

Just War

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'That WAS a narrow escape!' said Alice, a good deal frightened at the sudden change, but very glad to find herself still in existence; 'and now for the garden!' and she ran with all speed back to the little door: but, alas! the little door was shut again, and the little golden key was lying on the glass table as before, 'and things are worse than ever,' thought the poor child, 'for I never was so small as this before, never! And I declare it's too bad, that it is!'

Lewis Carroll, Alice's Adventures in Wonderland

We will remember September 11th, 2002, as a new day of infamy. Like Pearl Harbor, the attack signaled the beginning of a new war. Unlike Pearl Harbor, the targets on 9/11 were civilians, the weapons were jetliners, and *in a sense* we all became victims of the first war in a new age of conflict.

Never in our history have we felt so small or so locked out of our "old" life in America. And things may well become *worse than ever*, especially if we do not realize how narrow of an escape September 11th was.

For, despite the thousands killed and the continuing repercussions of that day, we were also quite *lucky*. Lucky the jetliners were not carrying "dirty" bombs laced with radioactive debris, or saturated with chemical or biological agents to spread throughout metropolitan New York City killing *millions*. We must now *realize* that we have had a very narrow escape from true disaster, and take seriously the intrinsic warning of 9/11—the warning that the *impossible* happened. We must learn to remember that the only thing keeping the "worst case scenario" of weapons of mass destruction loosed on the populace is not a lack of *will* or *desire* on the part of the terrorists; it is merely a lack of *opportunity*. We are in a New Age of Warfare, and the warning from 9/11 is that this new type of warfare is something we are not only unprepared for, but one that we *cannot* lose.

The quickest way to end a war is to lose it.

George Orwell

Section 1: Introduction

Since September 11th a global war on terrorism has been declared, fought, supported, criticized, protested, condemned, and argued against. Largely, the arguments for and the criticisms against the War on Terror rely upon an understanding of traditional Just War Theory. However, whether these arguments are for or against the justness of the current war, they arguments are *unverifiable*. This *new war* is an example of an entirely new *type* of war which does not follow the standards outlined in the traditional theory. And, since it does not and can not follow the "rules" of traditional Just War Theory, it has often been *mistakenly* deemed an *unjust* war. This is a mistake of the worst kind, for we must give the new war an accurate appraisal before condoning or condemning it.

Traditional Just War Theory *cannot* account for the new age of warfare because it was never designed to do so. It is as outmoded a way of thinking as assuming the Earth is the center of the galaxy. And, if you use the traditional account, you are attempting to

judge the nature of an orange by comparing it to the model of an apple. Since square pegs do not fit in round holes we are faced with a new challenge—that of creating a *new theory* of Just War for the new ways current and future wars will be fought. In other words, it is time we created some square holes.

This paper, however, is *not* that exercise of construction; it is not a *New Just War Theory*¹. Instead, it is an examination of the *traditional* theory and it is an attempt to show how and why it is no longer applicable to modern warfare. Though this is a philosophical paper, and deals with philosophical issues, I have chosen to avoid muddying into the various ethical frameworks to argue their specific interpretations and/or possible benefits. By ignoring the Consequentialist or Utilitarian versions (for example) we can deal directly with the merit of *each* problem in the most general sense. This is the first step towards creating a viable New JWT, and it is the only important thing now. Later, once the framework is developed, we will be able to wrangle over the finer points of a Realist critique, or a Utilitarian solution.

Therefore, until we have such a guideline, I urge you to *ignore* all the thousands of paper and Web articles proclaiming either the justness or unjustness of the War on Terror. They are incoherent—they are using the wrong scale for judgment. The ideology of traditional Just War Theory was outdated the day the Cold War ended, and certainly should have been buried in the rubble of 9/11.

Aquinas, Grotius, and all others could not foresee the future, nor create a theory capable of accounting for radically dissimilar future wars. They were as human as anyone, and likewise I don't think we can accurately theorize about JWT for war 500 years from now. To hold ourselves to their traditional model due to history or weight of current convention is irrational.

Furthermore, calling for the creation of a new model does not inherently lend support to the current war. I am not revising JWT to pardon or condemn but rather I am revising JWT as an entirely *distinct* enterprise—despite the fact that it is the *existence* of this current war that *causes* us to revise our theory. The introduction of the heliocentric model did not *make the sun the center*; it merely reflected the *reality* of the situation. So too, a new Just War Theory should be able to account for the recent face of warfare without making the War on Terror a *just war* by definition. We do not necessarily “back-door” a justification for the current war simply by creating a new standard. When some other new and terrible type of war develops, then we will have to re-adjust the theory again, but that is the nature of theories. They are correct as long as they fit and are useful to the application they were constructed for.

Again, in this paper I am *only* demonstrating how the radically different means and methods of warfare now require a new scale of judgment. This is a wake-up call to bring attention to the need for a new scale. Once that scale is established, then we can assess the justness or unjustness of wars in this era—including the War on Terror.

Section 1.1: the Basics of Just War Theory (*Justum Bellum*)

As a focus of both national and international scrutiny, the war against terrorism is being fought like none other in history. Yet by most accounts all ancient civilizations

¹ I will propose a *New Just War Theory* as part of my upcoming dissertation.

possessing standardized military organizations that fought in extended campaigns had some set system of guidelines to regulate the need to go to war, and ways to control the conduct of the soldiers. The chivalric code of European knights and the *bushido* code of the Japanese samurai are notable attempts to describe the means, methods, and practices of socially acceptable warfare. At least as far back as Cicero philosophers have engaged in the pursuit of studying the nature of warfare in an effort to outline its moral implications, and since then the proliferation and clarification of philosophical positions have developed their own views of moral warfare.

