that the war in Sierra Leone is a perfect example of a new war, with a mixture of state and non-state actors, almost all of the parties driven by

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<sup>29</sup> For example, the rebels would use to make their victims choose “between ‘long sleeve’ (having their hands cut off from the wrist) and ‘short sleeve’ (having their arms cut off from the shoulders)”. (Gberie: 137)

economical interests and targeting civilians to further these interests, committing unspeakable atrocities. Particularly characteristic about the war in Sierra Leone is the phenomenon of so-called ‘sobels’; soldiers posing as rebels to profit from looting. The distinction between soldier and rebel was thus blurred, the line between the ‘good’ and the ‘bad’ side obscured, which created enormous uncertainty and chaos. All of the warring parties had a stake in the conflict, satisfying their economical interests, which made putting an end to it so difficult. As Smillie et al. (2000: 2) put it: “The point of the war may not actually have been to win it, but to engage in profitable crime under the cover of warfare”.

Another distinctive mark the Sierra Leone war has left on the idea of guerilla warfare is the tactic of dismembering; sowing fear by mass amputations was characteristic of the RUF and made them so strong and almost unopposed, even though they lacked popular support. According to Gberie (2005: 2), “the military and ‘political’ efficacy” of the war depended “almost wholly on shock or terror tactics”.

Furthermore, there were hardly any direct battles between the rebels and the government army; the RUF and later also the APRC (even the NPRC to an extent) attacked villages and their inhabitants rather than the opposing militia’s. Thus, the Sierra Leonean war was long and brutal, with civilians being the main targets and victims: “Between 1991 and 1999, the war claimed over 75,000 lives, caused half a million Sierra Leoneans to become refugees, and displaced half of the country’s 4.5 million people” (Smillie et al.: 2).

## 5.2. The proportionality principle in the Sierra Leonean war

The principle of proportionality was dubbed problematic for the new war context in the previous chapter, on all accounts (*ad bellum* as well as *in bello* and *post bellum*), meaning that the theoretical content of the principles is not completely in accordance with assumptions in the theory of new wars (without any normative connotation).

### *5.2.1. Jus ad bellum proportionality*

With regard to *ad bellum* proportionality, it seems as if the RUF was not really considering the real costs and benefits of starting a rebellion. For even though they claimed to be fighting to ‘liberate’ the poor and marginalized, mainly peasants from the rural areas and urban youths, and overthrow the corrupt government in order to install real democracy, they almost immediately focused their campaign of looting and violence against civilians, the ones they claimed to be fighting for. Sankoh’s rhetoric of improvement of and access to education and healthcare and the proper use of the abundant natural resources, seems to be merely this:

rhetoric, unsupported and even contradicted by the RUF's acts. The true motives, judging from the RUF's immediate actions after declaring their rebellion, seem to relate more to economical gain; starting with attacking and looting remote villages does not indicate a genuine concern with those people. This is merely an observation, based on empirical facts, not a moral justification for jettisoning the *ad bellum* proportionality principle or condoning this type of behaviour.

### 5.2.2. *Jus in bello* proportionality

The *in bello* principle of proportionality seems to have been even less present in the minds of RUF leaders and rebels when the fighting began; it seems unlikely that attacking villages and civilians, and adopting cruel terror tactics to scare them into obedience, such as amputating limbs (hands, noses, lips, ears), could be justified, whatever the (military) aim or significance may be. Another RUF tactic was severing human heads, impaling them on wooden posts, put on display to discourage any potential protesters. (Gberie, 2005: 65-66)

For the RUF it probably made sense strategically to commit those atrocities, since the group lacked any form of civil support, especially at times their strength was countered by government or other forces (then the intensity and randomness increased).

There was ... a mark of desperation about the strategy: lacking any appeal among the citizenry, and without ideological motivations or political base of support, rejected by society, facing defeat, the rebels became wanton, the wantonness easily becoming neurosis and nihilism. (Gberie: 15)

However, this does not justify the means they employed; the harm they inflicted was disproportional to the goal they were trying to reach<sup>30</sup>.

Most other successful RUF tactics were equally despicable: abductions, especially of foreigners, aimed to gain recognition for the group and highlight the lack of control by the NPRC in the country. Also, the RUF had their own specific execution style: cutting of the heads, "working from the back with near-blunt machetes", sometimes posing the heads on poles to serve as warning signs to potential opponents (Gberie: 122).

As the conflict and actors changed, so did the tactics of the warring parties. By the beginning of 1995 for example, the rebels, impressed by the NPRC's firepower, no longer occupied

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<sup>30</sup> Especially since their rebellion was unjust to begin with: they did not have a just cause (although rhetoric implied they did, their true motivations proved otherwise), had no popular support and thus did not enjoy any legitimacy, and did not satisfy other *ad bellum* principles like good intentions or proportionality.

villages for a longer period of time but changed their tactic to “hit, destroy and run” (Gberie, 92). This led to even more chaos and greater losses.

