University of Southampton

School of Law

PhD Thesis

Permission To Die: An Examination of the Law and Morality of Battlefield Mercy Killing

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ABSTRACT

SCHOOL OF LAW

Doctor of Philosophy

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By Harry East

> 'Requests for battlefield euthanasia have, no doubt, occurred on battlefields as long as there have been battlefields. When men have taken up arms against one another, for whatever reason, there have always been those wounded who do not die immediately, but clearly cannot live for long, either because of their wounds or their circumstances. This can generate the desire to hasten their inevitable death, by both the wounded soldier as well as their comrades. These situations have probably occurred throughout history.'[1]

Mercy killings, those lethal actions carried out to relieve suffering, enacted by soldiers upon wounded enemy combatants during and after combat have been evidenced since the earliest recordings of armed conflict. An action which was taken from necessity due to inadequate medical knowledge and resources and also because of the existence of a less humane, but perhaps more practical society, are now considered as a criminal act. However, the act is often carried out from compassion and a feeling of sympathy towards the victim.

[1] J Keegan, R Holmes & J Gau *Soldiers: History of Men in Battle* (Hamish Hamilton London 1985) 146

Meanwhile, public values, the common law and legislation dealing with euthanasia have all developed in the domestic civilian setting. Mercy killings have traditionally been dealt with in a confusing manner by the courts, using ill-fitting doctrines such as diminished responsibility to alleviate the criminal stigma placed upon the defendant. In other situations the application of the law has created uncertainty concerning the demarcation between whether an act constitutes murder or manslaughter.

This uncertainty is compounded when the law developed to deal with civilian situations is juxtaposed on a mercy killing carried out by a soldier on another combatant in a battlefield setting. These situations present circumstances beyond the comprehension of civil domestic law. To implement it correctly requires a strained alignment between the pressures facing the soldier in combat and the pressures facing the defendant in peacetime, and there is a high likelihood that by doing so an injustice shall be served to the soldier and the victim.

The potential trial processes faced by the soldier who has carried out a battlefield coup de grace are also questionable. To try the soldier in a civilian court is to place the deliberation of his actions into the hands of those who are not his military or cultural peers and who will judge his actions in accordance with a belief system contrary to those the defendant is indoctrinated with through his military training. However, implementing civil criminal law in a court martial alongside military discipline offences for crimes which represent serious operational misconduct, creates conflict between which values should be prioritised. The values of military discipline are in competition with the values of the criminal law. The court martial also carries with it the aura of unfairness due to its inherent bias, and there are concerns over its partiality. However, it also offers potentially the best place for the soldier to

face trial because the case is deliberated upon by a Board of military personnel, his peers, who understand the unique culture of the soldier.

By comparing the professional soldier with medical professionals, who are also involved with end of life decision making a better sense of the 'wrongness' of the action can be found. In the medical context consent can be used to legitimise many actions which may lead to death, and even without it the doctor may act in the patient's best interests in a manner which avoids liability but results in death. The practice of double effect allows a physician to deliver pain relief even though there is a foreseeable consequence of death. The soldier's actions exhibit many of the same motives but are never legally justified. The comparison serves to change the perception of the action, from merely legally wrong to morally legitimate.

Although difficulties exist in arguing that mercy killing actions should be made legal, the wider consideration of the influences and behaviours can show that such actions can be morally legitimate and that it is not just to punish the soldier too harshly, nor is it just to hold him to account to laws which ill-fit the circumstances, be they domestic criminal laws, international criminal laws or military offence.

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List of Acronyms

Afghan National Army	ANA
Actual Bodily Harm	ABH
Captain	Capt.
Commanding Officer	CO
District Court Martial	DCM
International Security Assistance Force	ISAF
General Court Martial	GCM
Grievous Bodily Harm	GBH
North Atlantic Treaty Organisation	NATO

Physician Assisted Suicide	PAS
Post-Traumatic Stress Disorder	PTSD
Sergeant	Sgt.
Staff Sergeant	SSG

DECLARATION OF AUTHORSHIP

I, **Harry East**

declare that the thesis entitled:

Permission To Die: An Examination of the Law and Morality of Battlefield Mercy Killing

and the work presented in the thesis are both my own, and have been generated by me as the result of my own original research. I confirm that:

- this work was done wholly or mainly while in candidature for a research degree at this University;
- where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
- where I have consulted the published work of others, this is always clearly attributed;
- where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
- I have acknowledged all main sources of help;
- where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
- none of this work has been published before submission, **or** [delete as appropriate] parts of this work have been published as: [please list references]

Signed: *Harry East*

Date: 16/06/2013

Table of contents

When you're wounded and left on Afghanistan's plains,

And the women come out to cut up what remains,

Jest roll to your rifle and blow out your brains

An' go to your Gawd like a soldier.

Rudyard Kipling '*The Young British Soldier*' (1895)

Chapter One

Introduction

It is one hundred degrees in the shade; you are burdened with fifty pounds of equipment, and have just endured a sustained fire fight. Surrounding you are members of a fledgling foreign militia. Your charge is to organise and train these troops in order to secure their homeland from the insurgent threat that has dogged them for many years. On the ground before you, lays a wounded soldier. A soldier like yourself, who has fought bravely, showing the same loyalty to his comrades as you have shown to yours. The same devotion, the same battle, but a different cause; this man is your adversary, and he has suffered the fate that recently you fought hard not to suffer yourself. He is seriously wounded displaying all the hallmarks of being caught in a brutal exchange of modern military technology, severe blood loss, exposed soft tissue and misshapen appendages. It is almost certain that his affliction is mortal; if by some miracle he survives he will never live the life he has previously known or hoped for. The atmosphere emanating from the foreign militia is palpably hostile. You are faced with conflicting duties, first, your duty to fulfil the mission prerogatives of your patrol and to maintain the order of the foreign troops whose hatred of the enemy is deep rooted and seething. You are obliged to uphold the laws of war and set an example to your men, but there is another duty, a nagging sentiment lurking in the mire. It is a moral duty to end the soldiers suffering, a soldier who like you, shared the same fears of this moment coming to pass. Amidst the physical exertions, the mental anguish and the moral dilemma, you have to quickly make a choice. Out of compassion, you raise your rifle and fire two bullets into the wounded man. Several weeks later, after the incident has come to light, you are arrested and charged with murder.

Contemplate another scene. A mother enters a nursing home to visit her twenty year old severely brain damaged son, he had fallen from an ambulance several months earlier and can no longer care for himself or communicate and has no unaided mobility. She checks in under a false name because she is banned from visiting him, she has previously attempted to kill her son, who she perceives as suffering greatly. She locks herself in his room and produces a quantity of heroin and a syringe. She injects her son with a measure of heroin which she has been assured will be enough to produce a painless but fatal result. All the while the victim remains silent. A short while later she is arrested and charged with the murder of her son.

Finally, consider the life of a young woman in constant pain, her illness is not fatal but it is chronically debilitating, she has been stranded in her bedroom since her teenage years, suffering from severe Myalgic Encephalopathy (ME). As a result, she has to live in a darkened room, her bones are brittle, breaking easily, she is susceptible to debilitating infections and can never have children. Having been withdrawn from school prematurely, she has no friends, peers or social life, except those she meets through the internet, and with whom she discusses the possibility of committing suicide. Hers is a story of lost hope of ever living a normal life and of recovery. She decides to kill herself via an intravenous administration of painkillers. However, halfway through the process she is too weak to continue. Her mother, a nurse, steps in and administers the last, fatal doses. She too is arrested and charged with the attempted murder of her daughter.

All three are true accounts of events recounting the actions leading to a mercy killing.[2] Although representing very different circumstances, relationships among the actors, different causes of suffering and the part which each actor and victim played in their demise, they

[2] These cases respectively run, *R* v *Semrau*, which is an unreported Canadian military case, *R* v *Inglis* [2010] EWCA Crim 2637 and *R* v *Gilderdale* [2010] Unreported, which was widely reported in the British media.

share two characteristics. All of the protagonists acted from a sentiment of mercy towards the victim, and their actions are all considered as murder.

The width of activities the phrase 'mercy killing' covers results in uncertainty over how to manage the killing. In the first scenario the jury could not return a verdict on the charge of murder. In the second the mother was sentenced to ten years imprisonment for murder,[3] and in the third the mother received a conviction for assisted suicide with no term of imprisonment.[4] It is these differing outcomes, circumstances, and practical applications which give rise to the investigation carried out in this thesis.

1.1Mercy Killing: Outlining the Conflict Between Mercy and Justice

To understand what is meant by 'mercy' here, and to see why enacting a 'mercy' killing conflicts with the law and the institutional justice delivered under the legal system, the argument should start with the premise that 'justice is giving people what they deserve'.[5] From this basis it is argued that a person can deserve mercy; and so justice and mercy, which whilst often conflicting, also often occupy the same philosophical space. This conflict occurs because the function of the law is to administer protection or punishment to people in line with social standards of morality and which is appropriate to their behaviour, but, the behaviours which can be considered as deserving legal sanctions or not are so numerous that there exists no means to design rules which would appropriately cover them all. Hence, the law manifests itself in general and cumbersome offences, and focuses on the narrow mental

[3] E Grice 'Is Frances Inglis a cold – blooded killer or a loving mum? *The Telegraph* (London 22nd Jan 2010)
[4] Sandra Laville 'Mercy killing mother cleared of murder after helping seriously ill daughter die' *The Guardian* (London 25th January 2010)
[5] Plato *The Republic* (Translated by Sir Desmond Lee Penguin Classics 2003)

element of intent coupled with whether the act was carried out or not. This system is adequate to effectively and efficiently deliver the justice people deserve in most, but not all cases. [6]

Sometimes, the application of these generalised offences delivers a justice which is out of sync with society's concept of moral justice, or right and wrong, namely because in applying the broad offence to an action, and focusing only on whether the action occurred and whether the accused wanted it to occur, it fails to take into account the unique qualities of the act. One such act is a battlefield mercy killing, which is committed from compassion and seemingly in line with moral justice; that the victim should be spared an agonising or protracted death if at all possible, but one in which the actor suffers under the application of the offence of murder in accordance with institutional justice. Mercy in this context is a characteristic of those who have power to make choices otherwise, for instance the soldier in the battlefield mercy killing situation, such as Capt. Semrau, whose actions ran contrary to what was procedurally right but still appear morally correct.[7]

This thesis argues that the correct method of treating the battlefield mercy killer is to consider those wider circumstances that the criminal law does not take into account because of the generalised nature of its application. The justice applied in this unique and morally complex situation should consider the moral justice as well as the institutional justice that is applicable to the soldier. When a person delivers mercy to a person in the form of a mercy killing, very often it is because it is considered that no person deserves to die in either mental of physical suffering. Moral justice requires that the person's passing is eased, whilst the institutional justice argues that the act of easing the person's passing is prohibited and deserves punishment on behalf of the perpetrator. This is the central theme of this thesis, that the

[6] James Sterba 'Can a person deserve mercy?' [1979] *Journal of Philosophy* 10 11
[7] Claudia Card 'On Mercy' [1972] 182 *The Philosophical Review* 81 83

current institutional justice delivered to the mercy killer inadequately represents the moral justice that their action deserves.

When a mercy killing is enacted; a killing designed to avoid what would be considered a far more brutal or painful death, it raises a series of moral conundrums. Some condemn the action on a moral basis, founded in the belief that any killing is wrong. Others refuse to morally condemn the action because when the moral context is considered in which the actor behaved the condemnation of his actions become irrelevant. Others still praise the good intention of the mercy killer in acting to save the victim from a worse fate. [8]

In this thesis, the battlefield mercy killer's actions are not condemned on the basis that their actions can only be understood in context to and with reference to numerous considerations and circumstances which brought them to the point of enacting the killing. It is not the stance of this thesis to argue that the current law is bad, only that the law is badly applied to the soldier under several justice systems which could apply to the soldier and does not take into account several key principles which underline the basis of the criminal law. First, that it produces an incorrect stigma, second, that it is not proportionate and finally that it does not reflect the moral responsibility attributable to the soldier when they ease another combatant's suffering. Without considering these factors the battlefield mercy killer cannot receive justice.

[8] For the full range of ethical questions which are exposed in such a situation see: Didier Pollefeyt 'The Judgement of the Nazi's' in Micheal Beren Baum ed. *Murder Most Merciful: Essays on the ethical conundrum occasioned by Sigi Zeiring's 'The Judgement of Herbert Bierhoff* (University Press of America New York)

1.2 Fair Treatment for the Battlefield Mercy Killer

> 'I believe there are two elements that need to be considered, the moral and the legal. Much of the moral issue has already been discussed by previous speakers. I do not wish to canvass those views except to say that, whilst we speak about freedom of choice in both life and death, it seems to me that there is a considerable difference between taking one's own life and asking somebody else to help one take it. Mercy killing is a fact of war. For example, a soldier may be too badly wounded to be carried and you do not wish him to fall in to the hands of the enemy, for obvious reasons. There is a difference, however, between that type of behaviour in war and a similar type of behaviour, be it mercy killing or euthanasia in peace.'[9]

It is the premise of this thesis that cases of mercy killing on the battlefield should be considered differently, morally and legally from domestic cases. It is argued that treating these cases similarly to activities explained as 'domestic' mercy killings, causes the soldier to suffer an injustice. Whilst fundamentally the actors' motivations to alleviate pain and suffering are similar, the influences affecting the soldier are incomparable to the domestic mercy killer. These influences are too far removed from mercy killings taking place in the domestic setting, during a time of peace, which the law has developed in accordance with.

Furthermore, unlike the domestic mercy killer, the battlefield mercy killer may be subject to Service law and tried in a Service Court Martial. Whilst this form of trial may be more contextually adept, as those deliberating upon the decision are all military men like the

[9] *Debates of the Legislative Assembly For the Australian Capital Territory*, Hansard 2294 (daily ed. Nov. 22 1995)(Statement of Mr.Speaker Cornewell); available at http://hansard.act.gov.au/hansard/1995/pdfs/19951122.pdf last accessed 2nd Feb 2011

defendant, it may also have adverse effects on the type of justice the soldier receives. The soldier may be treated more harshly and less fairly than his civilian counterpart because of the innate disciplinary aspect of Service law. Following the procedure in service law may also trivialise the killing by marginalising the criminal and moral aspect of the act through viewing it as a predominately as a disciplinary concern.

Ultimately, the discussion seeks insight into what the correct 'justice' is, not only for the mercy killer but also for the act. Only through analysis of the context in which the act takes place, the nature of the criminal doctrines, the various legal jurisdictions the mercy killer is subject to and identifying the strengths and weaknesses in each, can this be achieved.

1.3 Mercy Killing and the Legal Dilemma

Key to the legal dilemma concerning mercy killings is the difficulty in matching the law to the nature of the act. Public opinion tends to differ from the legal view of compassionate mercy killings. They are considered as acts of murder, despite the negative connotations attached to this criminal label, and this supports the view that successive legislatures have 'taken no steps to translate the new morality into the concepts of law.'[10] Seemingly, support for mercy killings is stronger when the killing is associated with relieving the indignities of protracted and painful dying,[11] and when the law is applied in full force to these situations the dilemma is compounded as the rules and the circumstances of the act fail to satisfactorily match each other. Murder and the mandatory life sentence which accompanies it are unjustifiable in combat related mercy killings for two clear reasons. Neither the punishment

[10] G Williams 'Mercy Killing Legislation – A Rejoinder' [1958] 43(1) *Minnesota Law Review* 1 2
[11] H M Biggs 'The Assisted Dying for the Terminally Ill Bill 2004: Will English Law Soon Allow Patients the Choice to Die?' [2005] 12 (1) *European Journal of Health Law* 43 44-45

nor the conviction corresponds with the moral wrongfulness of the crime, and as such they do not deliver the appropriate justice to the battlefield mercy killer or the act itself.[12]

In each of the above examples 'justice' was administered differently. Perhaps it is best to say that certain types of mercy killings represent 'gaps' which the law does not necessarily cover appropriately or with certainty. In the three previous cases, the court came to differing conclusions as to the liability of the defendant's actions; failing to convict for homicide, murder and assisted suicide respectively. There remains uncertainty as to the type of justice the mercy killer should receive.

Where the accused is a soldier this uncertainty is compounded by the possible impact Service law will have on the proceedings. Unlike the civilian, the soldier is also subject to military justice and discipline. His actions are likely to constitute a breach of these standards and instigate unique military discipline charges. Furthermore, he will likely be subject to a court martial, in which military personnel will deliberate on the case concerning both his civil and military offences. The justice distributed by this court could possibly be overly harsh, in order to instil discipline, or biased against the criminal charges in order to protect the reputation of the armed forces and their personnel.

The justice applied to the mercy killing soldier is dependent on many factors, legal, political, and sometimes moral. But whether taking account of these factors delivers the right justice for the right reasons is questionable. No consideration on this topic is complete without acknowledging the moral debate surrounding mercy killings, and the moral debate will be

[12] W H Hexlion 'Mercy Killings in Combat: Ending the Suffering of Gravely Wounded Combatants- A Brief History, Applicable Law, Recent Prosecutions and Proposals For Much Needed Change' available at http://www.dtic.mil/cgi-bin/GefTRDoc?ADA519236 accessed 24/06/2012

used to inform the investigation as to what true justice is in a situation which has no specific legal rules developed for or pertaining to it.

To correctly gauge the extent of the soldier's 'criminality' when they enact a battlefield mercy killing their moral culpability is integral. This is not to confuse moral and legal concepts of right and wrong,[13] but in acknowledgement that the perception of any act of mercy killing, indeed any act, will be tempered in some manner by society's view of it. Thus to come to a conclusion as to the justice attributable to the act, the act must be put in context. This is particularly important in a situation, such as a battlefield mercy killing, which has evaded any direct interaction with the development of the law and a 'penumbra of doubt' exists as to its treatment.[14]

1.4 The Professional Soldier and Medical Practitioner

Modern, western soldiers might be said to have a professional duty to protect as well as take life, as enshrined in the Geneva Convention and specific national standards.[15] They are held to professional duties and standards by which they are expected to adhere when faced with life and death situations. As such sometimes administering violence causes death and sometimes administering violence protects life.

[13] H L A Hart *Law, Liberty and Morality* (Stanford University Press California 1963) 8
[14] H L A Hart 'Positivism and the Separation of Law and Morals' [1958] 71(4) *Harvard Law Review* 621
[15] Encapsulated in documents such as 'Values and Standards of the British Army' 2008 available on http://www.army.mod.uk/documents/general/v_s_of_the_british_army.pdf accessed 01/03/2012

> ‘It is axiomatic that all soldiers must exercise the highest standards of professionalism….at all times to both safeguard operational effectiveness and also the Army’s reputation.’[16]

Physicians represent of another professional body closely linked to end of life decision making and actions which operate in accordance to specific standards. Therefore, considering the moral and legal frameworks within which doctors operate in end of life situations will help widen the view of the soldier’s action, from one emanating simply from sympathy to one which has a clear and humane purpose. Physicians must treat those under their care,

> ‘…with respect whatever their life choices and beliefs…not unfairly discriminating against patients by allowing personal views to affect adversely professional relationships with them or the treatment provided or arranged.’[17]

In a similar vein the soldier is expected to behave in the following manner to all those who come under their protection.

> ‘Respect for others also extends to the treatment of all human beings, especially the victims of conflict, the dead, the wounded, prisoners and civilians, particularly those we have deployed to help.’[18]

[16] Ibid at para.28
[17] GMC Supplementary Guidance ‘Personal Beliefs and Medical Practice’ March 2008 available on http://gmc-uk.org/Personal_Beliefs.pdf_25416905.pdf accessed 04/03//2012
[18] n.10 at para.15

In the UK, medical practitioners are often the subject of focus in the wider euthanasia debate. Accordingly, much of the comparison will focus on the doctrine of double effect, the nature of consent and its ability inculpate or exculpate the defendant, and the difference between positive acts and omissions in end of life decision making.

1.5 The contextual nature of mercy killings

Mercy killings can only be properly considered within the context in which they occur. In the case of the bedridden woman previously described, her mother's act can be seen as providing aid; she completed a task her daughter had initiated and requested help in completing. In the case of the handicapped son, the mother acted from a misguided sentiment of care, believing that her son's death was the best outcome for him. Both of these actors can be said to have been influenced to behave as they did from ties of love and affection originating from their close familial relationship, causing both actions to take place in an emotionally charged atmosphere. In the soldier's case, whilst emotions were undoubtedly high, no relationship existed. He did not know the wounded man, but a duty called him to act from mercy, and there existed a plethora of comparable circumstances which can be seen to be just as mitigating as those commonly forwarded in domestic cases, regarding the wrongfulness of his action.

To understand these circumstances, military tradition, its brutalising, isolated culture and the effect that conflict can have on a soldier's subjective judgement of wrong and right must be contemplated. By contextualising the soldier's actions, it can be seen that the application of domestic criminal law is inept, and that a charge of or conviction for murder does not correspond with the wrongfulness of the crime. Such a conviction is damaging for two

reasons, first because of the imposition of a mandatory life sentence and second because of the deprecating criminal label it attaches to the convicted. This label, or stigma, is indelibly linked to the concept of administering appropriate justice. To consider what justice both the battlefield mercy killer and the act itself deserve requires the attachment of the correct 'label' to the act and actor. Understanding what stigma is and does will give understanding as to why it is wrong to convict the battlefield mercy killer for the crime of murder both generally and under the civil criminal law.

1.6 Criminal stigma and the importance of correct labelling in cases of mercy killing

In ancient Greece, 'stigma', referred to physical deformities which signified the moral status of the possessor, usually inferring that they were morally bad in some way; often the signs, or stigma, were cut or burnt into the body as punishments to advertise the bearer as a criminal or traitor. These persons were to be avoided, especially in public.[19] Contemporarily, the stigmatised often suffer from poor mental health, reduced access to education and employment and are affected by a gradual lowering of their social status,[20] and the term is applied more to the disgrace that the person has committed than any bodily evidence of it. Today stigmatisation occurs when 'some attribute or characteristic conveys a social identity that is devalued in a particular social context'.[21] Participating in criminal behaviour can result in this devaluing, yet within criminal activity, there are different levels of stigmatisation. It is conjectured that generally, rapists are regarded as morally worse than shop lifters and instances of thuggery are worse than trespass. Stigmatisation functions to bring about a group

[19] Erving Goffman *Stigma: notes on the management of a spoiled identity* (Simon and Schuster New York 1963) 1

[20] B Major & L T O'Brien 'The Social Psychology of Stigma' [2005] 56 *Annual Review of Psychology* 393 400

[21] J Crocker, B Major B & C Steele, 'Social stigma'. in Gilbert, D Fiske & Lindzey, G. (Eds.), *The Handbook of Social Psychology Vol. 2*, (McGraw Hill New York 1998) 504 505

desire for order and conformity.[22] Broad or local cultural values influence the exact characteristics an individual must possess and which are irrelevant when being targeted for stigma. To be stigmatised is detrimental to the individual, signifying that the stigmatised person has done something beyond the values of the group's collective morality, and should thus be treated accordingly. Most importantly, stigmatisation occurs, apart from to heighten individual self-esteem and social identity as an important tool which helps to justify particular social, economic and political institutions.[23] For example, the criminal justice system requires the phenomenon of stigmatisation in order to act as a deterrent. If people were ambivalent as to how they were labelled, then a significant part of a criminal conviction would be nullified.[24] The negative trait of criminality is founded upon the base structure of the criminal justice system, because to be labelled negatively is a deterrent in itself and as such the label is a punishment in the same way as the sentence.

The criminal law labels the offender according to the crime committed, some crimes are more heinously detested than others; categorisation communicates the differing degree of unacceptability of different types of conduct. 'The label applied to an offence ought fairly to represent the offender's wrongdoing.'[25] Labels should not be misleading as to the convict's degree of guilt, they should encapsulate the gravity of the behaviour the offender has undertaken and thus their moral guilt.[26] Offenders may feel subject to unjust treatment if the label attached to their conviction does not represent their 'real' guilt, especially considering the affect stigmatisation can have on them financially, mentally and socially. Labelling sends

[22] J C Phelan B G Link & J F Dovidio 'Stigma and Prejudice: One animal or two? [2008] 67(3) *Social Science & Medicine* 358 361
[23] n.16 at 511
[24] It is accepted that punishments often also consist of custodial sentences but take for instance a seven year sentence imposed for a conviction of rape, such a conviction may be seen in a worse light than a similar sentence imposed for an armed robbery, and have far more serious social consequences. People are not generally repulsed by bank robbers, often they are enthralled, not so with rapists.
[25] A Ashworth 'The Elasticity of *Mens Rea*' in C F H. Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworth London 1981) 53
[26] G Williams 'Convictions and Fair Labelling' [1983] 42(1) *Cambridge Law Journal* 85 86

a symbolic message, but is sometimes too broad and uninformative as to the offenders true behaviour. For this reason, English law does not have a single offence for homicide, but sub divides unlawful killings between the offences of murder and manslaughter.[27] However, even with this sub division, convictions can sometimes produce undesirable outcomes by suggesting a higher degree of guilt than their actions perhaps warrant.

Consider the imposition of a conviction for murder upon the mercy killer. Murder is generally perceived as a crime emanating from outright violence and criminal aggression that may involve elements of spite and hatred.[28] In contrast, the mercy killer acts from sentiments of compassion, sympathy and solitude. Murder, could be said to hold the greatest criminal stigma of any crime as it is the only offence in the laws of England and Wales which demands the imposition of a mandatory life sentence upon conviction. If mercy killings were considered as morally wrongful as murder, the majority would agree with stigmatising the mercy killer in the same way as the murderer. However, generally this has not been found to be the correct manifestation of the public opinion.[29] This claim is further supported by the continual suggestions that mandatory life imprisonment should be abolished and sentencing should be left to the discretion of the judge, so that mercy killers receive a more proportionate justice.[30] Repeated Bills have been proposed to demarcate the offences of murder or to legalise euthanasia in some instances.[31] Many mercy killers are currently subject to unfair

[27] C M V Clarkson 'Theft and Fair Labelling' [2011] 56(4) *Modern Law Review* 554 556

[28] C Lee *Murder and the Reasonable Man: passion and fear in the criminal court room* (New York University Press London 2003) 45

[29] House of Lords Select Committee on Assisted Dying for the Terminally Ill Bill *First Report of the House of Lords Select Committee on the Assisted Dying for the Terminally Ill Bill* 2005 HL Paper 86-1 (London HMSO) Appendix 7 S.3.1 Surveys supporting this claim relate predominately to Euthanasia carried out by a physician, in part whole and show that public support has been increasing over the last thirty years for such a practice. Support averages around the eighty per cent mark, whilst opposition averages at around fifteen per cent of those polled. There is a significant minority who are unsure.

[30] House of Lords Select Committee *Report of the House of Lords Select Committee on Murder and Life Imprisonment* 1989 HL Paper 78 (London HMSO)

[31] Assisted Dying for the Terminally Ill Bill [HL] 2006 The latest incarnation of this attempt came in the form of recommendations by the Law Commission for England and Wales to subdivide homicide into three separate

labeling, because the components of their crime do not match the stigmatisation which stems from a murder conviction.[32]

Often, in a case of mercy killing, a sentence of manslaughter by means of diminished responsibility has been imposed. But the manslaughter conviction is another broad criminal label. It involves those who are responsible for work place accidents, those who have killed after being provoked, those that are affected by an abnormality of the mind and many others who do exhibit the required intention for murder. Of course, arguments exist which support murder convictions for any intentional killer as more than just. To those who uphold the sanctity of life as the utmost moral consideration any intentional killing is justifiably murder.[33] Many other concepts exist justifying the rightness or wrongness of the conviction, for instance, a platonic view also supports attaching a murder label to the mercy killer, as it states that it is non-adherence to the laws of government that make a man unjust, not the nature of his actions.[34] These are issues which shall receive sufficient analysis when dealing specifically with the appropriate justice that should be served to the mercy killing soldier in chapter eight.

1.7 The significance of the 'battlefield mercy killer' hypothesis

No prosecution has ever taken place in the United Kingdom for actions defined as 'battlefield mercy killings.' However, prosecutions have taken place against NATO soldiers, in countries with a common law tradition and similar systems of military justice. These prosecutions involved killings which have taken place in the recent conflicts in Iraq and Afghanistan in

categories of first degree murder, second degree murder and manslaughter, rather than the present two tier system. See Law Commission, Murder, Manslaughter and Infanticide (Law Com No 304, 2006) para 1.67.

[32] J Chalmers & F Leverick 'Fair Labelling in Criminal Law' [2008] 71 *Modern Law Review* 217 219

[33] See Chapter 8

[34] J M Pollock *Ethics in Crime and Justice: Dilemmas and Decisions* (2nd edn Wordsworth Publishing 1994) 23

which British armed forces have been heavily involved. It is conjectured that many acts of battlefield mercy killing go unreported, evidenced by the numerous recollections collated in this work. However, the potential for prosecutions is rising in tangent to the increased use of recording equipment used by the armed forces and individual soldiers. Besides the continual presence of increasing numbers of journalists embedded with troops and the use of unmanned aerial drones, [35] individual soldiers now record much of the combat 'action' on portable handheld recording devices.[36]

In recent years a number of high profile incidents have taken place involving military misconduct brought to light through personal recordings and photographs, for instance, the mistreatment of Iraq suspects in Abu Ghraib prison,[37] or the desecration of Taliban dead by US marines.[38] The use of personal technology makes it easier to evidence such misconduct. Likewise, the potential to capture evidence of a battlefield mercy killing or the act itself is increasing which could prompt a case which may suffer from an unjust administration of law due to the current legal conflict. However, it is also imaginable that the presence of recording equipment or journalists might act as a deterrent to misconduct.

The previously mentioned, Canadian case of battlefield mercy killing is a perfect example upon which to base the considerations of this investigation. It shall be used as the primary reference to exhibit both the similar and differing aspects of a battlefield mercy killing in comparison to its domestic counterpart. Two US cases will also be used as secondary

[35] R Hodierne 'Media Credibility in War: The Phenomenon of the Embedded Reporters (2004) 9 -10 available on http://www.hodierne.com/cred.htm accessed 23/3/2012

[36] Kari Anden Papadolous 'US soldiers imaging the Iraq War on YouTube' (2009) 7 (1) *Popular Communications: The international Journal of Media and Culture* 17 and Cori E Dauber *YouTube War: Fighting in a world of camera in every cell phone and photoshop on every computer* available on http://wwwStrategicStudiesInstitute.army.mil/ accessed 23/05/2-12

[37] Hilda Epstein 'Abu Ghraib abuse pics show 'every indecency' *The Daily Telegraph* 28th May 2009 18

[38] George Stern 'US investigators interview marines filmed urinating over Taliban' *The Daily Telegraph* 13th January 2012 21

evidence of the behaviour and the legal treatment that different soldiers may receive. Both the Canadian and US military justice systems have developed from the system used by the British army during its imperial occupation of these territories. For that reason they bear many of the characteristics, positive attributes and criticisms of the British system which is the primary focus of this work, which makes them ideal examples.

1.8 The case of Captain Robert Semrau

Following the events depicted above, Capt. Robert Semrau was charged on December 31st 2009 with two criminal charges and two military charges relating to an incident that took place on the 19th of October 2009. He was charged with one count of second degree murder and one count of attempted murder under the Canadian Criminal Code.[39] The military charges consisted of one charge each of negligently performing a duty[40] and one of behaving in a disgraceful or cruel manner.[41] What exactly happened on that day is still something of a mystery and the case report is subject to various confidentiality sanctions. Coupled with this Capt. Semrau did not testify at his trial so his motives for acting that day cannot be known for certain.[42] However, a clear enough picture can be garnered to allow a detailed analysis.

The Captain was a member of the Royal Canadian Regiment, and was commanding an Operational Mentor and Liaison Team. The role of these groups was to provide practical training, advice and oversight to the newly formed Afghan National Army. He was accompanied by three other Canadian service personnel and up to thirty Afghan National

[39] Canadian Criminal Code s.231(7)
[40] National Defence Act (Canada) 1985 s.124
[41] ibid. at s.93
[42] Peter Worthington 'Semrau breaks silence' *The Toronto Sun* 22nd July 2010.

Army personnel.[43] This team was operating in the Lashkar Gah region of Helmand Province when they were ambushed by a force of Taliban insurgents. Air support was called and the Taliban forces withdrew. It was claimed that as a result of the fire fight over a hundred Taliban insurgents were killed.[44] In the aftermath, a dead Talib was found by the members of the Afghan National Army (ANA) under Semrau's supervision, and another, initially presumed dead, was located nearby. This second, wounded person had severe injuries, one leg was missing, the foot from the other had also been severed and there was a large gaping wound through his torso.[45] Capt. Semrau seemingly determined that nothing could be done for the wounded Talib, and neither his nor his dead comrade's body were recovered by NATO forces.[46]

It is at this point that the influences that affected Captain Semrau's next action come into play. Apparently, the body was initially found by the ANA soldiers, whom the Captain was mentoring. Allegedly, they were kicking, spitting on and insulting the wounded fighter, whilst contact had been made with the Afghan Frontier Police who were planning to strangle the man. In the words of the superior officer of the Afghan soldiers at the scene, Capt. Shafigullah, 'There was no possibility for him to stay alive that day.'[47] Capt. Semrau came across this dilemma, allegedly being told by his Afghan comrades that the soldier should be left rather than cared for, his fate being in 'Allah's hands.'[48] Semrau asked for all attending to disperse, two shots were then fired and then he reappeared. This particular detail is much contested. Of the three Canadian soldiers accompanying Semrau on patrol, two claimed that they then agreed to cover up the shooting, whilst one claims to remember nothing of the

[43] Alison Hanes & David Pugliese 'Soldiers case 'doesn't smell right'' *The National Post* January 5th 2009
[44] David Gonczol 'Canadian soldier charged with battlefield killing' *National Post* 1st January 2010
[45] John Thompson 'Judging Robert Semrau' *National Post* May 17th 2010
[46] David Gonczol 'Bailed granted for Canadian soldier accused of murder.' *National Post* January 6th 2010
[47] Bill Gravgeland 'Insurgent was '98 per cent dead' Afghan officer tells Semrau court martial' *Globe and Mail* June 22nd 2010
[48] Steven Chase 'Semrau court-martial puts 'soldier's' pact to the test' *Globe and Mail* March 24th 2010

episode.[49] An Afghan interpreter attached to the patrol claimed he saw the Captain fire the two bullets,[50] Capt. Shafigullah, Capt. Semrau's 'best friend', claimed he was angry because Semrau did not consult with him first.[51] Corporal Fournier, a member of the mentoring team, claimed that the Captain had told him and the others, 'you don't have to see this,' and after the shooting had claimed Semrau told him how he 'hadn't expected the shots to go through him like that.'[52] Finally, it was alleged that Captain Semrau felt 'bound by a soldiers pact to quickly end the battlefield suffering of the grievously wounded', be they friend or foe.[53]

However, while the court found that Capt. Semrau did indeed fire two bullets into the insurgent, they could not convict him on the charge of murder or attempted murder because the body was never recovered.[54] A military investigation team, returned some months later to the sight but found no trace of the body, although they did find two 5.56mm bullet casings, identical to those which Semrau's own weapon would have fired.[55]

The only charge that resulted in a conviction was the military offence of disgraceful conduct. His punishment was a demotion in rank, from Captain to 2nd Lieutenant, and to be stripped of his medals and decorations and dismissed from the Army. This was the lowest possible punishment that the court martial could administer; he was not dismissed with disgrace, which would have negated him ever working for the federal government of Canada again.[56]

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[49] Christie Blatchford 'For the jury in Semrau case the penalty did not fit crime' *Globe and Mail* July 19th 2010
[50] ibid.
[51] n.42 above
[52] Bruce Cheadle 'Semrau admitted 'it was me,' court martial hears' *Globe and Mail* April 28th 2010
[53] n.43 above
[54] Steven Chase 'Semrau not guilty of murder in death of wounded Taliban' *Globe and Mail* 19th July 2010. It is important to note that this was the Canadian charge of Murder contained within the Canadian Criminal Code which has some important differences to the British charge of murder, and which is considered in Chapter 3, 4 and 5.
[55] Bill Graveland Comrades attend court martial of captain charged in shooting death of insurgent' *Globe and Mail* Jun 21st 2010
[56] Steven Chase 'Disgraced soldier's loss of rank, medals and severance pay' *Globe and Mail* October 6th 2010

This case presents a veritable smorgasbord of legal and moral discussion. The sentencing especially indicates the vagueness of the acceptability of Capt. Semrau's actions. As stated, whilst Semrau's case was tried in Canada, the similarities between UK common law and the Canadian Criminal Code permit comparisons to be drawn. This similarity is especially acute concerning the composition of the rules governing military law between the two states. There are two other cases, *United States* v *Alban Cardenas*[57] and *United States* v *Maynulet*,[58] in which the courts have treated the defendant's differently and which help highlight the circumstances in which these types of actions take place and multiple approaches taken towards them.

The *Cardenas* case concerned a situation where, in the early hours of 18th August 2004, Staff Sergeant (SSG) Cardenas' platoon was conducting a security patrol in Baghdad, Iraq. Intelligence indicated that the insurgents were transporting insurgents into Sadr City in dump trucks in preparation for an attack. Cardenas' platoon engaged a dump truck that appeared to be throwing out explosive devices. The truck caught fire and rolled to a halt. SSG Cardenas section moved to secure the area around the dump truck, and arrived to discover a number of dead and wounded Iraqis in and around the vehicle. Cardenas and his companion Sgt. Horne began to provide medical assistance to the wounded Iraqis.

Sergeant (Sgt.) Home found an injured Iraqi teenager, Qassim Hassan, in the flames of the burning refuse. After moving him to safety he discovered that Qassim's limbs were burnt black, and his abdomen had been eviscerated leaving his organs exposed. Others reported on the victim's condition,

[57] *United States* v *Alban Cardenas* 29 (Headquarters, 1st Cavalry Division Jan 14th 2005)
[58] *United States* v *Maynulet* No.04-9847,242-243 (Headquarters, 1st Armoured Division April 1st 2004)

'...his torso...pretty much all tore up,[and] his guts laying (sic) on the street, covered in blood.'[59]

Sgt. Horne informed his officer that he thought Qassim was untreatable, the officer asked 'What do you want to do?' to which Sgt. Home replied, 'I want to put the guy of out of his misery.' The officer replied 'If you are going to do it, go ahead, but hurry up.'[60]

Horne then consulted with SSG Cardenas. Several minutes passed whilst first aid was administered to the other injured Iraqis and the situation in the surrounding environment was becoming increasingly hostile. SSG Alban was becoming increasingly concerned about an imminent attack and wanted to get his soldiers to a safe area. He approached Sgt. Horne who was standing close to Qassim. On seeing the victim's apparently irreparable condition and the terrible pain he was experiencing, he told Sgt. Horne,

'…were staying too long…shoot the guy and put him out of his misery.'[61]

Horne then fired his weapon at Qassim's chest in order to end his suffering. After two shots the victim was still alive and Sgt. Horne delivered another, to the head, resulting in the victim's demise.

At his trial Sgt Horne reiterated that neither he nor Cardenas shot the injured Iraqi from malice but,

[59] n.53 above testimony of Sgt. Devault at 102
[60] See 'Court Martial Record – Alban Cardenas, Jonathon J SSG' May 3rd 2006 available on http://www.expose-the-war-profiteers.org/archive/government/2006/20060405.pdf. accessed 13/3/2012
[61] n.53 above testimony of SSG Cardenas at 22-23

> '…because of the compassion we felt for (him)…[and] because of the condition that he was in. It's just not right to let any human just lay there and suffer like that… that's why I did it and I know that's why Sergeant Cardenas did it'[62]

The panel of military officers at their court martial found both guilty of unpremeditated murder,[63] and both were sentenced to a reduction in rank to that of private, a bad conduct discharge and for Sgt. Cardenas, one year confinement, whilst Sgt. Horne who fired the fatal shot received three years confinement.

In *United States* v *Maynulet*,[64] Capt. Maynulet was in command of an armoured convey on a 'kill or capture' mission seeking a high value target in the Iraq insurgency near Iraq. They established roadblocks, yet the target evaded their capture and a pursuit began in which shots were fired at the vehicle. The vehicle crashed and the occupants fled but the driver was unresponsive, he had suffered a bullet wound to the back of the head which had removed part of his skull leaving exposed brain matter.

Capt. Maynulet ordered his men to pursue the fleeing insurgents and the company medic to treat the driver. The medic estimated the victim had lost over one litre of blood, had an inch by six inch 'gaping head wound' and informed the Captain, 'There's nothing I can do for him, he isn't going to make it.'[65] He said it was the worst head wound he had ever seen,[66] and he believed the victim would be dead within twenty minutes.[67]

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[62] n.53 above testimony of Sgt. Horne at 89-90
[63] In violation of the US Code of Military Justice Art.118
[64] *United States* v *Maynulet* No.04-9847,242-243 (Headquarters, 1st Armoured Division April 1st 2004)
[65] ibid. testimony of Sgt. Thomas Cassidy Company Medic at 342
[66] ibid. at 337
[67] ibid. at 340

Presently, word came over the radio that his men had captured the target, who was in need of medical assistance. He sent his company medic to treat the target, and subsequently shot the injured river twice in the head. At his trial he also stated he did not act out of malice, but from respect to the victim's dignity.

> 'He was in a state that I didn't think was dignified. I had to put him out of his misery…It was the right thing to do. I think it was the honourable thing to do. I don't think allowing him to continue in that state would have been proper.'[68]

The panel of officers at his court martial cleared Capt. Maynulet of assault with intent to commit murder, but found him guilty of the lesser offence of assault with intent to commit voluntary manslaughter. He was spared a custodial sentence and was merely dismissed from service.

These cases evidence modern occurrences of battlefield mercy killings, committed by soldiers serving in forces with comparable military justice systems, and help build a picture of the mind-set of the defendant, the context within which the killing took place and the differing ways the law will interpret the situation. They, particularly *Semrau*, will be referred to throughout this thesis as a point of focus.

Chapter one focuses on the context in which battle field mercy killings take place. This includes historical recollections, and considerations of the nature of war, its violence and also

[68] ibid. testimony of Capt. Maynulet at 451-453

the psyche of the soldier, the military ethos and the bonds forged by brothers in arms. In order to portray the markedly different nature of battlefield mercy killings from their domestic counterparts, the unique influences that the soldier faces, from the military indoctrination process and their subsequent exposure to the stresses of armed conflict, are discussed concerning the potential effect this can have on the soldier.

Chapter two provides an overview of the three branches of law which may affect the soldier's treatment. Domestic criminal law, service law and international criminal law are all significant and plausible routes to justice and overlap exist between them. The justice that the battlefield mercy killer receives in light of each may differ because the stigma attached to the differing offences proffered by each is different. For instance, under international criminal law the mercy killer could be deemed a war criminal, under domestic law a murderer, and under service law they could be subject to various military discipline offences. The chapter is aimed at establishing the interplay between each system.

Chapter three involves an analysis of the criminal law and the debate over how mercy killings are dealt with in the civilian context. All types of 'mercy killing' are illegal in England and Wales and can be seen to constitute the crimes of murder, manslaughter or assisted suicide. The prohibition stands regardless of who the actors are, whether the victim be a spouse, sibling or offspring, or if the offender be a close relative, medical practitioner or a stranger. However, as will be demonstrated, the relationship between the defendant and the victim, and the defendant's motive is often crucial to the treatment of the defendant in court.

The rightfulness of classifying mercy killings as murder is questioned as is the legal sophistry which is used to soften the affect criminal sanctions have on the defendant. The

'inconsistencies and ambiguities associated with the present legal approach'[69] are particularly apparent in the court's use of the doctrine of diminished responsibility and assisted suicide which, unlike murder convictions allow for mitigation in sentencing. It is contended that none of these approaches is able to produce justice for the battlefield mercy killer themselves or for the action that has taken place. The criminal law has developed to deal with civilian issues in peacetime and these already ill-fitting doctrines befit not the soldier acting in times of conflict.

Chapter four asks whether the actions of the mercy killing soldier have anything in common with the actions of physicians involved in end of life decision making and practices. First, the theory of double effect is discussed. Whilst the soldier cannot benefit from the doctrine he clearly has much in common with the intention of the physician who seeks to alleviate the patient's suffering. Second, the absence of consent from the victim's in the cases detrimentally alters the morality of the action. This is accentuated when the consent and it's justifications are considered solely in relation to assaults and other overtly criminal acts. Understanding when consent is and is not relevant in the medical setting often softens the impact the lack of consent has upon the mercy killings righteousness.

Service law is the focus of chapter five. Historically, the traditional accusations levelled at the military justice system decree it as unjust and lacking impartiality. However, recent and widespread reforms seemingly make the process more stringent. Any case of a battlefield mercy killer would likely come before a court martial consisting of military officers who deliberate upon the facts and have a role in passing the sentence. It is argued that whilst the danger still exists, the soldier may benefit from being judged by a Board of military men who

[69] Hazel Biggs *Euthanasia, Death with Dignity and the Law* (Hart Publishing, 2001) 7

have some insight of the military training, ethos, lifestyle and perhaps combat, under which pressures the soldier has enacted the killing. However, there is also a risk that a distinct class bias is present within the military justice system potentially causing officers and enlisted men to be treated differently in similar circumstances of battlefield mercy killing.

Finally, to understand what constitutes justice for the battlefield mercy killer the reasons why he is being punished must be understood. Moral arguments surrounding mercy killing are often at odds with each other, some arguing that a murder conviction is just whilst others argue it is unjust. The reasons for punishment, retributivist in nature, do not always match up to the moral perceptions of the soldier's action, and thus this negates the moral culpability which is required for such punishment. The current ability to interpret the law only narrowly potentially leads to the conviction of a soldier who does not pose a threat of infringement of the normative expectations of an individual. The main focus should be upon the soldier's compassionate and sympathetic motive which is negated by the legal preoccupation on intent in the justice system. By judging the actions of the battlefield mercy killing soldier in light of all the aforementioned considerations, it is concluded that his actions are morally and normatively legitimate contrary to the archaic legal position. This is very much in line with the debates on civilian mercy killings and whether it is appropriate to criminalise them.

1.9 Terminology and Definitions and Conceptual Boundaries

In order to embark upon an analysis of the topic, an attempt will be made to give refined definitions to some of the key components, including the terms 'battlefield' 'soldier' and 'mercy killing', each of which has a myriad of possible practical and legal interpretations.

The term ‘battlefield’ will be understood as the scene of the killing. It shall be compared with the hospital or home, the scene of many domestic mercy killings. Individuals are bound by different behavioural requirements and legal constraints dependent upon their professional position and the circumstances they are operating in. This is no different in the armed forces; different roles have different duties which change dependent upon the theatre within which they are operating. The battlefield is circumstantially different to the wider area affected by armed conflict. For instance, the conflict may be in England but the specific area where the fighting takes place is the ‘battlefield’, the place of battle which can change daily. Thus, the violence which precedes the need to enact a mercy killing cannot be justified if the battlefield is, fir example, in London but the mercy killing takes place in Birmingham after an altercation between two drunken soldiers working in an administrative capacity. Perhaps a better term is ‘combat zone’; those isolated areas in which the fighting occurs, rather than the area or region of the wider conflict within which there can be a number of demilitarized zones,[70] and safe zones.[71]

> ‘The combat zone where subject to the undefended places rule liberty to bombard the whole area is quite plain, not restricted to enemy forces or installations, nor restrained by the presence of civilians in villages or towns usable for military purposes.’[72]

Of course, civilians can never be legitimately intentionally targeted, but within this ‘zone’ the legitimate violence between the belligerents is authorised. Thus, the ‘battlefield’, can occur wherever hostilities are engaged between two forces, whether it is an attack on a defended

[70] Geneva Convention Additional Protocol I 1977 Art. 60
[71] Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 Art. 15.
[72] Julius Stone *Legal Controls of International Conflict: a treatise on the dynamics of disputes and war* (Rhinehart New York 1954) 620 -621

position or an ambush of an enemy patrol, from that moment until the end of the violence the area has become the field of battle. For final clarity and due to the lack of a precise legal definition of where and what the battlefield is, a literal interpretation shall be employed, 'the piece of ground on which a battle is or was fought'[73]

Second, who exactly is a soldier must be defined, as in this study the battlefield mercy killing takes place between two soldiers. Establishing who constitutes a *bona fide* combatant is important because the rules apply differently to soldiers and civilians respectively.[74] In conventional interstate conflicts it is easy to ascertain who the soldier or fighter is, but in asymmetric warfare it is harder to determine because guerrilla tactics or irregular militias may be employed. International law states that, the

> '…armed forces of a Party to the conflict consist of all organised armed forces, groups and units which are under the command responsible to that Party for the conduct of its subordinate.'[75]

However, this is not a helpful definition in conflicts defined by insurgency and guerrilla warfare, in which it is not easy to distinguish the farmer from the fighter,[76] the soldier may

[73] *Oxford English Dictionary* (Oxford University Press Oxford 2007)
[74] Which is the reason for the differing Geneva Conventions over time. Each convention and its modification has been enacted to protect a differing class of individuals. See - First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1864 Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1906 Third Geneva Convention relative to the Treatment of Prisoners of War, 1929 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949.
[75] n.65 above Art. 43 para. 1
[76] Expert Meeting at the TMC Asser Institute, The Hague, on direct participation in hostilities under international humanitarian law, 2 June 2003 as cited in APV Rogers *Law on the Battlefield* (Manchester University Press Manchester 2004) 51

toil in the fields by day and fight by night. Uniforms are worn by conventional fighting forces as required by law, if only by use of a distinctive emblem or insignia.[77]

> 'Combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or on a military operation preparatory to an attack.'[78]

Yet in conflicts such as Afghanistan, it may be difficult for traditional soldiers to identify fighters and local inhabitants by their dress. In Afghanistan today, the International Security Armed Forces (ISAF) are fighting several 'sects' of insurgency, none of which may be recognisable from the other,[79] even though international law requires soldiers to make themselves distinguishable from civilians.

If no uniform is worn, the very minimum requirement placed upon a soldier belonging to such a force is to demand they display their arms openly,

(a) during each military engagement

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack.[80]

[77] The Hague Convention Regulations 1899Art. 1
[78] n.65 above Art 43 para. 3
[79] Thomas H Johnson and M. Chris Mason 'Understanding the Taliban and Insurgency in Afghanistan' [2007] 51(1) *Orbis* 71. The forces fighting in Afghanistan against ISAF and the Afghan Army are comprised of not only the Afghan Taliban and their Al Qaeda allies, but also the Tehrik i Taliban (Pakistani Taliban) and other Islamic sects. The Taliban its self is comprised of a unique set of tribal forces each varying in customs etc.
[80] n.65 above Art 44 para. 3

If they do so, they are entitled to the same protections and status as a combatant, which also affords them all the rights of attributable to prisoners of war. Because of the vagueness of clearly identifying who constitutes a soldier, a common sense theory will be applied here. Those armed persons, who occupy the area of the battlefield and are engaged in fighting with weapons will be considered 'soldiers' or fighters for the purposes of this study. That it is impossible to decide which sect or militia they fight for is irrelevant, for they are entitled to the same protection under international law even if they have not followed its requirements concerning openly declaring their combatant status.[81]

For clarity, the term 'mercy killing' must also be defined in regard to its use in this thesis. Acts of 'mercy killing' are regularly featured in the contemporary media,[82] and the rightness or wrongness of such activities have been the key issues in some of the U.K.'s highest profile cases in the early part of the twenty-first century.[83] But the general public's perception of 'mercy killing', as simply aiding a suffering victim to an inevitable death through a less painful route, hides the complexity of the debate.

In this capacity mercy killing is known by various names, assisted dying, voluntary euthanasia, non – voluntary euthanasia, assisted suicide and physician assisted suicide. Not all of these actions are undertaken from motives of empathy. Each is a variation on the practice, entailing different actions by very different players, and each asking different questions of the

[81] ibid.Art 44 para 4.

[82] For instance a chronological documentation of mercy killings evidencing the varied debate in the last decade can be seen in numerous newspaper articles. D. Johnson 'Whose life is it, anyway?' *The Telegraph* (London August 24th 2000), J. Revill and K. Ahmed 'Mercy Killings' spur law reform calls, *The Observer* (London April 30th 2003), J. Doward Church ends taboo on mercy killings, *The Guardian* (London 16th January 2005), S. Carrell Artist and terminally ill wife die ... suicide pact, mercy killing, or act of desperation?, *The Independent* (12th January 2007) F.Gibb Swiss clinic dignitas has helped 100 Britons die *The Times* (London 2nd October 2008), S. Doughty & F. Shlesinger 'Archbishop of York condemns the push for mercy killings' *The Daily Mail* (London 2nd February 2010)

[83] For example, *R (on the application of Pretty) v Director of Public Prosecutions* (2001) 11 BHRC 589 and *R (on the application of Purdy) v Director of Public Prosecutions* (2009) 27 BHRC 126.

law when such an act is carried out. Whilst the intricacies of each of them shall be considered, they are not all similar to actions carried out on the battlefield, particularly those conducted by the likes of Capt. Semrau. Therefore, for the purpose of this thesis, a mercy killing shall be considered as an intentional act which is aimed at ending the pain and suffering of another person. Under this definition, on the battlefield it might be understood as a 'coup de grace,' defined simply as '…a final blow or shot given to kill a wounded person',[84] and is 'an action or event that serves as the culmination of a bad or deteriorating situation.'[85] In the battlefield mercy killing the victim is expected to be in a condition close to death. How much pain the victim is in, whether their injury is mortal or merely more than trivial and whether mental suffering falls within the ambit of acts constituting mercy killings are qualifications which will be refined through both case analysis and engagement with ethical theory.

This thesis is not overtly concerned with mercy killings which may take place in field hospitals by medical practitioners. They do not come within the definition of battlefield outlined above, nor do they concern the same actors implicated here. The battlefield mercy killing takes place between two fighting soldiers using the weapons of their trade to enact the killing, whilst any such act in a hospital would likely involve a military medic using medical equipment. In referencing the soldier the male gender is generally used, not from any chauvinistic overtures, but purely arising from the normative understanding, which generally assigns the role of the warrior to the male.[86] Also, the victim's gender in *Semrau, Cardenas*

[84] n.68 above.
[85] ibid.
[86] For theories on the early realisation of this normative order see William Durant *Story of Civilization vol.1*.(Simon and Schuster New York 1942) 16. On the question of the generality of the male soldier stereotype it is accepted that well documented historical figures and sects of female warriors can be cited in opposition, from Boudica to Joan of Ark, certain Scythian sects and the mythological Amazons. However three factual arguments can also be made to enforce this position certainly in the hypothesised scenario. First, the British armed forces currently ban women from frontline infantry roles and the special forces because of the fear that there involvement in such unit could degrade their overall combat effectiveness a right reserved by s.85(4) of the Sex Discrimination Act 1975. Second, the validity of this discrimination was upheld in *Sirdar* v. *The Army Board, Secretary of State for Defence* (CaseC-273/97) Finally, the low probability of a female soldier being an

and *Maynulet*, was male as were all the other actors involved, and as particular reference shall be made to these episodes, the male pronoun will dominate the discussion.

Finally, the studies into the conduct of war, the concept of battlefield mercy killing and the development of a normative process of 'warriorisation' within the armed forces are predominately based on western concepts. It is accepted that the victims of Capt. Semrau, Capt. Maynulet and SSG Cardenas were surely not westerners, and that other societies hold different values as core to their military ethos. But, here the concern is with U.K. forces, the U.K. justice system and the morality which informs them. Again, it is important to reiterate, that although *Semrau* was heard under Canadian jurisdiction, this was sufficiently similar in form for postulation of the possible outcomes and reasoning for the outcome if such an instance were to occur in the U.K. courts. [87]

actor in this circumstance is low as evidenced by recent casualty rates. Of over 600 British service personnel deaths resulting from the 2004 Iraq war and Afghan conflict beginning in 2001, less than 1% are female.