Though there are those skeptics (masquerading as so-called “realists”) who deny that morality can coexist with war this paper implicitly assumes, but will not defend, the belief that they are wrong². Thus, for the sake of argument, we will assume that the nature of warfare is not incompatible within the more general framework of human morality.

Just war theory deals with the justification of how and why wars are fought. The justification can be either theoretical or historical. The theoretical aspect is concerned with ethically justifying war and forms of warfare. The historical aspect, or the “just war tradition” deals with the historical body of rules of agreements applied (or at least existing) in various wars across the ages...It is the role of ethics to examine these institutional agreements for their philosophical coherence as well as to *inquire into whether aspects of the conventions ought to be changed*.³

The traditional model of just war theory begins with Saint Thomas Aquinas’ outline for the justification of war and the permissible actions in war as found in the *Summa Theologicae*. It undergoes various criticisms and alterations by Francisco de Victoria and Hugo Grotius in the 15th century, and was later revived by contemporary philosophers like Elizabeth Anscombe, Michael Walzer, Thomas Nagel, and Richard Norman who felt the threats in the nuclear age and the war in Vietnam demanded a return to just war theory.

Just war theory distinguishes two sets of norms, those for weighing the **justice of war** (*jus ad bellum*) from the norms regulating **conduct in war** (*jus ad bello*). “The two are by no means mutually exclusive, but they offer a set of moral guidelines for waging war that are neither unrestricted nor too restrictive. *The problem for ethics involves expounding the guidelines in particular wars or situations*.”⁴

Section 1.2: *Jus ad Bellum*

The criteria for the justice of war are typically: 1) having a just cause, 2) declared by a rightful authority, 3) undertaken out of a rightful intention, 4) having a reasonable chance

² I will say only this to the “Realists”, the reality of war is that bad things do happen, but the very existence of war conventions, and the trials and punishment of war crimes seems to denote a correlation between morality and war in reality.

³ From the *Internet Encyclopedia of Philosophy*; <http://www.utm.edu/research/iep/j/justwar.htm> (*Italics mine*).

⁴ From the *Internet Encyclopedia of Philosophy*; <http://www.utm.edu/research/iep/j/justwar.htm> (*Italics mine*).

of success, 5) the proportionality of the means used is justified by the ends desired and lastly, 6) undertaken only as a last resort.

All of this, however, presupposes that the conflict occurs between *sovereign nation states*, and this is obviously not the case in the war against terrorism. In this war we are faced either with quasi-states like Palestine, or terrorist organizations composed of small, geographically-scattered groups or even *individual* terrorists who can be hiding in caves or downtown hotels anywhere on the globe. And, obviously, these organizations or individuals are not entities with broad and well-defined national borders. Instead, they must be using some sovereign nation(s) as their base of operations. Possibly they are hiding *with the support* of the government, or perhaps without the government *even being aware* that they are there.

Before we can address the six standard criteria of JWT we must consider the general implications for conducting a just war against terrorist regimes and organizations. Terrorism is not defined by national boundaries but instead a shared and common *ideology* is what links the terrorists together. When we undertake the task of examining the justice of war against an ideology and its followers, we are faced with a very different set of problems than when confronted by a conflict of nations. The following are some relevant questions relating to new difficulties with *asymmetrical* warfare:

In what capacity and by what right can we wage war against roving groups of aggressors? Can we pursue them across international borders? Do we need permission? What if a sovereign nation denies us access to terrorists within its territory, or denies us passage in pursuit of fleeing terrorists? What recourse do we have if a neutral nation denies us the ability to use of our military bases to launch counter-strikes or preemptive raids from their lands? How much of our full intentions must we declare beforehand? What of covert operations—necessary in a modern war on terrorism—must we get international agreement before acting? What if time is critical? Furthermore, is an *individual* an acceptable target? Can we pursue and eliminate all members of the terrorist group? How about selected key personnel? Does warfare permit assassination? Should terrorists be counted as criminals or soldiers or something else? Do they deserve POW status? Do they deserve a military tribunal? Is terrorism a war crime?

Since we are no longer dealing solely with conflict between sovereign nation states we need to extend and redefine just war theory so that it is relevant and offers support for answers to hard decisions.

Reaction/Opinion

It must be made clear that in asymmetrical conflict the sovereign nation has the right to pursue its attackers across international borders unless or until the perpetrators are handed over by any “hosting” nation. If the nation is unwilling or unable to turn over the terrorists, then it is accountable for any and all damages their “guests” cause. Terrorists are *not* merely criminals, *super-criminals*⁵, on par with Hitler, Stalin and Pol Pot. Criminals are defined by their will to live, typically they think they will never get caught, and they certainly do not *intend* their death when they set about planning and

⁵ I do not mean this to be flattering, or akin to “criminal mastermind”, I mean ‘super-criminal’ as a measure of the magnitude of their crimes against humanity.

conducting their criminal act⁶. There are no suicide bank robbers. Terrorists play at a level beyond crime, they not only target innocent civilians but they plan for maximal damage, take credit for their attacks, and hurl themselves into suicide attacks with no concern for *any* life. Terrorists are literally beyond the law and punishable only by military intervention, be it war or “international police-actions”. Furthermore, only large-scale, coordinated multinational global efforts will root them out. Asking permission to pursue should be a formality, part of a pre-arranged anti-terror agreement between *all* sovereign nations. We must establish a mutual support pact with a networked means of coordinating the international search effort, similar but greater than Interpol. Neutral nations should see that their denial of critical military bases may be interpreted as aiding and abetting terrorism, and any sanctions or repercussions that result from their denial of base usage should be expected. Furthermore, if the terrorists cause damage due to the denial of use, than the withholding nation is fully responsible for any and all reparations and/or subsequent actions against them. Of course, negotiation should always be the first route explored in attempting to capture terrorists in other nations, but if time or need is critical then there should be an international “right of way” given to pursue.

