

# TERROR IN THE NAME OF HUMAN RIGHTS

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*[The dominant political language of today seems to involve the notion that the 'terrorists' and 'outlaw states' threaten peace, human rights, dignity and freedom, and that in defence of these values 'we' are justified in going to war. This article draws attention to the highly problematic nature of this form of moral thinking about war. The article develops a jurisprudence of war and violence built upon the philosophy of Kant and Hegel. Contemporary acts of war and terror are positioned within the notion of 'war's moral problem' and are reconceived as a problem and a challenge of (mis)recognition.]*

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## I INTRODUCTION

This article presents a theoretical account of the way in which the boundaries of the legitimacy of violence are produced and developed through the operation of inter-subjective and inter-institutional recognition. It is not the purpose of this article to examine historical examples of how states, interest groups, courts, media organisations and legal and political institutions have recognised particular acts of violence as either 'war' or 'terror', 'right' or 'wrong', 'legal' or 'illegal'. Rather, the article is concerned with explaining how moral and legal judgements regarding the legitimacy of violence take place as acts of recognition and mis-recognition. My approach attempts to develop a jurisprudence that draws upon a tradition of German transcendental philosophy, in particular upon that of Kant and Hegel. I draw upon their philosophy to point to a difficulty that exists within conventional approaches to war and terror and that occurs as a pressing contemporary problem. This difficulty is called 'war's moral problem'.

Broadly speaking, war's moral problem may be seen to have emerged from the shift of 20<sup>th</sup> century international law away from a traditional or Westphalian endorsement of the state's right to war, and towards an attempt to reorder war around a central ideal of peace. In part, war's moral problem emerges as a 'paradox of peace', whereby the attempt to realise the ideal of peace often leads states and international organisations to act violently — to carry out a war against war; a war in the name of peace. In the latter half of the 20<sup>th</sup> century, this problem has developed further as the legal–moral ideal of human rights has come

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to influence much of the thinking about war. Far from conceiving of war purely in terms of states' rights, the legitimacy of war under international law is now predominantly ordered around what are claimed to be universal values: peace and human rights. The legal-moral language of these universal values openly condemns war, yet the powerful normative demand that these universal values be realised sometimes impels state and international actors to act violently — to carry out war in the name of human rights.

In introducing and attempting to address war's moral problem, this article does not examine the debates within positive international law over the way in which a particular act of war is understood as legitimate or illegitimate according to the rules and procedures of the *Charter of the United Nations* (1945) and to issues of fact related to particular actions. Nor does the article examine the forms of religious and moral reasoning contained within the 'just war' tradition and the criteria this tradition sets out for determining the legitimacy of an act of violence.<sup>1</sup> My approach is to examine how a 'universal' legal or moral value is produced and developed through a process of (mis)recognition,<sup>2</sup> and how this impacts upon thinking about war.

The article will show how an act of judgement within legal and moral reasoning that attempts to determine the legitimacy of a particular act of violence presupposes the acknowledgement and affirmation of a universal value possessing a particular content. By focussing upon how the 'universal' of a universal value is produced through a process of (mis)recognition, the article demonstrates how acts of war and terror play out underlying struggles and conflicts over the moral content of such values. In this manner, the article will show how legal thinking might come to terms with war's moral problem by taking notice of how judgements over the boundaries of the legitimacy and illegitimacy of violence take place within an ongoing and highly creative, inter-subjective and inter-institutional process. The article puts forward the argument that by viewing war's moral problem through the lens of a jurisprudential theory of inter-subjective and inter-institutional (mis)recognition, legal thinking might be better placed to come to terms with the contemporary challenge of terrorism carried out by radical Islamicist militants. One way out of war's moral problem is to move beyond the simplistic condemnation of the enemy's violence and to attempt to adopt a 'praxis of recognition'. This involves the attempt to recognise the ethics of the other's war.

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<sup>1</sup> See generally St Thomas Aquinas, 'The Summa of Theology' (Paul Sigmund trans, 1988 ed) [trans of: *Summa Theologiae*] in Paul Sigmund (ed), *St Thomas Aquinas on Politics and Ethics* (1988) 30; Michael Waltzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (3<sup>rd</sup> ed, 2000). See also Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (2004). It is not being argued here that the just war tradition is irrelevant. Indeed, every act of violence involves some form of calculation or weighting in accordance with particular values and criteria. This article simply pursues a different approach.

<sup>2</sup> This term is taken from Gillian Rose. The 'mis' of (mis)recognition refers to the moment of failure, error or slippage that occurs in every stage of self-consciousness. See Gillian Rose, *Hegel Contra Sociology* (1981); Gillian Rose, *Mourning Becomes the Law* (1996). In my use of this term, '(mis)recognition' will be used to refer to the broader category, which contains both the 'successful' moment of 'recognition' and the 'unsuccessful' moment of 'mis-recognition'. The term 'mis-recognition' will be used to refer only to instances when the 'unsuccessful' moment occurs.

The article begins by examining how war's moral problem can be seen to have emerged in post-1945 international law, ordered around the ideals of peace and human rights. It is argued that a clearer outline of the operation of war's moral problem within international law can be found in the writings of Kant. In particular, Kant describes the way in which war should be overcome by moral reasoning and moral action focussed upon the realisation of the universal values of peace and human rights. While Kant anticipates and acknowledges the emergence of war's moral problem, his solutions to it remain inadequate. Following on from Kant's account of war, the article considers an approach taken by one of Kant's early inheritors and critics, namely Hegel. By introducing materials relevant to Hegel's critique of Kant, as well as Hegel's account of how universals are produced via a theory of (mis)recognition, the article presents an alternative theoretical account of war's moral problem and of how contemporary thinking might respond to this issue.

Building upon a theoretical account of (mis)recognition, the article then discusses how the normative force of modern universal values such as human rights and human dignity (as conceived by thinkers such as Jacques Derrida and Ernst Bloch) opens onto global struggles between competing state and non-state entities over the content of these universals. Such struggles, it is suggested, are better understood when placed in the context of the post-Westphalian juridical ordering of violence and Carl Schmitt's theory of the 'partisan'. War's moral problem involves both state violence guided by the demands of universal values, and non-state or partisan violence, which challenges the state's monopoly upon the legitimacy of violence and is also carried out in the name of universal values such as human rights, human dignity and human freedom. The article will conclude by looking at the way in which acts of terror carried out by radical Islamicist militants take place within the context of (mis)recognition, and at the manner in which legal and moral judgement defines the boundaries of the legitimacy of violence through the recognition of some actors and values, and the mis-recognition of others.

## II WAR IN THE NAME OF HUMAN RIGHTS

Contemporary international law does not look favourably upon war. In the wake of the massive violence and destruction of the two World Wars, international law turned away from the traditional Westphalian ordering of war which respected the state's right to go to war in the protection of its interests. In the 20<sup>th</sup> century, the state's right to war was tempered by a higher value, which condemned war and placed 'peace' as a global regulative ideal.<sup>3</sup> The *UN Charter* affirms a form of international juridical order — a form of legal regulation built

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<sup>3</sup> For differing accounts of this historical movement, see Arthur Nussbaum, *A Concise History of the Law of Nations* (revised ed, 1954); Raymond Aron, *Peace and War: A Theory of International Relations* (Richard Howard and Annette Baker Fox trans, 2003 ed) [trans of: *Paix et guerre entre les nations*]; Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (1977); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002); Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004); Richard Tuck, *The Rights of War and Peace: Political Thought and International Order from Grotius to Kant* (1999); Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (4<sup>th</sup> ed, 1997).

upon interstate political cooperation, which seeks to secure ‘international peace and security’ by regulating and limiting the possibility of the use of ‘armed force’.<sup>4</sup> While the *UN Charter* condemns war,<sup>5</sup> it does not condemn war absolutely. Rather, it attempts to regulate the sovereign state’s traditional right to war by attempting to suppress acts of state aggression,<sup>6</sup> and to limit it to instances of individual and collective self-defence.<sup>7</sup>

In attempting to establish a form of universal juridical order, the *UN Charter* reframes the scope of the legitimacy of war. War is no longer conceived of as a valid exercise of a state’s right or interest. The question of the legitimacy or illegitimacy of war is shifted to the judgement and decision of the international juridical order — to its executive and (to a more limited extent) its legislative and judicial bodies. Under the *UN Charter*, war is given legitimacy within international law when the Security Council deems that acts of armed force are necessary to preserve international peace and security.<sup>8</sup>

One visible tension within this juridical framework arises through the competing sovereignties of international law and the state’s right to war. As the organisation of the UN presupposes, and is a product of, state sovereignty,<sup>9</sup> international law’s attempts to limit certain state rights run into difficulty. This tension is continually reasserted in the figure of war, as the UN is reliant upon state-based military forces<sup>10</sup> and its executive arm is hampered by political disputes between member states. Within this tension, the operation of war can be understood in terms of a struggle between competing forms of sovereignty: between the sovereignty of the state and the emerging sovereignty of international law. At times, the act of war occurs as the assertion of one form of sovereignty against the other.

A further tension arises as a result of the structure and aims of the UN. This tension could be thought of as a ‘paradox of peace’. At times, the determination of international law to ‘save succeeding generations from the scourge of war’, as posited by the *UN Charter*,<sup>11</sup> drives member states to carry out war in the name of peace. When international law seeks to realise or bring into actuality the demand for peace, peace itself is transformed into and relies upon its opposite. The value of ‘peace’ offers a ‘universal’ justification for war — one that stands above the rights of any particular state and is no longer confined within sovereign state territory or boundaries. This justification has something of a

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<sup>4</sup> *UN Charter* preamble.

<sup>5</sup> ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’: *ibid* art 2(4).

<sup>6</sup> *Ibid* art 1(1).

<sup>7</sup> *Ibid* art 51.

<sup>8</sup> *Ibid* art 42.

<sup>9</sup> *Ibid* arts 3–4(1).

<sup>10</sup> *Ibid* arts 43–44, 49.

<sup>11</sup> *Ibid* preamble.

'transcendent' or 'quasi-transcendent' quality in that it inhabits an unrealised 'beyond' which gives legitimacy to earthly action.<sup>12</sup>

Against this claim it could be argued that a war in the name of peace claims nothing more in justification than the prudent interest of preserving security. This interest in security claims little transcendent legitimacy and perhaps merely replicates the legitimacy of police action that would otherwise maintain peace and security within the sovereignty of a state. Further, the ground of legitimacy — that is, of peace and security — is posited by member states through their social-contractual formation of the UN organisation as the new sovereign body of international law. This counterargument, however, tends to be superseded when we consider a 'quasi-legal or moral' justification for war that has emerged within the field of international law and international relations, namely the notion of human rights.