[87] This will be evidenced in chapters 4, 5, 6 and 7

Chapter Two

Mercy Killing, War and the Warrior: A socio-historical investigation of the cultural influences upon the soldier and the impact of combat upon their perceptions

This chapter examines the circumstances which may drive a solider to enact a battlefield mercy killing. To do so it will first look at the influences which the courts accept may affect the civilian when they commit a mercy killing. From there, it can be seen that the influences which affect the soldier are markedly different. They are formed from unique military cultural experiences, and the unparalleled mental impact that conflict brings as well as from an inherent expectation of what it means to be a member of society's 'warrior' caste. In any situation, a multitude of factors influence a person's behaviour. Previous social experiences, moral beliefs, group pressures, practical implications and legal constraints are all factors which inform a persons actions.

When cases of mercy killing arise in the courts 'exceptional circumstances' [1] especially previous traumas, are often considered. In *Marshall*[2] for example, the defendant had previously watched her husband die a 'protracted and painful death' from cancer and could no longer bear to watch her mother suffer the same condition.[3] The court recognised the killing was committed from mercy rather than malice, yet this recognition could only be reflected in the twelve month sentence suspended for two years, rather than the conviction for attempted murder which the court had no choice but to impose.[4]

[1] Adam Jankiewicz 'Woman walks free after mercy killing case' *The Independent* 29th September 2001
[2] *R* v *Marshall* [2001] Unreported
[3] n.1 above
[4] In this case the defendant, Doreen Marshall had admitted crushing sleeping pills to try and kill her ninety year old mother, Cecilia Maxwell, unsuccessfully. Thus she was charged with attempted murder rather than murder.

> ‘It is, I think, common ground between prosecution and defence that your mother’s existence was absolutely wretched beyond belief…I am quite satisfied on the evidence before me that what you were attempting is sometimes described as a mercy killing … What your motive was, was one of mercy and consideration for your mother…The law does not permit mercy killing. That is the law, there are very good reasons for that law, but I have to pass a sentence of imprisonment to mark the gravity of this offence.’[5]

In such instances the courts are often ready to accept that the psychological impact of the defendant’s circumstances are relevant to their treatment at sentencing. For instance, many mercy killers have close familial relationships with the deceased and have been their full-time carer, this intimacy is acknowledged as having an impact on some defendants.

> ‘…there is a significant body of research that demonstrates the negative psychological impact of being a full time carer for another person who is suffering from a physical or psychological disorder. In my view the psychological effect [on the defendant] will have been compounded uniquely by the complex relationship that existed.’[6]

In *Webb*, the defendant smothered his wife, whom he had cared for full time for a number of years. She had repeatedly voiced her wish to die, and made him promise he would not let her awake from the deathly slumber she had instigated by drinking a cocktail of tablets and brandy. The court accepted these circumstances as evidence that the principle of the sanctity

[5] n.2 above per Rodwell J.
[6] *R* v *Webb* [2011] EWCA Crim 152 at para 26

of human life would not be undermined, unlike in *Marshall*, allowing them to impose a sentence of manslaughter by means of diminished responsibility. This defence is often used in order to mitigate the mandatory life sentence accompanying a murder conviction. It is justified by referring to the defendant's state of mind, affected by the circumstances, as constituting an abnormality substantially impairing the defendant's judgement.[7] In doing so the courts are often seen to display sympathy towards the defendant.

> 'It is clear from the evidence…that the mental turmoil engendered by the impossible situation in which the defendant found himself must have been dreadful…[and] that this lonely old man may receive the help that he will need to come to terms with the disaster that has overtaken his life.'[8]

Each case is judged on its facts, and often, although the court might sympathise, it cannot be reflected in the ruling, in spite of the gravity of the influencing factors upon the defendant's actions. In *R* v *Inglis*[9] the court accepted that,

> 'The genuineness that the actions represented an act of mercy and a combination of factors including that above i.e. a long obsession with the belief that she owed a duty to Thomas to end his suffering are…powerful considerations, far removed from the ordinary case of murder.'[10]

[7] Coroners and Justice Act 2009 s.52
[8] n.6 above per Lord Judge
[9] *R* v *Inglis* [2010] EWCA Crim 2637
[10] ibid. per Lord Chief Justice Irwin at para. 58

However, this did not prevent a conviction for murder, upheld on appeal, and the imposition of a mandatory life sentence.[11] The court did not accept that the mother's actions represented no threat to the principle of the sanctity of life as in *Webb* because, 'the fact is that he was alive, a person in being. However brief the time left for him, that life could not be lawfully extinguished.'[12] Thomas, her son, sustained severe brain damage after falling from a moving ambulance; he could not communicate, move or feed himself. At the time of the mercy killing Inglis was on bail for attempted murder, having previously injected her son with a near fatal dose of heroin for the same purpose. She was, '…motivated throughout by her personal conviction that should would release him from [his] living hell.'[13]

These are descriptions of 'domestic' mercy killings, which will be used to form comparisons between civilian and battlefield mercy killings especially in relation to the circumstantial and motivational factors which the courts take into consideration. There are an almost infinite number of possibilities in which a 'domestic mercy killing' may occur; hypothetically, an individual may be accidentally run over and in order to put the victim out of their suffering another driver or the same driver may reverse over them. Elsewise, an individual may fall a great height from a cliff into the sea in the proximity of another swimmer where, seeing that aiding the victim would be futile, cause great pain, and that the victim is certain to drown anyway, the swimmer decides the most humane course of action is to initiate the drowning themselves. Then there is the traditional burning lorry or policeman's dilemma,[14] in which a lorry driver is trapped in the cab of his burning vehicle after an accident. The police, fire-fighters and ambulance service are at the scene, but it is clear he will burn to death before he can be freed. He is in agony. He begs a policeman (who happens to be armed) to shoot him

[11] At appeal the minimum time the court required Miss Inglis to serve was reduced from over nine years to five years.
[12] n.9 above per Lord Chief Justice Irwin at para. 38
[13] n.9 above per Lord Chief Justice Irwin at para. 57
[14] C Mackellar 'Human Dignity and Assisted Dying [2007] 18(3) *Islam and Christian-Muslim Relations* 355 358

rather than let him burn and the officer does so. All the examples exhibit the choice between killing someone and leaving them to die in unbearable pain. Some indicate the request and consent of the victim whilst others depict the defendant taking matters into their own hands. But they can all be seen as acts of mercy. However, such cases are not regular occurrences and a greater catalogue of case law exists concerning those cases of mercy killing perpetrated against the ill and fragile, as in *Webb, Inglis, GIlderdale* and *Marshall.*

It is these actions, in which the killer is related, by birth, marriage, or a close loving relationship, and has endured many shared experiences with the victim, which fall within this thesis definition of the 'domestic mercy killing'. In these cases there is a tradition of the judge examining the influences the relationship has had upon the defendant, which often leads to the acceptance that they were acting from love and compassion. Often, this enables the use of the defence of diminished responsibility, or at least mitigates the sentence passed in some way. Physician Assisted Suicide is also a focus of this work but is considered later in detail.[15] For this thesis, 'domestic mercy killing' comprises the following elements. First, the existence of a close, loving relationship in which experiences and understandings between the defendant and the victim have been nurtured. Second, cases where the court accepts, to some degree, the mental impact of the victim's condition upon the defendant. Finally, where the victim has been suffering long-term from their condition, it is permanent, affects their quality of life and is often fatal.

[15] See chapter 6.

2.1 Peacetime and Wartime Mercy Killings – Similarities and Differences

Despite the differing sentences, the above judgements exhibited a consideration of the defendant's experiences, circumstances and the victim's condition as pivotal regarding their actions. Yet mercy killings are always treated as unlawful homicides regardless of the motivations of those actors involved.[16] Applied in peacetime, the civil law has developed in order to cope with varying expectations and to weigh accordingly the importance that should be paid to the surrounding circumstances when the courts pass judgement. During war, whilst the crime is similar, these influencing factors are markedly different. The relationships, bonds, behaviours and duties placed on soldiers develop in isolation from civilian life, and their profession is practiced beyond the ambit of peacetime considerations. It was in the light of such influences that Capt. Semrau committed the mercy killing, for which he was charged with murder.

However, some considerations seen in the peacetime cases are comparable. Capt. Semrau, like Frances Inglis,[17] killed the victim without a thought to the feelings of anyone else. He did not consult with the victim, their family, or his military comrades, much to the disappointment of Captain Shaffigullah.[18] Likewise, he felt he had a duty to fulfil his obligation towards other soldiers whom he believed shared a common bond, much like the duty George Webb felt he owed to his wife,[19] and Francis Inglis felt she owed to her son.[20] Yet the influences of Semrau's circumstances are entirely isolated from those experienced in the aforementioned cases, not originating from a familial bond or other civilian pressures but

[16] Report on Murder Manslaughter and Infanticide [2006] Law Com. 304 Part 7 see 7.4, 7.6 and 7.7
[17] n.9 above per Lord Chief Justice Irwin at para. 59
[18] Bill Gravgeland 'Insurgent was '98 per cent dead' Afghan officer tells Semrau court martial' *Globe and Mail* June 22nd 2010
[19] Helen Cater ''Mercy killing' husband George Webb released from prison' *The Guardian* 26th January 2011
[20] n.9 above per Lord Chief Justice Irwin at para. 57

from his experiences as a warrior and soldier. This does not mean they are not potentially relevant or commensurate with the issues affecting the defendants in domestic mercy killings. The circumstances affecting the soldier can be broken into three categories, psychological, practical and cultural.

The culture informing the combatant is crucial to understanding these influences. On a macro level the influences on the belligerents, not only the combat troops, but also their political masters and the considerations of wider society behind their decisions, allows an understanding of why the conflict is being fought. On a micro level it allows an understanding of why the participants behave in that way.[21] The particular cultural influences affecting the individual can be described as the effects of the 'frenzy' of war, the nature of the combat, and the cultural foundations which inform the participant's behaviour during combat. The natural instincts of the warrior and their customary practices have long influenced their actions, and it can be seen that many of these customs and instincts are present in the case of Captain Semrau.

2.2 Psychological Factors: The 'Frenzy'

Factors which influence this 'frenzy' sit in four main categories. The natural bloodlust accompanying the violence of combat, the emotional ravages combat exerts over the combatant, the de-humanisation process which soldiers are subject to, and often from the personal nature of the combat which brings a host of emotional motivations for the fighting, such as revenge, hatred, pride and honour. This frenzy has many times seen men acting in

[21] Patrick Porter 'Good Anthropology, Bad History: The Cultural Turn in Studying Was [2007] *Parameters* 45 46

manners unconstrained by thoughts for the dignity or protection of their enemies, wounded or dead.

‘Standing over him so they’d gloat and stab his body
So he triumphed
And now he was bent on outrage, on Shaming Hector.
Piercing the tendons, ankle to heel behind both feet,
He knotted straps of rawhide through them both
Lashed them to his chariot, left the head to drag
And mounting his car, hoisting the famous arms abroad,
He whipped his team to a run at breakneck on they flew,
Holding nothing back. And a thick cloud of dust rose up
From the man they dragged, his dark hair swirling round
That head so handsome once, all tumbled low in the dust
Since Zeus had given him over to his enemies now
To be defeated in the end of his own fathers.[22]

Such actions are not permissible under the protections afforded to the dead and wounded in the Geneva Convention,[23] but the Convention takes no account of the ‘frenzy’ which had so clearly taken over the actions of Achilles in his triumph and may also affect the contemporary soldier.

[22] Homer, *The Iliad* Translated by Robert Fagles, (Penguin Baltimore 1990) 554
[23] Geneva Convention for the amelioration of the sick and wounded 1949 Art.16 para.2 ‘As far as military considerations allow, each Party to the conflict shall facilitate the steps taken … to protect [the killed] against … ill-treatment.’ Geneva Convention Additional Protocol I 1977 Art. 34(1) ‘The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities … shall be respected’. Geneva Convention Additional Protocol II 1977 Article 4 of the 1977 Additional Protocol II provides:
1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person [and] honour …
2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:

The battlefield of the ancient and medieval world was an unregulated combat zone, in which no thought was spared for the distinction between combatants and those *hors du combat.* '…[T]he killing fields were the domain of the cavalry mopping up scattered infantry and foot soldiers following up despatching the wounded and worthless.'[24] Such killings appear ruthless and hardly fit with the contemporary notions of mercy killings motivated by sentiments of compassion, but this is the dilemma the modern soldier faces. This soldier is devoted to two operations requiring contradictory actions, one which comprises of killing the enemy and the other which demands he protects those no longer able to fight.[25] It is logical to question the ability of the frenzied soldier, who has recently been in a life and death struggle with the enemy, to make a clear demarcation between fighting and protection.

Blood lust may be an inherent part in our human psyche, linked to a negative desire to destroy and heightened by our instinctual will to live when in combat.[26] However, this marriage between our combative destructive tendencies and the will to live which then initiates a frenzy is a questionable theory when applied to the actions of individuals during combat,[27] '…it is a large step from what may be biologically innate leanings towards individual aggression to ritualised, socially sanctioned, institutionalised group warfare.'[28] Whatever the origins of this frenzy the numerous accounts of this state of being are evidence enough of its existence in certain individuals. To avoid the unruly frenzy is one reason why discipline is drilled into fighting troops during training. But even military trainers understand that it still

[24] Sean Mcglynn *By Sword and Fire: Cruelty and Atrocity in Medieval Warfare* (Orion London 2008) 89
[25] S Dalby 'Warrior Geopolitics: Gladiator Black Hawk Down and the Kingdom of Heaven[2008] 27 *Political Geography* 442
[26] Sigmund Freud *Beyond the Pleasure Principle* 1922 (reprinted Liverlight Publishing Corporation 1961)
[27] B Einreich *Blood Rite: Origins and History of the Passions of War* (Granta Book 2011) 91
[28] C B Kroeber and B L Fontana *Massacre on the Gila: An account of the last major battle between American Indians, with reflections on the origin of war* (University of Arizona Press 1986) 72

serves to embed an aspect of the 'terrible' into troops.[29] It is when this terrible aspect overflows the confines of it's purpose that a 'frenzy' manifests.

One such episode of 'frenzy', which affected a soldier's ability to demarcate between persons and times when it was acceptable to kill and when it was not, was witnessed by a young British officer during the Great War, after his troop stormed and captured a German trench. The young Officer struggled to come to terms the mindless brutality of his Sergeant.

> "Look here, we took a lot of prisoners in those trenches yesterday morning. Just as we got into their line, an officer came out of a dugout. He'd got one hand above his head, and a pair of field glasses in the other. He held the glasses out to S_____,… and said, 'Here you are Sergeant, I surrender.' S_____ said, 'Thank you, sir' and took the glasses with his left hand. At the same moment he tucked the butt of his rifle under his arm and shot the officer straight through the head. What the hell ought I to do?"
>
> "I don't see that you can do anything" I answered slowly, "what can you do? Beside I don't see that S_____ is really to blame. He must have been half mad with excitement by the time he got into that trench. I don't suppose he ever thought what he was doing. If you start a man killing, you can't turn him off like an engine. After all, he is a good man. He was probably half off his head."[30]

[29] **The Story of the Gurkhas in the Falklands Being Cannibals –See laptop version for reference.**
[30] Guy Chapman *A Passionate Prodigality* (Holt Rhinehart and Winston, New York 1966) 99-100

2.3 The influence of the battle upon the soldier's state of mind

Capt. Semrau, did not callously gun down a readily surrendering enemy, but it is naïve to assume that he would not be suffering from a heightened state of aggression in the minutes following the intense fire fight which could have affected his decision making. The possibility for aggression to linger and cause one to lose control is legally accepted, especially when the aggression stems from a history of violence directed at the defendant. *R* v *Ahluwalia*[31] evidences this principle. The defendant had suffered years of violence from her husband prior to killing him, the judge correctly informed the jury that,

> '…in considering acts done and words used, they were to take account of the whole history of marriage and not confine their attention to what was said or done on the night of the killing.'[32]

In a similar way, the mental impact of war on the soldier is well documented, with Post Traumatic Stress Disorder brought on by conflict increasing as a result of the recent wars in Afghanistan and Iraq.[33] Whilst the soldier in a battlefield mercy killing will not necessarily be suffering from the condition, it evidences the mental costs upon the individual due to such intense experiences. Previously held concepts of right and wrong might begin to change, and the classroom morality lessons many officers and soldiers are subject to may seem less

[31] *R* v *Ahluwalia* [1992] 4 All ER 899
[32] ibid. per Lord Taylor at 899
[33] National Audit Office – Ministry of Defence *Treating Injury and Illness Arising on Military Operations* Session 2009-2010 HOC 294 London: Stationary Office Feb 2010 15 *fig.* 3 – Between October 2006 and October 2009 there were 1,736 military personnel diagnosed with mental health conditions returning from the conflicts in Afghanistan and Iraq

applicable in the real situation.[34] An infantryman who participated in the massacre at My Lai during the Vietnam war in which several hundred civilians were killed, recalled,

> 'I remember seeing people being butted in the head with rifles. But you start losing your sense of what's normal. You don't give up your morals, but you become a lot more tolerant. We believed this behaviour pretty common place. I didn't think we were doing anything different from any other unit. You really do lose your sense…not of right and wrong but your degree of wrong changes.'[35]

A prolonged history of violence may have an even deeper psychological impact. Capt. Semrau was himself an infantry soldier, and it is not known whether he had killed any othesr in combat prior to the mercy killing. However, it is likely that he had, and that he had seen numerous men killed and severely injured, and that these deaths and injuries were the result of violent, yet legal, confrontations.[36] It is plausible therefore, to assume that the longer Capt. Semrau was exposed to such situations the greater the impact was on his concepts of not only right and wrong, but also of what behaviour was considered taboo, including the killing of another human.

For the combat soldier the taboo of killing is broken during conflict, with of all the passions of revenge and self-preservation heightened. However, whilst the taboo against killing is

[34] Office of the Judge Advocate General - National Defence *Code of Conduct for CF Personnel* Canada p.A1 concerning lesson plans for Code of Conduct

[35] Micheal Bilton and Kevin Sim *Four Hours in My Lai* (Viking New York 1992) 79

[36] The legality of such killings can be better understood as killings which are not illegal rather than being seen as those which are expressly legal. The 'laws of war', such as the Geneva Conventions, do not specifically outline when it is permissible for a soldier to kill another, rather they outline when, where and who it is not permissible to kill. Likewise, UK law does not sanction killing, but rather outlines when it is not permissible namely, 'under the Queen's peace' - killings during time of conflict therefore are not covered by such a prohibition.

founded on the wrongness of allowing personal sentiments of anger, revenge and pride overtake ones actions, the mercy killing is based upon notions of compassion and duty. One action is based on behaving detrimentally towards the victim the other on the belief that the action is for their benefit. It is of course conjecture, but the soldier who has already experienced the breaking of this prohibition might find it easier to justify killing based on more kindly foundations.

2.4 Preparing the soldier for battle – dehumanisation

Perceptions of right and wrong which have been developed through civilian experiences norms and rules apparently change during the intensity of war. The natural bloodlust which can arise, and the emotional strain and moral erosion that war entails is further compounded by the de–humanisation process that the soldier undergoes during training.[37] This involves breaking down the individual's notions of the taboo, namely that which prohibits killing, a perfectly sound precept in times of peace in civilian life, but a hurdle to military effectiveness in times of war.

> '…once you start, it's very easy to keep on. Once you start, the hardest – the part that's hard is to kill, but once you kill, that becomes easier, to kill next person and the next person and the next one. Because I had no feelings or emotions or no nothing. No direction. I just killed. It can happen to anyone.[38]

[37] Jonathon Glover *Humanity: A Moral History of the Twentieth Century* (Pimlico London 2001) 48
[38] n.35 above at 8.

The process of dehumanisation starts before the soldier experiences combat. This is not a new phenomenon, people must be prepared and readied in order to accept the actions which invert all of their previously held moral beliefs. In war it becomes right to kill, right to steal and right to pillage and loot. People are inherently adverse to breaking such inbuilt social boundaries, such that in Vietnam it was found that many soldiers could not initially bring themselves to fire upon the enemy.[39]

Soldiers must undergo a transformation to become reliable killers. In primitive, small scale societies this transformation was symbolised through ritualistic practices, the drums would beat, the men would dance, fast and or chant and finally, when they took on the role as a warrior, it was often customary to be adorned with headdresses, masks or body paint to signify the transformation.[40] The transformation process to convert a normal member of society into a warrior is evidenced throughout history in both fact and myth. It was not unusual for individuals to liken themselves to a wild animal, in acceptance of the animalistic and brutal acts they would have to commit and the need to leave behind them their humanness.[41] Scandinavian 'berserkers' renowned for their ferocity, donned bear furs before they became warriors. The word beserk itself translates to 'dressed in bear skins'.[42] In Celtic myth, Cuchulain morphed into a monster of terrifying aspects before he went into battle during which his savagery was insatiable.[43]

Modern processes of dehumanisation are far more disciplined. Relentless drilling and exercises form the process by which the recruit leaves behind his civilian persona and

[39] David Grossman *On Killing: Psychological Cost of Learning to Kill: The Psychological Cost of Learning to Kill in War and Society* (Little Brown 1995)
[40] n.27 above at 21.
[41] Georges Dumezil *Destiny of the Warrior* (Univeresity of Chicago Press 1970) 38
[42] n.27 above at 22.
[43] H R Ellis Davidson *Myths and Symbols in Pagan Europe* (Syracuse University Press Syracuse 1988) 84

becomes a 'military man'. Modern 'boot camps' have been created in order to create a soldier with a well-honed 'emotional edge',[44] in order to ease the killing experience for the recruit.[45]

> 'The hopeful candidate is subjected to a new catastrophic experience which breaks down to a large extent his previous personality organisation. His previous valuations fail and in order to find a new basis for self respect, he must adopt new standards…'[46]

As the soldier becomes inculcated with his new personality as a warrior within the new group he is associated with, he 'hyper invests' in the group, that is to say he takes on their values in place of his previous values. Such an investment in highly specialised groups leads to a level of alienation and heightened xenophobia; in order to kill the soldier must become emotionally attached and objectify the enemy.[47]

Capt. Semrau was a combat soldier who had undergone the rigours of the dehumanisation process that occurs during a recruit's basic training. He was operating in a culture of killing, where the taboo of killing had been purposefully broken and inverted. Judging him against the standards of the ordinary civilian who had not been processed in this way is problematic because killing is a larger step for the civilian to take. The moral constraints acting on a civilian who kills from compassion are heightened compared to the soldier who has been trained to kill, and it is thus a smaller step to take for the soldier, trained to kill, to deliver a coup de grace in the moments after a firefight than for a civilian in the domestic setting. A

[44] R Wayne Eisenhart 'You can't hack it little girl: A discussion of the covert psychological agenda of modern combat training' [2010] 31(4) *Journal of Social Issues* 13 15
[45] Jojurda Verrips 'Dehumanisation as a double edged sword: From boot camp animals to killing machines' in G Baumann and A Gringrich (Eds.) *Grammars of Identity/Alterity* (Berghahn Books 2004) 150
[46] S Stouffer *Measurement and Prediction. The American Soldier Vol. IV* (Wiley New York: 1950) 389
[47] D Winslow 'Misplaced Loyalties: The Role Of Military Culture In The Breakdown Of Discipline In Two Peace Operations' [2004] 6(3) Journal of Military and Strategic Studies 345 356

soldier's moral revulsion at killing has been eroded by the psychological processes that accompany the transformation of recruits into soldiers. However, the training of recruits is not only aimed at dehumanising them to make them reliable killers, but also to instil discipline and an adherence to an orderly level of conduct, especially in situations of heightened tension. The soldier is trained to conduct himself to a professional standard, which perhaps lessens the weight of the argument that can be used to partially excuse the battlefield mercy killer based on the dehumanisation process.

2.5 The nature of the combat and its effect upon the combatant

> 'If war is an act of force, it belongs necessarily also to the feelings. If it does not originate in the feelings, it reacts more or less, upon them, and the extent of this reaction depends not on the degree of civilisation, but upon the importance and duration of the interests involved…in short even the most civilised nations may burn with passionate hatred of each other.'[48]

Combat can have a very personal effect on the individual's outlook towards his treatment of the enemy. The cause of and background to the conflict can colour perceptions, hence tribal hostilities can, when aggravated, cause massacres born from a legacy of resentment.[49] This type of hostility was perhaps most violently evidenced by the Rwandan genocide and other violence between the Hutu and Tutsi tribes.[50] The Afghan conflict can, in part, also be

[48] Von Clauswitz, K *On War* translated by Graham J J (Digiread Publishing 2008) 24

[49] For instance, the intermittent hostilities between Israel and Palestine, Armenia and Azerbaijan and India and Pakistan. However, 'tribal warfare' as understood by westerners may be a western construct and in many ways is no different from the warfare which as traditional taken place in Europe between nations states, and indeed many of the recorded tribal warfare can be seen as arising from Western interference with the 'tribe' in the first instance. R B Ferguson 'Tribal Warfare' in N Scheper-Hughes *Violence in War and Peace: An Anthology* (Blackwell Publishing 2004)

[50] See P Y Reyhan 'Genocidal Violence in Burundi: Should International Law Prohibit Domestic Humanitarian Intervention?' [1996] 60 Alabama Law Review 771

regarded as a tribal conflict since there is a subdued but long held resentment between the Taliban and the Government formed from the former Northern Alliance, at play between members of the Afghan Army and the Taliban.[51] This type of conflict has occurred throughout history, and when soldiers party to the feud kill it is from feelings of revenge, anger, and righteous retribution and not the mercy and compassion associated with a mercy killing. The chroniclers of the Franco - Flemish War at the turning point of the thirteenth and fourteenth centuries have left behind a host literature evidencing the intense long held hatred the protagonists held for each other.

> 'The Flemings did not know how to distinguish him from the others lying on the ground, for they would have more gladly killed him than anyone else.'[52]

In these instances, any number of atrocities might be subjectively justified because of the soldier's overwhelming emotions and often both combatants and civilians are killed with equal glee, even when the protagonists claim the protection of moral piety.

> 'Remember, Lord, what the Edomites did on the day Jerusalem fell. "Tear it down" they cried, "tear it down to their foundations!" Daughter Babylon, doomed to destruction, Happy is the one who repays you according to what you have done to us. Happy is the one who seizes your infants and dashes them against the rocks.'[53]

[51] Neamattollah Nojumi *The Rise of the Taliban in Afghanistan: Mass Mobilisation, Civil War and the Future of the Region* (Palgrave New York 2002)
[52] *Annales Gananses* 71 – Showing that these conflicts are not a modern phenomenon, this depicts the Flemish rebellion against French tyranny who killed all with great delight.
[53] Psalm 137: 3-7

However, when two 'sides', be they states, tribes or political factions, go to war, an 'us and them' mentality is created. It may not arise from primitive 'tribal' resentment, but it can be seen to exist. In the same way that it is important to dehumanise the individual soldier so he becomes a reliable killing machine, it is equally important to objectify the enemy, making them less like 'us' in order to ease the killing process.[54] Before the individual or state attacks, that individual or group must become the enemy, individuals do not kill simply because they have weapons, rather they kill because they have reasons to kill, in war it is because the protagonist has become an enemy.

> 'In the beginning we create the enemy. Before the weapon comes the image. We think others to death and then invent the battle-axe or the ballistic missiles with which to actually kill them.'[55]

The opposition becomes the enemy based on a host of justifications particular to the values of the protagonist society. Discourse for such judgements centres on themes such as good motives versus the evil motive for the combat, the just cause combating the unjust cause and assigning the opposing party as guilty and one's own party as innocent.[56] The current 'War on Terror' illustrates this point. Certain states and regimes have been termed 'evil'[57], and singled out as the instigators of terrorism, perpetrators of weapons offences and implementers of oppressive policy measures and doctrine at odds with western democracy. This evil label has allowed and justified a number of specific policies, and in the case of Iraq, invasion and

[54] n.47 above at 356
[55] S Kenn *Faces of the Enemy: Reflections of the Hostile Imagination* (Harper & Row San Francisco 1986) 10
[56] Nico Carpentier and Daniel Billereyst 'Fighting Discourses – The construction of the self and the enemy: Media Covering War- Vietnam, Persian Gulf and Kosovo' Paper Presented at First University of Essex Graduate Conference in Political Theory: Contemporary Theory and Politics for the New Millenium 12th - 13th 2000 available on http://homepages.vub.ac.be/~ncarpent/kosovo_essex2.pdf last accessed 14/01/12
[57] The 'Axis of Evil' North Korea, Iraq and Iran

war committed by the forces of 'good', a set of affairs many argue was pre-decided but required justifications to implement.[58]

Labelling and objectifying the enemy is not new, the concept of the *jus ad bello*, the just war, was favoured by medieval European rulers as justification to commence war. The elements of such a justification are similar to the objectifying dialogue often heard in modern conflict. For instance, Saints Aquinas and Augustine emphasised the need for the protagonists good intent, 'to be just war must be waged with the correct authority, for instance, to rescue the poor…from the hands of the sinner'.[59] Justifications for war often took the form of the good needing to punish evil, 'it is generally to punish these things, when force is required to inflict the punishment'[60] These concepts of justice, the righteousness of good and the predominance of freedom are still evident in rhetoric used today to amalgamate the collective strength of a society when a nations sends its troops to war as is evident in George Bush's speeches on the invasion of Iraq.

> 'I believe that God has planted in every human heart the desire to have freedom. And even when that desire is crushed by tyranny for decades it will rise again.'[61]

A soldier's understanding of why he is fighting in any conflict will generally be influenced by the rhetoric of his political leaders, and this will require the objectification of the enemy as an alien entity embodying the converse of the individual's beliefs. For instance, the soldier in

[58] M Ryan 'Inventing the 'axis of evil': The myth and reality of US intelligence and policy making after 9/11 [2002] 17(4) [2002] 55 56
[59] Psalm 81:4
[60] Romans 13:4
[61] George W Bush 'Address to the Union Speech' 20/1/2004 available at http://millercenter.org/president/speeches/detail/4542 last accessed 16/01/2012

Afghanistan, where Capt. Semrau served, may understand the reasoning for his deployment as being designed to bring, freedom and democracy to the region and to protect his own nation form the locally trained terrorists. The soldiers will, generally, understand themselves to be in the right and the enemy, to be in the wrong. The enemy are the perpetrators of deceitful roadside bombings,[62] who commit atrocities upon the civilian population, especially those who cooperate with NATO and Afghan National Army forces. Conversely, the average Taliban fighter, is likely to see the conflict as a war against an aggressive invasion, by evil 'infidels' who offend their customary way of life. They carry out roadside bombings as their most effective weapon against the overwhelming brutal force of NATO,[63] who uses cowardly indiscriminate airstrikes, and feel justified in punishing collaborators perceived as traitors.

The combined pressures of battle, the natural tribal instinct to kill the enemy and the overt objectification of that enemy, places the battlefield mercy killing of the injured enemy soldier into context. It can be speculated that the soldier may not see his enemy as his equal, but as inferior and alienated from what he understands as man's common humanity. The enemy's moral outlook, methods of fighting and reasons for fighting are, in his eyes, the antithesis of his own beliefs. Having already been dehumanised to the point where he can kill his enemy,. this objectification has the possibility to further erode the demarcation between killing during conflict and enacting a battlefield mercy killing, and when considered alongside the compassion shown by a defendant during a mercy killer is evidence to suggest that the criminal standard to which mercy killers are held is too high for such a soldier.

[62] See J Keegan *History of Warfare (*Vintage 1993) 68. One of the most enduring objectification of the enemy is the means by which western forces objectify eastern forces, they see 'eastern' or oriental warfare as 'different and apart from European warfare' its peculiarities include the tactics of evasion delay and indirectness which is traditional despised in western culture.

[63] P Bracken *Fire in the East, The Rise of Asian Military Power and the Second Nuclear Age* (HarperCollins 1999) 32. Conversely, the Eastern view of the European warrior is that of the stereotypical swordsman 'charging forward, seeking a decisive showdown eager to administer the blow to obliterate the enemy'

2.6 Conflict as a personal experience

Conflict can become a personal experience for the combatant if he begins to attribute a sense of personal wrongdoing to the enemy even though individual soldiers may have no true quarrel with each other, there being no wider background between the two prior to the combat. This would seem appropriate in the case of Capt. Semrau since he and his Canadian mentors, unlike the ANA were not involved in 'tribal' hostilities. Here, the combat can become personal through seeing friends killed or wounded by the enemy, and hostility from the civilian population, which the soldier may believe they are protecting. A US Vietnam veteran recalls the death of a friend and the reaction of the locals.

> 'Both his feet were blown off, both legs were torn to shreds – his entire groin area was completely blown away. It was the most horrible sight I've ever seen … I talked to the mechanized platoon leader who is with us and he said that as he left the area to return to his fire base, the people in the village he went through were laughing at him because they knew we had been hit. I felt like turning my machine-guns on the village to kill every man woman and child in it.'[64]

Resentment arising from prolonged exposure to such events was a driving factor behind the atrocity at My Lai, where the platoon involved had lost four dead and thirty-eight wounded in the month leading to the atrocity. The history of Capt. Semrau's combat activities is unknown, but for the purposes of this thesis, it is fitting to presume that he, or another mercy killer engaged in combat of the intensity in Afghanistan, would be likely to have witnessed

[64] Bernard Edelman (ed.) *Dear America: Letters Home from Vietnam* (New York Norton 1985) 184 - 85

ordeals and felt the resentment of the Afghan civilian population at some time.[65] Possession of this personal enmity, mixed with the other attributes contributing to the frenzy of war could make the actor respond, if not callously, then with more detachment towards the injured enemy soldier than he would have otherwise. It may cause him to not weigh carefully enough the consequences of his actions on the victim, their family and the benefits that attempting to give aid might deliver.

Whilst Semrau may not have acted from personal hatred arising from tribalism, others around him may have, and it is wrong to think this would not have affected his actions. Group pressures are known to be a major cause of misconduct whilst on operation,[66] as seen with the case of the detainees at Abu Gharib whilst in the custody of the United States military.[67] Also, as a foreign officer tasked with leading vengeful natives, the existence of a strong coercive force urging the officer to act decidedly in order to gain their respect, or regain authority, should not be ruled out. Semrau may have feared that providing the legally required treatment for the wounded insurgent would cause a loss of respect and authority on his part, however this is merely informed speculation and no authority for this point of view has been found in the literature.

It is argued that these categories of 'battle frenzy' influence a person's behaviour during war. They occur naturally. Some, like Achilles, become intoxicated with the victory and exhilaration of battle, soviet soldiers fighting the Mujahideen in Afghanistan commented,

[65] Hugh Thompson 'Win hearts and minds in Afghanistan to win the war' *The Times* 20th November 2009
[66] Peter Rowe 'Military Misconduct during Armed Operations' [2008] 13(2) Journal of Conflict and Security Law 162 182
[67] Susan T Fieske, Lasna T Harris and Amy J C Cuddy 'Why Ordinary People Torture Enemy Prisoners' [2004] 306(5701) *Science* 1482

> 'We'll never walk, or make love, or be loved, the way we walked and loved and were loved over there. Everything was heightened by the closeness of death: death hovered everywhere and all the time. Life was full of adventure: I learnt the smell of danger…We're homesick for it, some of us, it's called the 'Afghan syndrome''[68]

2.7 From personally impacting to psychologically damaging

Other effects such as the mental trauma that the sights and experiences war can have upon the soldier should also be considered as these could affect his appreciation of his later actions. These psychological effects could be seen in the same manner as domestic cases of mercy killing in which the defendant's mental condition is considered relevant, such as in *Webb,*[69] *Inglis*[70] and *Marshall.*[71] They are the result of the accumulation of mental anguish particularly since, after witnessing the lingering painful death of a wounded comrade, the battlefield mercy killer may not be willing to watch another go through such pain, be they friend or foe. In the domestic setting, this was a significant consideration in the case of *Marshall*, who had previously watched her husband die.[72] Yet the concept of 'tribal' hostilities and personal grievance do not fit with the motivations of mercy implicit in the aforementioned cases. Rather they indicate that the taboo of killing is weakened to such a degree that soldiers can, to an extent, become unconcerned with the demarcation between the protected and the enemy. Such symptoms may enable the defence of diminished responsibility to mitigate the murder conviction if the soldiers experiences can be shown to

[68] Svetlana Alexievich *Zinky Boys: Soviet Voices from a Forgotten War* translated by Julia and Robin Whitby (Chatto & Windus London 1992) 78 - 79
[69] n.6 above
[70] n.9 above
[71] n.2 above
[72] n.1 above.

have influenced his perception of his actions, or he is 'unable to understand the nature of his conduct.'[73]

In this context Post Traumatic Stress Disorder (PTSD), commonly found in soldiers both serving and retired, has been accepted as a cause of an abnormality of mental functioning stemming from a recognised medical condition.[74] In *R* v *Gray* it was accepted that PTSD resulting from the Ladbroke Grove Train crash where the defendant had suffered a minor injury to his back was sufficient to trigger the defence.[75] The defendant later stabbed a stranger to death and the court accepted the plea of manslaughter on the grounds of diminished responsibility. It was the trauma of the rail accident which was used to explain his mental condition at the time of the act. Accordingly, it follows that PTSD arising from severe combat experiences might be enough to trigger the use of the defence. The Australian judiciary has already allowed its use in *R* v *Nielsen* and *R* v *Walsh*, both cases where Korean war veterans have been suffering with the condition.[76] In *Nielsen* the PTSD arising from his experience of war caused him to dehumanise his victim which meant he could not control his actions and did not possess the awareness to know not to attack his victim. In *Walsh*, the defendant appealed against his conviction on the basis that at the time he carried out his attack he was suffering from a flash back to a particular combat instance in which he was defending himself from the attack of a Korean soldier. However, PTSD was not the only mental condition they suffered from, both where homeless and suffering from a variety of other mental conditions.

[73] Coroners and Justice Act 2009 s.(1)(1A)(c)
[74] ibid. s.(1)(1)(a)
[75] *R* v *Gray* unreported for full facts of the case see *Gray* v *Thames Trains and others* [2008] Ewca Civ 713 in which the convicted was refused compensation for negligence on behalf of the train operator because of the nature of his conviction. This rested upon the doctrine *ex turpi causa non oritur actio* 'from a dishonorable cause an action does not arise'.
[76] *R* v *Nielsen* (1990) 47 A Crim R 268 and *R* v *Walsh* (1991) 60 A Crim R 419

However, issues arise which challenge the use of diminished responsibility in cases of mercy killing on the battlefield. First, is the issue of whether the bond between the victim and the defendant can be shown to be sufficiently close as to have credibly affected the defendant's reasoning in the same manner as the civilian cases. This may be easier to prove in cases where the relationship is between two comrades, but harder in cases like Semrau's where the victim is an enemy fighter, although it has been argued that the shared culture between soldiers may be seen as creating this bond.[77]It may however not be an issue if the soldier can rely upon the defence of PTSD as the basis for utilising the defence, although doubts remain here also. PTSD may be relevant when the defendant acts in a civilian or family context but its use should be doubted when applied to those who commit offences whilst in their professional capacity. For example, the defence of diminished responsibility is not available to doctors when they act in their professional capacity regardless of their experiences.

In *R* v *Adams*[78] it was agreed that doctors have no special defence available to them. They are expected to do everything in their duty to uphold the ethical standards of their profession and care for their patients. Likewise then, the soldier's use of PTSD to utilise the defence is questionable. Soldiers are trained to cope with the pressures of combat whilst upholding their duty to the laws of war. As their profession, like the doctor, deals with actions relating to the highest moral concern, life and death, it could be argued that any discrepancies in their professional conduct should not be able to be mitigated under any circumstance. Indeed, this is the case with police officers who cannot gain compensation for their inability to work because of the traumatic scenes they have experienced.[79] The concept of 'professional standards' and the role this concept may play in the treatment of the soldier is repeatedly encountered in this work, and the comparison between the legal position of medical

[77] See section 2.8
[78] *R* v *Adams* [1957] Crim LR 36
[79] *White* v *Chief Constable of South Yorkshire Police* (1998) 3 WLR 1509

practitioners during end of life treatment and decision making, and the battlefield mercy killer are considered in detail later.[80]

2.8 Cultural Factors

Another factor which informs the battlefield mercy killer's behaviour is the cultural environment in which they find themselves. The military norms governing the soldier evolve in isolation to mainstream society, and flowing from their training, which involves the aforementioned process of dehumanisation, the professional soldier traditionally treats violence as a skill to be practiced and honed to prepare them for battle,

> 'They strive to out do each other in handling weapons. They realise that without practice the art of war did not come naturally when it was needed. No athlete can fight tenaciously who has never received blows; he must see his blood flow and hear his teeth crack under the fist of an adversary, and when he is thrown to the ground he must fight on with all his might and not lose courage… a soul subject to terror has fleeting glory. He who is too weak for this burden, through no fault of their own, will be overcome by its weight…'[81]

This type of violent practice informs the soldier's behaviour, but unlike in a case of domestic killing, it should not be taken as evidence that they are predisposed to violence and thus battlefield mercy should be seen as an extension of this characteristic because such mercy emanates from other sentiments as shall be seen. Further, any imprisonment should represent

[80] See chapter 7.
[81] Roger of Havedon, *Chronica RS* 2:116

the need to protect the public.[82] Soldiers who are trained and ordered to fight should not be treated like thugs and brawlers with a penchant for assault, which is an undesirable comparison because there is little compassion evidenced in brawling. On the one hand is an individual who is ordered to violence by the state, and on the other is one who acts violently against the state's conventions.

2.9 Initiations and Rituals

The shared experiences of soldiers, creates a bond and mystique which is concerned with the warrior culture. The induction, or rite of passages that the 'warrior' passes through are often similar to those his enemy experiences. For example, in the middle ages a mutual respect between knights was often found[83] due to the common rites found throughout the Christian west. All would swear to uphold Christianity, go through symbolic cleansing and dressing rituals, attend mass and take solemn oaths of one kind or another.[84] In the modern day this initiation occurs during basic training and the British Army practice of 'beasting', pushes recruits beyond their physical limits as punishment for any perceived infraction by an individual in the group to create the one and all bond.[85] 'Beasting' is designed to be a 'degrading social experience'[86] which makes a soldiers allegiance to the group stronger through discouraging him from making mistakes and engaging in non-conformist behaviour. In addition, often the group are punished for the actions of a single individual. The physical intensity of 'beasting' is such that in recent years its legality has been questioned as at least

[82] *R* v *Beesley* [2011] EWCA Crim 1021
[83] C R Clephan *The Medieval Tournament* (Dover Publications New York 1995) See Chapter 3
[84] J F Betheune Baker *The Influence of Christianity in Warfare* (Macmillan & Bowes Cambridge 1988) 1. They would be bathed, clothed in various symbolic robes, white for purity, red representing the blood shed for his cause and black indicating death, they would fast and pray for up to twenty four hours and attend confession.
[85] Tim Lynch 'Taught to kill not to pity' *Independent on Sunday* 21st March 1993
[86] S H Irvinwe 'Innovative Self – Reports of Health – Related Quality of Life in Basic Training: Their Measurement and Meaning For Attrition' Paper Delivered at the Annual Conference of the International Military Testing Association, Brussels Belgium 26th-29th October 2004

one infantryman has been known to have died as a result.[87] Initiation rituals, known as 'hazing', are also common place within military organisations. They often involve acts against or by the individual which expose them to harm or potential harm and risk, and which the individual must brave in order to be accepted into the group.[88] Such practices are in widespread use across the globe, from Norway[89] to Russia,[90] America[91] and the United Kingdom. [92]

Instead of the normal moral pressures of family and community, soldiers across the globe are influenced by military discipline, which often involves unofficial 'beasting' or 'hazing' practices. This in turn is reflected in the way in which the soldier perceives the enemy, knowing that they too have gone through similar experiences leading to respectful though deadly treatment of one another. This sentiment, which may be considered as 'fair play,' abounded among the pilots of the first world war, and is exemplified by this statement from a military airman, 'I resolved today that…I would never shoot at a Hun who is at a disadvantage'[93]

When an enemy soldier is dying, this mutual respect could be paid in treating the wounded man in the same way the actor would wish to be treated. Indeed, because of the perception of a shared experience and culture, it may be felt that one owes a duty to the other to carry out the merciful act.

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[87] *R* v *Price and Others* [2008] Winchester Crown Court Unreported. For more details see Lucy Ballinger 'Junior Soldier Died of heatstroke after beasting punishment' *Daily Mail* 20th June 2008
[88] M A Finkel 'Traumatic Injuries Caused by Hazing Practices' [2002] 20(3) *American Journal of Emergency Medicine* 312 312
[89] K Ostvik 'Bullying and Hazing Among Norwegian Army Soldiers: Two studies of prevalence, context and cognition' [2007] 13(1) *Military Psychology* 17
[90] Z Baramy 'Resurgent Russia? A Still Faltering Military' [2008] *Policy Review* 102
[91] n.88 above.
[92] n.87 above.
[93] E Rickenbacker *Fighting the Flying Circus* (New York 1919) 338

> ‘We entered the City, and passed over dead bodies, and some that were not yet dead…I found three [soldiers] which were leaning against the wall, their faces totally disfigured, and neither saw, heard or spoke; and their clothes did yet flame with the gunpowder which had burnt them. Beholding them with pity there happened to come an old soldier, who asked me if there were any possible means to cure them, I told him no: he presently cut their throats without choler. Seeing this great cruelty, I told him he was a wicked man, he answered me that he prayed to God, that whenever he should be in such a case, that he might find someone that would do as much to him, to the end that he might not miserable languish.’[94]

The above statement may be at odds with what a civilian may see as a soldier’s duty to aid those injured persons they may come across. Thus it may inspire an initial revulsion to the account of a battlefield mercy killing, in much the same way as the ‘green’ physician in the above exert did when he encountered his first taste of the aftermath of battle. However, such civilians have not accepted by means of their profession the possibility of an imminent, unexpected death or serious injury as does the soldier whose perception of their duty to aid the battle wounded differs compared to the duties civilians may feel are owed to an injured person in a domestic, peacetime situation. It is not to say that the soldier is requesting death or aid in dying, but that each recognises the limits of their mortality and the close proximity with which they must confront this eventuality in practicing their profession.

[94] A Pare *The Apologie and Treatise of 1585* G Keynes (ed.) (Dover Press New York 1968) 21

> ‘The way of the Samurai is found in death. When it comes to either/or, there is only the quick choice of death. It is not particularly difficult. Be determined to advance. To say that dying without reaching one’s aim is to die a dog’s death is the frivolous way of sophisticates. When pressed with the choice of life or death, it is not necessary to gain one’s aim.’[95]

Soldiers engaged on active service are prepared to die both by the training they receive and their own expectations. Civilians, lacking the bonds of this experience have no way of recognising or establishing a course of action regarding a mercy killing upon an injured civilian they may come across. They cannot call upon what may be perhaps termed as a ‘commonality’ between individuals in which there is an innate understanding between the victim and the mercy killer of the perils and consequences of the task they both engage in. It is difficult for the civilian who comes across an injured person to reason that, ‘we are similar in our beliefs and experiences and because of this shared ethos it can be logically presumed that a mercy killing is more likely to be the wish of this person than prolonged agony and possible permanent disability. Of course this is simplistic and an almost finite number of possibilities exists which may influence a person to become a mercy killer.

2.10 The shared experiences of soldiers and the familial relationship

However, domestic cases which fit what could be called the ‘typical mould’ like *Inglis* and *Webb*, evidence killers who face another kind of battle which may be compared to the battlefield mercy killers quest to judge the best course of action upon encountering a seriously wounded soldier. They involve a killing between two people, in some kind of

[95] Excerpt from the Bushido Code of Japenese Samurai found in N Fotion and G Elfstrom *Military Ethics: Guidelines for Peace and War* (Routledge and Kegan Paul London 1986) 59

loving familial relationship, influenced by the duties they feel they owe to one another.[96] A soldier, like Semrau, cannot be said to hold a close relationship, in the familial sense of the word, to the enemy soldier who he kills, yet a relationship does exist. It is born from the shared experiences of soldiery and combat and creates an understanding, a reliance upon the decency of the other. This relationship is not new, oath taking in western Europe among knights ensured that their lands would not be attacked by each other whilst on crusade and that their families would be cared for.[97] That Semrau felt '…bound by a soldier's pact to quickly end the battlefield suffering of the grievously wounded'[98] reflects this. The sentiment can be as strong, if not from emotion but feelings of duty and honour which are exonerated in the military, as those formed between the actors in a domestic case. In Vietnam, a US sniper who came across an injured pilot who he knew would not survive acted on a similar sentiment to Capt. Semrau. He delivered a coup de grace on the grounds that it was,

> '…necessary according to the code of the warrior, an honourable fighting man puts his comrades out of their misery.'[99]

The mental impact of war and the relationship amongst the agents in battlefield mercy killing infers that it has many of the same characteristics as a killing committed in peace time. Starkly different are the natures of the ailment of the suffering victim, being directly related to the nature of the activity they are engaged in. In *Marshall*, *Inglis* and *Webb* the victims had been suffering for many months, each with little chance of recovery. An instance like the Semrau case, represents a victim having abruptly entered the hopeless state, and what is more

[96] n.69 above at para 152. The defendant in Webb was stated to have said he had promised the victim not to let her wake up.
[97] Maurice Keen *Nobles, Knights and the Men at Arms* (Hambledon Press London 1996) Chapter 3
[98] Steven Chase 'Semrau court – martial puts 'soldiers-pact' to the test' *Globe and Mail* March 24 2010
[99] Joanna Bourke *An intimate history of killing: Face to face killing in Twentieth Century Warfare* (Granta London 1999) 37

his wounds were inflicted by the actors own forces. Again, the duality of the expectations upon the soldier are exposed: he must kill the enemy when alive, but not kill him when almost dead. The legal maxim that 'all wounded and sick should be collected and cared for,'[100] does not represent the inherent ethos of the warrior, which may be more akin to never kicking a man when they are down. The domestic mercy killer rarely encounters a victim having just entered that state, nor, unlike the soldier, do they have the means at hand by which to enact the killing. The circumstances of the mercy killing in these instances are substantially different from domestic civilian cases and makes the default stance of offering aid to all those wounded hard to match with reality.

2.11 The immediacy of the trauma, the circumstances of the battlefield mercy killing and the practicalities of legal duties

However, questions do arise over the weight given to the mitigating effects of the immediacy and duality of the soldiers situation. These are based upon the concept of professional duty which was previously seen to raise doubt over soldiers' utilising the defence of diminished responsibility caused by PTSD in which they were compared with medical practitioners who cannot use the defence. This is because they are both acting in their professional capacity and therefore are trained to deal with the situations they encounter. Likewise, they are expected to perform their duty to professional standards. Previously, it has been seen that the standards expected from the soldier may be so high as to take no consideration of the stress of their situation upon their actions.[101] It is true that the courts have been unwilling to lessen the degree of criminal liability attached to the soldier when they act criminally, in part due to the

[100] n.23 above Geneva Convention Additional protocol II Art. 3
[101] See Chapter 5.

influence of sustained stress during active military operations. [102] However, these cases relate mostly to the use of self–defence and the use of excessive force rather than to acts emanating from a sense of compassion. Even so, it has been that the soldier who honestly believes what he is doing is right, should not and need not be treated as a murderer.

> "The common law is wide enough to achieve a just result without leaving the matter to the executive and, where its principles allow this, it should be done. In reducing the crime to manslaughter it is not the intention of the soldier which is relied on but his honest belief as to his duty. As to the use of excessive force, an unreasonable but honest man who killed might be guilty of manslaughter only."[103]

In Capt. Semrau's case it could be argued that he honestly believed what he was doing was right for a number of reasons. He did it for his troops safety, they were in a dangerous area and were held up whilst awaiting aid for the victim. He may have also acted for the success of the mission as they could not achieve their objective, which could potentially save more lives than the mortally wounded victim. And finally, from an intention to save the victim further suffering. These factors might indicate that his actions were not born from evil motives. The fact that he had a gun in his hand during an intense situation, and that he acted without malice could be seen as significantconsiderations as to his liability.

[102] *R* v *Clegg* [1995] 1 AC 482. In this case a British solider manning a checkpoint was found to have used unreasonable force when he fired upon a car which sped past the checkpoint without stopping. His first shots it was accepted were in self-defence, but he had then overstepped the legal ambit of the defence when he fired the last shot as the car had passed the checkpoint and soldiers, and subsequently killed a passenger. However, although this was not a murder carried out from a compassionate motive nor was it the case that the act was carried out from evil intentions. 'There is one obvious and striking difference between Private Clegg and other persons found guilty of murder. The great majority of persons found guilty of murder, whether they are terrorist or domestic murders, kill from an evil and wicked motive. But when Private Clegg set out on patrol on the night of 30 September 1990 he did so to assist in the maintenance of law and order and we have no doubt that as he commenced the patrol he had no intention of unlawfully killing or wounding anyone.' **Per Lord ? at which Page - this was in the C of A judgement**

[103] *Attorney General for Northern Ireland Reference* (No. 1 of 1975) 112

In *R* v *Clegg*,[104] the defendant shot and killed the victim at a checkpoint in Northern Ireland, after the vehicle the victim was travelling in failed to stop and several warning shots had been fired. His conviction for murder was ultimately upheld, suggesting that whilst the law *could* accommodate a lesser charge for the soldier, the professional standards expected of him whilst duty bound are of the highest order and situational pressures are not enough to mitigate this expectation.,

> "…this court considers, and we believe that many other fair-minded citizens would share this view, that the law would be much fairer if it had been open to the trial judge to have convicted Private Clegg of the lesser crime of manslaughter on the ground that he did not kill…from an evil motive but because, his duties as a soldier having placed him…armed with a high-velocity rifle, he reacted wrongly to a situation which suddenly confronted him in the course of his duties. Whilst it is right that he should be convicted for the unlawful killing,…we consider that a law which would permit a conviction for manslaughter would reflect more clearly the nature of the offence which he had committed."[105]

The imposition of strict legal duties may not be practical when they are expected to be practiced during the grim realities of warfare and in the aftermath of battle. Whilst the courts are unwilling to accept any mitigation, it must be accepted that the nature of warfare is and always has been chaotic, intense and confusing. This makes the courts upholding of high professional standards at all times, and the default stance of aiding any wounded persons, difficult to reconcile with reality. In the days when warriors fought in serried ranks and tightly

[104] n.102 above.
[105] n.102 above per Lord Lloyd of Berwick quoting Brian Hutton LCJ at paragraph 5

packed formations, there was no chance to collect the wounded, they were stranded where they lay or were trampled underfoot.[106] Throughout history the terribly afflicted have been dispatched whilst the fighting raged, especially when no hope of aid was available to them. Knights were often spared, but this was from altruism and the promise of a hearty ransom,[107] and was indicative of the innate class bias affecting the treatment of the actor and victim in battlefield mercy killings which dichotomises the issue.