Section 1.2.1: *Jus ad Bellum*, Just Cause

Just cause is easiest to establish in cases of self-defense as theorists typically agree that initiating acts of aggression warrants a response. But defining ‘aggression’ is difficult enough in a “standard” war, let alone in the arena of asymmetrical conflict. Standard theory still wrangles over whether aggression can include non-physical but socially or economically threatening actions (embargoes, etc.), so what about the new problems of terrorism?

Do terrorist claims of “aggression” by the West, demonstrated by “hostile” and “invasive” economic policies, proliferation of military bases in countries of the “holy land” seriously count as aggression *per se*? Or does self-defense only apply to sovereign *nations*? What rights do nations have that organizations and quasi-states do not? What is the extent of national self-defense? Can a nation use self-defense to preemptively counter aggression that has been planned, but has not yet been carried out by terrorists? Must we wait to be victims before we can respond? How far does the WTC attack go towards justifying extended actions against terrorist networks worldwide? Are these still acts of national “self-defense” three months down the road? Three years? Three decades? If terrorism is an international *crime*? Or is the very nature of terrorism an act of war? What about aggression as cyber-terrorism? Is there just cause in waging war against terrorists who cause massive denial-of-service outages that cost millions of dollars in economic damage? What if they shut down the power grid, and patients die in hospitals?

Reaction/Opinion

Nation states *do* enjoy rights that quasi-states and mere organizations do not. Even the UN and NATO do not have the rights or responsibilities that nations enjoy. Terrorism,

⁶ A case could be made that the recent rash of school shootings, Columbine and Erfurt for example, are cases of domestic terrorism, and not merely criminal acts.

by definition⁷, is an unwarranted attack on a nation by individuals, groups, or sub-national entities. There can be no justification for terrorist acts, and they can not claim self-defense, nor claim they were reacting to aggression. Self-defense refers only to entities who are holders of *both* rights and responsibilities⁸, thus individuals may defend themselves from another individual or group, and nations can defend themselves from other nations or non-sovereign threats. Terrorist groups, since they are not rights-holding entities, get no such right of self defense, though they are always fully responsible for their actions.

National self-defense should be *extended* to account for future acts of aggression when they are *reasonably suspected* of occurring. This is somewhat less restrictive than the “imminent threat” principle. In terrorism, there will be no massing of tanks or ships to forewarn of an attack, instead there may only be the barest of clues in intelligence reports, and some idea of what is at stake. As long as there is a supportable, reasonable belief that there is a genuine threat (intention, not action), it is sufficient to invoke the self-defense clause and launch a pre-emptive strike against the terrorists. Waiting until after the WTC attack means there is nothing left to prevent, so self-defense is, by that time, rather moot.

Terrorism is by nature an act of war, it is far beyond the normal expectations of a legal system designed with “typical” crimes and criminals in mind, therefore war tribunals are more properly equipped to deal with the serious nature of these offences.

Non-physical terrorist attacks are still deserving of both pre-emptive strikes and retributive (physical/military) action. Significant economic damage, with repercussions that affect the daily lives of innocent civilians can be considered an aggressive and violent act upon victims’ lives, futures, holdings, and securities, and is therefore actionable.

Section 1.2.2: *Jus ad Bellum*, Rightful Authority

In most all accounts, rightful authority is reserved only for sovereign nations. The debate has since shifted somewhat to try to account for what constitutes a “sovereign nation” and what are the limits of the term⁹.

The newest extension to consider in light of the new war is whether international organizations, such as the United Nations or the North Atlantic Treaty Organization can also constitute rightful authority, and whether they can declare and engage in just war against terrorism *as a collective*, or as the organization *itself* as an entity above and distinct from the member nations. Can the UN act *on behalf* of other nations who have not requested help? Finally, what of quasi-states like the Palestinian territory, and are there ever “illegitimate” nation states like the Taliban or Saddam’s regime?

Reaction/Opinion

⁷ I have a definition supporting this, and I believe others make similar claims.

⁸ Corporations are examples entities that may possess some rights in certain areas, but lack corresponding responsibilities.

⁹ For example, was the Vichy regime a sovereign nation? Was Hitler’s Reich? What about America during and shortly after the Revolutionary War?

It should be clear that in cases of terrorism international organizations *may* be considered rightful authorities and do possess the power to declare and fight a war on terrorism. Though not sovereign nations, these organizations are composed of bodies of nations. Organizations such as terrorist groups, which are formed and founded around a central ideology are *not* legitimate authority and possess no such right to declare war.

