

Rights, Wrongs and Drones: Remote Warfare, Ethics and the Challenge of Just War Reasoning

By Dr Peter Lee

In June 2013 the UK Supreme Court delivered a judgement that applied the European Convention on Human Rights to British combat operations, which undermined long-standing assumptions about the status of combatants in a war zone. While, conventionally, law is deemed to follow on from ethics, the invocation of individual rights in this legal case prompts the revisiting of recent just war debate over the role of individual rights when making normative judgements about the morality of war and ethical conduct therein. The way in which individual rights discourses are deployed in the philosophical underpinning of just war theory has a marked impact on how the ethical status of combatants and their actions can be assessed. The use of the Reaper by the Royal Air Force on remote operations in the Afghanistan theatre adds a further layer of complexity to those ethical considerations. Consequently, this article will explore the nexus of remote warfare, just war reasoning and individual rights, highlighting the contradictions, opportunities and potential implications that arise when making ethical judgements in the domain of war in the twenty-first century.

Introduction

'A good man would prefer to be defeated than to defeat injustice by evil means.'¹

Sallust, 41 BC

On 19 June 2013 the UK Supreme Court delivered a judgement that undermined previous rulings on, and assumptions about, the status of combatants in a war zone: a concept whose legal and moral² antecedents can be traced back through many centuries of the just war tradition. For the first time the Human Rights Act (1998), which enshrines the European Convention on Human Rights (ECHR) in UK law, was successfully applied to a case involving the deaths of soldiers on a battlefield, a battlefield that lay outwith the geographical confines of the UK and continental Europe.

The families of three soldiers killed in Iraq when their non-armoured 'Snatch' Land Rovers were blown up by a roadside bomb, had taken legal action against the Ministry of Defence (MOD) on the basis that the MOD had not reasonably taken every step to protect the lives of the soldiers. It was argued that the soldiers' 'right to life', as enshrined in Article 2 of the ECHR, had been violated by the negligence of the British Army. The key element of the plaintiffs' argument was that soft-skinned vehicles should not have been used in a high-risk environment when armoured vehicles were available, either already in the British Army's inventory or available to purchase on the open market. In its Judgement the Supreme Court justices explained: 'The Snatch Land Rover claims ... are all directed to the substantive obligation, which requires the state not to take life without justification and also, by implication, to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life.'³

In making its judgement the UK Supreme Court held the MOD legally liable for actions that had not gone far enough in protecting the lives – and rights – of the soldiers concerned. The court specifically rejected the MOD's claim that there was no case to answer on the basis of combat immunity, a claim that manifested itself in two ways. First, that the soldiers were outside the UK's jurisdiction; and second, that the MOD owed no such duty of care at the time of the soldiers' deaths.⁴ The UK Defence Secretary, Philip Hammond responded to the judgements by stating:

I am very concerned at the wider implications of this judgment, which could ultimately make it more difficult for our troops to carry out operations and potentially throws open a wide range of military decisions to the uncertainty of litigation ... It can't be right that troops on operations have to put the ECHR [European Convention on Human Rights] ahead of what is operationally vital to protect our national security.⁵

The Supreme Court judgement, together with the response of the British Defence Secretary, highlights an ever-present – and in a European context in particular, ever growing – tension in

the international political system as it currently operates, and against which political policies, military doctrine, and ethical and legal arguments must be formulated: the rights of individuals *versus* the rights of states. In their respective positions, the Supreme Court prioritised the human rights of individuals, while in his opposition to the Court's judgement the Defence Secretary stressed national security and the importance of protecting it, even at additional risk to soldiers' lives. The court's decision was neither unanimous nor uncontroversial, and the justices acknowledged that the matter should be approached with caution, lest they run the risk of undermining the capacity of a state to defend itself and its interests.⁶ Further, perhaps dramatically, the judgement stated that 'democracy itself may be at risk; if a state's resort to martial force be unreasonably curtailed.'⁷

The gravity of the potential consequences of applying individual rights in this way – as highlighted by both the Defence Secretary and the Supreme Court itself – is complicated further by the proliferation and use of new technologies to deliver lethal force from great distances across continents and multiple jurisdictions: especially for the Reaper. While, conventionally, law is deemed to follow on from morality, the invocation of individual rights in this legal case prompts the revisiting of recent just war debate over the role of individual rights when making normative ethical judgements regarding the use of military force. The way in which individual rights discourses are used to underpin just war theory has a marked impact on how the moral status of combatants and their actions can be assessed.

Consequently, this article will explore the nexus of remote warfare, just war reasoning and individual rights, highlighting contradictions, opportunities and potential implications for making ethical assessments in the domain of war. The first section will begin by setting the context of the subsequent discussion in actual – as opposed to fictionalised or sensationalised – Reaper operations, outlining a number of existing approaches to making moral assessments of RPA or 'drone' activities.⁸ The second section will focus on the use of individual rights in two competing just war approaches. Analysis will contrast Michael Walzer's just war reasoning, which subsumes individual rights within the more important rights of states, with Jeff McMahan's approach, which prioritises individual moral rights. I will examine the different ways that each uses the notion of rights in assessing the moral status of combatants and their actions. The remainder of the article will then explore the implications of that moral debate for the domain of remote military operations: for the use of Reaper in particular. Underlying this approach is the assumption that war, cultural mores, and evolving technologies shape just war reasoning at least as much – and possibly more – than just war shapes the clash of martial forces in pursuit of political ends.⁹

'Easy' Killing and Risk-Free War

The Reaper pilot and sensor operator stared intently at the bank of screens in front of them, their concentration fixed on one individual. Their target had been identified by more than one intelligence source and extended observation had confirmed both his identity and activities as an active Taliban combatant. The mission intelligence coordinator continued to actively

provide them with checks and updates, while at the same time legal sanction to attack the target – within the dictates of their rules of engagement – had been granted. The target was also sufficiently isolated to ensure that nobody else would be struck by the blast or shrapnel from the impending strike. As the selected weapon was about to be released and the target killed, the sensor operator thought he glimpsed, fleetingly, what may have been another person encroaching onto the camera's field of vision. Although once again only the target could now be seen on the screen, the sensor operator was reluctant to prosecute the target just in case someone, or more than one person, was standing just outside of their narrow field of vision – and therefore potentially at risk. A discussion ensued. The pilot had not seen anything untoward but the intelligence coordinator was unsure: there *might* have been someone there. The pilot reminded them that they were cleared to fire and that their rules of engagement allowed them to do so. Legal sanction was in place. With the crew split over whether or not to proceed with the attack, given even the small possibility of killing or maiming an innocent passer-by the pilot agreed with the others to abort the attack. Checks would continue and another suitable opportunity to strike the target – without the potential risk to an innocent bystander – would be sought.^{10 11}