The term 'quasi-legal or moral' is appropriate to describe the operation of human rights under international law in relation to war.<sup>13</sup> Whilst under the *UN Charter* the notion of human rights has a generally legal character, with respect to the legality of war, it is not explicitly cited as a legitimate ground for waging war. Under the *UN Charter*, the Security Council is granted authority to carry out the use of force.<sup>14</sup> In executing its responsibilities, the Security Council is to 'act in accordance with the Purposes and Principles of the United Nations'.<sup>15</sup> Under this heading, which gives broad scope for legal interpretation and argument, the Security Council is given a general, but not explicit, degree of legitimacy to conduct violent action in the interests of protecting and preserving human rights.

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<sup>12</sup> Here, a 'transcendent' or 'quasi-transcendent' quality might be thought to refer to the way in which a concept is raised to a level where it surpasses or reigns supreme over all others. In some cases, a concept might be elevated to a near-religious level, in the sense that it is drawn upon rhetorically to legitimate earthly action. Some 'secular' concepts such as peace, freedom and human rights are sometimes elevated in this manner, and the way in which some politicians (and some critics) speak about them is strikingly religious.

<sup>13</sup> Whether human rights operate as a 'legal' or a 'moral' justification for war is a question of dispute by international lawyers: see, eg. Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (1988); Mervyn Frost, *Towards a Normative Theory of International Relations* (1986); Alexander Moseley and Richard Norman (eds), *Human Rights and Military Intervention* (2002).

<sup>14</sup> *UN Charter* art 42.

<sup>15</sup> *Ibid* art 24(2).

Given the emphasis on the importance of human rights under the *UN Charter*<sup>16</sup> and subsequent declarations such as the *Universal Declaration of Human Rights*,<sup>17</sup> the notion of human rights has emerged as a powerful justification for the ordering of international legal and moral action. In terms of this justification, the *UDHR* does not mince words. It states quite strongly that the recognition of the 'inherent dignity' and 'equal and inalienable rights of all members of the human family' constitutes the 'foundation of freedom, justice and peace in the world'.<sup>18</sup> What helps to render this justification 'quasi-legal or moral' is the emerging use of the notion of human rights by international military alliances or 'coalitions' of states as a justification for carrying out war. Thus the notion of human rights emerges as a 'quasi-legal or moral' justification for acts of war which might otherwise be seen as acts of state aggression and therefore contrary to international law. Two recent cases where this notion was invoked were the bombing of Yugoslavia (Serbia and Kosovo) by the North Atlantic Treaty Organisation in 1999 and the invasion of Iraq by the United States and the United Kingdom (and their allies) in 2003.<sup>19</sup>

In these cases, the notion of human rights was attached to the ideals of peace and security as a justification for the act of war.<sup>20</sup> In one sense, it operates as a form of right higher than state sovereignty — one which transcends traditional legal limitations of international law and legitimates aggressive war. Human rights emerge as a justification which is no longer attached to sovereign territory. Such a moral justification argues that a particular war is not fought for state interest, rather it is carried out in the defence and preservation of 'humanity'. However, for those who must face and suffer from this violence, a war in the name of humanity may appear, more accurately, as terror in the name of human rights.

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<sup>16</sup> *Ibid* preamble, arts 1, 55.

<sup>17</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/RES/217A (III) (10 December 1948) ('*UDHR*').

<sup>18</sup> *Ibid* preamble.

<sup>19</sup> See, eg, Javier Solana, Secretary General of NATO, 'Press Statement on Decision to Initiate Air Operations over Federal Republic of Yugoslavia' (Press Release, 23 March 1999), available at <<http://www.nato.int/docu/pr/1999/p99-040e.htm>> at 22 May 2006; UK, *Parliamentary Debates*, House of Commons, 18 March 2003, vol 401, column 760 (Tony Blair, Prime Minister).

<sup>20</sup> In the case of Iraq, the notion of human rights was claimed as 'one' justification among 'many'. The argument that it was a war carried out in the name of human rights perhaps initially appeared secondary to the argument regarding the threat to peace via the existence of 'weapons of mass destruction' and 'imminent threat'. Given the failure of the occupying forces to find any such weapons, the language of justification for the occupation has now shifted to give greater emphasis to the notion of human rights, 'freedom', and 'democracy'. Compare the language of Colin Powell's speech to the UN Security Council in 2003 with that of George W Bush's speech in 2005: Colin Powell, 'Statement in the Security Council on Iraq' (Address delivered to UN Security Council, New York, US, 5 February 2003), available at <<http://www.un.int/usa/03clp0205.htm>> at 22 May 2006; George W Bush, 'President's Address to the Nation' (Washington DC, US, 18 December 2005), available at <<http://www.whitehouse.gov/news/releases/2005/12/20051218-2.html>> at 22 May 2006.

This movement within international law opens onto 'war's moral problem'.<sup>21</sup> The radical moral demand to eliminate war and to realise the dignity of humanity is transformed into its opposite: a war that tramples upon human rights and moves humanity ever further away from the ideal of peace. Further, the linking of the moral demand to the justification for war leads into a problem of judgement. The moral justification for war leads to the possibility of a number of different, competing actors, all claiming the legitimacy of *their war* in the name of peace, security and human rights. Such a war justified by a 'quasi-legal or moral' demand runs into the difficulty of legal and moral judgement — deciding between those who are acting to secure the interest of peace and humanity, and those who are merely using these concepts as a means of legitimising a war to further political and economic interests. War's moral problem turns on the issue of (mis)recognising genuine and non-genuine moral actors.

There is, however, another level of difficulty within war's moral problem. The attaching of a moral concept such as human rights to the justification of war turns the structure of the conflict into a struggle within a 'conceptual' realm of 'right' and 'justice'. A war in the name of human rights, or in the name of the adjoining concepts of human dignity, freedom and justice, leads to the possibility of war occurring as a struggle over the *content* of these concepts themselves. What perhaps makes this violence more destructive is the fact that the struggling participants may genuinely believe in the moral legitimacy of their violence; that their violence is carried out in accordance with a higher concept of right, which demands immediate realisation in the present. This opening of war's moral problem is not easily put to rest by either moral or legal ordering.

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<sup>21</sup> One early observer of this movement was Schmitt: see Carl Schmitt, *The Concept of the Political* (George Schwab trans, 1996 ed) [trans of: *Der Begriff des Politischen*]. Schmitt argued:

If pacifist hostility toward war were so strong as to drive pacifists into a war against nonpacifists, in a war against war, that would prove that pacifism truly possesses political energy because it is sufficiently strong to group men according to friend and enemy. If, in fact, the will to abolish war is so strong that it no longer shuns war, then it has become a political motive, i.e., it affirms, even if only as an extreme possibility, war and even the reason for war. Presently this appears [as a particular] way of justifying wars. The war is then considered to constitute the absolute last war of humanity. Such a war is necessarily unusually intense and inhuman because, by transcending the limits of the political framework, it simultaneously degrades the enemy into moral and other categories and is forced to make of him a monster that must not only be defeated but also utterly destroyed. In other words, he is an enemy who no longer must be compelled to retreat into his borders only: at 36.

Schmitt further argued that:

When a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its military opponent. At the expense of its opponent, it tries to identify itself with humanity in the same way as one can misuse peace, justice, progress, and civilization in order to claim these as one's own and to deny the same to the enemy: at 54.

This critique is also taken up in Costas Douzinas, 'Postmodern Just Wars: Kosovo, Afghanistan and the New World Order' in John Strawson (ed), *Law after Ground Zero* (2002) 20. Note that whilst a number of insights of Schmitt are drawn upon at various moments in this paper, the general argument is not 'Schmittian'. I do not consider that the political theory of Schmitt offers any feasible solutions to the question of war/terror or to war's moral problem.

## III WAR AND MORAL JUDGEMENT

There is something of a parallel between the moral treatment of war under contemporary international law and the approach of Kantian moral philosophy to the figure of war. For some, the insights of Kantian moral philosophy provide a guide to the difficulties raised by war under contemporary international law.<sup>22</sup> Looking briefly at Kant's approach to war will help to show how that which occurs for international law as war's moral problem is more deeply grounded in a tradition of European moral philosophy and in a philosophical tradition which attempts to reconcile the radical demand of morality and its relation to violence. In this attempt, the Kantian tradition is important.

Kant's approach to the problem of war can be seen as a radical moment within a natural law tradition, as it condemned the occurrence of war and attempted to morally order the relations between states. In 'Idea for a Universal History with a Cosmopolitan Purpose'<sup>23</sup> and in 'Perpetual Peace: A Philosophical Sketch',<sup>24</sup> Kant condemned the act of war and located the notion of peace within the wider frame of moral duty. Further, Kant drew upon a notion of 'cosmopolitan right', which occurred as a defence of human rights against incursions by the state.<sup>25</sup> Kant inherited this old Stoic notion as an enlightenment ideal.<sup>26</sup> For Kant, the concept of cosmopolitan right operated as an educative and political principle; as a way of thinking of one's identity beyond nationality and patriotism, and in terms of being a citizen of the world.<sup>27</sup> In many ways, both Kant's condemnation of war and the moral demand that states organise

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<sup>22</sup> The 'Kantian' or 'cosmopolitan' approach to international law and international relations is today a relatively popular one. See generally Otfried Höffe, 'Humanitäre Intervention? Rechtsethische Überlegungen' in Dieter Janssen and Michael Quante (eds), *Gerechter Krieg* (2003) 139; Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2002); Norberto Bobbio, *Liberalism and Democracy* (Martin Ryle and Kate Soper trans, 1990 ed) [trans of: *Liberalismo e Democrazia*]; Fernando Tesón, *A Philosophy of International Law* (1998); Charles Covell, *Kant and the Law of Peace: A Study in the Philosophy of International Law and International Relations* (1998); Georg Cavallar, *Kant and the Theory and Practice of International Right* (1999); James Bohman and Matthias Lutz-Bachmann (eds), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (1997); Sharon Anderson-Gould, *Cosmopolitanism and Human Rights* (2001); Kimberly Hutchings and Roland Dannreuther (eds), *Cosmopolitan Citizenship* (1999); David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (1995); Derek Heater, *World Citizenship and Government: Cosmopolitan Ideas in the History of Western Political Thought* (1996); Daniele Archibugi and David Held (eds), *Cosmopolitan Democracy: An Agenda for a New World Order* (1995); Daniele Archibugi, David Held and Martin Köhler (eds), *Re-Imagining Political Community: Studies in Cosmopolitan Democracy* (1998); Pheng Cheah and Bruce Robbins (eds), *Cosmopolitics: Thinking and Feeling beyond the Nation* (1998).