> '…the French had not so many to look after…the Zouaves lessened the number of the Russian wounded by a pretty free use of the knife and bayonet after the battle was over.'[108]

When the immediate suffering of the dying on the field of battle is evident even pious men have resorted to acts of mercy killing. The following, is the reply of a Padre, who accompanied British forces on the beaches on D-Day, when he was asked whether he offered prayers to the dying,

> 'Yes, but I also kept a loaded revolver in my pocket and if the agony of the young man was too much, I would end the prayers by shooting him through the temple.'[109]

The immediacy of the situation, and the urgency of the soldier's suffering, prompts the need for an instant reaction. The soldier has little time to weigh his options or consider

[106] Charles Oman *War in the Middle Ages* (Oxford University Press Oxford 1885) 299 -300
[107] J F Verbuggen *The Art of Warfare in Western Europe during the Middle Ages* (North Holland Publishing Co. Amsterdam 1077) 60
[108] Henry Clifford VC *Letters and Sketches from the Crimea* (Michael Joseph London 1956) 69
[109] A N Wilson 'Mercy killing is not a crime – it is a brave and selfless act of love' *The Independent* 24th January 2010

alternatives, he can await aid, which may be futile, too late, and leave the victim to die suffering, or the other extreme sees him shooting or bayoneting the victim and quickly ending his suffering. The lengthier the wait before making the choice leads to lengthier suffering. This immediacy is one factor that sets apart the mercy killing on the battlefield from its domestic counterpart. The effects of the victims suffering experienced by the domestic actor are less immediate and more cumulative.

The lack of a medical diagnosis of the victim's condition is another factor which sets Semrau's case apart from the typical domestic situation. This medical diagnosis plays an important role in understanding the gravity of the act in the eyes of the court. In *R* v *Gilderdale,*[110] the defendant was cleared of the charge of attempted murder by the jury and a guilty plea to assisted suicide was accepted. The victim, the daughter of the accused, had been diagnosised with ME for sixteen years and required regular medical treatment for the complications arising from the condition. In *Marshall* the victim had been diagnosed with a number of ailments, including being recognised as deaf and blind. In *Webb,* the victim, the defendant's wife, suffered from both mental and physical conditions,[111] believing she had many conditions, and actually suffering from very real ones, including cancer, incontinence and from transient ischaemic attacks.[112] In all of these cases the, nature of the medically diagnosed ailments affecting the victim were taken into consideration, influencing the courts view of the compassionate motive of the defendant, and ultimately leading each defendant to escape a jail term.[113] However, in *Inglis* the medical diagnosis can be seen to have acted to her detriment despite her compassionate motive. She acted contrary to the advice of the

[110] *R* v *Gilderdale* [2010] unreported see Sandra Laville 'Mercy killing mother cleared of murder after helping seriously ill daughter die' *The Guardian* 25th January 2010
[111] n.6 above per Lord Judge at para 5
[112] Commonly known as 'mini strokes'.
[113] n.6 above at para. 27 However, George Webb was initially sentenced to 2 years imprisonment but on appeal his sentence was changed to a 12 month sentence suspended for 12 months.

doctors, who claimed that a good chance existed of the patient's condition improving.[114] This no doubt affected the outcome of her trial, a conviction for murder and a sentence to serve a minimum ten years imprisonment, reduced to five on appeal.

Semrau represents a situation one step removed from *Inglis*, in that no medical opinion at all was given on the victim's condition before he acted. No medical personnel, or anyone who was qualified to assess the victim's condition was present on the patrol, as would be typical of many such groups. Of course, potentially an experienced combat veteran may have a reasonable idea of the likelihood of survival. It is likely, though not certain, that Semrau had seen previous serious wounds. However, in a combat zone where even medical practitioners are now surprised at the survival of many of the wounded, the judgement of a lay combat soldier would not withstand scrutiny.[115] Yet it is also likely that he was influenced not only by the prospect of the solider suffering prior to his ultimate death and possibly suffering physical abuse at the hands of his adversaries but also by the certainty that if he survived he would experience extreme physical disability that would be hard for a soldier to take. Regardless, Capt. Semrau seemingly diagnosed the ailment and the amount of suffering himself, subjectively, judging how much suffering and how badly injured the victim was. In *Inglis* such a subjective evaluation of the victim's condition was criticised by the judge as ignoring the wishes of other stakeholders, and wrongly judging that she possessed knowledge of the desires of a victim unable to communicate. But the case of Semrau is distinguishable from *Inglis* in this particular instance. *Inglis* was subject to the full weight of the law because,

> '…perhaps most significantly of all, her previous unsuccessful attempt to kill Thomas produced a deterioration in his condition without which, as far as we

[114] n.9 above per Lord Chief Justice Irwin at para. 22 and 34
[115] n.33 above.

> can see, the possibility of the withdrawal of hydration and nutrition would have been most unlikely to arise.'[116]

Her own actions had led to the futility of the victim's condition. They may have also exacerbated her feelings of grief and hopelessness because she knew that she was partly responsible for the condition. Similarly, Semrau, commanding the attack on the ambushers and requesting air support had led to the condition of the Taliban victim. Unlike the facts of *Inglis*, his initial actions or first attempt to kill the victim were not unlawful, he was legitimately engaged in combat. A situation by which a crime committed by the defendant led to the defendant committing another crime against the victim is markedly different from a situation in which the victim has entered into the suffering and mortal state through the legal actions of the defendant and then is 'put out' of this state by the illegal actions of the defendant. Yet breaking the actions down to the legal semantics fails to reflect the morality of the situation. Both Semrau and Inglis had knowledge which influenced their actions, the legitimacy of how influential this knowledge was is what ought to be questioned. Part of this knowledge would be the life or experiences their victims might be subjected to if instead they continued medical treatment.

2.12 Medical treatment for the grievously wounded

Frances Inglis knew that the only way her son would be legally permitted to die would be through the withdrawal of hydration and nutrition, which she believed was a 'barbaric death'.[117] Her actions constituted a method by which he would be spared this fate. Likewise, Semrau, or the soldier in Semrau's position, could be informed by the inherent rational fear

[116] n.9 above per Lord Chief Justice Irwin at para. 59
[117] n.9 above at para. 29

soldiers hold about being grievously wounded during battle. Medical facilities have not always been a feature of the armed forces, popular imagination depicts the battlefield being filled with the screams of the wounded, this coincides with a tradition of neglect towards the provision of aid which has a long tradition. Often delivering the coup de grace was seen as a humane way to treat the wounded who today must be protected. The killing of the French survivors on the field at Agincourt has been justified in this way.

> '[If] they did not bleed to death, [many of the French wounded] would have succumbed to the combined effects of exposure and shock during the night, when temperatures might have descended into the middle 30's Farenheit. It was, therefore, not arbitrary brutality when, in crossing the battlefield the next morning, the English killed those whom they found alive. They were almost certain to have died, in any case, when their bodies would have gone to join those which the local peasants under the Bishop of Arras, dug into pits on the site. They are said to have buried about six thousand altogether.'[118]

Even when a permanent armed force was created the need for a professional took place medical contingent was still a secondary consideration. The New Model Army of 1645 saw the attachment of surgeons not physicians to the army for the first time, and the Standing Army increased this provision by adding a surgeon's mate to each regiment.[119] The establishment of Field hospitals near the front and general hospitals for recuperation was another development, yet extensive treatment of the wounded was far from welcomed by the senior command. The wounded and sick were often seen as malingerers and cowards, senior

[118] J Keegan *The Face of Battle*(Penguin London 1976) 113
[119] H M Dingwall *Physician, Surgeons and Apothecaries Medicine in Seventeenth Century Edinburgh* (Tucknell Press East Linton 1995)

command allocated very little resource to their care and even less attention. What concern was shown to them was often harsh and unrepenting as recorded regretfully by Florence Nightingale during the Crimean war.

> 'To know that fifty to ninety were dying daily, to be sitting idle in the midst of them and to be told by one against whose whim we had to appeal that 'these needed no nursing as they were not wounded'!! To pass daily through the corridors filled with sick and dying creatures, to hear their moans and see their crying necessities.'[120]

Aristocratic sentiment towards the enemy wounded was often even more severe than towards their own troops, such that General Filangeri at Messina 1848 sentenced a physician to death for aiding the enemy wounded.[121]

However, even though disregard has often been shown towards the common infantryman who is stricken on the battlefield the nature of their wounds and medical knowledge has historically meant that the victims wounds were beyond the help of modern medicine. The wounds inflicted in battle are particularly traumatic and the potential for infection to enter the wound whilst the wounded soldier lies on the field of battle is high. For instance, the weaponry and equipment used in medieval Europe meant that even wounds considered as relatively minor today could be fatal.

> 'Many [of the French] would have suffered penetrating wounds, either from arrows or from thrusts through the weak spots of their armour. Those which

[120] Maria Luddy (ed.) *The Crimean Journals of the Sisters of Mercy, 1854-1856* (Four Courts Press Dublin 2004) 138
[121] GD Vecchio 'On the history of the Red Cross' [1963] 24 Journal of the History of Ideas 577

> pierced the intestines emptying its contents into the abodomen where fatal; peritonitis was inevitable. Penetrations of the chest cavity, which had probably carried in fragments of dirty clothing, were almost as certain to lead to sepsis. Many of the French would have suffered depressed fractures of the skull, and there would have been broken backs caused by falls from horses in armour at speed. Almost all of these injuries we may regard as fatal, the contemporary surgeons being unable to treat them.'[122]

Even by the nineteenth century, medical knowledge in Europe had not caught up with the power of the military technology, 'a shell broke the thighs of soldier who is since dead'.[123] Wounds easily treatable today were often fatal, surgeons could only treat what they saw, and abdominal bullets wounds gave the victim a fifty per cent chance of survival.[124] The various conditions suffered by the soldier were unknown and confused.

> 'Shock was recognised clinically but ill understood…There was no conception of the modern concept of the wound shock, due to loss of blood or other bodily fluid. There was uncertainty about the treatment of shock. Stimulants were advocated by some, in the form of brandy or other spirits: depressants were advocated by others in the form of opium.'[125]

Knowledge of the historic treatment of the wounded and the terrors of being wounded endure and it is suggested that modern day soldiers will to some degree be influenced by the failures of the past. Some may be prepared for death but it is far harder to prepare for intense

[122] n.118 above at 112- 113
[123] Henry Clifford VC *Letters and Sketches from the Crimea* (Michael Joseph London 1956) 117
[124] John Sheppherd *The Crimean Doctors: A history of the British Medical Services in the Crimean War Vol.II* (Liverpool University Press, Liverpool 1991) 468
[125] ibid. 473

suffering and debilitating, incapacitating wounds. On modern operations the British soldier is supported by a corps of medical resources,[126] and the wounded are treated and evacuated as soon as possible. Amputees who would not have survived in the recent past now often do, and even by today's standards seventy five cases of 'unexpected survival' have occurred,[127] out of five hundred and twenty two seriously wounded personnel serving in Afghanistan and Iraq.[128] This ability to save lives so close to death has an effect on the actions of the battlefield mercy killer. Preparation for sudden injuries and living with disfigurement, mental and physical disability and the need for constant care can be harder than coming to terms with death.[129] Indeed, the soldier may take solace from the fact that in the past they would have died from terrible wounds, believing this to be preferable to their fate in the present. Semrau, treating the victim as he himself wished to be treated if the positions were changed, was acting on this sentiment. Informed by the inherent understanding of the suffering soldiers face when seriously wounded, and that medical aid could be some time away,[130] his actions may be morally justified. No soldier, in his mind, would want to awake to the life that this victim would awake to, and no soldier can suffer that fate, worse than death, if they are unable to awake.

[126] See Royal Army Medical Corps found on http://www.army.mod.uk/army-medical-services/5319.aspx last visited 1st March 2011
[127] n.33 above at para 2.3 and 1.7
[128] ibid. p.5 figures taken between October 2001 and October 2009
[129] H C Hanger, B Fogarty, T J Williams, R Sainsbury 'Stroke patients views on stroke outcomes: death versus disability' [2000] 14(4) *Clinical* Rehabilitation 417. This claim is supported by a study of twenty four stroke victims, as strokes often come aboutly suddenly with little warning. There was a striking preference for sudden painless death in the groups. Painless death was preferred to even a minor stroke disability in over one-third of individuals, whilst 20% would prefer severe disability rather than painless death. Sixty-nine per cent of stroke patients and 82% of controls ranked death as preferable to severe disability.
[130] Semrau and his patrol had marched approximately twenty miles on the day of the mercy killing.

2.13 Conclusion

An important note should be made on the argument of the shared commonality and influence of isolated 'military' experiences which affect the actions of the battlefield mercy killer. Throughout it has been argued that, the isolated experiences, the rituals, customs and the strains of war affect and unite the warriors in a way which may be perceived as creating a common bond or relationship between them. However, the impact of these experiences upon the defendant in any such case will not be identical. What is being established is the general commonality between soldiers, and not a singularity which makes each individual and each military organisation in the same mould.[131] It is a broad investigation into military culture, the existence of a distinct and lasting set of beliefs and values which in turn inform the soldier's perception of right and wrong. These beliefs and values will not be identical in their substance or their effect upon soldier, but there are similarities enough to evidence a commonality between the warrior caste in different societies.

When contemplating what justice is for the battlefield mercy killer, many of the same considerations taken into account when deliberating upon a 'domestic mercy killing' such as *Marshall or Webb* are relevant. That is to say that when the law is applied to the soldier's situation, the many psychological influences affecting them should be seen as mitigating considerations as is the case with many domestic mercy killers. However, to superimpose the case law from domestic situations upon the soldier could inflict harsh justice upon them. Consider, for example, the detrimental view the courts take on acting contrary to medical advice, evidenced by *Inglis*. Applying this to the soldier, who does not even consult with medically trained personnel, but makes the diagnosis of the victims situation on his own,

[131] P Porter 'Good Anthropology, Bad History: The Cultural Turn in Studying War' [2007] *Parameters* 45 56

could mean a sentence for murder and a mandatory life sentence being imposed, even if they had no previous, immediate or accessible means to consult medical opinion as the defendant did in *Inglis*. Whilst the court should consider these mitigating circumstances they should not see the two acts as identical, for the pressures and standards upon each of the different defendants are too different to apply the domestic considerations directly upon the battlefield case. The soldier, whilst under the stress of the battlefield should not be judged according to the exact same criteria as the domestic mercy killer because the soldier has a different attitude towards killing and has immediate access to the means.

This difference occurs for several reasons. First, the duality of the situation in war is more confusing than in peacetime as the soldiers role is to both to kill and preserve life, sometimes he must kill his enemy and at other times he must protect them, the civilian need only 'not kill'. The taboo is clearly defined to the civilian but less so to the soldier, this is a factor which is markedly different to anything the courts would consider in a domestic mercy killing case. Second, the immediacy of the situation during battle and the availability of weapons with which to carry out the act of killing presents a new challenge. The victim quickly enters into the grievous state and the actor is immediately confronted with this, unlike the general perception of the long suffering or hospitalised victim in domestic cases. There is little time for the military actor to weigh their choices, and the court should accept this immediacy as a relevant factor. Third, the soldier's cultural experience is markedly different from the civilian cultural experience, and this informs their perceptions of what they feel may be morally 'right' if not the legal course of action. These perceptions of right, just and legal are discussed in more detail later. Following this, it may be that the emotions affecting the two types of defendant differ. It is easier to morally exculpate the civilian acting from emotions of compassion and sympathy, compared to the soldier, who whilst acting from these

motives is also affected by the vengeance, anger and aggression which war naturally causes. That is not to say they are malicious murderers, but rather that the emotional dilemma they face is more complex than simply attributing their actions to a compassionate or sympathetic motive. Finally, a point which should be made individually, but is intrinsic in all of those before, is the extremity of the situation within which the soldier finds himself. These factors should lead the court to view the case in the light of domestic mercy killings, to allow the imposition of perhaps, a different charge, the application of the defence of diminished responsibility or the at least the mitigation of sentence. Yet, they should also mean that the court accepts that such an instance is markedly different from situations which the domestic common law has developed to deal with, and that black and white application of case law may lead to an injustice. The pressures and influences on the battlefield are similar, but heightened in a way that the civilian case law cannot easily address.

The contrary view is that the full weight of the law should be applied to battlefield mercy killers because their actions should be seen as pure murder, in no slight part because they are trained professionals with a duty to uphold the ethical standards of the profession of arms. Semrau did not take into account the wish of his victim, did not offer him medical aid and acted arbitrarily in making his decision. This is an obtuse stance, ignoring the duality, the immediacy and the complexity of circumstances that the soldier is presented with, and is much dependant on several factors which are integral to the development of this thesis. First, the strict adherence to the 'sanctity of life' principle which, although has begun to be seen as sometimes unnecessary,[132] is still pervasive in legal and moral argument on the matter. Second, any battlefield misconduct, such as mercy killing, carries with it an overt political

[132] n.6 above.

taint. This has yet to be mentioned but is discussed in detail later.[133] The damage that misconduct can do to the reputation of the military and the legitimacy of the State's rationale for the conflict will certainly influence the type and means of justice the soldier is expected to face. If it is seen that an example must be made of the battlefield mercy killer, then a harsh imposition of justice may be favoured. Finally, this harsh stance rests upon the inability of the law to understand the nature of this act, and to accept that context and circumstance are integral to its understanding. The inability to marry good intentions with criminal intention is something that affects the mercy killer, both domestically and on the battlefield to a greater degree than in other offences. However, in order to deliver true justice to the soldier it must be considered which has greater value, the morality of the soldier's compassionate act or the black letter of the law and intention.

To conclude, as in domestic mercy killing cases, the mental condition and the entirety of the individual's circumstances should be understood when applying the law to the mercy killing soldier. However, the law should also accept that the soldier is experiencing exceptional circumstances which the common law is not equipped to provide an equitable remedy. In the interests of justice the courts should take these influences into account when passing judgement on the battlefield mercy killed.

[133] See Chapter 3.

Chapter Three

How to try the mercy killing soldier?

Evaluating the common law, international law and the military justice system concerning their ability to adequately deal with the battlefield mercy killer

An Overview

After considering the different influences which are at play when a soldier commits an act of battlefield mercy killing, the question remains as to what is the best judicial system by which to try the soldier. There are three competing branches of law which may be suitable. First, under the civil criminal law he could be charged with murder. *Semrau*, was tried under Canadian law, and thus charged with the offence of second degree murder, which has no equivalent in English law, a difference discussed elsewhere.[1] Second, military justice could impose disciplinary charges whilst hearing the charge of murder in a court martial. Third, his breach of the Geneva Convention could lead to a prosecution for war crimes under international law. Each of these systems potentially leads to both negative and positive outcomes for the actor and the reputation of that particular system. A brief overview of the whole followed by a deeper break down of the parts will be helpful in understanding how each system interacts with the other and how each may bridge gaps or leave holes that the others try, inadequately, to fill. Through this analysis a better understanding of the justice the soldier may possibly receive under each approach will be gained, and thus the best means to try the soldier can be evaluated.

[1] See Chapter 5.

3.1 Justice for the Soldier: Institutional Justice or Moral Responsibility

Giving the soldier legal justice can differ from the perception of what is a morally way just way to treat the battlefield mercy killer. Legal justice is delivered in accordance with the institutional rules of the criminal justice system, taking into account the appropriate criminal doctrine. Such doctrines generalise culpability under the concept of intention. Simplified, that is to say that the defendant is guilty of all offences committed through actions they intended without lawful excuse. Further, the definition of the offence itself is narrow; the *actus reus* is fulfilled by simply committing those defined actions.

The combination of these two narrow concepts produces an outcome which is devoid of any contemplation of other influences on the act other than the action itself and, for instance, the intention to hit, kick, stab, take, etc. Both are focused on a narrow concept of responsibility which is attributed by asking first, were these, specified, actions performed; second, were those actions intended? If both questions are answered in the affirmative then the defendant's guilt is proclaimed and 'justice' is served. Of course, such a generalised method is ideal to process acts which can be committed in a number of different ways and under many different circumstances but which would still be considered criminal. In this way, individuals within wider society know whether they are permitted to behave in a certain way, it promotes consistency and certainty and in a vast number of circumstances it is an appropriate means to deliver a justice that corresponds to the social condemnation of the offender's behaviour.

However, this approach fails to take into account the many other influences that inform a person's behaviour, those forces which caused them to behave that way. Many of these influences are not easily attributable to the defendant, being either totally out of their control

or because they are unaware that such forces are informing their actions. Without considering these circumstances the criminal justices system's treatment of a defendant under it's narrow interpretation is often in conflict with how the offender should be treated and labelled. In the following chapter the likely treatment of the battlefield mercy killing soldier by differing courts, legal systems, doctrine and procedure and the institutional justice each might deliver to the soldier, will be judged against the a concept of what might represent justice for the soldier if all of the wider influences impacting upon him when he committed the killing were considered. The effect of these wider influences is to inform the observer of the soldier's moral responsibility for the action; how wrong or right he was to act in that way at that time. Moral responsibility is thus closely related to the concept of fair justice to the soldier in line with them being treated as they truly deserve and not in line with them being treated comparably to offenders whose actions are very different but similarly categorised under normal institutional justice. It is in effect another means to assess blameworthiness, full blame is assigned if an offender intended the act and is its single cause but blame is reduced if the act is not wholly intended or has multiple causes.[2] Such an assessment can produce a different evaluation of the defendant's blameworthiness than the criminal justice system.

The most obvious relevant influences which affect the soldier enacting a battlefield mercy killing are those were considered in the previous chapter, namely, 'frenzy', the isolated military culture, the psychological impact of war and the relationships soldiers have with one another. Such factors will have an effect on the soldier's moral responsibility for the act. Before we consider the adequacy of the 'justice' to the soldier delivered by applying the following procedure and doctrine, first it is important to consider why the soldier's moral responsibility should be an important consideration to evaluating the treatment of the soldier.

[2] Kelly G Shaver *The Attribution of Blame: Causality, Responsibility and Blameworthiness* (Springer Verlag, New York 1985)

The foundation of the concept of moral responsibility lays in theories of determinism,[3] but can here be whittled down to the simple question of whether a person can only be truly and wholly morally responsible for their actions when instead of committing the act in question they could have made another choice or acted in another manner?[4] Moral responsibility is associated with wrongdoing, in the same way as criminal culpability, it seeks to attribute responsibility to those who can be legitimately blamed, in this way, criminal penalties represent this condemnation when someone commits a criminal act for which society holds them wholly to blame. But when a person has acted improperly because circumstances have made it impossible to do anything but act in that manner it might be said that the offender's moral responsibility is substantially lower.

Take for instance the soldier behaving from 'frenzy', acting from an irresistible impulse over which he has little or no control. The previous chapter contained an account of a trench clearance by British soldiers during the Great War.[5] The Sergeant in a young officer's company killed a surrendering German shortly after combat, but the Sergeant was not condemned by the officer's companion, rather his responsibility was downplayed because, 'After all, he is a good man. He was probably half off his head.'[6] The fact that a person was acting because of external influences on his mentality is not an unknown consideration in the criminal law. When it is found to be a cause in the actions of the defendant then special defences such as diminished responsibility, discussed in depth latter, can apply.[7] The reason that in such circumstances the actors moral responsibility is lessened, is because to attribute

[3] That the total set of facts influenced from the past together with the natural laws entail all the facts about what happens in the present and future. For more information concerning determinism and it's relationship with theories of moral responsibility see, John Fischer *My Way: Essay on Moral responsibility* (Oxford University Press, Oxford, 2006).
[4] Harry G Frankefurt 'Alternate Possibilities and Moral Responsibilities' [1969] 66(23) *Journal of Philosophy* 829 830.
[5] **Guy Chapman – currently footnote 30**
[6] **Guy Chapman – currently footnote 30**
[7] **Cross reference to criminal law chapter and page on diminished responsibility.**

moral responsibility a belief must exist that 'indignation or resentment would be a fitting response…', and in these situations this is not the case.[8]

But this formulation can be taken further than merely excusing the attribution of full moral responsibility upon those who act uncontrollably or because of some impulse. The furthest extent of this philosophy is a circular argument, that no one can be truly morally responsible for their actions, because nothing can be *causa sui,* the cause of itself, in as much as nothing happens in isolation but rather all circumstances are affected by other goings on, and to be truly responsible for one's own actions one would have to be *causa sui.*[9] Even when it is said that a person has acted from 'reason', reason indicating that one acts from a mentally conscious standpoint and is capable of having moral responsibility attached to their acts, it is argued that mental consciousness is informed at any given moment by the particular individual's surroundings. Nor is it possible that a person can choose to be conscious of the way one is, true moral responsibility can only be attributable to an individual if they had intentionally brought about the way they are.[10]

The clearest problem with this polemicized standpoint is that if practiced it would inevitably lead to the view that criminals are morally blameless,

> '…the human mind has not even an iota of power of creative adaptation to environmental demands and that, consequently all human conduct is accidental;…thus this view implies that we can speak of the criminal,

[8] R.J. Wallace *Responsibility and the Moral Sentiments* (Harvard University Press 1994) 77
[9] Galen Strawson 'The Impossibility of Moral Responsibility' [1994]7(5) *Philosophical Studies* 24 27
[10] Galen Strawson 'The Impossibility of Moral Responsibility' [1994]7(5) *Philosophical Studies* 24 32

> disregarding the very causation of the criminal, as of non-criminal behaviour, in the individual case.'[11]

In turn this raises questions as to whether it is justifiable to punish offenders. Punishment itself is justified by the social acceptability and desirability of retribution or deterrence,[12] if the perception of a person's moral responsibility is diminished to a minimal degree on the basis of the limiting effect of all the circumstances upon an actor up until that point, then the rationale for punishment and attributing blame could not exist. Nor does such a view correspond with a primary function of attributing responsibility in the first place, which originates from the need of the group to protect itself from inimical acts of individuals which if allowed to be carried out freely would threaten the group's existence. Rather, when considering how to attribute moral responsibility to a person, a rational approach should be considered, which takes into account both the relevant circumstances of the offender but which also recognises their duty to exercise some control over their actions regardless of the circumstances.

> 'Chance hereditary, environment have settled many things for us; we are hedged about by bounds we cannot pass; but these bounds are not so narrow as we are sometimes taught, and within them we have a considerable degree of freedom and responsibility.'[13]

[11] S Sheldon Glueck *Mental Disorder and Criminal Law: A Study in Medic – Sociological Jurisprudence* (Little Brown and Co, Boston 1927) 444

[12] **Cross reference to the last chapter on retribution and rationale for punishment and why it is inconsistent with punishing the offender.**

[13] S Sheldon Glueck *Mental Disorder and Criminal Law: A Study in Medic – Sociological Jurisprudence* (Little Brown and Co, Boston 1927) 445

It is not too far to reason that humans possess a capacity for consciously guiding their own conduct in line with legal sanctions, but in certain circumstances this capacity is expected to stretch too far. For instance, in situations like the battlefield mercy killing, where the circumstances of its commission are crucially important and which is so unique so as to nullify the benefits brought about by the pragmatism of the generalised approach of the criminal justice system, the tendency in legal thought to attribute agency, and thus responsibility, to the individual alone denies the existence and relevance of collective agency and the influence of wider circumstances to the detriment of fair justice.[14] In these situations, considerations of the defendant's moral responsibility will have the effect of tempering the view of the mere application of institutional justice which would deem the killing as murder, attaching all of the negative penalties and connotations associated to that label even though it was committed from the dual considerations of mercy and compassion. Furthermore, moral responsibility can be interpreted in light of positive responses also, for instance a person may, to some degree be praised for some actions, even those which some would attach blame and resentment to. The compassionate mercy killing of a mortally wounded soldier is one such act which evokes opposing responses.[15]

In the previous chapter, the influence of the military culture on the actions of the soldier was considered. This culture and the affects it has on the soldier's behaviour are vitally important when considering what level of moral responsibility should be attributed to the soldier after they commit a battlefield mercy killing. It is this culture that makes the mercy killing soldier's actions different from the civilian who kills during peacetime; they are considerations which are unique to the soldier, circumstances which don't affect the ordinary

[14] C Soares 'Corporate Versus Individual Moral Responsibility [2003] 46(2) *Journal of Business Ethics* 143 148
[15] John Fischer and Mark Ravizza *Moral Responsibility: Responsibility and Control: A Theory of Moral Responsibility* (Cambridge University Press , Cambridge 2000) 23

person. However, under a narrow legal application the institutional justice the act would receive fails to contemplate or give credence to such circumstances.

Similarly, the psychological impact of battle considered in the previous chapter is another circumstance affecting the actions of the soldier which represent a set of reasonable considerations when assessing the justice which the soldier would likely receive. This is not a factor relevant in a civilian killing during peace time, in response to which the law surrounding homicide has developed, but nonetheless there is an inability to acknowledge this difference. Again a narrow application of the law negates such circumstances as being relevant in the application of the justice that is delivered. This results in a clash between the blameworthiness attributed to the soldier under the justice system he is tried by and the level of moral responsibility that the collective feel is truly attributable to him.

It is this conflict between moral responsibility as the foundation of just treatment to the battlefield mercy killer and the institutional justice that he would actually receive which informs the premise in this thesis that the current justice a battlefield mercy killer could expect to receive would be inadequate. It will be seen that, contrary to what shall be called public opinion, currently the battlefield mercy killer will be either, treated too harshly, labelled incorrectly or the act itself will not be adequately appreciated. This, as shall be seen is due in part to the system under which the soldier will be tried, and in part due to the use of poorly fitting doctrines, which are adequate for more general types of killing but not for soldier's accused of battlefield mercy killing.

3.2 The Case of Baha Mousa

In the recent case involving the death of a detainee in Iraq,[16] the British soldiers in whose custody the victim was were tried for various offences ranging from murder and causing actual bodily harm to military offences. The cases involving the death of Baha Mousa gave rise to questions from the three branches of law, none of which when answered gave a satisfactory and clear conclusion as to the correct legal treatment of the defendants. Whilst this case did not involve a mercy killing, it did involve a victim whom the laws of war regarded as a protected person, and whose death was beyond what is permissible during conflict. It also involved soldiers who were on operation in a zone of considerable violence.

The Baha Mousa case, although it does not represent a battlefield mercy killing, does represent military misconduct which could have been tried under three very different systems of law and thus three very different types of justice could have been delivered. It is helpful, as no case of battlefield mercy killing has come before the courts of England and Wales, but Baha Mousa has enough procedural similarities to identify some of the main areas of contention if ever one should.

Baha Mousa was an Iraqi civilian, who was detained and died in the custody of British soldiers in 2003. The hotel clerk was arrested on the 14th of September 2003, thirty six hours later he was found dead. A post mortem revealed ninety-three separate injuries, including a broken nose, broken ribs and serious kidney damage.[17] Seven soldiers faced court martial accused of military, common law and international criminal law offences. The charges of

[16] The Baha Mousa case which was the subject of various trials, which shall be discussed at length in the following pages.
[17] Robert Fisk 'The Story of Baha Mousa' *The Independent* (London 12th July 2009)

manslaughter and occasioning actual bodily harm[18] (ABH) and battery[19] against Corporal Payne and Sergeant Stacey respectively, are of particular interest.

Such a case evidences perfectly the differing routes that may be taken to bring the defendant in a battlefield mercy killing to justice and also what sort of justice each of these routes may deliver. As previously mentioned, the common law concerning domestic mercy killings has not developed in order to cope with an instance of mercy killing on the battlefield. This effectively leaves a problematic 'space' which requires the application of justice. However, it is how justice is applied and the type of justice that is delivered which is of importance to the mercy killer. There is a stark difference between the routes open to the domestic mercy killer and the routes that may be taken for the battlefield mercy killer.

3.3 Uses of Civil Criminal Law in military crimes

It may be that using the civil criminal law of England and Wales produces suitable outcomes but unwanted consequences for those administering a battlefield coup de grace. As mentioned, treating the crime in the same way as *R* v *Webb*, *R* v *Marshall* and *R* v *Inglis* could either lead to the mitigation of the sentence passed on the soldier through the imposition of manslaughter by diminished responsibility, or a lengthier jail sentence and unwarranted stigma.[20] When the court considered the psychological impact the victim's condition had upon the defendant and the nature of their relationship, as in *Webb* and *Marshall*, manslaughter convictions were passed. However, in *Inglis*, the past experiences of the defendant, namely her previous attempt on her son's life and her refusal to heed medical advice, meant she suffered the full weight of the law; a murder conviction, and mandatory life sentence was passed. In *Inglis* it

[18] Offences Against the Person Act 1861 s.47
[19] ibid s.39
[20] See Chapter 1, 1.6 p.12

may be said that the conviction led to a moral stigma being attached to the defendant, which may be regarded as too heavy. Incorrect attachment of moral stigma is implicit in asking whether the common law should be used to prosecute soldiers in times of war.

That the common law was used to prosecute the men raises concerns about the different legal perspectives possible about such actions, and how the application of different legal procedures and interpretation can potentially change perceptions of the act. For example, international lawyers may view Sergeant Stacey's violent acts in the case of Baha Mousa as war crimes[21] or perhaps torture.[22] However, instead of the imposition of these grave charges, they were dealt with through a common law charge of occasioning actual bodily harm, the type of which may be used to prosecute assaults on the underground.[23] But war in Iraq bears no resemblance to peacetime in London; by dealing with the action as a breach of military discipline the distinctions between the gravity of the breaches and the severity of the crime is lost. The soldier has a duty to protect and behave appropriately whilst on operations, which outstrips his civilian counterpart. Likewise, a manslaughter charge for an act likened to torturing to death is inappropriate if torture is understood as an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, often for such purposes as obtaining a confession or punishing him for an act he has or is suspected of having committed.[24] A charge of manslaughter can infer that the result of the actions was

[21] Statute of Rome Art. 7
[22] ibid. at Art.8(2)(b)(ii)
[23] n.4 above.
[24] UN Convention Against Torture and other Cruel, Inhumane or Degrading Treatment Part I Article I states 'For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

unintended,[25] or that it was the result of reckless behaviour. However, the subsequent inhuman treatment charge brought against Payne infers that he was indifferent to the amount or result of the suffering that he caused his victim.[26] Furthermore, the actions committed by the soldiers become more serious when one considers that the victim was owed a duty of care by the soldiers who were his custodians, especially as he was attacked in their custody, not during a flashpoint whilst on patrol during confusion and high tempers. The common law has developed primarily to administer justice in civilian circumstances and does not always translate effectively to offences during military operations war crimes are unlike domestic crimes, being more serious, and treating them as domestic crimes is unresponsive to this behaviour.

3.4 Criminal stigma and the inadequacy of the domestic criminal law concerning war crimes

In *Payne*, applying the common law trivialised the conduct of the defendants. The offences held within the common law are not specific, nor do they attach the correct label to clearly identify what the defendant has done. Equally murders committed during war are not fully encompassed by the civill crime of murder, which will generally be imposed in times of peace.

> 'It would not be sufficient to criminalise these offences in accordance with the penal code relating to homicide...There should therefore be

[25] Jack K Weber Some Provoking Aspects of Voluntary Manslaughter Law [1981] 10 *Anglo American Law Review* 159 160
[26] International Criminal Court Act 2001 Art. 8(2)(a)(ii)

> specific provisions relating to...[crimes]...against humanity and war crimes in international legislation.'[27]

The stance of the International Criminal Court means that it is only used as a court of last resort in cases where a national court is unable or unwilling to prosecute the case. This presupposes the existence within the national legislation of legal concepts which cover the particulars of a war crime. In *Payne*, it meant that the ABH charges were brought against defendants who had been involved in the systematic physical and mental degradation of the victim, and it is argued that this is inadequate. Those that advocate the priority of the national court often argue that this allows a minimalist and therefore effective means of remedying the breach through the most efficient means.[28] But this approach has two clear disadvantages. First, the offences in the criminal law correspond only roughly to the definitions and requirements foreseen under international law. For instance for the purposes of *Payne*, compare the offences of torture, found in the Statute of Rome, and occasioning actual bodily harm.

> '"Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;'[29]

[27] M Bergsumo M Harlem N Hagashi 'Importing Core International Crimes into National Law' [2010] 1*FICHL* 1 3
[28] S J Hankins 'Address to the Forum for International Criminal and Humanitarian Law' (Oslo: 27th/10/2006)
[29] n.7 above at Art. 7 s.2(e)

There is no statutory definition of what constitutes ABH, hence the common law and sentencing guidelines[30] are required for a more definite comprehension, but it is clear that that it can describe a crime of the magnitude of torture.

> 'Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable ... to be kept in penal servitude'[31]

> 'For this purpose we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.'[32]

Likewise, consider how international law describes and contextualises the criminal killing of a wounded adversary, in which it is also linked to acts such as mutilation and torture.

> 'In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: '

[30] Sentencing Council *Assault Definitive Guideline* 2011 available at http://sentencingcouncil.judiciary.gov.uk/docs/Assault_definitive_guideline_-_Crown_Court.pdf last accessed 27/1/2012
[31] n.4 above.
[32] *R* v *Donovan* [1934] AER 207 Per Swift J

> '(1)Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;'[33]

If the battlefield mercy killing was treated thus, then not only would the killer be over stigmatised by the murder conviction, they would then also be labelled as a war criminal, the same label used for those accused of genocide such as Slobodan Milosevic and his ilk. The second disadvantage to the minimalist approach which advocates the use of national civil laws first concerns criminal penalties. Just as the law may not correctly label the criminal, either being too harsh or too soft with its inference to guilt, the punishments available may not be commensurate with the seriousness of the international crimes.[34]

As touched upon, there is also the problem of too little stigma being attached in some cases whilst too much is attached in others. Donald Payne aggressively killed a man under his protection from a wicked motivation and was charged with manslaughter because national law was used to prosecute him. As suggested previously, manslaughter convictions can have less stigma attached to them than a murder conviction, and it is also forwarded that they have less stigma attached to them than the label of war criminal, which Payne's acts could also have been construed as. However, for a battlefield mercy killer acting from compassion, it is possible that if either international or national criminal law was followed then the criminal label attached to the offender would have far greater negative connotations attached to it. If the decision in *Inglis* was persuasive, the defendant would be charged with murder, attaching a greater stigma and penalty than incurred by the manslaughter conviction in *Payne*. Motivation is of course not normally considered by the courts, but that does not mean that it is fair to inflict upon the soldier acting from a genuinely compassionate, motivation in order

[33] Statute of Rome 1998 Art. 7 s.2(c)(1)
[34] n.13 above at 7

to aid the victim a greater punishment than the solider acting callously to the intentional detriment of his victim. Indeed, as shall be seen in cases of assisted suicide, when a compassionate motive exists it can play a part in the decision as to whether it is appropriate to prosecute in the public interest.[35]

Previously, it was stated that the use of the national courts trivialised the seriousness of the crime. But, it can argued that instead of trivialising the act, using the domestic courts in such cases also protects the soldier from receiving the heavy stigma which would be allocated in an international criminal court. Compare the circumstances in *Payne* with the gruesome acts of Nazi henchmen or members of similar totalitarian regimes. The henchmen are acting from ideological hatred, against a whole class of persons. Whereas, individuals like *Payne* may be best considered as bad eggs, who are perhaps pushed further away from their previous moral boundaries through combat stress and peer pressure. The preamble of the Geneva Convention states that the label of war crime should be reserved for grave breaches of international law. *Payne*, when understand in light of this reservation, does not present facts that are comparably grave, such as genocide or the systematic torture or rape of certain classes of people. To deem misconduct as such could thus damage the deterrent effectiveness the label 'war criminal' possesses.

Because of the differing context, treating soldiers engaged in an operational military environment the same as those in a civilian environment can do both the solider and the victim a great injustice, the definitional inability of common law offences to match the morality of wartime actions makes the transference conceptually unsound. Interpreting such crimes thus is a broad interpretation, and effectively gives universal jurisdiction to common

[35] The Director of Public Prosecutions Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide 2010

law crimes such as occasioning ABH and murder, by converting them into crimes against humanity. This presupposes that there is a universal understanding of the nature of these crimes and thus there are universal international pre-emptory norms in which some behaviour is unacceptable and thus should be dealt with in the best possible manner by the national government.[36] For instance, when the Spanish government used civil law offences to bring charges against General Pinochet for crimes in Argentina and Chile it had to use terrorism laws as his act were difficult to reconcile with Spanish domestic law.[37] There was no means to prosecute him for being a tyrannical and murderous dictator and thus it was neccessary to bastardise existing law; Pinochet was not however a terrorist in the way the word is commonly understood. In the same way as in *Payne*, where the actions of the soldiers did not match up the common understanding of ABH, in a battlefield mercy killing, the act is not one which many people would consider as stereotypical murder, particularly when the compassionate motive is taken into account It embodies a different set of values to those usually associated with the offence. The transference of the common law crime to the battlefield mercy killing is a mismatch which raises many questions about the moral culpability of the action.[38]

3.5 Overview of the criminal law's worthiness to prosecute military misconduct

The use of common law crimes is not the best way to impose sanctions on the battlefield mercy killer. First, it is difficult to marry the nature of the act with any comparable offence and this risks incorrect labelling and stigmatisation. Second, in doing so the crime is given a broad interpretation, and as such certainty and clarity are lost in the application of the offence, because they essentially deal with crimes with which people hold a common understanding of

[36] M Del Caria, M Carrasco & J A Fernandez 'Re Pinochet' 93 *American Journal of International Law* 690 696
[37] ibid. at 696
[38] See chapter 8.

the wrongdoing and which take place in context specific situations. However, the use of war crimes legislation in all but cases of the gravest breaches has the adverse effect of weakening its deterrent effectiveness. Whatever the complications and inadequacy of this approach, it is accepted that there remains a need to exercise criminal jurisdiction, even if it is of a national nature, over those responsible for the grossest human rights abuses. But in the case of the mercy killing soldier there is often no 'gross' abuse of individual rights and thus the reason for applying the law in such a manner is ill founded.

One solution may be to enable the law to recognise certain offences in war as extraordinary crimes which are accompanied by diminished levels of culpability.[39]A further solution has been to incorporate distinct statutory provisions which deal with the issue of war crimes. This has already happened in the UK.[40] However, as shall be seen, the use of war crimes is yet to be effectively evaluated because of the reluctance national governments have with admitting that members of their armed forces committed a war crime, in *Payne* the defendant was charged with a war crime under International Criminal Court Act 2001 as well as manslaughter.[41] Members of the armed forces may however also be tried by a military court martial and they may be subjected to specific disciplinary charges.

3.6 Military Discipline

Semrau, like Donald Payne, was tried in a military court and charged with the two military offences of disgraceful conduct and negligently performing a military duty,[42] plus the civil

[39] George Fletcher 'The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt' [2002] 111 *Yale Law Journal* 1499 1543
[40] n.12 above at s.51(1)
[41] C K Hall 'Universal Jurisdiction: New Uses for an Old Tool' in M Lattimer & P Sands (Ed.s) *Justice for Crimes Against Humanity* (Hart Publishing 2003) 213
[42] National Army Act 1985 s.93 and s.124 respectively

offence of second degree murder. The close similarity of the military justice systems of Canada and the United Kingdom allows sound comparisons to be made between *Semrau* and a British soldier accused of a battlefield mercy killing in a UK court martial.[43]

The primary aim of military justice is to administer discipline in order to maintain the efficiency of the army based on a doctrine of superior orders. Civil crimes can also be heard in a court martial, and Donald Payne was charged with committing a civil offence contrary to section 70 of the Army Act 1955, that is to say manslaughter. Such crimes are often regarded as threatening military discipline and effectiveness rather than as being primarily concerned with criminal behaviour.[44] Capt. Semrau also faced a civilian charge, that of second degree manslaughter. It could be argued as evidenced by the sentiments of the judge that the court primarily saw the act as a breach of military discipline rather than a crime in itself.

> 'We need discipline and we need to keep our professionalism, that's what distinguishes us from every other guy with a gun in this country.'[45]

As with the common law system there are possible problems caused by military system when dealing with cases of battlefield mercy killing. Both have the potential to blur the distinction between the gravity of the wrong doing and the severity of the criminal label and sanctions attached to them. Whereas, the common law system does this by using ill-fitting offences to marry with the international requirements, service law does this by imposing a distinct set of disciplinary charges upon defendants which are only applicable to service personnel. Three of

[43] The history of this link is discussed in Chapter 4.
[44] See Chapter 7.
[45] Lt. Col. Perron the Judge in the Semrau case as cited in Christie Blatchford 'For the jury ion Semrau case the penalty did not fit the crime' *Globe and Mail* 19th July 2010

the defendants in the *Payne* case were charged with negligently performing a military duty,[46] an offence which is comparable to the military charge brought against Capt. Semrau and, as discussed previously, evidences that there is a high expectation that soldiers will uphold their professional standards.[47] However, given that such military charges were so evident in *Payne* and constituted the only offence Semrau was convicted of, it could be said that maintaining high professional standards is being trumpeted above imposing the appropriate criminal sanctions. Further, the use of such charges is wide and varied. For instance, in *Semrau* and *Payne* the charge was used in a case of mercy killing and one involving an act charged as a war crime. Military charges are incapable of distinguishing the nature of the act involved and perhaps military authorities are worried about the use of criminal sanctions which could undermine the integrity of their force.

The military authorities in *Payne* spoke about the victim's death in 'worryingly euphemistic' terms,[48] confirming their fear that the 'uncomfortable facts of the case' would potentially undermine the operational effectiveness of the Army.[49] It appeared that their concerns focused upon the reputation of the institution rather than any direct outrage at the killing, which took place during an unlawful 'conditioning process.'[50] Likewise, although it was accepted that Capt. Semrau had shot an injured enemy combatant and therefore a protected person, the court found Semrau guilty on a solitary charge concerning military discipline. The military judge emphasised that he had failed in his duty as an officer to set an example to his subordinates.

[46] Army Act 1955 s.29A(b)
[47] See chapter 1, 6 and 8.
[48] Peter Bradley & Gerry Simpson 'The Death of Baha Mousa' [2007] *Melbourne Journal of International Law* 340 344
[49] 'General Dannatt Speaks after Close of Cpl Page Court Martial', Defence News (UK) 30th April 2007 available from http://www.mod.uk/DefenceInternet/DefenceNews/Archive last accessed April 2nd 2011
[50] ibid.

> 'How can we expect our soldiers to follow the laws of war if their officers don't? How can we expect the ANA to follow the laws of war if the officers mentoring them do not?'[51]

A focus on military discipline can overlook the gravity of the crime, but military proceedings can also be a fairer way to try the solider for offences occurring under operational stress. Soldiers' experiences during war are different to civilian experiences during peace; thus both the legal application of rules and the process of judicial administration should be different. A soldier tried before a jury of twelve civilians is not sitting before his peers. A soldier before a Board of military officers is tried by those with an understanding of the particular culture of the soldiery. Semrau received sympathy from his military contemporaries,[52] and as an officer he was judged by his peers. The use of military justice is mitigated because it can deal with the soldier in a manner the civil common law cannot. The defendant is treated inclusively rather than exclusively, his actions are judged by a set of principles he himself is subject to rather than those which are abstract from his circumstance,[53] which is one of the main distinctions between the civilian and military contexts. However, this is not to be taken to mean that the soldier should be judged purely on the moral foundations of the military environment, these beliefs are not enough to negate criminal liability as the trial judge in Semrau pointed out, 'Decision based on moral preference cannot prevail over lawful commands.'[54]

[51] n.31 above.
[52] Bill Graveland 'Comrades attend court martial of captain charged in shooting death of insurgent' *Globe and Mail* June 21st 2010
[53] See chapter 8, especially the argument on the abstract nature of intention as the means of providing legal and moral blame.
[54] Friscolanti M 'Captain Robert Semrau dismissed from the forces' Tuesday October 5th 2010 found on http://www2.macleans.ca/2010/10/10/05/capt-robert-semrau-dismissed-from-the-forces/ accessed 13/1/2012

A further concern of the military justice system is the supposedly inherent unfairness of the procedure. The command structure which dominates the system has been seen to influence the manner in which the court makes decisions. Only officers sit in the court martial, the same officers who are responsible for disciplining non – commissioned ranks. The possibility of favourable treatment to their own and less favourable treatment to their subordinates is a matter which is considered elsewhere,[55] however, it has been seen that in conflict itself, favourable treatment has often been shown to the 'higher' warrior caste.[56] Moreover, the whole court martial procedure has been consistently criticised for lacking accountability and being arbitrary.[57] Many court roles have been intertwined in the role of a single commissioned officer, and the lay character of the court raises doubts over its ability to adequately deal with the legal complexities of criminal cases.

In conclusion, the difficulties which make the court martial an unsuitable means for trying the mercy killing soldier can be summarised as follows. The courts dual function of administering both discipline and justice could be seen to be side lining justice for discipline and perhaps even the preservation of reputation. This gives rise to questions over the supposedly arbitrary nature of the court and the manner in which this can taint the treatment of the defendant. Conversely, the advantages of the court martial system mean that the battlefield mercy killer would be tried by those who have experienced the same cultural influences of military service, training and indoctrination. Their actions could be better contextualised by those that try them than by the civilian jury of the Crown courts. These matters are the basis for the evaluation of the ability of service law to provide an adequate legal redress to the battlefield mercy killer.

[55] See chapter 7.
[56] See Chapter 1. the recollection of the sparing of enemy Knights for ransom and the details of the treatment of the Russian Officers compared to the infantry during the Crimean war are but two examples more shall be seen in chapter 7.
[57] See chapter 7, 7.1,7.2 &7.3.

3.7 International Law

The battlefield mercy killer can also be subject to international law because his killing of a protected person constitutes a war crime under the Statute of Rome 1998.

> 2. For the purposes of this Statute "war crimes" means:
>
> (a)Grave breaches of the Geneva Conventions of 12th August 1949, namely any of the following acts against person or property protected under the provisions of the relevant Geneva Convention.

(i) wilful killing;

(iii) wilfully causing great suffering, or serious injury to body or health;

(iv) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

Any victim so badly wounded will be seen to have surrendered and therefore to kill him would breach Art 2(a)(iv). The victim in Semrau's situation had no means of defence and it can be assumed that they surrendered at discretion,[58] meaning an unconditional surrender of their resistance or aggression as they were in no condition to respond at all. On these grounds it is postulated that there exists the possibility for the mercy killing soldier, to be convicted of a war crime, and potentially be sent to the International Criminal Court for trial.

[58] n.7 above at Art 8 (2)(a)(vi)

3.8 The label of 'War Criminal' and politicised justice

First, however, there is again an argument for ensuring the label that is attached to the convicted is one which can be said to fairly match the magnitude of his actions. The label of 'War Criminal' and the attachment of war crimes should be reserved for highly specific behaviour, such as actions of mass atrocity. In this way only large scale offences carried out from political motives would be prosecuted as war crimes, rather than individual breaches which are capable of being committed by any one individual during any time of war for a host of motivations and which fall far below the level of the stereotypical war criminal. The preamble to the Statute of Rome makes clear that such sanctions should only be imposed on the most serious crimes.[59] Although this is a somewhat ambiguous term, a common consensus in the international community sees such crimes as those which are committed in a systematic manner[60] or on a large scale, or those instigated or directed by Government or by any organisation or group.[61] If such an interpretation is correct this would exclude, '…isolated inhumane acts committed by a perpetrator acting on his own initiative and directed against a single victim.'[62] Hence, it is not appropriate to try the battlefield mercy killer, or even those such as Corporal Payne under the Statute of Rome in the International Criminal Court (ICC).

The Statute itself defines 'serious' as an intention to destroy individuals or whole groups of human beings;[63] acts carried out as part of a widespread systematic attack directed against any civilian population,[64] or by the large scale commission of war crimes.[65] These are co-

[59] n.7 above see Preamble 'The States Party to this Statute affirm that the most serious crimes of concern to the international community as a whole must not go unpunished….'
[60] Report of the International Law Commission, UN GAOR, 48th Session, Supp No. 10, 45 UN Doc. Art.51(10)(3). Systematic means that it must be pursuant to a preconceived plan/policy.
[61] ibid. at Art.51(10)(5)
[62] Hwang P 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court' [1998] 22 *Fordham International Law Journal* 457 467
[63] n.7 above at Art.6
[64] n.7 above at Art.7

ordinated multifaceted attacks, not a single action carried out from compassion, duty or even pragmatism but from political motives beyond any comparison with the mercy-killer's motivation. To apply them to individual breaches not motivated by any evil intention, could potentially weaken both the gravity the label 'war criminal' holds, and over stigmatise certain individuals. Clearly a difference exists between a mercy killer who commits a compassionate act, which can be defined as a breach under Art 2(a)(iv), and an individual who played a key part in the mass execution of thousands of innocents from political and ideological beliefs. However, the use of the label war criminal is currently used for both. Nazi atrocities and their contemporary examples stand as ideal types for the atrocities the public attaches the label war crime to. It would over stigmatise the mercy killer the label of war criminal is itself a punishment. The domestic courts rarely talk of the need to overtly punish the actor in a mercy killing,[66] whereas a prosecution under war crimes legislation would punish the solider far beyond his civilian counterpart. Of course, the Soldier who commits a mercy killing could be said to be bound by a stricter duty than the civilian. As touched upon previously they must adhere to professional standards, however, even when they breach these standards this usually falls within the jurisdiction of military disciplinary procedures.[67] It is a far leap from a failure to uphold ones professional duty to becoming a war criminal, and one which the mercy killing would fall far short of.

[65] ibid. at at Art.8
[66] *R* v *Webb* [2011] EWCA Crim 152 per LJ Eady at 17
[67] See Chapter 1 on professional standards and chapter 6 where the duties of the physician and soldier are compared.

3.9 Politicised Justice

War crimes are usually reserved for 'the most serious crimes of concern to the international community.'[68] Reconceptualising a mercy-killing as a war crime is an undertaking which could lead to a devaluation of the significance of war crimes and to an undermining of the political and legal justifications for the conflict. For instance, Semrau was engaged in a legal war, fighting on the side generally seen as the non-aggressorr,[69] but war crimes are normally attributed to parties within the 'aggressor' state, for instance the Bosnian commander Ratko Mladic.[70] Being considered in the same light as Nazi war criminals has an obvious effect on the legitimacy and reputation of the military, and the legitimacy of the conflict. The state's use of force is dependant in many ways on public support for the government who have taken the decision to enter the conflict. A conflict in which human rights abuses have been perpetrated against the civilian population by the British troops whose mission was to break the yoke of tyranny which oppressed that civilian populace could quickly lose support. One such example is the US public support for the war in Vietnam during which misconduct by US service personnel was consistently reported.

> 'Normatively it is desirable for political leaders in a democracy to commit national resources in ways generally approved by the populace. Large scale military commitments should, if at all possible, meet with the approval of public opinion.'[71]

[68] n.7 above see Preamble

[69] The author accepts that this view is open to interpretation. Evidence fo the assertion can be found from the aims NATO's mission in Afghanistan is to protect the Afghan peoples; build the capacity of Afghan Armed forces to enable self security; to counter the insurgency and to deliver stronger governance. ISAF's Mission in Afghanistan http://www.nato.int/cps/en/natolive/topic_69366.htm? Last accessed 15th June 2011.

[70] David Rohde *Endgame: the betrayal and fall of Sbrenica, Europe's worst massacre since World War II* (Westview Press Colorado 1998)

[71] S Vebra, R A Brody E Parker et al 'Public Opinion and the War in Vietnam' [1967] 2 *The American Journal of Political Science Review* 317 317

In *Payne* the defendant was charged with war crimes;[72] the inhuman treatment of a protected person.[73] However this was through national legislation which brought certain activities into line with the Statute of Rome. He too was fighting in a legal war but, like the military mercy killer, could potentially have stood in the same dock as someone like Slobodan Milosevic if the case had been referred to the International Criminal Court, casting a shadow on Britain's reasons for and handling of the conflict.[74] No doubt this is one reason the trial was kept in Britain, and furthermore not in the Crown Court but in the military tribunal, where the defendant was judged by his military contemporaries and not the civilian public.