This incident raises a number of practical and moral questions: On what basis is the Reaper (or Predator or other armed remotely piloted aircraft) crew permitted to take the life of a fellow human being? What moral status is held by the enemy combatants involved, both the targets on the ground and the combatants operating the Reaper? In addition, what makes an individual liable, or not, to attack by deadly military force? These questions have been and continue to be subject to numerous enquiries by academics and practitioners alike. In the incident outlined above, legal authority had been granted for the strike and the crew involved would have been protected from prosecution if they complied with their rules of engagement (ROE) and unintended collateral damage – the wounding or death of a non-combatant – had occurred. Contrary to popular mythology, the crew involved were not itching to pull the trigger in the latest deadly round of 'war by Playstation'; instead, their discussion focused on whether it was 'right' – an ethical judgement – to release the weapon in that particular situation.

David Whetham provides a particularly thoughtful overview of moral and political challenges raised by the use of remotely piloted aircraft in 'Killer Drones: The Moral ups and Downs'.¹² Like most Western commentators setting out to assess the moral implications of remotely conducted asymmetric operations against a technologically inferior enemy, Whetham draws upon the memes and themes of just war, with familiar notions of *jus in bello* providing a touchstone for his analysis. In this context he introduces but does not explore in depth the moral calculus involved in removing physical risk from one group of combatants (Reaper pilots, for example).

In the context of RPA operations, the relationship between physical risk, ubiquity and moral legitimacy is recognised, though not explored, in UK defence doctrine.¹³ At a UK parliamentary

level, Louisa Brooke-Holland has provided members of parliament with a formal Briefing Note which touches slightly upon the ethical and moral implications of the use of remotely piloted weapons, and in places repeats – uncritically – assertions made by proponents and opponents alike.¹⁴ For example, she quotes Medea Benjamin, author of *Drone Warfare: Killing by Remote Control*, who has stated: ‘The biggest ethical problem with drones is that it makes killing too easy’.¹⁵ When allowed to stand alone and unquestioned such a comment is granted greater credibility than it deserves in a complex debate. It is particularly disturbing in a document that might be the only basis on which some UK MPs will make judgements about the practicality and morality of remotely piloted aircraft operations. What does Benjamin mean by ‘easy’? From a technological standpoint, killing by Reaper is monumentally difficult. Huge numbers of people – again, contrary to urban myth – are needed to remotely deliver lethal ordnance: from software engineers to hardware engineers, traditional airframe technicians to communications specialists, armourers to logisticians, intelligence coordinators to legal advisors, and so on. Furthermore, conventional aircraft such as the Tornado or Typhoon have significantly greater destructive potential than the remotely piloted Reaper because of the larger payloads they can carry. Perhaps, however, killing by ‘drone’ is meant to be psychologically ‘easy’.

Such an assumption is shared by Cole *et al* who state boldly: ‘Operators, rather than seeing human beings, perceive mere blips on a screen. The potential for this to lead to a culture of convenient killing may well be reason to consider banning this new type of lethal technology’.¹⁶ Minimal evidence and maximal hyperbole is invoked as part of an anti-drone campaign: all without direct reference to the experience of the operators involved or any appreciation of the actual level of close-up detail that is available to the Reaper crew.¹⁷ On practical grounds alone such a simplistic argument should be rejected: the political and reputational cost to both the UK and the RAF of allowing ‘disconnected’ sociopaths to indulge in such so-called ‘easy’ and ‘convenient’ killing (even ignoring the inconvenient presence of multiple layers of legal and institutional oversight and accountability) is beyond calculation. That some individuals can accept such claims without demur says more about their credulity than the validity of the claims. In contrast, one Reaper pilot describes his experience:

I have killed the enemy from both [conventional aircraft] and from the Reaper. The body’s reactions are the same – it surprised me. Your mouth goes dry and the hairs on the back of your neck stand up. Everything goes tense and you get that sick feeling in your stomach. You know what you are about to do.¹⁸

Of course, one individual’s account does not constitute empirical evidence of perfect, unerring behaviour in every circumstance. However, it will hopefully encourage greater analysis and further research, while discouraging the spread of unthinking, uncritical presumptions that often seem to be based on little more than a few hours’ experience playing ‘*Call of Duty*’ on a computer. The physical reaction described here does not suggest that killing has become ‘easy’ for the person/people involved. And finally on this belaboured point, does ‘easy’ refer

to the sheer numbers that can be killed? It always seems morally perverse to resort to simple arithmetic when human lives, and deaths, are involved. For example, according to the United Nations, 'as many as 1 million people are estimated to have perished' in Rwanda in the weeks following 6 April 1994.¹⁹ They were killed using mainly machetes and traditional farming implements. I would not like to speculate how psychologically difficult it was to take part in that killing but, technically speaking, it was 'easy', highly effective in an evil sort of way, and all of the many thousands of weapons involved could probably be purchased for less than the price of one precision guided missile.

Much more nuanced in her analysis of remotely piloted aircraft operations is Alison Williams, who critically engages with the 'spatial practices' involved and the 'idea that the bodies of the aircrew are becoming less important'.²⁰ In response to the common accusation that remote operations are 'risk-free' to the crews involved, she goes on to observe: 'commentators mistakenly assume that it is only the physical body that can be damaged by warfare.'²¹ To a lesser extent, James Cook considers the moral implications of separating combatants from combat, arguing that the 'relatively unique status of RPA pilots and cyber operators may well challenge the [just war theory]; especially if those combatants are not adequately separated from civilian populations.'²²

While the foregoing, and the rapidly expanding 'morality of drones' oeuvre, strives to make normative moral assessments of killing at a distance, this paper turns now to a more abstract consideration of the philosophical means that make it possible – drawing on just war discourse – to even speak of the morality of war in general and Reaper operations in particular.