There are “illegitimate” nation states, and have been in the past. A more function/ability-derived model or a Lockean account of nationhood is preferred over a Hobbesian-type “ultimate authority” model. A corrupt regime (one that is not directed by the will of the people, and does not abide by abstract laws, etc.) cannot be considered a sovereign state, regardless of recognition by other, similar states, and has no rightful authority. Meaning, it can be legitimately opposed (externally and internally) in case of civil unrest or revolt, and if it is the will of the people to remove the corrupt regime then other nations may intervene and help topple the old regime with one fitting the model of a true sovereign nation.

Section 1.2.3: *Jus ad Bellum*, Rightful Intention

Rightful intention focuses on both the practicalities and the consequences of engaging in warfare. Essentially, rightful intention closely parallels the notion of “just cause”. To engage in rightful intention is perhaps better described by giving examples of what is *not* allowed. Things such as: war for mere expansion, war for benefit without true threat (i.e. creating or embellishing an incident to cover a move for resources or other hidden motives), war by proxy (where innocents are used merely as a means) and war for personal motivations (Hitler) or for political distraction from domestic pressures and issues. This is not an exhaustive list, but serves well enough as a general guideline.

Typically, rightful intention is easy to accept at first glance, and only becomes a quagmire as one delves ever deeper into possible reasons and motivations for going to war. At some point it will seem that all wars relate to self-interest in one way or another, but there should be reasonable limits placed on just how far self-interest goes before it links up with other, more altruistic or more generally acceptable motivations

Reaction/Opinion

Despite what many across the world believe and have piously argued against, 9/11 is a perfect example of rightful intention. It was begun as an extension of self defense and continues to serve as a preventative measure. By contrast, it would be much more difficult to argue for rightful intention in the Gulf War of 1991, or entering the Vietnam War as a response to the Gulf of Tonkin incident.

It could be argued that all of the talk of rightful intention will eventually boil down to national self interest, and there may be some truth to this line of thinking. But then again, *any* act of self preservation could be construed as an example of self interest if pushed far enough. The current campaigns in the War on Terror did *not* come about because we have acted out of retribution or vengeance¹⁰, but rather it is centered on the

¹⁰ Many soldiers and civilians may want or desire vengeance, and they may feel the appropriate emotional correlates, but the existence of these emotive qualities does not nullify the overriding evidence for justness in our rightful intention.

rightful intention that we *prevent* a similar or worse atrocity in the future. John R. Searle wrote the following supporting intuition in an Op Ed page following the WTC attack.

Our inability to describe the situation is a symptom of a deeper misperception. Most of the public discussion I have heard in both the United States and Europe is based on the belief that because our actions are a result of the eleventh of September, that is what they are about, that we should primarily be seeking justice or revenge or some such. Nothing could be farther from the truth.

Our actions should be directed at, for example, the 18th of July 2008. On that date six teams of terrorists working in six major American cities simultaneously detonate nuclear bombs...the attack kills over five million Americans...Those who wish to kill us learn from their mistakes...Given the certainty that these people wish to destroy us, and the probability that they will use increasingly effective explosive, chemical, biological, and nuclear means to do it, what is an intelligent response on our part?

The intelligent response, which we have begun, is a global campaign against terrorism and terror-supporting regimes. This is not a war against Islam, and it is not a campaign of vengeance, it is a war to secure the future. We are fighting a war in order to prevent a catastrophic nightmare from ever being unleashed upon the world. The great threat to the world comes from a disproportionate few—a relative handful of crazed zealots who jeopardize every life in the world, Muslim and non-Muslim alike. Unfortunately, this is likely to be a long and fatiguing war.

Section 1.2.4: *Jus ad Bellum*, Reasonable Success

Reasonable success is typically construed as a weighted, consequentialist consideration of the pragmatic aspect of waging war. “The thrust of the principle emphasizes that human life and economic resources should not be wasted in what would obviously be an uneven match”¹¹.

Beyond the standard criticisms of consequentialist weighting of human lives in theoretical balances, the significant failure of this principle as a viable criteria in asymmetrical warfare is that could be impossible to accurately assess the costs and benefits of an open-ended war on terror. It is an international, extended campaign against a more-or-less unknown entity comprised of terrorist organizations and their supporting nations. Complicating things even further, both the terrorists and the supporting networks may come in and go out of existence without notice. The strength and wealth of terrorist armies may grow and decline without much evidence—are they in hiding or have they quit?

In the Cold War we were always kept well apprised of the strength of enemy forces, their geographic distributions, supplies, relative capability and morale. Yet, before September 11th, who could have believed that the twin towers of the World Trade Center would be destroyed in a well-coordinated, vicious and preplanned terrorist attack?

In overthrowing the Taliban we were once more in the familiar element of a “standard” battlefield, but in the search for Osama bin Laden and his Al Qaeda we face

¹¹ From the *Internet Encyclopedia of Philosophy*; <http://www.utm.edu/research/iep/j/justwar.htm>

an entirely new and challenging struggle. How accurately can we predict much will it cost? What if he does possess nuclear weapons, how much will it cost to find that out?

In addition to the millions of dollars now being spent on improvements to Homeland Security and the millions that the war effort itself is costing, we must guess at the cost of the actual pursuit of global terrorism, combined with the economic consequences of the WTC attack, as well as account for the cost of possible future attacks and countermeasures...make up whatever numbers you wish, it will be expensive.

