# 1

# Introduction

## *Justifying war but restricting tactics*

A sense of honor may be said to forbid what the law permits.
Hugo Grotius, *De Jure Belli ac Pacis*, 1625, p. 716

This is a book about the normative foundations of international criminal law, specifically international humanitarian law, concerning the violations of the rules and customs of war. The philosophy of international criminal law is both very old and very new. Debates about the rules of war have been ongoing for several thousand years, culminating in truly impressive and original work by Just War theorists in the 17th century, especially Hugo Grotius and Samuel Pufendorf. But it is also true that debates about the theoretical foundations of international criminal law are only in their infancy in that relatively few articles and books have been written about this subject since the Nuremberg trials, an event that caused a sea change in the way international law addressed war crimes. At Nuremberg, individuals rather than States were the subject of prosecution for war crimes, and the defense of superior orders was greatly curtailed. It is my hope to draw extensively on the older, Just War, tradition, in ways that will make these older ideas relevant for practitioners and theorists today, as well as to make political philosophers working in the Just War tradition aware of recent cases and legal theories that will enrich their philosophizing.

War crimes are crimes committed during armed conflict. In this book, I argue that the best way to understand war crimes is as crimes against humaneness. By this I mean that war crimes are not best understood as crimes against the whole of humanity or as crimes of aggression or even primarily as crimes against justice, but that they are violations of

the principle requiring that soldiers act humanely, that is with mercy and compassion, even as these same soldiers are allowed to kill enemy soldiers. The apparent paradox of this remark illustrates the conceptual problems of understanding, and normatively grounding, the idea of war crimes and of international prosecutions for such crimes.

The book tries to make sense of one of the ideas embedded in contemporary international law, namely that there are severe restrictions on how soldiers can fight in war, even if they fight with just cause and their opponents have committed atrocities. Humanitarian considerations of mercy and compassion count morally in war, and often these considerations are not reducible to considerations of justice. There are two reasons for thinking this. First, sometimes humanitarian considerations become duties because one has rendered another person completely dependent on one, by taking that person prisoner for instance, and that then create fiduciary or stewardship duties toward the one rendered dependent and vulnerable. Second, even if humanitarian considerations are not duties of soldiers, they must be adhered to if soldiers are to fight with honor. This is because soldiers, to be more than mere killers, must restrain themselves according to higher than normal standards of behavior. Honor is the key component in the way the military academies have trained soldiers for hundreds of years.

In this book, I explore whether a minimalist natural law theory can ground humanitarian restraints during war. This theory could help support many of the wide-ranging practices normally condemned by the rules of war and prosecutable as war crimes in international tribunals. The Just War tradition about *jus in bello*, the moral justification of using certain tactics in war, is confronted by very recent developments in international criminal law, especially concerning the law of war crimes. Ultimately, I develop a new understanding of the central principles that govern the rules of war. Drawing on literature in both moral philosophy and international law, this book attempts to reset the debate about war crimes in the 21st century.

I argue that the idea of war crimes can be made sense of and that prosecutions for war crimes can also be justified, but in a more restricted way than is normally thought. Specifically, major changes need to occur in how we distinguish combatants from civilians, in the way that we distinguish so-called conventional from unconventional weapons, and in the way in which we think we are entitled to act toward prisoners of war, even those who are illegal combatants. In making these changes, we will need to reconceptualize the main normative

principles that have governed our understanding of what counts as a war crime: the traditional principles of discrimination (or "distinction" as it is called in legal circles), necessity, and proportionality, in light of what I regard as the cornerstone of the rules of war, the principle of humane treatment. Such a rethinking will also require, at the most fundamental level, a change in how we understand the universal moral or natural law basis of international law, the main subject of the early chapters of this book.

This book is the second volume of a projected multivolume set on the philosophical foundations of international criminal law. The volumes argue for a defendant-, rather than a victim-, oriented approach to international criminal law. Following the division of criminal law set out at the Nuremberg trials, the first volume dealt with crimes against humanity, this second volume deals with war crimes, and a third volume is projected to deal with crimes against peace. All three volumes proceed from a minimalist moral position indebted to 17th-century thinkers not normally linked: Thomas Hobbes, Hugo Grotius, and Samuel Pufendorf. The books draw on a rich historical tradition as a way to shed light on very recent conceptual and normative issues in international criminal law.