States, Rights and Just War

Since 1977 and the publication of his *Just and Unjust Wars*, Michael Walzer has provided a uniquely influential voice in modern just war theory. Nicholas Rengger goes as far as to describe Walzer's *magnum opus* as 'unambiguously the most influential academic reconsideration of the tradition in recent times'.²⁴ Over the past four decades Walzer's ideas have been tested, challenged and ranked as first among equals alongside those of other just war luminaries such as James Turner Johnson and Jean Bethke Elshtain. Walzer – like Johnson,²⁵ Elshtain and many others – locates his work firmly within the just war tradition and draws upon enduring historical concepts therein in order to make judgements about the morality of war in the twenty-first century. Setting his work within what he calls a 'legalist paradigm',²⁶ Walzer draws upon the notion of individual rights to provide a philosophical foundation for his just war theorising. Contrarily, the most concerted and sustained challenge to Walzer's just war theory has come from Jeff McMahan, who argues 'that some of the principles [Walzer] defends do not and cannot derive from the basic moral rights of individuals and indeed, in some cases, explicitly permit the violation of those rights'.²⁷ The remainder of this section will explore key points of difference between these two distinct approaches to making moral assessments concerning war, before going on to explore their significance for RPA operations in the final section.

While Walzer relies on individual rights as a key foundation on which to base his just war theorizing, those rights are set in the context of, or subordinated to, state rights: with the origins and the nature of the relationship between the two left largely undefined in his *Just and Unjust Wars*. He writes of the relationship between the two (individual rights and state rights):

Individual rights (to life and liberty) underlie the most important judgements that we make about war. How these rights themselves are founded I cannot try to explain here. It is enough to say that they are somehow entailed by our sense of what it means to be a human being. If they are not natural, then we have invented them, but natural or invented, they are a palpable feature of our moral world. States' rights are simply their collective form.²⁸

It appears, superficially, that Walzer grants primacy to individual rights when making judgements about the morality of war. However, the relationship between individual and state rights is insufficiently defined to confidently support such an assumption. If his just war theory somehow rests on individual rights, the relationship between those rights and waging war is mediated by the state: state rights therefore being granted priority over the individual rights.²⁹ He writes of the relationship between the two: 'The rights of states rest on the consent of their members. But this is consent of a special sort. State rights are not constituted through a series of transfers from individual men and women to the sovereign or through a series of exchanges among individuals.'³⁰

Lackey makes a bold, if over-simplified, assessment of the place of personal rights in Walzer's *schema*, noting, 'Walzer's theory is no simple affirmation of personal rights against the encroachment of the general interest: *the whole of his theory of just wars* hinges on the notions of the rights of nation-states, not individuals.'³¹ It is clear from Walzer's words above that individual rights play a significant role in his just war theory. In addition, Brian Orend is critical of Walzer's lack of detail at this point, noting, 'It is ironic that so much weight is put on human rights in Walzer's just war theory yet so little is said either about their nature or their justification.'³² Perhaps Orend does not go far enough in his criticism here. Not only does Walzer avoid explaining or justifying how he forms the basis of his rights argument, he appears at best apathetic and at worst ambivalent about how these rights come to *be*. Walzer has no intention of debating the benefits of natural law, or any other philosophical³³ basis for his rights-oriented arguments. It therefore appears that his pragmatism is more concerned with the application of these rights within his system than with explaining how they exist in the first place: his conception of rights being an *assumed*, rather than a defined, moral source.³⁴ Consider some words of Walzer on the relationship between politics and philosophy concerning the validation of individual rights:

philosophical validation and political authorization are two entirely different things. They belong to two entirely distinct spheres of human activity. Authorization is the

work of citizens governing themselves among themselves. Validation is the work of the philosopher reasoning alone in a world he inhabits alone or fills with the products of his own speculations.³⁵

Walzer appears unwilling to resolve any tension between the nature of rights and their origins. In effect he has bracketed, or set aside, questions concerning the theoretical basis of his rights approach to just war, concentrating instead on the application of his just war theory with practical examples: typically prioritising the role of states. While this has enabled him to address the practicalities of his just war arguments, the lack of clarity over the relationship between individual and state rights – as the basis for his just war arguments – would later present problems when challenged by McMahan's more individual rights-focused argument. Furthermore, they highlight a limitation of his theorising when it is applied to the kind of military interventions that have occurred since the end of the Cold War: specifically, when one protagonist is a sub-state entity. Despite the foregoing, Walzer's commitment to the state in his political and just war writings is not that of a blinkered idealist, rather it comes with demands and expectations, especially in the legitimate use of force in self-defence: He writes:

The moral standing of any particular state depends on the reality of the common life it protects and the extent to which the sacrifices required by that protection are willingly accepted and thought worthwhile. If no common life exists, or if the state doesn't defend the common life that does exist, its own defense may have no moral justification.³⁶

Though these words were originally written in 1977 they include a prescient definition, even if not intended at the time, of what is commonly referred to today as a failed state. If we take a strict reading of Walzer's description here, Afghanistan still fails to meet the criteria – at least in moral terms – of a fully functioning state. For all of the monumental efforts and sacrifices made by UK and NATO military personnel, only a fool or a blinkered optimist would begin to claim that some credible form of common life exists in Afghanistan in 2013, and that it is being adequately defended by the Afghan police, army and government. While Walzer does not set out to define or specify how the rights of states are constituted, he makes it clear that these rights are, to some extent at least, related to or dependent upon the rights, and common life, of the individuals who make up that state. It is in this context that his political and theoretical priority lies with the rights of the state. Against this backdrop Walzer's just war theory is located primarily in a 'global community [that] is pluralist in character, a community of nations, not of humanity, and the rights within it have been minimal and largely negative, designed to protect the integrity of nations and to regulate their commercial and military transactions.'³⁷

McMahan's sustained critique of Walzer's just war concentrates primarily on the paradoxical status of individual rights and state rights. Although he does not expound the relationship between the two kinds of rights, Walzer repeatedly confirms that they both exist and support his just war theory. McMahan, however, opts for a highly selective reading of Walzer's

prioritisation of state rights, using the domestic analogy³⁸ to attribute claims to Walzer that Walzer does not claim for himself. McMahan states: 'If we conduct our thinking about war by focusing on relations among states and treating states as if they were individuals with rights that are analogues of the rights of persons, the actual rights of actual persons become essentially invisible.'³⁹ Going further he adds: 'If we take the domestic analogy seriously, it should lead us to treat individual persons as if they had no more significance in relations between states than a person's individual cells have in relations between persons.'⁴⁰ Put more simply – perhaps too simply – for McMahan, Walzer's prioritising of the rights of states makes individuals rights redundant, or at least insignificant.