Not only the rebels were responsible for the death of civilians, other warring parties also killed non-combatants (particularly valid for the ‘soldiers turned rebels’ in the AFRC). Sometimes this was unintentional, for example with the response of the Nigerian troops to violence committed by the AFRC/RUF People’s Army; the Nigerians used heavy artillery to attack AFRC headquarters, but missed their targets and killed and wounded many civilians. (Gberie: 112) Even though the loss of civilian lives is always regrettable, this action was different than the violence employed by the rebels, for the Nigerians were not intentionally targeting civilians; this counts as collateral damage or double effect (as cruel as it may sound) and thus does not interfere with the principle of (*in bello*) proportionality. Furthermore, evidence that “Nigerians bombed selected targets in Freetown, including the main military barracks” implies that they tried to uphold the principle of proportionality and discrimination by aiming at a military target, thereby fulfilling their moral duty, even when they did not always achieve the best results/were not always successful in avoiding civilian settlements (Gberie: 112).

Nevertheless, civilians were killed in both instances and this is not only unfortunate, but it also boosted a new strategy by the AFRC:

The AFRC’s response, while perhaps predictable, was horrific nonetheless. Their most effective resistance was to attempt to portray the Nigerians as killing civilians in Freetown in their heavy-handed effort to enforce the sanctions, and thereby trigger international outrage against the Nigerians. Their weapons of choice were mortars and grenade launchers, weapons whose projectiles exploded on hitting the ground. In October 1997, a flypast by some Nigerian jets over Freetown left thirty-five civilians dead, victims of projectiles fired by the junta’s forces. ... The BBC, reporting the incident, announced that the Nigerians were responsible for the killings. (Gberie: 113)

By the time of the 1999 invasion of Freetown by the AFRC and RUF, any hint of proportionality considerations were long gone. The name of the invasion alone, ‘Operation No Living Thing’, would have been enough to condemn this attack proportionality-wise, for it implies total and utter destruction (which can be proportional to nothing). Even though looting, random killings and mass amputations were characteristic of the entire conflict, its scale and intensity totally escalated during this two-week raid. “At night, because there was a



blackout, the rebels would lock up whole families in their houses and set them ablaze, so that there would be light in the area” (Gberie: 129). Another example of the complete detachment of any sense of humanity relates to their infamous hallmark, amputations:

The rebels had heard that an aid agency was in the country helping to sew up severed hands, so now they would bag all hands they chopped off and take them away [bury them]. It was not to eat them, as many have alleged, but simply to deprive their victims of any chance of having their hands back. (Gberie: 128)

The following account of Human Rights Watch about sums it all up:

The rebel occupation of Freetown was characterized by the systematic and widespread perpetration of all classes of gross human rights abuses against the civilian population. Civilians were gunned down within their houses, rounded up and massacred on the streets, thrown from the upper floors of buildings, used as human shields, and burned alive in cars and houses. They had their limbs hacked off with machetes, eyes gouged out with knives, hands smashed with hammers, and bodies burned with boiling water. Women and girls were systematically sexually abused, and children and young people abducted by the hundreds. (HRW, 1999)

At this point, there was hardly any difference between the violence used by troops countering the rebels; all warring parties found themselves on a slippery slope of targeting civilians (first the ones allegedly aiding the rebels, later on more generally) and profiting economically wherever possible. The Nigerians for example employed a sloppy counter-offensive strategy; marked by the “use of heavy artillery, naval guns and aircraft to bomb the heavily populated areas where it was suspected that the rebels were hiding, leading to many civilian deaths”, and “summary executions of suspected civilians by the Nigerian troops were common. Hundreds of innocent civilians were murdered in this way” (Gberie: 131).

Thus, as far as *in bello* proportionality is concerned, rebels aiming to overthrow the government (as it started in the beginning), as well as international and government forces countering the rebel-violence (especially at a later stage in the conflict), did not make appropriate considerations, while they should have from a moral perspective, targeting mainly civilians to further personal (economical) gain and sow fear.

The rebel Revolutionary United Front (RUF) and the military junta Armed Forces Revolutionary Council (AFRC) committed the most egregious abuses, including the widespread use of purposeful amputation, but the pro-government forces—the Civil Defense Forces (CDFs) and the peacekeeping troops of the Economic Community of

West African States Cease-fire Monitoring Group (ECOMOG)—also perpetrated violations of humanitarian law. Indiscriminate killing, rape and sexual slavery, the use of children as combatants, and arson were widespread tactics in a war of terror mainly directed at civilians. (Dougherty, 2004: 39)

Therefore, the principle of proportionality has not been upheld, by none of the warring parties<sup>31</sup>: “It [the decade-long Sierra Leonean civil war] was characterized by a stunning indifference of combatants on all sides to the laws and customs of war, the laws of humanity, and the dictates of the public conscience” (Schabas, 2004: 146). Besides proving problematic in the theoretical context of new wars (even though potentially able of incorporating notions of human security), empirical analysis shows the *in bello* proportionality principle was generally absent in the considerations of different actors in the Sierra Leonean war. Though this observation does not affect the normative value of this just war criterion in principle, it does point to issues regarding the practical implementation of and compliance with this principle and international law based upon it.