The use of war crimes generally denotes ringleaders and advocates of 'evil' ideology. If war crimes are understood thus, then it is easy to consider the potential damage a 'civilised' country's military reputation may face when they prosecute their own agents, engaged on a legitimate mission, rather than with its own laws but sanctions inextricably linked to evil dictators. It can be argued that *Payne* did indeed commit war crimes, but as it was an isolated instance, unlinked to any wider official ideology and only relating to the passions of a small group of individual's, it may be more appropriate to label such cases as serious misconduct rather than war crimes because a wider ideological or political aspect of their actions is not present. Again, it is argued that labelling misconduct as a war crime can undermine the force a conviction for a breach of the various international treaties can have. It is worth noting that Semrau did not face any war crimes charges, and was instead dealt with through national civil criminal law administered by a military court but their application is foreseeable.

[72] Robert Verleack '"Historic Prosecution" for Armed Services' *The Independent* 20th September 2006
[73] n.12 above at Art.8(2)(a)(ii)
[74] The author accepts that the legality of this war is also open to interpretation but makes the assertion based on the legality of UN resolution 1441. For the purposes of this work the war is understood to be widely condemned as immoral rather than illegal, debate over the demarcation of this labelling cannot be discussed here.

However, the national government also risks losing support from its international allies, and for these two reasons it is argued that there is a distinct political flavour to the justice which may be served to the battlefield mercy killer by the use of international law in an international court such as the ICC. For instance, many states party to the ICC did not approve of British involvement in the invasion of Iraq. There may have been a feeling that Britain should be held politically accountable for its actions, and bringing a British soldier to trial in the ICC could be one way of doing just that.[75] This could effectively turn the issue of the actions of a single individual into a vendetta between states.[76]

3.10 Victor's Justice?

'The victor will always be the judge, and the vanquished the accused'[77]

Since the concept of the modern war crimes tribunals, time and again it has been seen that the victors impose the law over the defeated and as such it is members of the defeated regime who are generally considered war criminals. In cases where the national courts have to punish their own they often take a more timid approach. For instance the Treaty of Versailles[78] had provisions within which it allowed for the prosecution of the Kaiser[79] and twenty-one thousand other german officers,[80] but not a single mention, nor plan, existed for any of the

[75] Dempsey G T 'Reasonable Doubt: The case against the proposed International Court [1998] 311 *Cato Policy Analsysis* 5
[76] Manidami M 'Beware Human Rights Fundamentalism' Mail and Gaurdian Online March 20th 2009 http://mg.co.za/article/2009-03-02-beware-human-rights-fundamentalism Last accesed 11/01/12
[77] Herman Goering quoted in G J Bass *Stay the Hand of Vengence, The Politics of War Crimes Tribunals* (Princeton University Press New Jersey 2000) 8
[78] Treaty of Peace Between the Allied and Associated Powers and Germany, June 28 1919. Hereafter the Treaty of Versailles
[79] ibid. at Art 227
[80] ibid. at Art 228 – 229. Art 229 actually makes provision for acts only when committed by German soldiers against the Allies. 'Persons found guilty of criminal acts against nationals of one of the Allies and Associated Powers shall be brought before a tribunal of that nation.'

allies to be prosecuted. Furthermore it was only members of the victor states which would sit on the tribunals.

> '[A] tribunal where the enemy would be the judge and party, would not be an organ of law but an instrument of political tyranny aiming only at justifying my condemnation'[81]

Yet the failure of international law meant that the victors instead pressured the german national courts to bring these prosecutions. Because of their reluctance, and of the thousands of prosecutions envisaged only twenty-one german officers faced trial in the german Supreme Court.[82] This is another reason behind the highly politicised nature of this type of justice, as it can be used either to justify the reasons for war, or to enact a vengeance upon the vanquished party. Hence, it could also be called victors justice. The victors must finally legally validate their part in the conflict by criminally vilifying their enemies in the court of law in much the same way as they must first be vilified in the public's imagination.[83] The trials at Nuremburg[84] and Tokyo[85] after the Second World War could be seen as such. Heads of the military organisations of the respective regimes were made to answer for the destruction casued throughout the war and of the acts against both military and civilian populations. '[I]n the last analysis, this trial was a political trial. It was only a victor's justice'.[86] Conversely, the Allies in that war committed acts which may have been seen as major war crimes by Japan and Germany if they had been defeated, such as the dropping of the atomic bombs on

[81] Kaiser Wilhelm II quoted in Bass G J *Stay the Hand of Vengence, The Politics of War Crimes Tribunals* (Princeton University Press New Jersey 2000)
[82] Prinz B 'The Treaty of Versaille to Rwanda: How the International Community deals with War Crimes' [1998] 6 *Tulane Journal of International and Comparative Law* 553 554-556
[83] See chapter 1 concerning the objectification of the enemy.
[84] Agreement for the Prosecution of Major War Criminals of the European Axis – Nuremburg 1945
[85] International Military Tribunal for the Far East 1946
[86] Tojo Hideki quoted in Minear R H *Victors Justice: The Tokyo War Crimes Trial* (Princeton University Press New Jersey 1971)

Hiroshima and Nagasaki, and the bombing of Dresden. However, the victors qualified these actions by defining them as legal acts of military necessity.[87] It is at least arguable that justice during war has always been thus.

> 'When these matters are discussed by practical people, the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept.'[88]

A state, such as Britain, which used the brutality of the regime in Iraq and Afghanistan as a vindication for its involvement in both conflicts, would it is suggested, be reluctant to either pursue or accept a application from the ICC concerning a soldier charged with misconduct. It is not in the victor's interests to discredit the righteousness of their campaign. Neither is it just to treat the battlefield mercy killer in this way, even if a strict interpretation of International Treaties allows the possibility of such a route. Their trial would be subject to large scale international scrutiny, incomparable with the trials of domestic mercy killings. Further, the stigma attached to a war crimes charge is in itself far too weighty, they are the reserve of the 'most serious breaches' of human rights abuses,[89] which, it is argued are not constituted by the action of a battlefield mercy killing.

3.11 Other effects of the use of International Law

Referring a case to the ICC to be tried for international crimes can also damage the reputation of the nation's own legal system. It could shed doubt upon the British system of criminal

[87] See chapter 8
[88] Thucydides *History of the Peloponnesian War*
[89] See the Preamble of the Geneva Conventions 1949

justice, as the ICC is supposed only to compliment national criminal justice systems when trial procedures are unavailable or ineffective. Furthermore, there is an argument that British citizens, when tried should enjoy the protection of British laws for crimes they have committed abroad and can effectively come under the jurisdiction of the laws of England and Wales.[90] One such protection that would not be afforded to the defendant in the international criminal court is that of a trial by jury.[91] Juristic sympathy is a leading contribution to the mild treatment many domestic mercy killers receive when they face trial.

> "I do not normally comment on the verdicts of juries but in this case their decision if, I may say so, shows that common sense, decency and humanity which makes Jury trials so important in cases of this kind"[92]

This 'humanity' would effectively be removed by packing the defendant off to the ICC, which employs an inquisitorial form of judicial investigation. Further, in the court of public opinion , once an application from the ICC is upheld, the defendant is often seen as guilty, although such an application is not itself a guilty verdict.[93]

A final problem with such a publicly held trial is the operational consequence resulting from such a hearing. Potentially, new regulations of the soldiers conduct whilst on operations could be proposed which limit their behaviour in certain situations and effectively place them in danger. Such scandals often bring about reactive regulation as a public attempt by the

[90] Editorial 'Judging the ICC: The cases for and against US participation in the International Criminal Court' *Los Angeles Times* 16th March 2009
[91] L Spooner *Essay on the Trial by Jury* (J P Jewett and Co. Boston 1852)
[92] Caroline Gammell, 'Mother Kay Gilderdale found not guilty of murder attempt on ME sufferer daughter", The Telegraph, 25th January 2010, per. Bean, J.
[93] Manidami M 'Beware Human Rights Fundamentalism' Mail and Guardian Online March 20th 2009 http://mg.co.za/article/2009-03-02-beware-human-rights-fundamentalism Last accesed 11/01/12

authorities to distance themselves from the wrong doing.[94] Such a possibility could be detrimental to British service personnel, who it is argued are already too restricted by the current rules of engagement, which impose too many limitations for them to offensively tackle insurgent threats in Afghanistan.[95]

Of course, this creates a dilemma in which the interests of the military personnel must be weighed against the possibility that some civilians may fall victim to 'bad eggs', whose behaviour it is argued can never be stamped out. From Wellington's 'scum of the earth'[96] to the Abu Gharib scandal, extreme acts of cruelty will be committed during the most extreme of circumstances. That is not to say that it is right, but that such actions should be treated practically and relevantly and not over reacted to. War indulges the violent passions of man and it is not illogical to accept that no matter what restrictions are implemented on the soldiers conduct, some will find it impossible to control those passions. Justice for the individual victim of misconduct is important, but should not come through the widespread restriction of military behaviour, through the punishment of the individual perpetrator. Such justice, although encompassing some elements of a 'noble deed', overlooks the realities of the consequence of such justice, which is to perhaps endanger more than it preserves.[97]

3.12 The possible influence of European law

A final legal concern should be touched upon. The actions of the British soldier carrying out a battlefield mercy killing may also fall within the ambit of the European Convention on

[94] Dubber M D 'Regulatory and Legal Aspects of Penalty' in Sarut A, Douglas D and Umphrey M., (ed.s) *Law as Punishment Law as Regulation* (Stanford University Press 2011) 25
[95] Morell V & Belkin 'NATO in Afghanistan: A Test of the Transatlantic Alliance [2009] *Congressional Report Service*
[96] Coss E J *For all the King's shilling: an analysis of the campaign and combat experiences of the British Soldier in the Peninsular War, 180 -1814* (University of Oklahoma Press Norman 2010)
[97] Julie Flint 'To Put Justice Before Peace Spells Disaster for Sudan' *The Gaurdian* (London 6th March 2009)

Human Rights(ECHR). There is a view that human rights do not exist during war, because they are based on the civil norm whereas war takes place as an exception to the norm,[98] and thus the *inter arma enim silent leges* maxim applies.[99] However, Article 2 of the ECHR, provides an obligation on the part of member states to ensure that there is a framework of laws to protect the right to life and to ensure that there is no unjustifiable taking of life.[100]Killing during war is justifiable but battlefield mercy killing is not, furthermore, the European Court of Human Rights has recognised the presence of a procedural obligation to investigate cases where an unjustifiable loss of life may have occurred.[101] This throws a certain amount of uncertainty over whether the ECHR would apply in the instance of a battlefield mercy killing.

Parties to the convention must secure everyone within their rights and jurisdiction, but this only applies to the soldiers fighting for that particular party. It is unlikely that these rights are to be conferred upon the enemy who fall into the custody of the soldiers bound by the convention as it is still very much in doubt if the ECHR even confers rights upon civilians who are third parties to the conflict in states which are not party to the convention.

> 'It may seem surprising that an Act of the U.K. Parliament and a European Convention on Human Rights can arguably be said to confer rights upon citizens of Iraq which are enforceable against a U.K. governmental authority in the courts of England and Wales.'[102]

[98] Saby Ghoshray 'When does Collateral Damage Rise to the Level of a War Crime?: Expanding the Adequacy of Laws of War Against Contemporary Human Rights Discourse' [2008] 41 *Creighton Law Review* 679
[99] Which means that during war the law falls silent.
[100] *R (Middleton)* v *West Somerset Coroner* [2004] UKHL 10
[101] *McCann* v *United Kingdom* [1995] ECHR 31
[102] *R (Al Skeini)* v *Secretary of State for Defence* [2007] QB 140 at 248 Brook LJ

In *R (Al Skeini)* v *Secretary of State for Defence*,[103] the high court found that Baha Mousa's convention rights had been violated because he was under the jurisdiction of a party to the convention by means of his detention.[104] This was verified by the Court of Appeal.[105] However, Baha Mousa was actually detained by the British forces, and was in their custody. In Semrau, or a similar case, the victim is not in the actor's custody. He is to be protected by him but he is not being detained as a suspected criminal with a view to prosecution, thus placing him under the jurisdiction laws of the protector is an unfeasible extension. However, stretching duties conferred upon the actor by his state during times of peace, to foreign field in times of war is a tenuous application of the law.

3.13 Conclusion

Soldiers accused of mercy killing should be subject to the most appropriate judicial system so that justice is carried out in relation to the victim and the defendant. This section has identified the three branches of law which could be followed in a case of battlefield mercy killing. Further investigation is required to explain all of the technicalities evident in each branch of law. However, at this point the use of international law by which to try the battlefield mercy killer should be eliminated, particularly with reference to war crimes. The justice that would be received by the battlefield mercy killer if his actions were interpreted thus would be highly prejudicial for several reasons. First, due to the highly politicised nature of war crimes proceedings and secondly, it is an ill-fitting doctrine in this circumstances because his actions can only loosely be interpreted as relating to the aim of treaties such as the Statute of Rome and the Geneva conventions. While they seemingly fit the criteria for a 'breach' in substance and in spirit they do not. Finally, and following from this point, it

[103] *R (Al Skeini)* v *Secretary of State for Defence* [2005] WLR 1401
[104] ibid. at 1498
[105] n.88 above at 279

would be another example of an incorrect criminal label and too heavy stigma being attached to the soldier

Semrau, did not involve a charge relating to war crimes, instead his breach of the convention was dealt with using the criminal law. It is accepted that there could be an instance in which it is feasible to charge the battlefield mercy killer with a war crime, this would be on the basis of the administration of a rather politicised form of justice. For instance, when a soldier on the 'losing' side effects a battle field mercy killing against a mortally wounded member of the 'victorious' side, the 'victorious' side may see war crimes as an appropriate means by which to punish the 'cruelty' of the enemy. However, this in itself further illustrates the ineptness of international law to deal with such an instance.

The civilian criminal law and military justice are the most appropriate judicial regimes by which to deal with the soldier and as such require further exploration although they are not perfect mechanisms. The military justice system allows the soldier to be judged by his peers, and the common law allows the action to be judged on a level below war crimes, albeit possibly more harshly than it should be. The following two chapters will consider more closely the adequacies and deficiencies of both and explain the technicalities by which the mercy killing soldier may be brought to trial under each system and in their respective courts.

Chapter Four

Marching Out of Step:

The Common Law and the Battlefield Mercy Killer

In England and Wales mercy killings are dealt with as homicide, they are unlawful killings. The distinguishing feature between whether the killing is treated as murder or manslaughter is the intention or *mens rea,* the mental element, of the crime. If the defendant is proven to have intended to kill or cause grievously bodily harm (GBH) then a conviction of murder will follow, if it is proven that they intended a different outcome through their actions, or they were reckless as to the death in some way then a conviction of manslaughter may be imposed instead. Further, a charge of murder may be mitigated by use of a special defence, such as diminished responsibility or provocation, which can reduce the conviction to manslaughter. In domestic mercy killing cases, using diminished responsibility often mitigates a charge of murder to a manslaughter conviction, but not always. For example, in *Inglis* the defence of diminished responsibility was unsuccessful and the court upheld her conviction for murder. Yet in some cases, a charge of murder may be dropped whilst a charge for assisted suicide might remain successful, as seen in *Gilderdale*.

The municipal criminal law, the internal law of the state, was used to prosecute Capt. Semrau in Canada, rather than the international laws discussed in the previous chapter, but as noted previously, problems exist in treating the battlefield mercy killer in the same manner as the domestic mercy killer. It is not asserted that the contemporary law of murder in England and Wales is bad law, only that in the case of the battlefield mercy killer it is wrongly applied to a situation which the imposition of the offence of murder or an alternative inadequately represents. In considering how to deliver the most apt justice to the battlefield mercy killer,

this section is divided into three parts. First, there are the issues of where the mercy killer should be tried and why his actions should be considered illegal compared to legal killings during war. In *Semrau*, the killing was enacted by an enlisted service man, upon a foreign citizen in a foreign country,[1] yet the case was heard before a Canadian Court Martial in Canada. Before we detail how the law might deal with a battlefield mercy killer, it is first necessary to ascertain how it is possible to apply the laws of one jurisdiction to crimes committed in a jurisdiction thousands of miles away.

Second, it must be considered what types of charge, offence and defence may be applicable to the battlefield mercy killer, and which if any provide a just outcome for the defendant. Comparing the battlefield mercy killing with comparable domestic cases involving alleged mercy killings, there are three possible convictions which could apply. Each of these is dependent upon either the defendant or the victim's mental characteristics at the time of the killing. First, as in *Inglis*, a charge of murder may be brought, which requires an understanding the defendant's intention and *mens rea*. Second, as in *Webb* and *Marshall*, there is a possibility the murder charge will be mitigated to manslaughter by means of the defence of diminished responsibility. This would require considering the mental state of the defendant regarding their mental health at the time. Finally, as in *Gilderdale*, assisted suicide, which as will be discussed would generally be practically difficult and portray improbable legal reasoning. This would require an insight into both the victim and the defendant's mind set. This chapter focuses upon whether the battlefield mercy killer's actions fall within the domestic criminal law's ambit, and it is argued that the civilian domestic law as it stands does not offer the possibility of adequate justice to the soldier. Arising to deal with problems in peacetime, the law is not considerate of the contextual differences which are apparent during

[1] The country was of course was Afghanistan but the nationality of the victim can not be stated with certainty because of the influx of foreign participants who fight for the Taliban. See Mendelsohn B 'Foreign Fighters – Recent Trends' [2011] 55(2) *Orbis* 189

wartime and affect the actions of the actor accordingly. Without reference to this difference it holds the soldier accountable to an incompatible standard of behaviour because it abstracts the soldier from the circumstances in which the killing took place and which should be considered when judging his actions.

Before discussing the use of domestic legal doctrine can take place, it is necessary to ascertain whether the soldier's action of battlefield mercy killing is a recognisable crime under British law. There are two distinct issues to be dealt with, where the crime was committed and when the crime was committed. The first issue concerns whether and how the crimes of the soldier in a foreign country can be legitimately prosecuted under the laws of their sovereign state, which may be several thousand miles away. The second issue, when, is concerned with the situation in which the killing took place. To be illegal, the killing must fall within the 'queen's peace' a circumstance which killings during battle normally fall outside of. Whether and how the battlefield mercy killing falls within the ambit of this concept is a necessary consideration.

4.1 Legal Logistics: the jurisdiction of the criminal law and the battlefield mercy killer

Behaviour deemed criminal in the jurisdictions of England and Wales may not be recognised as such under the laws of other nations. However, some actions, such as murder are almost universally prohibited.[2] In the case of the mercy killing British soldier, this does not mean that they will face trial under the laws of that nation in which the act was committed. It is more likely that they will be tried in the courts and under the laws of England and Wales.

[2] International Law Commission *Report on the Work of the International Law Commission's 48th Session* (United Nations1996) 96

Where, in which location, the soldier is tried for his crimes could impact on the type of justice that is delivered to him. As was discussed in the previous chapter,[3] his crimes could also be considered as war crimes, and thus triable at the international criminal court. The justice delivered at the ICC, a national court where the soldier is deployed on action or the soldier's own national court will potentially differ. The ICC, as discussed, may present a highly politicised justice, whilst the national courts of the state in which the crime was committed could use the case for their own purposes, to generate support for the popular resentment of external forces in their own country and to fulfil a desire for retribution.[4] Finally, the soldiers own national courts may be biased by the political need for 'damage limitation' following the allegation of a breach of the Geneva Conventions by its own soldiers. However, there is good reason to argue that the crime should always be tried in the soldiers own national court, because this is both most legally sound and will deliver a justice in line with the soldiers own understanding of right and wrong. In addition doing so places the judgement of his behaviour in the hands of his cultural peers on whose behalf he serves.

It could be practically argued that the best place to try those charged with crimes is the nation, if not the locality, where the crime was committed because usually the offender and any relevant witnesses will be found there.[5] Traditionally in English law, up until the nineteenth century, under the doctrine of venue, the trial had to be conducted in the locality where the crime was committed, as the jury ought to come from that locality. This was also because of the absence of any overt imposition of state sovereignty over the punishment of criminal conduct, the sovereign punished crime which affected him, but the concept of criminal law as

[3] See chapter 3 – 3.9.
[4] See Charles G Haines 'General Observations on the Effects of Personal, Political and Economic Influences in the Decisions of Judges' [1923] 17 (2) *Illnois Law* Review 96 and S S Beale 'What'law got to do with it? The Political, Social, Psychological and Non-Judicial Factors Influencing the Development of (Federal) Criminal Law' [1997] 1 (1) *Buffalo Criminal Law Review* 23
[5] Williams G 'Venue and Ambit of the Criminal Law Part 1' [1965] 81 *Law Quarterly Review*276 277

protecting the wider society did not begin to become apparent until the late sixteenth century.[6] Furthermore, it could be said that the state in which the crime has been committed has the strongest interest in punishing the offender because, '[t]he territorial sovereign has the strongest interest, the greatest facility and the most powerful instruments for repressing crimes.'[7]

The behaviour has breached their criminal rules, and letting it go unpunished by them could effectively undermine their legal authority, especially if the crime has no equivalent in the defendant's home country.

> 'The basic philosophy behind the territorial theory is that a government in order to maintain its essential sovereignty must be the only power capable of effecting the maintenance of peace and order within its own boundaries.'[8]

However, this is not the case and today it may be argued that the crown courts have the authority and jurisdiction to try any indictable offence under English and Welsh law, wherever they are committed.[9] There are three legal principles which are forwarded to explain this extra jurisdictional application of the law. First, the protective principle allows the state to act when one of its own citizens commits a crime abroad which is prejudicial to the governance of the state, for instance plotting treason. Second, the territorial principle allows for prosecution of citizens for crimes committed abroad which have a discernible

[6] Von Bar K L *International Law Private and Criminal*(Gillespie & Son Bristol 1888) 625
[7] Lewis G C *Foreign Jurisdiction and the Extradition of Criminals* (1859) quoted in 'Harvard Research on Jurisdiction of Crime' [1935] 29 American Journal of International Law (Supplement)
[8] *US* v *Rodrigues*, 182 F Supp 479, 488 in Sarkar L 'The Proper Law of Crime in International Law' [1962] 11 *International Comparative Law Quarterly* 446 448
[9] Supreme Court Act 1981 s.46(2)

impact on, for instance, UK territory, such as smuggling contraband.[10] Finally, there is the universal principle, which is clearly at the heart of contemporary theories behind the jurisdiction of national courts over war crimes charges. This principle allows for the crimes of a citizen in another jurisdiction to be tried in their home state, when they have committed crimes seen as so universally repugnant that every state might have legitimate jurisdiction over them.

The crime of murder under English law has a long history of extra-territorial jurisdiction. Initially this may seem confusing as customary common law definitions of the offence would seem to confine the offence to the 'county[s] of the realm'.

> '…when a person, of sound memory and discretion, unlawfully killeth within any county of the realm any realm any reasonable creature…under the King's peace, with malice aforethought…'[11]

A by-product of such a definition could lead to some acts of murder escaping prosecution. For instance, in *R* v *Black*[12] a literal application of this rule could have led to the prosecution of the defendant for two murders in Scotland collapsing as Scotland did not constitute any counties of the realm until the Act of Union 1707, after the formulation of Coke's definition.[13] If the application of the law of murder was confined only to counties of the realm, then this would negate the possibility of offences committed by a mercy killing soldier on campaign in countries such as Afghanistan being prosecuted at home. Clarity is provided concerning those offences which have extra-territorial jurisdiction through express statutory provisions, that

[10] Watson G R 'Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction [1992] 17 *Yale Journal of International Law* 41 55
[11] Sir Edward Coke *Institutes of the Laws of England* (1797)
[12] *R* v *Black [1995]* T.L.R. 128
[13] Hirst M 'Murder in England or Murder in Scotland' [1995] 54(3) *Criminal Law Journal* 488

have been evident long before the common law definition of murder spoke of confining the offence to a 'county of the realm'.

> 'It is enough to say that certainly from the reign of Henry VIII this rule has been subject to statutory exceptions. Crimes of the present day which, though committed abroad, can be tried in England, are treason, homicide…'[14]

Traditionally, the extension of this jurisdiction was in the King's interest, perhaps in order to combat the occurrence of conspiracies against the regent from being formulated abroad.[15]

However, for some time it seemed that both offender and victim would have to be British. This qualification suggests that there was concern for protecting British citizens abroad, to ensure that they received 'British' justice when the act concerned two native citizens. In *R* v *Chambers*[16] the defendant was convicted of murdering another Englishman in Barcelona and *R* v *Helsham* saw the conviction of an Englishman for killing his English opponent in a duel in France.[17]

Contemporarily, the express provisions within the Offences against the Person Act 1861 clearly set out that murder alone, without any connection to treason or conspiracy is an extra – jurisdictional crime, triable in the courts of England and Wales.

[14] *R* v *Page* [1954] 1 QB 170 Per Lord Goddard C.J. at 175. The Statute Lord Goddard referred to was 33 Hen VIII c.23
[15] Such as the so called Treason Acts 1543
[16] *R* v *Chambers* (1709) 1 Shower 6
[17] *R* v *Helsham* (1845) 2 C & K 53, 101 see also *R* v *Sawyer* (1815) Russ & Ry 294 where the defendant was convicted under the aging laws of Henry VIII (33 Henry VIII c.23)

> ‘Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen’s dominions or without, and whether the person killed were a subject of Her Majesty or not, every offence committed by any subject of Her Majesty in respect of such a case, whether the same shall amount to the offence of murder or of manslaughter, may be dealt with, inquired of, tried, determined, and punished in England or Ireland provided, that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder committed outside of England or Ireland, in the
> same manner as such person might have tried before the passing of this Act.[18]

Furthermore, modern statutory enactments make it clear that the victim need no longer be a British citizen. Express statutory provision now exists for bringing the behaviour, which would have been indictable by the standards of English law, of those employed by Her Majesty’s Government whilst abroad under the jurisdiction of the national criminal law, regardless of who the victim is.[19] The mercy killing soldier could be construed as such an employee as he works within the military arm of the state and is on campaign in a state sanctioned operation. Total clarity concerning the jurisdiction of the criminal law to operate in instances of mercy killing on the battlefield in foreign, non-sovereign territories can be found in the numerous Army Acts and the surrounding case law. As will be discussed, service law holds that military personnel can be tried by court martial for allegedly committing an offence contained in the civil criminal law.

[18] Offences Against the Person Act 1861 s.9 to be read in accordance with Offences Against the Person Act 1861 (Section Nine) Adaptation Order 1973 S.I. No. 356/1973
[19] Criminal Justice Act 1948 s.31(1)

> '…every person who, whilst he is subject to military law shall commit any of the offences in this section mentioned shall be deemed to be guilty of an offence against military law, and if charged under this section with any offence (in this Act referred to as a civil offence) shall be liable to be tried by a court martial, and …'[20]

In *R* v *Page,*[21] a soldier was charged with killing an Egyptian national whilst serving in Egypt. It was argued that as the murder had not occurred in any 'county of the realm' he could not face a trial for murder. However, s.9 of the Offences against the Person Act 1861 was tested and upheld and the court found that the law was applicable in cases of murder by service men serving abroad.[22] When this is added to the principle that 'the Army carries the criminal law with it wherever it goes',[23] there is no doubt as to the ability for the service man in Britain to be tried under the criminal law for crimes committed abroad.

The Armed Forces Act 2006 only applies to those under it's jurisdiction, for instance British Soldiers serving on campaign or in a base in a foreign nation. Those soldiers who are not serving in an official capacity at the time or are off base during times of peace are likely to be tried by the courts of the state in which they perpetrate the act.[24] However, the battlefield mercy killer who commits a crime in a foreign nation whilst operating under the auspices of the British government is almost certain to find themselves on trial before a British crown court or court martial in the modern day.

[20] Army Act 1955 s.41
[21] n.14 above.
[22] As a result Coke's definition became seemingly obsolete and the Interpretation Act 1978 was used to deal with the mischief caused by the words'counties of the realm'
[23] Pritchard M J 'The Army Act and Murder Abroad; [1954] 16 *Cambridge Law Journal* 232 241
[24] Glanville W 'Venue and Ambit of the Criminal Law: Part 2' [1965] 81 *The Law Quarterly Review* 400

The alternatives provide a less than attractive type of justice. The possibility of a war crimes trial at an international court, as previously discussed, potentially provides a highly politicised justice, influenced by the competing interests of the international community.[25] However, the political influence can also work on a national level if the soldier were to be tried in the courts of the state in which the alleged offence took place, for instance when the soldier is deployed on peacekeeping, reconstruction and provincial stabilisation missions, as in Afghanistan.

In March 2012, a serving United States' soldier, allegedly walked off his base in Afghanistan and into a neighbouring village. It is alleged he then shot sixteen Afghan civilians including women and children.[26] The Afghan government called for the soldier to face trial in Afghanistan.[27] This incident came after several others, which damaged US and NATO relations with the Afghan people and government, including burning a Koran and videos of soldiers urinating on dead Taliban soldiers.[28] NATO support has been gradually waning within Afghanistan as the conflict continues into its eleventh year. Allowing the soldier to be tried in Afghanistan could have allowed the justice delivered to have been tempered with the public outrage of NATO deployment and anger at western forces. The trial could have been used to appease the discontented and portray the Afghan Government as independent from outside interference and sympathetic to the hostility of the population. It is likely he will be tried in the United States under a court martial.

[25] See chapter 3 - 3.6 & 3.7
[26] Jean Schmidt 'US soldier kills 16 Afghans in shooting rampage' *The Telegraph* 11 March 2012
[27] Timothy Mak 'Afghanistan demands public trial for accused soldier' *Washington Times* Monday March 12th 2012
[28] Felix Martinez 'Barak Obama's Koran apology 'calmed things down' *The Telegraph* Monday March 19th and Jean Schmidt 'US investigators interview Marines filmed urinating over Taliban corpses' *The Telegraph* 13th January 2012

It is not to say that the soldier who is tried according to the procedures and laws of his own state is not affected by political influence. For instance, British soldiers are required to have respect for others and,

> '…maintain the highest standards of decency and fairness at all times, even under the most difficult of conditions. External scrutiny, including intense media interest, is now an attendant part of all aspects of military life. Soldiering is about duty; so soldiers should be ready to uphold the rights of others before claiming their own.'[29]

It is clear that the modern military knows that it is under intense external observation, be that from other states with an interest in the conflict or from media agencies whose portrayal of any alleged misconduct may affect the political reputation of the mission and state involved. With this in mind, the potential interest and interference from external agencies will be lessened if the proceedings are kept 'in house'. Further they protect their soldiers from being targeted as war criminals by trying them under the domestic law of their own country. Of course this leads to claims that the justice administered in such circumstances is a 'victor's justice' where only soldiers from the losing or oppressed side face the full force of the law.[30] However, there is also traditional legal doctrine which accepts that the national laws of the soldier's homeland are those which should be used in situations such as that which Capt. Semrau faced.

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[29] Values and Standards of the British Army 2008 available on http://www.army.mod.uk/documents/general/v_s_of_the_british_army.pdf para. 15 Last accessed on 01/03/2012.
[30] Waldemer A Solf, 'War Crimes and the Nuremburg Principle' [1990] *National Security Law* 359 367-402 in M S Martins 'National forums for punishing offences against International Law: Might US soldiers have their day in the same court?' [1995] 3 *Vancouver Journal of International Law* 659 660

Dating back to the crusading armies of Europe, states would grant safe passage to armies of other nations to pass through their territory without fear of reprisal. Often this agreement inferred that the armies would keep their own discipline, for if not, hostages held by the transiently occupied state would be forfeit.[31] Since then, there has been the gradual establishment of a principle that military forces 'invited' by the nation in which they are attendant shall have legal jurisdiction over their troops when they function in an official capacity.

> 'A crime committed in a foreign territory by a member of these forces cannot be punished by the local or civil or military authorities, but only by the commanding officer of the forces or by other authorities of their home state.[32]

This premise is founded on 'strong grounds of convenience and necessity which prevent the exercise of jurisdiction over a foreign organised force which with the consent of the territorial sovereign enters its domain.'[33]

On this basis it appears that the idea that dual jurisdiction, especially over military forces is regarded as detrimental.[34] Essentially, the intervention of outside foreign courts is destructive to military order, which relies on a discipline based service law for maintaining good order.[35] The imposition of an overarching system of foreign national law could effectively negate this discipline based system and as such would be inconsistent with the control any sovereign must

[31] J W Nesbitt 'The rate of march of crusading armies in Europe' [1963] 19 *Traditio* 167
[32] Robert Jennings & Arthur Watts (ed.s) *Oppenheim's International Law* (4th edition Longman London 1992)
[33] Charles Cheney Hyde *International Law I* (Little Brown and Company New York 1945) sec. 247
[34] Archibald King 'Jurisdiction over Friendly Foreign Armed Forces' [1942] 36 *American Journal of International Law*539 545
[35] See chapter 7.

have over its own armed forces.[36] Such a principle is internationally recognised. In the *Casa Blanca* case,[37] the French and German governments debated over who controlled certain members of the armed forces stationed in Morocco. In 1909 the French Foreign Legion were legally stationed in Morocco, when three german members decided to desert. They headed for the German Consul, who offered them protection under German law. The Permanent Court of Arbitration ruled that in a case where two competing legal jurisdictions compete, the jurisdiction of the Corps of occupation should have preference concerning the treatment of its soldiery.[38]

In the modern conflict, treaties are agreed whereby it is accepted that each force invited to a foreign country in order to help fight, stabilise or peace keep, shall retain the criminal jurisdiction over its serving personnel if they commit a crime during duty. This was the case in the First World War,[39] Second World War during the occupation of many regions which had become mandates and protectorates of the allied powers after these conflicts.

> 'No member of the British Forces shall be subject to the criminal jurisdiction of the courts of Egypt, nor to the civil jurisdiction of those courts in any matter arising out of his official duties.'[40]

[36] n.34 above at 548-549
[37] *Deserters of Casa Blanca: France* v *Germany* The Hague, 22nd May [1909]
[38] George Grafton Wilson *Hague Arbitration General Cases* (Ginn and Company London 1915) 86
[39] Indeed often the allied agreements made with France read almost identically. The British agreement with France on this matter read: 'His Britannic Majesty's Government and the Government of the French Republic agree to recognise during the present war the exclusive competence of the tribunals of their respective Armies with regard to persons belonging to these Armies in whatever territory and of whatever nationality the accused maybe' Whilst the American treaty reads: 'The Government of the United States of America and the Government of the French Republic agree to recognise during the war the exclusive jurisdiction of the tribunals of their respective land and sea forces with regard to persons subject to the jurisdiction of those forces whatever be the territory in which they operate or the nationality of the accused.'
[40] Great Britain, Treaty Services No.6 (1937) Cmd. 5360

Returning to the US soldier who allegedly committed atrocities in Afghanistan, whilst the Afghan government sought a public trial in Afghanistan for the soldier, this will likely never happen. Present day, nations enter into Status Of Forces Agreements (SOFAs) when they are active in other countries. The United States SOFA with Afghanistan effectively means that US personnel are immune from criminal prosecution by Afghan authorities.[41] Britain, has never made an express agreement with Afghanistan concerning preserving criminal jurisdiction over their service personnel, but does benefit from a general NATO SOFA, which guarantees this jurisdiction unless otherwise stated.[42] Hence, the current practice of maintaining jurisdiction over service personnel whilst serving in another country by 'invitation', is in line with long established international practice.

In conclusion, there is solid legal tradition throughout the development of the common law evidencing the gradual widening of the national jurisdiction to envelope crimes committed abroadupon foreign citizens, including those committed by service personnel. Added to this is the traditional acceptance of international law that foreign militaries that are 'invited' to serve in another country in an official capacity retain the right to try their own soldiers for offences committed in that country. Whilst all three possibilities, the soldiers national court, the court of the nation where the offence took place and the ICC have the potential to be externally influenced by factors beyond purely administering justice to the soldier, the soldier's national laws and courts have the firmest legal claim and provide the highest degree of protection to the defendant from outside media, state and political influences on his treatment.

However, where the crime was committed is not the only concern of the courts, but also when, for it is likely during times of war that the killing will fall outside the jurisdiction of the

[41] R C Mason 'The Status of Forces Agreements (SOFA): What is it and how has it been utilized?' *Congressional Research Service* (15th March 2012) 7
[42] ibid. at 12

criminal law itself. The question of 'when' does not regard what time of day but rather under what circumstances and events; whether or not the killing took place under the 'Queens peace'. In Britain a killing is only murder when committed 'under the Queen's peace'.[43]

4.2 The Queen's peace

During war people are killed. Belligerents on either side legitimately attack each other with the intention to kill. Yet these killings are not considered as murder for a multitude of reasons. Under English common law one such reason is that these killings take place during a time of war, outside of the 'Queen's peace'.

> 'Murder is when a man of sound memory and of the age of discretion, unlawfully killeth…any reasonable creature *in rerum natura* under the [Queen's] peace, with malice aforethought, either expressed by the party or implied by the law, so as the wounded party etc., die of the wound or hurt etc…'[44]

Whether or not the killing is a crime depends on whether or not it happened under the Queen's peace. Hence, if the victim was killed outright during the fighting no crime would have been committed, it only becomes criminal when the victim is a protected person and thus falls under the concept of the Queen's peace. Therefore, before the mercy killer is indicted for murder, it must be shown that he was operating outside of the Queen's peace when he enacted the killing. It is however, difficult to ascertain exactly when the Queen's peace exists, and what the Queen's peace means.

[43] 3 Co Inst 47
[44] ibid.

This ‘peace’ is an abstract concept to the soldier on operations, where practically it may become difficult to attribute the concept to any definite time or space, and when and in what circumstances they are subject to the ‘peace’. For the soldier the peaceful place may instantaneously become a combat zone, and vice versa. The concept of protected persons and areas[45] infer that the soldier does not operate in circumstances which are outside of the Queen’s peace at all times when they are at war. But defining when the Queen’s peace occurs is difficult and requires insight into the development of the concept.

In the past all societies, at least western societies, have experienced a period in which it was not clear where actions of private vengeance against injuries stopped and where public retribution for offences began.[46] Of course, this system of vendetta, blood feud and private wars could become intolerable if not checked. Historically, the Monarch was initially concerned with acts of contempt to his authority,[47] homicides were not generally within the Monarch’s jurisdiction, and as such it was the right of the kinsfolk of the two parties to redress these matters. In a way, every man in the realm had his own ‘peace’ which was often dependent upon who land upon which the dispute took place. Of course, a great man’s ‘peace’ was of more importance than a common man’s ‘peace’.[48] As such, ‘peace’ could be interpreted loosely as ‘space’ and each man was entitled to his own justice in the space he controlled.

[45] The Laws of War which make it illegal to attack certain zones are numerous but some shall be given here to contextualise this point. Undefended places cannot come under attack – The Hague Convention Regulations 1899 Art. 25. Zones which have been designated ‘no fire zones’ to which the civilian populace may seek refuge in are also not options for attack – The Geneva Convention relative to the Protection of Civilian Persons in times of war 1949 Art. 14. Finally, fixed medical facilities of the opposing forces can never be attacked. – Geneva Convention for the Amelioration for the Condition of the Sick and the Wounded in the Field 1949 Art. 19

[46] Pollock F ‘The King’s Peace in the Middle Ages’ [1900] 13 *Harvard Law Review* 177 178

[47] In 1 Hen c.10 the Crown Plea of *furtum morte impunitum* could be forwarded in cases of theft concerning the King. The defendnat was to be punished but at a later date by the king, common thieves on the other hand were left to the County and local courts.

[48] n.46 above at 41

The peasant had his own 'peace' in his home, the Earl's 'peace' extended through their town and county, whilst the Queen's peace, the most important of all was not only restricted to space also circumstance, extending in respect of persons, occasions and places, such as during wartime and the Highways of the land. The eventual widening of the Queen's peace was in order to protect the monarch's own interests and benefit the their own coffers. Since more offences came within the monarch's domain, the more forfeitures and fines they could collect whilst legally restricting any possible contenders to their hegemony. Previously, it was very much the physical presence of a monarch which ensured protection from the violations of others. For instance, upon the death of Henry I, during the interregnum, there was no King to ensure the peace and widespread lawlessness went unpunished.[49] Law abiding citizen's began to expect the peace to protect them as the right of every peaceable citizen.[50]

From these acts of self-interest comes the modern altruistic view that the first business of the executive power is to ensure order is maintained within its borders and that this should be done in a uniform manner. From this, has grown the view that the Queen's peace, does not only prohibit, but also protects citizens from those breaching the peace. Contemporarily, 'Queen's peace' should be taken to mean those bound by the laws and customs of the State, which covers, as discussed previously, soldiers on foreign operations. The concept of the Queen's peace has contributed to the establishment of the formal modern criminal system. A primary function of the criminal law is to protect organised society and the individuals who

[49] Pollock F 'The King's Peace in the Middle Ages' [1900] 13 *Harvard Law Review* 177 185
[50] n.46 above at 47

comprise it.[51] Thus an act might be said to be contrary to the Queen's peace if the act is an offence against the state, a criminal activity that injures the state.[52]

Soldiers engaged with enemies during a time of war are acting outside the Queen's peace, war is one of those 'spaces' to which the concept of the 'Queens peace' as a means to regulate the citizens of the nation does not apply. The normal legal rules are suspended and further, those who are being killed are themselves not entitled to the protection of the peace as their acts are offences against the state. Their actions are neither peaceable nor lawful, as they are enemies of the state and can be construed as committing some type of recognisable offence. This sentiment was expressed in *Page*, where it was stated that combat represented an occasion under which citizens were no longer under the Queen's peace and thus the offence of murder was not applicable to soldiers who slew enemy combatants.[53] Lord Halisham's *obiter* in the later case of *R* v *Howe* reiterated the sentiment when he excluded from the concept of murder the 'killing of combatants engaged in combat'.[54] For instance, the soldiers engaged by Capt. Semrau's patrol, could be said to be neither lawful or peaceable, as the Taliban, may fit within the concept of unlawful belligerents and their upper command could be seen as war criminals who commit crimes against humanity.[55]

However, when the enemy fall into the category of the protected persons, either through injury or capture,[56] it would seem the protection of the Queen's peace does apply to them. They are no longer engaged in the criminal activity against the state. The 'space' and the

[51] A Levitt 'Some Sociological Aspects of the Criminal Law' [1919] 13 *Journal of Criminal Law and Criminology* 90 93
[52] Stephen J F *A History of the Criminal Law of England Vol.I* (C J Clay and Sons London 1888) 2-4
[53] *R* v *Page* [1953] 2 All ER 1355 per Lord Goddard at 1357
[54] *R* v *Howe* [1987] AC 417 per Lord Halisham at 428
[55] Casey L A, Rivkin D B, Bartram D R 'Unlawful Belligerency and it's Implications Under International Law' [2003] *The Federalist Society for Law and Public Policy Studies* found on http://www.fed-soc.org/publication/detail/unlawful-belligerency-and-its-implications-under-international-law Last accessed 13/02/2012
[56] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick 1949 Art. 13

circumstances affecting that space have changed so, no longer are the soldiers justified in killing their opponents because they are acting in a manner which may injure the state and thus damage the Queen's peace. They must now respect the protection given to them as protected persons and which brings them under the protection of the concept. The concept of the Queen's peace is a practical tool for justifying prosecution for murder during peace time, but when the concept concerns the battlefield mercy killer, again the argument of poor application of the law arises; it is a case of making the situation fit the law rather than applying an offence which properly fits the behaviour.

4.3 Killing during conflict and the self-defence doctrine

As discussed, the common law definition of murder requires the offence to occur during the 'Queen's' peace. The law distinguishes between killings taking place in battle and killings taking place in peace time. However, when a person kills another during peacetime in self-defence their actions are often legally justified, and whilst those who kill during battle are exempted from liability under the common law, as in that moment they are not operating under the Queen's peace, this exemption is often explained in terms of self-defence. Of course, it is important to point out that the soldier must also be operating under the rules of engagement, and when they operate outside of these their actions can become criminal.[57] The law therefore places the grievously wounded enemy combatant under the Queen's peace from

[57] *R* v *Clegg* [1995] 1 All ER 334 at 491 The defendant's conviction was upheld because his actions were deemed to sit outside of the rules permitted by the 'Instructions for opening fire in Northern Ireland' para. 5 "You may only open fire against a person: (a) if he is committing or about to commit an act likely to endanger life, and there is no other way to prevent the danger. The following are some examples of acts where life could be endangered, dependent always upon the circumstances: (1) firing or being about to fire a weapon; (2) planting, detonating or throwing an explosive device (including a petrol bomb); (3) deliberately driving a vehicle at a person and there is no other way of stopping him; (b) if you know that he has just killed or injured any person by such means and he does not surrender if challenged and there is no other way to make an arrest."

the moment they have surrendered at discretion, as they become protected persons under binding international law and are no longer active combatants.[58]

This exposes the duality of the soldier's situation. They can legally, and are duty bound to kill the enemy, but within an instant this action becomes illegal and punishable by the heaviest criminal sanctions if the enemy surrenders. The justifications for killing functioning combatants and the prohibition for killing the incapacitated combatant are dependent upon the concept of intention.

Normally in criminal law, it is the actor's intentions or *mens rea* which distinguishes the level of criminal liability placed upon the defendant and their culpability; a lack of intention can mean that the defendant is unable to be found guilty of certain crimes.[59] However, the soldier intends to kill his enemy during active fighting and also intends to kill the wounded and suffering enemy soldier when performing battlefield euthanasia; these are two different actions which have the same result but only one is a crime.

> 'Famously, the law of murder cannot distinguish between the contract killer and the mercy killer and this is but one upshot of a process of moral exclusion that is as old as the modern criminal law.'[60]

In each case the intentions is parallel but the motivations behind the intention differ. One is acting from self-defence and professional responsibility, it being his job to kill the enemy,

[58] Statute of Rome 1998 Art 2(a)(iv) They have also become *hors du combat* under the Geneva Convention 1949 Additional Protocol I 1977 Art.1(1)
[59] This is of course not the case in crimes of strict liability.
[60] Alan Norrie *Punishment, Responsibility and Justice, A Relational Critique* (OUP, Oxford 2000) 180

and the other from a motive of compassion. It is the motivation for acting which distinguishes the two acts yet the law does not distinguish these acts and hence mercy killing is a crime in which the defendant is often convicted of murder. The moral justifications that form the foundations of the doctrine of self-defence are often used to explain why soldiers who kill the enemy during battle are acting neither morally nor legally wrong.[61] Killing in self-defence is an exception to the general rule making killing punishable[62] and there is a right to protect one's bodily inviolability, recognised domestically by both the courts,[63] and parliament.[64]

Domestically, the defence rests on three tenants which are compatible with the experiences of the soldier. First, there must be a belief of a threat, based on subjective understanding of the circumstances.[65] A soldier who kills an enemy on a field of battle who has a gun but who is not actually firing at him, qualifies, because the victim is clearly a possible, plausible threat.[66] Second, the threat need not be unlawful,[67] the soldier could be fighting other soldiers in a conventional war in which neither side is apparently acting illegally. Third, the force used by the person relying on self- defence must be proportionate, and one would expect a reasonable

[61] St. Aquinas *Summa Theologiae* 'But as it is unlawful to take a man's life, except for the public authority acting for the common good,…as it is not lawful for a man to intend killing a man in self-defense, except for such as have public authority, who while intending to kill a man in self-defense, refer this to the public good, as in the case of a soldier fighting against the foe, and in the minister of the judge struggling with robbers, although even these sin if they be moved by private animosity.' St. Augustine *From Augustine to Publicola Letter 48* 'I do not agree with the opinion that one may kill a man lest one be killed by him; unless one be a soldier,…provided it be in keeping with [the status of] one's person.'

[62] H L A Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (John Gardener 1968) 13

[63] *Blake* v *DPP* [1993] Crim LR 586 – Self-defence only justifies use of force to protect oneself or prevent crime.

[64] Criminal Law Act 1967 s.3(1) 'A person may use such force as is reasonable in the circumstance in the prevention of crime, or in effecting or in assisting the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.'

[65] *R* v *Gladstone Williams* (1984) 78 Cr App R 276

[66] Of course, as stated the soldier operates under the laws of war. In conflicts such as Afghanistan they must Positively Identify (PID) the target as an enemy combatant before opening fire. PID reduces the chances of mistargeting, which could result in both friendly and civilian casualties – Robert E Rasmus 'The Wrong Target – The Problem of Mistargeting Resulting in Fratricide and Civilian Casualties' [2007] available on http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA468765&Locat last accessed 21/3/2012. However whilst these rules are essential in practice the practice of PID can be very difficult to implement in real situations and thus can endanger lives on both sides – Mark S Martins 'Rules of Engagement For Land Forces: A Matter of training, not lawyering' [1994] 143 *Military Law Review* 1

[67] Jonathan Herring *Criminal Law Text, Cases and Materials* (Oxford University Press, Oxford 2004) 612

man would say that during war lethal force is a proportionate response to the lethal force of the enemy.[68] Finally, the attackers need not strike first.

> 'A man who is about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstance may justify a pre-emptive strike.'[69]

Accordingly, once contact is made with the enemy, patrols need not wait to be engaged. If the target is clearly depicted as a legitimate combatant,[70] then an assault is justified.

However, at common law self-defence cannot be used when the actor has placed himself in a situation leading to the attack,[71] whereas in the military context the soldier has placed himself at risk by the very nature of his profession. Indeed, it may be said that he has been required to do so and that this is his duty, failure to engage the enemy could plausibly be seen as disobeying a lawful command or failure to perform ones duty and punishable under service law.[72] In summary, this justification for the acceptance of killing during conflict compared to during peacetime is due to the soldier being engaged in a subjectively just enterprise and thus he acts in the belief that his actions respond to the initial danger. In individual instances of combat, the soldier kills to protect himself, his comrades and to legitimately stop the furtherance of the enemy cause. This type of justification cannot be used to excuse a battle field mercy killing.

[68] *R* v *Owino* [1995] 2 Cr App R 128
[69] *Beckford* v *R* [1988] 1 AC 130 PC Per Lord Griffiths
[70] See Chapter 1 1.11. The difficulty in accurately finding who is and who is not a combatant.
[71] *Manlik* v *DPP* [1989] Crim LR 451
[72] Armed Forces Act 2006 s.12 and s.15 respectively

Consider the known facts of *Semrau*. His life was no longer in danger from the victim or his companions as the fire fight had subsided. His intention to kill remained after it could have plausibly been excused using self-defence, and the act of killing took place after the victim ceased to be a threat. However, seen in this light a duality is created in which violently and aggressively seeking out active enemy soldiers is acceptable, but where the killing of a mortally injured enemy, precipitated from motives of compassion and kindness, cannot be excused. Although, motivated from kindness the mercy killer is punishable, whereas during battle his violence is praised. It would seem a moral difference exists between the two actions. Motive, however, is always irrelevant to the determination of guilt, the courts are primarily concerned with the actor's intention to take life.

> 'A word to you about motive,… if you were sure, that [the defendant] had as his primary purpose, the ending of [the victim's] life, then his motive for doing what he did can afford him no defence… All that, of course, is highly relevant to any consequences which might follow from a verdict of guilty, but it is not a defence to the charge.'[73]

The mercy killer may claim his 'intention' was to relieve the suffering of the victim, and that death was a by-product of this action,[74] but this is irrelevant to the courts formulation of guilt which deems virtually certain criminal consequences of any guiding motive as intentional.[75] It is the actors sound intention not their good motivation that can justify their killing during war, as well as the status of the combatant.

[73] *R* v *Cox* [1992] 12 BMLR 38 at 46 Per Ognall J
[74] Dual effect will be considered in the section comparing the battlefield mercy killer and the medical professional in situations of end of life actions
[75] *R* v *Nedrick* (1986) 83 Cr App R 267

In conclusion, the soldier who has committed a mercy killing, falls within the jurisdiction of Britain's criminal law and has killed an enemy soldier outside the justifiable acceptances of the Queen's peace. Furthermore, his actions be explained by the use of the doctrine of self-defence. He is therefore triable for murder. However, whilst he is triable for murder under the domestic laws of Britain, this is not to say that these laws are the best means by which to bring justice to the mercy killing soldier. It could be argued that the domestic civil criminal laws, and the common law which has grown around instances of domestic mercy killing are so far removed from the activities and culture of the soldier as to be insufficient.

Chapter Five

The Battlefield Mercy Killing as Homicide

The previous chapter dealt with how the mercy killer was indictable under British law and why the killing was considered murder in comparison with the legitimate killing of enemy combatants that take place during war. The mercy killing soldier will likely be charged with murder. However, this charge is often mitigated in domestic cases of mercy killing by the special defence of diminished responsibility which, if accepted, leads to a conviction of manslaughter. The focus of this chapter is not to criticise the law as it stands, although it does produce absurd results even in domestic cases, but rather to highlight why it is improper to apply the law to the battlefield mercy killing. Furthermore, it will postulated, that in certain circumstances, such as if the enemy was a fanatic, perhaps a suicide bomber or a fundamentalist avowed to fight to the death, then the law surrounding suicide and assisted suicide might become relevant.

The alleged mercy killer Capt. Semrau was charged with second degree murder under Canadian Criminal Law. The Canadian system demarcates murder into two categories. '[F]irst degree murder when it is planned and deliberate',[1] and, 'all murder that is not first degree murder is second degree murder.'[2] This demarcation allows both parole and sentencing discretion, and also defines the degrees of wrongness by describing the overtly criminal acts which constitute first degree murder, namely those which pose the most risk to the public.[3] That the killing must be 'planned and deliberate', loosely corresponds with the

[1] Canadian Criminal Code s.231(2)
[2] ibid. at s.231(7)
[3] ibid. at s.231(3) Contract killing, s.231(4) murdering a police officer, s231(5) (a) during a hijacking s.231(5) (e)&(f) resulting from a kidnapping s.231(5)(b)(c)&(d) resulting from a sexual assault

English concept of 'intention to cause…'.[4] Whilst definitional differences exist, it was still a charge of murder, and a soldier in a similar position to Semrau would face an equivalent charge in the United Kingdom. Where the traditional definition of the offence runs:

> 'Murder is when a man of sound memory and of the age of discretion, unlawfully killeth…any reasonable creature *in rerum natura* under the [Queen's] peace, with malice aforethought, either expressed by the party or implied by the law, so as the wounded party etc., die of the wound or hurt etc…'[5]

Of course, it is also necessary to demonstrate causation before liability can be established. In Semrau, the body of the victim was not recovered and the court was therefore unable to convict him of second degree murder. It could not be conclusively proven that his shots caused the death of the insurgent, even though he was found to have shot the victim.[6] Fatally wounded soldiers will eventually die from their wounds regardless of the shots fired by a compassionate enemy. The difficulty is in finding which wounds caused their death. Factual and legal causation must be proven.

5.1 Causation and the battlefield mercy killing

For the act to be considered murder, causation must be proven, the defendants actions must be shown to be a significant and operating cause of the defendant's death. In *Semrau*, it could not be proven that his shots caused the death of the insurgent. Whilst he was found to have

[4]Or 'malice aforethought' in Cokes definition. See further Galloway D 'Criminal Liability and the Centrality of Intention' [1992] 5 *Canadian Journal of Law and Jurisprudence* 143
[5] 3 Co Inst 47
[6] Steven Chase 'Semrau not guilty of murder in death of wounded Taliban' *Globe and Mail* (Ontario 19th July 2010)

fired two shots into his torso, it could not be conclusively proven that the victim died from these shots. In court the prosecution must show that the victim would not have died at that time 'but for' the actions of the soldier.[7] The obvious problem in a scenario such as that in which Capt. Semrau found himself is that the victim was so terribly wounded he could have died at any instant. He was severely wounded, with a large hole through his torso and one shredded and one lost leg among other serious injuries, and it has been conjectured that such injuries were fatal, especially if they were not treated immediately. The shots Capt. Semrau fired may not have caused the death of the victim, who may have died from his other serious wounds before the effects of the shots took their toll. Yet, in a mercy killing in must be assumed, for the purposes of this thesis, that the shots, or actions of the combat soldier led to the death of the victim.