McMahan produces a sequence of logical steps in this argument, each of which makes sense when viewed on its own terms. However, the intellectual sleight of hand comes in the assumptions that underpin McMahan's approach where he implies that the domestic analogy, as he presents it, is somehow representative of Walzer's position when the reality is significantly different. Over many years Walzer has consistently sought to retain the tension between individual rights and human rights in his work, even if he has not defined the relationship at length. McMahan, however, claims that Walzer has consistently ignored the rights of individuals in his just war theorising. Taking his argument to its logical conclusion, McMahan considers that where a state 'has acted in such a way as to forfeit its right against attack, and if all its citizens are equally part of the state, then it seems that they should all be legitimate targets of attack.'⁴¹ He somehow suggests that Walzer's just war theory eventually, through a series of logical leaps, takes us to a position where within an aggressor state there is no difference between combatant and non-combatant, innocent and non-innocent – however those terms are defined – they are subject to legitimate attack. However, the only way he can make that argument is by omitting, entirely, Walzer's repeated acknowledgements that individual rights and state rights are somehow interdependent. McMahan's ultimate claim that the domestic analogy has led to 'collective responsibility, collective guilt, collective liability, and collective punishment' would be more relevant if he provided examples to support his case.⁴² It would also be more impressive if he could demonstrate the presence of such intended outcomes in Walzer's writings in particular, and in the just war tradition more broadly. Significantly, however, McMahan's partial reading of Walzer and his associated selective application of logical progressions has an important bearing on the moral status of combatants, and it is to this aspect of just war that we now turn.

The Moral Standing of Combatants

Walzer broadly summarises the moral order that enables the conduct of war to be described, disputed and justified or otherwise as the 'war convention.'⁴³ This war convention is made up of 'the set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements that shape our judgements of military conduct.'⁴⁴ Given the diversity of sources Walzer calls upon, his war convention should be understood more as a loose coalition of ideas that frame his moral arguments than a coherent, succinct theory. He goes on to describe the war convention as having been 'expounded,

debated, criticized, and revised over a period of many centuries. Yet it remains one of the more imperfect of human artefacts: recognizably something that men have made, but not something that they have made freely or well.⁴⁵ The strength of Walzer's admittedly ambiguous approach is that it leaves scope for reinterpretation as time and circumstance changes. In that regard his contribution to the just war tradition is in keeping with his many predecessors. The weakness of his approach is that it remains vulnerable to a focused and sustained critique – such as that carried out by McMahan.

Crucial in Walzer's theorising, and a dominant assumption within the just war tradition for centuries, is viewing enemy combatants, regardless of whether they fight either as part of an aggressive army in an unjust war, or as part of an army acting justly in self-defence, as moral equals. This moral equality rests, in Walzer's just war theory, on the ability to distinguish between categories of people – combatants and non-combatants. For Walzer, non-combatants are part of a broader category he refers to as 'innocent people' who, because they pose no direct threat to their enemies cannot lose their rights (for example, their right to life).⁴⁶ Non-combatants are 'innocent' no matter how good or evil the decisions of their political leaders with regard to war. Further, combatants, at least regular combatants who serve in recognised, state-sanctioned, uniformed militaries, lose that presumption of innocence because of the threat that they pose to enemy lives during times of war. In addition, for Walzer, combatants gain more rights – such as the right to kill under particular conditions – during times of war while simultaneously accepting a reduced right to life.

McMahan challenges the view that soldiers engaged in a just war while defending innocents somehow 'only' hold moral equivalence to those soldiers whose actions may be contrary and unjust: 'It does not seem that people can forfeit or lose moral rights simply by defending themselves and other people from unjust attack.'⁴⁷ Therefore, for McMahan, soldiers fighting in a just war to defend the innocent should not lose any of their individual rights to life. He adds: 'So unjust combatants use wrongful means – the killing of people who are innocent in the relevant sense – to achieve ends that are unjust. It is hard to see how that could be morally permissible.'⁴⁸ At first glance it appears that McMahan makes a valid point – the combatant fighting a just war in a just manner must surely be acting ethically, while the combatant fighting an unjust war using wrongful means must be acting unethically. Therefore, the rights of those fighting justly should be protected. McMahan's approach certainly appears to anticipate the Supreme Court ruling on the rights of UK soldiers outlined at the beginning of this article.

The key to understanding McMahan's approach to the moral equality of combatants is to recognise that he bases that equality on the application of assumed *universal* individual moral rights – with no consideration of the role of states. His unjust combatant – one who fights in an unjust war – violates the rights of the just combatant, so they cannot in any way be considered as moral equals in the way that Walzer advocates and which the war convention, broadly understood, accepts.

Again, McMahan's capacity for logical progression of argument – within the constraints and assumptions that he does not always make clear – is impeccable. However, in basing his own just war reasoning on an application of universal moral rights, thereby making combatants responsible for making their own judgements about whether or not a war is just and therefore whether or not to participate in it, McMahan places an unrealistic expectation upon soldiers, sailors and airmen to make moral judgements about the cause for which they are being asked – ordered – to fight. He writes that 'if soldiers lack a just cause, there are no goods that they are justified in pursuing by means of war'.⁴⁹ They therefore act in an unethical way simply by taking up arms when ordered. He also argues that where just cause is absent there can be no discrimination, because,

The distinction between legitimate and illegitimate targets does not coincide with that between combatants and non-combatants. Rather, what discrimination requires is that soldiers target only those who are morally responsible for an unjust threat or for some other grievance that provides a just cause for war.⁵⁰

McMahan's case here is logical in that one argument follows another. This logical progression rests on his assumption that soldiers are fully able to ascertain whether or not the course of action they are being asked to pursue is supported by a just cause. Further, they can *only* use force against someone who is morally *responsible* for an unjust threat. However, the responsibility for the existence of an unjust threat is typically held at a much higher level by political leaders. If McMahan's logic is extended where does it stop? If soldiers are held to be morally blameworthy for engaging in war – despite not having access to all the information held by senior political decision-makers – do the civilians who feed those soldiers share in the collective responsibility, thereby making themselves liable to collective punishment?