<sup>23</sup> Immanuel Kant, 'Idea for a Universal History with a Cosmopolitan Purpose' (H B Nisbet trans, 1991 ed) [trans of: *Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*] in Hans Reiss (ed), *Kant: Political Writings* (2<sup>nd</sup> ed, 1991) 41.

<sup>24</sup> Immanuel Kant, 'Perpetual Peace: A Philosophical Sketch' (H B Nisbet trans, 1991 ed) [trans of: *Zum ewigen Frieden. Ein philosophischer Entwurf*] in Hans Reiss (ed), *Kant: Political Writings* (2<sup>nd</sup> ed, 1991) 93.

<sup>25</sup> Kant's notion of 'hospitality' can be read as a critique of European colonialism: see *ibid* 105–8.

<sup>26</sup> Daniele Archibugi, 'Immanuel Kant, Cosmopolitan Law and Peace' (1995) 1 *European Journal of International Relations* 429, 441.

<sup>27</sup> Martha Nussbaum, 'Patriotism and Cosmopolitanism' in Joshua Cohen and Martha Nussbaum (eds), *For Love of Country?* (2002) 3, 7.

themselves to secure peace and human rights anticipated many of the developments in international law that have occurred throughout the 20<sup>th</sup> century.

Kant argues that ‘reason, as the highest legislative moral power, absolutely condemns war as a test of rights and sets up peace as an immediate duty’.<sup>28</sup> He states:

The concept of international right becomes meaningless if interpreted as a right to go to war. For this would make it a right to determine what is lawful not by means of universally valid external laws, but by means of one-sided maxims backed up by physical force. It could be taken to mean that it is perfectly just for men who adopt this attitude to destroy one another, and thus to find perpetual peace in the vast grave where all the horrors of violence and those responsible for them would be buried.<sup>29</sup>

Kant’s principle of ‘action in accordance with duty’, as set forth in *Groundwork of the Metaphysics of Morals*,<sup>30</sup> can be seen to lay a basis for the demand that states subject their actions to a universal moral law.<sup>31</sup> In this respect, the problem of war is framed by Kant as a problem of individual moral conviction and moral duty. In considering the notion of moral duty within the sphere of interstate relations, Kant drew attention to two contrasting figures: the ‘moral politician’ and the ‘political moralist’. The former conceives the principles of political expediency in such a way that they conform with morality and practical reason. The latter ‘fashions his morality to suit his own advantage as a statesman’.<sup>32</sup>

One argument given by Kant is that a lack of peace in the world results from the political moralist making its moral principles subordinate to political ends.<sup>33</sup> Peace<sup>34</sup> can only be secured by politicians becoming moral politicians who follow the formal principle: ‘Act in such a way that you can wish your maxim to become a universal law (irrespective of what the end in view may be)’.<sup>35</sup> This moral duty involves the demand to institute some form of higher law or political–juridical order, standing above states. Kant argues that peace cannot be inaugurated or secured without a general agreement between nations. Hence, a particular kind of ‘league’ is required, a ‘pacific federation’ (*foedus pacificum*) that would seek to end all wars for good.<sup>36</sup> In ‘The Metaphysics of Morals’,<sup>37</sup>

<sup>28</sup> Kant, ‘Perpetual Peace’, above n 24, 104.

<sup>29</sup> Ibid 105.

<sup>30</sup> Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor trans, 1998 ed) [trans of: *Grundlegung zur Metaphysik der Sitten*]. This refers to what is commonly known as the ‘categorical imperative’, involving the injunction to ‘[a]ct only in accordance with that maxim through which you can at the same time will that it become a universal law’: at 31. Thus it requires that we ‘[s]o act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means’: at 38.

<sup>31</sup> Kant, ‘Perpetual Peace’, above n 24, 103–4.

<sup>32</sup> Ibid 118.

<sup>33</sup> Ibid 121.

<sup>34</sup> Note that Kant has a parallel argument for the development of human peace based upon a conception of human anthropology and a notion of ‘providence’: see Kant, ‘Idea for a Universal History’, above n 23, 53.

<sup>35</sup> Kant, ‘Perpetual Peace’, above n 24, 122.

<sup>36</sup> Ibid 104.

<sup>37</sup> Immanuel Kant, ‘The Metaphysics of Morals’ (H B Nisbet trans, first published 1970, 1991 ed) [trans of: *Die Metaphysik der Sitten*] in Hans Reiss (ed), *Kant: Political Writings* (2<sup>nd</sup> ed, 1991) 131.

Kant argues that the idea of a perpetual peace occurring through mutual international agreement is something of an impossibility, ‘an idea incapable of realisation’.<sup>38</sup> However, he argues that the ‘political principles’<sup>39</sup> that share the same aim are not impracticable.<sup>40</sup> These attempts would be situated within the movement from a state of war<sup>41</sup> to a state of juridical order — or perhaps, by extension, to a state of international law.

One difficulty that arises within Kant’s approach is the means by which a juridical order might be realised. As the operation of alliances or congresses is still situated within the state of war, the moral effort to realise the goal of peace may come under threat. In the face of such a threat, moral actors may be forced to carry out war. In one sense, this moral legitimisation of war is generally limited by Kant to the instance of self-defence and does not broadly legitimate an aggressive war aimed at forcing states to accept international law.<sup>42</sup> However, for Kant, while states exist within a state of war, they live under the constant ‘threat’ of aggressive war breaking out.<sup>43</sup> Moral duty demands that this threat be removed, and that a political–juridical order that guarantees peace be established.<sup>44</sup> Kant argues:

Thus the state of peace must be *formally instituted*, for a suspension of hostilities is not in itself a guarantee of peace. And unless one neighbour gives a guarantee to the other at his request (which can happen only in a *lawful* state), the latter may treat him as an enemy.<sup>45</sup>

In a footnote to this passage, Kant notes that when parties live in a ‘legal civil state’, it is generally assumed that one cannot take hostile action against another unless one has been injured by them.<sup>46</sup> However, he argues that within the state of nature one party causes injury to another by the very lawlessness of the first party’s existence — its lawless existence is a permanent threat.<sup>47</sup> In this respect, Kant argues that while no ‘active injury’ has taken place, one party can demand that the other enter into a lawful state, or move away from the vicinity.<sup>48</sup>

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<sup>38</sup> Ibid 171.

<sup>39</sup> For example, political action guided by the moral insights of practical reason and the categorical imperative.

<sup>40</sup> Kant, ‘The Metaphysics of Morals’, above n 37, 171.

<sup>41</sup> Kant, ‘Perpetual Peace’, above n 24, 98. On Kant’s account being situated between a state of war and a state of nature, see Patrick Capps, ‘The Kantian Project in Modern International Legal Theory’ (2001) 12 *European Journal of International Law* 1003. This is Kant’s argument and is not, of course, a statement of fact about the world. Whether ‘perpetual peace’ will be realised in the world remains to be seen. What is relevant here is that Kant (and many others) placed hope in the possibility of world peace and that this hope gives a particular incentive and direction to human action.

<sup>42</sup> Kant, ‘Perpetual Peace’, above n 24, 98. See also Kant, ‘The Metaphysics of Morals’, above n 37, 116–18.

<sup>43</sup> Ibid 98.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid (emphasis in original) (citations omitted).

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

Whether this points to a moral legitimation of aggressive war is unclear.<sup>49</sup> However, it is apparent that Kant's argument runs into the difficulty of determining the limits of a moral legitimation of violence based upon the indeterminacy of the notions of 'self-defence' and 'threat' — notions that continue to trouble international law and international relations.<sup>50</sup>

In such a manner, Kant's account runs into war's moral problem. The moral condemnation of war and the establishment of the goal of peace leads to the contradictory situation of a war being fought against war: a war against war, or a war for peace. In the situation where states are attempting to realise or defend an international juridical order, a war carried out by an alliance of 'enlightened states' could be considered as a moral duty. However, once morality is tied to the justification of state action, this gives rise to disputes between states over the question: 'Who is the legitimate moral actor?'<sup>51</sup> This is a dispute over the question of who is a moral politician and who is merely a political moralist.

How might the Kantian approach deal with war's moral problem? One possibility involves that which might be termed a process of moral ordering whereby the actions of states need to be judged by the standards of a universal moral law. This occurs as a moment of self-judgement, and as the moral judgement of states by their others. Another possibility involves the operation of a functioning international law that can provide objective legal judgement over disputing states. Following contemporary developments in international law, Kantians such as Jürgen Habermas see something of a solution in this latter position. For Habermas, the dispute between moral claimants and the 'moralisation' of war may be resolved by the establishment of a 'real' international law that is not reliant upon the political decisions of states, and that can render objective legal judgement backed by independent force.<sup>52</sup> However, short of this realisation in the present, in the face of war Habermas is forced to revert to the first option, that of state action carried out in accordance with moral duty.

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<sup>49</sup> Given the tone of Kant's writings on peace, it is doubtful whether he would have condoned acts of aggressive war under his moral framework. Yet aggression, when understood as 'preventive' self-defence undertaken in cases of 'emergency', complicates a Kantian condemnation of aggressive war.

<sup>50</sup> What is at issue here is the difficulty that occurs within Kant's moral reasoning about war, and the way in which the difficulties in this moral reasoning shed light upon similar difficulties found within international law.

<sup>51</sup> Note Kant's reference to the notion of the 'unjust enemy' and his awareness of the problematic nature of such a concept: see Kant, 'The Metaphysics of Morals', above n 37, 170.

<sup>52</sup> Jürgen Habermas, 'Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight' in James Bohman and Matthias Lutz-Bachmann (eds), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (1997) 113. Habermas argues:

Establishing a cosmopolitan order means that violations of human rights are no longer condemned and fought from a moral point of view in an unmediated way, but are rather prosecuted as criminal actions within a framework of a state-organized legal order according to institutionalized legal procedures. Precisely such a juridification of the state of nature among states would protect us from a moral de-differentiation of law and would guarantee to the accused full legal protection, even in cases of war crimes and crimes against humanity: at 140.