It is enough for the death to have been accelerated for causation to be proven, on the basis that the victim would not have died at that exact moment 'but for' the defendant's actions.

> 'Murder is an act or series of acts done by the prisoner which were intended to kill and did in fact kill the dead [victim]. It does not matter for this purpose that her death was inevitable and that her days were numbered. If her life was cut short by weeks or months, it is just as much murder as if it was cut short by years.'[8]

Generally, the circumstances of a battlefield mercy killing would not be paralleled in domestic cases. The situations tend not to display the immediacy presented in *Semrau*. For

[7] *R* v *White* [1910] 2 KB 124
[8] *R* v *Adams* [1957] CLR 365 per Delvin J

instance, in *Gilderdale,*[9] *Webb*[10] *and Marshall,*[11] the victims suffered long term conditions; it was not a case of ending their life by minutes or hours but a more considerable shortening of their lives. For instance in *Inglis,*[12] the administration of a lethal dose of heroin was clearly significant and was the operating cause in the victim's death, since he was not in an inevitably mortal condition. In these cases it is easy to apply both the 'but for' rule and a *de minimis* test, ensuring the action was more than minimal,[13] both of which would prove causation.

A battlefield mercy killing of a fatally injured soldier involves shortening the victim's life by considerably less time and there are also questions over what can be constituted as a 'minimal' action. Shots fired by a soldier accelerate the death, but to say they change the course of events regarding the victim more than minimally can be questioned. The victim will certainly die imminently, the shots accelerate this certainty but the outcome is not changed more than minimally, the time is affected slightly but the result remains unchanged. In this light the shots may not be seen as substantial cause of death.

Quantifying what constitutes a minimal action, or a substantial cause in relation to the *de minimis* test is a complex task. In *R* v *Adams,*[14] the court said it mattered not if the action of the defendant cut short the victim's life by weeks or months, this still constituted an unnatural hastening of the victim's death for the purposes of murder. However, the mercy killing soldier is faced with a victim for whom death is imminent, and his actions may hasten the victim's death by only minutes or hours. In some professional spheres, in some circumstances, such a shortening is considered as less than minimal. Fr instance, when physician's carryout

[9] *R* v *Gilderdale* [2010] Unreported
[10] *R* v *Webb* [2011] EWCA Crim 152
[11] *R* v *Marshall* [2001] Unreported
[12] *R* v *Inglis* [2010] EWCA Crim 2637
[13] The *Actus Reus* for murder requires the defendants conduct to be 'a significant cause of death'.
[14] n.8 above per Delvin J

procedures for pain relief which foreseeably yet not intentionally cut the victims life short, a hastening of hours or even days is not considered an unlawful hastening.

> 'If, for example, because a doctor had done something or has omitted to do something, death occurs at eleven o'clock instead of twelve o'clock, or even Monday instead of Tuesday, no people of common sense would say, 'oh, the doctor caused the death.'[15]

However, physicians' actions are considered differently and are subject to specific legal sophistry, discussed later.[16] What makes the soldiers actions different is that he has the sole intent to kill the injured soldier, his actions are therefore a significant and operating factor and the victim would not have died at that instance 'but for' the defendant's actions.

Although there is room for debate over the impact of the soldiers actions, establishing a causal link is dependent on more than proving the 'but for' rule and applying the *de minimis* test. No *novus actus interveniens* or intervening act must have occurred which broke the chain of causation. The actions of the defendant must directly relate to the cause of the victim's death. In a battlefield mercy killing conflict arises over which act was the actual cause of death, either the initial legitimate attack or the subsequent killing.

The victim is in a deathly situation, and would inevitably die regardless from the wounds inflicted by a legitimate attack. However, the court cannot start the chain of causation at the beginning of the legitimate commencement of hostilities which placed the victim in the mortal condition. No crime had been committed at this point, the infliction of serious wounds

[15] ibid.
[16] See chapter 6 for a discussion on double effect and the *Adams* case.

upon the victim was carried out within the legal boundaries of international war. For a murder charge to be successful, the chain of causation must be regarded as starting from the point Capt. Semrau, or those in a similar position take their action after the cessation of hostilities when the victim falls under the protection of international law. Of course it can be argued that if the victim had not been put in that condition, then the mercy killer would have no need to act. But that argument can only stand if the actions, both the legitimate violence and the mercy killing are understood as a continuous whole, rather than being broken into two separate actions, the legitimate hostilities and the shooting, which falls outside the permissible actions of the soldier during war.

Domestically there are two cases which open debate over the practicality of transposing the doctrine of causation onto a serving soldier who provides the coup de grace to a fallen adversary during times of hostilities. In *R* v *Malcherek*,[17] turning off the victim's life support machine was not the seen as the cause of death, rather it was the initial attack which caused her to be placed on life support. She was already brain stem dead and incapable of breathing, but was being kept alive via a ventilation machine. This may seem contrary to the law as applied to the battlefield mercy killer, who whilst not responsible for the behaviour which put the victim in their terminal condition, would be held responsible for the actions which lead to a shortening of their life. However, shooting the battlefield victim who is dying and withdrawing life support from a patient who cannot live without it are different because in one situation the victim is still alive without assistance whilst in the other life would not be possible without assistance. The withdrawal is based on lawful omission of the physician's duty to care for the patient in cases where the medical treatment no longer has any beneficial effect. The mercy killing soldier kills the victim, who is still alive without treatment, through

[17] *R* v *Malcherek* [1981] 2 All ER 422

a positive act, there is no omission. These types of actions are not legally justified,[18] and can be interpreted as being a *novus actus interveniens*.

A further domestic case also raises debate. In *R* v *Chesire*,[19] the victim had been shot in the leg and stomach, but was no longer in a life threatening position. Subsequent negligent medical treatment led to his death. The court still held the defendant, the perpetrator of the original attack, liable for murder, as the victim would not have been in hospital and required treatment 'but for' the injuries inflicted by the defendant. The treatment in essence had not broken the chain of causation. In the theoretical scenario of the battlefield mercy killing, the victim is not in a stable condition but mortally wounded, there is no 'but for' consideration in as much as the victim would be in that position regardless of the defendant's actions. Whilst the subsequent treatment of the victim by the defendant kills him, this cannot be attributed to original actions which took place during the initial hostilities. The defendant's actions are the cause of death because they do not shorten life and are not lawful intervention.

Despite these reservations, the mercy killing soldier would still be liable for murder. This can only be if the chain of causation is taken as starting from the point at which the victim comes under the custody and protection of the defendant's forces and is separated from the initial attack on the basis of the legitimacy of that attack. This must be the case, for without proving a causal link between the soldier's actions and the victim's death criminal responsibility cannot be attributed to the action. In the eyes of the law, the defendant's conduct had criminal consequences, and as a result should be punished at least to some degree. Proving the causal link between offender and result allows the logical application of such a punishment. [20] Causation allows the evaluation of situations for the purposes of attributing criminal

[18] See chapter 6 for further discussion on withdrawing treatment.
[19] *R* v *Chesire* [1996] Crim LR 595
[20] Ryu P K 'Causation in Criminal Law' [1958] 106 *University of Pennsylvania Law Review*773 774

responsibility, or the consequences of actions.[21] It is 'a matter of imputations' as to which consequence can be attributed to which actor and how logical this imputation would be.[22]

However, it is the level of criminal responsibility that is attributed to the battlefield mercy killer that seems unjust and not the doctrine of causation.

> 'It is now recognised in almost all cases that the problem is one of degree of fault and not of causation and that, I believe is a highly satisfactory result.'[23]

The doctrine of causation allocates fault by casting a wide net over the perpetrator's actions. Under the principle of *novus actus interveniens*, the actions which led to the victim's death in a battlefield mercy killing are considered only from the point at which he came under the defendant's protection and do not take into account the battle he participated in and which left him mortally wounded. Further, the 'but for' test disproportionately accentuates the soldiers effect in hastening the victim's death. For instance, in *Semrau,* it has been conjectured that the victim's wounds were of a fatal nature and he was going to die, but the law does not allow for differentiation between an inevitable, lingering, suffering death caused by legitimate actions and an immediate merciful killing.

Imposing these domestic rules on the battlefield mercy killer supports the argument of the non-empathetic nature of the law in this area, [24] but further, it shows that in applying such law in particular to the battlefield mercy killing soldier, not only will it produce an absurd result,

[21] Hart H L A & Honore T 'Causation in Law' [1956] 72 *Law Quarterly Review* 58
[22] Hall J *Principles of Criminal Law* (The Bobbs-Merrill Company1947) 256
[23] Goodhart A L 'Appeals in Questions of Facts [1955] 71 *Law Quarterly Review* 402 414
[24] Grubb A 'Euthanasia in England – A Law Lacking in Compassion [2001] *8 European Journal of Health Law* 89

but also an injustice. Just because the law lacks empathy does not make it bad law, yet it does mean that in applying it to unique situations, in which the empathy of the offender was a key factor behind their behaviour, that the consequence will be the deliverance of an institutional justice out of line with society's appreciation of the action. However, whilst it is still likely that the mercy killing soldier will be charged with murder, there is good reason to believe that, at least in some cases, he might not have to suffer the mandatory life sentence and that his conviction can be mitigated through the use of the special defence of diminished responsibility, which has been utilised in many cases of domestic mercy killing.

5.2 A Conviction for Manslaughter by means of Diminished Responsibility

Below the level of murder a homicide may be considered to be manslaughter, of which there are many different categories. The killing of the victim in a battlefield mercy killing is undoubtedly a homicide, but the moral value of the action may mean that a murder conviction is unjust because it fails to appropriately reflect the level of criminal responsibility and overly stigmatises the soldier. The question of whether or not the soldier's actions can fit with the domestically developed law of manslaughter should be investigated will now be considered.

Manslaughter may be categorised as either involuntary or voluntary manslaughter. Involuntary manslaughter covers situations in which a person kills another, but does so without the intent to kill them or cause GBH. Such actions fall into two brackets, deaths which are caused by gross negligence on the behalf of the defendant, and deaths which are caused inadvertently by the defendant's unlawful act. The defendant charged with gross negligence manslaughter faces a four stage test;[25] first there must have been a duty of care to

[25] *R* v *Adamako* (1994) 3 All ER 79

the deceased. No general duty towards another person exists but it can come about, for instance, through terms of employment,[26] and where there are reasonable grounds to impose such a duty because of the principles of, proximity, justice, foreseeability and fairness.[27] In the case of the battlefield mercy killer, a duty is owed under international law.[28] Second, that duty must be breached, as was the case in the mercy killing soldier's situation. Third, the breach must cause, or significantly contribute to the death of the victim. The nature of the significance of the cause was discussed previously, and as such it can be said that the breach did significantly contribute to the victim's death. Finally, the breach should be characterised as gross negligence; and therefore a crime. The actions of the soldier could be construed as such especially when considered in relation to the professional standards and duties soldiers have to uphold international laws of war.[29] As such the soldier who kills in these circumstances acts in gross dereliction of his duties.

The action may also be seen as unlawful act manslaughter, where the killing is the result of the defendant's unlawful act. Such an act is one which all sober and reasonable people would realise would subject the victim to the risk of physical injury, though it need not be serious harm.[30] In the case of the battlefield mercy killing, the action was unlawful, in accordance with international law and a reasonable person would clearly foresee it to pose the risk of injury to the victim. However, neither of these categories of involuntary manslaughter would be used to deal with the soldier accused of delivering a coup de grace to the mortally

[26] *R* v *Pitwood* (1902) 19 TLR 37
[27] *Donohue* v *Stevenson* (1932) AC 582
[28] Namely under the general provisions of the Geneva Convention for the Amelioration of the Condition of the Sick and Wounded 1949
[29] For details of the soldiers duty see 'Values and Standards of the British Army' 2008 available on http://www.army.mod.uk/documents/general/v_s_of_the_british_army.pdf last accessed on 01/03/2012. Para. 15 '… All soldiers must act within the law and the nature of modern, complex, land based operations makes it essential that they maintain the highest standards of decency and fairness at all times, even under the most difficult of conditions. External scrutiny, including intense media interest, is now an attendant part of all aspects of military life. Soldiering is about duty: so soldiers should be ready to uphold the rights of others before claiming their own.'
[30] *R* v *Williams and Davies* (1992) 2 All ER 183

wounded on the battlefield. That is because the soldier in such a situation has the intent to kill the victim. He intends to end his suffering through killing him.

Therefore, the law regarding voluntary manslaughter may be applicable to the mercy killer. He has intended to kill the victim, or inflict serious harm, but there are mitigating factors which reduce the defendant's culpability. For instance, the defendant may be able to rely on the defence of diminished responsibility, which is often used in cases of domestic mercy killing.

To do so it must be proven that he was suffering from an abnormality of mental functioning which substantially impaired his ability to;[31] understand the nature of his conduct;[32] form a rational judgement;[33] or exercise self-control.[34] Domestically, the use of this defence is a popular method to mitigate the mercy killer's responsibility because

> '… where someone commits a mercy killing in a moment of distress or despair. It might be argued that this person merits formal mitigation on the basis that exigency if their situation edges out the process of reasoning while also blocking the inferences which would normally be drawn from their behaviour.' [35]

However, this reasoning relates to the definition of diminished responsibility, in s.2 of the Homicide Act 1958 and not the way it is understood under s.52 of the Coroners and Justice

[31] Coroners and Justice Act 2009 s.52(1)(1)(b)
[32] ibid. at s.52(1)(1A)(a)
[33] ibid. at s.52(1)(1A)(b)
[34] ibid. at s.52(1)(1A)(c)
[35] N Lacey 'Partial defences to homicide: Question of power and principle in imperfect and less perfect worlds' in A Ashworth and B Mitchell (ed.) *Rethinking English Homicide Law*' (Oxford University Publishing Oxford 2000) 124

Act. Under the previous definition, the defence was successfully used, between 1982 and 1991 where, of twenty trials involving mercy killing which relied on the defence only one returned a murder conviction. This was in part due to the fact that the defendant in that particular trial initially relied on the defence of provocation rather than diminished responsibility.[36]

The recent change in the legal definition of the defence has left it's applicability in mercy killing cases in doubt.[37] Previously, the domestic mercy killer's use of the defence relied upon the intensity of caring for their loved one, with all the relational emotions this involved, as bringing about the 'abnormality of the mind'.[38] Medical evidence was required, but the court maintained the discretion to interpret each case on its own merits.[39] The reforms of the Coroners and Justice Act make a medical diagnosis essential before the defence can be utilised,[40] and in a number of cases, such as *Webb*, this does support the use of the defence.

> '… there is a significant body of research that demonstrates the negative psychological impact of being a full-time carer for another person who is suffering from both physical and psychiatric disorder. In my view, that psychological effect will have been compounded uniquely by the complex relationship that must have existed between Mr Webb and his wife, whose own psychiatric difficulties, together with her suicidal drives, will have further undermined Mr Webb's mental health.' [41]

[36] *R* v *Cocker* [1989] Crim LR 740
[37] n.31 above at s.53 has replaced the Homicide Act 1957 s.2
[38] Homicide Act 1958 s.2
[39] *R* v *Walden* [1959] 1 WLR 1008
[40] n.31 above at s.52 (1)(1)(a)
[41] n.10 above at para. 16

On the battlefield a soldier's mental condition can certainly be affected by the trauma of war, but whether or not this type of mental impact must be considered in conjunction with the proximity of the relationship between the victim and defendant is uncertain. The psychological trauma of the battlefield upon the defendant may need to be coupled with a relationship with the victim for the defence to succeed.

The experience of war has effects on the individual that may cause them to act differently from the reasonable man in civilian times of peace, and their mental health may be affected via a recognised medical condition such as Post Traumatic Stress Disorder.[42] The effects of war upon the participant's perception of right and wrong and levels of acceptable behaviour were discussed in previous chapters.[43] However, the focus on the nature of the relationship the defendant had with the victim is often crucial in the defence's success in the domestic courts.

George Webb used the defence in civilian life after caring for his wife for a number of years. He obviously had a close and loving relationship which had been in existence for decades, the deterioration of which could plausibly affect his mental reasoning. It would be difficult for a soldier like Capt. Semrau to evidence a comparable relationship with the victim and thus successfully employ the defence. The victim is an enemy soldier with whom the defendant assailant has no intimate relationship. However, his isolated conditioning, in common with all soldiers across the globe, innately imbibes him with a common understanding that can be construed as type of close relationship,[44] and could perhaps, although it is an imperfect match,

[42] National Audit Office – Ministry of Defence *Treating Injury and Illness Arising on Military Operations* Session 2009 – 2010 HOC 294 London: Stationary Office Feb 2010 15 *fig.* 3
[43] See chapter 2.
[44] See chapter 2 on the influences of war and soldiering on the individual

be used as the means to compare the act with those in a case like *Webb*. For instance, a soldier charged with pre-meditated murder in a US case of battlefield mercy killing expressed such a familial sentiment towards his victim.

> 'My intention was to ease his pain, and that's how I felt. I felt like it was my brother that was lying there with those wounds, I remembered what I was taught, what I was shown by my leaders about what was right and what was wrong.'[45]

Being a full-time carer for a loved one and suffering the 'negative psychological impact'[46] of that occupation is contextually different to the bonds of brotherhood occurring in war, but this does not mean that the defendant is not acting under abnormality of mental functioning, only that the lack of a clearly proximate relationship makes it hard to match with civilian instances in which the defence was utilised.

Whilst the potential diagnosis of the battlefield mercy killer and the domestic mercy killer do not match, the abnormality of the defendant's mind as occurring from potential PTSD may be enough for soldiers to utilise the defence, although to do so may distance them from the actions of the domestic mercy killer. The courts have previously allowed a wide variety of medical conditions as evidence of the abnormality of mental functioning. For instance, in *R* v *Vinagre*,[47] prior to the legislative change, the defendant suffered from a strange condition called 'Othello Syndrome' which caused morbid jealously for no apparent reason and resulted in him stabbing his partner to death and he thus qualified to use diminished responsibility as a

[45] *United States* v *Alban – Cardenas* 29 (Headquarters, 1st Cavalry Division, Jan 14 2004) Testimony of Staff Sergeant Alban – Cardenas at 124
[46] n.31 above at para.16
[47] *R* v *Vinagre* (1977) 69 Cr App R 104

defence. Such a wide application of the defence makes it likely the soldier suffering with PTSD may find that the defence is applicable to him.

Evidence of PTSD, has been forwarded as evidence of diminished responsibility in commonwealth jurisdictions. In *R* v *Nielsen*,[48] it was asserted that the defendant's Korean war experiences had left him with PTSD and depression. In this vein, it may also be possible to argue that the culture of military life has also affected the defendant's reasoning. This not just based on the understanding of a familial relationship being comparable to the bonds the defendant has with other warriors through the existence of an isolated culture. In *Nielsen*, the defendant argued that his experiences had led to him 'de-humanising' his victim in the same way which soldiers are taught to dehumanise their enemy.[49] However, in *Nielsen*, the defendant failed on appeal to get the courts to accept that he could justly qualify for using the defence.

The initial cause for the reform of the defence of diminished responsibility in the UK was its evolution far beyond the permissible causes of its original definition.[50] It has long been argued that liberal use of diminished responsibility displays an abdication of responsibility in cases where a responsibility ought to remain.[51] This responsibility is certainly more evident in the mercy killing by a soldier of a wounded enemy compared to a husband upon his wife. The defendant in the latter instance is subject only to a prohibition against killing, whereas the soldier is also subject to an imposed duty to protect the wounded.[52] Whether or not this would agitate his circumstance is another unknown and uncertainty remains over applications of the

[48] *R* v *Nielsen* (1990) 47 A Crim R 268
[49] See chapter 2.
[50] Ministry of Justice *Murder Manslaughter and Infanticide: Proposals for reform of the law* 2008 Consultation Paper (CP 19/08) 14
[51] J E Williams 'The Homicide Act 1957 and Diminished Responsibility. An Abdication of Responsibility' [1958] *Modern Law Review* 21
[52] n.28 above at Art.12

modified defence and it's malleability in relation to mercy killing, especially with the onus the new act places on a substantial medical diagnosis. The court is primarily occupied with malicious intent and bad motives rather than whether the defendant was trying to alleviate suffering.

> 'The appellant's responsibility was diminished, not extinguished. He knew what he was doing and that what he did was unlawful; and the possible consequences of what he was doing when he was doing it' [53]

But, in domestic cases juries have often been sympathetic to the mercy killer, seemingly taking into account the defendant's circumstance and motive.[54] Whether a battlefield mercy killer could successfully use this facility depends on whether the soldier is willing to utilise the defence. They may feel that their actions did not stem from an abnormality of the mind, and that their actions were totally justified. For example, at his trial for pre meditated murder for delivering a coup de grace to an injured Iraqi suspect in 2004, US soldier Capt. Maynulet informed the court that he stood by the morality of his actions.

> 'He was in a state that I didn't think was dignified. I had to put him out of his misery…It was the right thing to do. I think it was the honourable thing to do. I don't think allowing him to continue in that state was proper.'[55]

Of course many domestic mercy killers may feel the same way and utilise the defence none-the-less because there is no alternative. In such a case where the defendant does not wish to

[53] n.10 above per the Lord Chief Justice at 17
[54] R D Mackey 'Diminished Responsibility and the mentally disordered' in A Ashworth and B Mitchell (eds) *Rethinking English Homicide Law* (Oxford University Publishing Oxford 2000) 79
[55] *United States* v *Maynulet* No. 04 – 9847, 242-243 (Headquarters, 1st Armoured Division Apr. 1, 2004) Testimony of Capt. Maynulet at 451 -453

utilise the defence of diminished responsibility, the murder charge will be followed through, but there remains an area of law, that concerning suicide, which provides some possible avenues of exploration concerning the liability of the defendant.

5.3 Suicide: The battlefield mercy killing as a suicide

Suicide is not illegal, it involves circumstances 'where the deceased intended to take his own life.'[56] Often, the victim acts alone on these intentions, however, in some instances the suicide involves the actions of others. When other parties are involved in a suicide, their involvement can be interpreted as criminal.[57] Thus sometimes, where the victim of a battlefield mercy killing has previously displayed a settled intention to die justice might be better served to the battlefield mercy killer, if it was possible to lay some responsibility for their actions at the feet of their victim. This might occur where, by chance of luck and bad the victim killed outright, but left lingering painfully alive and the mercy killing itself only comes about because of their suicidal intentions. This section will therefore focus on the attributes of the victim as suicidal, rather than the defendant's actions as a killer, in order to understand why the criminal sanctions of murder may be too harsh a punishment. It is not to say that the mercy killing is a suicide, it cannot be because the soldier performs the last action which kills the victim, but rather sometimes the victim's intentions were suicidal and thus full responsibility for their deaths does not lay with the defendant. There are several relevant types of suicide that may be relevant to the mercy killing soldier; victim precipitated suicide, suicide pacts and assisted suicide, and the suicidal nature of some types of combatants has a long tradition in war.

[56] Jan Neelman & Simon Wessely 'Changes in Classification of Suicide in England and Wales: time trends and associations with coroner's professional backgrounds' [1997] 27 *Psychological Medicine* 467
[57] Suicide Act 1961 s.2

> ‘And while the attention of our men is engaged in that matter, in another, Adiatunnias, who held the chief command with six hundred devoted followers whom they call *soldurii*; the conditions of whose association are these – that they enjoy all the conveniences of life with those to whose friendship they have devoted themselves: if anything calamitous happen with them either they endure the same destiny together with them, or commit suicide: nor hitherto, in the memory of men, has there been found any one who, upon his being slain to whose friendship he had devoted himself, refused to die.’[58]

The above account of the *Soldurii* depicts the willingness of soldiers to die for their cause and for one another in a tacit understanding of the bonds of fellowship and honour that bind them and for the isolated military culture previously discussed. In the ancient world, this fight to the death mentality was well documented, ‘The Spaniards too, held it a disgrace to survive in battle,…’[59]. Often, as with the *Soldurii*, the fate of these warriors was bound to those who they had sworn to protect or serve, they had formed a pact to die together in battle, and if their opposite was slain, they too must fight and place themselves in a position in which the enemy would slay them also. The followers of the Germanic Chieftain Chronodamaric, ‘…judged it a disgrace to live after the death of their King or not to die for him if the opportunity occurred.’[60]

In some instances, such as contemporary suicide bombers, those that could be deemed combatants accept and show a willingness, and determination to die in battle. This state of affairs does not translate to all soldiers but many, like the *soldurii*, would rather die than

[58] Julius Caesar *The Gallic War* Translated by Carolyn Hammond (OUP Oxford 1996) 3.22
[59] Valerius Maximus *Factorum et Dictorum Memorabilium Libri Novem* Translated By K Kempf (1880) 80
[60] Amien Marcellin *Historae (LXIV-XVI)* Translated by E Galletier and J Fontaine (ed.s) (Paris 1968) 186 -187

survive their comrades' death, whilst in many instances they have killed themselves rather than be subject to the enemy treatment, when the odds are against them. When fighting against imperial Rome for example, the Zealots, besieged in Masada, committed mass suicide to a man rather than be captured by the overwhelming force that faced them.[61] Other soldiers have been prepared to spend their life, especially when wounded, with the intention of taking an enemy with them, such as the Japanese soldiers during their retreat through New Guinea.

> 'A man who had the strength left to pull the pin could always blow himself up, so everyone tried to keep one grenade until the last moment. Even those who tossed away their rifles never threw away their last grenade.'[62]

In war suicide can often therefore be seen as a mercy, a release from the tortures of war. When death surrounds the soldier, the means by which it is achieved can blur into irrelevance.

> 'In New Guinea, we didn't know what was killing us. Who killed that one? Was it death from insanity? A suicide? A mercy killing? Maybe he just couldn't endure the pain of living. I remember the war as mainly one of suicides and mercy killings.'[63]

In many military organisations, contemporarily and traditionally, cultural and religious influence leads to an expectation that the soldier will carry out his duty to fight the enemy

[61] N Ben-Yehuda *Masada Myth: Collective Memory and Myth Making* (University of Wisconsin Press Madison 1995)
[62] Ernest Herr *The Army that Disappeared* http://www.angelfire.com/planet/solomon0/NewGuinea.html last accessed 25/03/2012
[63] ibid.

unto death,[64] as is seen in the jihadist battlefield behaviour under the law of the military jihad.[65]

The most famous example of this is the actions of Japanese Kamikaze pilots during the Second World War who were not ordered to die, but rather volunteered for the suicidal mission. [66] Of course there was psychological pressure in the form of state and peer expectation,[67] but it was their choice to voluntarily embark on a mission from which they had no intention of returning. It thus seems paradoxical that knowing that some soldiers are so intent on dying for their cause, often influenced through differing cultural factors than western society is exposed to, to then punish the soldier who shoots the victim who has barely failed to achieve his aim and is suffering in a mortal condition.

Such a culture may seem alien from a western viewpoint, in which the martial tradition has slowly eroded, and where the concept of warriors, martyrs and heroes is no longer prevalent.[68] Today western militaries are more individualised and the soldier will be more likely to act on decisions which are best for him and not the entirety of the group.[69] Conversely, eastern military establishments with a martial history, for instance, members of the Turkish Armed Forces, have a heightened willingness and acceptance of dying for their cause, and to serve the country by sacrificing their lives.[70]

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[64] Freamin B K 'Matyrdom, Suicide and the Islamic Law of War. A Short Legal History' [2004] 27 *Fordham International Law Journal* 299 208

[65] Sheikh Yusuf Qaradawi 'Whether Suicide Bombings are a Form of Martyrdom' 8/11/2003 available at http://qaradawi.net last accessed 15/12/2011

[66] Sasaki M 'Who became Kamikaze pilots, and how did they feel towards their suicide mission?' (1999) *The Concord Review* 175 179. The first mission leader, Lt Yukio Seki reportedly said of the mission 'I understand, please let me do it' when the mission was proposed.

[67] ibid. at 179

[68] Bauman Z *Liquid Life* (Polity Press Cambridge 2005) 43

[69] ibid. at 91

[70] Soeters J L, van den Berg C E, Varoglu A K < Sigri U 'Accepting death in the military: A Turkish – Dutch comparison' [2007] 31(1) *International Journal of International Relations* 299 302

Thus soldiers exist, who show a fanatic devotion to their cause and display an intention to die whether they achieve their objective or not. In the modern day evidence of this can be seen in Islamic fundamentalists who undertake suicide attacks and 'martyrdom operations'.[71] These may be identified by their dress,[72] or it may be evident from the ferocity of their attack and actions in battle. However, if a soldier were to commit a mercy killing on one of these suicidal fighters, the victim's previous intentions and desire to die would tend to be ignored and the soldier would still be charged with murder. In situations where the victim falls into such a bracket, the law surrounding suicide may serve a better justice to that particular mercy killer, but may not be practically applicable. Nevertheless if it were to occur, three practices are of relevance, suicide pacts, assisted suicide and a practice known colloquially as 'death by cop' or victim precipitated homicide

5.4 Victim Precipitated Homicide

Victim precipitated homicide, or suicide by cop was first widely recorded in the United States. It is estimated that such types of suicide account for up to thirteen per cent of all shootings resulting in death which are carried out by U.S. law enforcement officers.[73] Since first being recorded, it has been evidenced throughout the world, including in the UK.[74] Essentially, the victim provokes another to kill them to achieve their goal of suicide. It has been postulated here that some fighters, for instance those seeking martyrdom, have a clearly settled intention to die and the attributes and actions of the participants in victim precipitated homicide are key

[71] C Reuter *My Life is a Weapon: Modern History of Suicide Bombers*
[72] Many Islamic suicide fighters dress in the black of the traditional Islamic apocalyptic warrior – The female suicide bombers of the Chechan rebels wore Black Hijabs – J Hughes 'Chechnya Conflict: freedom fighters or terrorists?' [2007] 15(3) *Demokratizatsiya: The Journal of Post-Soviet Democratization* 293 300
[73] Houston H R, Anglin D Yarborough J et al'Suicide by Cop' [1998] 32(6) *Annals of Emergency Medicine* 665 667
[74] Best D Quigley A Bailey A 'Police shooting as a method for self-harming: A Review of the evidence for suicide by cop in England and Wales between 1998 and 2001' 32(4) *International Journal of the Sociology of the Law* 349

factors which point to whether victim had suicidal intentions. Many of those involved in victim precipitated suicide are unable to suffer the loss of self-esteem associated with arrest by the police and failure in their objective.[75] On the battlefield these attributes and actions may manifest themselves in the image of the proud warrior who continually attacks the enemy heedlessly and against the odds, to achieve his goal without losing any self-esteem as to the bravery of their conduct.[76] Furthermore, in cases where the victim's death will be seen as glorious sacrifice, and he places himself in reckless positions, acting without regard to his life and refuses to surrender or lay down his arms, these actions can be interpreted as clearly suicidal.

However, in such cases involving policemen, the initial attack usually kills the victim. The police can use lethal force to neutralise the victim, but if the force, for some reason does not kill the victim outright, the victim's previous suicidal actions do not justify the police shooting him. In the same way, the defendant solider in a battlefield mercy killing cannot easily claim the defendant's previous suicidal actions as a justification for his actions. Whilst there is no general duty to prevent suicide, when a person comes under the custody and protection of a valid authority a duty does exist to take reasonable steps to prevent such actions.[77] The victim of the battlefield mercy killing is certainly under the protection of the soldier, and thus some type of duty is owed to prevent harm coming to him by his own actions. He should also no longer pose the type of threat that would justify a shooting. Whilst

[75] Parent R B 'Suicide by Cop: Victim Precipitated Homicide' [1998] 65(10) *Police Chief* 111 114
[76] Kennedy D B, Homant R J and Hupp R T 'Suicide by Cop' *FBI Law Enforcement Bulletin* [1998] August
[77] For instance, ptients lacking capacity who are under medical care in hospital either voluntarily, *Rabone* v *Pennine Care NHS Trust* (2012) UKSC 2, or involuntarily *Savage* v *South Essex Partnership NHS Trust* (2008) UKHL 74 are owed a duty by the hospital under the ECHR Art. 2 to ensure that appropriate gerenal measures are taken to protect te lives of patients in hospitals. This does not mean all lives but rather operational measures should be put in place, and that a duty exists when it is clear the patient means to ahrm themselves. Likewise, the police have a duty to ensure that operational measures are put in place to stop those under their custody committing suicide and must ake reasonable steps to ensure this. *Reeves* v *Commissioners for the Metropolis* [2000] 1 AC 360.

his intentions during battle were suicidal the soldiers delivering a coup de grace to the victim cannot easily be viewed in the same light as victim precipitated suicide.

To view the killing as a victim precipitated suicide may have delivered a more apt justice to the victim because it places some responsibility for the actions on the victim. This is not to say that all victims of war who might experience a coup de grace to end their suffering are responsible for this state of affairs. Only that, in some circumstances, where the soldier clearly displays suicidal intent, such as fanatics and would be martyrs, holding the mercy killer solely responsible may be too harsh. In the alternative it may be possible to see the actions of the victim in light of a suicide pact, such as those entered into by the *soldurii* and Zealots in the ancient Roman wars. Rather than seeking martyrdom, in some cases soldiers are bounded by such strong bonds forged in the isolated culture of the military and tempered in the extreme conditions of war, that they are loathe to outlive their comrades.

5.5 Suicide Pacts

The behaviour of the Zealots and the *soldurii*, can be understood as a suicide pact because each party had sworn to kill themselves. In the case of the Zealots, to escape capture, in the case of the *soldurii* they would kill themselves by fighting to the death. In both examples there was a common agreement to die together and the parties entered into the action with the 'settled intention' of dying. Suicide pacts are defined in both the Homicide Act 1957 and the Suicide Act 1961.

> 'For the purposes of this section "suicide pact" means a common agreement between two or more persons having for its object the death

> of all of them, whether or not each is to take his own life, but nothing done by a person who enters into a suicide pact shall be treated as done by him in pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact.'[78]

Under the law of England and Wales, the survivor of such a pact commits an offence. Before the 1957 Homicide Act, the survivor of such a pact was often held to be guilty of murder.[79] Today,

> 'It shall be manslaughter and shall not be murder, for a person acting in pursuance of a suicide pact between himself and another to kill the other or be a party to the other killing himself or being killed by a third person.'[80]

As with victim precipitated homicide, placing liability on the survivor of the suicide pact seems to suggest that it is right that he takes some responsibility for his suicidal actions. If these previous actions where considered as constituting an explanation for why the battlefield mercy killer feels obliged to kill the wounded victim, then this questions whether holding the defendant wholly responsible by charging them with murder provides appropriate justice. The victim's actions and obligations to his comrades, which he entered into himself, brought on his wounds, and there is a certain moral value in an argument which reasons that those who bring about their condition from their own choices ought not to escape any responsibility for their actions. The common law states that such actions should be deterred regardless of the motive of the parties.

[78] Homicide Act 1957 s.4(3)
[79] *R* v *Croft* [1944] KB 295
[80] n.78 above at s.4

> '…sensible people will understand of course what brings people in the luckless position of these two to so desperate a state of mind. However, even people like them must be dettered from going to the extreme of terminating life. This is the policy of the law, guided by the public interest. It must therefore be plainly understood that those who contemplate suicide and do not successfully achieve it in a suicide pact will be punished if the other party to the pact dies.'[81]

Of course, many such warriors who wish to die with their comrades, are not operating under normal conditions and might have been coerced, indoctrinated or pressured into choosing to die with their comrades against their foe. This could be the case when they serve within a military system which equates death with dishonour, such as the Imperial Japanese military during World War Two, where soldiers were advised:

> "Meet the expectations of your family and home community by making effort upon effort, always mindful of the honor of your name. If alive, do not suffer the disgrace of becoming a prisoner; in death, do not leave behind a name soiled by misdeeds."[82]

However, those who do enter into such a pact, spoken or unspoken, and who have the settled intention to die, would domestically be guilty of manslaughter if they survived and illustrating that there is an acceptance that such actions are wrong. In a battlefield mercy killing however, this intention and liability is likely to be forgotten and all responsibility is

[81] *R* v *Martin* (1986) 8 Cr App R (s) 419 Per Watkins J at 421
[82] Japanese Army Field Service Code 1941

placed on the defendant because the defendant delivers the final act of death, outside the legitimately confined arena of the combat itself. However, it may alternatively be possible to view the defendant's action in light of an attempt to assist the soldier with a settled intention to die as assisting or encouraging suicide

5.6 Assisting or encouraging suicide

Russian Soldier: What do you want?

Injured Chechen Rebel: To go to the paradise.

Russian Soldier: Where?

Injured Chechen Rebel: To the paradise.[83]

In 1995, the Russian army occupied the village of Kosmo Volsky during the First Chechen War. In film from the assault, a Russian soldier is seen pointing a gun at an injured Chechen, and the above exchange took place. A request to be killed in this way may fit within the nature of an offence known as assisting or encouraging suicide under section 59 of the Coroners and Justice Act which creates the offence of assisting or encouraging suicide:

(1)A person ("D") commits an offence if—.

(a)D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and.

(b)D's act was intended to encourage or assist suicide or an attempt at suicide.

[83] Viewable on http://www.youtube,com/watch?v=741ucintEy8M last accessed 26/03/2012

A conviction on such a charge does not carry with it a mandatory life sentence, rather it has a maximum tariff of fourteen years and in some cases the convicted person will escape a custodial sentence.

The suicidal intent of certain warriors has been discussed and the potential attribution of some personal responsibility for their condition has also been considered. Potentially, in some circumstances, where the victim has expressed a clear and explicit request for aid in dying, the charge of assisted suicide may fit the situation however, as always the circumstances will affect the whether such a charge is appropriate. Whilst assistance can involve active participation, for example, if a person drinks a lethal cocktail through a straw they commit suicide but the person who mixes the cocktail and hands them the cup has merely assisted by active participation. In the battlefield mercy killing the final action is performed not by the victim but by defendant who fires the shot or uses the knife. This distinguishes the conduct from suicide, which would occur if the defendant merely handed the weapon to the victim who then administered the final action to himself. Accordingly, the battlefield mercy killing exhibits more features of murder, which it is already argued is wrongly applied, than assisted suicide. The mere possibility of an assisted suicide charge itself ideally evidences the level of the use of inappropriate legal doctrines surrounding mercy killings, which when used correctly are suitable offences, but when applied to situations where unique considerations are involved cause confusion and injustice.

However, there are cases which throw doubt on this interpretation. In *Gilderdale,*[84] the mother of the victim was convicted of assisted suicide, after she helped her daughter to kill

[84] n.9 above.

herself. Her daughter had expressed her desire to kill herself, and her mother thus prepared drugs by which this could be achieved. When her daughter became too weak to continue to administer them through an intravenous drip, her mother took over and continued to administer the drugs until her daughter died. The preparation of the drugs was a positive act which fits within the idea of assisted suicide, but the final action of administering the drugs ought properly to be seen as more than mere assistance. Nevertheless, Gilderdale was convicted of assisted suicide and sentenced to a suspended custodial sentence.

Of course, not all soldiers will be in the position of the injured Chechen rebel mentioned above or the victim in *Semrau*, many will not have the capacity to make their desires heard. They might make their intention to commit suicide clear through their actions, but that is through forcing someone to kill them rather than requesting aid in dying. In *Semrau*, the victim was completely unconscious, and was unable to make such a request verbally. However, such a request need not necessarily be in words. In *R* v *Robey*,[85] the defendant delivered the final act in the victim's death, it was merely signified to the defendant, here the defendant's wife had recently returned home from an extended hospitalisation after the defendant had accidentally spilled a boiling kettle down her neck. She had become nervous and anxious, and jealous of her husband's attachment to his young daughter. After an argument she returned to the bedroom with a knife, placed the point to her chest and threw herself onto the bed. Fatally wounded, the emergency services took over an hour to attend, in which time Robey forced the knife home with lethal effect because, '…he didn't want her to suffer further.'[86] The court accepted that he had delivered the final action.

[85] *R* v *Robey* (1976) 1Cr App R 127
[86] ibid. at 129

> ‘The verdict involved that you pushed that knife further in while she was still alive and that is something which I cannot possibly overlook.’[87]

Yet the court apparently accepted the defendant’s argument that he had done so because she looked at him as if to say, ‘please do it’, and thus requested aid in dying and convicted him of assisted suicide.

The courts have been willing to stretch the application of assisted suicide in cases where the defendant delivered the final act, but much rests on the victim’s clear intention and request. In *Gilderdale,* this expression can be seen in the actions of the victim; she had discussed dying on the internet, from which it was deduced that the she possessed an intention to commit suicide and had instigated the administration of the lethal drugs by her own hand. Likewise in *Robey*, it can be said that the victim initiated the killing herself and it was deduced that she asked for help through communication with her husband. He interpreted ‘a look on her face as if to say ‘help me finish it off’’.[88] Whilst the victim in the battlefield mercy killing who has suicidal intent may express this through his reckless battlefield behaviour, this is some way away from a clear request for aid in dying.

Whilst a conviction for assisting or encouraging suicide may bring better justice to the defendant in terms of potential punishment, the stigma attached to the conviction may still be inappropriate. In some cases it is clearly associated with crimes of a passionate motive, which it is asserted a battlefield coup de grace often is. In *A* v *United Kingdom*[89] the killers of elderly persons were leniently sentenced. Their motive was to ‘…comfort and console the old and the

[87] ibid. per Browne LJ at 129
[88] ibid. at 129
[89] *A* v *United Kingdom* (1984) 6 EHRR CD 140

sick and the bedridden or suffering from incurable illness.'[90] However, such cases are rare, and often assisted suicide is used to prosecute those who coerce and cajole the victim to commit the act. In *R* v *MacGranaghan*,[91] acting from an aggravated motive, namely the offender's hatred of the victims crime of child neglect, he influenced his mentally 'pathetic'[92] victim to commit suicide, and received an eight year jail sentence. Likewise, in *Mcshane*,[93] the defendant received a two year custodial sentence, for attempting to assist her mother to commit suicide, in a '…truly terrible crime…motivated by the desire for money.'[94]Conversely, acting from a motive of compassion may lead to no charge being brought,[95] and thus is should be considered that such an offence has negative and positive connotations which may or may not justly serve the battlefield mercy killer.

In conclusion, whilst imposing such a charge allows greater leniency in sentencing, there are some practical problems which affect its successful application. Furthermore, just because assisted suicide delivers a more desirable justice in terms of sentencing does not make it the correct way to do deal with the action. It still has a stigma attached to it which has connotations of deceit and manipulation which are not components of the action which the battlefield mercy killer is committing. It is not bad law, but using it would again represent bad application of the law.

[90] ibid. at 141
[91] *R* v *MacGranaghan* (1987) 9 Cr App R 447
[92] ibid. per Lord Croom-Johnson at 448
[93] *R* v *Mcshane* (1978) 66 Cr App R 97
[94] ibid. at 104
[95] The Director of Public Prosecutions Policy for Prosecutors in Respect of Cases of Encouraging and Assisting Suicide 2011 p.7 para45(2)

5.7 Conclusion

In very specific circumstances, the battlefield mercy killer may be considered as someone who has assisted another to commit suicide. To do so, the victim might have all of the attributes of fanatics and would be martyrs in that they have a clear intention to die, or he may simply express a wish to die following the infliction of mortal wounds. Either way, there must be some kind of request from the victim if a claim of assisted suicide is to be satisfied or the nature of the defendant's actions should be limited to compliance with that request. If such a case were successful the sentence imposed upon the defendant would obviate the harshness of a murder conviction and potentially provide a more just outcome. There are however practical difficulties in applying the assisted suicide in these circumstances and it also has a stigma which may not be suitable. However, within the context of soldiers who have suicidal intentions and the treatment administered to them it should be considered.

The circumstances of a battlefield mercy killing are very different from mercy killing cases which the law of homicide has developed to address. Of the three most likely charges, none perfectly correspond to the circumstances of the crime. In almost all circumstances, the mercy killing soldier will face murder charges and might, possibly, succeed in reducing their conviction to manslaughter if a defence of diminished responsibility is accepted. Potentially, in limited circumstances, it may be that a charge of assisted suicide may be brought.

However, neither seem to fit with the nature of the crime of mercy killing. Of course, this is a moral judgement, which shall be discussed. As such, whilst they are perfectly adequate doctrines to deal with traditional cases where a killing has taken place in a peaceful, civilian situation, it is wrong to apply them to the battlefield mercy killer. In cases where there is no

point in treating the victim on the battlefield, but it is clear they are suffering, and where their pain and inevitable death outweighs the practical benefit any aid can provide them, there is another comparable area of law, that relates to physicians making life or death decisions. The next chapter will consider whether, on some level, this may be comparable to the actions of the mercy killing soldier.

Chapter Six

Conceptual M.A.S.H[1] up:

Mercy Killing, medical ethics and military murder

Putting the service man on trial, in a civil criminal court, charged with murder for administering a battle field coup de grace to his mortally wounded and suffering adversary, is not ideal; especially if he is tried according to the rules and precedents of peacetime civilian mercy killings rather than those in battle between soldiers. It might instead be preferable to apply precedents used in cases involving medical practitioners since they are able to rely on a unique set of rules and interpretation of rules when making end of life decisions. Both the physician and the soldier are subject to certain professional duties when confronted with offering treatment or aid to those in need. In conflict, it is stipulated that the wounded,

> '…shall be treated humanely and cared for by the Party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria… they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.[2]

Whilst physicians must swear to,

> '… prescribe regimens for the good of my patients according to my ability and my judgment and never do harm to anyone'[3]

[1] M.A.S.H. - Mobile Army Surgical Hospital
[2] Geneva Convention 1949 Convention for the Amelioration of the Sick and Wounded Art.12
[3] Hippocratic Oath – to note that many doctors do not swear the Hippocratic oath anymore but is a pervasive influence in the medical ethics which inform their professional duty.

Often, physicians must make difficult decisions over the administration of treatment which could lead to the patient's demise. They do not become liable for causing death because they operate within specific conceptual and legal boundaries, which are often influenced by moral imperatives. It may thus be beneficial to judge the soldier in light of end of life practices undertaken by other professionals who deal with death and are also subject to acceptable standards of conduct, rather than against the standards of lay civilians whose actions are not so governed and who do not deal with life and death decision making in their professional capacity.

Medical ethics, principally the concept of autonomy, might perhaps offer an alternative view of the wrongfulness of the soldier's action. In medical practice the patient's autonomy is safeguarded by the need to gain their consent, which can

> '…legitimate many practices that would otherwise be regarded as crimes. It is also central to the exercise of autonomy, choice and the maintenance of control over medical decisions at the end of life, which are widely regarded as essential for achieving dignity in dying.'[4]

The lack of request or consent in the cases of *Semrau*, *Maynulet* and *Cardenas*, exasberated it criminal nature and also called into question it's moral value. However, in medical practice when consent cannot be gained, the practitioner must act in the patient's best interests. It would be informative to consider whether Capt. Semrau might be regarded as having acted in the best interests of his so called victim and if so what impact that might have on his liability. Separately, the theory of double effect, concerning administering pain relief which causes

[4] Hazel Biggs *Euthanasia, Death with Dignity and the Law* (Hart Publishing Oxford 2001) 69

unintended death is in some ways comparable to the actions of the battlefield mercy killer. Such a comparison may offer a better means by which to judge the battle field mercy killer's actions than using the aforementioned civilian examples since the soldier's actions are also aimed at relieving the pain of the suffering victim.

However, whilst the both physicians and soldiers deal with life or death consequences and are both held to professional standards of behaviour, it is important to note throughout that whilst the soldier acts from compassion to provide a better, or more just end for the wounded victim in contravention to his professional duties, the physician's duty is to be dispassionate because they are acting within the confines of their profession when involved in end of life actions. The discussion must begin with a consideration of how far 'consent' can legitimise any action, and what effect it has on the moral perception of the behaviour.

6.1 The nature of consent

> 'If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove the absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer. There are, however, many acts in themselves harmless and

> lawful which become unlawful only if they are done without the consent of the person affected…'[5]

From this it is clear that consent to an action between two persons has the power to change the moral and legal character certain actions. If x takes something from y with the consent of y, then it is said that x is borrowing something. If x takes something from y, without consent, then it might be said that x has stolen something.[6] Similarly,

> 'Consent turns rape into love making, a kidnapping into a Sunday drive, a battery into a football tackle, a theft into a gift and a trespass into a dinner party.'[7]

In some situations the courts have decided that consent is irrelevant because allowing such actions on the basis of the consent of the parties would be against the public interest. Often, '…the rules excluding the victim's consent as a defence to charges of murder and assault may perfectly be explained as a piece of paternalism designed to protect individuals against themselves.'[8] Essentially, some actions are considered neutral, only becoming wrong when consent is not gained, for instance sexual intercourse, whilst others are considered wrong regardless.

[5] *R* v *Donovan* (1934) 25 Cr App R 1 per Swift J at 507. These acts which are '...themselves harmless and lawful which become unlawful only if they are done without the consent of the person affected.' Are those such as discussed. Sex without consent can become rape, taking property without consent can become theft, etc.
[6] Subject to other requirements, - the intention to permanently deprive and dishonesty on the part of x.
[7] Heidi M Hurd 'Blaming the Victim: A Response to the Proposal that Criminal Law Recognise a General Defence of Contributory Responsibility' [2005] 8 *Buffalo Law Review* 503 504
[8] HLA Hart *Law, Liberty and Morality* (Oxford University Publishing London 1963) 31

Despite 'involv[ing] intentional violence resulting in actual or sometimes serious bodily harm…surgery is a lawful activity.'[9] Medical treatment is an action that can be generally legitimised by consent because of a 'presumption that any physical contact occurring in the course of medical treatment will be for the benefit of the recipient and is therefore, ultimately in the public interest'[10] In the medical context, the physician must gain the consent of the patient before they administer treatment.[11] Any unauthorised touching of another, even of a patient by their physician, can constitute battery and the administration of treatment without consent could constitute a more serious assault. Gaining consent in this context represents the practical application of the doctrine of self-determination and,

> '…every human being of adult years and sound mind has the right to determine what shall be done with his own body.'[12]

All persons have the right to have their autonomy respected, and therefore before any act is undertaken which directly affects their person they should have a choice to decide whether they want the action to take place. Self-determination in medical procedures is considered a basic right and is enforced through the threat of criminal charges where consent is not first given.[13] Physicians cannot override the competent patient's will, adults of sound mind have the right to decide whether they undergo or refuse treatment, and treating them without consent may lead to actions in negligence as well as constitute a crime.[14]

[9] *R* v *Brown* [1993] Cr App 44 per Lord Templeman at 47
[10] n.4 above at 72
[11] Acting in the patients 'Best Interests' is considered in due course.
[12] *Schloendorff* v *Society of New York Hospital*(1914) 105 NE 92 (nY) Per Cardozo J at 93
[13] *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 per Ward J at 98
[14] *Airedale NHS Trust* v *Bland* [1993] AC 789 per Lord Mustill at 891'…any invasion of the body of one person by another is potentially both a crime and a tort…'.

The requirement of consent converts the theory of self-determination into practice and safeguards the patient from medical paternalism, prioritising patient autonomy over clinical discretion. [15] However, lack of consent does not preclude criminal liability in every circumstance and an individual's autonomy can be overridden for a number of reasons. In a medical context if a patient is deemed to lack capacity to give appropriate consent it may be the physician can act in their best interests.[16]

In *Semrau, Cardenas* and *Maynulet*, the victims did not give consent to the coup de grace which was administered to them. Although the defendants each acted from compassionate motives this lack of consent can be said to have altered the nature of the act. Indeed, in cases of assisted suicide, whether the victim requested or consented to the action is an important factor as to whether a prosecution is even brought against the defendant,[17] whilst the absence of consent has the contrary effect. If the victim did not reach a voluntary, clear and settled decision to commit suicide which they communicated clearly and unequivocally to the suspect then this is considered evidence that they did not consent to the assistance and increases the likelihood that a prosecution will be brought in the public interest. [18]

Situations arise in medical practice in which it is crucial to gain the consent of the individual, or the permission of the court to act in their best interests. Such situations include the refusal of life saving treatments by the patient or the withdrawal or withholding of treatment from the patient.[19] It will be informative to consider whether the actions of battlefield mercy killers

[15] n.4 above at 113
[16] There is an issue here about whether a person who lacks capacity actually has autonomy or at least whether they can exercise it, so the issue is not necessarily whether that persons autonomy s overridden but rather it likely it does not exist.
[17] Director of Public Prosecutions *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* February 2010
[18] ibid. at para. 43(3)(4)&(5)
[19] n.14 above.

such as Capt. Semrau can be feasibly compared to the physician who acts without consent and perhaps whether battlefield mercy killings would be interpreted differently and more justly by comparison to the practice of medical professionals. First, it should be noted that for the consent to be valid a number of requirements must be met on behalf of both the patient and the physician.

6.2 Valid and Informed Consent

> 'Every person is presumed to have the capacity to consent to or refuse medical treatment unless and until that presumption is rebutted.'[20]

A patient's consent is valid only if it is 'informed' and they have the 'capacity' to consent or to refuse the proposed treatment. Informed consent is only achievable if the medical practitioner conveys all of the relevant information regarding the treatment, including its purpose and the positive and negative consequences. All relevant information should be disclosed, if it is withheld from external motivations this affects the validity of the consent, '[o]f course, if information is withheld in bad faith, the consent would be vitiated by fraud.'[21] Finally, the patient's autonomy must not be infringed, and if evidence of coercion exists, which forces the patient to consent or refuse treatment this is grounds upon which to question the validity of the consent. [22]

[20] *Re MB (Medical Treatment)(Court of Appeal)* [1997] 2 FLR 426 per Butler Sloss LJ at 436
[21] *Chatterton* v *Gerson* [1981] QB 432 Bristow J
[22] *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 T was involved in a road traffic accident whilst at the thirty fourth week of her pregnancy. After conversing with her mother she refused a blood transfusion and signed a refusal of consent form the contents of which were not explained to her. Her refusal was believed to have been formed on the basis that she held some sentiments of a Jehovah's witness, a faith she did not practice but her mother did. It was reported that after her mother attended the hospital the daughter appeared to be led in all decision making by her mother. Her baby was delivered, via caesarean but was unfortunately still born, after this her condition deteriorated further and again she was refused a blood transfusion. The court viewed it as an emergency situation and deemed that it had been proper for the physician's to treat her in the way they felt best, noting the possibility of coercion of her ability to fully consent.

> '…doctors have to consider whether the decision is really that of the patient. It is wholly acceptable that the patient should have been persuaded by others of the merits of such a decision and have decided accordingly. It matters not how strong the persuasion was, so long as it did not overbear the independence of the patient's decision.'[23]

The information need not be expressed in minute detail, rather broad terms can be used the degree of disclosure in each case is to be judged primarily on the basis of medical evidence; what a body of medical opinion considers to be appropriate. However, lively debate exists as to whether this '*Bolam* direction', that physician are not negligent as long as they acted 'in accordance with the practice accepted at the time as proper by a body of medical men skilled in that particular art'[24] is still correct, or whether such a direction amounts to medical paternalism, as it effectively leaves it to the practitioner's discretion to disclose what they think is necessary to the patient.

The use of the direction was upheld in both *Sidaway* v *Board of Governors of the Bethlem Royal Hospital*[25] and *Blyth* v *Bloomsbury Area Helath Authority*,[26] despite being questioned on good grounds in the former. Ms Sidaway was not informed of the one per cent chance of paralysis involved in the procedure, which consequently occurred. She argued she should have been made fully aware of this information but the House of Lords ruled this was not the case because a reasonable body of medical opinion concurred that the clinical team had acted

[23] *Re T [Adult: Refusal of Medical Treatment]* [1992] 4 All ER 649 per Lord Donaldson
[24] *Bolam v Friern Hospital Management* Committee [1957] 2 All ER 118 per McNair J at 122
[25] *Sidaway* v *Board of Governors of the Bethlem Royal Hospital* [1985] AC 871
[26] *Blyth* v *Bloomsbury Area Health Authority* [1993] 4 Med LR 151

in accordance with the practice of body of medical men.[27] However, it seems that in particular instances more knowledge should be given concerning the specific consequences of treatment. In *Smith* v *Tunbridge Wells Health Authority*[28] a young married man was not informed of the risk of erectile dysfunction and impotence that the procedure to be undertaken carried. When this subsequently happened, the court found that in such circumstances, the specificity of certain information has relevance. In some situations the required level of disclosure is now broadly defined in statute,[29] particularly with regard to treatment refusal.