However, to get an accurate picture of the costs, you must always consider the cost in human lives if we do not engage in this war. One can see that this pragmatic assessment is utterly ridiculous. We are now in a fight for our collective lives, a struggle to secure our future, and as Searle points out in the closing of his Op Ed piece; “Our greatest need is to understand the nature and permanence of the struggle we are now in.” How can you assess the cost of a permanent struggle for survival?

Reaction/Opinion

There can be only one way to assess the costs of the war on terrorism, or international police-actions, or humanitarian interventions—and that is in the cost of human lives lost if we don’t act, weighed against lives saved by intervention and prevention. What good are worries about the economy if we are subjected to virulent attacks by weapons of mass destruction? Who cares about the price of gasoline when anthrax is being weaponized for use against Western cities?

Granted, on its face it is difficult to measure “potential lives lost” or “people saved”, but it is a system we commonly accept in everyday calculations. When police arrest a drunk driver, there is always the notion that doing so was justified because it *may have* saved a life. “He could have killed someone” is a common enough human intuition to serve as a basis for limiting behavior, or weighing potential costs of actions.

In the case of terrorism, when we have substantial intelligence structures alerting us to a threat or imminent attack, and the same preventative calculation of “lives saved” should be sufficient to fulfill the reasonable success criteria and warrant our intervention.

Unlike wars between nations, we must now try to prevent *every* action we know of, regardless of the financial costs involved, or the chances of success in the mission. We can not choose to endure the odd terrorist bombing because it was either too expensive to try to stop, or because we weren’t sure we could be reasonably successful in attempting to prevent it. If we are alerted to an impending terrorist attack, and if we do not have the time to mount a full-scale response, then we must respond with whatever is available. It is never permissible to allow an attack on the grounds that we were unsure of reasonable success. We must always make every attempt, whatever the odd or costs.

Section 1.2.5: *Jus ad Bellum*, Proportionality

The notion of proportionality addresses the principles that sanction the means or methods of waging war, and states that they should be balanced by the desired outcome (ends). In the framework of traditional just war theory, proportionality typically limits just actions to redressing a specific wrong while striving to minimize general, overall (total), or specific collateral damage. Again, in the realm of nation states, when Iraq invaded

Kuwait, proportionality only allowed for the return of the lost lands and oil fields, pushing into Iraq and giving new territory to Kuwait would go beyond all proper measure. Likewise, the immediate use of nuclear weapon strikes against Baghdad would have been an escalation beyond all reasonable and available alternative methods to remove Saddam's army from Kuwait. Counterattacks, though justified by self defense, cannot proportionate levels of response. This principle of proportionality is seen as the only way to prevent ongoing future reprisals, but this prevention notion is still contested.

Reaction/Opinion

What is a proportional response to the WTC attack? Should we fly planes into Al Qaeda caves? Obviously the strictest interpretation is foolish in the extreme. But how does one measure the justness of the means used when combating terrorism, especially when the threat of weapons of mass destruction is possible, plausible, or likely?

Considering the complete *unjustness* of using such weapons of terror on innocent civilians, shouldn't any means be considered appropriate to prevent their use? If we have intelligence information suggesting that Saddam has nuclear weapons facilities buried deep underground in reinforced complexes, and the only way to eradicate their threat is by use of a limited field-grade tactical nuclear device, then isn't that proportionate to the threat involved? Or must we suffer the attack first in order to justify our equally weighted response?

Clearly, in this new era of warfare, we must consider legitimate, imminent threats as sufficient cause to warrant reprisals equivalent to the perceived or possible *threat-level*, even if the weapons have not yet been used against us (or in the case of WMDs, we are justified in striking before they are even *completed*). Let me repeat myself, this is a war for *survival*, and we must match the proportionality of the potential *threat*, not the actual use.

We are out of the Cold War, and the power of threat or bluff are useless against a suicidal enemy. MAD, the policy of mutually assured destruction, worked (arguably) because both sides feared destruction. Once you remove that balance, once you have an enemy who embraces death as a means to win you have lost all deterrent power. The only response available is the utter destruction of the opponent—even if they “merely” threaten. All threats must be taken seriously, and dealt with accordingly.

Finally, though this will overlap with some of what's to come in the *jus ad bello* section, I will make the further claim that given the nature of terrorism, proportionality in response to terror can include denial of basic human rights to *known* terrorists. Due to the nature of their crimes, whether merely intended or actually committed, place them beyond all standard protections. Their crimes are against humanity writ large, and as such they have forfeit all claim to the protections afforded to all other human beings. This does not mean terrorists have *no* rights, it simply means that their rights have been suspended for the duration of the *specific* need and within a tight and restricted focus.

Section 1.2.6: *Jus ad Bellum*, Last Resort

Though this final principle of *jus ad bellum* may seem quite obvious, it is a veritable nightmare to clearly establish when *exactly* the place of last resort has been reached. All

too often it seems “last resort” is invoked well before all means of negotiation or diplomacy are exhausted. On the other hand, it is conceivable that there could be cases where the criteria has been met or superseded and yet action is still withheld for a variety of reasons. Regardless, since we will not deal with specific cases here, and in the abstract the principle seems clear enough in intent, then for the moment we will skip a deeper investigation into this principle. We will simply assume it refers to a point in time when an ongoing diplomatic situation is deteriorating and there comes a point when it is clear that there is no alternative but armed conflict. And, when dealing with traditional warfare between nations we assume this corresponds to the break-down of formal talks and the massing of troops at borders, etc., and we will leave it at that.