### 5.2.3. *Jus post bellum proportionality*

*Post bellum* proportionality deals with determining reasonable punishment for acts executed in war. As far as *post bellum* proportionality is concerned, the unofficial end of the war being the Lomé Peace Accord, the Sierra Leonean war completely strikes out. In this peace agreement between the government and the RUF, an amnesty act has been incorporated, releasing all RUF members from potential fears for being held accountable for their war crimes and for prosecution. Several former RUF leaders were even provided with government positions (Sankoh becoming Vice-President for example). In general one can say that:

... as for former combatants of the RUF and their comrades in the so-called People’s Army, life shortly after the official end of the war appeared to be far better than that which their victims in the Amputee Camp were living. About 2,230 of them, including ex-rebels and renegade soldiers who had gained personal notoriety for mass murder and amputations, were reintegrated into the ‘new’ Sierra Leone Army. (Gberie, 2005: 200)

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<sup>31</sup> Even the UN-mission UNAMSIL did not uphold the proportionality principle: they were supposed to bring and keep peace after the Lomé Accord was signed, but were highly inefficient (partly because of an ambiguous mandate, but mostly because of other preoccupations like diamonds and the beautiful Freetown beaches) and there are accounts that suggest they also targeted civilians. (Gberie, 2011: 167)

The amnesty agreement caused problems between the two different bodies for transitional justice after the Sierra Leonean war; the Truth and Reconciliation Commission (TRC) and the UN Special Court for Sierra Leone. (Dougherty, 2004: 51; Frulli, 2000: 868; Schabas, 2004: 165) The Special Court is autonomous, has jurisdiction over national as well as international crimes and can prosecute juvenile offenders (a very controversial aspect at the time); the Court has “*jurisdiction over persons who were 15 years of age at the time of the alleged commission of the crime*”<sup>32</sup> (Frulli: 866). It condemns the amnesty agreement and tries to work around it by excluding grave violations of international law, stating that amnesty is only an option for perpetrators of crimes under Sierra Leonean law (like arson).

The TRC was established<sup>33</sup> by the parties to the Lomé Agreement “to ensure that there was some sort of accountability, even if it would not be accompanied by penal sanctions and stigma” (Schabas, 150). The TRC views amnesty as a requisite for their work; without it no one would be willing to honestly confess their crimes, hence making truth finding and true reconciliation impossible. (Frulli: 868; Schabas: 152) Furthermore, based on testimonies of government negotiators for the Lomé Accord, the TRC believes that amnesty was genuinely thought to be the only solution to make the RUF sign a peace agreement and put a halt to the violence.<sup>34</sup> (Schabas: 158-164)

So, even though amnesty would make it possible for perpetrators of war crimes to go unpunished, in the end the UN succeeded (on the basis of the Lomé Accord) to disarm the entire remaining Sierra Leonean rebel force. Thus, can this amnesty deal (which the UN also protested) be seen as a spot on the sheet of (international) justice? For if it was this agreement that actually made it possible (or was thought of to make it possible at the time) to end the violence, does this not make it a proportional measure? According to Schabas (2004: 165), it does: “To the extent that it [amnesty] was a *sine qua non* [essential condition] for the end of

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<sup>32</sup> The Rome Statute, establishing the ICC, for example, explicitly limits jurisdiction of perpetrators under 18 years old (the international criminal tribunals of Yugoslavia and Rwanda are silent on this account). (Frulli: 866, n. 43)

<sup>33</sup> The TRC was inaugurated in Freetown on the 5<sup>th</sup> of July 2002, after setting it up with the involvement of civil society groups and human rights monitors. (Gberie: 210, Dougherty: 41)

<sup>34</sup> This reflects the dilemma of peace versus justice; is it more important to ensure (some Western notion of) justice by prosecuting war criminals, even if this would mean the war and violence (against civilians) continues? And who can decide on this trade-off: government officials and/or international organizations, or the people faced with and victimized by the violence on a daily basis?

armed conflict, the grant of amnesty was acceptable”<sup>35</sup>. Thus, because proportionality considerations were present (perhaps unintentionally or unconscious), this measure can not only be deemed effective, but also in line with moral requirements.

### 5.3. The principle of discrimination in the Sierra Leonean war

After theoretical examination in the previous chapter, the principle of discrimination was dubbed problematic for the new war context on both accounts; *in bello* and *post bellum*.

#### *5.3.1. Jus in bello discrimination*

The necessity, ability and practice of distinguishing between combatants and non-combatants, civilians and soldiers, in combat is prescribed by the *in bello* principle of discrimination.

The war in Sierra Leone began by a rebellion by the RUF. As the Sierra Leonean conflict was a spill-over from the war in Liberia, the RUF mainly consisted of Liberians, especially in the early years of the war, and many (teenage) fighters spoke with a distinctively Liberian accent. (Gberie, 2005: 61-62) This could be a way of distinguishing regular Sierra Leoneans from the rebels, although not entirely ‘waterproof’ since the RUF also consisted of Sierra Leoneans.