Whilst the doctor must fulfill his obligation to provide relevant treatment information, the patient must also have the capacity to consent. Capacity is presumed,[30] and relates to the patient's ability to weigh the information, retain it and come to a conclusion on the information concerning their proposed treatment. Where possible, certain adjustments should be made for the patient, for instance, if they are hard of hearing or elderly= opportunity must also be given to the patient to assert their capacity. Assumptions about their capacity should not be made solely based in reference to a particular condition or aspects of the patient's behavior.[31]

When a patient cannot understand, retain or use the relevant information to form their decision,[32] and cannot communicate their decision by any appropriate means,[33] then they lack capacity.[34] Assessing the patient's lack of capacity is supposedly judged by the courts,[35] but in

[27] n.25 above per Lord Scarman at 872
[28] *Smith* v *Tunbridge Wells Health Authority* [1994] 5 Med LR 334
[29] Under the Mental Capacity Act 2005 s.4 the information relevant to a decision also includes information about the foreseeable consequences of deciding one way or another about treatment or refusal s.4(a) and failing to make the decision s(4)(b). For further discussion see, n.4 above at 74-79
[30] Mental Capacity Act 2005 s.1(2) A person is assumed to have capacity unless shown he lacks it.
[31] ibid. at s.2(3)(b)
[32] ibid. at s.3(1)(a) & (b)
[33] ibid. at s.3(1)(c)&(d)
[34] There are more statutory qualifications on this than detailed here. Mental Capacity Act 2005 s.3(2) A person is not to be regarded as understanding information relevant to a decision if they are unable to understand an

practice the assessment to give or withhold treatment in these circumstances is often a matter of clinical judgment.[36] Sometimes, a lack of capacity to consent is the result of the patient's inability to communicate their preference through unconsciousness due to their condition, rather than due to inhibited mental comprehension. In these cases, consent to or refusal of treatment may have already been provided in a patient's advance directive.

The patient may make an advance directive to refuse treatment at a later time when they no longer have the capacity to consent or to refuse treatment.[37] These can be in writing and expressed in informal terms.[38] To apply, the advance directive must relate expressly to the ailment which is the cause of the inability to consent,[39] if circumstances are in existence which were not foreseen when the patient made the advance directive then this can negate its validity.[40] At the time the advance directive was made, the patient must have had the capacity to make such a decision.[41] In keeping with the patient's right to self-determination, they may withdraw from the decision at any time,[42] and as a safeguard the directive must be made in front of witnesses.[43] Importantly, with regard life sustaining treatment, unless the treatment is specifically verified as unwanted even when life is at risk then the decision will not be valid.[44] Still, there will be times when the patient lacks the capacity to consent and no advance directive exists, such as when the patient is placed in their predicament through an emergency situation, as would be the case in relation to a battlefield mercy killing.

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explanation of it given to him in a way appropriate to them. Likewise they may be considered as having capacity to make the decision even if they can only retain the relevant information for a short time- Mental Capacity Act 2005 s.3(3)

[35] *Richmond* v *Richmond* (1914) 111 LT 273 and *Re MB(An Adult: Medical Treatment)* [1997] 8 Med LR 217

[36] The British Medical association and the Law Society *Assessment of Mental Capacity: Guidance for Doctors and Lawyers* (Third edition The Law Society London 2010) 124 para.13.3

[37] n.30 above at s.24

[38] ibid. at s.24 (2)

[39] ibid. at s.24(1)(a) & (b) and s.25(4)(a)

[40] ibid. at s.24 (4)(b)

[41] For a wider discussion on Advance Directives see, n.4 above.

[42] n.30 above at s.24(3),(4) &(5) Such a decision need not be in writing.

[43] ibid. at s.25(6)(a)(b)(c)&(d)

[44] ibid. at s.25(5)(a)

In *Semrau*, all of the relevant information pertaining to the consequences of Capt. Semrau's subsequent actions were not disclosed to the victim. There can be no possibility therefore that in such situations the consent of the mortally wounded soldier can help to legitimise the action, because it cannot be given. However, it may be said that shooting a victim suffering from battle wounds displays a wrongful disregard to his autonomy. But this raises the issue over whether a person who lacks capacity actually has autonomy, especially when they cannot experience it because of their mental and physical condition. As such it is not that their autonomy is disregarded but rather that it does not exist. In such circumstances the physician can act in a patient's best interests and it will be informative to consider whether the behaviour of the mercy killing soldier is commensurate.

6.3 The best interests of the patient

If the patient cannot consent to treatment and no valid advance directives exist, the physician must proceed in their best interests. The decision should be made with regard to the previous wishes of the patient,[45] such as their past feelings, beliefs, values and any other circumstantially relevant factors.[46] There will often be other interested parties, family for instance, who whilst not being able to decide for the patient can give insight as to the defendant's wishes,[47] likewise, consultation with the wider clinical team is expected.[48] This is particularly important where any decision made will result in the patient's death.

[45] ibid. at s.4(6)
[46] ibid. at s.4(6)(a) b) & (c)
[47] ibid. at s.4(7)(a)(b)(c) & (d)
[48] General Medical Council *Withholding and Withdrawing – guidance for doctors* 2010 para. 33 available on http://www.gmc-uk.org/withholding_and_withdrawing_guidance_for_doctors.pdf_33377901.pdf last accessed 04/03/2012

Instances exist in which treatment is withdrawn without the consent of the patient who lacks capacity where treatment is no longer of benefit and can no longer be justified against the unconsented infringement of their autonomy and person. Previously,

> 'Primacy [had been] given to the principle that the law should provide no means of enabling treatment to be withheld where the patient was in no condition to indicate whether they did or did not consent to it.'[49]

For instance, patients with severe brain injury may now sometimes survive indefinitely, some have only primitive postural and reflex movements and may never again speak, although their eyes may move. PVS patients, for instance, have an absence of functioning in the cerebral cortex, which is responsible for thinking, feeling and responding to stimuli; the patient will never regain consciousness. It is unlike a coma, as cognitive behaviour cannot be regained, and it is different to those with 'brain death' whose heart always stops beating within a week or two, or those suffering from 'locked in' syndrome who retain consciousness but no movement.[50] However, there is conflicting medical opinion as to the exact diagnosis of PVS.[51]

Airedale NHS Trust v *Bland,*[52] clarified the law on whether or not treatment shuld be continued for patients in PVS.. The patient, Anthony Bland was in a permanent vegetative state (PVS) after being the victim of a crushing incident in which his brain was deprived of oxygen for several minutes. After resuscitation he could still breathe independently, but there

[49] R Goff 'A matter of Life and Death' [1995] *Medical Law Review* 3 14
[50] Bryan Jennett 'Persistnet Vegatative State After Brain Damage: A syndrome in search of a name' [1972] 299(7753) *The Lancet* 734
[51] See Suzanne Ost 'Blinking Subjects; Blinking Justice? – Law, Medicine and the PVS Patient' [2001] 23(1) *Liverpool Law Review* 1
[52] n.14 above.

was no hope for improvement; he was kept alive by the provision of artificial nutrition and hydration. His family asserted that if had capacity he would have wished to have the treatment withdrawn.

> 'He certainly wouldn't want to be left like he is. I feel that he should be removed and the family feel the same. I was angry when the advice from the coroner was received. I can see no point whatsoever in continuing treatment.'[53]

In *Bland*, the court was asked whether it would be lawful for the physicians to withdraw nutrition and hydration from the victim, which would lead to his death. This brought the integral ethical principles of the sanctity of life and the right to self-determination into conflict; '…the ultimate respect that might be paid to a patient's autonomy – respect for their choice to die – potentially conflicts with the 'autonomy' of the medical profession in respecting its primary guiding principle: First do no harm.'[54] However in *Bland*, the patient was unable to exercise his right to self–determination and the court found that the physicians should act in his best interests.

> '…Anthony Bland is an individual human being and the principle of self-determination says he should be allowed to choose for himself and that, if he is unable to express his choice, we should try our honest best to do what we think he would have chosen.'[55]

[53] n.14 above at 797 (quote from Stephen Bland the patient's father)
[54] Graeme Laurie 'The Autonomy of Others: Reflections on the Rise and Rise of Patient Choice in Contemporary Medical Law' in Sheila MacLean *First do no Harm: Law Ethics and Healthcare* (Ashgate Publishing Company Hampshire 2006) 145
[55] n.14 above per Lord Hoffman at 829 -830

The reasoning held, that whilst it is never lawful to take active steps to cause or accelerate death, in specific circumstances it is lawful to withhold life sustaining treatment, including feeding if it provides no benefit to the patient. The physicians responsible for Bland therefore had neither a duty nor were entitled to continue the treatment. The necessity, created by the patient's inability to choose, and which caused the physicians to act in the patient's best interests and thus administer treatment had passed as had the justification for the treatment. Subsequently, the physician's omission to perform what had previously been a duty was no longer unlawful and the physicians could not be liable for failing to provide medical care. In such situations, the sanctity of life principle does not apply absolutely,[56] and is not violated by ceasing to give medical treatment, especially where treatment is administered without consent and involves invasive care.

The withdrawal of treatment was further justified on the basis that there is a prohibition against violating the person. Those who have not expressed their wish to discontinue treatment do not lose their right to have treatment discontinued if it is in their best interests to do so and it is supported by evidence that this was their desire before losing capacity. Indeed, if they have capacity, or have made a specific advanced decision at a time when they possessed capacity, a person may decline treatment even if it is contrary to their best interests. The unconsented treatment of a patient in a PVS represents an invasion of their privacy.[57]

The patient's incapacity in *Bland* allowed the physicians to act initially due to the emergency situation which created the necessity for the physicians to act without consent. The patient was unable to communicate with medical staff and in such emergency situations patients may be treated without consent, but only where '…it would be unreasonable, as opposed to merely

[56] ibid. at 789
[57] ibid. at 828

inconvenient, to postpone until consent can be sought.' [58] This emergency situation is reiterated here because of the comparisons that shall be shortly made between these situations and those battlefield mercy killings evidenced by *Semrau, Maynulet* and *Cardenas*.[59]

Treatment prolonging life will normally be in the patients best interests provided that the treatment is not considered to be excessively burdensome or disproportionate compared to the proposed benefits. When no benefit is given to the patient then life prolonging treatment is no longer in the patient's best interest.[60] Some of the characteristics of these circumstances can be transposed to the battlefield mercy killing scenario. In *Semrau, Cardenas* and *Maynulet* the victims were also unable to communicate and actions were taken which led to the end of their lives without their consent. However, in these cases those who took the life limiting decisions were not doctors whose duty was to act in the best interests of a patient but soldiers, who acted according to their own understanding of what was best for the victim.

6.4 The soldier and the victim's best interests

The victims in *Semrau, Maynulet* and *Cardenas* could not consent as their wounds were so grave as to have rendered them unconscious. However, comparing the actions of the defendant in these cases with those of physicians involved in end of life decision making, may inform the degree to which this disregard to the victims wishes has an impact upon the perception of these actions.

[58] PDG Skegg 'Justifications for Medical Procedure Performed Without Consent' [!974] 90 LQR 512
[59] Other reiterations of this precedent can be found in various sources e.g.. '…it gives rise to a necessity to act in the interests of the assisted person without first obtaining his consent.' *Re F (A Mental Patient: Sterilisation)* [1990] 2 AC 1 Per Lord Goff.
[60] General Medical Council *Withholding and Withdrawing – guidance for doctors* 2010 para. 11 available on http://www.gmc-uk.org/withholding_and_withdrawing_guidance_for_doctors.pdf_33377901.pdf last accessed 04/03/2012

The victims suffered from an impairment which rendered them both unconscious[61] and unable to consent. None of them could understand, retain or use and weigh the information regarding the nature of their condition even if it had been forwarded to them.[62] In *Semrau* the victim's condition was so rare that this unresponsiveness was initially to be due to the fact that the victim had already succumbed to his wounds.[63] The situation created an emergency which can generate an exception to the requirement to gain consent in the medical context, 'where the patient is unconscious and unable to express his wishes.'[64] In such situations physicians are justified in acting in the patient's best interests such that the initial treatment in *Bland* was justified because of the necessity of the patients circumstance.[65] The patient is suddenly placed in a critical condition and no knowledge as to their wishes is available.

> 'Where, for example, a surgeon performs an operation without his consent on a patient temporarily rendered unconscious in an accident, he should do no more than is reasonably required, in the best interests of the patient…..where the state of affairs is permanent or semi-permanent, as may be so in the case of a mentally disordered person, there is no point in waiting to obtain the patient's consent. The need to care for him is obvious; and the doctor must then act in the best interests of his patient, just as if he had received his patient's consent so to do.'[66]

In such a case the doctor treating the patient should do no more than is required to stabilise the patient. This is different to the soldier because doctors are permitted to act in order to

[61] n.30 above at s.2(1)
[62] ibid. at s.3
[63] See chapter 1 for details of Capt. Semrau's case.
[64] ibid. per Ward J at 99
[65] n.14 above.
[66] n.23 above per Lord Goff at 73

'help' the patient, whereas the mercy killing soldier's actions would likely not be regarded as 'helping' the victim.

The actions of the battlefield mercy killer using his weapon to administer a coup de grace are not those legally comparable to the physician acting in the patients best interests. The physician who withdraws treatment without consent does so because it is of no longer of benefit to the patient, their actions are justified as an omission because there is no duty to act. The soldier who shoots the victim regardless of consent is not withdrawing treatment which no longer has benefit, but rather is engaged in a positive act to end life, and it cannot be argued that the battle field mercy killer has acted in accordance with a body of medical opinion.[67] This is compounded by the fact that the soldier has a legal duty to protect all wounded and the fact they can be said to be engaged in something which has no other intention or use than causing death.[68]

> '…no one is entitled to introduce an external agency of death. It was this prohibition which Dr Cox violated by injecting Mrs Boyes with Potassium Chloride.'[69]

The victim's condition in the battlefield mercy killing situation may be so grave that no form of medical treatment would be of benefit or in their best interests. It may be argued that the soldier should be free from liability if they omit to tend the wounded in situations, in which they will inevitably die. This however negates the argument that such acts are committed from mercy, there is little mercy in allowing a wounded solider to experience a lingering, painful, death in order to avoid liability. Second, the soldier is under a positive duty to aid all wounded

[67] n.24 above.
[68] Geneva Convention 1949 For the Amelioration of the Condition of the Sick and Wounded in the Field Art. 12
[69] n.14 above per Lord Hoffman at 832.

and protected persons in their custody regardless of whether or not it is in their best interests.[70] They are bound to take steps as far as appropriate to aid the victim,[71] very much like the physician, the intentional killing of a patient is not an action which can easily be construed as providing this aid.

The motivations of the soldier, the victim's condition and the extremity of the situation all temper the view that should be taken of the action. Whilst, consent or the absence of consent with good reason does not make the soldier's actions legal, they may mitigate the view that the strictest penalty and charge possible ought to be brought against the mercy killer. The justifications allowing a physician to act without consent during end of life decisions and the nature of their actions differs from those of the soldier delivering a battlefield coup de grace. They are conceptually distinct. One is an omission and one is a positive action. The physician acts in accordance with accepted professional custom whilst the soldier acts contrary to the professional duties imposed upon them.

Although the soldier's actions are not justifiable unlike the physician's actions, the victim's condition and circumstances are similar to those which may be present when a doctor acts in the patient's best interests. The comparison with the medical practice in these circumstances has been useful, because although there was no consent on the part of the victim in *Semrau* that does not mean that the actions should be seen as entirely wrong. Indeed, when the understanding of the medical practice is coupled with the battlefield mercy killer's compassionate motive, it makes a forceful argument that true justice to the soldier is to not impose harsh punishments or convictions.

[70] ibid.
[71] n.68 above Art. 15

Much of the issue for the soldier who delivers a battlefield coup de grace is that his intention cannot be masked. He intends to kill the victim, all be it from a compassionate motive, in order to relieve their pain and suffering. There is an accepted practice within the medical profession in which easing the patients pain may consequently cause their death. Understanding such a practice will give a better understanding of the mercy killer's intention and help in any evaluation of the appropriate justice they should receive.

6.5 Double effect

In medical practice it is not unusual to administer a heavy dosage of pain relief drugs to a dying patient, which may have the side effect of killing them. The battlefield mercy killer also aims to alleviate suffering through his actions. When Capt. Semrau delivered the coup de grace to the wounded insurgent, it was to 'alleviate the battlefield suffering' of a fellow warrior.[72] The shots he fired were designed to alleviate the victim's pain but this also had the adverse effect of killing him. At first glance the two examples may seem comparable, however, on closer inspection there are conceptual difficulties in matching the two practices. The ethical doctrine of double effect allows health care professionals to administer potentially fatal medication, provided their intentions are to control the symptoms of the patient's condition.

> 'The established rule [is] that a doctor may, when caring for a patient who is, for example, dying of cancer, lawfully administer painkilling drugs despite the fact that he knows that an incidental effect of that application will be to abbreviate the patient's life. Such a decision may properly be made as part

[72] Steven Chase 'Semrau court-martial puts 'soldier's' pact to the test' *Globe and Mail* March 24th 2010

> of the care of the living patient, in his best interests; and, on this basis, the treatment will be lawful.'[73]

A patient who is terminally ill and suffering in great agony may require a dosage of analgesics or opioids to relieve their pain which could foreseeably cause their death. The doctor has a duty to alleviate suffering but it is not legal to intentionally kill the patient. It would seem that there is a distinction between impermissible intended consequences and permissible, merely foreseen, consequences. The main point of contention in such acts is that the drugs that the doctor administers must have had therapeutic value to the patient; they must not have been administered solely to kill the patient. Accordingly a physician who commits an act with the sole intention of ending a person's life is liable for murder. However, through a type of indirect causation physicians can be legitimately involved in actions which lead to the death of the patient because death is not the primary intention. Such instances rely on the causal link between the intentions, the actions and the patient's death.

6.6 Case studies: Intention by any other name? A matter of perceivable intent

R v *Adams* was the first case to establish the doctrine of double effect in law.[74] Here the doctor had been accused of 'easing the passing' of elderly patients but was able to rely on the doctrine of double effect. He did administer analgesic medications, such as morphine, at doses which would have been lethal, but it was successfully argued that although death was a foreseeable side effect the primary intention was to relieve pain. The doctrine of double effect covered Dr Bodkin Adams' actions, because the use of analgesics supported the assertion that

[73] n.14 above per Lord Goff at 868
[74] *R* v *Adams* [1956] Crim LR

his intention was to alleviate pain and not solely to shorten the life of the victim, even though it might be argued that in this instance it amounted to the same thing.

In an interesting aside, debate occurred over whether Dr Adams' actions could fall within the ethical boundaries of the doctrine because of the circumstances of his relationship with a particular patient. He stood to inherit a Rolls Royce from one of the deceased, which could have put his actions outside the ambit of the concept as any action involving double effect should not come from a questionable motive, as then it may give rise to questions as to the true reason the doctor administered the pain relief, was it too alleviate pain, or where more sinister sentiments involved? As it stood his argument based on the concept of double effect succeeded and he was acquitted.

Adams can be contrasted with *R* v *Cox,*[75]where the defendant physician was convicted of attempted murder. Dr Cox was found to have administered medication for the sole reason of bringing about the victim's death and, by definition, anything with a sole purpose cannot have a double effect. Dr Cox was a consultant rheumatologist who had treated the victim, seventy year old Lilian Boyes, for severe rheumatoid arthritis over thirteen years. Upon her admittance to hospital, Dr Cox administered two ampoules of strong potassium chloride to Mrs Boyes, more than twice the amount necessary to cause death. This drug has no analgesic effect. Cox was found to have deliberately brought about the death because the drug he gave had no therapeutic benefit for the patient so it could not be argued that the intention was to relieve the agonising pain Mrs Boyes was experiencing. Dr Cox was charged with and convicted of attempted murder rather than murder only because it could not be proven that it was the potassium chloride that had caused the victim's death rather than her own illness. By his own

[75]*R* v *Cox* (1992)12 BMLR 38

admission he believed he had shortened her life by perhaps one hour.[76] If double effect is to be relied upon there must be a medically therapeutic benefit to the patient, and even the pleas of the victim to administer the drug and end their life, as in *Cox*, cannot validly legitimise the action.

> '. . . if he injected her with potassium chloride with the primary purpose of killing her, or hastening her death, he is guilty . . . If a doctor genuinely believes that a certain course is beneficial to his patient, either therapeutically or analgesically, then even though he recognises…a risk to life, he is fully entitled… to pursue it. If …the patient dies, nobody could possibly suggest that in that situation the doctor was guilty of murder or attempted murder.'[77]

In applying the doctrine of double effect, the courts seemingly bypass an important premise concerning causation and reinterpret it in this particular instance for this particular class of individuals. The 'but for test' for factual causation in normal circumstances seemingly makes it irrelevant as to how much the defendant's actions shortened the victim's life. When dealing with cases involving medical practitioners and pain relief within the ambit of the double effect doctrine the courts apparently take a more practical approach.

> 'If, for example, because a doctor had done something or has omitted to do something, death occurs at eleven o'clock instead of twelve o' clock, or even Monday instead of Tuesday, no people of common sense would say, 'Oh, the doctor caused her death'. They would say that the cause of death

[76] Julia Stuart 'This doctor answered the prayer of a patient desperate to die.' *The Independent* 4th October 2005
[77] n.75 above per Ognall J at 39

> was the illness or the injury, or whatever it was, which brought her to the hospital, and the proper medical treatment that is administered and that has had an incidental effect of determining the exact moment of death is not the cause of death.'[78]

There is however a legal dilemma as to the true validity of double effect in cases concerning pain relief at the end of life. Actions similar to those of Dr Adams portray a form of intention known in criminal law theory as oblique intention. Intention is integral to every crime other than those of strict liability, fundamentally, intention as to a consequence of what is done requires the desire of the consequence.[79] However, it is possible to attribute undesirable consequences as intentional in respect of 'known certainties.'[80]

> 'Where the defendant desires result x, and anyone can see by merely considering x, that another result, y (forbidden by law), will also be involved, as the direct consequence of x and almost as part and parcel of it, the defendant will be taken to intend both x and y.'[81]

The law attributes all foreseeable consequences which are a 'virtual certainty' as being intended,[82] and with this intention normally comes criminal responsibility. A physician who administers palliative drugs for therapeutic reasons whilst 'foreseeing' the strong possibility

[78] n.74 above per Devlin J
[79] Anthony Duff 'Intention, Mens Rea and the Law Commission Report' [1980] *Criminal Law Review* 147 149
[80] Glanville Willaims 'Oblique Intention' [1987] 46 *The Cambridge Law Journal* 417 418
[81] ibid. at 419
[82] See *R v Woollin* [1999] AC 82 Per Lord Steyn '…where the direction is not enough, the jury should be directed that they are not entitled to find the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.'

of the doses lethal effects would at first instance sight be regarded as possessing criminal intention.

> '… where the defendant is aware that a consequence in the future is the certain (though undesired) result of what he does. He is liable for a crime of intention if the foreseen though undesired consequence is inseparably bound up with the desired consequence.'[83]

In conventional 'actions', which require intention to be present in order to prove that an offence has been committed, this is understandable. Much of this depends on potential public outrage at being unable to attribute crimes to criminals who primarily intended to commit another offence, or no offence at all but also committed others in its pursuit. Imagine Lord Halisham's example of the criminal who, in order to collect the insurance money, places a time bomb on a plane which explodes in mid-air. He intended to collect the monies, not kill the passengers, but he knew his plot would involve the death of the passengers. '….if any passengers are killed he is guilty of murder, as their death will be a moral certainty if he carries out his intention.'[84] Public outrage would ensue if such an individual was charged with only the intended insurance fraud.

Because death is a clearly foreseeable consequence of administering lethal doses of pain relief medication,[85] critics have argued that this constitutes a form of physician assisted suicide or 'slow euthanasia',[86] which is unlawful in the UK. physician assisted suicide, is an activity in

[83] n.80 above at 420
[84] *R* v *Hyam* [1975] AC 55 Per Lord Halisham at 74 C
[85] Richard Huxtable 'Get out of Jail free?' The doctrine of double effect in English Law' [2004] 18 *Palliative Medicine* 62
[86] J A Billings S D Block 'Slow Euthanasia' [1996] 12(4) *Journal of Palliative Care* 21 24

which the physician actively takes part in a request to aid the death of a patient,[87] and it is often said that deaths brought about through 'double effect' are morally equivalent.[88] However, unlike actions of double effect, which provides some protection to physicians, physician assisted suicide is illegal and professional bodies remain ambivalent towards any such behaviour.

> 'A change from our current position of opposing a change in the law to one of neutrality will be seen as removing objections. It would be seen as a green light.[89]

The argument comparing the two practices rests on the basis that the foreseeability of the patient's death can be little differentiated from intentionally administering the drugs with a view to killing the patient.[90] However, there are very different ethical judgements between allowing a patient to die and actively killing them.[91]It has been suggested that perhaps the only evidence that gives this view credence is the practice of recording the patient's death as due to the ailment the patient was suffering from rather than respiratory depression brought on through the administration of a lethal dose of palliative drugs.[92] To record the death as brought about through the legal administration of analgesics may be a step too far and would provoke criminal action. Such arguments are countered by studies reporting that very little evidence

[87] See R F Weir *Physician Assisted Suicide* (Indiana University Press Indiana 1997)
[88] Howard Brody 'Physician-Assisted Suicide in the Courts: Moral Equivalence, Double Effect and Clinical Practice' [1998] 82 *Minnesota Law Review* 939
[89] Ethics Committee Chairman Tony Calland Speaking at the BMA annual conference 27th June 2012 'BMA continues to oppose legalising assisted dying' available on http://bma.org.uk/news-views-analysis/news/2012/june/bma-sticks-with-opposition-to-legalising-assisted-dying accessed 28/6/2012
[90] n.88 above.
[91] James Rachels 'Active and Passive Euthanasia' [1975] 78 *New England Journal of Medicine* 292
[92] Susan Anderson Fohr 'The Double Effect of Pain Medication: Seprating Myth from Reality' [1998] 1(4) *Journal of Palliative Medicine* 315

exists to suggest that deaths resulting from respiratory depression brought about from the administration of high doses of opioids are regular occurrences.[93]

However, the argument that the doctrine effectively legalises actions which would otherwise constitute murder does have some validity. The practice clearly does not fit with the accepted rules, by which, '… intention [includes] the means as well as the end and the inseparable consequences of the end as well as the means.'[94] In accordance with this the courts have displayed a willingness to accept the protective value of the doctrine in cases where the administration of therapeutic drugs has cut the patient's life short by only a short period, regardless of the 'but for' test.[95] If they did not, the strict view would be employed and, 'If the life was cut short by weeks or months it is just as much murder as if it was cut short by years.'[96] For policy reasons, it is undesirable that medical professionals acting from laudable motives should potentially be subject to legal sanctions.[97]

Despite calls to abandon the doctrine of double effect because it exhibits clear jurisprudential distortion,[98] it remains accepted. The UK government accepts that the practice is legal and ethically and practically distinct from any form of active euthanasia.[99]

> 'In some cases patients may in consequence die sooner than they would otherwise have done but this is not in our view a reason for withholding treatment that would give relief, so long as the doctor acts in accordance

[93] ibid. at 316
[94] n.84 above.
[95] n.74 above per Devlin J
[96] ibid.
[97] n.4 above at 86
[98] David Price ' Euthanasia, pain relief and double effect' [1997] 17(2) *Legal Studies* 323 324
[99] *Report of the Select Committee on Medical Ethics* HL Paper 21-I HMSO, 1994 4 at para. 76

> with responsible medical practice with the objective of relieving pain or distress with no intention to kill.'[100]

The action is tolerated because sometimes actions involving moral intent have to be judged on their moral quality,[101] and administering pain relief to seriously ill patients on the verge of death is neither morally wrong nor should it incur criminal liability in the eyes of law makers. Even though the outcome, the death of the patient, may be seen as a bad consequence, it is acceptable because of the physician's duty to alleviate suffering.[102]

> 'In the case of "double effect" we excuse the act or, to put it more accurately, we find the act acceptable, not because the doctors sugar coat the facts in order to permit society to say that they couldn't really know the consequences of their action, but because the act is medically and ethically appropriate even though the result - the patient's death - is both foreseeable and intended.'[103]

In many ways, as has been argued for the events surrounding the battlefield mercy killing, only after all of the circumstances have been evaluated can a judgement be made as to whether killing and letting die are equivalent in any given case.[104] In this light '…legal concepts such as intention merely serve to mask retrospective rationalisations of substantive value judgements which occur or commentators want to make.'[105] This is important because

[100] ibid. at 1994 4 at para. 245
[101] A Norrie *Crime, Reason and History* (2nd Edition Butterworths 2002) 50
[102] n.88 above at 946
[103] Plaintiffs-Appellees v State of Washington 79 F 3d 790 at 823 (Re-hearing en bunc 1996) The Court of Appeal in the Ninth Circuit (USA)
[104] P T Menzel 'Are killing and letting die morally different in the medical context? [1979] 4 *Journal of Medical Philosophy* 269
[105] Nicola Lacey 'A Clear Concept of Intention: Elusive or Illusory?' [1993] 56 (5) *Modern Law Review* 621 622

the allocation of intention is the means by which the criminal system allocates the moral blame that is required for justifying punishment. However, in cases of mercy killing, intention does not indicate the true moral value of the behaviour and is inept as being indicative of moral responsibility, it is only useful to indicate where legal guilt lays. In cases of double effect 'intention' is with dealt with through legal sophistry in order to ensure that the moral value of alleviating terminal suffering does not lead to criminal sanctions and ignoring the moral 'goodness' of the action would be to serve injustice regarding the social appreciation of the action.[106]

Regardless of its justifications, the doctrine of double effect has become a recognised practice in end of life treatment. Whether or not the actions of the battlefield mercy killer are commensurate with the actions of the physician can now be explored.

6.7 The 'criteria' of double effect

Ethicists postulate that for an act to fall within the boundaries of double effect there are four criteria that ought to be met.[107] First, the act must be 'morally' good and not of questionable motive, for instance, not motivated because the actor stands to inherit some windfall from the victim's death.[108] Second, any good consequence from the action should not be brought about through a 'bad' act. Third, the actor must not intend to bring about the bad consequence, in this case death, yet they may foresee the likelihood of this occurring. Finally, the good

[106] See chapter 8 for discussion on normative values.
[107] J M Boyle 'Towards Understanding the Doctrine of Double Effect' [1980] 90(4) *Ethics* 527, W S Quinn 'Actions, Intentions and Consequences: The Doctrine of Double Effect' [1989] 18(4) *Philosophy and Public Affairs* 334, T E Quill, R Dresser & D W Brook 'The Rule of Double Effect – A Critique of its Role in End of Life Decision Making [1997] 1768 *New England Journal of Medicine* 337
[108] n.74 above.

consequence of the action, and the bad consequence of the action must be roughly commensurate.[109]

Clearly, such criteria are morally loaded, and as such represent a set of subjective tests,[110] but they are useful to assess the conduct of the battlefield mercy killer. What one person judges to be 'bad' may not be seen as such by another, similarly, decisions as to how commensurate the 'good' and 'bad' consequences of the action are, will be regarded differently.[111] These are considerations taken into account elsewhere, but clearly in the medical setting, the alleviation of pain is seen as a good outcome and a good motive, the administration of the pain relief is a good act, and in specific situations the alleviation of pain and suffering can be seen as commensurable to the bad consequence, which is death.[112]

Equating the treatment of physicians performing actions within the doctrine of double effect to the mercy killing soldier is likely to be impractical and perhaps impossible. Of course, the two use the tools of their trade to enact the killing, the soldier uses his weapon whilst the physician uses medicine. However, guns and medicine are unlikely to be compatibly interchanged. If the soldier administered morphine or pain relief to a wounded comrade, as in

[109] A B Rich 'Causation and Intent: Persistent conundrums in end of life care.' [2007]16(1) *Cambridge Quarterly Review of Healthcare and Ethics* 63 69

[110] Another way of describing these criteria may be simply to say 'One may permit the evil effect of his act only if this is not intended in itself but is indirect and justified by a commensurate reason.' P Knauer 'The Hermeneutic Function of the Principle of Double Effect' [1962] *12 Natural Law Forum* 132 136

[111] For instance, the stance of the British Humanist Society can serve as example of the view that using such a doctrine can be morally damaging. 'The doctrine of double effect seems to us a sophistry which is morally particularly damaging. Where there are two outcomes of a given action, one good and one bad, the action is justified only if the good outweighs the bad in moral significance; and the moral weights of the two outcomes depend on the outcomes and the overall context, and are quite independent of the doctor's self-described intentions. If a doctor knows, or should know, that a certain result will follow a certain action, and if his causing that result will be morally wrong, then that action is morally wrong. It is morally legitimate to give doses of pain-killers which are lethal (immediate or long-term) only if it is morally legitimate to kill that patient (with immediate or delayed effect) in those circumstances.' *Report of the Select Committee on Medical Ethics* HL Paper 21-I HMSO, 1994 4 at para. 76

[112] For the purposes of this paper, such situations are those in which the victim is very near to death and clearly in agony.

the sombre scene in Saving Private Ryan,[113] in which after an attack on a machine gun outpost the US soldiers administer a large quantity of morphine to a mortally wounded comrade, it would make a more suitable comparison. There are many such accounts of this occurring through history,[114] a British officer in the Great War was noted to 'administer a heavy dose of morphia in the hope it will ease the victims out of their agony.'[115] However, whilst feasibly more commensurable these are not the actions of focus in this work.[116]

With reference to the criteria, first, in the same way as the physician, Capt. Semrau intended to alleviate the battlefield suffering of a grievously wounded and suffering combatant. Capt. Semrau stood to gain nothing from the death of the victim and so in line with the criteria he did not act from a questionable motive. Whether the good consequence, the alleviation of the victim's pain, came about from a bad act, requires further considerations of what constitutes a bad act. For instance, whilst the doctor administering therapeutic drugs is not committing an offence, because such an action lays within his role as a physician who is required to do 'good' for the patient, the soldier acts illegally in shooting a protected person, going beyond his duty and acting in contradiction to the laws of war.[117] So it would seem the good consequence comes about from a bad action contrary to the established criteria for double effect.

Although Semrau was acting according to his duty when he intended to killer the insurgents during the fire fight, his duty and his intention was different when he discovered the injured victim. He intended to relieve his suffering, but the way in which he sought to achieve this

[113] Steven Spielberg, Director *Saving Private Ryan* 1998
[114] For example the story of an American veteran who recalled the recalled how they used morphia to ease the passing of the mortally wounded who were dying in pain. 'Hill had his platoon-sergeant beside him, screaming with a stomach wound, begging for morphia; he done for, so Hill gave him five pellets. We always carried morphia for emergencies like that.' Robert Graves *Goodbye to all that* (Cassell & Co Ltd. 1961) 141
[115] Holmes *Acts of War: The Behaviour of Men in Battle* (New York Free Press 1986) 188
[116] The doctrine of double effect would more feasibly and comfortably fit such occurrences because the drugs administered have some pain relief effect; of course the motive behind their administration is questionable.
[117] See n.88 above for the types of duties he is bound to.

end was by killing the victim. This is different to the physician who seeks to relieve pain by administering therapeutic drugs even though death is a foreseeable consequence as the drugs relieve the unwanted symptoms. Whereas, in *Semrau* like *Cox*, it was the administration of a deathly intervention which was used to relieve the pain of the victim.[118]

The final criterion of double effect, whether the good consequence of the action is commensurate with the bad consequence of the action is also specifically morally subjective. For instance, whether a quick death and release from pain is considered a better consequence than a lingering, painful but certain death depends on individual beliefs and preferences. Here, focus is on the known consequences. In *Semrau*, the victim was released from pain, which it is asserted is a good consequence, the outcome was his death which is a bad consequence. It may thus be best to judge this last requirement by the nature of the consequences the death brought about. First, the law was broken, generally a bad consequence but the magnitude of this infraction is a primary focus of this paper, secondly, the reputation of the armed forces may have been damaged, which as discussed has bad political consequences.

Perhaps, the truly bad consequence is the way in which the act was committed and the effect this has on doctrines which underpin end of life decisions when they are carried out by medical professionals. Capt. Semrau did not ask the victim, did not consult with anyone as to his actions, he just acted, in a manner in which he saw fit and thus his actions cannot benefit from the moral legitimacy brought about through gaining consent or acting in the patients legitimate best interests as discussed earlier. Neither did he act out of professional experience and according to accepted professional standards as a doctor does, quite the opposite.

[118] n.75 above per Ognall J at 39

6.8 Conclusion

The law dealing with end of life actions in the medical context is not compatible with the actions of the battle field mercy killer. It offers the soldier no protection from the full force of the law of murder. However, by comparing the soldier's actions with those of the physician his behaviour may be viewed more sympathetically.

Whilst the soldier's actions do not fit with concepts such as double effect or withdrawing treatment in the patient's best interests, he like Dr. Cox is not '…a murderer as the word is commonly interpreted.' [119] Much of the repugnancy towards the action stems from the presumption that the soldier is 'taking matters into his own hands' and acting without regard for the wishes of the victim. A closer examination of the nature of consent in both normal criminal theory and in the medical context allays this presumption. In instances of a battlefield coup de grace, justifications for punishing lack of consent lose much of their validity if, because of military culture and related influences, the soldier can legitimately claim to be acting in the victim's best interests but without legal sanction.

Whilst the actions of the soldier gains greater contextualisation from the comparison with medical practitioners the attitudes of soldiers themselves may be better judged through processes other than the civil criminal courts. A Court martial, or military tribunal, is composed of military men who have shared many of the experiences of the defendant and who may understand the subjective element of the act more clearly. However, with this increased subjectivism come inherent dangers as to the fairness and impartiality of service law

[119] J K Mason & G T Laurie *Mason and McCall Smith's Law and Medical Ethics* (Oxford University Press Oxford Seventh Edition 2002) 306

and the perceived bias towards attaining discipline rather than justice. This will be the subject of the next chapter.

Chapter Seven

Marching Up and Down the Square: The Military Justice System and the Mercy Killer

Introduction

Shakespeare's Henry V depicts the severity of military justice as it is used to discipline the criminal and disorderly elements of the English force. In light of his friends harsh sentence, Pistol appeals to the Welsh Captain Fluellen, however, both his immediate superior and the King himself support such disciplinary measures.[1]

Pistol: For he hath stolen a pax, and hanged must a' be:
A damned death! Let gallows gape for dog; let man go free
And let not hemp his wind-pipe suffocate:
But Exeter hath given the doom of death
For pax of little price….

Fluellen: Certainly, aunchient, it is not a thing to rejoice
at: for if, look you, he were my brother, I would
desire the duke to use his good pleasure, and put
him to execution; for discipline ought to be used…….

The King: We would have all such offenders so cut off: and we
give express charge, that in our marches through the
country, there be nothing compelled from the
villages, nothing taken but paid for, none of the

[1] *William Shakespeare* Henry V Act III Scene IV

> French upbraided or abused in disdainful language;
> for when lenity and cruelty play for a kingdom, the
> gentler gamester is the soonest winner.

Pistol appeals against the sentence, Fluellen reviews it and refers it to the King and Henry himself confirms the decision as in line with good practice. At the end of this chapter the reader may see in this exchange the beginnings of modern practices designed to protect the impartiality of the modern court martial.

Military Law, or Service Law has accompanied effective fighting forces since their inception. All members of the military are subject to military law, and whilst it deals with specific service offences, designed to maintain the utmost discipline and effectiveness, the Court Martial can also hear civil criminal offences committed by service personal. Earlier, an analysis was undertaken of the unique nature of the 'fighting man' and the isolated culture in which his behaviour takes place,[2] and as a result, it has been postulated that the domestic civil courts may be unable to properly assess the unique factors applicable to the battlefield mercy killer. Service law and the court martial offer an alternative means of trial.

Capt. Semrau faced a court martial, as did the defendants in the US cases of *United States* v *Alban – Cardenas*[3] and *United States* v *Maynulet*.[4] They were tried by their military peers, under systems which closely resemble the basic structure of Service law in the United Kingdom and under charges that would closely relate to the battlefield mercy killer. Unlike the civil criminal courts, in which the soldier would be tried by civilian jurors, represented and prosecuted by civilian counsels and have his case heard in a court presided over by a civilian

[2] See chapter 2
[3] *United States* v *Cardenas* 29 (Headquarters, 1st Cavalry Division Jan 14th 2004)
[4] *United States* v *Maynulet* No. 04-9847,242-243 (Headquarters 1st Armoured Division Apr. 1 2004)

judge, the court martial predominately consists military men or women,. These persons will have been through many of the same 'shared experiences' and influences which affect a soldier and make his actions difficult to judge by the standards of the 'ordinary' man. None of the defendants in the aforementioned cases was convicted of murder, but all were found to have committed lesser crimes and service offences. Whether or not a civil criminal court would have convicted them of murder cannot be said with certainty, but the court martial does offer the military defendant the prospect of a more suitable consideration of their actions.

However, this benefit is also mitigated by factors which throw the impartiality of the procedure and the type of justice which is being administered into question. Military justice systems have been consistently labelled unjust and liable to be influenced from command influence with a focus on administering discipline rather than justice. Their membership has previously been confined to the officer cadre of military personnel who may or may not have a prejudiced view of the actions of the private soldier. Consequently, just how far military justice is concerned with delivering justice as a fair verdict, or whether it is more concerned with maintaining military discipline and the effectiveness of the fighting for force it governs is open to debate.

> 'An army, to be successful in the field, must from the moment it begins to train at home have absolute control of its discipline. The commanding general is everything. He must bear the three keys. He must have final control. He must be the judiciary, the legislative and the executive. If he were not, he would not have an army.'[5]

[5] Editorial 'Judging the ICC: The cases for and against US participation in the International Criminal Court' *Los Angeles Times* (Los Angeles16th March 2009)

Closely related to this is the issue of class, which has been touched upon in previous chapters. Potential exists for differing treatment between defendants from the officer classes and enlisted men. How far those presiding on the court martial are truly the peers of the soldier they try is questionable since they all belong to the officer classes and are trained to maintain the discipline in the lower ranks, whom they govern on a daily basis. Conversely, in the civil court, the twelve persons selected by lot can be seen as the epitome of the wider community which the defendant originates from and able to offer a range of views, whereas a Board of officers may be seen as partisans to the armed force's command structures whose view is to sustain the discipline of the armed forces.[6] Historical investigation indicates that there has been notable disparity in the treatment between commissioned officers and enlisted men for commensurable crimes.

Finally, they have largely consisted of legally untrained persons, who again may be more concerned with discipline than justice.[7] In this environment, can the court martial with its composition of military men, be expected to come to a fair verdict on serious and complicated criminal matters based on legal reasoning and jurisprudence which is normally the domain of civilian lawyers?

> 'It would, indeed, seem as reasonable to expect fifteen military men capable of concluding satisfactorily a purely judicial investigation, dependant in every stage on the application of principles of a jurisprudence with which they cannot become acquainted, as to imagine the fifteen judges of your majesty's superior and common law courts at Westminster competent to

[6] Lysander Spooner *An Essay on Trial by Jury* (Library of Alexandria 2000) 6-14

[7] It is noted that civlilian juries are also untrained but the Board in a Court Martial has particular powers in relation to sentencing which civilian juries do not possess and it is in this role that it is argued they require training, as discussed in depth later in the chapter.

> form a correct opinion concerning critical military operations dependant on pure military strategy.'[8]

This chapter focuses on both the benefits and the detriments the battlefield mercy killer may experience under a court martial. The negative effects are not only those which arise from courts lack of impartiality and the perceived bias, but also the negative effects of a trial which may diminish the gravity of the act by trumping military discipline above administering justice to the defendant and for the victim.

Capt. Semrau was tried in a Canadian court martial, Capt. Maynulet and SSG Cardenas in a United States court martial. Both the Canadian and United States procedures have their foundation in the British military justice system which was spread to these jurisdictions during colonial rule. However, before analysing the traits of the court martial it should be understood how and why military law came into being in the United Kingdom and how it spread throughout the British Empire and influenced the military law of those former colonies.

7.1 The development of British Military Law

Initially, it should be remembered that the over-arching feature of all military codes is the need to ensure that recruits adhere adhere to the command structure in order to create military discipline and the requirement to impose consequences if not.

> 'If a soldier does not obey his quincurion, but sets himself in opposition, he shall be chastised, and likewise for the quincuriuon who is not obedient to

[8] Samuel Warren, 'A Letter to the Queen on a Late Court Martial' (1850) William Blackwood & Sons 10

> the Decurion, and the Decurion who does not obey his centurion. If any legionary dare resist his superior officer, that is to say a count or a tribune, he shall suffer the supreme penalty. For all subordination of a soldier towards a commanding general or commander-in-chief calls for a capital punishment.'[9]

Traditionally, military law was developed in a top down manner, the word of the superior was law to be obeyed. This was no different in the foundations of British military law which eventually inherited the mantle of the exemplary system of military justice.

> 'There was extant, I observed, one system of Articles of War which had carried two Empires to the head of mankind, the Roman and the British; for the British Articles of War are only a literal translation of the Roman. It would be vain for us to seek in our own invention or the records of warlike nations for a more complete system of military discipline…they have governed our armies with little variation to this day.'[10]

In feudal England, all land was granted by the Crown to landowners in return for, amongst other things, military service and the promise to furnish their overlord with military force from the fiefdoms they controlled. No standing army existed, and would not until the aftermath of the civil war.[11] Instead, men fought as retainers of the crown, not as servants to the crown. They fought in return for protection or land from their King or their lord who owed fealty to the King. The military force was disbanded at the cessation of hostilities, or when they could no longer be reasonably detained in the Crowns service, as the majority of such

[9] *Military Laws from Rufus*, Article 11
[10] C Adams *The Life and Works of John Adams: Vol III* (Little Brown and Company 1856) 74
[11] See chapter 1

forces were peasant militias who had to attend to their liege.[12] Service was owed to the crown only during war not indefinitely.

Few constant laws existed by which to regulate soldier's activities. Each time the host was summoned, new treatises, known as the Articles of War, were drafted to amalgamate the laws governing that particular host during that particular campaign. These were of most importance when the armies fought on the continent, or sometimes the holy land, where no local customs existed. Importantly, the regent was considered the supreme war leader, the commander-in-chief, and the Articles of War were drafted in his name. They are an early instance of the law being used to govern and instil discipline and efficiency upon a fighting force. The laws incorporated many of the same standards of behaviour upon the troops as they were subject to at home, for instance the act of murder was prohibited whilst on campaign.[13] Military discipline also required subordination and the ability to ensure the obedience of those one commanded, hence acts with no civilian comparison, such as desertion, were also made felonious under the Articles.[14]

In this early period, violations of the Articles of War were heard under the Court of the Constable and Marshal. The Marshal was effectively the chief of staff whilst the Constable may be seen as the logistical organiser of the force.[15] These early tribunals are generally seen as the 'fountain of marshal [martial] law'.[16] Generally, the court's jurisdiction covered only soldiers serving abroad, but did have some jurisdiction within the realm.

[12] Neveux F & Curtis H, *A Brief History of the Normans: The Conquests that Changed the Face of Europe* (Robinson London 2008) Chapter 5 – recounts the most famous instance of such disbandment. In 1066 whilst Harold Godwin's armies had to be disbanded to collect the harvest after spending the summer encamped on the south coast of England awaiting the Norman invasion of William the Bastard.
[13] An example is seen during Herny VII reign – I Hen VII, c.14
[14] 1 Hen VII c.14 – although this is the first time (1470) it is seen that desertion is recorded as felonious.
[15] See W S Holdsworth 'Martial Law Historically Considered [1902] 18 *Law Quarterly Review* 117
[16] Edward Coke *Institutes of the Lawes of England Concerning the Jurisdiction of the Courts* (Protedfort and R Brooke London 1797) 122

> '…it pertaineth to have cognizance of contracts touching deeds of arms and of war out of the realm and also of things that touch war within the realm, which cannot be discussed or determined by the common law, which other constables heretofore have duly and reasonably used in their time.'[17]

Practically, the court heard and had jurisdiction over all, 'the offences and miscarriages of soldiers contrary to the laws and rules of the army.'[18] It was designed to meet the needs of a mobile, non – regular feudal army and was restricted to trying cases of a military nature only.[19]

Then as now, the common law civil courts held primacy, as fear existed that marshal courts could be used to control the civilian populace by holding civilians to the same high standard as the soldiery. Legislation continually restricted the use of the courts within the realm.[20] These fears were realised during the religious tensions during the Tudor and Stewart monarchies, when the jurisdiction of martial law and the Court of the Constable was widened and Martial law began to be administered during both times of war and also during any time of 'apprehended disturbance'.[21] In the aftermath of the civil war the courts became redundant for two reasons. First, the introduction of a permanent military force led to the cessation of the periodic drafting of the Articles of War. Second, the Court of the Constable and Marshal had previously been a law making body unto itself,

[17] 13 Rich II, St I, C.2 (1389)
[18] Hale *History of the Common Law* Charles Runnington ed. (London 1870) 42
[19] n.17 above.
[20] ibid.
[21] n.15 above.

> 'Whereby it appeareth that all the four justices agreed that the Constable and Marshal had a law by themselves, whereof the common law doth take notice, as well it doth of ecclesiastical law, being a law of itself from the common.'

By the seventeenth century the common law courts had grown in stature and viewed rival courts with suspicion, and were disposed to question and challenge the legality of a court which encroached upon their primacy.[22] This suspicion of the court martial has lingered into the twenty-first century in which the military process is continually being called into question amid claims of the need for increased transparency and accountability.[23]

Like the contemporary Armed Forces Acts and their predecessors the Army Acts, the Articles of War included many common law offences such as the act of murder. Unlike modern legislation which implicitly prohibits all criminal offences,[24] prohibited acts were expressly defined within the articles, so theft of goods and acts of plunder were often permitted if carried out against hostile civilians. Finally, the application of the Articles was restricted to particular courts at particular times, much like the jurisdiction of the modern court martial.[25] Soldiers could only be held accountable in these courts for actions during campaign, because of the fear of the harsh justice they handed out being administered to civilians.

The emergence of the Standing Army meant the armed force required governance at all times unlike the previous levied forces.[26] The Articles no longer served and gave way to the Mutiny Acts in 1689, so named because they were initiated after many soldiers refused to fight for the

[22] ibid. at 118
[23] For an overview of the continuing debate listen to, Joshua Rozenburg *File on Four: Military Justice* (BBC Radio 4 2nd Nov 2010) available on www.bbc.co.uk/radio/player/b00vkxh9 last accessed 6/6/2012
[24] Armed Forces Act 2006 s.42
[25] See chapter 4.
[26] This force was created after the Royal Prerogative fo drafting the Articles of War was rested away from the monarch and invested in Parliament after the expulsion of James II and the investiture of William III in 1688.

new King.[27] The Mutiny Acts were the first to create purely military disciplinary offences such as mutinous assemblies, permitting prisoners to escape and desertion to the enemy.

7.2 The birth of the early court martial

In this period the Articles of War still existed but now related to court procedure. Trials began to be heard before committees of officers who deliberated upon cases. Again the jurisdiction of these courts was restricted, primarily dealing with military offences because of the lingering fear of the military courts suppressive capabilities. The phrase 'not in times of peace' was inserted into the Mutiny Acts to limit the court martials jurisdiction,[28] and common law offences which could be heard before these courts became increasingly limited. In England and Wales, and the Colonies of America, India and Australia, criminal discrepancies committed by serving personnel were preferably dealt with through the civil system. By 1749, military courts were barred from hearing cases of murder and many other serious crimes, such was the suspicion cast upon the tainted justice that they delivered, which primarily implemented harsh exemplary military discipline as a deterrent.[29]

> 'Martial Law, which was built upon settled principles but was entirely arbitrary in its decisions, was as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as law. The necessity of order and discipline in an army was the only thing which could give it countenance: and therefore it ought not to be permitted in time of

[27] However, the enactment of these acts was still periodical much like the Articles of War which were drafted only to meets the needs of the gathering host. Because it was illegal to muster and keep an army for longer than twelve months without parliamentary consent, the Mutiny Act were re-enacted annually until 1878.The first of these Acts was recorded as 1 W & M., C4 1689 and the last during the reign of Queen Victoria as 41 Vict., c.10 1879

[28] 1 Anne c.16 1702

[29] M J Pritchard 'The Army Act and Murder Abroad' [1954] *Criminal Law Journal* 237

> peace when the King's Courts are open for all persons to receive justice according to the laws of the land'[30]

The court martial comprised of commissioned officers sitting in deliberation who decided the appropriate sentence who were advised by civilian judge advocate.[31] The Board of officers was presided over by a president, who held the most senior rank, whilst the judge did not operate in the same manner he would in a civilian case. He could only offer advice to the board at the hearing and often was ignored in the pursuit of administering personal justice and discipline.[32]

By the late seventeenth century, the judge advocate also became involved in prosecuting as well as presiding over the trial,[33] and at this point the modern concern caused by the courts composition and its effect on the impartiality of the court arises. The duality of many positions within the court plagues court martial procedure to this day, as does the influence of command hierarchy within the process.

Since ancient Rome, service law has meant that justice and discipline are intertwined; for the military to be effective it must be disciplined, and as such the discipline must be enforced upon the inferior by the superior. Just as the Kings of England had previously drafted the Articles, and held sway over the decisions which would govern the troops on campaign, the

[30] D P O'Connell 'The Nature of British Military Law' *Military Law Review* 19(1963)147

[31] There were often over a half a dozen judge advocates serving the military at one time and these were presided over by the Judge Advocate General, first appointed in 1666 by Charles II (Dr Samuel Bowes).

[32] The ability of the board to dissent from the previously weaker position of the judge advocate had been recognised as far back as the mid eighteenth century. Yet still the practice continued, even after attempts were made to remind the Board of the judge advocates legal expertise. 'The opinion of the Deputy judge advocate ought to be conclusive upon any point of law or procedure which arises upon a trial at which he officially attends, whether he has or has not an opportunity of consulting the JAG before a decision is made.' J York Scarlett Adjutant General of the Army *Memorandum to the Presidents of all District and General Court Martials*, 1865

[33] Jeff Blackett *Rant on The Court Martial and Service Law* (3rd ed. Oxford University Press Oxford 2009) 6

officers in the Standing Army held the right to discipline their troops. It is still argued that control over offending soldiers must be held in the hands of their commander.