In many cases of terrorism, it seems quite evident that first and last resort may be one and the same. If terrorists are threatening innocent lives, and their threat is plausible, what is the case for *not* attacking immediately? What is the justification for waiting until *after* the bomb explodes in the bus, or plane, or in the shopping mall? In many instances, the window of opportunity to prevent a terrorist attack may be so small as to prevent anything but a swift response—a first and last resort simultaneously.

Reaction/Opinion

Again, we must realize that traditional ways of thinking about what constitutes a “last resort” are not going to be widely applicable to asymmetrical conflict, especially when confronting terrorists. Perhaps, in some special cases, there may be instances where there is a continuum of possible actions between the initiation of the threat, and the response by the military. However, why take the risk? We can safely assume that a terrorist, by virtue of being a terrorist, is dedicated to killing and dying for the cause. In addition, the terrorist can be rightly suspected of spreading lies and disinformation throughout any potential negotiation or interrogation in order to mislead and manipulate their captors. We must remember that they will use every opportunity as a means to further their own cause, and inflict some form of damage on “the enemy”.

Not only should they not be trusted, they should not be given the chance to cause damage later if they are released after “successful” negotiations. We are in a war for survival, the terrorists are quite aware of this, and they are quite familiar with our inherent inclinations to *not* resort to violence—they used this against the doomed passengers on the jets, and they will use it against the general psyche of the populace.

It is not a case of us “sinking to their level”, or an eye for an eye, it is a sober recognition of the current situation, and a realization of the nature of the new type of war we are *all* in. We must be aware of how they will use our nature against us, how they will negotiate for more time, or food, or diesel fuel and fertilizer, whatever they think they can get away with and use against us later. It is for *these* reasons that there is no distinction between a first and a last resort when dealing with terrorism. We are already at the point of last resort, after having been too soft and too weak in our responses to previous terrorist attacks such as the Pan-Am 107 bombing, the embassy bombings, the 1993 WTC bombing, the *USS Cole*, and the Marine barracks, to name a few.

Section 1.3: *Jus ad Bello*

The counterpart to justice in war is *just conduct* in battle. Justice in war is neither the same thing nor intrinsically linked to just conduct in battle. Conforming to one half does not imply conformity with the other; you can conduct yourself well but still fight an unjust war, and vice versa. *Jus ad Bello* is an overarching principle that outlines expected behavior on the part of combatants. It can be broken down into three major subsections: **discrimination, proportionality, and responsibility.**

Reaction/Opinion

Like *Jus ad Bellum*, it may well seem that much of traditional thinking regarding the proper conduct in warfare is now outdated. Without the set-piece battlefield, without clearly uniformed troops, and without a sense of restraint and discipline on both sides of the engagement, it is difficult to see how this principle fits the new battlefield of disguised, hidden, and secretive terrorists who field no weapons other than a suitcase or a box cutter, and use planes as missiles. It is no longer a case of locating the enemy's position and engaging him in open combat, it is now a matter of simply trying to determine who is a terrorist, and where in the world (literally) they are—including where they may be hiding *within* the target nation, “sleeping” until it is their time to attack.

Section 1.3.1: *Jus ad Bello*, Discrimination

In traditional models of just conduct, targets are carefully selected to avoid the purposeful, accidental, or indiscriminate killing of innocent civilians¹². This is made easy in standard armies, where all soldiers are required to wear uniforms¹³. Furthermore, all targets are clearly military (equipment, personnel, garrisons, training facilities and the like) or non-military but war-related (munitions plants, steel mills, oil refineries, railways, etc.).

In war, by virtue of joining the fight¹⁴, combatants are generally seen as relinquishing some of their basic human rights (e.g. *not to be killed or targeted in war*). In contrast, civilians never relinquish their right to life, or give up their right not to be directly targeted, and since they are unwilling participants in the war¹⁵—essentially bystanders—they are outside the realm of selectable targets. The truly accidental, or the foreseen but unintended death of civilians¹⁶ does not automatically nullify the justness of

¹² Typically, and though a Utilitarian case can be made to support the deliberate targeting of civilians at Hiroshima and Nagasaki (to break the will of the Emperor without invasion) I believe that the standard model of JWT does not support such activities, and that is the model I am relying on for my point.

¹³ Deliberately concealing your identity as a soldier, and deliberately hiding your uniform indicates you are acting as a spy, and as such outside most war conventions—including the risk that you will be shot on sight if discovered, etc.

¹⁴ Some theorists draw a distinction between the rights of those who willingly joining and those who are forced to join through conscription/coercion, and though interesting in its own right, this argument is outside the scope of our discussion.

¹⁵ Again, this is a broad brush stroke over many nuanced arguments in the history of JWT that seeks to define the rights, roles, obligations and duties of combatant/noncombatant and innocent/non-innocent distinctions. Some hold that the only innocents in war are those actively protesting it, or those incapable of understanding it (children, insane, infirm, etc.).

¹⁶ Traditionally understood as the *Doctrine of Double Effect*.

the conduct of the war, but it certainly raises questions and criticisms if seen to be excessive¹⁷.

Special problems with the issue of discrimination are well entrenched in appraisals of World War Two. Especially interesting are the Allies' fire-bombings of Dresden and Tokyo, and the American nuclear detonations over Hiroshima and Nagasaki. And though these debates about WWII are ongoing, there is little disagreement when it comes to the clear unjustness of the Mylai massacre by US forces during the Vietnam War.