Walzer's attitude towards McMahan's approach to just war might be described as respectful scepticism. For Walzer, McMahan's attribution of moral responsibility to the individual rather than the collective (of, say, civilians or soldiers, combatants or innocents) is idealised and unworkable in practice. Walzer's response is based primarily on the impracticality of applying McMahan's ideas to the unpredictable and awkward business of war. Walzer's lack of a detailed discussion of the relationship between individual rights, state rights and the individual's moral standing in war, leaves him open to the charge of prioritising pragmatism and practicality over theory. Conversely, McMahan's perceptive, and in places selective, development of just war ideas based on universal individual moral rights leads to eloquent arguments that impress with their logic but often have questionable application in a messy world characterised by overlapping political self-interests, moral ambiguity and recourse to martial force in less-than-clear circumstances. What cannot be ignored, in Europe at least, is that the application of the ECHR to British soldiers in Iraq – a theatre of combat operations geographically separated from Europe – changes the social, legal and political landscape within which ethical debate surrounding individual rights and war takes place. As we proceed to the final section of this paper discussion returns to remotely piloted aircraft operations, examining how the

application of the contrasting just war approaches of Walzer and McMahan – specifically their respective approaches to individual moral rights – significantly shapes any moral assessment of Reaper operations in Afghanistan.

Morality and Remote Warfare

Contrary to McMahan's reading of Walzer and his analysis of who may or may not be legitimately attacked in war, Walzer's just war theory does not permit the blanket killing of the innocent; he does, however, grant exceptions to his general prohibition on the killing of the 'innocent'. For example, on grounds of 'military necessity'⁵¹, if the avoidance of civilian deaths will present undue risk to the lives of combatants or to a militarily essential target. He describes this as 'not a retained but a war right'.⁵² This 'right' to kill civilians in some situations is captured in international humanitarian law, with the Geneva Conventions prohibiting only attacks 'which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which *would be excessive in relation to the concrete and direct military advantage anticipated*'.⁵³

Assessing the competing rights located in noncombatant immunity, military necessity, and undue risk to the lives of combatants, involves a utilitarian calculation in which subjective bias will be all but impossible to avoid.⁵⁴ The non-combatant will prefer an absolute right to life even if it renders military action impossible, while the military commander will prefer the maximum legal and moral room to manoeuvre (so to speak) when making operational decisions. The political leader, meanwhile, will often tend toward whichever of these two positions most serves their ends while minimising negative repercussions for themselves (as opposed to repercussions for the combatants or vulnerable non-combatants, though these factors may all be linked). Take the situation outlined earlier, where a Reaper crew was legally authorised to attack a target, but chose not to fire *just in case* an innocent bystander standing just out of their field of vision might be hit by the blast. It would be difficult for anyone to credibly argue that the crew acted in any way other than ethically. The context suggests that there was time to double-check that the prospective blast zone was clear before any subsequent attack.

If, however, the Reaper attack had been time critical and a major military advantage would be lost without the immediate striking of the target – say, allowing a Taliban commander and several IED-makers⁵⁵ to proceed with several waves of attack – the target could have legally been prosecuted: even if an innocent bystander was hit. In Walzer's terms, such an act, even with the death of the non-combatant, could still be regarded as a moral action, especially viewed in utilitarian terms. In McMahan's individual-rights approach, however, there are no circumstances in which an innocent bystander can lose their right to life: he refers to 'the *exceptionless* prohibition of intentional attacks on civilians or non-combatants'.⁵⁶ Therefore, the Reaper crew would be acting immorally if they fired a weapon knowing that it would likely cause a non-combatant's death or grievous wounding: even if they achieved a significant military advantage for their allies in the process, and saved the lives of numerous other non-combatants who would otherwise be killed by IED and in other Taliban attacks.

One further factor to consider in this scenario is the political dimension. Each country's ROE – where the military is legally constituted in a state context – are frequently designed to conform to both domestic law (of both the sending and the host country), and international humanitarian law in the shape of the Geneva Conventions. In an environment like Afghanistan in 2013 it is feasible that ROE can be satisfied, a moral case for action can be made in terms of Walzer's 'military necessity'⁵⁷ argument, and yet an attacking force – using the Reaper or another weapons platform – can choose not to engage. If Clausewitz's maxim that war is a continuation of politics holds true (and I will grant here that it does), political leaders – for reasons of their own – may require or demand a level of non-combatant immunity that transcends the minimum required by ROE, the Geneva Conventions, or the moral permission granted in Walzer's *schema*: zero civilian casualties. In effect, they would appear to be invoking McMahan's absolutist position on the killing of the innocent. However, in reality their intentions and motivations would not be based on, or even associated with, McMahan's moral claims about the importance of individual rights. A political intent could be prompted by a desire to avoid the deaths of innocents as a means of making it easier to negotiate the end of hostilities with an enemy. Less honourably, a political leader may simply wish to avoid negative newspaper headlines for reasons of personal or party-political advantage. In such a situation – and it is not difficult to imagine it arising – the moral imperative of the combatant is subsumed within higher political aims as *jus in bello* surrenders moral priority to *jus post bellum*.