In their ‘manifesto’, the RUF describe themselves as a sort of freedom fighters (‘guerrillas’): “The guerrilla is the people in arms. It is the guerrilla removes the fear imposed on society by the uniformed ‘men in arms’ [the government army]” (Gberie: 39). This seems to imply that they distinguished themselves from the regular army by not wearing any uniforms, and posing as civilians. Evidence for this mainly un-uniformed appearance of RUF rebels (at least the frontline troops), is a video clip of the RUF in an early stage of the conflict, showing Sankoh “in combat fatigues and carrying a rifle, surrounded by dozens of mainly ragtag teenage fighters” (Gberie: 60). This implies that it would be very difficult for government soldiers to distinguish non-combatants from combatants (from the RUF side), as they looked similar. It is imaginable that the confusion only grew, when Momoh, looking to expand his army at the end of 1991, recruited mainly from the slums of Freetown, attracting unemployed youths, often with a criminal background and/or drug addiction. This produced an army of “uniformed

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<sup>35</sup> However, this is not to say that amnesty in general is an acceptable solution: “There are, to be sure, many disgraceful examples of dictators granting themselves amnesties. But a defence of the practice in some circumstances should not be viewed as a justification of amnesty under all circumstances. The issue does not lend itself to absolute answers. The usefulness, the viability and the legitimacy of an amnesty reside in complex dynamics of the peace process”. (Schabas, 2004: 166)

rabble which acted and looked much like the ragtag rebels they were sent to fight” (Gberie: 64).

At later stages in the war, when the range of involved actors expanded and the groups became more amorphous (with the sobel-phenomenon for example), it became more and more difficult to distinguish between the involved actors and different fighting groups, and civilians. The private military company EO was supplied with Sierra Leonean army uniforms for example. (Gberie, 2005: 94) Later on in the war, more and more civilians became active in the conflict, engaging in profitable banditry for economical gain; “in the atmosphere of general insecurity and even chaos in the war-affected areas, groups of bandits (civilians) imitated rebel tactics, carrying out their own attacks ... for loot” (Gberie: 81). The NPRC was known for using ‘volunteers’ or ‘irregulars’ to fight the rebels in war-affected areas; tapping into feelings of revenge and an urge to liberate their villages the NPRC recruited local, unemployed young people. (Gberie: 76) By doing this, the principle of discrimination was blurred, because the distinction between combatants and non-combatants, civilians and soldiers is blurred. However, this development did not only make distinguishing between non-combatants (civilians) and combatants harder, it also made distinguishing less morally valid, for certain civilians actively participated in the conflict and were no longer innocent bystanders.

In general however, the situation for civilians also became more and more cluttered, chaotic and dangerous; they were at risk for falling prey to the rebels, but simultaneously had to be on their guards for the government soldiers, who could mistake them at any time for being a rebel: civilians feared and fled the “NPRC’s brutal troops, for whom anyone in ‘rebel territory’ was perforce a ‘rebel’” (Gberie, 2005: 80).

At a certain point, somewhere in late 1993, early 1994, there came a point that disloyal soldiers started capitalizing on the unstable security situation by turning into so-called ‘sobels’; performing their acts as soldiers during the day and discarding their uniforms at night, pretending to be rebels and intimidating and looting from civilians. (Williams, 2011: 45; Gberie: 82) This phenomenon made distinguishing between the rebels and soldiers almost impossible, but it is questionable whether the distinction was even valid anymore; rebels and soldiers often engaged in a so-called ‘sell game’, exchanging looted goods and allegedly even ammunition and weapons. (Williams: 45; Gberie: 182; Kaldor, 2006: 112) “Renegade soldiers had run amok, carrying out their own attacks on civilians, mainly for loot”, and by the end of

1994 the government itself even admitted that parts of its army were running rampage, and Strasser “warned the public against ‘harbouring a soldier who does not possess his authentic document... Strident action will be taken against all civilians found in possession of military uniforms and equipment’” (Gberie: 91). This statement by Strasser implies that the NPRC actually saw some value in upholding the principle of discrimination, but often was not able to do so (because of confusion stemming from civilians and rebels wearing army uniforms<sup>36</sup>).

As far as the RUF goes, it can be said that for them it should have been possible to distinguish between fellow rebels, soldiers and civilians. Although they did become frustrated with “countering attacks from the Kamajors – who were a grassroots militia force, operating in their own terrain and therefore largely ‘invisible’”, which signals trouble with distinguishing men from the Kamajor militia, they reacted to this frustration with “more violent and indiscriminate attacks by the RUF against villagers” (Gberie, 2005: 15). This seems to imply a shocking fact: the RUF deliberately targeted civilians, meaning that it was possible for them to discriminate, and they chose to discard the principle of discrimination and non-combatant immunity. This statement by Human Rights Watch underwrites this point:

The rebels made little distinction between civilian and military targets. They repeatedly stated that they believed civilians should be punished for what they perceived to be their support for the existing government. Thus, the rebels waged war against the civilian population through the perpetration of human rights abuses. (HRW, 1999)