More so than the trouble spots in WWII, which was at least perceived to be a just war for a just cause and with a rightful intention, through legitimate authority, discussion of Vietnam mires itself in the troubles associated with being able to properly identify who is, and who is not a combatant. This is especially problematic in guerrilla warfare where many fighters are actively trying to deceive the opposing forces. However, once they reach for a weapon, it is fairly obvious what their intention is. Unlike guerrillas, it may be impossible to know who is, and who is not, a terrorist. How easy is it to determine if the man with the box cutter is actually planning on opening a cardboard box, or whether he is going to commandeer a plane?

Reaction/Opinion

Terrorists, by and large, do not wear uniforms and by the time they are identified it is probably too late. The female suicide bomber in Jerusalem may have been acting oddly before she blew herself up, but she certainly was not advertising her intentions to commit murder when she walked towards the bus.

Worse yet, terrorists are not confined to a set geographical region of conflict like guerrilla fighters are, they are global-mobile and may already be well-insinuated or deeply hidden at "home" in America. Given the great lengths they will go to conceal their identity, there is no way to reasonably presume that a military force can do much to combat terrorists unless they either mass together at a training camp, or else reveal themselves when a bus blows up or a plane is hijacked.

Biometrics may be one good way to record and track *known* terrorists, but like the national ID card and other ideas, it may be more of an intrusion on privacy rights than a useful and effective tool. The better route is simply more effective and more thorough *searches*. We do not care who you are, we only care that you are unarmed and not a threat.

For the most part, we will have to rely on the skills of law enforcement and federal intelligence agencies to determine who is and who is not a threat, which effectively removes this principle of *jus ad bello* from the next interpretation of just war theory.

Section 1.3.2: *Jus ad Bello*, Proportionality

¹⁷ And again, I am skipping over the many arguments about what constitutes "excessive death" or civilians as 'excessive' is an unfortunately yet another vague term in the lexicon of JWT.

Similar to the *Jus ad Bellum* principle, this one seeks to balance the scales of allowable reprisals. In this particular understanding of just conduct, proportionality is meant to limit “collateral damage” and minimize general destruction and casualties.

Often these understandings are formalized in international legal doctrine. The Geneva Conventions and similar articles outline numerous required and banned actions that soldiers must abide by, these may include things like: banning certain types of weapons or limiting their acceptable use (no mustard gas, no 50-caliber machine guns used against personnel, no biological agents, etc.), requirements for housing POWs, mandates on how the enemy wounded are to be treated, and even restrictions on damaging “Artistic and Scientific Institutions and Historic Monuments”¹⁸.

Reaction/Opinion

September 11th should have demonstrated that if this principle of proportionality-in-conduct is applied to today’s wars, then it is purely one-sided in restricting the actions of the non-terrorists. While we restrain ourselves by using precision munitions and by carefully selecting our targets¹⁹, the enemy—the terrorist—desires to inflict maximal damage on the civilian population by any means available. Their arsenal ranges from weapons of mass destruction, to cyber-attacks on the economy (witness the denial-of-service attacks on Taiwan), and we can be certain they are working on new means and methods we are currently unaware of. The destruction of the Buddhist statues demonstrates that terrorists do not care about limiting or restricting damage, whether it is damage to people, the environment (Saddam’s burning oil fields) or anything else they do not value.

As an outgrowth of proportionality, and in an effort to minimize the extent and overall violence of the war on terror, especially regarding the prevention of harm to innocent lives, it should be obvious that *human resource exploitation* (i.e. torture) is within the bounds proper conduct. In a purely Utilitarian move, the needs of the millions outweigh the rights of the few or the one, especially since terrorists have relinquished their rights not to be interrogated in much the same way that the soldier has relinquished his right not to be targeted and killed. Once you join up, you are agreeing to waive your basic human rights. This application of force, torture, though standardly impermissible ought to be considered a viable means of last resort information gathering. Since we are already disadvantaged by the utter lack of restraint on behalf of the terrorist, we are more than justified in claiming that proportionality supports this drastic measure of proportionality, as long as there is sufficient belief that the suspect in question has the specific information we require. “Fishing trips” should be considered outside the bounds of proportionality, but the strictest application for the narrowest of answers is not. Finding the dirty bomb hidden in the NYC subway system is a need proportionate to justify such restricted exploitative action.

Torture and reprisals are new facets of warfare’s ugliness that we are going to learn to live with if we are going to get serious about winning. In the past, we liked to pretend that war could be cleaned up, and that rules would mollify our behavior in a

¹⁸ Treaty on the Protection of Artistic and Scientific Institution and Historic Monuments, 15 April 1935.

¹⁹ Yes, accidents have occurred, but for the *thousands* of bombs dropped, the number of collateral casualties has been phenomenally low compared to any other war in the past century.

realm moral Realists would claim is outside the ethical realm, and in truth, they may be partially correct. It is outside the morally permissible actions in old JWT, but ought to be included in the revised understanding of warfare, to do less is to unnecessarily hinder our ability to succeed and survive. When faced with an adversary that will use any means, we must respond in kind to protect ourselves. “When fighting a tiger, be a tiger yourself.”