Perhaps the most potentially serious moral implication of invoking McMahan's conception of individual moral rights-based just war is to be found in his rejection of key features of Walzer's just war theory and the war convention more generally. McMahan rejects, for example, the notion that belonging to a particular group of combatants brings with it a liability to be attacked as well as the right to attack an identified and identifiable enemy. He writes: 'My most serious concern about Walzer's argument derives from his failure consistently to adhere to the rejection of group membership as a basis of liability to attack.'⁵⁸ For McMahan, *contra* Walzer, membership of a particular group – the Royal Air Force, the US Army, the Taliban – does not in itself automatically grant to the enemy an inherent right to attack *any* member of that group in time of war. That is, if I am not threatening you or endangering your life then you have no right to threaten or endanger mine: 'In short, if liability is a function of action and not membership, immunity must be a function of the absence of action and not of membership.'⁵⁹

There is one logical application of McMahan's individual-focused just war reasoning that holds particular moral significance for individuals involved in remote operations, such as the RAF Reaper crews based in the US or the UK who fly aircraft over Afghanistan. Namely, when a person is physically separated from the battlefield by thousands of miles and *cannot* be attacked by an enemy who is not equipped to do so. For McMahan, that person has no right to endanger an enemy combatant just because he belongs to the enemy's army or militia: if I do not threaten you as an individual I must be immune to attack from you. Hence, using McMahan's line of logical reasoning all remotely piloted aircraft operations against the Taliban⁶⁰

in the Afghanistan theatre must, *de facto*, be immoral. Since the Reaper sensor operator in Creech Air Force Base cannot – as things currently stand – be attacked by a member of the Taliban, then (according to McMahan) he or she can have no right to target and kill an enemy combatant who is a member of the Taliban.

Returning to Walzer's just war reasoning, and the relationship between the moral standing of combatants and the degree of risk they endure in carrying out their duties. It would appear, therefore, at least by focusing in the individual-rights aspect of Walzer's just war, that the moral standing of Reaper pilots and sensor operators is problematic: the degree of risk they share in conducting operations is not equivalent to the risk endured by their targets or potential targets, or their allied ground combatants in the Afghanistan battlespace. The lack of risk-bearing by Reaper crews suggests an imbalance in the individual-rights aspect of Walzer's moral equation that weighs the combatant's right to take the lives of others against the right to preserve his or her own life. However, to come to such a conclusion would be to overlook the crucial philosophical basis of Walzer's just war outlined previously. For although individual rights – whether that be the right to take life or the right to preserve life – are a key feature of his moral framework, Walzer consistently sets those rights in the context of prioritised state rights and the rights of the military collective.

As a result, the right of a Reaper sensor operator to kill a human target⁶¹ in Afghanistan does not rest solely or even primarily on his or her individual moral status as a combatant; that right rests in turn on the more important or higher order right of the state to defend itself and the (somehow) aggregated or collective moral rights of the individuals therein. Further, without the right to protect fellow combatants who are being attacked – for example, either using an artillery barrage from several miles away or using a Reaper from thousands of miles away to protect an Army patrol on the ground in Afghanistan – the very idea of a legitimate, collective state-sanctioned armed force descends into parody. Not every act on or around a battlefield can be reduced to, or legitimately called, an act of self-defence in an arena of equivalent risk. Examples of this asymmetry include firing long-range artillery against an enemy armed only with rifles, dropping bombs using conventional aircraft on an enemy who has no air defences, or firing heavy guns or missiles from a ship against a target with no maritime capability. Further, it has been the aim of political leaders and military commanders since the dawn of time to achieve asymmetric advantage on the battlefield: the advent of the longbow achieved, at least temporarily, a tactical advantage no less significant than that provided by modern-day RPA. However, tactical asymmetry does not equate to moral asymmetry. It is a naïve reading of the history of warfare that equates chivalrous conduct to a desire for a 'fair' fight: generals and soldiers have always sought every advantage possible over an enemy determined to kill them. Individuals such as Reaper operators can and do operate as moral agents within a legitimate, sanctioned, state-centric moral framework of the type advocated by Walzer and which has dominated the just war tradition for centuries. The following personal account from a Reaper pilot – and it is worth quoting at length – demonstrates both the theory and practice of discriminating between combatants and non-combatants:

I've had multiple strikes, where waiting a little longer, or using the extra situational awareness tools in the Reaper have resulted in much better outcomes than you'd have got from a manned aircraft in the same setup. It happens almost every day. My last flight involved working with [soldiers on the ground], who wanted us to provide some ISR⁶² on a hotly-contested area where they encounter a lot of IEDs and a lot of sporadic, harassing fire. We saw, before sunrise, a man leave a compound and go to an area behind a building. He started digging, interacting with the ground. The controller [on the ground], saw that and immediately suggested that it was an IED, and started trying to arrange permission for us to strike under the "hostile act" ROE. His thinking was that there was a recent IED strike nearby, it was suspiciously before sunrise, and this was near an entryway to the compound, so probably a defensive IED.

My crew disagreed, and as we watched longer and more closely, we could pick out some of the tools he was using and started to assess them as regular farming tools. Eventually with the first fringes of sunrise, we could tell he was just seeding a small patch of ground. Watching him for an hour let us see that he had none of the hallmarks of a traditional IED emplacer; there was no rapidity, no hurry, no equipment, no lookout ... I had a team inside the ops room I could talk to at length on the phone; second/third/fourth opinions available as required, and a feed that could be instantly stopped, rewound and reviewed to gather more information. A manned aircraft with less equipment, less time, and a poorer camera would have almost certainly considered engaging [earlier].⁶³

Discriminating between a legitimate target and an innocent civilian going about his business lies at the heart of this example. Far from making it easier or more convenient to kill a prospective target, the Reaper's persistence and close-up view of events below enabled the crew to analyse what was happening in considerable detail and avoid an unnecessary death. Such caution challenges many ill-informed and oft-repeated assumptions about Reaper operations: the crew's concerns prompted by a complex interplay of rules of engagement, commander's intent, and a desire to act ethically at the extreme of human activity – killing another human. As one sensor operator summed up these three considerations: "Keeping the lawyers happy, the boss happy, and letting me sleep at night."⁶⁴

Walzer's moral framework is far from perfect yet he still strives to allow the co-existence of moral agency and individual rights in complex military operations, which are shaped by changing and sometimes unclear political constraints. In response to McMahan's challenges in a number of areas, but particularly over the issue of assigning moral responsibility to individuals rather than collectives, Walzer writes the following:

What Jeff McMahan means to provide ... is a careful and precise account of individual responsibility in time of war. What he actually provides, I think, is a careful and precise account of what individual responsibility in war would be like if war was a peacetime

activity...I don't deny [his] perceptiveness; I only want to deny its relevance to the circumstances of war.⁶⁵

Many who are steeped in military tradition might instinctively sympathise with Walzer's sentiments here, recoiling from some of the impractical implications for future wars of McMahan's ideas. This seems to be the concern of the UK Defence Secretary highlighted in the Introduction who said, 'It can't be right that troops on operations have to put the ECHR [European Convention on Human Rights] ahead of what is operationally vital to protect our national security.'⁶⁶ However, they should not dismiss McMahan's challenge out of hand: individual rights, in Europe at least, continue to increase in prominence and the UK Supreme Court's ruling on the rights of soldiers in an operational theatre must inevitably prompt further ethical debate. The final twist here could eventually be that the 'gold standard' for protecting the right to life of British soldiers on the battlefield requires the constant overhead presence of a Reaper, or its future derivative, during particularly dangerous engagements with the enemy. The irony of such an eventuality for those who judge the Reaper or other armed RPAS to be somehow inherently evil is that this means of delivering air power has – when used within proper legal constraints and governance structures – the capacity to *protect human rights* by being more discriminating in its targeting, and proportional in its use of force – in other words, more ethical – than any previous aircraft in the RAF's inventory.