> 'The power to command must remain with the military forces if we expect to have an efficient and well disciplined military. The power to command depends upon discipline, discipline depends on the power to punish. If we take the power to punish away from the military we will destroy discipline, and eventually the power to command.'[34]

The influence of the doctrine of command control was manifest in various positions, being mostly occupied by commissioned officers, their functions conflicted. For instance, the judge advocate, the only non-military member, was responsible for both prosecuting and advising the defendant, whilst ensuring they did not suffer from an over-zealous prosecution which he himself was bringing. The 'board' of officers who deliberated on the verdict and influenced the sentence had no legal training, they had only military training and the knowledge of military discipline.[35]

Some official oversight existed, and no serious sentence was complete without approval from the crown or a commander with the delegated authority, usually the Judge Advocate General. The civil courts maintained their supremacy with a review capability over the courts martial and again the power of the military court, especially concerning serious crimes, was slowly eroded. Often soldiers were tried by civil courts rather than the court martial in order to ensure that the most serious crimes received fair trial. By 1879 both the Mutiny Acts and the

[34] *US Senate Committee on Armed Services* 81st Congress 1st Sess. 228 (1949) Per William J Hughes President of the judge advocates association
[35] Luther C west 'HIsory of Command Influence on the Military Judicial System' [1970] 18 *UCLA Law Review* 1

Articles of War were consolidated into a single statute,[36] the forerunner of the various Army Acts, which governed military justice throughout the twentieth century.

7.3 The Modern Court Martial: Recent changes in light of perceived lack of impartiality

This is the background of the court in which it is likely a battlefield mercy killer would face trial. Inherently the court has delivered harsh punishments and justice and for that reason has required constant jurisdictional restriction. Recent reformation of the system has taken place which makes it far more procedurally sound, but whether or not command influence would affect the trial of a battlefield mercy killer depends on factors which are unquantifiable. Some members of the board may possess proclivities which predispose them to regard the stringent application of military law as paramount to good discipline, whilst others may be more sympathetic to the plight of the soldier and some may exhibit a mixture of both. This is informed speculation, arguments are explored in this chapter which indicate that both are plausible. However, as it is impossible to identify what effect the composition of the board may have, perhaps a better question to ask is whether the court martial procedure is rigid enough to ensure that justice is served rather than merely discipline, and whether the application of justice will trump command ideals?

The dual roles and command influence seen in the early court martial endured in one form or another into the twentieth and early twenty-first century. It was not until challenges could be mounted under European law that any meaningful measures were taken to address this matter. These challenges were largely based on Article 6 of the European Convention of Human Rights.[37]

[36] Army Discipline and Regulations Act 1879 42 & 43 Vict C.23
[37] European Convention on Human Rights Article 6.1

Before the Armed Forces Acts of 1996 and 2006 began to incorporate changes, there existed several practices which could make it look to outside observers that command influence was able to interfere with the court. Often the manifestation of many roles and procedures in a single person caused a perceived conflict of interest, much like the role of the Judge Advocate in the early development of the Court Martial. This inhibited the defendant's right to,

> '…a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'[38]

The Army Act 1955, assigned the roles of defence, prosecution, jury and those bringing the initial charge to military personnel who as such were within the military command structure. This posed problems because it was believed that the pursuit of discipline may oust the application of justice because of the perceived lack of impartiality created by the courts constitution.

> 'However, I share the concerns…with the problems of independence and impartiality which are inherent in the very nature of military tribunals. In my opinion, the necessary association between the military hierarchy and military tribunals – and the fact that members of the military serve on the tribunals – detracts from the absolute independence and impartiality of such tribunals…the members of a court martial, who are the triers of fact, and the Judge Advocate, who presides over the proceedings much like a judge, are chosen from the ranks of the military. The members of the court martial will also be at or higher in rank than Captain. Their training is designed to insure

[38] ibid.

> that they are sensitive to the need for discipline, obedience and duty on the part of the members of the military, and also for military efficiency. Inevitably, the court martial represents to an extent the concerns of those persons who are responsible for the discipline and morale of the military. In my opinion, a reasonable person might well consider that the military status of court martial's members would affect its approach to the matters that come before it for decision.'[39]

7.4 The Commanding Officer: An example of Command and Judicial Interplay

The chain of command is a central aspect of the military structure, and as such pervades military justice. Officers such as the Commanding Officer (CO) may have the dual role of delivering both discipline and justice. Summary offences, not heard in the court martial, are dealt with by the CO. Though not legally qualified, they are aware of the legal powers their role entails.[40] It is a command role, not an administrative post, occupying a senior position in the chain of command by which superior officers hold supremacy of command over all junior ranks and they are responsible for disciplining the troops they command. Military law being heavily concerned with discipline makes it logical for the CO to be the primary source of military justice.If an outside authority were the source of this justice it could potentially undermine the entire command structure.[41]

Previously, the CO held absolute power in summary cases, organising the pre-trial detention of the defendant and having powers of detention. The CO could undertake a summary trial

[39] *R* v *Généreux* [1992] SCR 259 per Lamer CJC at 294 -295
[40] They are usually educated through courses and publications such as the Manual of Service Law, Ministry of Defence 2009
[41] David Richards 'The Armed Forces Act 2006 – Civilianising Military Justice?' [2008] *Criminal Law Review* 198

where he combined roles of prosecutor, judge and reviewer of the sentence he had passed, all upon a soldier who was under his direct command and influence. Ultimately, it was found that the procedure violated the independence, impartiality and consequently the fairness of the trial in contravention of Art. 6.1, and that the exclusion of legal representation at the such trials was a violation of Art.6.3.[42]

Summary cases now have far more official oversight. CO's can no longer simply decide, but must report potential breaches of discipline to the Director of Service Prosecutions and the Service Police who effectively take control of any serious charge, and who evaluate the merits of the case before a hearing of any sort can be instigated. [43] Their sentencing powers have also been limited,[44] and these restraints reduce the command influence on the impartiality of the trial whilst ensuring that but ensure the command structure is not undermined by an outside authority, because the Service Police and DPS are military organisations separated from the command structure.

This potential conflict between the military officer's duty to discipline and serve justice may lead the battlefield mercy killer to suffer an injustice. If the deliberating officers are concerned primarily with discipline rather than justice many important factors in the case may be ignored. The mercy killer's compassionate motive, the stresses of combat and the circumstantial evidence in which the incident took place, may be ignored as the case is seen as a matter of serious misconduct which must be remedied to maintain military efficiency.[45] Such a trial will not take place under a summary hearing, but it serves to highlight the dual role of the

[42] *Bell* v *UK* [2007] ECHR 41534/98
[43] n.24 above at s.113(1) This is especially so in the case of a Schedule 2 offence – Civil Crimes
[44] n.24 above at s.132 – s.133. They cannot dismiss the soldier from service and can only order a reduction of a single rank and detention for a maximum of ninety days.
[45] As was discussed in Chapter 4, these matters are considered in the civil criminal courts, but only in relation to the civilian circumstances which have influenced previous cases. As such the influences affecting the soldier administering a battlefield coup de grace are not fully recognised in these courts.

military officer when functioning in their legal capacity, which historically has led to the command influence permeating the proceedings.

7.5 Command influence and the safeguards of the modern court martial

The most recent reform of the court martial system has focused upon this apparent influence of the command structure on the court martial to outside observers.

> 'An individual who challenges the independence of a tribunal…need not prove actual lack of independence. The question is whether a reasonable person, familiar with the constitution and structure of General court martial, would perceive that tribunal as independent. The independence of a tribunal is to be determined on the basis of the objective status of that tribunal. This objective status is revealed by an examination of the legislative provisions governing the tribunal's constitution and proceedings, irrespective of the actual good faith of the adjudicator.'[46]

It has never been confirmed that justice has been influenced through the command structure, but the concern is that it could. As indicated in the above quote, justice could be seen to be influenced and if command influence does affect a trial in this way, it could impact on the justice the battlefield mercy killer receives. Recent changes have been aimed at halting this perception, which may ensure that the trial procedure for those administering battlefield coup de graces limits the potential for injustice to occur.

[46] n.39 above at per Lamer CJ

Today, the court martial is a standing criminal court which dispenses public justice, but it also supports the operational effectiveness of the Armed Forces. As such, whilst it has a right to have regard to the public interest it also has a right to have regard to the interests of the Armed Forces.[47] For this reason, it should not be seen as a crown court sitting in uniform, but it must regard the unique differences relating to the service context which military law serves. However, it is still required to provide a standard of justice which is just as high as that which is administered by the crown courts. This is illustrated by the Court Martial Rules which state that when the judge advocate reaches an impasse where the Armed Forces Act or the Court Martial Rules cease to apply, they should follow the procedure in accordance with the Crown Court.[48]

Previously, two tiers of court martial were available; the General Court Martial (GCM) and the District Court Martial (DCM). The DCM was the lower court, had a minimum of three members on its board, deals with less serious indictable offences and had the power two imprison for a maximum of two years. The GCM heard the most serious crimes, had a minimum of five members on the board, and can sentence in accordance with the maximum limits that the specific offence provides. Concerning the battlefield mercy killer, the GCM had authority to hear all cases, including murder. Various important murder trials tooh under a GCM,[49] but never before has a case of battlefield mercy killing been heard in the UK. However, under the Armed Forces Act 2006,[50] this demarcation has been swept away, although the board still comprises of three to five members, sentencing depends on the nature of the offence and not the composition of the board.

[47] n.33 above at 25
[48] Armed Forces (court Martial) Rules 2009 r.26
[49] *R* v *Page* [1954] 1 QB 170
[50] n.24 above at s.155.

As with the role of the CO in a summary case, many of the procedures in the court martial had been governed by a single person regardless of a possible conflict of interest, until a series of cases led to legislative change during the late nineties and end of the last decade.[51] For instance, the role of the convening officer and the confirming officer were manifested in a single person.[52] As the convening officer they were responsible for both establishing the court, appointing the personnel who would try the defendant, and also for bringing the prosecution. As confirming officer they decided whether the sentence passed could stand. Effectively, under this system, a soldier brought to trial for committing a battlefield mercy killing would face a trial where the prosecution chose the jury, brought the case against the defendant and then acted as a judicial review body.

> 'The Commission therefore considers that, whether or not the Convening officer is as a matter of fact the prosecuting authority, he is seen to be central to the prosecution of the case by court martial.'[53]

Such a conflict could easily make the court martial seem to lack impartiality. Of course, this could have been to the mercy killer's benefit if the army adopted an in house paternalistic attitude towards the defendant, and wanted to limit the damage caused by a possible murder conviction. That is to say they sympathised with his plight and feared the adverse publicity the case could potentially bring. However, this in itself presents a flawed justice in which the treatment of the crime itself comes second to political motivations.

Findlay v *United Kingdom,*[54] led to the dismantling of the role of the CO into separate entities. The court found that s.107 of the Army Act 1955 was incompatible with Article 6, because

[51] The most sweeping legislative change has come in the form of the Armed Forces Act 2006
[52] Army Act 1955 s.86 and s.111
[53] Report of the Commission on Human Rights, Application No. 22107193 Alexander Findlay Para 99

allowing a non-judicial individual to uphold a conviction was contrary to the principle that judicial determination cannot be overturned by a non-judicial authority.[55] The European Commission on Human Rights,[56] addressed many problems which made the court martial appear to lack impartiality it was thus seen as objectively unfair, although it could not be proven to be subjectively unfair, only that the procedure they followed enabled insinuations of partiality. It was the procedure that was flawed and not the human operatives within the procedure.

> 'In addition, an objective test must also be applied, that is ascertaining whether sufficient guarantees exist to exclude any legitimate doubt … [I]t must be determined whether there were ascertainable facts, particularly of internal organisation, which might raise doubts as to impartiality. In this respect even appearances may be important: what is at stake is the confidence which the court must inspire in the accused in criminal proceedings and what is decisive is whether the applicant's fear as to a lack of impartiality can be regarded as objectively justifiable' [57]

The convening authority was abolished under the Armed Forces Act 1996, and new roles were created separating the roles from the perceived pressures of command influence as far as possible. The role of the Director of Service Prosecution was created, who whilst being a member of the services, was outside the chain of command and thus 'independent' in their responsibility for prosecutions. The court administration officer took over the role of

[54] *Findlay* v *United Kingdom* [1997] 24 EHRR
[55] See Andenas Mads 'European Perspective on Accountability and Judicial Interdependence' [2007] 41(1) *The International Lawyer* 1
[56] Abolished since 1998, when the need to apply to the commission was no longer required as the European Court of Human Rights had its jurisdiction widened and individuals could take their cases directly to the court.
[57] n.53 above at para 90

convening the trial and appointing the president of the board and the lay members, who were civil servants with guarantees as to their independence. The judge advocate role was enhanced, no longer are they 'quasi clerks', they now have powers more in line with a judge in a civil criminal trial.

However, despite these changes, further queries remained over the composition of the board, who were all serving officers, and their potential to be influenced by the command structure through both the permanent president and the inherent ideal of command, an ideal they had been trained to imbibe in their subordinates.[58] This was first raised in *Morris* v *UK*,[59] and led to the 'Morris direction' which is now read to board members before each trial, reminding them of their duty to be impartial.[60] Further doubts were then raised as to the board's lack of legal training with regard to their sentencing role and, despite being initially dismissed, this doubt still remains.[61]

> 'Indeed, in performing the role only occasionally, the members of a court – martial resemble jurors and should bring to the task the freshness of approach which is one of the benefits of the jury system.'[62]

The Board in a GCM consists of up to seven members,[63] and in response to these cases and concerns it, has undergone substantial changes. First, no one who is involved with the

[58] *R* v *Boyd, Hastie and Spear; Sanby and Others* [2002] UKHL 31
[59] *Morris* v *UK* (2002) 34 EHRR 1253
[60] However, the precise formulation of the guidelines are a matter for the trial judge, but it is designed to cover in sufficient detail those matters which are necessary to reinforce the independence and impartiality of the court. Normally the judge will ensure that the lay members have read and received the relevant guidance regarding the trial procedure, and explains that no reports of members' performance during the trial will be made. Guidance is given in Practice in Courts Martial: Collected Memoranda 2009 s.4 available on http://www.justice.gov.uk/downloads/courts/judge-advocate-general/PracticeInTheCourtMartial-CollectedMemoranda-V3-October2009.pdf last accessed 09/06/2012
[61] See *Cooper* v *UK* [2003] ECHR 48843/99
[62] n.58 above per Lord Rodger at para. 67

prosecution, or has any links can serve on the board.[64] Nor can anyone who has served less than three years as an officer.[65] Most importantly, they can have no affiliation with the units the defendant has served in,[66] unlike the regimental court martial in which the defendant was essentially being judged by his own personal officers. The Permanent President, holding the minimum rank of Lieutenant Colonel, heads the board and the position will be his last posting before retirement in order to minimise the possibility of his role being influenced by career prospects in higher command. The Permanent President is more than a foreman of the jury, being charged with upholding the integrity of the deliberative process.[67] In an attempt to curtail any potential interference, whether it is subliminal in nature or not, junior members of the board are required to offer their opinions on the case before the more senior officers.[68] This should help to minimise the board members themselves being influenced by the command structure, which is present even in this small group makeup.

When sentencing deliberations actually take place, the lay members move from the member's box and sit on the bench, either side of the judge advocate to hear the pleas of mitigation. They are then advised on general sentencing principles and the tariffs particular to the specific offence. They may provide the judge with service considerations as to sentencing and the career implications of particular sentences. They all have an equal vote, but when the decision is split, then the judge advocate holds the deciding vote on sentencing.[69]

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[63] This is always so when it is a schedule 2 offence. Armed Forces (Court Martial) Rules 2009 r.29
[64] n.24 above at s.156(2)(1)(2) & (3)
[65] ibid. at s.156(2)
[66] Armed Forces (Court Martial) Rules 2009 r.32
[67] Their duties are found within *The Court Martial Guide and the Summary Appeal Court Guidance Volume 2 : Guide for Court Members* Table 3.8, and include, collating the votes on the verdict in order of seniority, announcing the findings in court, signing a record of the findings, chairing any discussion during deliberations on the findings, ensuring all members have an equal vote and voice and to protect the boards integrity by ensuring that members of the board have no external contact with interested parties.
[68] Armed Forces (Court Martial) Rules 1997
[69] Concerning their sentencing powers and role the training of the lay members of the board, junior officers are encouraged to attend trials as 'persons under instruction' in order to understand their capacity in this role. They

Finally, the modern judge advocate is still a civilian. Such persons must be legally qualified advocates of at least five years' experience. They act much like the judge in the civil process, although the advice they give to court is now legally binding.[70] They also deliver their findings on the case in open court before the Court Martial retires to consider the verdict, on which they have no say, but they do join the board in deliberations on sentencing. Although the judge advocate is not a 'member' of the court martial, he is appointed by the Secretary of State for Defence, who is the political leader of the military force. Therefore it has been argued that he can be dictated to by a higher military authority which jeopardises his independence.[71] Despite the changes, there still exists a view that the judge advocate's strengthened involvement in the court martial 'is not sufficient to dispel any doubt as to the court martial's independence.'[72]

7.6 *Semrau* and the Court Martial

These challenges and criticisms of the court martial's potential lack of impartiality have been mirrored in other jurisdictions which have their roots in the colonial British system. Most importantly, in Canada, where Capt. Semrau faced trial under a court martial, the challenges have to some degree mirrored those experienced by the British system of military justice. The previous view of their system of military justice was similar to the traditional British view, which feared a system of justice being totally severed from the command structure and justified the procedural flaws.

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take an oath and may remain with the members of the board during deliberations when the court is considering sentence but not when the board is deliberating on the finding, nor can they offer any advice or opinion.

[70] n.24 above at s.84(c)

[71] n.33 above at 185

[72] n.53 above at para. 103

> 'In a military organisation such as the Canadian Forces, there cannot ever be a truly independent military judiciary; the reason is that the military officer must be involved in the administration of discipline at all levels. A Major strength of the present military judicial systems rests in the use of trained military officers who are also legal officers to sit on courts martial in judicial roles. If this connection were to be severed, (and true independence could only be achieved by such severance.), the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibilities effectively. Neither the Forces nor the accused would benefit from such a separation.'[73]

Initially, the lower court of the standing court martial was challenged on the grounds that it was not impartial. A single military judge sitting alone and deliberating upom a case could not be seen as impartial.[74] The second notable challenge was upheld in *R* v *Ingebrigston,*[75] where it was argued that the court was not sufficiently independent from the chain of command structure. Furthermore, the role of the military judge in a standing court could never be impartial because their pay, promotion prospects and appointment were subject to the military executive and thus they could not be guaranteed to be sufficiently independent under the Canadian Charter of Rights.[76]

[73] J B Fay 'Canadian Military Criminal Law: An Examination of Military Justice' [1975] 23 *Chitty's Law Journal* 228 248
[74] *Mackay* v *R* [1980] 2 SCR
[75] *R* v *Ingebrigston* (1990) 5 CMAR 87
[76] Presumably under The Constitution Act Part 1 1982 Article 9 - Everyone has the right not to be arbitrarily detained or imprisoned.

The major changes to the Canadian court martial system came about after *R* v *Genereux*[77] and *R* v *Foster.*[78] These challenges led to many changes especially concerning those officers who carried out conflicting functions and focused upon areas of concern which closely resembled those in the UK, which took place several years later in the UK. They focused upon the lack of independence the judge advocate enjoyed,

> '…The National Defence Act and regulations fail to protect a judge advocate against the discretionary or arbitrary interference of executive... As a result, there was no objective guarantee that his career as military judge would not be affected by decisions tending to favour an accused rather than the prosecution. A reasonable person might well have entertained an apprehension that the person chosen as judge advocate had been selected because he had satisfied the interests of the executive…'[79]

Also of concern was the influence of the command structure on the Board members themselves, who were assessed on the basis of their performance at the court martial,

> 'A military officer's salary is determined in part according to a performance evaluation. There was no formal prohibition at the time against evaluating an officer on the basis of his performance at a General Court Martial.'[80]

Finally, it was deemed that whilst justice may be being served in the Canadian court martial, it was reasonable to assume, very much like its UK counterpart, that it could seem to outside

[77] n.39 above.
[78] *R* v *Foster* [1992] 88 DLR (4th) 169
[79] n.39 above.
[80] ibid.

observers that the system was not as impartial as it should be. This particular case concerned the role of the convening officer.

> '…certain characteristics of the General Court Martial system were likely to cast doubt on the institutional independence of the tribunal in the mind of a reasonable and informed person... military officers, who are responsible to their superiors in the Department of Defence, are intimately involved in the proceedings of the tribunal. In particular, it is unacceptable that the authority that convenes the court martial, i.e. the executive, which is responsible for appointing the prosecutor, should also have the authority to appoint members of the court martial, who serves as the triers of fact.' [81]

Since then steps have been taken to improve the perceived justice the court martial delivers both at home and in the relevant jurisdictions considered here. What this means for the mercy killing soldier is unquantifiable, especially since no soldier has been brought to trial for such an act in the UK. Nevertheless, there are two clear effects such a trial could have for mercy killer, the board could sympathise with the defendant, as comparable military men with the same experience, in a manner that a civil try jury composed of civilians cannot. Elsewise, they may take a more draconian outlook upon the charge and view the court martial as a means to ensure discipline is the paramount consideration of the trial. It is most probable that the members of the board will not evidence such polemicized attitudes, and one would hope and expect a level of dispassionate professionalism.

[81] ibid.

Despite the safeguards and oversight which have been introduced to the improve the system, potential for the possibility of bias still exists. Judging whether the mind-set of the individual board members can be improved via these changes cannot be evaluated. Nor can the military culture in which the individual board member finds themselves operating or any influence on their deliberations. This subjective mind-set and military culture may adversely affect the private solider charged with a mercy killing, and may have something to do with what shall be termed here, class bias.

Capt. Semrau, facing trial in a Canadian court martial, which like its British counterpart had faced major procedural overhaul to improve the appearance of impartiality, was not convicted of second degree murder. He was convicted only of the military offence of negligently performing a military duty, and punished with demotion to junior officer and discharged from the Canadian Forces. Capt. Semrau was an officer, and was tried not only by a board of military men like himself but also by his peers. Whether or not it is possible to postulate that a private soldier might be treated differently by a board of individuals who are usually responsible for commanding his ilk and disciplining his smaller service misdemeanours requires further investigation.

7.7 The arbitrary nature of the court martial and the early disparity in treatment between the private soldier and the commissioned officer

The potential for this type of bias to occur to occur is compounded when officers sit in deliberation over private soldiers, as shall be assessed. Whether the court martial delivers discipline veiled as harsh justice, and the potential influence of ‘class bias’ are closely related.

To investigate these claims it is best to begin with the foundations of the system and focus upon the practices and sentences which may have informed this view.

In the seventeenth, eighteenth and nineteenth centuries officers in the infantry, guards and cavalry bought their commissions and they were not required to undergo formal training or selection.[82] Lord Wellington himself bought his first commission in 1787 as an ensign and bought a further seven until he reached the rank of Lieutenant Colonel and commanded a regiment of his own.[83] This 'purchase system' did not end until 1871.[84] To become an officer one had to be a gentleman, and to be considered a gentleman required, breeding, education, money and social status. Furthermore the regimental commander himself, the lieutenant colonel, was expected, with a small government subsidy, to fund their regiment from their private wealth, including, recruitment, wages, uniform, equipment and welfare payments to widows.[85]

This class divide certainly shaped the views officers had of the enlisted men serving under them, and Lord Wellington himself made one such famous remark evidencing the disdain in which the common soldier was often held.

[82] Douglas W Allen 'Compatible incentives and the purchase of military commissions' [1998] 27 *Journal of Legal Studies* 45. See also C B Otley 'The social origins of britsh army officers' [1970] 18(2) *The Sociological Review* 213

[83] Neville Thompson 'The Use of Adversity' in Norman Gash ed. *Wellington: Studies in the Military and Political Career of the First Duke of Wellington* (Manchester Manchester University Press 1990) 8

[84] Army (Purchase System) The Royal Warrant HC Deb 21 July 1871 vol. 208 c89 'Royal Warrant of 20th July 1871, to cancel and determine all Regulations authorising the purchase or the sale or exchange for money of Commissions in the Army from 1st November 1871.'

[85] Correlli Barnett *Britain and Her Army: 1590 -1970* (William Marrow New York 1970) 138

> ‘The French system of conscription brings together a fair sample of all classes; ours is composed of the scum of the earth – the mere scum of the earth.’[86]

This prejudice was greatly influenced by the sociological approach of Benthamite thinkers, who believed that there existed a criminal ‘class’ within the Victorian working classes, many of who enlisted in the army.[87]

> ‘Men of loose and unstable principles must constitute a very large element of our army. Poverty forces these characters to enlist, and exposed to the low temperature of our garrison towns, they naturally revert to their former habits.’[88]

This clear social division and the prevailing attitude towards the private soldier, could provide the basis by which an enlisted soldier accused of a battlefield mercy killing may be treated differently from a commissioned soldier who is being tried by a jury of his peers. There exists a plausible argument to suggest that disparity in treatment for the same crime has previously occurred between officers and private soldiers in previous manifestations of the court martial and that a class divide still segregates the ranks.

In the past offences of a lesser nature and purely military misdemeanours were dealt with by a tribunal consisting of officers of the same regiment. These were the Regimental Court Martials, whilst the General Court Martial, was a far more formal affair which was reserved

[86] Earl Phillip Stanhope *Notes of Conversation with the Duke of Wellington* (London 1888) 14
[87] Peter Burroughs ‘Crime and Punishment in the British Army 1815-1870’ [1985] 100(396) *The English Historical Review* 545
[88] *Report on Military Prisons, Parliamentary Paper* 1868-69 (4209)XXX 576 statement of Major Edwardes Governor of Fort Clarence Military Prison

for serious crimes, including desertion and murder. The RCM was an informal affair, its boundaries were left deliberately undefined, and it was procedurally less strict than the formal GCM, and incomparable to the civil law courts.[89] Conducted by five officers, and initially reserved for crimes of less gravity, the officer class consistently overstepped these boundaries and prosecuted men for crimes reserved for the GCM under different offences.

> 'Officers have tried men for Desertion under pretence of neglect of duty, whereby they have evaded the bringing of offenders to Tryal before a General Court Martial'[90]

However, disregard for procedure was the least of the RCM procedural indulgences. Overzealous punishments occurred regularly and help to explain the inherent belief in the harshness of the court martial. It is also perhaps the best evidence of the detrimental effects the chain of command influence could potentially have on the court martial, as discipline through exemplary and overtly punitive methods was prioritised over fairness and the true administration of justice.

> '…looking out on the Parade I saw a soldier tied to halberd and a body of Guards in the Round, the Solider was stript, and the Drums with switches whipped him two hundred lashes; and as I am informed a few days after two hundred more, and a few days later two hundred more, in all six hundred executed by ten Drums.'[91]

[89] A N Gilbert 'The Regimental Court Martial in the Eighteenth Century British Army' [1976] 8 *Albion: A Quarterly Journal Concerned With British Studies* 51 51
[90] Judge Advocate Hughes to Secretary of War 3rd March 1723 W.O. 71/15
[91] Judge Advocate Hughes to Secretary of War 3rd March 1723 W.O. 71/15

The above is a recollection of a punishment given for an alleged case of defrauding the Colonel of the Regiment of several men, (collecting pay for men no longer serving in the regiment); a claim which was never safely nor wholly substantiated. Under a thin veneer of legality the RCM allowed officers to punish their soldiers without regard to legal procedure which might have been upheld in a GCM presided over by a judge advocate. RCM procedure was lax, written accounts of trials were not maintained and there existed no system of review. However, '[N]o military person is therefore of absolute right entitled to demand the assembly of a GCM...' the colonel would review such requests and '…either grant or refuse it as he shall think proper.'[92]

Nor were the GCMs a paradigm of transparency and just decision making, although they represented a more comprehensive system of legal transparency, abiding within defined powers and boundaries. The disparity in treatment by the military justice system between the common soldier and the commissioned officer can be most acutely seen in the GCM, it regularly passed severe punishments such as the death penalty. Contrasting the treatment between commissioned and enlisted men for similar offences evidences the disparity.

Art LVIII At every muster the commanding officer of each regiment, troop, or company, then present, shall give to the commissary of musters certificates signed by himself, signifying how long such officers, non-commissioned officer, and soldier, who shall not appear at the said muster, have been absent, and the reason of their absence; which

[92] Alexander Tyler *AN Essay on Military Law and the Practice of Courts Martial* (London, 1880) 338-339

> reasons, and the time of absence, shall be inserted in the muster – rolls, opposite to the respective names of such absentees.[93]

This offence was designed to minimise desertion and fraud because being absent from the regimental mustering without certification could be constitute either. It was not unknown for both unscrupulous non-commissioned and commissioned officers to claim that non-existent soldiers were absent in order to claim their pay and privileges in absentia. Private John Ellingham, for missing muster was charged with desertion, the GCM decreed that his punishment should also set an example to his comrades so Lieutenant Colonel Sir Charles O'Hara sentenced him to be hanged 'in sight of as many of his companions of that regiment.'[94] Comparably, a Captain Cassill, who missed and presented several false names at muster with the intention of collecting their pay was punished with suspension and disabled from holding future military office.[95]

Captain Cassill's punishment can be considered harsh compared to that of his peers. For example, Captain Eyton, was presented with solid evidence against him including the sworn testimony of a serving solider regarding his constant false mustering, yet the court was,

> '…of the opinion that the Captain Louis [Eyton] has given full satisfaction to the court, as to the articles brought against him by the Corporal Todd and

[93] Various different forms of false muster existed see William and Mary, 1692: An Act for punishing Officers and Soldiers who shall mutiny or desert Therr Majesties Service and for punishing False Musters and for the payment of Quarters [Chapter XII Rot. Parl. pt. 3. nu. 8.]', *Statutes of the Realm: volume 6*: *1685-94* (1819) 393-398.

[94] Judge Advocate General's Office: Courts Martial Proceedings and Board of General Officers' Minutes. In a General Court Martial held in the Great Room at Horse Guards at Whitehall. 1694 Feb 9th and 11th 21

[95] ibid. In a General Court Martial held in Portsmouth. 1694 Oct 4th 32

> therefore the Court does clear him of the False Musters and those other offences connected…'[96]

The witness against him was a non-commissioned officer. This 'soft' treatment of those the members of the court may have considered peers and gentlemen was not displayed when passing sentence upon enlisted soldiers. In one particular sitting, twenty-three private soldiers were sentenced to death for mainly crimes concerning failure to attend muster.[97] For the enlisted soldier at least, 'A court martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers,'[98] who represented a class divide and thus a skewed perspective of their role.

The modern changes to the court martial procedure concerning the demarcation of roles within a single officer have made the procedure aesthetically pleasing to observers of justice. However, the class differentiation of the court martial procedure may still be evident when dealing with a private soldier. Only officers are allowed to serve on the board and until the late twentieth century, the officer classes still mainly consisted of the social elite. [99] In the early 1980's eighty-two per cent of Army officers originated from 'independent' schools, excluding grammar schools, with over one third originating from just fourteen high profile public schools.[100] Even with the social change occurring in Britain, the preference remained for officers to be recruited from the traditional backgrounds,[101] however, at the end of the

[96] n.94 above on 1696 January 9th Per Brigadier Stewart, President of the Court Martial at 77
[97] n.94 above In a General Court Martial held at Newport on the Isle of White 1708 3rd & 5th July 100 -101 – However this appeal was overturned by the Judge Advocate General who within these papers has an interesting debate during correspondence with the president of the board who sanctioned these sentences.
[98] *O'Callahan* v *Parker* (1969) 395 US 258 Per Douglas J at 263-264
[99] C B Otley 'The Social Origins of British Army Officers' [1970] 18(2) *The Sociological Review* 213 C B Otley 'The Educational Background of British Officers' [1973] 7(2) *The Sociological Review* 191
[100] K M Macdonald 'The Persistence of an Elite: The Case of British Army Officer Cadets' [1980] 28 (3) *The Sociological Review* 635
[101] G Slaman & K Thompson 'Class and Culture and the Persistence of an Elite: The Case of Army Officer Selection' [1978] 26(2) *The Sociological Review* 285

century it was said that the 'elite' makeup of the officer cadre was not as sharp as it once was.[102] Currently, the Ministry of Defence,

> '…does not monitor recruitment and promotion by socio-economic groupings or by educational background…it takes account of a potential recruits educational achievements and qualifications but not the type of school they attended.'[103]

However, in 2005, 53 per cent of recruits at Royal Military Academy Sandhurst still originated from independent Schools,[104] and encouragement for joining the Army as an officer is still aimed at these social backgrounds.[105] More importantly, non-officer recruitment draws on mostly young people from disadvantaged backgrounds, with many recruits joining as a last resort when they cannot gain other employment.[106] These have below national average educational achievements, have high rates of unemployment prior to enlistment, and a significant proportion come from 'broken homes' in economically deprived areas.[107] The military,

[102] Reggie Vo Zugbach de Sugg & Mohammed Ishaq 'Officer Recruitment: The Decline in Social ELiteness in the Senior Ranks of the British Army' in Hew Strachan ed. *The British Army, Manpower and Society Into the Twenty-first Century* (Frank Cass Publishers London 2000)
[103] House of Commons Committee of Public Accounts *Recruitment and Retention in the Armed Forces* Thirty-fourth Report of Session 2006-2007 18th June 2007 para. 19
[104] ibid. at para. 20
[105] ibid. at para. 21- In 2005 same year seventy-three per cent of Army Scholarships were paid to candidates from independent school.
[106] David Gee *Informed Choice? Armed forces recruitment practice in the United Kingdom* (2007) available on http://www.essex.ac.uk/armedcon/storyid/000733.pdf last accessed 11/06/2012
[107] Ministry of Defence 'Analysis of Socio-economic and educational background of non-officer recruits' [Memorandum to the House of Commons Defence Committee 2004] cited in House of Commons Defence Committee *Duty of Care* (Third Report of Session 2004-2005) Vol 2 Ev. 255-257

> '…acknowledge that, for many youngsters, particularly from deprived or disadvantaged backgrounds the Armed Forces provide an opportunity that may have been denied them in civilian life.'[108]

This glosses over the reality that many enlisted soldiers are forced by circumstance to join the military from a position of socio-economic weakness, it could be said that, '…the defence of the realm depends on a socio economic underclass.'[109] There is still a clear class divide between the ranks which may have been evident in *Semrau*, *Maynulet* and *Cardenas*.

Capt. Semrau was a commissioned officer and charged only with negligently performing a military duty. The second degree murder charge against him was dropped and he served no time in confinement. His punishment was demotion to junior officer and dismissal. The Canadian court martial, similar in design to the British, was staffed by commissioned officers of commensurate rank to Capt. Semrau. They would have understood the pressures of leadership that faced Semrau on that day when the Afghan Army personnel were mistreating the soldier. They may also have felt sympathy towards him for making the wrong procedural decision whilst in charge, which they may have experienced themselves. It should be asked whether they would be more empathetic to a man they could directly relate to because of his position? He had after all shared in their role as an officer who was expected to maintain discipline amongst the lower ranks. Whilst this cannot be answered a common sense approach would suggest it is possible, and if so, the nature of the justice that Capt. Semrau received may be different to that received by an enlisted man with whom the Board could not directly empathise.

[108] ibid. at Vol.1 5-6
[109] n.106 above at 17

This empathy can also be seen in *United States* v *Maynulet*, where the defendant was a Captain commanding a US force during the occupation of Iraq who shoot a mortally 'wounded getaway' driver. He was found not guilty of a murder charges against him, but was convicted of assault with the intent to commit manslaughter.[110] He was discharged from service but was not sentenced to a period of confinement. [111] But when the defendants were not commissioned officers in a similar exchange the court was not so lenient.

In *United States* v *Cardenas* the defendant was a non-commissioned officer, he and his co-defendant, Sgt Horne, (who was sentenced at another trial) had delivered the coup de grace to an insurgent who had been shoot in a previous skirmish and was lying mortally wounded before them during an increasingly hostile situation. They were convicted of unpremeditated murder and conspiracy to commit murder,[112] and were sentenced to one and three years confinement, a bad conduct discharge and a dishonourable discharge respectively and were demoted several ranks to that of Private.

Care must be taken when comparing sentences passed in different jurisdictions by courts conducted under differing procedures and policy influences, it is also tricky to compare individual cases rather than looking at general trends. Each case was circumstantially different and evoked different responses, yet still, the two officer defendants tried before a Board of officers for a battlefield mercy killing have been spared incarceration and perhaps received lesser convictions, whilst the enlisted defendant's received more serious convictions and prison sentences. In the USA considerations of class tend to be less prevalent and less obvious than in other jurisdictions however, to attain the rank of Captain in the US Army, you must be

[110] In violation of United States Uniform Code of Military Justice 10 USMC s.934 (2000) Art.134
[111] The US court martial also utilises a board consisting of officers who deliberate on the sentence and punishment.
[112] n.110 above at s.934 (2000) Art. 118

in receipt of a university degree,[113] which must be paid for, and thus the educational level of the officer is far higher than that of the average enlisted man.

It may be best to redefine the 'class bias' based on broad social status, as one which also includes the attainment of rank within the Armed forces. Inclusion within the commissioned officer group, comes with the attainment of superiority and authority, in the command structure at least, over those below you. The existence of a natural bias towards those who are traditionally disciplined compared to their officer compatriots was the subject of enquiry in *Boyd*, where it was asked whether it was reasonable to assume that the Board may hold the evidence given by a fellow officer in higher regard than that of a private soldier. However the Lords dismissed the assertion as unfounded.

> 'Of course, this submission is really just a matter of assertion. There was, and could be, no evidence to back it up… Viewed in this light, the specialised knowledge and experience of the members of the court-martial could be seen as a positive advantage rather than a disadvantage. However, this maybe, I see no reason to think that, when duly directed by the judge advocate, officers in a court-martial cannot properly assess the evidence and return a true verdict based on it. I therefore reject the appellant's argument on this point.'[114]

[113] Charles A Henning *Army Officer Shortages: Background and Issues for Congress* (CRS Report for Congress 2006) 18
[114] n.58 above per Lord Rodger of Earlsferry at para 84

7.8 The positives and negatives of trial by court martial for the mercy killer and the administration of justice.

Focusing on the potential social bias and lack of impartiality of the court martial can be misleading. Good reasons are evident to consider the court the ideal place for the battlefield mercy killer to be tried. Foremost, is the fact that he will be tried in a military setting, by military men who will have an understanding of the culture in which the soldier operates compared to the jury in a civil trial. They may have participated on active operations, been placed in morally compromising situations which brought them into conflict with accepted practice, perhaps they even saw friends die or were wounded and can sympathise with the mental toll brought on by that prolonged exposure to conflict. They could understand the soldier's plight in context in a way civilian juries could not.

Furthermore, the ideals of military duty that officers are expected to abide by such as, honour, loyalty and integrity, have been used to argue why the officer is the ideal candidate to serve on the Board.

> 'The oath taken by the members of the court required them to well and truly try the accused 'according to the evidence' and to do justice according to the relevant 1955 Act 'without partiality, favour or affection.' ...There is no reason to suppose that the members of the court-martial would be any less faithful to their oath or any less diligent in applying the directions given by the judge advocate than would the members of a jury. Indeed it is at the very least arguable that the officers on a court-martial, as members of the armed forces for whom trust and obedience to commands are particularly important,

would be even more likely than civilian jurors to be true if their oath and to follow the directions given to them.'[115]

Nor should military discipline be interpreted as a bad thing, in itself it is very useful and the courts offer the ideal avenue by which to fairly administer this discipline, which is integral to the effective fighting force. The trial judge in *Semrau* evidenced such a sentiment and Capt. Semrau's conviction cannot be said to have been tainted by the imposition of harsh military justice. 'We need discipline and we need to keep our professionalism, that's what distinguishes us from every other guy with a gun in this country.'[116]

A further reason to support the credibility of the court martial as the place to give the mercy killing soldier a fair and impartial trial lays in the fact that the UK does not practice conscription. The strength of volunteer forces, like Canada and the UK, can be quickly affected by dissatisfaction among the ranks. A system of Kangaroo courts which imposes unfathomably harsh punishments would create low morale and affect the forces professional reputation to potential volunteers. True 'discipline' in these forces is actually achieved by positive self-discipline through patriotism, morale and camaraderie and military justice is only used when a lack of discipline attracts sanctions. The courts are not used to enforce a discipline on the troops, they are a means of last resort.[117] It is in the military's best interest to ensure the trials are fair and impartial, and that in cases like *Semrau*, the process is as fair as possible.

[115] *R* v *Boyd, Hastie and Spear; Sanby & Others* [2002] UKHL 31 Per Lord Earlsferry at para.65
[116] Lt. Col. Perron the Judge in the Semrau case as cited in Christie Blatchford 'For the jury ion Semrau case the penalty did not fit the crime' *Globe and Mail* 19th July 2010
[117] C F Blair 'Military Efficiency and Military Justice: Peaceful Co-existence' [1993] 42 *University of New Brunswick Law Journal* 237 239

Conversely, protecting the reputation of the armed forces may also affect the fair administration of justice, not to the mercy killer, who may receive a lesser sentence but to the victim and the act itself. The killing may be marginalised in order to protect the military's upstanding reputation, as discussed earlier concerning the Army's response in *R* v *Payne*.[118] The military authorities spoke of the victim's death at the hands of the British soldier in 'worryingly euphemistic terms' calling the facts of the case 'uncomfortable',[119] which could potentially undermine the operational effectiveness of the Army.[120] Their concerns were not directed at outrage at the killing but on the potential damage to the institution. They called the circumstance of the killing part of an unlawful 'conditioning process',[121] a euphemism for torture. Likewise, in a case of battlefield mercy killing, it is possible that the misconduct would be focused upon rather than the murderous act itself, and could be detrimental to the armed forces professional standing.

This may have occurred to some degree in *Semrau* where the court accepted that Capt. Semrau had shot an injured enemy, a protected person, but found him guilty of only a single breach of military discipline. The judge emphasised that he had failed in his duty as an officer to set an example to his subordinates, whilst the fact he had shot a wounded enemy went largely unreported. The crime was marginalised but the discipline was magnified, ssubverting justice in order to serve the military's purpose of ensuring disciplined efficiency and protecting its professional reputation.

[118] *R* v *Payne and Others [*2007]
[119] Peter Bradley 'Gerry Simpson 'The Death of Baha Mousa' [2007] *Melbourne Journal of International Law* 340 344
[120] 'General Dannatt Speaks after Close of Cpl Page Court Martial', Defence News (UK) 30th April 2007 available from http://www.mod.uk/DefenceInternet/DefenceNews/Archive last accessed April 2nd 2011
[121] Ibid.

> 'How can we expect our soldiers to follow the laws of war if their officers don't? How can we expect the ANA to follow the laws of war if the officers mentoring them do not?'[122]

Whilst this may mean that the soldier who has delivered a battle field coup de grace receives a lesser conviction and sentence this in turn affects the 'justice' delivered to both the defendant, the victim and in relation to the action itself. Such treatment of the behaviour curtails any moral response to the action and provides an uncertain indication as to society's appreciation of the defendant's behaviour. It ignores any evaluation of what justice the victim deserves as by convicting the soldier of only military crimes it gives the perception that the armed forces are the true victim.

7.9 Conclusion

A balancing process is required between the argument that any system of military justice will never be fair and the argument that modern arguments pertaining to human rights should be excluded from military consideration because it is impossible to run an effective military machine under such constraints. Despite the changes to the court martial to make it appear more procedurally sound, critics will continually uncover faults. For instance, despite the increased oversight of the composition of the Board, '…whilst one of the members was a Permanent President, the remaining Members [return] back to their ordinary military duties at the end of the applicants court martial,'[123] and thus are still influenced by the military command structure.

[122] n.116 above.
[123] n.53 above at para 105

The statement is true, but whether or not the fact the members of the board return to military duties affects their judgements in the manner discussed can never be tested, it is purely subjective. Perhaps, such hostility towards the court martial prevails because of the authoritarian sentiments which can be traditionally placed upon the command of military.

> 'I am convinced that in justice to other men, soldiers who go to sleep on post, who go absent for an unreasonable time during combat, who shirk in battle, should be executed; and that Army Commanders or Corps Commanders should have the authority to approve the death sentence. It is utterly stupid to say that General Officers, as a result of whose orders thousands of gallant and brave young men have been killed, are not capable of knowing how to remove the life of one miserable poltroon.'[124]

Yet the purpose of military justice is not to ensure that the troops are bound by the 'unmitigated will of the commanding officer',[125] as the constant limitations on military tribunals through history have shown, but rather to keep discipline and ensure that the soldiery also abides by the laws of the land, despite their isolated and sometimes privileged position. The plight of the battlefield mercy killer should be better understood by courts manned by military men with a similar mind set to the defendant. In the US cases of *Cardenas* and *Maynulet* and the Canadian case of *Semrau* it is apparent that this has led to the imposition of lesser convictions and shorter sentences. However, these cases also possibly display a worrying bias that is present in the court martial system as an inherent and ineradicable aspect of military life. The imposition of authoritarian or class bias could prejudice proceedings leading to uncertainty as to how the officer or enlisted person may be treated.

[124] House Committee on Armed Services, 80th Congrees, 1st Sess 2153 (1947) Per Lieutenant General J Lawton Collins.
[125] S T Ansell 'Military Justice' [1919] 5 *The Cornell Law Quarterly* 1 17

However, compared to the civil system, where the soldier faces trial and is considered in relation to his civilian counterparts and is deliberated upon by a jury whose members have little or no understanding of military life, warfare and the effects both of these have on an individual's choices and conduct, the court martial trial is not an unattractive option for the battlefield mercy killer. Despite the reservations it is likely that he will receive an 'understanding' justice, from men who can in some way relate to the defendant. That the Board also contemplates the consequences of the defendant's actions for military discipline is a larger obstacle to the defendant in theory than in practice. In 2002 the acquittal rates for all cases in the courts martial system were 59% for non –commissioned officers, whereas the acquittal rate in the civil courts varied between 37.4% and 44.2% during the years 1998-2002.[126] For the soldier, the court martial seems to be the best place for trial if they protest their innocence or wish for 'success'.

Of course, such a stance ignores the bigger question of justice. Success for the mercy killer, an acquittal or lenient sentence, is different to true justice, for himself, the victim and the act. Such a success ignores the act's gravity and the moral considerations that should be given to it. Whilst the varying methods of how the battlefield mercy killer can be tried have been investigated and the unique experiences which should be taken into account have been considered, the final questions remain. What is justice for the battlefield mercy killer and how should the act be viewed?

[126] A Lyon 'Two Swords and Two Standards' [2005] *Criminal Law Review* 852

Chapter Eight

Conclusion

Justice to the mercy killer

'Justice is to give each his own'[1]

''Well then, ought we give our enemies whatever is due to them?',

'Certainly' he said, 'what is due to them; and that is, I assume, what is

appropriate between enemies, an injury of some sort.''[2]

Speaking at a press conference, in the wake of a trial for the murder of a child by his mother, Detective Inspector Maxine Martin's statement read, 'I take no satisfaction from the sentence delivered to Kimberly Hainey today, although I am satisfied that justice has been served.'[3] This is the archetypal rhetoric when it is held, both subjectively and objectively, that someone is rightfully punished for a crime. When someone is punished for an offence they are found to have committed it is often said that 'justice has been served.'

However, Bernard Martin, speaking after the judge passed a fourteen year sentence upon a man who murdered his son with a baseball bat, said, 'I don't think justice has been served, the fact that this idiot got the minimum possible sentence he could get is disgusting.'[4] This opposing view is often heard when sentences are deemed disproportionate to the offence committed in the eyes of an individual or wider group, as such justice has not been served.

[1] Plato *The Republic* (Translated by Sir Desmond Lee Penguin Classics 2003)
[2] ibid. at8-9 line 332(b)
[3] Chris Clements 'Declan murder cop says justice has been served' *Daily Express* 13th Jan 2012 8
[4] Andrea O'Neill 'Father of Murdered East Kilbride teen furious over sentence' *East Kilbride News* 4th June 2012

It is important for the victims, their wider families and the community to know that the wrongdoer has been held accountable for their criminal actions committed against those individuals. In the words of Detective Inspector Caroline Corfield, speaking after the trial of a man who murdered his partner, 'Hopefully they can come to terms with what happened with the knowledge that justice has been served and Karl Burman will serve a long sentence for this dreadful crime.'[5] Individuals like to feel that someone has been held accountable for the wrongs committed against them, 'It does help that justice has been served…. now it is just a matter of trying to move on…'[6] said Diana Atkinson, whose son was knifed to death.

It follows then, that when justice is served, the convicted has 'got what they deserved',[7] or at least this is what some people believe. Others often feel that the offender may have deserved to have been punished more severely, as this is what is due to the convicted. 'The sentence is a positive one, though I'm a policeman so I always want longer, but it sends a positive message.'[8] Others may feel that a jail sentence may be too much and the offender does not deserve such a harsh sentence.[9] This is a matter of proportionately, whereby the punishment should be seen to fit the crime and that the wrongdoing against the victim and wider society's morality is reflected in the sanctions against the offender.[10]

This just deserts theory of punishment is properly known as retributivism, where retributivist conceptions of punishment seek to allocate moral blame for the crime, claiming there is a moral link between punishment and guilt. Punishment goes hand in hand with accountability

[5] Kyle Andrews 'Shauna Lee Murderer sentenced to life' *Coventry Post* 22nd March 2012
[6] Jennifer Bell 'Mother of murdered victim Mark Webb speaks out about her on going grief' *The York Press* 6th March 2012
[7] Adam Uren 'Hero says rapist got 'what he deserved'' *Peterborough Telegraph* Tuesday 5th June 2012
[8] ibid. per Detective Superintendent Rich Seston speaking after Ryan Forde was convicted for a 'stranger rape' and sentenced to six years imprisonment.
[9] Mel Evans 'Rutgers suicide spy case sentence due' *The Telegraph* 21st May 2012. Many people felt that the defendant did not deserve to receive a gaol sentence.
[10] Stephen Simone 'A Rant on YouTube Does Not Deserve a Prison sentence' *The Telegraph* Tuesday 5th June 2012

or responsibility.[11] Under this theory the mercy killer would deserve punishment, and justice would be served when he is convicted of the crime he has been proven to have committed, namely murder or manslaughter. If he is convicted of murder, according to a retributivist theory, the imposition of a mandatory life sentence is proportionate to the crime. This thesis has argued that this is not the case however and that this is not justice for battlefield mercy killer. The killer who acts from compassion to ease the suffering has acted in a far more legitimate way and these factors deserve to be accounted for when considering how to treat them punish him because, like other mercy killers such harsh sentencing may not be appropriate for the battlefield mercy killer. If the level of punishment is intrinsically related to the notion of justice the reasons behind the commission of the crime and the imputus behind the punishment must be understood and acknowledged.

8.1 The rationale for punishment

Offenders are punished for a number of reasons, because they deserve to be punished, to prevent them from committing further crimes, to discourage others, to protect society, to make them pay penitence for harms caused, to convey the societal disapproval of their behaviour, and to maintain the authority of the rule of law by ensuring people clearly understand the consequences of disobedience.[12] Punishment enforces criminal prohibition and without it laws could be freely flouted at will without fear of consequences. Thus to doubt the legitimacy of punishment casts doubt upon the enterprise of the criminal law.[13] In the criminal law, justice and punishment are inextricably linked; the sanctions that are imposed upon the battlefield mercy killer will be used to measure the justice both he and his victim

[11] P Bean *Punishment: A Philosophical and Criminological Inquiry* (Oxford Martin Robertson 1981) 14-15
[12] C Banks *Criminal Justice Ethics* (Sage Publications 2008) 104
[13] Christopher L Russell 'Detterring Retributivism: The Injustice of Just Punishment' [2002] 96 *North Western University Law Review* 843 852

receive. Too harsh a punishment may be perceived as unjust to the soldier, too soft a punishment may be perceived as unjust for the victim, whilst the wrong type of punishment may be perceived as casting the level of condemnation of the behaviour into doubt. For instance, when Capt. Semrau was punished with demotion and dismissal, it has been argued that these punishments did not recognise the moral gravity of his behaviour and only addressed his perceived indiscipline.

In opposition to the retributivist theory introduced earlier, stand consequentialist based theories, which justify punishment according to the good consequences which are promoted by the sanctions against the individual. These theories are founded upon the principle that it is wrong to harm another in any circumstance save for self-protection, for either the individual or the wider community. The system should not exercise punishments on anybody unless there is some good benefit to be derived from it.

> '... That the one purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others…His own good, either physical or moral, is not sufficient warrant…The only part of the conduct for anyone, for which he is amenable for society, is that which concerns others'[14]

Under this approach, punishment itself is not a good action, all punishments are intrinsically bad, as they require the infliction of harm upon another person against their will. However, they are justified because the consequences of punishments can provide 'good' results which

[14] John Stuart Mill *On Liberty* (1859) (Oxford University Publishers Oxford 1975) 21-22

outweigh the harm done to the offender.[15] For instance, through incarceration the offender is incapacitated and prevented from committing further harm to others, if they are successfully rehabilitated whilst in prison they will not harm society with their criminal behaviour again. Punishment also upholds the rule of law which maintains an orderly society and when publicised, punishments deter others from participating in similar behaviour. Such concepts underlying the administration of punishments were traditionally thought to be morally sensitive, merciful and humane, [16] and most infamous amongst the consequentialist justifications for punishment is that of deterrence which implies that the punishment will prevent others behaving similarly.

> '…if delinquents were constantly punished for their offences, and nobody else knew of it, it is evident that…there would be a great deal of mischief done, and not the least particle of good…The punishment would befall every offender as an unforeseen evil. It would never have been present in his mind to deter him form the commission of the crime. It would serve an example to no-one.'[17]

However, consequentialist justifications for punishment have been replaced by a resurgence in the retributivist doctrine. Doubts over the worthiness of the deterrence aspect, the cornerstone of the theory, have abounded for years in the wake of sociological surveys which question its credibility.[18] It can now be said that, '[R]etributivism can be fairly regarded as the

[15] Jeremy Bentham *The Theory of Legislation* (1871)(Triibner London 1976 2nd edition) 171 -170
[16] n.13 above at 848
[17] Jeremy Bentham 'Principles of Penal Law' in John Bowring (ed.) *The works of Jeremy Bentham* (Russell and Russell London 1962) 399
[18] See Johannes Andenaes 'Does Punishment Deter Crime' [1968] 11 *Criminal Law Quarterly* 76, J P Gibbs M L Erikson & G F Jensen 'The deterrence doctrine and the perceived certainty of legal punishments [1977] 42 *The American Sociological Review* 355, and Daniel S Nagin 'Criminal Deterrence Research at the Outset of the Twenty-First Century' [1998] 23 *Crime and Justice* 1

leading philosophical justification for the institution of criminal punishment.'[19] It seems that mercy killers are punished in line with this retributivist theory because the consequentialist justifications for punishment ill fit the battlefield mercy killer. Therefore, the most credible argument that can be provided to tie the punishment of the battlefield mercy killer to the consequentialist theory, is that such punishment sets an example. For instance, speaking at Capt. Semrau's trial judge advocate Lt. Col. Perron said,

> 'How can we expect our soldiers to follow the laws of war if their officers don't? How can we expect the ANA to follow the laws of war if the officers mentoring them do not?'[20]

However, Capt. Semrau was not punished particularly harshly, as he was merely demoted two ranks and discharged from the Canadian Forces but served no custodial sentence. The purpose of 'making an example' of an individual when they have committed a particular action, is to deter others through publicising the punishment. Whilst in Capt. Semrau's case the knowledge that committing such an act could result in a discharge from the service of a military violently engaged in supressing a costly insurgency may not deter individuals, who may see such a punishment as desirable, there are other reasons to suggest that even if harsher sentences were passed this would not effectively stop the soldier committing the crime. First, this concerns the nature of the crime and the impact the concept of deterrence has on different activities, if the criminal act is performed from mercy and compassion, as in a battlefield mercy killing, then the threat of a criminal sanction is likely to be less of a deterrent.[21]

[19] David Dolinko 'Three Mistakes of Retributivism' [1992] 39 *UCLA Law Review* 1623 1623
[20] Lt. Col. Perron the Judge in the Semrau case as cited in Christie Blatchford 'For the jury ion Semrau case the penalty did not fit the crime' *Globe and Mail* 19th July 2010
[21] A Pepitone 'Social psychological perspectives on crime and punishment' 31(4) *Journal of Social Issues* 197

Second, the action has been carried out for thousands of years on various battlefields, and continues to this day.[22] Thirdly, and partly explaining the second reason, a battlefield mercy killing is usually a split second decision occurring during intense unforeseen circumstances rather than a premeditated killing planned before the event. As such, punishment is not deterring those who are 'considering' such behaviour, rather it is the circumstances which create the need to act. Add to this the situational stress which is likely to negatively impact upon a person's ability to make appropriate decisions,[23] and it is not reasonable to believe that the soldier will be deterred by recalling the punishments inflicted upon others for similar actions At the very least it is appropriate to claim that the consequences of punishment in this circumstance may not be fully weighed.