As illustrated by Habermas' defence of the NATO bombing of Yugoslavia (Serbia and Kosovo) in 1999,<sup>53</sup> such a solution is highly problematic. This is due to the difficulty of separating the political and economic interests of a state (or a group of states) from its 'moral' actions. When an aggressive war is linked to the defence of peace and human rights, the attempt to morally order war runs the risk of merely offering 'sorry comfort' to some acts of violence while condemning others. Thinkers such as Habermas<sup>54</sup> and Jacques Derrida<sup>55</sup> are not unaware of the difficulties faced by the Kantian or cosmopolitan position when it runs into war's moral problem. Unfortunately, other thinkers do remain somewhat unaware of the extent of war's moral problem and its consequences.<sup>56</sup>

#### IV ONE CRITIQUE OF MORAL ORDERING

At first instance, the suggestion that states should act in accordance with moral duty and coordinate their acts by reference to the notions of peace and human rights does not appear unreasonable. The argument might be thought of as the 'moral common sense' of our times. Yet, the moral ordering of state action is not unproblematic and the suggestion that states subject their action to a universal moral law guided by peace and human rights runs into difficulty. In one sense, the attempt to order or organise state action through the development of a formal rule or maxim runs up against the 'concrete' — the various social, cultural, ethical, political and economic interrelations and mediations that orientate human life and occur as a process through which the diversity of human life gains meaning, generates belief and orientates human action. Here, some elements of Hegel's critique of Kantian morality are relevant.

For Hegel, the determination of universal maxims for moral action needs to be understood as being formulated by living, mediated, social beings who have an interrelated existence as *Geist* (spirit)<sup>57</sup> and who gain their ethical orientation through *Sittlichkeit* (ethical life).<sup>58</sup> In this sense, the attempt to formulate

<sup>53</sup> Jürgen Habermas, 'Bestialität und Humanität: Ein Krieg an der Grenze zwischen Recht und Moral', *Die Zeit* (Hamburg, Germany), 29 April 1999, available at <[http://www.zeit.de/archiv/1999/18/199918.krieg\\_.xml](http://www.zeit.de/archiv/1999/18/199918.krieg_.xml)> at 22 May 2006.

<sup>54</sup> Habermas, 'Kant's Idea of Perpetual Peace', above n 52, notes:

The politics of human rights undertaken by a world organization turns into a fundamentalism of human rights only when it undertakes an intervention that is really nothing more than the struggle of one party against the other and thus uses a moral legitimation as a cover for a false juridical justification: at 147.

<sup>55</sup> See Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning, and the New International* (Peggy Kamuf trans, 1994 ed) [trans of: *Spectres de Marx*]; Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Mark Dooley and Michael Hughes trans, 2001 ed) [trans of: *Cosmopolites de tous les pays, encore un effort!*].

<sup>56</sup> See, eg, John Rawls, *The Law of Peoples* (1999).

<sup>57</sup> Here, the Hegelian term 'spirit' (*Geist*) is being used in a particular sense to denote a character of an individual's 'being' that is comprised not only of an individual's corporeal body, but also an individual's 'social being': the cultural, ethical and linguistic human interrelations through which every human individual is constituted, and which every human individual may claim as part of his or her wider self. 'Spirit' should not be confused with a notion of community, but rather denotes not only the creative, reflexive and ongoing processes through which a human individual comes to be, but also the cognitive and ethical standpoint that arises when an individual begins to comprehend his or her multiple layers of spiritual-social being and the conflicts contained therein.

<sup>58</sup> Usually translated as 'ethical life', Hegel's term *Sittlichkeit* can be understood to designate the socio-cultural complex sometimes termed 'a form of life'.

universal maxims to guide human moral behaviour must be seen to take place within a world of ongoing contradictions, where conceptions of humanity, dignity and right are not fixed but occur within a constant *process* involving the movement of culture, legal forms, material-economic relations, history, and artistic, religious and philosophical reflection. In the ongoing process of spirit, any formulation of a moral universal occurs as one moment in time of spirit's self-judgement.

Kant's argument is not completely unaware of a world of differing ethical and political norms and values, and in his 'The Metaphysics of Morals',<sup>59</sup> Kant situates moral judgement within the state and in a sense, within something that might come close to a Hegelian notion of *Sittlichkeit*.<sup>60</sup> Further, the Kantian position is not unaware of the many contradictions occurring within everyday life and of the need for critical thinking to sift this into some form of moral-conceptual order. As Onora O'Neill notes:

Practical judgement is *always* a matter of finding a way of achieving a range of aims and objectives while conforming to a plurality of principles of duty, and of so doing so while taking account of the varied realities and vulnerabilities of human life.<sup>61</sup>

Hegel's critique that Kantian morality is an 'empty formalism'<sup>62</sup> certainly rides roughly over some of the subtleties of Kant's approach. However, Hegel's critique, developed through the theory of (mis)recognition, points to a number of limitations of Kantian moral reasoning, and develops an account of ethics that is substantively different to Kant's.<sup>63</sup> One focus within the Hegelian approach is upon the formation of universals within human thought determinations, which, for Hegel, proceed from the abstract to the concrete through a process that involves error, mistake and conflict. Generally, a Kantian approach views practical reason as determining a set of universal, regulative ideals to which the world, through human action, ought to be made a closer approximation. Hegel's account resists this Kantian deontology, and sees the operation of practical reason as situated within a process of inter-subjective (mis)recognition, through which concrete universals are produced. Practical reason cannot determine absolutely how the world ought to be, because any thought determination necessarily involves limit and error. For Hegel, if we are to grasp ethical

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<sup>59</sup> Kant, 'The Metaphysics of Morals', above n 37.

<sup>60</sup> See Otfried Höffe, *Immanuel Kant* (Marshall Farrier trans, 1994 ed) 169–91 [trans of: *Immanuel Kant*].

<sup>61</sup> Onora O'Neill, 'Instituting Principles: Between Duty and Action' in Mark Timmons (ed), *Kant's Metaphysics of Morals: Interpretive Essays* (2002) 331, 338 (emphasis in original).

<sup>62</sup> G W F Hegel, *Elements of the Philosophy of Right* (H B Nisbet trans, 1991 ed) § 135 [trans of: *Grundlinien der Philosophie des Rechts*].

<sup>63</sup> The strength and validity of Hegel's critique of the 'empty formalism' of Kant's theory of moral duty is contested within the Hegel literature. My own view is that there remains a substantive difference between Kantian and Hegelian ethical approaches and that a Hegelian account focussed upon concrete universals and a praxis of recognition is a better approach than that offered by Kantian deontology. For discussions of Hegel's critique of Kant, see Allen Wood, *Hegel's Ethical Thought* (1990); Robert Pippin, *Idealism as Modernism: Hegelian Variation* (1997) chs 2–5; Paul Franco, *Hegel's Philosophy of Freedom* (1999); Shlomo Avineri, *Hegel's Theory of the Modern State* (1972); Michael Hardimon, *Hegel's Social Philosophy: The Process of Reconciliation* (1994).

standpoints, we need to come to terms with their concrete, mediated and thick<sup>64</sup> contents, which have developed through the errors, conflicts and corrections of many thought determinations within the process of (mis)recognition. In a Hegelian sense, ethics occurs as a 'praxis of recognition'.

One account of Hegel's notion of recognition (*Anerkennung*) is given in *Phenomenology of Spirit*.<sup>65</sup> This process, which can be termed the process of (mis)recognition, can be understood to stretch through much of Hegel's system,<sup>66</sup> including the *Elements of the Philosophy of Right*.<sup>67</sup> The process of (mis)recognition also occurs within Hegel's account of the relations between states.<sup>68</sup> Hegel's account of (mis)recognition helps to show how Kant's attempt to determine universal principles for moral action remains problematic. By focussing upon how a 'universal'<sup>69</sup> is produced between two figures (two self-consciousnesses), the process of (mis)recognition points to the limitations of the Kantian attempt to morally order the actions of individuals and states. Further, the process shows the way in which the attempt to determine a moral universal leads not only to dispute, but also, at times, to the inability of the disputing parties to successfully mediate their claims. Such dispute may be considered a healthy aspect of public discourse. However, when extended to the sphere of international political action, public debate over the content of a universal may shift quickly into public violence.

For Hegel, self-consciousness, or the 'I', is something which is produced in a creative process via the mediation and interrelation of human individuals.<sup>70</sup> The

<sup>64</sup> The sense of 'thickness' here refers to a concept or standpoint which is understood as having a mediated content.

<sup>65</sup> G W F Hegel, *Phenomenology of Spirit* (Arnold Miller trans, 1977 ed) [trans of: *Phänomenologie des Geistes*].

<sup>66</sup> For differing accounts of the process of (mis)recognition, see Jürgen Habermas, *Theory and Practice* (John Viertel trans, 1988 ed) [trans of: *Theorie und Praxis*]; Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Joel Anderson trans, 1995 ed) [trans of: *Kampf um Anerkennung*]; Robert Pippin, *Hegel's Idealism: The Satisfaction of Self-Consciousness* (1989); Terry Pinkard, *Hegel's Phenomenology: The Sociality of Reason* (1994) chs 5, 7; Michael Theunissen, *Sein und Schein: die kritische Funktion der Hegelschen Logik* (1978); Peter Dews, *The Limits of Disenchantment: Essays on Contemporary European Philosophy* (1995); Hans Küng, *The Incarnation of God: An Introduction to Hegel's Theological Thought as a Prolegomena to a Future Christianity* (John Stephenson trans, 1987 ed) [trans of: *Menschwerdung Gottes*].

<sup>67</sup> See generally Robert Williams, *Hegel's Ethics of Recognition* (1997) chs 6–15; Michael Theunissen, 'The Repressed Inter-Subjectivity in Hegel's Philosophy of Right' in Drucilla Cornell, Michael Rosenfeld and David Carlson (eds), *Hegel and Legal Theory* (1991) 3; Robert Pippin, 'What Is the Question for which Hegel's Theory of Recognition Is the Answer?' (2000) 8 *European Journal of Philosophy* 155.

<sup>68</sup> Hegel, *Elements of the Philosophy of Right*, above n 62, §§ 331, 338.

<sup>69</sup> A 'universal' is a concept that is inter-subjectively recognised as having a shared meaning. The production of universals occurs within societies, traditions and institutions. Extended from language, a universal may be thought to involve a whole range of social signifiers and further, contents of concepts, the particularity of which gain a value or validity generally endorsed by individuals, groups or states over time. It is often argued that the notion of human rights have universal validity across humanity. Such a particular notion of right (a legal-moral concept) the content of which is drawn from Anglo-European traditions can be thought to have been brought into a position of universal validity through being constantly affirmed and recognised by individuals, states and legal systems. Actors who refuse to recognise human rights can be thought to challenge the universality of human rights and assert another form or content of right in its place.