Conclusion

The advent of remotely piloted aircraft capable of delivering kinetic air power has contributed significant new dimensions to the political, operational and moral dimensions of war, highlighting the asymmetry between enemy capabilities in Afghanistan and elsewhere. If the addition of Reaper to the UK's military capability was viewed simply as an extension of the RAF's inventory its use would be considered neither problematic nor controversial, and moral assessments could be based on normative just war assumptions. However, no weapon system has prompted more debate, opposition and speculation – usually uninformed speculation – since the nuclear controversies of the 1980s. In addition, the issue of the rights of individuals, legally and morally, has advanced apace over the past two decades, in Europe at least. It has hopefully become clear in the course of this article that much more nuanced and probing analysis of the moral dimension of remotely piloted aircraft operations is needed, with the significance of individual rights-based moral arguments being paid particular attention. The UK Defence Secretary Philip Hammond voiced serious concerns about the impact of the legal application of the European Convention on Human Rights to military operations. A parallel shift in emphasis in the moral arguments surrounding war from state-centric to individually focused would have significant consequences for the moral component of fighting power as currently understood in the UK and by most of its Western allies – especially with the advent and use of remote technologies. The notion of morally justified collective action of the type currently undertaken by NATO partners in Afghanistan may be significantly or fatally undermined: a danger acknowledged by the Supreme Court. Military practitioners and scholars of military practice ignore societal developments at their peril. How many in

the military and academic communities, as little as 15 years ago, would have predicted that the European Convention on Human Rights would be successfully applied to British soldiers on a battlefield in Iraq? The survival of the just war tradition for almost two millennia (longer, depending on where you start it) has depended on its ability to adapt and remain relevant when making moral assessments about war in changing political, military, technological and cultural landscapes. Its relevance to war should no more be seen as definitive, fixed and timeless than the contributions of the longbow, gunpowder, the Spitfire or nuclear weapons. Similarly, the relevance of individual rights to just war theory would appear to be growing in significance and should be maintained as an object of ongoing ethical enquiry.

Notes

¹ Sallust (86BC - 34BC), *Jugurthine War*, 41BC, from <http://www.quotationspage.com>, accessed 7 July 2013.

² In this article, the term 'morality' refers to rules and codes that are broadly accepted, while 'ethics' is about individual choices and decision-making: often in relation to those codes.

³ Supreme Court Judgement, 19 June 2013, 'Smith, Ellis, Allbutt and Others v The Ministry of Defence', [2013] UKSC 41, p. 21, para. 57, http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2012_0249_Judgment.pdf, accessed 26 June 2013.

⁴ *Ibid.*, p. 5, para. 13.

⁵ Philip Hammond, 19 June 2013, <http://www.reuters.com/article/2013/06/19/us-britain-iraq-court-idUSBRE9510QH20130619>, accessed 26 June 2013.

⁶ Supreme Court Judgement, p. 24, para. 66.

⁷ *Ibid.*

⁸ Sensible debate about remote operations is bedevilled with terminological disputes and caveats. This article will refer to remotely piloted aircraft or remotely piloted aircraft systems because these terms accurately encapsulate the element of human agency involved in the delivery of lethal force from the air. The use of 'drone', and to a lesser extent 'unmanned aerial vehicle', is a frequent ploy in public discourse about Reaper operations, which obscures – either deliberately or accidentally – the high degree of human involvement in every part of the process.

⁹ For an extensive defence of this statement see Peter Lee, *A Genealogy of the Ethical Subject in the Just War Tradition*, PhD Thesis, submitted to King's College London, 2010.

¹⁰ This incident was recounted to me at length by one of the Royal Air Force crew members involved during a visit to Creech Air Force Base on 15 July 2013. The video and audio footage of the incident is now used in the training of new Reaper crews to highlight the importance of ethical decision-making and shared crew involvement in the decision-making process.

¹¹ Permission was obtained from all Reaper crew quoted directly or indirectly in this article. Further, before submission of this article to *Air Power Review* the personnel cited were given the opportunity to read the manuscript to ensure that no-one had been quoted inaccurately or out of context.

¹² David Whetham, 'Killer Drones: The Moral ups and Downs', *RUSI Journal*, Vol. 158, No. 3 (June/July 2013) pp. 22–32.

¹³ *UK Air and Space Doctrine*, Joint Doctrine Publication 0-30 (Ministry of Defence), July 2013, pp. 2-8 – 2-9; and Joint Doctrine Note 2/11, *The UK Approach to Unmanned Aircraft Systems*, Ministry of Defence Development, Concepts and Doctrine Centre (March 2011) p. 5-8ff.

¹⁴ Louisa Brooke-Holland, 'Unmanned Aerial Vehicles (drones): An Introduction', Parliamentary Briefing Note (April 2013), <http://www.parliament.uk/briefing-papers/SN06493>, accessed 21 May 2013.

¹⁵ Medea Benjamin, quoted in *ibid.*, p. 14.

¹⁶ Chris Cole, Mary Dobbing and Amy Hailwood, *Convenient Killing: Armed Drones and the 'Playstation' Mentality* (Fellowship of Reconciliation: Oxford, 2010) p. 4.