Whilst it is desirable to deter unlawful actions, morally bad actions, or socially condemned actions mercy killing is a very particular crime which attracts an atypical social response illegal. There is, for example, much evidence to suggest that mercy killings do not necessarily suffer social condemnation,[24] especially when associated with 'indignities of protracted dying.'[25] Furthermore, in this context the punishment does not protect the public at large, they need no protection from the administration of a battlefield coup de grace, as circumstantially it is a very unlikely set of events to befall the normal person in everyday life. Applying punishment in line with consequentialist theory is also redundant if it is said that the

[22] As is evidenced by the examples in chapter two, from the accounts of such killings taking place in antiquity, to the accounts of medieval knights participating in such behaviour, the Crimean war and up until the modern day cases of *Cardenas* and *Maynulet.*

[23] See K R Hammond *Judgements under Stress* (Oxford University publishing New York 2000) and also how the perception of the situation negatively affects decision making Kathleen M Kowalski-Trakofler & Charles Vaught 'Judgement and decision making under stress: an overview for emergency managers' [2003] *International Journal of Emergency* 278 281

[24] See The Law Commission Report 290 *Partial Defences to Murder,* Appendix C: Brief Empirical Survey of Public Opinion Relating to Partial Defences to Murder, August 2004 HMSO London , and The Law Commission Consultation Paper 177 *A New Homicide Act for England and Wales*, Appendix A: Report on Public Survey of Murder and Mandatory Sentencing in Criminal Homicides, November 2005 HMSO

[25] Hazel Biggs 'The Assisted Dying for the Terminally Ill Bill 2004: Will English Law Soon Allow Patients the Choice to Die?' 12(1) *European Journal of Health Law* 43 44-45

punishment is inflicted in order to rehabilitate the soldier. There is no evidence to suggest that battlefield mercy killing is a common place phenomenon or that mercy killing soldiers go on to become serial killers. Nor is it likely that they will pose a lingering threat to individuals. That said, it is clear that by punishing the soldier the rule of law is upheld and its authority is not seen to be damaged. There are of course exceptions in which the offender can escape punishment without the rule of law being affected, which are discussed later, but punishing the soldier on the basis that he broke the law and thus deserves punishment has a distinctly retributivist flavour, thus, it appears more probable that the mercy killer is punished because they deserve to be punished rather than because of the justifications offered by a consequentialist argument. Before this is analysed, a little more depth should be given to the theory of retribution especially concerning the grounds upon which it might justify why the offender should be punished.

Under a retributivist theory punishment is justified by no more than a just deserts argument.

> 'What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of his act. The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not and it is better irrespective of any of the consequences of punishing him.'[26]

[26] John Rawls *The Two Concepts of Rules* [1965] 64(1) *Philosophical Review* 3 5

That is not to say that the punishment has no other useful outcomes, only that such consequences are not needed in order to justify the initial sentence. All that is required is for the offender to have been found deserving of punishment,[27] and the punishment must be proportionate to the wrong caused. The severity of the punishment that a person deserves is directly commensurate with the amount of harm they have inflicted upon another, literally an 'eye for an eye'.[28]

> '[Whatever] undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself. But only the law of retribution (jus tallies)…can specify definitely the quality and quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them.'[29]

However, this theory is not without its critics. The justification it offers for instigating sanctions, that '… the guilty ought to be punished because they deserve it, is not an argument but an assertion.'[30] It offers no concrete grounds other than this assertion,[31] merely claiming it is 'right' that the guilty suffer. It may be stretched as far as to say that 'moral order' requires the institution of punishment, but why this is so is unclear.[32]

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[27] Immanuel Kant *Metaphysics of Morals* (1797) (May Gregor trans. Cambridge Cambridge University Press 1991) 22
[28] Deuteronomy 19:21
[29] n.27above at 141
[30] Richard Wasserstrom 'Why punish the guilty?' in Gertrude Ezorsky (ed.) *Philosophical Perspectives on Punishment* (New York State University of New York Press 1972) 337
[31] n.11 above at 30
[32] ibid. at 31

This is not a satisfactory answer as to why the soldier is punished for the battlefield mercy killing, or a basis on which to discuss how best they ought to be treated. Indeed, in the case of the soldier, the doctrine may seem somewhat flawed because when compassionate acts do not normally invoke moral condemnation, which is fundamental in a just deserts argument. Understandably, when murder is committed the punishment should be commensurate, and in most jurisdictions, murder convictions are represented by a lengthy period of imprisonment. However, the battlefield mercy killer cuts short the life by only a matter of minutes, whilst a conviction for murder tends to deprive the soldier of his liberty for a minimum of fourteen years.[33] This is a disproportionate punishment, the sentence should be lenient because he acted out of compassion in a situation far removed from the civilian ideals which the law generally deals with. The true determination of how to treat the soldier who administers a battlefield coup de grace is first to gage the degree of wrongness represented by his behaviour.

8.2 Wrongness as opposed to illegality

The wrongness of certain behaviours can be determined only with reference to the system within in which they take place. Any system, in this case the criminal justice system, will be founded upon principles which inform it's rules. In turn these systems also take into account social norms, the widely held social perceptions of right and wrong as legitimising their decisions.

The sanctity of life principle supports the imposition of a murder or manslaughter charge when a person has been unlawfully killed and supporters of the principle claim it has ethical

[33] The temporal element is an important difference between the domestic mercy killer and the battlefield mercy killer. In the cases of *Pretty* and *Bland*, the life was being to be cut short or was cut short by a considerable length of time. This is because the immediacy of the situation is different. (See Chapter 3) In the battlefield mercy killing situation, the victim is close to death after suffering severe wounds, as in *Semrau*, in which the victim was so grievously wounded that the patrol at first thought he was dead.

primacy because, for among other reasons, 'life is a gift from god and should not be taken.'[34] In the case of a battlefield mercy killing, this principle competes with another, that of individual respect for the suffering dying person, which is manifest in the act of compassionate killing. Delivering the appropriate punishment or justice to the battlefield mercy killer requires a value judgement between these principles.[35] In cases of a battlefield mercy killing the principle of greater importance is that which recognises the suffering of the victim because this tallies with public values. If the sanctity of life principle were followed it would cause undignified, futile suffering in all cases for no other reason than to respect the rule it upholds, the prohibition of killing.

However this is not the case, the sanctity of life principle is not unilaterally accepted as an absolute value,[36] reflected in the legal treatment of those who take life or are involved in end of life decisions, especially in the medical profession. Some actions are not deemed as contravening the principle and in other situations the court is willing to take into account mitigating circumstances to ensure that the punishment is not too harsh. For instance, in the medical context legal sophistry is used to avoid conflicting with the principle,[37] if the principle were upheld absolutely, it would question the feasibility of physicians administering palliative care which they foresaw as having a high likelihood of causing death. As such, if the principle held primacy the standard which the physician would be obliged to uphold would run in line with preserving life above all other considerations. This is not the case, the axiom in professional ethics is to promote the welfare of the patient and their

[34] T Chappell 'Chappell's reply to Jung' [2003] 40 *Philosophy Now* 15-16
[35] Hans Kelsen 'What is Justice? Justice, Law and Politics in the Mirror of Science' in W I Jennings ed. *Collected Essays By Hans Kelsen* (Berkley and Los Angeles Press 1957)
[36] Contrary to arguments to the opposite such as Norman L Gessler *Christian Ethics: Contemporary Issues and Opinions* (2nd ed. Baker Academic Michigan 2010) 16 where it is stated that the duty not to kill is an absolute requirement.
[37] See chapter 6.

wishes.[38]Furthermore, in cases of domestic mercy killings including *Marshall* and *Webb* the courts have acknowledged that some killings do not detrimentally affect the ideal.

> 'In the unusual and particular circumstances of this case we do not believe that the principle of the sanctity of human life would be undermined if the sentence imposed on the appellant were now reduced to one of 12 months' imprisonment, suspended, so that this lonely old man may receive the help that he will need to come to terms with the disaster that has overtaken him'[39]

Mercy killings evidence the famous 'penumbra of doubt' in legal reasoning,[40] where the rules do not fit the nature of the crime. The sanctity of life principle which underlies these rules is not as persuasive as in other instances of killing and little guidance is available about how to proceed. For this reason mercy killers have been subject to diffuse treatment. *Gilderdale*, *Inglis*, and *Webb* were recent mercy killing cases, which passed verdicts of assisted suicide, murder and manslaughter by means of diminished responsibility respectively. If the rule were absolute then logically all cases of killing should be treated alike. The secondary importance the sanctity of life principle should be allocated in relation to respecting the individuals suffering and the compassion shown them when a mercy killing takes place, is further

[38] Paul Jewel 'Rationality, euthanasia and the sanctity of life' Paper delivered at the Australian Association for Professional Applied Ethics 12th Annual Conference 28th-30th Sept. 2005 p. 2 available at http://w3.unisa.edu.au/hawkeinstitute/gig/aapae05/documents/jewell.pdf last accessed 12/6/2012
[39] *R* v *Webb* [2011] EWCA Crim 152 at para 26
[40] H L A Hart 'Positivism and the Separation of Laws and Morals' (1958) 71(4) *Harvard Law Review* 621

evidenced by public opinion which does not condemn such actions,[41] principles only gain moral validity when they are supported by the community in general.[42]

An absolutist view of the sanctity of life principle supports the retributivist justice administered to the mercy killer on no more certain grounds than because any infringement upon the principle deserves punishment. But when the behaviour does not match the degree of wrongness society ascribes to the action, especially when a battlefield mercy killer is charged with murder,[43] then abiding by this absolute principle creates an injustice for those who are tried with regard to it. It is not to say that the offence of murder is bad law or that the sanctity of life principle lacks general public support, but they represent an incorrect attitude towards the specific circumstances of the mercy killer because the consequences they have upon the compassionate defendant are not proportionate to their behaviour. In principle a prohibition on killing is agreeable, but it becomes problematic when the law is upheld over moral concerns.

> 'The most pernicious laws, and therefore those which are most opposed to the will of God have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned and if I object to the sentence, that is contrary to the law of God…the court of justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance to the law which I impugned

[41] See The Law Commission Report 290 *Partial Defences to Murder,* Appendix C: Brief Empirical Survey of Public Opinion Relating to Partial Defences to Murder, August 2004 HMSO London , and The Law Commission Consultation Paper 177 *A New Homicide Act for England and Wales*, Appendix A: Report on Public Survey of Murder and Mandatory Sentencing in Criminal Homicides, November 2005 HMSO
[42] R. Dworkin *Law's Empire* (Harvard University Press Cambridge: MA 1986) 209-214
[43] n.41 above.

> the validity. An exception, demurer plea, founded on the law of God was never heard in a court of justice, from the creation of the world to the present moment.'[44]

Contemporarily, in the above exert the phrase 'God' should be transposed with 'public opinion', the decline of religious influence in society is well documented but religious themes still resonate in the new morality of an individualised society.[45] Laws and public morals are not the same, nor should they be, for to treat the two as interdependent creates the danger of existing law becoming the final test of moral behaviour and escaping criticism. If it were so it could not be argued that the law treats the battlefield mercy killer unjustly, especially when they are charged with murder. 'The existence of law is one thing; its merit or demerit is another'.[46] Laws are influenced by moral input and murder is an offence, in part, because it is widely held that the general killing of persons is not desirable both objectively and subjectively. It also makes sense to preserve the lives of kith and kin.[47] It is the general acceptance of the principle that life is sacred that legitimises the imposition of the rule over society,[48] it has some '…generally accepted ethical postulates underlying [its]…ultimate sanction'.[49]

Regarding mercy killing these 'generally accepted ethical postulates' or social 'norms' and the legal stance can be said to be unaligned as many widely accepted surveys show that public opinion does not support the imposition of murder or manslaughter charges in cases of

[44] John Austin *The Province of Jurisprudence Determined* (Library of Ideas 1954) 185
[45] Louis Dumont 'Religion, Politics and Society in the Individualistic Universe' in *Proceedings of the Royal Anthropological Institute of Great Britain and Ireland* (Royal Anthropological Institute of Great Britain and Ireland 1970) 31
[46] John Austin *The Province of Jurisprudence Determined* (Library of Ideas 1954) 184
[47] n.38 above at 6
[48] Lon L Fuller 'Positivism and Fidelity to Law' [1958] 71(4) *Harvard Law Review* 632
[49] R H Lowie The Origin of the State (Harcourt, Brace and Company New York 1927) 113

mercy killing.[50] Norms are a social judgement of what is right and wrong, what is acceptable and what is unacceptable in any situation. They are based on a common understanding of fairness, efficiency and other justifications which make the practice recognised and valid, and have attained a minimum level of compliance, but that does not mean that individuals interpret the understanding of the norm identically.[51] Often, what starts as a collective moral ideal, becomes an equitable principle and then becomes a rule of law.[52] Communities regularly respond to 'any infringement upon the law with condemnation, because it is seen that the violation is against an accepted norm.'[53]

Not all norms are represented by law and the rules which apply to the mercy killer do not always identify the community's shared understanding or normative values.[54] Many norms are simply commonly held beliefs of right and wrong and with regards to mercy killing public opinion is not against the practice, and as such does not suffer societal condemnation. The misalignment of the legal and the normative appreciations of the behaviour evidences that for an action to be illegal there is no need for it to meet the social expectations of wrongness.

Specifically regarding the battlefield mercy killer, the normative appreciation of his actions should also be considered in light of the isolated society in which he operates.[55] The norms which exist within the military culture, especially those regarding the camaraderie and duty each soldier owes to each other and which are focused on principles of honour and loyalty, compound the effect that the wider public opinion has on the perspective of the behaviour. There exists no widespread social repugnance towards the action as evidenced by the numerous public surveys, but there does exist a polemicized academic debate between the

[50] n.41 above.
[51] Neil MacCormick 'Norms, Institutions and Institutional Facts' [1998] 17 *Law and Philosophy* 301 306
[52] Roscoe Pound 'Jurisprudence and Ethics' [1945] 23 *North Carolina Law Review* 183 188
[53] Neil MacCormick 'Norms, Institutions and Institutional Facts' [1998] 17 *Law and Philosophy* 301 303
[54] See Ronald Dworkin *Laws Empire* (Cambridge MA: Harvard University Press) 209-214 for a theory of how laws gain legitimacy.
[55] See Chapter 2

proponents for and against legalising euthanasia,[56] which, are often regarded with more validity than the opinion of the average man.

The battlefield mercy killer is punished because such behaviour constitutes an offence which on its broad principles is societally supported as prohibiting a wrong. But in the specific activity of mercy killing the action the law prohibits, killing another, is not always considered wrong but is still illegal.[57] There are many examples of individuals committing actions which break the law but not being held liable on account of the fact that the action is not seen as unjustifiably wrong. When actions are held criminal despite displaying only a small degree of wrongness, this is often because the criminal law primarily focuses upon the actor's intent and the physical end result rather than their motive for acting as shall be considered.

8.3 Considering the morality of the action: motive and intention

'But is not the just man good?'[58]

A main component which informs the way in which a mercy killing is normatively judged, is that of compassion. The compassionate motive involved in the killing is often cited as the reason why it is morally acceptable.[59] However, the law seemingly ignores motive excluding 'a moral element in human conduct in the attribution of fault.'[60]

[56] The most common argument against the legalisation of euthanasia is often based on religious theory, see Roland Chia *The Right to Die: A Christian Response to Euthanasia* (Armour Publishing 2009)
[57] n.41 above.
[58] n.1 above at 14 line 335(d)
[59] LIezl van Zyl *Death and Compassion: A virtue-based approach to euthanasia* (Ashgate 2000)
[60] Alan Norrie *Crime, Reason and History* {London Butterworths 1993) 171

Ignoring motive abstracts the defendant from the context which has given rise to their crimes. This removes the battlefield mercy killer from not only the battleground setting, with all the emotional connotations that entails, but to also from his experiences as a soldier,[61] as he is held to account by the standards of a law developed in response to civilian considerations.[62] This false separation decontextualizes the moral issues, no moral sense can be made of the action regarding whether it was good, bad, right or wrong.[63] But humans are not nomads; they are social creatures and operate between 'two domains, the social and the personal, and what anybody does can only be explained by reference to both'.[64]

If the court had to pay attention to the factors that motivate a person to commit a crime, the difficult task of considering moral fault would have to be undertaken in every crime, for example, when a mother steals food to feed her child.[65] Focusing on intentional agency as providing the paradigm of responsible agency is more convenient, as in doing so the defendant's intention represents their moral culpability[66] and justifies the imposition of retributivist punishment.[67] However, equating intention as wholly reflective of moral culpability ignores the normative perception of mercy killing, under which the practice is not always condemned. Focusing on intention as the paramount consideration means that the compassionate motivation in a battlefield mercy killing is ignored and therefore an act driven by a 'good' motive is punished because the required intention is comparable to that present in actions normally driven by a bad motive and which generally deserve punishment.

[61] See chapter 2.
[62] See chapter 3.
[63] n.60 above at 4-5
[64] R Hare D Clarke & N DeCarlo *Motives and Mechanisms* (Methuen London 1985) 21
[65] Anthony Duff *Philosophy and Criminal Law* (Cambridge University Press Cambridge 1998) 171-175
[66] R A Duff *Intention, Agency and Criminal Liability* (Blackwell Oxford 1990) 102
[67] M Moore *Placing Blame* (Clarendon Oxford 1997) 33-45

Good reasons exist to exclude considerations of motive. In principle formal justice should deliver certainty and treat people with equality and deliberations on moral matters linked to motive would tend to involve highly subjective considerations of right and wrong and thus create uncertainty. Concentrating on the cognitive state of intention allows more objective standards to be utilised. It is illegal to intentionally kill a person in being regardless of motive. This stance causes an injustice to the mercy killer, who is not normatively 'wrong' but it does provide a general justice by providing certainty, and of course it seems a just outcome to those who oppose mercy killings as wrong.[68] Advocates of formal justice might argue that even if one aspect of the rule was unjust, in order to maintain justice in conjunction with the principle of consistency it might be better to apply unjust laws consistently.[69]

However, this does not escape the fact that any moral judgement of a person's behaviour will take into account their reasons for acting. Whilst the predominant emphasis on intention satisfies the moral requirement to impose punishment when the defendant has acted from desire, emotion or simple inclination, when the defendant acts, like the battlefield mercy killer, because they consciously saw their act as good and its consequence a desirable end then punishment does not sit comfortably with the moral appreciation of the act.[70] Such reasoning is similar to the Kantian principle to,

> 'Act only on that maxim whereby you can at the same time will that it should become a universal law'[71]

[68] n.59 & 56 above.
[69] John Rawls Theory of Justice (revised edition Harvard University Press 1999) 51
[70] EJ Bond *Reason and Value* (Cambridge University Press Cambridge 1983) 16-18
[71] n.27 above at 44.

Or more simply, '…in everything, do to others what you would have them do to you.'[72] The existence of a commonality between the defendant, the victim and the rest of society, tempers the view of the behaviour. Both the victim's condition and the defendant's dilemma can be sympathised with, many people would not only act as the soldier did to end the victim's suffering, but if they were the victim, would appreciate the administration of a coup de grace.[73] This commonality is evident in the sympathy that is felt towards the mercy killer where the ability to put oneself in both the defendant's and victim's 'shoes and feel their pain' is evident[74]

8.4 Justice, sympathy, mercy and excusable conduct.

If formal justice demands mercy killings to be punished as murder or manslaughter, it may be that an exception in the application of the law should be made in order to give fair treatment to the soldier. If justice is dependent on certainty and equal application and intention is the maxim by which moral culpability is adduced, perhaps when the moral culpability is unfairly reflected in the punishment, 'mercy' should be shown to the battlefield mercy killer themselves. Justice and mercy are different virtues since when justice is delivered and each man is given his due, a statement is also delivered according to the wrongness or rightness of their actions. Mercy is to make an exception without making this statement, and as such often arises from a feeling of commonality with the defendant.[75] Treating someone mercifully is not based on judging them against acceptable standards of behaviour but there usually exists a

[72] Matthew 7:12
[73] In 2010 80% of participants questioned agreed that it should b allowed to end the terminal suffering of another. See, S McAndrew 'Religious faith and contemporary attitudes' in Park A, Curtice J, Thomson K, Phillips A, Clery E and Buts E (ed.s) *British Social Attitudes 2009-2010: The 26th Report* (Sage London 2010) 87-113
[74] C D Baston *The Altruism Question* (Laurence Erlbaum Associates Publishers New Jersey 1991) 83-84
[75] Emilios A Christodoulidis 'The Irrationality of Merciful Legal Judgement: Exclusionary Reasoning and the Question of the Particular' [1999] 18 *Law and Philosophy* 215 221

sympathetic feeling towards the defendant, or 'the heightened awareness of another and the urge to alleviate that suffering.'[76]

The argument for mercy is to assert that in particular situations the abstract universality of formal justice should be departed from, especially when the behaviour does not sit comfortably within the reasoning behind the rules.[77] As such, in certain situations a departure from the justice that legal certainty provides might be justified,[78] and the existence of widespread, genuine sympathy towards the defendant may be such a justification. In doing so this may bring certain benefits to judicial reasoning.[79]

The sympathy displayed towards mercy killings can be seen often in popular culture, for instance the sympathy the reader has towards George when he shots Lenny in Steinbeck's 'Of mice and men.'[80] Judicial decisions concerning mercy killings have also been seen to display sympathy towards the defendant. Ognall J tempered justice with mercy when imposing a sentence of twelve months imprisonment suspended for twelve months upon Dr. Cox, and the General Medical Council (GMC) expressed the wider public sympathy towards the predicament that faced both physician and patient when they did not remove him from the practicing register.[81] Through sympathy, judges may better understand the defendant's perspective and appreciate all the legally relevant facts of the case. However, sympathy can

[76] Lauren Wispe *The Psychology of Sympathy* (Plenum Press New York 1991) 158
[77] n.75 above at218
[78] J Murphy 'Mercy and Legal Judgement' in J Murphy and J Hampton *Forgiveness and Mercy* (Cambridge University Press Cambridge 1988) 124
[79] Lynne N Henderson 'The dialogue of heart and head' [1988] 10 *Cardozo L Review* 123, Lynne N Henderson'Legality and Empathy [1987] 85 *Michigan Law Review* 1574, Robin West *Caring for Justice* (1995) 22-93, Martha L Minow & Elizabeth V Spelman 'Passion for justice' [1988] 10 *Cardozo Law Review* 37 51-52, John T Noonan Jr 'Heritage of Tension' 22 Arizona State Law Journal [1990] 39 *Arizona State Law Journal* 39 & Benjamin Zipursky 'DeShaney and the jurisprudence of compassion [1990] 65 *New York University Law Review* 1101
[80] John Steinbeck *Of Mice and Men* (Penguin Books New York 1994)
[81] Hazel Biggs *Euthanasia, Death, Dignity and the Law* (Hart Publishing Oxford 2001) 65

already be seen in the court room, especially in cases of domestic mercy killings, Bean J clearly sympathised with the defendant in *Gilderdale* when he said,

> "I do not normally comment on the verdicts of juries but in this case their decision if, I may say so, shows that common sense, decency and humanity which makes Jury trials so important in cases of this kind"[82]

Legitimising the acceptance of sympathy in judicial decision making would only encourage the subjective perspective taking in which judges are already involved.[83] Regarding justice, judging sympathetically may be regarded as a bad idea because like other emotions, sympathy is too irrational, subjective and biased to deliver formal justice.[84] Sympathetic decision making by its nature would be more subjective and be inconsistent with processes of what is generally regarded as good decision making, and yield unfairly biased decisions.[85]

> 'Sympathy for suffering and indignation are worthy sentiments, but they are not safe visitors in the courtroom, for they blind the eyes of justice. They may not enter the jury box, not be heard on the witness stand, nor speak too loudly through the voice of counsel. In judicial inquiry the cold clear truth is to be sought and dispassionately analysed under the lenses of the law.'[86]

[82] Caroline Gammell, 'Mother Kay Gilderdale found not guilty of murder attempt on ME sufferer daughter", The Telegraph, (London 25th January 2010) per. Bean, J.
[83] Toni M Massaro 'Empathy, legal storytelling, and the rule of law: New words old wounds?' [1989] 87 *Michigan Law Review* 2099 2106 -2110
[84] Martha Nussbaum *Poetic Justice: The Literary Imagination and Public Life* (Beacon Press Boston 1995*)* 53-78
[85] Neal R Feigenson 'Sympathy and legal judgement' [1997] 65 *Tennessee Law Review* 1 6
[86] *F W Woolworth Co.* v *Wilson* (1934) 74 2d 439 at 443

The concern is what constitutes justice to the mercy killer? Viewing their plight sympathetically may be in line with public opinion, but when that means that the decision is influenced by a subjective form of mercy, that cannot constitute true formal justice, that which is widely held as 'best', for the soldier. The reason for this is '…plain enough. Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking, 'the judge was biased.'[87] Formal justice requires certainty, and to provide this certainty all the agencies involved in the criminal justice system must act within legally defined boundaries, whereas the administration of mercy seemingly requires large discretion on the part of a decision maker, which is out of keeping with the modern administrative state.[88] Furthermore, mercy must be given freely, if it is asked for it becomes a form of justice because,

> 'If one offers some general reason for being given lenient treatment, or one points to features of the case that support such a claim, an argument of justice has been offered and in asking for justice one does not ask for mercy.'[89]

The battlefield mercy killer offers exactly the sort of reasons which seek to give some justification to his conduct in order to credit it with a certain amount of legitimacy. To make a 'merciful' exception of the soldier delivering a battlefield coup de grace offers neither justice to the soldier or his victim. Receiving mercy undermines the moral gravity of the act because it is forgiven rather than justified. However, the sympathy shown to the battlefield mercy killer's actions may be shown more legitimately not through the administration of a 'merciful' pardon, but because such actions are considered excusable.

[87] *MR Metropolitan Properties Co. (FGC) Ltd.* v *Lannon* [1969] 1 QB 577 per Lord Denning at 599
[88] Rachel E Barkow 'The Ascent of the Administrative State and the Demise of Mercy' [2008] 121 *Harvard Law Review* 1333 1335
[89] N Simmonds 'Judgement and Mercy' [1993] 13 *Oxford Journal of Legal Studies* 52 55

In reality, the 'moral element' is not consistently excluded and issues of motive continually interrupt the law. It is accepted that,

> '…in principle it ought to be recognised that to any criminal charge there may be an answer or explanation that would make it morally repugnant to convict in the circumstances, even if the elements of the offence are made out, and even if there were understandable reasons why prosecution was brought in the first place.'[90]

In relation to this it must first be acknowledged that the excuse is distinct from the merciful pardon. Excusing the act is achieved by shedding favourable light on what the defendant did through a focus on why the defendant committed that wrongdoing. This would allow the compassionate and sympathetic motive as well as all the distinct cultural influences involved to be considered when a soldier delivers a battlefield coup de grace. To excuse an action accepts that there are morally active reasons which deserve contemplation at play in the defendant's conduct.

> 'The gist of an excuse…is precisely that the person with the excuse lived up to our expectations…the question is whether that person lived up to expectations in a normative sense. Did she manifest as much resilience, or loyalty, or thoroughness, or presence of mind as a person in her situation should have manifested?'[91]

[90] Jeremy Horder *Excusing Crime* (Oxford University Publishing Oxford 2004) 7
[91] John Gardner 'The Gist of Excuses'[1998] 1 *Buffalo Criminal Law Review* 575 578-579

As such, an excuse is not an outright denial of responsibility. Rather, it is a statement that the soldier should be excused because when his behaviour is evaluated against how he ought to have behaved, it is seen that in ending the agony and suffering of the terminal victim he does not fall short of an expected standard of behaviour that is well below the normative expectations of what is the right thing to do in such a situation.

However, the standard of behaviour to which the soldier should be held accountable could be argued to be the objective standard of the reasonable soldier; if a person is a soldier they should behave as a soldier is expected to behave.[92] The soldier is trained to withstand pressure and abide by rules and they are bound to certain expectations, one of which is to protect the wounded. Such a stance fails to accept that there are some situations where what is expected of the soldier goes beyond what is reasonable, and the circumstances presented to the soldier in the battlefield mercy killing scenario is one such instance. To expect the soldier to stand by and watch another die a painful death in order to comply with impractical expectations which do not take into account the reality of the collective influences that are at play should not make the action inexcusable.

After consideration of the law's failure to reflect the realities of a soldiers experience's as a member of the armed forces and during combat, as well as failing to take into account the morality of the act and the public opinion of the behaviour, the final question can be asked, what is the best justice that can be delivered to the battlefield mercy killer?

[92] ibid. at 557

8.5 What to do with the mercy killing soldier?

> 'And what about the just man? In what activity or occupation will he best be able to help his friends and harm his enemies?'
> In war; he will fight against his enemies and for his friends.'[93]

Perhaps, as the moral appreciation of the action does not marry the legal attitude towards the battlefield mercy killing, the best justice that can be delivered to the soldier acting from compassion is to bring no prosecution. This stance is intensified by taking into account the previous considerations of the public perception of the action. One reason not to bring a prosecution is that it is not in the public interest. Such a rule is well established within the criminal justice system, as Attorney General Shawcross stated,

> '[i]t has never been a rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution', there should only be a prosecution when '…it appears the offence of the circumstances of its commission…are of such a character that a prosecution in respect thereof is required in the public interest.'[94]

These decisions are taken by the Crown Prosecution Service (CPS) and the Director of Public Prosecutions (DPP) and precedent exists displaying that in some types of involvements in end of life actions, prosecutions are regarded as not in the public interest.[95] Under the Code for Public Prosecutors, decisions on whether to prosecute must be made first at an evidential stage, when it is decided if appropriate evidence exists to bring a prosecution, and if so at the

[93] Plato *The Republic* (Translated by Sir Desmond Lee Penguin Classics 2003) 9 line 332(e)
[94] Speech of Attorney-General Sir Hatley Shawcross, *House of Commons Debates*, Vol 283, 29th January 1951
[95] Director of Public Prosecutions Policy for Prosecuting Cases of Assisting or Encouraging Suicide 2011

public interest stage it is decided whether it is in the public interest to bring the prosecution.[96] In a limited number of cases, prior to the evidence being collected it will be clear that the public interest does not require a prosecution.[97] Prosecutions will always take place unless the factors supporting a prosecution are outweighed by those not supporting a prosecution However it is not simply a matter of adding up the factors on either side, as one factor may outweigh all of its opposites. Likewise the absence of a factor does not mean it should be taken as a factor tending in favour of the opposite direction.[98]

Some common public interest factors tending against a prosecution against the battlefield mercy killer are, that if a case is brought the court will likely impose a nominal penalty and that the suspect was at the time of the offence suffering from significant mental ill health.[99] Regarding the soldier, in many cases of domestic mercy killing such as *Webb* or *Gilderdale* and in *Semrau*, where suspend sentences or no sentence at all was passed on the suspect, it could be very likely that he receives a nominal penalty. Similarly as was discussed previously in relation to ill mental health where it was argued that the experiences of combat can have a detrimental effect on a soldier's mental state leading to trauma and PTSD, or may just manifest itself in the 'frenzy' of war which overtakes some combatants.[100]

However, there also exist common public interest factors which favour a prosecution, under which the soldier's actions may also fit. First, if the conviction is likely to lead to a significant sentence, then a prosecution ought to be brought.[101] In *Inglis*, the defendant was convicted of murder and sentenced to life, although this was later reduced to ten years, and her actions

[96] The Code for Crown Prosecutors February 2010 p.7 para.4.1
[97] The Code for Crown Prosecutors February 2010 7 para.4.2
[98] ibid. at.9-10 para.4.12 -4.14
[99] ibid. at 13 para.4.17 (a) & (j)
[100] See the whole discussion in chapter 2.
[101] n.97 above at 13 para.4.16 (a)

were designed to release her son from what she perceived as his suffering, very much like the subjective evaluation the soldier makes of his victim's condition. Another factor favouring prosecution is whether the offence involved the use of a weapon.[102] This speaks for itself, however, the soldier carries his weapon legitimately and does not illegally carry a weapon in a manner detrimental to the public, and thus the use of a weapon to enact the killing should not be necessarily seen as further criminal behaviour compounding the offence. Also, that the soldier committed the offence when the victim was in a vulnerable situation, being wounded, and when he, the soldier, was in a position of authority being bound to protect him, are factors which favour prosecution.[103]

Despite these factors favouring a prosecution, the act may also have grounds for becoming an offence which should only prosecuted with the consent of the DPP or Attorney General. The problems entailed in prosecuting battlefield mercy killings fit the reasoning behind the need for such special consent. Such consent is required in some cases, to ensure consistency in prosecution in instances where it is not easy to define the offence very precisely, to enable account to be taken of mitigating factors which are not susceptible to statutory interpretation, and to ensure that any prosecution takes into account important considerations of public interest.[104] Currently, there is little consistency in how mercy killings are treated, depending on the circumstances they have been seen as murder, manslaughter and assisted suicide in recent years.[105] If consent was required to prosecute a mercy killing it would add an element of consistency in the laws application by taking account of all of the motivations and mitigating circumstances prior to trial. Public interest factors could also be considered and

[102] ibid. at 13 para.4.16 (c)
[103] n.97 above at 13 para.4.17 (h) & (j)
[104] Franks Committee *Report of the Committee on Administrative Tribunals and Enquiries* CM 218 1957 London:HMSO
[105] *Inglis*, *Webb* and *Gilderdale*

perhaps then the social attitudes towards the behaviour would not be negated by the obtuse legal stance.

In considering whether or not to bring a prosecution, precedent is found in end of life cases in the Director of Public Prosecutions Policy for Prosecuting Cases of Assisting or Encouraging Suicide.[106] Under these guidelines an important factor in favour of bringing no prosecution is whether the act is carried out from compassion to the victim,[107] the same compassion that the soldier shows to the victim when he delivers a battlefield coup de grace. This important factor is overlooked by the current legal stance, but is fundamental in establishing the moral appreciation of the act, but which is vital to justifying the punishment and thus the justice the soldier receives.

A particular episode which took place during the Falklands war supports the argument that perhaps the best justice which can currently be achieved for the battlefield mercy killer is to bring no prosecution. After the battle of Goose Green, the Argentine hostages were being supervised whilst they moved their ammunition to safer storage when an accident led to an explosion which immediately engulfed three men and caused another to fall into the flames. A British Sergeant, a medic, managed to get close to the burning Prisoner of War, but his multiple attempts to save him failed as the fire was too hot.

> 'About four to five minutes after the explosion and start of the intense fire, the Sergeant, who was in considerable distress because he thought he saw the man moving and could not reach him, obtained a self-loading rifle and fired three or four shots, with the intention of ending his [the victim's]

[106] Director of Public Prosecutions *Policy for Prosecuting Cases of Assisting or Encouraging Suicide* London: UK http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html. Accessed 25/6/2012
[107] ibid. at 7 para. 45(2)

> apparently intense suffering because he considered that he was beyond further assistance and in agony.'[108]

This led to an immediate informal investigation by the British authorities in which Argentine officers accepted the medic's explanation and did not pursue the matter.[109] A formal investigation soon followed,[110] in which the UK Government, after considering all of the facts and after scrutiny by relevant legal authorities, concluded that proceedings would not be instigated against any individual involved in the death. The inquiry found that the medic believed that the burning prisoner of war (POW) was alive and beyond the point where medical assistance could have any benefit, and that he acted out of mercy. In not bringing proceedings against him they 'wish[ed] to spare him further agony and exonerate him for his act of mercy.'[111]

Deciding not to prosecute in such cases bypasses the other uncertainties which are evident when the soldier is tried under civil domestic law in the court martial. Whilst the law continues to offer inadequate solutions for dealing with mercy killers in general, the best justice which can be offered to the battlefield mercy killer is not to hold them to account under a legal system which offers the possibility of 'justice' which is too harsh, not specific and undeserved.

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[108] United Kingdom, British Report in Accordance with Art. 121 of the Third Geneva Convention relative to the treatment of prisoners of war of 12th August 1949, *Explosion of Ordinance on 1st June 1982 in which Four Argentine Soldiers Died and Eight Others were Injured While in Custody of British Forces at Goose Green East* Falkland (1982) 2

[109] ibid. at) 3

[110] In accordance with Geneva Convention relative to the treatment of POWs 1949 Art.121 Every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, shall immediately be followed by an official enquiry by the detaining power.

[111] ibid.

8.6 The Creation of a New Offence to Deliver Justice to the Soldier

This thesis has focused on the inadequacies of the law to justly treat the mercy killing soldier. First, this can be caused via the mode of trial by which the soldier is tried; in the civil criminal courts the soldier is judged by persons who may lack the contextual understanding of their actions because of the isolated nature of military life. Meanwhile, in the military courts the soldier's trial may be prejudiced by the need to maintain, first, military discipline, and second the reputation of the armed forces and the mission upon which they are engaged. However, both procedures have certain characteristics which could potentially be desirable when trying the soldier who kills from mercy on the battlefield.

Furthermore, the legal doctrines currently applied to the soldier accused of a battlefield mercy killing and under which the courts are bound to try the soldier, deliver only institutional justice to the soldier, which does not correspond to the soldier's degree of moral responsibility.[112] First, the civil criminal law imposes the general offence of murder, which is far too wide a concept to appropriately depict the social justice in this situation. In lieu of this, in cases where the courts and prosecution perceive that the justice delivered under the rules will cause a unique injustice, the courts apply bastardised doctrines such as diminished responsibility or misapply other offences such as assisted suicide, in order to dilute the consequences of a murder conviction. As a result, the mercy killer who has acted from compassion will be wrongly stigmatized via conviction which incorrectly indicates the nature of his act. For instance, if convicted with murder, such a label incorrectly signifies attributes of violence and aggression and not the battlefield mercy killer's primary motive, which was compassion.

[112] See Chapter 3, 3.1 & 3.4

Additionally, legal doctrines developed in the context of civilian peacetime, are at best unhelpful and at their worst run the risk of trivializing the actions of a soldier who kills from compassion during war. When acts during war are labelled similarly to actions during peace there is a risk of interpreting such acts comparably to instances when the same conviction is passed during peacetime on a civilian.[113] In turn this labelling ignores and fails to convey the wider circumstances of battle and war which influence the soldier when they commit the act.

In an attempt to outline a possible means by which a better justice can be achieved in such circumstances, the more suitable aspects of both of the previously mentioned means of trial and legal doctrines shall be adopted and added to. Of the two systems discussed, the Court Martial offers the most suitable means to hear cases of battlefield mercy killings by soldiers. Court Martial trial offers several distinguishing features for the soldier. First, most importantly, military personnel populate the Board, the equivalent to the Jury in civil criminal procedures. This provides the soldier with the opportunity to be tried by a jury of his peers, unlike the civil criminal courts where the jury represents the civilian population of the local area.[114]

This allows the soldier to be tried by those who may have a better insight and comprehension concerning the circumstances of such a killing. They are better able to consider the soldier's actions in context and can perceive many more of the factors which brought him to that eventuality than the lay person. These factors include the militaristic culture which has informed the soldier's actions, the stress of combat and the duality of the soldiers role in both being required to protect or to kill the same person dependent upon circumstances which can change in an instant, but nonetheless influence the soldier's decision making abilities.

[113] See Chapter 3, 3.2, 3.4 & 3.5
[114] See Chapter 7, 7.8.

> '…in criminal cases it is not only the right and duty of juries to judge what are the facts, what is the law and what was the moral intent of the accused; but that is also their right, and their primary and paramount duty, to judge of the injustice of law,...'[115]

This system allows a better evaluation and consideration of the soldier's moral responsibility, which as discussed throughout,[116] can only be properly gauged by first referencing all of the factors which are in play upon the individual, including his past relevant experiences and then, afterwards, considering his intention to kill the mortally wounded person, rather than focusing on his immediate intention alone. This results in a narrow interpretation of the act, consequently generalising the condemnation of an actor's criminal actions as simply right or wrong. The argument against widening the mental element of the crime focuses on the fact that that the common law does not take into account motive, but this is now a perverse fiction. The Director of Public Prosecutors Guidelines on Assisted Suicide clearly state the existence of compassion on the accused's behalf as a factor in deciding whether or not to instigate prosecution,[117] whilst the court, especially in unique situations, have accepted that, 'motive generally throws light on intention…'.[118] Applying such narrow methods to morally and legally complex and unique cases, such as the battlefield mercy killing, produce judgments which are out of sync with concepts of social justice, or poorly fashioned adjustments of existing law to allow for the anomaly.

Clearly, negative attributes can also be attached to the system of Court Martial.[119] But to an extent these are features of any system whereby one person or section of society is asked to judge another; the effect of prejudice and bias upon decision making is universal to all

[115] Spooner L *An Essay on Trial by Jury* (Library of Alexandria 2000)
[116] See Chapter 8, 8.3
[117] See Chapter 8, 8.4
[118] *R* v *Court* [1988] 2 All ER 221 per Lord Grifftihs at 224
[119] See Chapter 7, 7.8

people, whether they are members of the military or not. Of course, these prejudices could be accentuated in such an ordered social structure such as the military, but they could equally be offset by the importance of understanding the shared nature of soldier's collective experiences of training, fighting and living within the Armed Forces when assessing the moral nature of the soldier's actions. For these reasons, whilst not perfect, it remains the best means by which to evaluate how far the soldier should be held responsible.

However, before the case proceeds to trial, a decision must be made to prosecute the defendant. As discussed previously,[120] a battlefield mercy killing as outlined in this thesis fulfils many of the public interest grounds favouring no prosecution of the soldier; yet it also fulfils many of the grounds for prosecuting the soldier. It has been forwarded that because of their complexity and unique nature, such actions should be considered as offences which should only be prosecuted with the special consent of the DPP or Attorney General. The background and precedent for such considerations have been the focus of prior discussion in this chapter,[121] but such considerations should necessarily be readdressed here, as they would form a common sense basis for any future prosecutions. Questions specifically relevant to whether or not any prosecution should commence may consider whether any complaint has been raised about the battlefield killing; who raised that complaint; the proximity to recent combat in which the killing took place; the nature of that combat; the rank of the killer; if they were of commanding rank what was the nature of their responsibility to the men under their command?. Evidence about the nature of the victims condition should also be considered, particularly whether they were showing signs of a particularly high level of suffering due to their mortal wounds. Simple questions such as these could help to determine whether the action was one of compassion and necessity rather than of callousness which was caused by a break down in order and respect for military law.

[120] See Chapter 8, 8.5
[121] ibid.

Notwithstanding that there is a decision to prosecute, and that the trial should take place under Court Marital, it should then be considered which legal doctrine best would apply to the mercy killing soldier. The greatest confusion caused by the legal approach to mercy killings has been the patchwork of doctrines that have been applied to the action during times of peace.[122] Convictions range from murder to manslaughter via diminished responsibility and sometimes even assisted suicide. None fit the battlefield mercy killing adequately, either reflecting to much moral condemnation, attributing the wrong mental condition to the soldier or simply because the act does not meet all components of the offence respectively. No current offence developed in response to peacetime actions is appropriate to judge an act of battlefield mercy killing. This could be remedied by either the development of a distinct defence for the act of mercy killing or the creation and adoption of a new law to govern battlefield mercy killings.

Dealing with the concept of a defence first, it should be noted that the primary concern of a criminal defence is to stop an injustice which would result under the institutional rules if some other factor was not properly taken into account. Such defences are either a total defence, such as self-defence, or have a mitigating effect on the possible conviction, such as loss of control. The validity of a defence is normally the subject of consideration at trial. In the case of the battlefield mercy killing, this introduces an important safeguard, as the soldier's version of events and their credibility is examined in court, reducing the possibility that the defence would be successfully invoked by people not deserving of it.

The traditional objection to any defence of 'mercy' killing has long been that,

[122] See Chapter 4

> 'It will be extremely difficult to distinguish killings where the motive was merciful from those were it was not.'[123]

However, basing the defence on the natural and admirable human emotion of compassion,[124] would not be a unique development for a defence in criminal law. If the mercy killing is a reasonable expression of this compassion then it can be comparable to other defences such as duress and self-defence. For instance, fear is an equally natural emotion and when the accused's actions are a reasonable expression of it, either in committing a crime from fear of violence against them or others if they resist, or committing an assault to fend off that violence the court allow the defence of duress or self-defence.[125]

A defence of mercy killing could be defined as follows;

> 'Where a defendant is found to have killed the victim out of compassion excited by the circumstances they found themselves, and where their actions were a reasonable expression of that emotion.'[126]

Such a defence would go some way to safeguarding against incorrect labelling and subsequent stigmatising of the defendant. Whether or not it should offer a total defence is a more interesting concept. Whether there is no blame in the defendant's conduct or some blame in their conduct are matters which could affect the applicability of the defence. It may be the case that the circumstances of the battlefield mercy killing give rise reason to punish the defendant to some degree, yet their actions do not portray anywhere near the level of moral responsibility attributable under a murder conviction.[127] For instance, it may be shown

[123] Report of the Royal Commission On Capital Punishment (1953) CMND 8932 para 179.
[124] Jeremy Horder 'Mercy Killings: Some Reflections on Beecham's Case' [1988] 52 *Journal of Criminal Law* 309 311
[125] For the courts acceptance of duress see *R* v *Steane* [1947] KB 997. For considerations of self-defence see Chapter 4.3
[126] Based loosely on J. Horder's formulation of the defence to assisted suicide, found in Jeremy Horder 'Mercy Killings: Some Reflections on Beecham's Case' [1988] 52 *Journal of Criminal Law* 309 311
[127] KJM Smith 'Assisting Suicide' [1983] *Criminal Law Review* 579

they acted against orders, or that their motive was also influenced by other less praiseworthy considerations. If the defence were complete in its application then many soldiers whose actions do not warrant a murder conviction would not be able to utilise it successfully.

A more preferable method to minimise injustice, would be to create a new offence. The creation of a new offence would signify a break from the previous confusion caused by using the traditional legal approach, compared to the creation of a special defence which is aimed at bandaging some of its ill effects.

A new offence would also have the benefit of clearly signifying the soldier's actions, which in turn would allow the correct amount of social condemnation to be attached to them. As English law sees no difference between euthanasia and other types of killing,[128] the creation of a new category of homicide would be required. The offence of Combatant Induced Non – Combat Homicide is forwarded as such an example.

> Whosoever kills a seriously wounded enemy soldier who is *hors du combat*, from compassion with the reasonable belief that such an action is easing their suffering; shall be guilty of the offence of Combatant Induced Non- Combat Homicide.

The meaning of 'Combat Induced' can be explained based on the previous discussion which forwarded that combatants take risks with their lives when engaging in battle, knowing that serious injury or death is a distinct consequence.[129] The phrase 'Combat Induced' reflects this acceptance on the soldier's behalf, and is intended to convey that the killing came about in response to their injuries which they were aware they could suffer.

[128] A Grubb 'Euthanasia in England – A Law Lacking Compassion' [2001] 8 *European Journal of Health* 89, 90
[129] See Chapter 5, 5.5 & 5.6

It is designed uniquely for combat, not civilian, scenarios. By removing such an offence from the civilian arena; clearly relating it to combat and between combatants the name denotes exactly what action the soldier has committed; he has killed an enemy soldier, outside of combat in part due to that soldier's actions. Unlike murder, which insinuates too much moral condemnation or manslaughter via diminished responsibility which presupposes mental deterioration, this label is clear and factual and offers a far better representation of the soldier's actions. Further clarification may be needed over certain aspects of such an offence, for instance, for an appropriate definition of the meaning of 'seriously wounded', but it is envisioned that the offence would only cover those who kill combatants from a reasonable and genuine belief that the victim was mortally wounded.

By making sentencing discretionary, the soldier's punishment will depend on the circumstances or absence of circumstances surrounding the killing. Full consideration of the facts should be given by the Board, and Judge Advocate and the entirety of the circumstances, both mitigating and aggravating, should help to influence to what extent the soldier and his actions should be commendable and to what extent they should be condemnable, even to a custodial sentence spanning years. However, it is not posited that the maximum penalty should be life imprisonment. In cases where the actions of the soldier likely warrant such a sentence, it is difficult to assume that the action was truly or primarily a mercy killing and in such instances where the punishment is to be so great it is likely that the intentions and motive of the killer best fit a charge of murder. If such actions were charged and convicted using the new offence, and a term of life imprisonment was passed, then the offences ability to express a far lower level of responsibility and wrong doing would be nullified.

A conviction for Combatant Induced Non- Combat Homicide is still a criminal conviction, and as such it still possesses the criminal stigma. But if such an offence is charged correctly then it will only apply to those who act appropriately, and who are influenced by compassion

and sympathy. The stigma attached to it is not as heavy as being charged with a war crime or serious assault and the discretionary powers of sentence allow an appropriate punishment to be passed. Nonetheless, some stigma is necessary for the pragmatic reason that killing non-combatants during war is a difficult business to assess. Some such killings are clearly reprehensible,[130] others are not so clear cut;[131] the only way to ensure that unacceptable killings are not justified on dubious grounds is to apply a blanket ban on all such killings. However, to then punish all killings, regardless of circumstance and motive, using the same offence is where an otherwise understandably pragmatic approach becomes less practical and more arbitrary.

Nor is it ideal that, that a conviction of Combatant Induced Non-Combat Homicide in the Court Martial, is likely to be accompanied by some type of military charge for it is likely that, in committing the act, the soldier responsible would have breached his orders in some way. However, military discipline must be preserved, not only to maintain an effective fighting force, but also to ensure that men do not overstep the moral boundaries which are quickly blurred during combat, and where a soldier killing from mercy and a soldier killing from a less praiseworthy motive are difficult to differentiate. It is assumed that the level of penalty delivered in response to a conviction of Combatant Induced Non-Combat Homicide would be reflected in the severity of the military charges against the soldier.

The creation of a new offence is not a perfect solution but it does offer a fairer, more just and more consistent means by which to judge the soldier. When an infinite amount of possibilities and circumstances exist surrounding how any action may take place, it is absurd to expect a single offence, such as murder, to adequately and ideally reflect these circumstances and the moral revulsion attached to them. By giving wider scope to how the soldier involved in a

[130] See Chapter 3, 3.3
[131] *United States v Cardenas* 29 (Headquarters, 1st Cavalry Division Jan 14th 2004) & *United States v Maynulet* No. 04-9847,242-243 (Headquarters 1st Armoured Division Apr. 1 2004)

battlefield mercy killing can be charged, and dealing with that soldier exclusively in the military courts, his actions will be understood in context and can be labelled reflecting the actions which actually took place rather than casting a dark shadow over the soldier's character in the form of a murder conviction.

8.6 Conclusion

Unfortunately, despite the public acceptance of mercy killing, the current legislature continues to, 'take no steps to translate the new morality into the concepts of law.'[132] Domestically, this has led to uncertainty as to how people involved with mercy killings, originating from both voluntary or involuntary requests, shall be treated, and as such the 'current legal status of assisted dying is inadequate and incoherent…'[133] When the domestic law is applied to the battlefield mercy killer, the uncertainty and incoherence of the domestic approach has the opportunity to serve a great injustice upon the soldier who operates in an culture isolated from common law developments.

Conflict and military training are such extreme experiences that the effects of both require judicial consideration. Trying the soldier under the common law is not effective, as neither the law nor the jury are equipped to judge the battlefield mercy killer. There are, however, some broad considerations taken into account with domestic mercy killers which should also be considered when the soldier stands trial. For instance, the mental state of the defendant, which can be affected by both the trauma of conflict and the military culture the soldier operates within, and which dehumanises the enemy, is a relevant factor. Also comparable is the nature of the relationship with the victim, which is influenced by bonds of shared

[132] G Williams 'Mercy Killing Legislation – A Rejoinder' [1958] 43(1) *Minnesota Law Review* 1 2
[133] The Commission on Assisted Dying *Final Report* (Demos London 2011) 152

experience which soldiers have known since time immemorial. The battlefield mercy killing should be considered as a whole, and should include a focus on the circumstances of the death, the prior influences upon the soldier, including their perspective on the taboo of killing another human, and the frenzy of battle which can influence the soldier's decision making. Justice in this circumstance is very much dependant on treating each case individually and looking further than the intention of the defendant as means to correctly judge his actions.

Current criminal law is confusing in its application and attaches inappropriate stigma to the battlefield mercy killer when the charge is murder. The moral perception of murder differs greatly from that which is attached to mercy killing, and in passing a mandatory life sentence a great injustice is caused. This is due to the focus on intention and downplaying motive, coupled with the false preoccupation with the sanctity of life principle. However, comparing how far actions consented to or not consented to can be legitimated in medical practice is helpful to gain a greater appreciation of the kinds of actions which result in death but through legal sophistry prove that the sanctity of life principle is not absolute, as public opinion towards euthanasia already shows. Unfortunately, the soldier's actions are not compatible with the behaviour of medical practitioners who act in the patient's best interests or under the doctrine of double effect, when they withdraw, withhold or provide pain relief treatment which consequently causes death.

Trying the soldier under a court martial bypasses the problem of cultural misunderstandings between the mercy killer and the jury, but potentially poses risks to the justice that the soldier receives because of the threat of inherent bias and the prioritising of military discipline over the criminal law. However, as true justice can only be delivered through an understanding of all of the circumstances in which the event took place, the court martial, deliberated upon by

a Board of officers, offers the soldier a chance to be tried by fellow military men who understand the culture in which he operates.

Overall, the main concern is that the potential punishment, especially following a murder charge, exaggerates the moral culpability that should be attributed to the battlefield mercy killer. Any punishment of the soldier can only be justified on the grounds that he deserved such a punishment, but such a view is not aligned with modern society's norms. It is not to say that current law is bad law, it serves its purpose perfectly adequately, but rather the use of the current criminal law serves an injustice to the battlefield mercy killer. The principles which inform the law simply do not serve to effectively deal with this type of action, which originates from motives, such as compassion, which clash with the traditional motives justifying the prohibition.

Because of the conflicting, incoherent laws and principles combined with the wholly different experiences of the soldier applying any current common law will potentially create an injustice where someone is punished for committing a morally commendable, or at least an excusable act. Unless a specific law is enacted which deals with mercy killings of this nature, it will be hard to marry the actions, motives, intentions and circumstances of the soldier and the situation with current legal thinking. Furthermore, there is strong argument to suggest that it is not in the public interest to bring a prosecution for murder or manslaughter against the soldier who has delivered a coup de grace. The UK government has in circumstances of a similar nature exonerated such behaviour,[134] and because of the legal mire in which the soldier may be forced to wallow, it is argued that in cases of legitimate battlefield mercy cases this should be the correct and best way to give justice to the soldier.

[134] n.108 above.

Of course, there is potential for abuses to occur, it is not hard to envision a situation in which soldiers claim that they killed a protected person from compassion to mask some atrocity or brutality they have enacted upon a protected person. However, treating each case individually will minimise the possibility of such abuse whilst delivering a more appropriate justice to those who are forced to make a hard choice between their duty to impractical legal restraints and their duty to both their fellow soldier and their moral convictions influenced by long tradition.

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