In the Sierra Leonean case, the distinction between combatants and non-combatants can be called asymmetrical: for the rebels it was relatively easy to distinguish between soldiers and civilians, because soldiers were uniformed, but for the army it was difficult to make a distinction between the rebels and ordinary civilians, since they were both dressed more or less the same. The following account of the 1999 invasion of Freetown by the AFRC/RUF seems to prove that the rebels were very aware of this and even used it as a strategy:

The rebels had infiltrated the city a week or so before, joining civilians displaced by their attacks on Hastings, Waterloo and the surrounding villages to flock into the city with their weapons wrapped in dirty bundles. It was a familiar RUF tactic, causing mass displacement by attacking villages and joining the movement of frightened

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<sup>36</sup> At one point, the rebels even posed as UN soldiers, wearing UN army uniforms (stolen from Zambian peacekeepers linked to Unamsil). (Gberie, 2011: 166)

villagers to infiltrate towns and cities; and it was one extremely difficult to counter. (Gberie: 125)

Using these kind of tactics made it impossible for the soldiers countering the rebels to discriminate between them and regular civilians; they had to fight “a highly dangerous, almost invisible, enemy that used civilians as human shields and wore civilian clothes” (Gberie: 131). This asymmetry causes ambiguity with regard to the applicability of the *in bello* principle of discrimination in the context of new wars, since the difficulty of discriminating and the presence of aligned considerations varied with different actors involved in the Sierra Leonean war. However, this implies that in principle it is possible to discriminate between combatants and non-combatants in a new type war: especially for the rebels it would have been relatively easy, but they explicitly chose not to do so (thereby clearly violating their moral duty). The difficulties faced by government forces and international troops in distinguishing between rebels and civilians remains problematic, and should be addressed more adequately in the context of just war theory (and international law), in order to ensure proper guidelines for compliance and possible prosecution (the fact that it is difficult to discriminate cannot become an excuse for targeting civilians for example).

### 5.3.2. *Jus post bellum* discrimination

The *post bellum* principle of discrimination is active in the process of ascribing liability for crimes and responsibility for respecting and upholding the terms of peace.

According to Gberie (2005: 11), “ultimate responsibility for the starting of the war” lies with the RUF, “and therefore the atrocities that largely characterised it [the war], rests with this group [the RUF]”. Although this sort of aligns with certain strands of just war theory<sup>37</sup>, on the one hand it is to general to assign all RUF members an equal amount of responsibility, while on the other hand to narrow, because there were other parties involved in the war who (also) committed unspeakable acts.

Human Rights Watch aptly describes the difficulties in determining political and individual accountability:

It is difficult to ascertain the level of seniority within the RUF at which the perpetration of human rights abuses was ordered, though the widespread participation in abuses suggests that they must have been authorized at a high level within the

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<sup>37</sup> Basically stating that if you initiate and are fighting an unjust war, which can be said for the RUF, everything is lost to you morally; there is no way of making this right. See for example Chapter 3 and Orend (2000, 2007) and Rodin & Shue (2008).

RUF's command structures. Victims and witnesses frequently overheard commanders on the ground give orders to perpetrate atrocities, and there are very few accounts of individual combatants or commanders trying to halt the abuses. When witnesses reported that individual combatants did object and try to halt the abuses, those objecting were often met with death threats from their fellow rebels. (HRW, 1999)

When President Kabbah requested the UN to set up an international tribunal, he did this to prosecute members (the leadership) of the RUF<sup>38</sup>. Although the Security Council reacted in a positive manner to the request, directing the Secretary-General to negotiate an agreement concerning a Special Court with the Sierra Leonean government, it did not restrict the Court's jurisdiction to RUF members; all those most responsible perpetrators should be within reach, "whatever their political affiliation" (Schabas, 2004: 155). The Court also explicitly claimed so-called 'personal' jurisdiction: "the Special Court will have the power to prosecute 'persons most responsible' for serious violations of international humanitarian law" (Frulli, 2000: 862). This means that individuals can be held responsible for their acts in the war. However, from the onset it seemed unlikely that low-ranking individual soldiers (or even rebels), taking orders from superiors, would be targeted for prosecution on the Special Court level; they would usually be dealt with via traditional forms of justice (local ceremonies etc.). According to Gberie (2005: 211):

The Special Court is concerned less about the foot soldiers than about those in leadership or command positions, people who were in a position to have 'planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of war crimes.

The batch of people indicted by the Court underlines this stance, including among others Foday Sankoh and Hinga Norman (Minister in the Kabbah' government), and last but not least Liberian President Charles Taylor<sup>39</sup>. (Gberie: 213)

This focus on leadership and instigators also related to the possibility of holding juvenile war criminals accountable: even though it was highly controversial within certain (human rights) groups, most Sierra Leoneans endorse the provision. "Sierra Leoneans wanted the worst

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<sup>38</sup> The president explicitly named RUF leader Foday Sankoh. (Frulli, 2000: 858 n. 2, Dougherty, 2004: 40)

<sup>39</sup> The Court "unveiled a long-sealed indictment accusing Taylor of bearing 'the greatest responsibility' for the decade-long war in Sierra Leone". (Gberie: 213) According to Gberie (214), Charles Taylor is "the true mastermind of the brutal wars in the region".



perpetrators punished regardless of age, while human rights organizations argued that juvenile prosecutions would weaken rehabilitative efforts” (Amann, 2001: 167).