In the first section of this introductory chapter, I set out some of the main reasoning that has shaped the Just War tradition, specifically why some wartime tactics are justified and others are not. In the second section, I begin to explain what is involved in the principle of humane treatment, going back to the Roman philosopher Seneca for guidance. In the third section, I discuss the general idea that rules of war can be justified, even in just wars, and that these rules proscribe certain forms of treatment, regardless of whether the soldiers fight with just cause or not and even though the intentional killing of soldiers is itself justified. In the fourth section, I describe the differences between crimes against humanity and war crimes and discuss the difficulty of trying to categorize the very disparate provisions of the rules of war. And in the final section, I present a brief summary of the arguments of the four main parts of the book.

## I. THE JUST WAR TRADITION AND WAR CRIMES

In the Just War tradition, a tradition that goes back at least two thousand years, the best-known theorist is Hugo Grotius, who wrote in the early 17th century. I will draw heavily on Grotius, and indeed the

view that I espouse in this book could easily be called Grotian. Grotius is the most obvious bridge between contemporary war crimes law and the old Just War tradition because he is one of the few non-contemporary theorists to be included in a small group of experts in international law whose views are actually sources of international law.[1] But there are many other theorists in the Just War tradition who are regularly referred to by international legal scholars and even by courts today.

The close relation between Just War theory and the international law of war crimes is accepted by many scholars but not well explained. One explanation for this close relation is simply that the major categories of both Just War theory and international criminal law overlap. In Just War theory, there are two important questions: Was the decision to wage war morally justified (*jus ad bellum*), and were the tactics employed in war morally justified (*jus in bello*)? This Just War division is reflected in international criminal law's distinction between crimes against peace and war crimes. The decision to wage war in an aggressive manner is subject to prosecution as a crime against peace. The use of inhumane tactics during war is subject to prosecution as a war crime. Indeed, it is sometimes said in international law that crimes against peace are *jus ad bellum* violations and war crimes are *jus in bello* violations.[2]

Traditionally, *jus ad bellum* considerations were thought to be unrelated to *jus in bello* considerations. Similarly, there is generally no conceptual connection between crimes against peace and war crimes. I take up this point in greater detail in Chapter 2, arguing that war crimes should be conceptualized independently of considerations of whether those fighting in a war are fighting for a just cause or not. Contrary to what some theorists and politicians currently believe, the

[1] The Statute of the International Court of Justice, T.S. No. 993, 59 Stat. 1055 (June 26, 1945), article 38, identifies the sources of law that this international tribunal may refer to. These sources include "the teachings of the most highly qualified publicists of the various nations." Grotius is one of the only noncontemporary "publicists" recognized as falling under this category. There are also other sources that will be discussed subsequently.

[2] See *The Handbook of Humanitarian Law in Armed Conflicts*, edited by Dieter Fleck, Oxford: Oxford University Press, 1995, p. 1. "Although the subject of this Manual is the law applicable to the conduct of hostilities once a state has resorted to the use of force (the *ius in bello*) that law cannot be properly understood without some examination of the separate body of rules which determine when resort to force is permissible (the *ius ad bellum*)."

same tactical restraints should apply to all combatants, even those who are sometimes called "terrorists." This is at least as much due to what is important for "victim" soldiers as for the "victimizers," who must maintain a sense of honor even as they engage in intentional acts of killing that would – outside of war, with its unique code of moral conduct – be considered monstrous.