<sup>70</sup> Hegel, *Phenomenology of Spirit*, above n 65, § 174.

coming to an awareness of itself as a *process* of being constituted *through* that which is other than it (the not 'I') — a process of coming to know itself, or *re-cognising* its self-conception — is termed the process of recognition. For Hegel, only as self-consciousness becomes aware of *how* its 'I' is constituted can its self-conception gain a universal validity.<sup>71</sup>

In this process, self-consciousness comes into confrontation with objects in the world, including objects which occur as another self-consciousness. For self-consciousness to attain a conception of itself that has a 'universal' validity, it must come to see that what stands before it as an object is also a self-conscious subject and that itself, the 'I', occurs as an object for another. Through this, self-consciousness may come to comprehend itself, the 'I', as both an object for itself and for another.<sup>72</sup> In this respect, self-consciousness comes to see the universal as a concrete universal, occurring as the mediation of self-consciousness in a self-reflective, ongoing, dialectical process through a subject-object relation. For Hegel the universal is a product of mediation, and self-consciousness is experienced in the recognition of the "'I'" that is "We" and "We" that is "I".<sup>73</sup> For Hegel, the concept of self-consciousness comes to be understood as a process and as a result of self-reflection and mediation, where the concept of self-consciousness can be understood through the broader concept of spirit (*Geist*).

Importantly, this process also involves a moment of *mis*-recognition. In this moment of failure, or slippage, self-consciousness is unable to or refuses to recognise itself through the other, and that which occurs as a universal is only a universal 'for it'. The 'mis' of (mis)recognition is not simply a selfishness or self-centredness. Rather, it occurs as the expression of the limits of human cognition — the inability of the finite mind to grasp the infinite nature of its fully mediated, concrete self.<sup>74</sup> This might be thought to occur in the sense that human thinking cannot grasp the whole (the infinite set of mediations and interrelations within the universe),<sup>75</sup> but only fragile, weak, limited moments of itself in its relations to its many others.

However, in the process of (mis)recognition, human thinking takes its weak, limited conception of itself in relation to the world and transforms it into

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid § 177.

<sup>73</sup> Ibid. This 'We' could also be thought of as a cosmopolitan 'We', or the 'We' of humanity, yet in the Hegelian conception this occurs as a product or a result of the process of recognition between parties. In merely asserting this 'We' from one side, an actor's conception would remain abstract and would result in a mis-recognition of the other party. The genuine 'We' could occur only in a radical, dialectical process where the coordinates of self-knowledge are shifted and transcend their previous limitations to encompass a broader or 'thicker' conception of their ethical position in the world.

<sup>74</sup> This interpretation should be differentiated from that given by Kojève, who interprets the process of (mis)recognition in more of an anthropological sense: see Alexandre Kojève, *Introduction to the Reading of Hegel* (James Nicholas trans, 1980 ed) [trans of: *Introduction à la lecture de Hegel*]. The interpretation should also be differentiated from the 'Lacanian' interpretation given by Žižek: see Slavoj Žižek, *The Sublime Object of Ideology* (1989); Slavoj Žižek, *Tarrying with the Negative: Kant, Hegel and the Critique of Ideology* (1993) chs 5–6.

<sup>75</sup> There is a hermeneutical aspect involved in Hegel's process of (mis)recognition. On this aspect, see Hans-Georg Gadamer, *Hegel's Dialectic: Five Hermeneutical Studies* (Christopher Smith trans, 1976 ed) [trans of: *Hegel's Dialektik*]; Paul Redding, *Hegel's Hermeneutics* (1996).

something strong — a conception of truth or value, or a substantial ground upon which thinking believes that it stands firmly. This moment of mis-recognition<sup>76</sup> functions as a naive or limited self-certainty of self-consciousness, a self-positing which is maintained as ‘certainty’ through the negation of its others, which otherwise compromise or contradict it.<sup>77</sup> This conception can be thought of as ‘abstract’ in the sense that it denies or remains unaware of its constitution as a process of mediation through the ‘concrete’ — a process of ongoing mediated relations.

At this point, for Hegel, the struggle between purely abstract or subjectively produced ‘universals’ over self-certainty becomes a struggle over the truth and validity of life and existence itself.<sup>78</sup> The existence of the non-recognised or mis-recognised other occurs as a contradiction which places under threat the abstract universal of self-consciousness. In Hegel’s account, this opposition leads to a struggle in which each self-consciousness attempts to negate the other’s existence as a contradiction, and a relation of mastery and slavery (*Herrschaft* and *Knechtschaft*) in which one subjectivity’s conception of itself is brought into prominence or dominance by force.<sup>79</sup> Understood in this wider framework, Hegel’s theory of (mis)recognition can be seen as the ongoing and dialectical process whereby spirit (*Geist*) contains both the successful moment of recognition and the unsuccessful moment of mis-recognition. This broader concept might be thought of in terms of spirit’s (mis)recognition of itself, and comes to play an important role in Hegel’s conception of the state as ‘objective spirit’ (*Der objektive Geist*), in which abstract right, morality and ethical life are situated.<sup>80</sup> Following this reading, the relation between states and their moral ordering might be conceptualised through the theory of (mis)recognition.

At the level of the interstate relation, the development of a universal law and a set of universally shared customs and values could be seen to take place through a process of successful interstate recognition.<sup>81</sup> Here, the attempt of the Kantian ‘moral politicians’ to act in accordance with a moral universal occurs through the successful moments of acknowledgement and recognition of their many others in forming the content of any universal law. However, the situation becomes problematic where states and political and cultural bodies recognise themselves and their own ethical content (*Sittlichkeit*) as an already fully internally-mediated, concrete universal. In such a situation, the act of the ‘moral politician’ in determining a universal might be seen as a mis-recognition of its others wherein its self-conception relates to its others in purely negative terms. In

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<sup>76</sup> There is a something of a similarity between this moment of (mis)recognition and Hegel’s comments on the ‘understanding’ (*Verstand*) in the ‘Little Logic’, found in G W F Hegel, *The Encyclopaedia Logic (with the Zusätze): Part I of the Encyclopaedia of Philosophical Sciences with the Zusätze* (Theodore Geraets, Wallis Suchting and Harry Harris trans, 1991 ed) §§ 79–82 [trans of: *Encyclopädie der philosophischen Wissenschaften. Teil I, Wissenschaft der Logik*].

<sup>77</sup> Hegel, *Phenomenology of Spirit*, above n 65, § 186.

<sup>78</sup> *Ibid* § 187.

<sup>79</sup> *Ibid* §§ 187–8.

<sup>80</sup> Hegel, *The Encyclopaedia Logic*, above n 76, §§ 483–552.

<sup>81</sup> Hegel, *Elements of the Philosophy of Right*, above n 62, §§ 333–9.

this sense, the other occurs as merely a contradiction and a threat to that which is understood by each party as the content of 'universal'.<sup>82</sup>

At particular moments within the interstate relation, the determination of a mediated content of the universal cannot be produced through debate, or discourse, or through the varied attempts of each state or actor to see into the other. Rather, through the assertion of the 'mis' of mis-recognition, the various actors remain blind to the temporal, limited and particular content of their moral universal. In other words, each party's conception of the moral universal remains one-sided, in the sense that each understands the production of the universal to be a result of only their own thinking. Instead of enlightened debate, what occurs is violent conflict over the content of the universal whereby each party, genuinely carrying out their action in accordance with moral duty, is driven to force the other to acknowledge the universality of its moral demand.

In such a situation, the cause of violence may have little to do with the distinction between 'political moralists' and 'moral politicians'. Conceivably, the parties might be attempting to act morally, yet the demand that they should act more morally cannot resolve the ongoing violence. The 'mis' of mis-recognition asserts itself as the temporal impossibility of recognising the other and of producing a universal with a valuable, mediated content. In this sense, when framed in terms of a process of (mis)recognition, the Kantian argument that politicians should act in accordance with a universal moral duty, and the argument within the normative force of international law that action should be coordinated by the universal demands of peace and human rights, may be seen to fall into difficulty. In many ways, the moral or legal demand or claim couched in the language of universal values may lead to one party attempting to force this 'universality' upon its others; to demand recognition of a legal or moral claim through the threat and use of violence. In this sense, what might be seen to arise within universal moral and legal claims is the chance of a mis-recognition of the other and an ensuing violent struggle for recognition over the *content* of peace, law and human rights. This might be thought of as a violent struggle over the content of right itself, whereby each party sees itself fighting a war and killing others in the genuine struggle for human dignity.

This process of (mis)recognition, understood as a series of violent struggles over moral and legal content, occurs both practically and theoretically as the contemporary version of war's moral problem. The power of the moral demand — the radical, futural pull of an unrealised human dignity which is 'not yet'<sup>83</sup> — characterises an element of the contemporary 'normative force of law', which renders war in the name of human rights romantically seductive and politically dangerous. These two interrelated frames — the normative operation of contemporary international law and Kantian moral philosophy — are both led into, and seem unable to fully come to terms with, war's moral problem. This problem has threatened and continues to threaten to explode into a global

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<sup>82</sup> Ibid §§ 321, 323–4. Note that Hegel has a particular critique of Kant's moral demand for peace. Part of this involves a certain 'ethical' value of war and the relation between war and the ethical 'health' of the state: *ibid* § 324. While I will not deal with this element of Hegel's critique here, it can be noted that it is bound up with Hegel's account of interstate (mis)recognition.

<sup>83</sup> This term is taken from Bloch. See the discussion below in Part V.

struggle (or series of struggles) of (mis)recognition over the content of human dignity.

## V THE GLOBAL STRUGGLE FOR HUMAN DIGNITY

In principle, few would deny the importance and significance of the role of human rights in modernity. The demand for human rights, their preservation and their realisation, is called forth from all continents and, seemingly, from across the political spectrum. One might argue that the concept of human rights occurs as a significant form of ‘right’ within modernity, and that it occurs as a radical legal–moral demand which shapes and challenges legal, political and social ordering. Human rights occur as partly actualised, and, more meaningfully, at a global level, they are largely unrealised and remain as a potentiality; a demand; a promise; something which is ‘not yet’ and which *must* be brought into existence. Yet the exact content of this demand is elusive and ambiguous, and any discussion of human rights and its notions of human dignity and justice immediately opens onto the issue of the way in which struggles for recognition affirm the universality of particular contents of human rights, and suppress or *mis*-recognise others. Further, there arises an issue of attempting to come to terms with the (mis)recognised content of human rights, dignity and justice, without reducing these concepts to the profanity of a simple bargain.