In general, it seems as if the post bellum principle of discrimination was upheld (or compliance was at least attempted) within the main mechanism for ascribing liability and responsibility and punishing accordingly, the Special Court.

The other justice-seeking mechanism, the TRC, also distinguished between the group most responsible for the crimes committed in the war; while admitting that “all sides in the conflict were guilty of abuses”, the TRC concluded “that the RUF committed by far the highest proportion of atrocities” (Williams, 2011: 70). But overall it took a slightly more moderate and balanced stance; in a sense the TRC relieved some of the burden of responsibility from the rebels’ shoulders, by concluding “that the primary cause of its civil war ‘was years of bad governance, endemic corruption and the denial of basic human rights that created the deplorable conditions that made conflict inevitable” (Williams: 7). It is an extremely encouraging observation that both of the institutions set up in order to hold perpetrators accountable after the war incorporated considerations of *post bellum* discrimination in their quest for justice. This proves that even though the principle does not always seem to fit the theoretical features of new wars (as described in chapter 4), it can actually be upheld in the practical reality of new war.

Although it cannot really be seen as *post bellum* justice (if it can even be seen as justice in the sense of just war theory; just punishment) since the war was not ended at that point, it is interesting to note developments in 1998, right after Kabbah was reinstated (and before the Freetown rebel-invasion of 1999), with regard to actual prosecution and discrimination. Kabbah tried several civilians and soldiers for involvement in rebel activities, the first trial ending on August 25<sup>th</sup> of 1998 with sixteen civilians sentenced to death by hanging for treason. (Gberie, 2005: 116) Now pay careful attention to the following account of what happened next:

Soldiers arrested in connection with the coup were tried separately, by court martial. ... the court found thirty-four guilty and condemned them to death by firing squad. Unlike the civilian accused, the soldiers did not have the privilege of appeal ... twenty-four soldiers convicted of treason, ... were executed by firing squad on the beaches of Freetown. The execution was open to public view. They were the unlucky ones. The convicted civilians, including Sankoh, were still awaiting the hearing of their appeals

when the rebels, who had withdrawn to the countryside after their ousting by the Nigerians, struck at Freetown and freed almost all of them. (Gberie: 117)

These developments have serious consequences for the principle of discrimination, for it seems as if the rebels are not seen and tried as combatants, but as civilians: non-combatants. This would make the distinction between combatants and non-combatants invalid in this particular case: non-combatants can be either civilians or rebels (let alone the ones that are both; that sometimes pose as rebels to loot), but since the rebels do take part in the fighting, they cannot claim immunity (as civilians can). Since the distinction between combatants and non-combatants is not upheld with regard to civilians (innocent bystanders) and rebels (as a warring party), a correct observation would be that the discrimination principle is thrown overboard.

#### 5.4. The principle of just cause for termination in the Sierra Leonean war

The principle of just cause for termination (/rights vindication) deals with the vindication of rights that were originally being violated; violations that caused the intervention in the pre-war situation, leading to the war. In the case of Sierra Leone, according to the rebels civil, political and socio-economic rights were denied to the people by the corrupt government. However, as established earlier, these human rights violations (however true they may have been) were used solely to legitimate the violence and looting by the rebels.

At first it may seem as if the start of the war, with the rebels claiming to want to overthrow the government because of corruption and oppression, was driven by humanitarian concerns, which would then form the yardstick to which the ending of the war could be measured. But, this was mere rhetoric and did not really dictate the RUF rebels' actions or 'political agenda' (since they had none, according to Gberie, 2005). Thus, counteractions by the government to stop the rebels can be seen as a way of preserving the sovereignty of the state, thereby making the (re)instalment of a legitimate government and ousting the rebels aims that, when reached, justify terminating the war. When one looks at the conflict in an abstract manner, this can be said to have been achieved (unofficially by the Lomé Accord, officially by finishing the DDR-programme).

However, the 'justness' of the way in which the government forces went about this is questionable.<sup>40</sup> Besides, even though there was a legitimate cause for termination of the war and violence, which was attempted several times (1996 Abidjan, 1999 Lomé Accord), the

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<sup>40</sup>The behaviour of government forces with regard to the rebels and the population has been extensively dealt with; see paragraph 5.2.1.

violence continued to ignite again and again, causing the termination of the war to drag on and be extremely messy.

Nevertheless, it can be said that since the rebels did not start a just and legitimate war, and therefore would not have been a just victor if the war had been decided in their favour, the government(-aligned) forces (including international troops) were right to put an end to the violence. And although the lack of effectiveness in doing so, leading to a huge amount of unnecessary victims, and the fact that the human rights violations which formed the rhetorical grounds for rebellion (which were actually quite legitimate, had their pursuit been sincere) were not adequately addressed, is highly regrettable, it does not affect the justness of the cause for termination.