While I largely follow the Just War tradition in this book and hence take an explicitly moral approach to international relations and law, many of the positions I advance are equally at home with other approaches to international theory. For instance, my approach is not inconsistent with that of Hedley Bull and Benedict Kingsbury. Both of these theorists, like me, are influenced heavily by the work of Grotius. Hedley Bull supports a view he sometimes calls "solidarism," which seeks solutions to international problems by looking to the common good of a world where States are recognized as actors and which is strongly influenced by the success that consensual international organizations have achieved, most especially the United Nations, in solving global problems. In general, Bull supports the idea, which he associates with Grotius, that "States and rulers of states are bound by rules and form a society or community with one another, of however rudimentary a kind."[3] I also do not presume that there is more than a rudimentary global society or community and seek after principles that would reasonably guide States in that world.

Similarly, I think that my approach is also consistent with that of Benedict Kingsbury, who argues in favor of an "internationalized public law approach." This approach, he says,

> cuts across the inside/outside distinction that has structured traditional public international law analysis and in doing so moves outside the standard parameters of pluralism and solidarism – but it does not correspond with approaches that locate the impetus for law in transnational interactions of global civil society.[4]

Kingsbury says that his approach differs from pluralist, or realist, approaches in that it does not depend on agreement among States, but

[3] Hedley Bull, "The Importance of Grotius in the Study of International Relations," in *Hugo Grotius and International Relations*, edited by Hedley Bull, Benedict Kingsbury, and Adam Roberts, Oxford: Oxford University Press, 1990, p. 71; also see his classic study *The Anarchical Society: A Study of Order in World Politics*, London: Macmillan, 1977.

[4] Benedict Kingsbury, "People and Boundaries: An 'Internationalized Public Law' Approach," in *States, Nations, and Borders*, edited by Allen Buchanan and Margaret Moore, Cambridge: Cambridge University Press, 2003, p. 303.

instead looks to extrapolate principles from how States actually have resolved disputes, especially within their own borders, as when one part of a federated State has a dispute with another part. This approach is also similar to my own, especially in Chapter 2, where I explain why it is in a State's interest to adopt rules of war that will restrain its soldiers who fight in foreign wars. Such reasons do not depend on there being a global civil society or generally a cosmopolitan moral theory, as was also true for 17th-century Just War theorists like Grotius.

Indeed, as will become clear, one of the central claims of this book is that the rules of war are grounded in concepts of honor and mercy, not necessarily in global justice. Honor is best understood within a particular population group, such as a group of soldiers of a particular nationality. Codes of honor can be grounded in a sense of integrity, where soldiers see themselves not as hired assassins but as members of a profession with rules restricting their behavior in often quite limiting ways. These rules and codes can also be grounded in universal moral principles, as I argue in Chapter 3, but they need not be. Codes of honor can be justified as dispute resolution mechanisms that operate especially well within given societies and that then form a model for how interstate disputes about the conduct of soldiers might be resolved as well. Generally, international criminal law can often find good guidance in domestic law.

Throughout this book, my focus is on war crimes and therefore on the *jus in bello* branch of Just War theory. In a future volume, I will address crimes against peace and the *jus ad bellum* branch of Just War theory.[5] "War crimes" is thus being used in its technical sense to mean only certain international crimes committed during war. There is a more popular use of the term "war crimes" that effectively equates all international crime with war crime. This is even seen in legal circles where the ad hoc international criminal tribunals at The Hague and Arusha, which involve prosecutions for genocide and crimes against humanity as well as for war crimes proper, are referred to as war crimes tribunals. I will be interested in the conceptual link and obvious parallels between war crimes understood narrowly and the *jus in bello* branch of Just War theory.

There is also a normative reason for why the Just War theory and the international law of war crimes are connected, as they will be in this

[5] That volume, now in draft, is tentatively called "Aggression and Crimes Against Peace."

book. International law generally, and international criminal law in particular, of which the international law of war crimes is one part, is in an early developmental stage today. As judges and legal scholars try to establish a normative jurisprudence of international criminal law, they are drawn to work in many fields. And as one might imagine, when looking for grounding principles, moral and political theorists are often referred to. It is as if international criminal law were being built from the ground up, often out of moral sources. As has been well recognized, law and morality merge at the point where law is first founded. I will not defend the mixing of law and morality, and I am certainly aware of the pitfalls to be avoided here. My point is only that emerging law often draws on moral sources, and the international criminal law is no exception.