Something of this *aporia*<sup>84</sup> within the legal–moral demand was taken up by Derrida in his later turn towards ethics and was given prominence as the ‘force of law’. Derrida argues:

Justice remains, is yet, to come, *à venir*, it has an, it is *à-venir*, the very dimension of events irreducibly to come. It will always have it, this *à-venir*, and always has. Perhaps it is for this reason that justice, insofar as it is not only a juridical or political concept, opens up for *l’avenir* the transformation, the recasting or refounding of law and politics. ‘Perhaps,’ one must always say perhaps for justice. There is an *avenir* for justice and there is no justice except to the degree that some event is possible which, as event, exceeds calculation, rules, programs, anticipations and so forth. Justice as the experience of absolute alterity is unrepresentable, but it is the chance of the event and the condition of history.<sup>85</sup>

Derrida’s description of the ‘quasi-messianic’ (or ‘messianic without messianism’) demand of the ‘yet to come’ of law and justice can be understood to point to a similar conception<sup>86</sup> given by the Marxist philosopher Bloch in his

<sup>84</sup> See Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (2000) 21, for a discussion of the various ‘aporias’ contained within the notion of human rights.

<sup>85</sup> Jacques Derrida, ‘Force of Law: The Mystical Foundation of Authority’ in Drucilla Cornell, Michel Rosenfeld and David Carlson (eds), *Deconstruction and the Possibility of Justice* (1992) 3, 27 (emphasis in original).

<sup>86</sup> One way of reading Derrida’s conception of law is to situate his account of ‘justice’ and its ‘quasi-messianic’ structure (which he partially develops from Benjamin, below n 97) within a wider tradition of natural law. By inheriting a radical moment within this tradition, the ‘quasi-messianic’ demand of a justice yet to come is related to a radical demand found within both Kant and Marx. In this sense, Derrida’s essay on the ‘force of law’ needs to be read in the context of his larger work on law and international law: see Derrida, *Specters of Marx*, above n 55. Derrida describes this demand as

conceptualisation of the full radicality of the natural law tradition, with its demand that human dignity is ‘not-yet’.<sup>87</sup> For Bloch, the questions at the heart of the tradition of natural law place demands upon the present that cannot be easily dismissed or erased. The quasi-messianic or utopian demand of justice, right and human dignity does not stand external to law, but occurs as the immanent demand of law itself that it realise its not yet realised moral and ethical potential.<sup>88</sup> This futural pull of the present always threatens to crack open any static formulation of law’s existence, driving it to reach beyond itself or be overturned. What Bloch points to is a radical demand of human rights and human dignity, which, developing and belonging to a tradition of natural law, operates as a significant form of the concept of right which is central to the challenge and

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a link of affinity, suffering, and hope, a still discreet, almost secret link, as it was around 1848, but more and more visible, we have more than one sign of it. It is an untimely link, without status, without title, and without name, barely public even if it is not clandestine, without contract, ‘out of joint’, without coordination, without party, without country, without national community (International before, across, and beyond any national determination), without-co-citizenship, without common belonging to a class. The name of the New International is given here to what calls to the friendship of an alliance without institution among those who, even if they no longer believe or never believed in the socialist-Marxist International, in the dictatorship of the proletariat, in the messiano-eschato-logical role of the universal union of the proletarians of all lands, continue to be inspired by at least one of the spirits of Marx or of Marxism (they now know that there is *more than one*) and in order to ally themselves, in a new, concrete, and real way, even if this alliance no longer takes the form of a party or a worker’s international, but rather of a kind of counter-conjuration, in the (theoretical and practical) critique of the state of international law, the concepts of State and nation, and so forth: in order to renew this critique, and especially to radicalize it: at 85–6 (emphasis in original).

<sup>87</sup> Ernst Bloch, *Natural Law and Human Dignity* (Dennis Schmidt trans, 1986 ed) [trans of: *Naturrecht und menschliche Würde*]. On Bloch’s notion of the ‘not-yet’, see Ernst Bloch, *The Spirit of Utopia* (Anthony Nassar trans, 2000 ed) [trans of: *Geist der Utopie: Bearbeitete Neuauflage der Zweiten Fassung von 1923*]; Ernst Bloch, *The Principle of Hope* (Neville Plaice, Stephen Plaice and Paul Knight trans, 1995 ed) [trans of: *Das Prinzip Hoffnung*]. For accounts of Bloch’s philosophy in English, see Wayne Hudson, *The Marxist Philosophy of Ernst Bloch* (1982); Jamie Daniel and Tom Moylan (eds), *Not Yet: Reconsidering Ernst Bloch* (1997); Vincent Geoghegan, *Ernst Bloch* (1996); John Miller Jones, *Assembling (Post)modernism: The Utopian Philosophy of Ernst Bloch* (1995).

<sup>88</sup> For Bloch, this ‘quasi-messianic’ or ‘utopian’ demand of natural law is not something introduced to law from the outside. Rather, it relates to the immanent ethical demand of law itself to push beyond its own limitations and become truly universal. Further, this conception relates to Bloch’s notion of the ‘not yet conscious’, which, while containing a religious influence, is situated within a reading together of Kant and Hegel — a reading together of the power of the Kantian moral demand (the ought) and self-legislation of the revolutionary ‘I’, and of the starkness of the Hegelian demand to grasp the spiritual-material world of *Geist* (the concrete, the relational totality, the whole, of the ‘We’). In this sense, Bloch’s *The Spirit of Utopia*, begins: ‘I am. We are. That is enough. Now we have to begin.’ (*Ich bin. Wir sind. Das ist genug. Nun haben wir zu beginnen.*) (author’s own translation): Ernst Bloch, *Geist der Utopie: Bearbeitete Neuauflage der Zweiten Fassung von 1923* (1964) 1.

demand of law today, both domestic and international. Bloch argues:

The establishment of honesty and uprightness against a well-padded, re-christened, and retrogressive subordination is a postulate of natural law that is found nowhere else. The exasperation that Kant felt was not only a moral exasperation when he said that he refused to consider it an insignificant matter that man was treated as insignificant by his rulers 'in that they treat him as a beast of burden, or as a mere instrument of their own intentions, or in that they array men against each other in order to resolve their own quarrels.' And Marx is not merely giving economic advice when he teaches us 'to overthrow all relations in which man is a degraded, enslaved, abandoned, or despised being.' It is therefore quite understandable that this being that is always set aside or reduced to a merely 'sociological' subject continues to command our attention. It does not belong on the scrap heap; what is outdated is not natural law itself but what it attacks. The simple critical saying 'A thousand years of injustice still do not make an hour of justice' and the constructive definition 'Enlightenment is man's release from his self-imposed tutelage' both retain their value, for neither has its worth in that which natural law once attacked. This means that human dignity is not possible without economic liberation, and this liberation is not possible without the cause of human rights, which is beyond all forms of contracts and contractors. Liberation and dignity are not automatically born of the same act; rather they refer to each other reciprocally — with economic *priority* we find humanistic *primacy*. There can be no true installation of human rights without the end of exploitation, no true end of exploitation without the installation of human rights.<sup>89</sup>

Bloch's account of the emancipatory and futural demand of human rights pays attention to the change in the content of this demand through the natural law tradition, and is thus open to the utopian possibilities of a change in form and content of this demand in the future. Further, Bloch's account recognises the cooption of the radical demand of natural law by forms of positive law that endorse moments of its content, or strip it of its revolutionary and radical core. Hence, in accordance with the genealogy presented by Bloch, the contemporary situation where multiple actors are drawing upon the power of the demand of human rights is not illogical. This is exemplified by the ongoing war in Iraq, where both a powerful invading coalition led by the US and the Iraqi resistance against occupation are guided by and lay claim to conceptions of human rights, dignity and justice. What this involves is a struggle between competing conceptions of the content of human rights, dignity and justice, and the issue of whether this content justifies or stands against current legal institutions (eg the state, international law). Bloch points to this 'doubling' within the natural law tradition, arguing that:

The generality of the law was in fact a claim that was originally revolutionary; it was a progressive bourgeois law, one backed by thoroughly human impulses found in Rousseau and even before him as an essential determination of classical natural law. But in detaching itself from the inequality maintained by property, juridical equality had the function in the bourgeois state of law of dissimulating itself behind the abstract imperfections of the privileges of the ruling class. To this there corresponds another fact: namely, that the bourgeois constitutional state, which often made the effort to hide its apparatus of repression and its class character, in another form had a political exterior that demonstrated an unbridled

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<sup>89</sup> Bloch, *Natural Law and Human Dignity*, above n 87, xxviii–xxix (emphasis in original).

violence. While juridical equality, the protection of contracts, and so on were tied to the free competition internal to the state, it is the same free competition that leads to another very different generality: total war, which in the relations between states produces judicial anarchy with pure power on one side of the scale.<sup>90</sup>

Through the introduction of the notion of human rights into positive law, both at the level of the state and at the level of international law, there occurs something of a transformation within war's moral problem: war occurs as the process of struggle between opposing conceptions over the content of human dignity. The radical demand of human rights gives law a moral force. This moral force is also held by those who oppose contemporary forms of law, who oppose their constitutional state, or who oppose the operation of international law, and who demand the transformation of one or both to reflect a conception of human dignity which is 'not yet'. Yet, the inability to properly express what right or justice *ought* to look like — by its confounding of the present as a moment of *aporia*, or, simply, the dispute between various interests (political, economic, religious) about what human dignity *is* — leads to a violent collision between these forces of law. This mis-recognition of the concept, and the process of mis-recognition between the parties, turns war into a war between multiple actors who all claim to have 'right' on their side.

What makes this situation so explosive is that a war in the name of human rights — a war over the content of human dignity and justice — need no longer be confined to the legitimacy accorded to traditional violent actors: the police, the army, the sovereign state. As war is fought in the name of *humanity*, why should the *state* maintain its monopoly upon the legitimacy of violence? In a global struggle over human dignity, is not the legitimacy of violence given to all of those who fight in humanity's name? In this sense, the demand for human rights has the potential to explode the traditional juridical ordering of the practice of war. Through the cosmopolitan inclusion of all of humanity as 'citizens' of the world, war in the name of human rights leads us towards a global civil war over the content of human dignity.