Section 1.3.3: *Jus ad Bello*, Responsibility

Some theorists, perhaps influenced by incidents such as occurred at Mylai hold that just conduct requires that agents involved in war must be held accountable for their actions—war itself is not an excuse to behave badly. This is countered by those (mostly older views) who claim that when acting on orders, the soldier is free of responsibility, and responsibility lies only with the commander in charge. The Sherman Principle, named after actions taken in the Civil War, places all responsibility on the original aggressor, claiming that since they started the war, they are entirely liable for anything that happens. Currently, there seems to be an overall balance of blame for responsibility in conduct, and it is usually determined on a case-by-case basis, much like responsibility in any typical crime or accident.

Reaction/Opinion

Regardless of which side you agree with, it must be seen that responsibility, like proportionality above, can only reasonably be expected to apply to one side of the conflict. The terrorist has no interest in responsibility in *any* moral sense we would understand. Publicly claiming responsibility for the act of terror, without the requisite understanding of the moral guilt of that action is only another means of “advertising” their seriousness and commitment to “the cause”. It is merely an effort to curry favor within the extremists’ sympathizers and is wholly different than the responsibility we demand of our troops—responsibility which includes moral or ethical evaluation.

In fact, it is often a claim of extremists that any exercise in terrorism is God’s will, or that since the clerics and clergy condone it, then it cannot be an evil action. The notion that terrorists are somehow morally responsible and punishable for their actions is not in their world view. Therefore, as far as we should be concerned, we must abide by whatever measures of responsibility we can afford in a specific situation. Since our troops *are* well trained and disciplined, we *can* still expect them to act like the professional soldiers that they are—up until the point where it unreasonably threatens their lives, the lives of innocents, or the mission’s goals to do so. Giving the enemy quarter is expected, unless the enemy is strapped with explosives and the desire to use it.

Section 2: Terrorism and Morality, Summary

The era of gentlemanly conflict is dead. It is not that nation states no longer try diplomacy first and then solemnly agree to settle their differences on the battlefield;

“standard” wars will probably remain with use throughout our entire history. It is rather and understanding that it is no longer the case that that is the *only* mode of warfare. The idea that wars will be fought battle after battle with troops and tanks clashing with equivalent forces is an outmoded, but not implausible notion²⁰. It is merely the case that we can no longer expect *only* set-piece conflicts with determinate targets, proportionate and reasonable conduct, uniformed soldiers, and clearly delineated national boundaries to limit conflict. War, terribly, has “evolved” into a more virulent strain than we have seen before, but the old disease is still around, and still kills quite effectively.

It is not the existence of standard war that is in question, but instead it is a question of the ability of the standard-model-only theory of *Justum Bellum* to give us an accurate appraisal of our new model of asymmetrical warfare. What state of affairs constitutes a final victory when there are no factories, no massed troops, or entrenched tank battalions to eliminate? Who can we deter with mutually assured destruction when terrorists are little more than death-cults with political agendas?

In this very raw, very new world we are faced with entirely new types of adversaries, ones who do not “play fair” and who do not suspend combat on Christmas Day²¹. Instead, we face homicidal suicide hijackers. Our wars are fought against terrorists who slaughter innocent civilians by crashing jetliners into busy office buildings in Manhattan. Daily, it seems, we are forced to reconcile ourselves with images of female suicide bombers in Jerusalem, or other “martyrs” who see their suicidal killings as legitimate ways to oppose the public policy. *From now on*, we must always live with the idea that terrorists are targeting America with weapons of *mass destruction*. Weapons that are intended to kill hundreds of thousands to *millions of civilians*. And, as we try to return to our daily routine, we must consider the fact that in addition to the “usual” nuclear, chemical and biological weapons, we now face nuclear-tainted “dirty” bombs, weaponized anthrax, and worse—all weapons which the terrorist *will* use if given the opportunity. Only in today’s world can a *box-cutter* and a fully fueled Boeing loaded with *passengers* become a weapon of *war* and *terror*.

If we are to assess the War on Terror, and all the future asymmetrical wars to come, then we must create a new standard. We need a new theory able to account for the radical changes to the means and methods of warfare in this century, changes that define the current conflict and those to come—changes that sit ill with old notions of proportionality, and acceptable conduct. We are faced with asymmetrical warfare on a global scale, and a theory that can only appraise the unjustness of Hitler’s invasion of Poland is useless to us.

Nor do we need idle philosophical ruminations and speculations on human rights in the abstract. Rather, we need to know, *now*, if we can torture *this individual* in order to save millions of lives. We need to know if covert teams are justified in sneaking across closed borders in pursuit of terrorists. These and many others are only a *few* of the issues crucial to the conduct of this new war, a war that is largely a *war of information*. A war

²⁰ Witness the talk of invading Iraq, and the strategy for dealing with his WMDs *and* his standard troops. The mere existence of Al Queda and worldwide terrorism has not caused the republican Guard to cease to exist (unfortunately).

²¹ Though this happened in both World Wars, I would still think it is far more of an aberration in war than a mark of “standard” warfare. Yet, there is still the fact that it occurred, and this shows how our perceptions of warfare are and have been severely altered from then to now.

where we have only minutes to prevent a nuclear device from destroying a major city somewhere in the world. We need a new, comprehensive theory, and we need it *now* because we *must* evaluate this war, find just means to conduct it, and keep or gain further support at home and abroad.

If we do anything less than we have taken the first step towards losing everything, because if we cannot create a new theory, then we are on the path to becoming incapable of *adapting* to the new environment, and that is truly a fatal flaw if we wish to survive.

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