The Just War tradition is a good starting point, primarily because of the way it forces us back to a moral ground that is more easily accessible. To answer the question of whether or not one State might be justified to go to war against another State, a question that initially seems daunting, we ask, for instance, about what we would consider justifiable if you, as an individual, were interacting with a stranger who has threatened you, challenging you to a duel for a perceived offense. While this strategy is not without its own difficulties, it seems intuitively plausible to many people who do not know how else to get started in thinking about war. In what follows, I will say something about what sort of moral questions seem apt when considering war, especially in the way that Just War theorists traditionally did, although there are significant criticisms of this approach that must be assessed as well.

It is normally assumed, based largely on the Just War tradition, that engaging in some wars can be justified. The difficulty is to explain why killing, even massive killing that is characteristic of war, can be considered justified while the use of certain tactics, such as the use of fragmentation bombs, or even tactics that fall short of killing, such as the destruction of cultural artifacts, are not considered justified in war. The intentional taking of life in combat is not condemned, but nonetheless restrictions are placed on how much suffering can be caused during such combat. The idea that during war certain acts of soldiers are morally and legally wrong seems initially to strain credulity. There has been a very healthy debate about such matters over the centuries. The founder of the Just War tradition, Augustine of Hippo, argued against the Early Church Fathers, who were largely

pacifists.[6] Early Just War theorists argued that wars, especially wars to stop the slaughter of the innocent or wars to protect helpless States, could be justified, as could the killing that war involves, but that there were moral rules that had to be adhered to nonetheless.

The idea that needs normative support is that even in war there are moral or legal rules that require not that intentional killing be stopped, but that killing and its ancillary activities be conducted with moral restraint nonetheless. Just War theory was intimately connected to natural law theory, with its central idea that there were universally binding moral obligations that transcended culture, historical epoch, and circumstance. While many versions of both Just War theory and natural law theory have been proposed, it seems to me that Grotius was right that the most plausible approach admits the least number of principles or, put differently, that has a minimum of moral principles that are proposed. There is a secular natural law tradition, extending at least from the works of Grotius and Pufendorf, that is important for my theoretical arguments.[7]

The rules of war constitute a system of norms for regulating the behavior of States and their agents during war in the absence of a World State. And the system of norms is meant to apply to what is probably the most stressful of times, when war has broken out and both sides to a dispute not only call the other "enemy" but also can find no other way to resolve the dispute but to attempt physically to coerce or even annihilate each other. In such times, to have any agreement about what the rules of the game are must be seen as a good thing. Every time it is possible to get people who have sworn themselves to be enemies to stop and think before they assault or kill each other, surely much more good than harm has been achieved, even if the rules that produce the "stop-and-think" are themselves not as clear-cut as we might otherwise have hoped for.

## II. HUMANITARIAN CONCERNS

The area of law that is closest today to the *jus in bello* rules of war is sometimes called "international humanitarian law." Throughout this

[6] Augustine, *The City of God* (c. 420), translated by Henry Bettenson, New York: Penguin Books, 1984, Book 19, pp. 843, 861–862, 866–867.

[7] On this topic, see Richard Tuck, *The Rights of War and Peace*, Oxford: Oxford University Press, 1999; and J. B. Schneewind, *The Invention of Autonomy*, Cambridge: Cambridge University Press, 1998.

book, I will argue for a conception of humanitarian law that is a combination of morality and legality. It is for this reason that I, and others, have sought the roots of these principles in what has been called natural law theory, albeit a secular and minimalist version. Natural law theorists have traditionally not been as bothered by a porous border between law and morality as have other theorists. Indeed, natural law theorists have championed the view that this is the correct way to understand that border. The codes of honor and chivalry have also been based on moral principles, especially as they have connected their rules with natural human feelings of compassion and mercy. Such codes were premised on the idea that legal rules of conduct should reflect the moral virtues. As I will argue, in wartime the chief value that legal codes should be modeled on is the principle of humane treatment as more important than the principles of discrimination, necessity, or proportionality.