¹⁷ Having spoken in numerous public debates and conferences on the themes of the ethics of remotely piloted aircraft and the ethos of those involved, the most common – and most illegitimate – form of argument against the use of remotely piloted aircraft involves a combination of the following unquestioned assumptions: 'drones are evil'; 'drones are autonomous'; contradicting the previous point, 'drone operators are deliberately dehumanized, unthinking killers'; 'our assertions must be true or governments would deny them' (do governments state where their nuclear submarines are lurking?). Such inanities belong in the activists' lexicon and not in academic debate, which is why I do not respond to them here.

¹⁸ Personal communication by a UK Reaper pilot, 16 July 2013, Creech Air Force Base.

¹⁹ Rwanda Genocide and the United Nations, <http://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml>, accessed 12 July 2013.

²⁰ Alison J. Williams, 'Enabling persistent presence? Performing the embodied geopolitics of the Unmanned Aerial Vehicle assemblage', *Political Geography*, 30 (2011) p. 381, 387.

²¹ *Id.*

²² James Cook, 'Cyberation' and Just War Doctrine: A Response to Randall Dipert', *Journal of Military Ethics*, Vol. 9, No. 4 (2010) p. 420.

²³ For further related reading see: David Fisher, 'The Robotisation of War: An End to Military Virtues?' in Andrew Todd (Ed.) *Military Chaplaincy in Contention: Chaplains, Churches and the Morality of Conflict* (Farnham: Ashgate, 2013) pp. 83-92; David Whetham, 'Remote Killing and Drive-By Wars' in David W. Lovell and Igor Primoratz (Eds), *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century* (Farnham: Ashgate, 2012), pp. 199-214; Patrick Lin, 'Ethical Blowback from Emerging Technologies', *Journal of Military Ethics*, Vol. 9, No. 4 (2010) pp. 313-331; Peter W. Singer, 'The Ethics of Killer Applications: Why Is It So Hard To Talk About Morality When It Comes to New Military Technology?' *Journal of Military Ethics*, Vol. 9, No. 4 (2010) pp. 299-312.

²⁴ Nicholas Rengger, 'On the Just War Tradition in the Twenty-First Century', *International Affairs*, Vol. 78, No. 2 (2002) p. 355.

²⁵ Helpful introductions to their works include: James Turner Johnson, *Morality and Contemporary Warfare* (New Haven and London: Yale University Press, 1999); Jean Bethke Elshtain, *Just War Theory* (New York and London: New York University Press, 1992).

²⁶ Michael Walzer, *Just and Unjust Wars*, Third Edition (New York: Basic Books, 2000) p. 61.

²⁷ Jeff McMahan, 'The Sources and Status of Just War Principles', *Journal of Military Ethics*, Vol. 6, No. 2 (2007) p. 91.

²⁸ Walzer, 2000, p. 54.

²⁹ Id.

³⁰ Id.

³¹ Lackey, 1982, p.536 (*my italics*).

³² Brian Orend, 'Michael Walzer on Resorting to Force', *Canadian Journal of Political Science*, Vol. 33, No. 3 (Sep 2000) p. 528.

³³ The term 'ontological' may well be a more technically precise alternative to 'philosophical'.

³⁴ Were this paper to afford the luxury of further investigation of this point, the foundational assumptions of liberal democracy would probably be a good place to start exploring.

³⁵ Walzer, M., 'Philosophy and Democracy' in *Political Theory*, Vol.9, No.3 (Aug 1981) p. 397.

³⁶ Walzer, 2000, p.54.

³⁷ Michael Walzer, 'The Moral Standing of States: A Response to Four Critics', *Philosophy and Public Affairs*, Vol. 9, No. 3 (Spring 1980) p. 226.

³⁸ A philosophical approach that attributes the characteristics of an individual to a state. For example, equating an individual's right to self-defence to a state's right to self defence. A number of logical progressions can then be argued based on the initial assumptions.

³⁹ McMahan, J., 'The Sources and Status of Just War Principles', *Journal of Military Ethics*, Vol.6, No.2 (2007) p. 96.

⁴⁰ Id.

⁴¹ Ibid., p. 97.

⁴² Id.

⁴³ Walzer, 2000, p.44.

⁴⁴ Id.

⁴⁵ Ibid., p.45.

⁴⁶ Ibid., p.146.

⁴⁷ Jeff McMahan, 'Collectivist Defenses of the Moral Equality of Combatants', *Journal of Military Ethics*, Vol.6, No.1 (2007) p.51.

⁴⁸ Id.

⁴⁹ Jeff McMahan, 'Just Cause for War', *Ethics & International Affairs*, Volume 19, No. 3 (Fall 2005) p.6.

⁵⁰ Id.

⁵¹ Walzer, 2000, p.146.

⁵² Id.

⁵³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 51 (5), <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=4BEBD9920AE0AEEC12563CD0051DC9E>, accessed 10 July 2013 (*My italics*).

⁵⁴ Utilitarianism is amoral philosophy that seeks the highest amount of good for the highest number of people.

⁵⁵ IED: 'improvised explosive device'. In Afghanistan this typically refers to roadside bombs that can be triggered either automatically like landmines, or in a controlled manner using wired or remote detonation.

⁵⁶ McMahan, 2007, p. 102 (*My italics*).

⁵⁷ Walzer, 2000, p.146.

⁵⁸ Jeff McMahan, 'Liability and Collective Identity: A Response to Walzer', *Philosophia*, Vol. 34 (2006) p. 13.

⁵⁹ *Ibid.*, p. 15.

⁶⁰ This argument refers specifically to Afghan Taliban. The moral case for attacking Al Qaeda members in Afghanistan is more complex and there is not the scope here to explore the nuances fully.

⁶¹ To be clear, I am referring here to a legally authorised target, supported by specific intelligence information, and correctly sanctioned within nationally defined rules of engagement.

⁶² ISR: Intelligence, surveillance and reconnaissance.

⁶³ Personal communication by a UK Reaper pilot, 18 August 2013, based at Creech Air Force Base.

⁶⁴ Personal communication by a UK Sensor Operator, during a visit to Creech Air Force Base on 15 July 2013.

⁶⁵ Michael Walzer, 'Response to McMahan's Paper', *Philosophia*, Vol. 34, No.1 (2006) p.43.

⁶⁶ Philip Hammond, 19 June 2013, <http://www.reuters.com/article/2013/06/19/us-britain-iraq-court-idUSBRE95I0QH20130619>, accessed 26 June 2013.

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