All in all, the case-study of Sierra Leone shows that in a typical new war, analyzing the application of and judging the compliance with principles of just war that pose theoretical dilemmas in this context is ambiguous and precarious. Besides proving problematic with regard to theoretical features and assumptions of human security and new wars, the *ad bellum*, *in bello* and/or *post bellum* principles of proportionality, discrimination and just cause for termination have shown to be problematic in practice.

Certainly some positive things were noticeable, like the attempt to uphold the *post bellum* principle of proportionality (with regard to amnesty) and discrimination (prosecuting the 'most responsible' individuals), the fact that government forces tried to discriminate between civilians and rebels (at certain stages in the war, even though they were often unsuccessful), and the connection with the principle of just cause for termination. Nevertheless, the negative tends to overshadow the positive in the Sierra Leonean case: the total disregard for principles of *ad bellum* and *in bello* proportionality (the use of horrific tactics and means by not only rebels but also government forces, sobels), and *in bello* discrimination (especially the rebels, deliberately targeting civilians), give this war its distinctively gruesome character and made it an infamous example of a new war<sup>41</sup>.

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<sup>41</sup> For an overview of the outcomes, see Table 2., p. 59.

Table 2. Overview of the outcomes from the case-study: application of and compliance with just war principles in the Sierra Leonean war.

	<b>Present</b> (considerations for principles was present)	<b>Absent</b> (considerations for principles was absent)	<b>Mixed</b> (presence/absence of considerations for principles varied with different actors)
<b>Jus ad bellum principles</b>		- Proportionality (5.2.1.)	
<b>Jus in bello principles</b>		- Proportionality (5.2.2.)	- Discrimination (5.3.1.)
<b>Jus post bellum principles</b>	- Proportionality (5.2.3.) - Discrimination (5.3.2.) - Just cause for termination (5.4.)		

## Ch. 6. Conclusion

The purpose of this research is to establish the extent to which recent empirical developments, like the shift from state to human security and ‘new wars’, challenge current just war theory with regard to assessing the justifiability of (new) wars. After describing the (meaning and consequences of) the new focus on human security, the specific assumptions and theoretical features of new wars (in relation to old wars), and the traditional framework of just war theory, an analysis was made of the theoretical applicability of *ad bellum*, *in bello* and *post bellum* principles to the new context. Lastly, the practical application of theoretically problematic principles was analyzed and tested in a case-study of Sierra Leone. Once again, it is important to note that the purpose of this research has not been to question the normative value and moral necessity of just war theory and its principles in judging the justness of wars.

As discussed in chapter 4 (and summed up in table 1), the theoretical applicability of the just war principles (the extent to which they are in accordance with the new context, in theory) varied. The criteria of just cause, good intentions, last resort and legitimate authority (all *ad bellum*), and public declaration (*post bellum*) were deemed to be able, in theory, to deal with notions of human security and new wars. On the contrary, the principles of likelihood of success (*ad bellum*), (the condemnation of) intrinsically heinous means (*in bello*), and right intention (*post bellum*), proved unsuitable to fit the new war context and its theoretical features (assumptions). The remaining principles, namely of proportionality (*ad bellum*, *in bello*, and *post bellum*), discrimination (*in bello* and *post bellum*) and just cause for termination (*jus post bellum*), were ambiguous: their theoretical applicability to the new context (including incorporating human security considerations) was questionable and indecisive, calling for further analysis in the practical reality of a case. Therefore, the practical applicability of those principles (the extent to which they can be applied to and are being upheld in practice) was tested, by means of a case-study of the war in Sierra Leone. Again, the outcome was inconclusive overall: although some principles proved to be present in the considerations and acts of various actors, others were violated and trampled under foot. Compliance with the *post bellum* principles of proportionality, discrimination and just cause for termination (/rights vindication) surprisingly existed (or was at least attempted), while the *ad bellum* and *in bello* proportionality principle was often carelessly (even deliberately) set aside. Interestingly, the *in bello* principle of discrimination showed to be most ambiguous in the case of the Sierra Leonean war, for it was rejected by some and upheld by other actors.

Even though this research has not been able to deliver any absolute answers with regard to the use and validity of current just war theory in the new war context, it has opened the door for acknowledging recent empirical security-related developments (and releasing to an extent the state-centric approach) in thinking about just war theory. Certainly, new developments of a focus on human security and the emergence of new wars challenge traditional just war theory, but they definitely do not render a moral justification of the waging of, and behaviour in and after, war unnecessary; presumably even more indispensable on the contrary. More research has to be done on this topic, positioned in the field somewhere on the border of International Relations and Political Philosophy.

What is needed in order to make a more solid judgement about the added value of just war theory and the applicability of just war principles in the context of human security and new wars, and what is missing in this research, is the analysis of more cases. Due to pragmatic reasons, and because the empirical part is not the main part of the thesis but rather an exemplary part to the theoretical reasoning, this thesis uses the war in Sierra Leone as its only case for analyzing the compliance with just war principles in the empirical reality.