I will defend a Grotian approach to international humanitarian law in the next three chapters. To give a sense of the origins of this view, I wish to rehearse some of Seneca's ideas, advanced more than a thousand years before Grotius' time and upon which Grotius clearly built. In his great work, *De Jure Belli ac Pacis*, Grotius refers to Seneca many times, regarding him as one of the main authorities on the idea that soldiers should avoid cruelty, which Grotius believed to be central to how soldiers should conduct themselves.[8] After rehearsing some of Seneca's views, I will then provide a preliminary sense of how I will adapt these ideas in later chapters as I develop a normative grounding for international humanitarian law.

Seneca is one of the first philosophers seriously to consider the rules of war.[9] Writing at the end of the Roman Empire, Seneca wrote *De Clementia*, which explicitly talks about the restraints of war in terms of humanity and mercy. Seneca first proposes that we think of mercy as "leniency on the part of a superior towards an inferior in imposing punishment." After considering several other possible definitions of mercy, Seneca finally settles on defining it as something that "stops short of what could deservedly be imposed."[10] Seneca says of mercy that it has cruelty as its opposite. And cruelty is best understood, says

[8] Hugo Grotius, *De Jure Belli Ac Pacis* (On the Law of War and Peace) (1625), translated by Francis W. Kelsey, Oxford: Clarendon Press, 1925, p. 722.
[9] See Nancy Sherman, *Stoic Warriors*, Oxford: Oxford University Press, 2005.
[10] Seneca, *On Mercy*, Book 2, para. 3, in *Seneca: Moral and Political Essays*, edited by John M. Cooper and J. F. Procope, Cambridge: Cambridge University Press, 1995, p. 160.

Seneca, as going "beyond the limit of anything humane or justifiable."[11] Sternness is compatible with mercy, but cruelty is not. So, the obvious question is what more is involved in humane treatment than merely not being cruel. Seneca says that mercy may involve forgiveness but not pity. Indeed, he makes the telling statement that there are some people, "senile or silly, so affected by the tears of the nastiest criminal that, if they could, they would break open the prison. Pity looks at the plight, not at the cause of it. Mercy joins in with reason."[12]

So, for Seneca mercy is not merely a knee-jerk reaction to the misery of others. Rather, it is a rational consideration of what it is appropriate to do, grounded in one's feelings of common humanity. But the reasonable course is not necessarily that which is consistent with retribution. Seneca goes on to say that some have understood Stoicism to be a doctrine that should eschew both pity and mercy. But Seneca again invokes the idea of humanity, saying: "[W]hat on earth is this science which tells us to unlearn our humanity."[13] And he then explains this idea by saying:

> A wise man then will not feel pity. But he will be of help and service, born as he is to assist the community and promote the common good. Of this help he will give his part. Even unfortunates who deserve reproach and correction will be allowed a due measure of his kindness.[14]

Seneca eventually comes back to the Aristotelian position that the wise man judges "not by legal formula, but by what is equitable and good."[15] And this is not to do what is opposed to justice, but that which is in the fullest sense just, even though it is contrary to what is properly deserved as a matter of retribution. Here, Seneca, like Aristotle, looks to a broader conception of justice, one that involves more than mere retribution, although one that still seeks to give people what is their due. The idea is that even when a person has done wrong he may be "due a measure of kindness."[16] For there are several reasons why one has done wrong, many of which involve fortune or luck, and the wise man will struggle against this. "Whenever he can, he will intervene against fortune."[17] Concerning prisoners of war, Seneca says that they should be released "unharmed, sometimes even commended, if they had an honorable reason – loyalty, a treaty, their freedom – to drive them to war."[18]

[11] Ibid., para. 4, p. 161. [12] Ibid., para. 5(1), p. 161. [13] Ibid. para. 5(2), p. 162.
[14] Ibid., para. 6, p. 163. [15] Ibid., para. 7, p. 164. [16] Ibid., para. 6, p. 163.
[17] Ibid. [18] Ibid., para. 7, p. 164.