## VI JURIDICAL ORDERING AND THE PARTISAN

If we consider the possibility of a global civil war over the content of human dignity, this leads into a question of how we determine the scope of the legitimacy of violent action. In other words, how do we (mis)recognise the legitimate perpetrators of violence? The attempt to deal with this aspect of war's moral problem through a process of moral ordering, as inaugurated by Kantian moral philosophy, comes into difficulty as it runs into cognitive and hermeneutic limitations described by the 'mis' of the process of (mis)recognition. What occurs, then, is a series of violent relations between various actors, all morally condemning their others and all driven by a powerful moral demand which has

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<sup>90</sup> Ibid 136–7. Bloch goes on to argue:

Every time shadows appeared over capitalist prosperity, inner tensions surfaced, even at the edges of this prosperity, where it is reinforced by the production of war and distinguishes itself by a threat of permanent war; in this the formal constitutional state reveals its other nature, by which it can turn into fascism at any moment: at 137.

something of a transcendent quality and is situated as a 'beyond'. Such a quasi-theological sense of the demand of human rights as the 'not yet' resembles the period of European intrastate civil war between the competing Christian confessions, known as the Thirty Years War (1618–48).

In the wake of this period of religious and political destruction, the difficulties caused by competing religious and moral claims were given something of a legal 'solution' through a process of juridical ordering. In this process, theological–moral claims were partially 'suspended' in favour of an emphasis upon the values of peace and security and upon the juridical ordering of violent action via state sovereignty.<sup>91</sup> Following the Peace of Westphalia in 1648, the legal concept of 'war' came to be determined under domestic and international law as 'state war' and non-state violence was delegitimised. In this process, the chaos of an underlying civil war between theological–moral actors was suppressed and shaped into the division within the legal order of, on the one hand, legitimate war and, on the other, the illegitimate violence of civil war, terror and crime. 'War' as 'state war' or 'war proper' functioned as a juridical mechanism that ordered the underlying chaos of ongoing civil wars into *forms* of violence with legally recognised legitimacy. While in this process, civil war, terror and crime are normally seen as standing outside 'war proper' and remain, in this sense, as 'not war', each can still be thought to be grouped under a special category of 'non-state war'. It is important that legal thinking hold onto this category, as it pays attention to the manner in which the boundaries of the legitimacy of violence have been produced historically, and how they continue only so long as they are recognised by contemporary actors.

One aspect of the development of this Westphalian juridical ordering of the legitimacy of violence can be seen in the writings of Hugo Grotius. Juridical ordering occurs within a tradition of natural law whereby the natural law right to private violence is given up to the legal institution of the state for the sake of peace and security. In a sense, the legal order of the sovereign state is drawn upon to protect what later comes to be called human rights. Grotius argues:

In the first principles of nature there is nothing which is opposed to war; rather, all points are in its favour. The end and aim of war being the preservation of life and limb, and the keeping or acquiring of things useful to life, war is in perfect accord with those first principles of nature. If in order to achieve these ends it is necessary to use force, no inconsistency with the first principles of nature is involved, since nature has given to each animal strength sufficient for self-defence and self-assistance.<sup>92</sup>

Further, he posits that:

By nature all men have the right of resisting in order to ward off injury, as we have said above. But as civil society was instituted in order to maintain public

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<sup>91</sup> This is just one interpretation of the Westphalian tradition — there are others: see generally Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (1999); Torbjørn Knutsen, *A History of International Relations Theory* (1992); Ian Clark and Iver Neumann, *Classical Theories of International Relations* (1996). See also Ian Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Europe* (2001), on the de-moralisation of politics by German natural law.

<sup>92</sup> Hugo Grotius, *The Law of War and Peace* (Francis Kelsey trans, 1984 ed) 52 [trans of: *De Jure Belli ac Pacis Libri Tres*].

tranquillity, the state forthwith acquires over us and our possessions a greater right, to the extent necessary to accomplish this end. The state, therefore, in the interest of public peace and order, can limit that common right of resistance.<sup>93</sup>

This relinquishing of the natural law right to private violence, and the ceding of the moment of judgement over multiple claims to the sovereign, leads to what later comes to be described as the sovereign's monopoly upon the legitimacy of violence.<sup>94</sup> The closing-off of internal violence with the hope of securing internal peace involved the recognition of the sovereign as having a right, and perhaps the sole right, to violence. In order to secure internal peace, the 'right to violence' became a properly sovereign right — a right recognised between sovereigns and pertaining only to sovereignty.<sup>95</sup>

In this sense, the legal notion of war carried out between sovereign states might be thought to have its genesis in civil war, in private war and in terror, and in the attempt to regulate and bring a situation of bloody chaos into some form of political and legal order. In one respect, interstate war, or 'war proper', can be thought of as merely a legally-ordered form of civil war which asserts itself against its origin. In this self-assertion, the notion of war negates and is distinguished from civil war (and terror) through the positing of law, through the positing of the sovereign, and through the sovereignty of juridical decision that determines the boundaries of public and private violence.<sup>96</sup>

Civil war occurs as the dark underbelly of all war proper which cannot be completely erased — a presupposition which haunts the sphere of legitimacy that the sovereign has given to itself and which is given to it by the acknowledgment of other sovereigns. In not being able to erase its presupposition, all 'war proper' occurs as merely 'dressed-up' civil war (and in some senses, terror) in which a sphere of legal legitimacy over violence is claimed and has come to bear with some weight on social reality through an institution's endurance over time.

The legal notion of war does not like to be reminded of its origins in civil war, nor of the fact that it is merely a juridically ordered, regulated, and politically legitimised *form* of social violence.<sup>97</sup> It is, however, reminded of its developmental or determining relation to violence through the re-emergence of civil war, which seeks to upset the juridical ordering of violence by challenging the state's right to violence. The emergence of civil war, revolution, private violence and terrorism contests the juridical ordering of the legitimacy of violence under domestic and international law. Further, this emergence does so by opposing the *content* of both the law of the sovereign and of international law.

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<sup>93</sup> Ibid 139.

<sup>94</sup> Max Weber, 'Politics as a Vocation' in Hans Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Hans Gerth and C Wright Mills trans, 1946 ed) 77 [trans of: *Politik als Beruf*].

<sup>95</sup> A similar account of this history is given by Schmitt, *Der Nomos der Erde*, above n 3, 112–17.

<sup>96</sup> The positing of the state's monopoly upon the legitimacy of violence out of the chaos of civil war, and as a negation of civil war and terror, present in Grotius, operates at a more radical level in Hobbes: see Thomas Hobbes, *Leviathan* (Richard Tuck ed, 1996) 88–9.

<sup>97</sup> On the founding of law and the state upon violence, see Walter Benjamin, 'Critique of Violence' in Peter Demetz (ed), *Reflections* (Edmund Jephcott trans, 1986 ed) 277 [trans of: *Zur Kritik der Gewalt*].

Under such a conceptualisation, the boundaries between ‘war proper’ and ‘terror’ begin to be broken down and are seen to be mediated through each other by the figure of ‘civil war’. Such civil war might be thought of as a process of the recognition and mis-recognition of the legitimacy of particular violent actors. Violence recognised as legitimate by the juridical order is treated as war, while violence not recognised by the juridical order as having legitimacy is treated as terror.<sup>98</sup> Within a tradition of international law, one important element in the recognition of ‘war proper’ is the form of violence involved: traditionally, that carried out openly and in an orderly manner by the armies of European states, as opposed to the strategies of ‘terror’ and guerrilla warfare carried out by the irregular fighter, the ‘partisan’. With regard to this form of juridical ordering, Schmitt’s theory of the partisan is relevant.<sup>99</sup>

For Schmitt, this tension between the legal ordering of state war and the reassertion of civil war occurs as an ongoing process of international law. In focussing upon a theory of warfare, what emerges frequently and predominantly is the category of the ‘irregular fighter’ who stands apart from the traditional armies of European states. This form of partisan war gained prominence through its success in defeating regular European military forces by using terror and subversive military tactics, by blending in with the civilian population and by using secrecy and the knowledge of territory to its advantage.<sup>100</sup> Schmitt traces this form of modern warfare to the success of the Spanish Guerrilla War against Napoleon (1808–14)<sup>101</sup> and to the success of a number of anti-colonial wars such as those fought by the communist forces against the Japanese invasion of China (1932–45), and the French defeats in Indochina (1946–54) and Algeria (1954–62).<sup>102</sup>

What makes Schmitt’s theory of the partisan interesting is his conceptualisation of the partisan not merely within a theory of irregular warfare, but in its development as a political theory through Clausewitz, Lenin and Mao.<sup>103</sup> According to Schmitt, in Lenin and in Mao, the theory of the partisan becomes a theory of international political revolution.<sup>104</sup> Schmitt argues that by binding the notion of class struggle to partisan warfare, Lenin’s theory of partisanship threatened to upset not only the traditional concept of warfare, but more so the tradition of European Westphalian political and juridical ordering.<sup>105</sup> Schmitt contends:

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<sup>98</sup> See Noam Chomsky, *Hegemony or Survival: America’s Quest for Global Dominance* (2003) 188–200, in relation to the way in which American and British military authorities attempt to distinguish ‘war’ from ‘terror’ and ‘counter-terror’, and to how this military distinction is put to the side in the political designation of some acts of violence as legitimate ‘warfare’ and others as illegitimate ‘terror’.

<sup>99</sup> Carl Schmitt, *The Theory of the Partisan: A Commentary/Remark on the Concept of the Political* (Alfred Clement Goodson trans, 2004 ed) [trans of: *Theorie des Partisanen: Zwischenbemerkung zum Begriff des Politischen*].

<sup>100</sup> *Ibid* 9–13.

<sup>101</sup> *Ibid* 5.

<sup>102</sup> *Ibid* 8.

<sup>103</sup> *Ibid* 5.

<sup>104</sup> *Ibid*.

<sup>105</sup> *Ibid* 33–7.