Other cases that could be exemplary for further research, which fit the new war framework of Mary Kaldor (2006), are: the genocide in Rwanda in 1994, where Hutu's killed thousands of Tutsis; the civil war in Sudan (north versus south, Khartoum government versus SPLA rebels), from the mid 80's until 2005, when a peace agreement was signed; the genocide in Bosnia-Herzegovina between 1992 and 1995, where (Bosnian) Serbs and Croats, backed by the Serbian (and to a lesser extent the Croatian) government, killed thousands of Muslim Bosnians; and the ethnic violence in the Sudanese Darfur-region (ongoing conflict since 2003), a spill-over from the north-south conflict. A more recent case of what looks to be (becoming) a typical new war, is the violence in Syria, where the fighting between government forces, militias and rebels continues to intensify and is becoming ever more cruel and obscure, increasingly causing civilian deaths.<sup>42</sup>

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<sup>42</sup> After the International Committee of the Red Cross (ICRC) stated that parts of the violence in Syria amount to civil war, the UN has recently declared the conflict in Syria to be a civil war. (see <http://www.ibtimes.co.uk/articles/351498/20120613/syria-violence-bloodshed-damascus-massacre-assad-un.htm>; <http://www.reuters.com/article/2012/05/08/syria-redcross-idUSL5E8G87KJ20120508>; <http://topics.nytimes.com/top/news/international/countriesandterritories/syria/index.html>) Kaldor views the violence in Syria as a new war, see for example <http://www.opendemocracy.net/mary-kaldor/what-to-do-about-syrias-new-war>.

Furthermore, another shortcoming of the research in this thesis, which is due to the same pragmatic reasons, is that only a limited amount of just war principles is put to the test in the case-study. Ideally, all of the just war principles as discussed in chapter 4 will have to be tested, in order to come up with the most comprehensive analysis and inference of their overall status with regard to human security and new wars. It is only by way of doing this, expanding the number of case-studies of specific new wars and expanding the amount of just war principles being researched, that it will be possible to draw a more general conclusion about the usage and possible adjustment of just war theory for new wars.

The bottlenecks with regard to just war theory and the (new) empirical reality of human security and new wars are identified in this research; now it would be valuable to extend it with more elaborate empirical analysis. Recommendations for further research would be to expand the number of cases (to for example Sudan, Rwanda and Bosnia), but also the number of just war principles analyzed in those cases; also test the principles that can most likely be applied relatively unproblematic in the new war context (forming the sort of ‘most likely case’), and the principles that will probably cause insurmountable problems for application in new wars (forming a ‘least likely case’, ensuring that their practical application is in fact as unfeasible as theoretically thought to be).

Based upon the outcomes of this further research, the very ill-fitting principles (posing problems in theory and practice) should be selected and adjusted, so as to be able to incorporate notions of human security and address new wars. This does not mean the principles lose normative value or that one should be ‘pragmatic’ about putting them to use, simply because the reality (in theory and practice) refuses to comply: it refers to a subtle manoeuvring, somewhat linked to the distinction between ideal and non-ideal theory. Ideal theory comes up with theories about how the world should work in an ideal situation (like under Rawls’ veil of ignorance) and which principles ought to guide our thoughts and behaviour in that ideal-typical environment (and therefore also in real life). Non-ideal theory is more sensitive to the context of the real world we are living in, and starts from that point in drawing up guiding principles. It is not about what the ideal world would look like, but what this world could ideally look like.

Further research, on the basis of which just war theory could be made more suitable to assess the justifiability of new wars, is not to deny the normative value of these principles, but rather

has to adjust them somewhat to the modern context of new wars and human security, in order for them to remain relevant in the practical reality of international policy and law.

This research does not question the moral validity of just war theory; it merely attempts to show that certain principles of just war theory do not completely fit with the new context of human security and new wars. The fact that for example the *in bello* proportionality principle has not been upheld (see page 50), does not mean it should not have been: is (not) does not imply ought (not).

But, for the sake of trying to shape the world we live in in the most ideal manner, the just war principles that ultimately prove to be unfit after more extensive research (theoretically and/or practically), thus have to be redrawn or redesigned, and their new and improved versions should also be taken up in (the drafting of) international law. This way, by ensuring the connection of just war theory to new wars and human security and updating international law accordingly, the moral and legal aspects of justifying wars are up to date with recent empirical developments, making it easier to address new wars in a just and fair manner: condemning illegitimate resort to war, preventing human rights abuses and holding the right actors accountable.

Former US President Jimmy Carter stated in his Nobel Prize acceptance speech: “War may sometimes be a necessary evil. But no matter how necessary, it is always an evil, never a good”<sup>43</sup>. However, just war theory argues that the war effort (from the resort to war to its execution and termination) can be legitimized and justified, which implies it does not necessarily have to be evil. In the same vein, the theoretical ideas of human security and humanitarian intervention imply that war can be a necessary means in order to achieve a more just, safe and peaceful end. And although applying and adjusting principles of just war to the context of human security and new wars is all very difficult, it has to be done, for without moral guidelines, steering considerations and behaviour, (new) war will surely, and can only, be hell.

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<sup>43</sup> Jimmy Carter’s Nobel Prize acceptance speech, 2002, [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/2002/carter-lecture.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/2002/carter-lecture.html).



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