The partisan's irregularity refers today not only to a military 'line' or formation, as it did in the eighteenth century, when the partisan was just a 'lightly armed troop,' nor to the proud uniform of the regular troop. The irregularity of class struggle calls not just the military line but the whole edifice of political and social order into question. In the Russian professional revolutionary, Lenin, this new reality was raised to philosophical consciousness. The alliances of philosophy with the partisan, established by Lenin, unleashed unexpected new, explosive forces. It produced nothing less than the demolition of the whole Eurocentric world, which Napoleon had tried to save and the Congress of Vienna had hoped to restore.<sup>106</sup>

Schmitt's conception of partisan war attempts to re-conceptualise global politics as a global civil war between partisans along the lines of class struggle. This notion of class war plunges the Westphalian ordering of the legitimacy of sovereign violence back into chaos. War proper reverts to its civil war form, and fighting occurs *across*, rather than *within*, the traditional lines of legitimacy drawn by legal forms and ordering (ie as intra-state rather than as inter-state war). For Schmitt, this global civil war becomes described through his notions of 'friend' and 'enemy'.<sup>107</sup> However, if the conceptualisation of the theory of the partisan along the lines of 'class struggle' is put to the side, and Schmitt's conception of the partisan via his friend-enemy theory is re-conceptualised through Hegel's theory of (mis)recognition, then the theory of the partisan gains greater contemporary theoretical and practical relevance.

The Westphalian tradition of juridical ordering tries to come to terms with war's moral problem by attempting to de-moralise private violence and by vesting the legitimacy of violence within legal forms and institutions: primarily, the sovereign state and its right to war. However, this process of juridical ordering offers only a partial solution, as the content of the law it has affirmed in the name of peace and security comes under threat. Peace and security lose their value when the radical demand of human dignity equates them with a juridical order that maintains injustice.

Through the partisan, both the form and the content of law achieved by juridical ordering are challenged. The partisan's act of violence threatens to dissolve this order and remind it of, and return it to, its grounding within a civil war between multiple moral (political, economic and religious) claims. When the partisan is thought of in terms of the natural law tradition, what emerges against a process of juridical ordering is the occurrence of partisan wars carried out in the name of human rights, human dignity and justice. These notions challenge the content of the law affirmed by the sovereign and that maintained by the shared state sovereignty of international law. Yet, as the notion of human rights is affirmed by the structures of international law itself, modern partisan war occurs potentially with and against international law. The partisan exploits the tension in contemporary international law between Westphalian state sovereignty and the affirmation of human rights — the tension occurring between the demand for peace and security and the demand for human dignity and justice. Considered in light of the limitations of the traditions of the moral and juridical ordering of war, the occurrence of contemporary partisan war over the content of

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<sup>106</sup> Ibid 36–7.

<sup>107</sup> Ibid 61–5. See also Schmitt, *The Concept of the Political*, above n 21, 26–7.

human dignity should not appear startling or very different. Looking deep within war's moral problem, might we not attempt to (mis)recognise the moral legitimacy of the contemporary partisan — the so-called 'Islamic terrorist'?

## VII TERROR IN THE NAME OF HUMAN RIGHTS

Is there a contemporary alliance between partisanship and the radical demand for a human dignity and justice which is not yet, but must, through action, be realised? Might not this alliance occur in the figure of the 'Islamic terrorist', or more precisely, the acts of terror carried out by so-called 'radical Islamicist political movements'? If one locates this form of partisan violence as a development from the 19<sup>th</sup> and 20<sup>th</sup> century political movements of Islamic reformism, the suggestion that such acts of terror are carried out in the demand for human dignity and justice is not unreasonable.<sup>108</sup> When these movements are considered within a wider framework of anti-colonial (anti-Anglo-European) partisan war carried out throughout the 20<sup>th</sup> century, these acts of terror are, in a larger sense, nothing new.<sup>109</sup> If this violence is also considered as a form of messianic or quasi-messianic violence — a violent action attached to one out of many different forms of messianism or messianic demands — then this suggestion is also not unreasonable.<sup>110</sup> Both Bloch and Derrida point to an affinity between the demand for right and justice which is not yet, or yet to come, and a certain 'messianic' or 'quasi-messianic structure'. This messianic or quasi-messianic structure is not one of waiting and patience, rather, it is one of action: of acting upon the world with human hands to bring forth what is 'not yet'.<sup>111</sup>

Might not this relate to a number of partisan actors carrying out violence in the world today? Here, one can speak of a global civil war carried out between a number of messianic or quasi-messianic demands of differing content, but all stemming from a mixing of 'secular' and 'religious' traditions. Could not these acts of violence be, in fact, acts of terror which are given moral-religious force by the demand or call of justice that is 'not yet'? Further, these actors are situated within ongoing processes of (mis)recognition. Each mis-recognises not only the claims of the other, but also the power, validity and effects of their own actions and claims. Situated within war's moral problem (and suspending convictions regarding the privilege of the state) these actors are not too distant from other actors who carry out war/terror in the name of so-called 'secular' human rights.

<sup>108</sup> See generally Ibrahim Abu-Rabi, *Intellectual Origins of Islamic Resurgence in the Modern Arab World* (1996); John Esposito, *The Islamic Threat: Myth or Reality?* (1992).

<sup>109</sup> Such movements can be considered in terms of a wider tradition of Islamic political thought which emerged in response to the European colonial experience. Of relevance are such thinkers as Sayyid Abul-A'la Mawdudi, Hasan al-Banna and Sayyid Qutb.

<sup>110</sup> One might argue that some acts of terror carried out by 'radical Islamicist militants' are purely religious, purely messianic, and non-political, and as such their violence is not tied to the moral demand. While this suggestion is perhaps reasonable, it should not be forgotten that such actors are a development and a response to a modern world shaped in many ways by political and economic forces and that any religious demand cannot be abstractly separated from this global concrete. Thinking should be careful not to draw arbitrary boundaries between the religious, the political, the economic and the moral, as doing so ignores the important speculative interrelations between them.

<sup>111</sup> See above Part V.

It is in this respect that the acts of terror carried out by the radical Islamicist militant need to be taken seriously. Such action should not be dismissed as the violence of 'religious crazies', or considered as mere unpolitical, primordial *jouissance*. These contemporary acts of terror might well be driven by a genuine demand for the realisation of human dignity and justice within this world, even if this demand is coordinated by a transcendent or other-worldly set of concepts. In many ways, this demand is no less genuine than the moral demand which legitimises humanitarian intervention and humanitarian war. Owing to the structure of both demands, thinking cannot draw an arbitrary separation between a purely 'human' motivation and one that has something of a 'transcendent' or 'quasi-transcendent' motivation. In this light, rather than condemning such acts outright, contemporary thinking needs to ask itself both how these acts occur within the framework of war's moral problem, and how such acts of terror are situated within ongoing processes of moral and juridical ordering underwritten by the operation of (mis)recognition. Moral and legal judgement over contemporary acts of terror should not end, but rather should begin with these questions.

Two final points are worth considering. It is important to note that the act of judgement, which attempts to comprehend or assess the legitimacy of an act of war or terror in the name of human rights, takes place within a set of traditions. These traditions of the moral and juridical ordering of violence operate to frame and shape the way in which thinking approaches the act of violence. The conceptualisation of violence through the graduations of 'war', 'civil war', and 'terror' locate an act within a sphere of determined legitimacy. Further, the conceptualisation of violence through notions of 'moral duty', 'universality' and 'humanity' attempts to hide the frailty of the moral justification of violence, which otherwise perches unstably above war's moral problem. This is not to say that all judgement is predetermined, or that thinking should abandon attempting to develop criteria for determining the 'legitimacy' of violence. Rather, the suggestion is merely that moral and legal judgement is situated within a process of (mis)recognition, and that the task for judgement concerns the issue of how well it (mis)recognises itself in this wider process and manages to navigate through an awareness of its own failures and limitations.

This point becomes relevant to those who carry out war and terror in the name of human rights. The ongoing violence occurring in a global civil war over the content of right itself cannot be resolved merely through the processes of moral and juridical ordering, but it might occur through a 'praxis of recognition', whereby each actor comes to comprehend itself (mis)recognising itself, its claim, and the other. The structure of (mis)recognition leads to no final resolution, as every successful moment of comprehension is wound back into the 'mis' of mis-recognition. Yet, for the violent actor, carrying out war or terror in the effort to radically reshape the world in accordance with a moral demand, one cautionary moment of (mis)recognition may not be too difficult to grasp.

Such a moment of caution is given by Hegel in his commentary upon the moral force that drove the French Revolution and subsequent period of Terror. The universal notion of 'absolute freedom', which attempted to radically reshape and reorder the concrete, became so abstracted from this concrete that its moral demand, no longer mediated through the world of complex ethical, economic and

social relations, was unable to *produce* any positive work or deed.<sup>112</sup> Rather, the force of its moral demand, coupled with its abstraction from the concrete, meant that it occurred as pure negative action — as ‘the fury of destruction’.<sup>113</sup> Hegel argues:

The sole work and deed of universal freedom is therefore *death*, a death too which has no inner significance or filling, for what is negated is the empty point of the absolutely free self. It is the coldest and meanest of all deaths, with no more significance than cutting off a head of cabbage or swallowing a mouthful of water.<sup>114</sup>

It is not too difficult to view this pure negativity in contemporary moral violence. It occurs both in acts of violence which many support and those which many condemn: the act of war in the name of humanity, and the act of terror in the name of human rights. In looking at war’s moral problem, the fast descent of all morally-driven violence into the empty and base negativity of ‘terror’ should not be forgotten. While this point, and the argument presented here in general, is nothing new, such a ‘remembering’ remains relevant to the act of judgement over contemporary violence. As a problem of judgement, the question of how the act of violence and the moral demand are reconciled does not go away. To offer a simple justification for violence is always very easy; to properly attempt to recognise oneself in the moment of judgement is more difficult. This latter task, of judgement working through its own (mis)recognition, is not unimportant: it is relevant to both contemporary legal thinking and political action.

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<sup>112</sup> Hegel, *Phenomenology of Spirit*, above n 65, §§ 582–9. On both the significance of the French Revolution to Hegel’s thought and his response to it, see Manfred Riedel, *Between Tradition and Revolution: The Hegelian Transformation of Political Philosophy* (Walter Wright trans, 1984 ed) [trans of: *Zwischen Tradition und Revolution*]; Joachim Ritter, *Hegel and the French Revolution: Essays on the Philosophy of Right* (1982) (translated with an introduction by Richard Dien Winfield: these essays originally appeared in German in Ritter’s *Metaphysik und Politik: Studien zu Aristoteles und Hegel* in 1969); Jean Hyppolite, *Genesis and Structure of Hegel’s Phenomenology of Spirit* (Samuel Cherniak and John Heckman trans, 1974 ed) [trans of: *Genèse et structure de la Phénoménologie de l’esprit de Hegel*].

<sup>113</sup> Hegel, *Phenomenology of Spirit*, above n 65, § 589.

<sup>114</sup> *Ibid* § 590 (emphasis in original).